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State Action and the Due Process of Self-Help: Flagg Bros. Redux

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ARTICLES

STATE ACTION AND THE DUE PROCESS OF SELF-HELP; *FLAGG BROS.* REDUX

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Law is politics carried on by other means.
John Griffith[1]

I.

Flagg Bros., Inc. v. Brooks[2] was a minor watershed for the recently constituted Burger-Rehnquist Court.[3] In that single decision in 1978, the Court both constricted one of the more powerful legal tools of the civil rights movement, the state action doctrine, and sharply limited the Court's earlier, solicitous decisions beginning with *Sniadach v. Family Finance Corp. of Bay*

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1. *Here Come the Judges*, TIMES LITERARY SUPPLEMENT, Feb. 18, 2000, at 14 (paraphrasing the observation of Karl von Clausewitz that "War is nothing but a continuation of politics by other means." KARL VON CLAUSEWITZ, VOM KRIEGE 8, ch. 6, § B (1833)).

2. 436 U.S. 149 (1978).

3. Between the decision in *Sniadach* in 1969 and the decision in *Flagg Bros.* in 1978, five seats changed. Chief Justice Warren was replaced by Chief Justice Burger (1969), Justice Harry Blackmun (1970) replaced Justice Abe Fortas, Justice Lewis Powell (1972) replaced Justice Hugo Black, Justice William Rehnquist (1972) replaced Justice John Harlan, and Justice John Paul Stevens (1975) replaced William O. Douglas. The Justices who remained from the Warren Court were Justices William Brennan, Thurgood Marshall, Byron White and Potter Stewart. Justice Stewart was replaced by Justice Sandra Day O'Connor in 1981 prior to the decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), which caps the period discussed in this article. See BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 385 (1993).

View[4] on the due process of creditor's remedies. But beyond this feat, the way in which Justice Rehnquist managed the reduction of both doctrines for the majority also introduced into the miasma of state action one of its more bizarre twists.

Flagg Bros. arose when Shirley Brooks tried to prevent a privately owned and operated storage company from selling her belongings under the warehouseman's lien provisions of the New York Uniform Commercial Code.[5] Mrs. Brooks and her family had been evicted from their apartment and the city marshal who had supervised the evictions arranged for her belongings to be stored by Flagg Brothers.[6] Instead of challenging the threatened sale under state law, Mrs. Brooks's attorneys brought a § 1983[7] action in the

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4. 395 U.S. 337 (1969). *Sniadach* was followed within a relatively short span by five other decisions reviewing the legitimacy of pre-judgment creditors remedies: *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *N. Ga. Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601 (1975); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); and finally *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). With the exception of *Mitchell* and *Flagg Bros.*, each decision struck down a prejudgment creditor remedy for failing to satisfy the requirements of due process. Because of this similarity and in the interest of clarity, these decisions will be referred to collectively as "*Sniadach et al.*" throughout this article. *Fuentes* was decided by a seven-member Court. Justices Powell and Rehnquist had been nominated but not yet sworn in. Had the Court waited for Justices Powell and Rehnquist to consider the case, it is possible that the decision would have gone the other way. Justice Powell voted to uphold the sequestration remedy in *Mitchell* but voted against the garnishment procedure in *North Georgia Finishing*. See *Mitchell*, 416 U.S. at 623 (Powell, J., concurring); *N. Ga. Finishing*, 419 U.S. at 609 (Powell, J., concurring).

5. *Flagg Bros.*, 436 U.S. at 151 & n.1.

6. *Id.* at 153.

7. 42 U.S.C. § 1983 (1994 & Supp. 1997). Section 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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.

Section 1983 was adopted as § 1 of the Klu Klux Act of 1871, 17 Stat. 13 (1871). It is modeled after § 2 of the Civil Rights Act of 1866, 14 Stat. 27 (1866), reenacted in the Enforcement Act of 1870, 16 Stat. 140 (1870). In any action under § 1983, the plaintiff must show that the defendant both (i) acted under color of state law and (ii) deprived the plaintiff of a right secured by the Constitution or some other federal law. *Flagg Bros.*, 436 U.S. at 155. The issue in *Flagg Bros.* was whether the private conduct of the warehouseman could be regarded as state action so that it might possibly violate a right secured by the Constitution, i.e., the Due Process Clause. *Id.* at 157. The state action question was crucial because the guarantees of the Fourteenth Amendment, including the Due Process Clause, run only against the states. *Id.* Thus, if the conduct of the warehouseman could not be deemed to be state action, it could not possibly violate any rights given by the Fourteenth Amendment and the § 1983 action would have to fail. Where the private conduct is deemed to be state action by virtue of the state action doctrine, the first condition of § 1983, that the conduct be under color of state law, is obviously also satisfied. *See Lugar*, 457 U.S. at 928 ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.") (quoting United States v. Price, 383 U.S. 787, 794

United States District Court for the Southern District of New York against the storage company.[8] They alleged that the planned sale by the storage company would deprive Mrs. Brooks of her property without due process of law.[9] The Supreme Court, in an opinion by Justice Rehnquist, not only dismissed the action against the private warehouseman for want of state action, it also declared that the state statute that created the warehouseman's actions *itself* was not state action for purposes of the Fourteenth Amendment.[10]

Prior to *Flagg Bros.*, a host of eminent scholars had criticized both the state action doctrine[11] and the Court's antagonism to creditors remedies.[12] Those scholars considered the state action doctrine incoherent, and the Court's protection of debtors inefficient and unnecessary. But Justice Rehnquist's opinion for the Court in *Flagg Bros.* did little to address the criticisms of either doctrine, and instead added confusion where none before had existed, particularly in its handling of the state action issue.

The state action doctrine purports to be an interpretation of the language "No state shall," which in one or another variation introduces each of the guarantees of § 1 of the Fourteenth Amendment, the Privileges or Immunities Clause, the Equal Protection Clause and the Due Process Clause.[13] Thus it appears to limit those guarantees to the actions of states and to deny a cause

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n.7 (1966)).

8. *Flagg Bros.*, 436 U.S. at 153.

9. *Id.*

10. *Id.* at 166.

11. *See, e.g.*, Lawrence A. Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893 (1975); Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW GUILD REV. 627 (1946); Harold Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 CAL. L. REV. 208 (1957); William W. Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 214; Jerre S. Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347 (1963).

12. *See, e.g.*, Allison Dunham, *Due Process and Commercial Law*, 1972 SUP. CT. REV. 135 (1912); Soia Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973); Robert E. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975); James J. White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503 (1973). *But see* Barkley Clark & Jonathan M. Landers, *Sniadach, Fuentes, and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973); Mark G. Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954 (1974).

13. U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment reads in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

of action in the federal courts against private defendants for their purely private initiatives. In other words, the duty bearers under each clause are the states and not private persons. It is yet a distinct question whether any of those guarantees might impose a duty on the states to provide protection in their state laws to persons against some purely private initiatives. But those would be protections administered in the first instance in state courts.

Nevertheless, from the very inception of modern state action doctrine, it was clear that the Court was fashioning a doctrine to overcome those limitations and allow the federal courts to hear actions against altogether private parties accused of violating the guarantees provided by the Fourteenth Amendment. Though the Court's opinion in the *Civil Rights Cases*[14] of 1883 is regularly regarded as the root of the state action doctrine, the birth of the modern doctrine is better located in the infamous White Primary Cases.[15] In the first of these decisions, *Nixon v. Herndon* from 1927, the Court allowed an action for damages under the Equal Protection Clause against certain judges of elections who had been appointed by the private Democratic Party of Texas to run its state primary.[16] The judges had excluded Black would-be electors from the primaries as required by state law.[17] While the discriminatory Texas statute itself was patently unconstitutional, the Court never made it clear why the private judges of elections, who would appear to have been merely regulated parties, could be sued in federal court for damages as if they were agents of the state.

By 1944, when it heard the penultimate White Primary Case, *Smith v. Allwright*,[18] the Court allowed a similar action for damages against the Texas Democratic Party's judges of election even though the discriminatory rules

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14. 109 U.S. 3 (1883).

15. The so-called White Primary Cases consist of *Terry v. Adams*, 345 U.S. 461 (1953) (no majority opinion); *Smith v. Allwright*, 321 U.S. 649 (1944) (Reed, J.); *Grovey v. Townsend*, 295 U.S. 45 (1935) (Roberts, J.); *Nixon v. Condon*, 286 U.S. 73 (1932) (Cardozo, J.); and *Nixon v. Herndon*, 273 U.S. 536 (1927) (Holmes, J.). Each of these cases dealt with efforts by the Texas Democratic Party to exclude Blacks from voting in Democratic primaries. In *Herndon*, the exclusion was required by Texas law. 273 U.S. at 240. In *Condon* the discrimination was required by a rule adopted by the Party's Executive Committee though Texas law had been amended to grant that authority to the Committee. 286 U.S. at 82. The Court found that such authority ordinarily lay with the Party as a whole. *Id.* at 84. *Grovey* dealt with an amendment to the bylaws by the Party as a whole, and the Court refused to find state action. 295 U.S. at 47. *Smith v. Allwright* overturned *Grovey*. 321 U.S. at 666. *Terry v. Adams* held unconstitutional a similar bylaw adopted by a county affiliate of the Party. 345 U.S. at 462. In *Terry*, the Court split over three opinions favoring the result without a single theory garnering more than three votes. *Id.*

16. *Herndon*, 273 U.S. at 539.

17. *Id.* at 540.

18. 321 U.S. at 649.

originated with the party.[19] Two years later, in *Marsh v. Alabama*,[20] the Court subjected a private corporation to the demands of the Establishment Clause when the corporation arranged to have a Jehovah's Witness arrested for criminal trespassing after she refused to quit proselytizing in the company town.[21] Among other things, the Court, through Justice Black, declared "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free."[22]

The high water mark of the modern state action doctrine came in 1961 in *Burton v. Wilmington Parking Authority*.[23] *Burton* was an action for declaratory and injunctive relief brought by a black man who had been denied service in a privately owned and operated restaurant in Wilmington, Delaware.[24] Because the restaurant was located in a parking structure owned by the City of Wilmington, the Court held that the City could be held responsible for the discrimination and that the owner could be sued directly under the Fourteenth Amendment.[25] It was in *Burton* that the state action doctrine finally crystallized into something of a test: "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[26] Should the state become sufficiently involved in the private initiative, then the initiative becomes state action and the private actor can be sued under the Constitution in federal court.[27] Correlatively, when the state becomes involved in the private

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19. *Id.* Nine years after *Smith v. Allwright* the Court in *Terry v. Adams* extended the decisions to more local primaries. 345 U.S. at 461. The Court was unable to gather a majority behind any of three opinions written in support of the outcome. *Id.*

20. 326 U.S. 501 (1946).

21. *Id.* at 503-04.

22. *Id.* at 507. Of course, in the ordinary situation, a municipality neither owns nor possesses a town. Rather, it adopts ordinances of general applicability which represent an exercise of the state's police power. Thus, the ordinances are clearly covered by the injunctions of the Fourteenth Amendment in a way that the policies of a private corporation are not. *Marsh* was subsequently invoked to prohibit a privately owned shopping mall from banning picketers. *See* Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308, 318 (1968). *Logan Valley* was overruled less than ten years later by the Burger-Rehnquist Court. Hudgens v. NLRB, 424 U.S. 507, 518 (1976). *Hudgens* limited *Marsh* to its precise facts, i.e., to company towns. *Id.* at 516-17.

23. 365 U.S. 715 (1961).

24. *Id.* at 716.

25. *Id.* at 724-25.

26. *Id.* at 722.

27. *Id.* at 725.

conduct, by virtue of its involvement the state can be held accountable for the private initiative.[28]

While the touchstone of the doctrine thus came to be state *involvement* in private conduct, the Court refused to define with any particularity what constituted "involvement." The Court explained its refusal as follows in *Burton*:

> Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted."[29]

The test thus became no test at all but merely an opportunity for the Court, case-by-case, to extend the guarantees of the Bill of Rights to purely private initiatives. *Burton* itself is an example of how the doctrine could be used to find responsibility and a kind of quasi-agency where the law had never before found them and for which no sound explanation was ever offered.

Though the doctrine might have been incoherent and surely lacked any basis in either the text or history of the Fourteenth Amendment, the Vinson and Warren Courts used it often for undeniably salutary ends.[30] The state action doctrine was an essential component of the Court's efforts to end racial segregation in the South. Allied with the Equal Protection Clause, and on occasion the Due Process Clause, the effect of the doctrine was expansive. It extended constitutional protections beyond the expressed ambit of the Fourteenth Amendment to embrace private initiatives as well.

In *Flagg Bros.* the effect was strikingly the opposite. Not only did the Court refuse to convert private action into state action, it also declared plain state action, a state statute, to be something other than state action and therefore immune from the requirements of the Fourteenth Amendment.[31] The court held that because the warehousemen's lien provision of the New York Uniform Commercial Code did not involve the State in the actual sale of stored goods, the statute could not be regarded as state action:

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28. *Burton*, 365 U.S. at 725.

29. *Id.* at 722 (quoting Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947)).

30. In saying this, I do not mean to endorse the Court's plain willingness to disregard the clear language of the Constitution and fabricate new constitutional law. I mean to suggest only that in doing so, it was at least serving a noble cause.

31. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 165 (1978).

> Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act. . . .
>
> We conclude that the allegations of these complaints do not establish a violation of these respondents' Fourteenth Amendment rights by either petitioner Flagg Brothers or the State of New York.[32]

This is a move that the Court had never before made. There had never been any question that a state statute was not state action. How could it possibly not be? The function of the state action doctrine was to extend the applicability of the Fourteenth Amendment to private parties. It had never been used to constrict the responsibility of the state for what was plainly a state initiative—its own statutes.

To better appreciate the perversity of the Court's decision in *Flagg Bros.*, one need only compare it with the Court's decision in *Mitchell v. W.T. Grant*,[33] decided only five years earlier. In *Grant*, the court upheld a Louisiana sequestration statute.[34] Though the statute did not require notice to the owner/debtor or the opportunity for a hearing prior to the sequestration, the Court nevertheless held that the statute satisfied the demands of due process just because the sequestration order had to be issued by a judge who was required to review the creditor's application and allegations before issuing the order.[35] Prior judicial review was necessary to satisfy due process, the Court held, because it assured the legitimacy and likely merit of the creditor's claim.[36]

In *Flagg Bros.* by contrast, precisely the lack of judicial involvement, indeed any involvement by any state agent, insulated the self-help statute from all due process scrutiny. The difference between *Grant* and *Flagg Bros.* was the novel use of the state action doctrine in the reasoning of the latter. Because neither the court nor any state agent was involved in the dispossession or sale of the debtor's goods, the statute was not deemed to be state action for constitutional purposes.[37] I indicated earlier that in the few years prior to *Flagg Bros.* a substantial number of scholars criticized the

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32. *Id.* at 166 (emphasis added).

33. 416 U.S. 600 (1973). *Grant* itself represented something of a retrenchment from the Court's earlier and even more protective decisions beginning with *Sniadach*. *See supra* note 4.

34. 416 U.S. at 604-05.

35. *Id.* at 605-07.

36. *Id.*

37. *Flagg Bros.*, 436 U.S. at 165.

Court's concern to protect debtors against prejudgment creditor remedies.[38] None of those articles, however, suggested that state statutes creating prejudgment creditor remedies were in any respect beyond constitutional scrutiny.

Surprisingly, given the Court's radical use of the state action doctrine, there was almost no scholarly criticism following *Flagg Bros.* In one of the only articles devoted to *Flagg Bros.*, Paul Brest read Justice Rehnquist's decision for the Court as having been driven by commitments to two incompatible higher level principles.[39] The first commitment was to a notion of state action that marks a sharp divide between public and private actions.[40] The second was to a theory of constitutional positivism according to which rights of liberty and property exist only by virtue of a state's protection of them.[41] Brest regards these two commitments as incompatible because he believes that the positivist cannot appeal to a public-private divide without relying on some notion of natural law.[42] Brest may be right that at some sufficiently high level of abstraction there may be a conflict between these two ideals. In the context of the Fourteenth Amendment, however, there is plainly no such incompatibility. The state action doctrine is not concerned with some abstract distinction between the public and private spheres. It is concerned rather to create a set of rights and to define who enjoys and who bears the burden of those rights. In that regard, the language of the Amendment itself refers to the states and not to "any person."[43] Thus, a positivist need not appeal to natural law for the dichotomy; it appears on the face of the Amendment itself.

But Brest is partly right. Rehnquist's opinion in *Flagg* does represent a rejection of the expansive doctrine of state action that I described earlier, as well as a fairly clear intention to restrict the obligations of the Fourteenth

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38. *See supra* notes 11-12.

39. Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982). Larry Alexander struck similar themes in an article written prior to the decision in *Flagg Bros. See* Alexander, *supra* note 11. Alexander responded to a United States Ninth Circuit Court of Appeals decision, *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974). The Ninth Circuit in *Adams* held that a California statute authorizing self-help repossession did not sufficiently involve the State in the self-help to support an action against the creditor under § 1983. *Id.* at 329. It did not go so far as the Court in *Flagg Bros.* and declare that the state statute was not state action and beyond scrutiny. It never addressed the legitimacy of the statute, restricting itself to the appropriateness of the § 1983 action against the private defendant. *See id.*

40. *See* Brest, *supra* note 39, at 1296.

41. *See id.* at 1301.

42. *Id.*

43. U.S. CONST. amend. XIV, § 1.

Amendment to the states. In three opinions preceding *Flagg Bros.*, two of which were written by Justice Rehnquist, the Berger-Rehnquist Court had already applied the doctrine much more narrowly than the Court had ever applied it before. In *Moose Lodge No. 107 v. Irvis*,[44] decided in 1972, Justice Rehnquist's first year on the bench, the Court found that a liquor license granted by the Pennsylvania Liquor Authority to a Moose Lodge and requiring the Lodge generally to abide by its bylaws did involve the state in the Lodge's racially discriminatory bylaws.[45] Instead of requiring the Lodge to admit Blacks, however, or the state to withdraw the license from the Lodge, the Court simply ordered the Liquor Authority to rewrite the Liquor License so as not to require the Moose Lodge to follow its discriminatory provisions.[46] Two years later, in *Jackson v. Metropolitan Edison Co.*,[47] the Court refused to find state action in a decision of a private utility to terminate service even though the utility enjoyed a partial monopoly and was heavily regulated by the state's utility commission.[48] An almost identical relationship between a privately owned bus company and the Public Utilities Commission of the District of Columbia led the Court twenty years earlier to find state action in a decision by the bus company to begin broadcasting radio programs in the bus.[49] Two years after *Jackson*, in *Hudgens v. N.L.R.B.*,[50] the Court overruled *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*,[51] which had extended the logic of *Marsh v. Alabama* to a shopping mall.[52] *Hudgens* limited *Marsh* to its precise and increasingly rare facts, that of a company town.[53] But in none of these cases did the Court go as far as it did in *Flagg Bros.* and declare a state statute to be something other than state action.

In addition to its rejection of the expansive state action doctrine, *Flagg Bros.* represents the Burger-Rehnquist Court's hostility to the Warren Court's restriction of creditor's remedies under the Due Process Clause. Already in *Mitchell v. W.T. Grant Co.*,[54] the Court upheld against a due process challenge

44. 407 U.S. 163 (1972) (Rehnquist, J.).
45. *Id.* at 171-72.
46. *Id.* at 179.
47. 419 U.S. 345 (1974) (Rehnquist, J.).
48. *Id.* at 350-51.
49. *See* Pub. Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 462 (1952) (Burton, J.).
50. 424 U.S. 507, 510 (1976) (Stewart, J.).
51. 391 U.S. 308 (1968) (Marshall, J.).
52. *Id.* at 318.
53. *Hudgens*, 424 U.S. at 516-17.
54. 416 U.S. 600 (1974) (White, J.).

a Louisiana sequestration statute which was virtually identical for all practical purposes to the statute struck down in *Fuentes v. Shevin*[55] only one year earlier.[56] But *Flagg Bros.* presented the Court with a unique challenge. The warehouseman's provisions at stake in *Flagg Bros.* provided less procedural protection than any of the creditor's provisions struck down by the Warren Court. Consequently, the Court could not uphold the warehouseman's provisions without striking down a substantial number of precedents. In addition, the case was brought against a private party. Under prior state action decisions, the Court could not easily find that the state statute did not involve the state in the private conduct since the state had created the remedy. But if the state involved itself in the private conduct, then under the state action doctrine, the private conduct was also state action and the private party could be sued for damages under the Due Process Clause. What was left to a Court trying to avoid both consequences but to declare the statute to be something other than state action? If the statute were not state action, then the state would not be involving itself in the private conduct. And if the state were not involving itself in the private conduct, then neither could the private conduct be regarded as state action.

My purpose in this article is twofold. The first purpose is to show that there is nothing in the logic of *Flagg Bros.* to support the Court's determination that the New York Uniform Commercial Code warehouseman's provision is other than state action. If the statute is state action, then under *Sniadach* and the decisions that followed it, the New York statute is also clearly unconstitutional under the Due Process Clause. The second purpose though is to show that the Court was at least correct in this regard, that actions like that in *Flagg Bros.*, brought under the Due Process Clause against a private party, have no place in the federal courts. But to accept that conclusion, on sound grounds, the Court must also accept the fact that the Constitution was intended to impose affirmative obligations on the states.

Section II below considers the logic of Justice Rehnquist's opinion in *Flagg Bros.* Section III describes why Justice Rehnquist was nevertheless correct in refusing to find state action in a private initiative. Section IV

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55. 407 U.S. 67 (1972) (Stewart, J). *Fuentes* was decided by a 4-3 vote. *Id.* Justices Powell and Rehnquist had not yet been approved by the Senate at the time that *Fuentes* was argued but were on the Court before the decision was announced. Both Powell and Rehnquist voted with the majority in *Mitchell.* Only a few months later, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Court once again struck down a garnishment statute under the Due Process Clause. The swing votes were White and Powell with White writing the majority opinion in both cases. Powell was the swing vote in *Flagg.*

56. *Fuentes*, 407 U.S. at 67; *Mitchell*, 416 U.S. at 600.

returns to and criticizes Professor Brest's analysis of *Flagg Bros.*, an analysis that was fairly representative of the time and which continues in some quarters to this day.

II.

Justice Rehnquist's version of the state action doctrine in *Flagg Bros.* departs in a number of substantial and subtle ways from the doctrine that was shaped prior to 1972, the year that both Justice Rehnquist and Chief Justice Burger were appointed to the Court. The most general departure was to treat the earlier decisions as representing extremely limited particular types or categories of state involvement in private conduct. Prior to 1972, the doctrine had been treated consistently as an opportunity that allowed the Court case-by-case, as it saw fit, to apply the guarantees of the Fourteenth Amendment to private conduct. For example, in *Flagg Bros.*, Justice Rehnquist proceeds by asking whether the actions of the defendant warehouseman could be comprehended under either of two categories of state involvement culled from the earlier cases: (i) where the state had delegated to the private defendant a power "traditionally exclusively reserved to the State,"[57] the so-called "public function" doctrine or (ii) whether the state authorized or encouraged the private conduct.[58]

Additionally, in his reference to the earlier decisions, Justice Rehnquist not only read those decisions as limited narrowly to their facts, he also interpreted those facts as representing occasions when the states were truly independently responsible for the private conduct, either by making the private conduct possible at all or by compelling it. For instance, Justice Rehnquist quotes *Adickes v. S.H. Kress & Co.*[59] as recognizing the principle that the state is responsible for private conduct only when it compels the private act.[60] Justice Rehnquist observed that the Court had never held that a state's mere acquiescence in a private action converted that action into the action of the state.[61]

The problem with this representation is that even a superficial survey of only a few of the major state action decisions shows that the Court had not

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57. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978) (quoting from Justice Rehnquist's earlier opinion in *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)).

58. *Id.* at 164.

59. Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970).

60. *Flagg Bros.*, 407 U.S. at 164.

61. *Id.*

limited itself to the two categories that Justice Rehnquist identified.[62] More importantly, none of the earlier cases limited the doctrine to situations in which the state was truly responsible for the private conduct. In *Smith v. Allwright*, the State of Texas played no role in the Jay Bird primaries. It neither delegated a state power to the local democratic party nor did it prohibit Blacks from voting.[63] The only relationship between the City of Wilmington, Delaware and the Eagle diner in *Burton* was that of landlord and tenant, and nothing in the lease required the restaurant to exclude Blacks.[64] In *Public Utilities Commission of District of Columbia v. Pollak*,[65] the Court regarded as state action the decision of a private bus company to broadcast radio programs for no reason other than that the Public Utilities Commission of the District of Columbia had reviewed a complaint and refused to pursue it.[66]

But my concern here is not with these broader issues. I want to focus on what emerged for the first time in *Flagg Bros.*, the idea that a state statute might be other than state action and consequently not subject to review under the Due Process Clause. We get our first glimpse of this new direction, although perhaps only recognizable as such in hindsight, in the very first paragraphs of Justice Rehnquist's analysis of *Flagg Bros.* He begins the analysis benignly by noting, correctly, that the threshold issue in an action under § 1983 invoking the Due Process Clause is whether the conduct of a private defendant can be attributed to the state.[67] He writes,

> [h]ere, respondents allege that Flagg Brothers has deprived them of their right, secured by the Fourteenth Amendment, to be free from state deprivations of property without due process of law. Thus, they must establish not only that Flagg Brothers acted under color of the challenged statute, but also that its actions are properly attributable to the State of New York.[68]

The idea of attribution strictly speaking is narrower than the notion of involvement as the Court used the latter term in earlier opinions. Apart from that departure, however, Rehnquist sets up a fairly traditional state action analysis.

The more significant departure was then to contrast the situation presented in *Flagg Bros.* to the circumstances of the Court's earlier decisions

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62. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 462 (1953).
63. 321 U.S. 649 (1944).
64. *See Burton*, 365 U.S. at 719.
65. 343 U.S. 451 (1952).
66. *Id.* at 464.
67. *Flagg Bros.*, 436 U.S. at 155.
68. *Id.* at 156 (citations omitted).

involving the due process of creditor's remedies, *Sniadach v. Family Finance Corp. of Bay View*,[69] *Fuentes v. Shevin*, and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[70] Rehnquist observes,

> It must be noted that respondents have named no public officials as defendants in this action. The city marshal, who supervised their evictions, was dismissed from the case by the consent of all the parties. This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*; *Fuentes v. Shevin*; *Sniadach v. Family Finance Corp.* . . . . While as a factual matter any person with sufficient physical power may deprive a person of his property, only a State or a private person whose action "may fairly be treated as that of the State itself," . . . may deprive him of "an interest encompassed within the Fourteenth Amendment's protection." Thus, the only issue presented by this case is whether Flagg Brother's action may fairly be attributed to the State of New York. We conclude that it may not.[71]

There is a subtle equivocation in the passage. On the one hand, Justice Rehnquist concludes that the only issue presented by the case is whether the action of the private defendant can be regarded as state action and therefore subject to the Due Process Clause. Justice Rehnquist is correct in that when the defendant is a private party, one has to ask whether the state action doctrine permits the private defendant to be regarded as the state. Otherwise, the Due Process Clause, along with all of the other guarantees of the Fourteenth Amendment, does not apply. The equivocation is the invocation and distinguishing of *Sniadach*, *Fuentes*, and *North Georgia Finishing*. Because of the way that these earlier creditor's remedies cases originated and were framed, none involved a state action issue either explicitly or even implicitly. That is, in none of these cases was the Court presented with the issue of whether a private defendant could be treated as the state for the sake of holding its conduct subject to the requirements of the Due Process Clause. In each case, the focus was directly on a state statute creating a prejudgment creditors' remedy.

Sniadach, the first of the line, began as a garnishment action in a Wisconsin trial court.[72] The due process challenge to the Wisconsin

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69. 395 U.S. 337 (1969).

70. 419 U.S. 601 (1974). There is yet a fourth case belonging to this series decided between *Fuentes* and *North Georgia Finishing* which Justice Rehnquist does not cite: *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). *Mitchell* differs from the other three decisions primarily because the Court upheld the sequestration order challenged in that case. Thus, there was little need for Justice Rehnquist to distinguish *Mitchell*, as he needed to distinguish the cases, *Sniadach et al.*, favorable to the debtor in *Flagg Bros.*

71. 436 U.S. at 157 (citations omitted) (quoting Jackson v. Metro. Edison, Co., 419 U.S. 345 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972)).

72. Family Fin. Corp. of Bay View v. Sniadach, 154 N.W.2d 259, 260 (Wis. 1967).

garnishment statute was raised by the debtor as an affirmative defense against the garnishment.[73] The statute was upheld by the Wisconsin Supreme Court[74] and came before the U.S. Supreme Court on a writ of certiorari.[75] Because the debtor challenged the state statute as an affirmative defense to an action brought under the statute, the focus was immediately on the constitutional legitimacy of the Wisconsin statute.[76] There was no allegation that the creditor's conduct was state action. It was unnecessary. The state action doctrine had only been invoked before, and was indeed only necessary, where a private party was being sued in federal court and alleged to be in violation of a Fourteenth Amendment guarantee or, alternatively, where the plaintiff was attempting to hold a state responsible for a purely private initiative, as in *Burton*.[77] Neither of those elements was present in *Sniadach*. The debtor was not suing the creditor, nor was the debtor holding the state responsible for a purely private initiative. The debtor was attacking directly the legitimacy of a state statute in the context of a state action.[78] There was no discussion in the Supreme Court's opinion in *Sniadach* suggesting that the statute itself was state action and subject to the Due Process Clause only because an agent of the state was actively involved in the garnishment.

Fuentes v. Shevin, on the other hand, was brought as a § 1983 claim in a federal district court.[79] Unlike *Flagg Bros.*, however, the complaint in *Fuentes* named the attorney general of the state, in that case Florida, as a defendant and did not allege that the actions of the private creditor violated any constitutional rights. The complaint sought only a declaration that the state replevin statute was unconstitutional and an injunction against its further enforcement.[80] Justice Stevens, who wrote the Court's opinion for *Fuentes*, described the Court's understanding of the action as follows, "Mrs. Fuentes instituted the present action in a federal district court, challenging the constitutionality of the Florida prejudgment replevin procedures under the Due Process Clause of the Fourteenth Amendment. She sought declaratory and injunctive relief against continued enforcement of the procedural provisions of the state statutes that authorize replevin."[81] Thus, even though

73. *Id.* at 261.
74. *Id.* at 265.
75. Sniadach v. Family Fin. Corp. of Bay View, 393 U.S. 1078 (1969).
76. *See* Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 339 (1969).
77. Burton v. Willmington Parking Auth., 365 U.S. 715 (1961).
78. *Sniadach*, 395 U.S. at 338.
79. Fuentes v. Shevin, 407 U.S. 67, 71 & n.3 (1972).
80. *Id.* at 71.
81. *Id.*

the action was brought in a federal district court under § 1983, the Court treated the action as one focusing directly on the legitimacy of the state statute. There was no discussion in *Fuentes* of any state action issue, much less any discussion suggesting that the statute constituted state action only because it required a clerk to sign and stamp documents submitted by the creditor and to then issue the writ.

Like *Sniadach, North Georgia Finishing* originated in state court as an action by a creditor seeking a prejudgment creditor remedy, in this case a garnishment.[82] Again, as in *Sniadach*, the due process issue was raised by the debtor as a defense against the action by the creditor.[83] Consequently, as in both of the decisions that preceded it, the scrutiny in *North Georgia Finishing* was directed against the state statute creating the remedy.[84] There was no issue of whether the action of the private defendant was state action and no question about whether the statute could possibly be other than state action. Referring to the state statutes creating the garnishment remedy, Justice White framed the issue in *North Georgia Finishing* purely in terms of the validity of the statute: "[w]hether these provisions satisfy the Due Process Clause of the Fourteenth Amendment is the issue before us in this case."[85]

Justice Rehnquist is surely correct that the statute implicated in *Flagg Bros.* is different from the statutes at issue in the earlier cases. In the earlier cases, the statutes required that some state officer take some active role to effect the creditor's remedy, however slight.[86] The statute in *Flagg Bros.* required no action by any state officer. The remedy was permitted to be effectuated purely by self-help. But the traditional state action question, properly raised in *Flagg Bros.* because of the focus on private action, was not present in those earlier cases. Thus, those earlier cases ought to be irrelevant to the threshold question of state action that Justice Rehnquist sees as the only issue in *Flagg Bros.* As we will see, it is this unsound assimilation of the state action doctrine, properly raised in *Flagg Bros.*, to the circumstances of the earlier due process cases, in which there was no state action issue, that ultimately permits Justice Rehnquist to slide the state action doctrine from the private conduct to the state prejudgment creditor statutes themselves. By assimilating the earlier decisions to *Flagg Bros.* and then distinguishing them on the grounds of the involvement of state officers in the execution of the

82. N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).
83. *Id.* at 603.
84. *Id.*
85. *Id.*
86. *See, e.g., Fuentes*, 407 U.S. at 72.

remedy, Rehnquist first creates a state action issue where none existed before. He then makes the involvement of state officers crucial to the new state action issue, whether the state statutes, the only focus in the earlier cases, are themselves state action.

Someone might object by insisting that the Due Process Clause can only apply to actions of the state or persons covered by the state action doctrine. Thus, even if the state action dimension of the Due Process Clause was not discussed explicitly in *Sniadach et al.*, it was nevertheless there implicitly. The Court could not have addressed the validity of the statutes in *Sniadach et al.* unless those statutes were state actions. So far, the objection is sound. It becomes unsound, however, if it concludes further that the reason why the statutes were state action was because they required the active participation of a state officer to effect the remedy. There is no support for that doctrinal move in the decisions in those cases. Whether the state statutes were or were not acts of the states was never an issue, and the significance for state action purposes of the involvement of state officials in the execution of the remedy never arose. So far in his opinion, however, Justice Rehnquist is not yet making the leap from the nature of the private defendant to the state action of the statute.

Justice Rehnquist moves closer to that ultimate conclusion in an extended footnote responding to a criticism made by Justice Stevens in dissent.[87] The context is Justice Rehnquist's discussion of whether the action of the private defendant might be attributed to the state because the statutory authorization for the remedy constitutes a delegation of an "exclusive prerogative of the sovereign."[88] The possible exclusive prerogative of the sovereign, as Justice Rehnquist characterizes it, is the power to settle disputes between debtors and creditors.[89]

Justice Stevens conceives the issue quite differently, as necessarily involving not only the applicability of the Due Process Clause to the private defendant, but also the legitimacy of the statute that authorized the conduct.[90] He wrote:

> It is . . . clear that . . . whatever power of sale the warehouseman has, it does not derive from the consent of the respondents. The claimed power derives solely from the State, and specifically from § 7-210 of the New York Uniform Commercial Code. The question is whether a state statute which authorizes a private party to deprive a person of his

87. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 n.10 (1978).
88. *Id.* at 160.
89. *Id.* at 161.
90. *Id.* at 169 (Stevens, J., dissenting).

> property without his consent must meet the requirements of the Due Process Clause of the Fourteenth Amendment. This question must be answered in the affirmative unless the State has virtually unlimited power to transfer interests in private property without any procedural protections.[91]

In this passage, Justice Stevens perhaps conflates two distinct ideas. The first is the liability of the private warehouseman to the requirements of the Due Process Clause. This is the decisive issue for Justice Rehnquist. The second issue is whether the statute is invalid under the Due Process Clause. But Justice Stevens is also ultimately correct in linking the two questions. If the act of the warehouseman derives its effectiveness only from the statute, as Justice Stevens asserts,[92] then the act, even as Justice Rehnquist articulates the state action test,[93] is state action. If that is so, then the next question is whether the act of the warehouseman, made what it is by the state statute, is valid under the Due Process Clause. If those actions fail to meet the requirements of the Due Process Clause, then necessarily the statute which authorizes the act is ipso facto invalid as well.

This is Justice Rehnquist's challenge, to characterize the effect of the statute in a way so that it does not bestow the mantle of state action on the private conduct. If Rehnquist can avoid characterizing the private action as state action, then he can avoid addressing the legitimacy of the statute. But Justice Rehnquist goes further. He characterizes the effect of the statute in such a way that the statute itself is not state action. He thus is able not only to dismiss the action against the private defendant, but also to insulate the state statute from scrutiny. Here is how Justice Rehnquist responds to Justice Stevens:

> The validity of the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York law. It 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 process or state officials were ever involved in enforcing that body of law.[94]

But once again, Justice Rehnquist steps into equivocation. He is correct that the Court had never held that the action of a private party with regard to an

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91. *Id.*
92. *Flagg Bros.*, 436 U.S. at 169.
93. *Id.* at 155-56.
94. *Id.* at 160 n.10.

object of property was state action merely because of the existence of property law. Indeed, *Evans v. Abney*[95] is a striking example to the contrary. In his will, Senator Bacon of Georgia conveyed a parcel of land to the City of Macon as trustee with instructions that the land be used to create a park for the exclusive use of the white citizens of Macon.[96] The Court held in *Evans v. Newton*[97] that the City could not continue to operate the park and exclude blacks.[98] On remand, the Georgia trial court ruled that the trust had failed and the property reverted to the heirs of Senator Bacon.[99] The Supreme Court of Georgia then held that the sole purpose for which the trust was created was no longer possible and the trust should be terminated.[100] The decisions of the Georgia courts essentially gave force to the discriminatory intent of Senator Bacon and the result, as the challengers argued before the U.S. Supreme Court, was to penalize the black residents of Macon. The Court rejected this argument and held instead that

> [t]he construction of wills is essentially a state law question . . . and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs.[101]

If ever a Court, and particularly a liberal Court, might have seized on a neutral law to create state action, this would have been the case. It was Georgia property law that gave Senator Bacon the power to control the descent of his property as he declared. Georgia law then deprived Blacks of admission to the park to honor the Senator's wishes. Writing in dissent, Justice Brennan argued that the Georgia probate code, by permitting the establishment of racially exclusive parks, conferred a special power on testators.[102] But the Court never considered the idea that neutral state property law alone might transform into state action private choices which exercised the powers given by state law.

The equivocation in Justice Rehnquist's reply to Justice Stevenson comes in the second part of the passage quoted above:

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95. 396 U.S. 435 (1970).
96. *Id.* at 436.
97. 382 U.S. 296 (1966).
98. *Id.* at 302.
99. *See* Evans v. Newton, 148 S.E.2d 329 (Ga. 1966).
100. Evans v. Abney, 165 S.E.2d 160, 166 (Ga. 1968).
101. Evans v. Abney, 396 U.S. at 444.
102. *Id.* at 458 (Brennan, J., dissenting).

> It 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 process or state officials were ever involved in enforcing that body of law.[103]

The state action inquiry had never been about the status of statutes as state action. State statutes might have provided the sufficient involvement in private conduct such that a private agent could be considered a state agent. Or they might have provided the significant involvement so that the state could be held responsible for the conduct of the private party because by virtue of the doctrine and the involvement the private conduct had been transformed into state conduct. But the Court had never before turned the state action doctrine against real state action and required that a law actively involve itself in private conduct by sending out agents or requiring processes presided over by state agents for the law itself to be regarded as state action. The equivocation consists in observing that the mere existence of state property law alone had never been sufficient to create state action where none had existed before, and then turning that doctrine against the laws themselves, which no one before had ever doubted were state action.

Rehnquist then again distinguishes *Sniadach*, *Fuentes*, and *North Georgia Finishing*.[104] But he now makes explicit what was only suggested in his earlier invocation of the trilogy, that the state statutes at issue in those cases were state action only because they provided for the participation of true state agents in the execution of the remedies:

> This situation is clearly distinguishable from cases such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, *Fuentes v. Shevin*, and *Sniadach v. Family Finance Corp.* In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred. The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *North Georgia Finishing* had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been the property of the debtor.[105]

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103. *Flagg Bros.*, 436 U.S. at 160 n.10 (emphasis added).

104. *See supra* note 4.

105. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 n.10 (1978) (citations omitted).

We've seen that in none of this trilogy of decisions did the Court consider the state action issue. It neither asked whether the private conduct of the creditors constituted state action, nor much less did it ask whether the state creditors remedy statutes themselves were state action. The idea that a state statute might be other than state action is introduced for the first time by Justice Rehnquist here in *Flagg Bros.*

But how could a state statute be other than state action, whether or not it created a process involving state agents, or sent its agents into the field to participate in the execution of a remedy? The answer to that is the third and final movement in Justice Rehnquist's adaptation of state action in *Flagg Bros.* According to Justice Rehnquist, and the majority of the Court for whom he wrote, a state statute creating a self-help creditor's remedy, unlike the statutes in *Sniadach et al.*, is not state action because it is not action at all.[106] A statute purportedly creating a self-help remedy is in fact not altering in any respect the preexisting legal landscape; it is merely a declaration by the state that it will not act with respect to the self-help.[107] Because the Due Process Clause only applies to state action, if § 7-210 of the New York Uniform Commercial Code is not state action, then the Due Process Clause does not apply to it.[108] There is no state action by the State of New York, thus no state action by the private warehouseman, and therefore no due process violation by either the state or the warehouseman.[109]

Justice Rehnquist's introduces this idea in response to the argument that the State of New York was responsible for the act of the warehouseman because, by virtue of § 7-210, it had authorized or encouraged it.[110] The Court held,

> This Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State.
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> . . . .
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> It is quite immaterial that the State has embodied its decision not to act in statutory form. If New York had no commercial statutes at all, its courts would still be faced with the decision whether to prohibit or to permit the sort of sale threatened here the first time an aggrieved bailor came before them for relief. . . . If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner.

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106. *See id.*
107. *See id.*
108. *Id.*
109. *Id.* at 166.
110. *Flagg Bros.*, 436 U.S. at 164.

> . . . .
>
> By the same token, the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7-210 permits but does not compel, to threaten to sell these respondents' belongings.
>
> Here, the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale.[111]

But surely Justice Rehnquist here is crudely misrepresenting the legal effect of § 7-210. That provision does far more than merely declare the intention of the State of New York not to interfere with the practice of warehousemen to sell the goods of delinquent bailors and keep the proceeds. The real, significant effect of § 7-210 is to grant to warehousemen the legal power to transfer title to the goods of their bailors without the bailors' consent. Without § 7-210, the attempted sale of goods by a warehouseman would not have that effect. Indeed, it would be actionable conversion and the bailor would be entitled to recover possession of the goods from the purchaser.[112] Justice Rehnquist here ignores the difference between transferring possession and transferring title.[113] Surely a bailor has the physical power to transfer bare possession of goods and a state statute neither augments nor diminishes that raw physical power. But that raw physical power was not what was at issue in *Flagg Bros.* The issue in *Flagg Bros.* was over the legal power that the warehouseman had to convey title without the consent of the bailor. And that power could only come from the state.

It would be a stretch to characterize § 7-210 as delegating an exclusive prerogative of the sovereign, the first of the two categories of involvement that Justice Rehnquist culls from prior state action decisions. Presumably, the exclusive prerogative of the sovereign extends only to the power to adopt binding rules of general applicability and to declare taxes to support public programs. Nor could one accurately claim that the statute compels the warehouseman to sell his bailor's goods. But it would require no stretch to recognize that § 7-210 authorizes the private warehouseman to accomplish something that the warehouseman could not accomplish otherwise: convey good title to the purchaser of a bailor's goods without the consent of the bailor. The statute thus endows private action with a legal force that it would not otherwise enjoy the private sale under the statute terminates the title of the

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111. *Id.* at 164-66.

112. *Id.* at 153 n.1.

113. Although, curiously, in a footnote to an earlier discussion, Justice Rehnquist concedes that New York "has . . . enacted a statute which provides that a warehouseman conforming to the provisions of the statute may convert his traditional lien into good title." *Id.* at 161 n.11.

bailor and conveys title to the purchaser. It authorizes without judicial process, but with no less effect, the involuntary termination of property rights.

The crucial distinction between raw physical power and legal entitlement was explicitly recognized by the Court in the *Civil Rights Cases*[114] nearly one hundred years before *Flagg Bros.* Writing for the majority Justice Bradley observed,

> An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed.[115]

Justice Bradley goes on to insist that the abrogation of these rights by the states is the "great seminal and fundamental wrong which was intended to be remedied [by the Fourteenth Amendment]."[116] The Court thus holds that the Fourteenth Amendment in fact imposes positive obligations on the states to protect certain interests against private interference.[117] I will return to this idea in the next section.

An alternative approach to the problem of *Flagg Bros.* might have been to acknowledge that any action by the state is state action but decided that § 7-210 did not violate the requirements of due process. *Shelley v. Kraemer*[118] cited both the *Civil Rights Cases* and *Virginia v. Rives*[119] for the principle that "the [Fourteenth] Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.'"[120] It is interesting in this regard to compare the logic of *Flagg Bros.* with Justice Rehnquist's conclusion eleven years after *Flagg Bros.* in *DeShaney v. Winnebago County Dep't of Social Services.*[121] Again writing for the majority, Justice Rehnquist held that "nothing in the language

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114. 109 U.S. 3 (1883).
115. *Id.* at 17.
116. *Id.* at 18.
117. *Id.*
118. 334 U.S. 1 (1948).
119. 100 U.S. 313 (1879).
120. *Shelley*, 334 U.S. at 14.
121. 489 U.S. 189 (1989).

of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[122]

But assume that the opposite were the case, as the Court held in the *Civil Rights Cases*, and the states were obligated by the Fourteenth Amendment to protect the life, liberty and property of its citizens. The bifurcated approach of the state action inquiry requires the Court first to establish independent of any particular guarantee of the Fourteenth Amendment that the challenged conduct is 'state action.' Only if the action is state action can the Court proceed to analyze its constitutional validity. Given this methodology, employing Justice Rehnquist's principle that a state's refusal to act is not state action, then the Court could never possibly review a claim that a state has refused to act. The action would not be state action, and therefore not subject to constitutional scrutiny. Such a result would be absurd and contrary to the methodology that the Court actually employed in *DeShaney*. The more natural and sensible approach is to recognize that any action by a state is state action, including decisions not to act, as the Court repeatedly held before Justice Rehnquist's revisionism in *Flagg Bros.*, and then ask how the act fares under the guarantees of the Amendment.

Why did Justice Rehnquist abjure this approach in *Flagg Bros.*? One explanation is that Justice Rehnquist and the other members of the majority believed what they said, and what was implicit in what they held. There is no difference between possession and title, and § 7-210 creates no new legal powers. It is nothing more than a declaration that the State of New York will not interfere to stop warehousemen from ridding their warehouses of goods for whose storage they have not been reimbursed. But this seems highly unlikely. The amount of equivocation and mischaracterization in the opinion is too great, and too cleverly assembled to be anything but intentional.

Perhaps the better explanation is that had the Court acknowledged that § 7-210 was indeed state action, to get the same breadth of results it would have had to overrule the state action doctrine plus the trilogy of due process cases beginning with *Sniadach v. Family Finance Corp.* And the votes simply weren't there for so radical a house cleaning. If the Court had acknowledged that § 7-210 was state action, under all but the narrowest reading of the state action doctrine,[123] the conduct of the private defendant would surely have been

122. *Id.* at 195.

123. In *Flagg Bros.*, Justice Rehnquist seems to suggest that a state can only be held responsible for private conduct if it *compelled* the private conduct. This would indeed be a very narrow reading of the earlier state action decisions. Under such a reading, because New York only makes § 7-210 available but does not require anyone to use it, § 7-210 would not provide the sort of involvement necessary to convert

state action too. If the action of the private defendant were state action, then the statute that involved the state in the private conduct would be subject to scrutiny. Under *Sniadach et al.*, § 7-210 would surely have failed to satisfy the requirements of due process. *Sniadach* struck down a Wisconsin garnishment procedure which required employers to withhold fifty percent of employee wages upon receipt of a summons issued by a clerk of the court.[124] *Mitchell v. W.T. Grant Co.* upheld a Louisiana sequestration statute only because authorization of the writ of sequestration had to be issued by a judge after review of a verified petition of affidavit that described the facts on which the petition was based.[125] Section 7-210 does not even provide the protection available in *Sniadach*, much less the judicial review required by *Mitchell.*

The lack of support for the more thorough housecleaning is suggested by the Court's decision in *Lugar v. Edmondson Oil Co.*[126] by virtually the same Court just four years after *Flagg Bros.*[127] *Lugar* presented much the same facts as *Flagg Bros.* Like *Flagg Bros.*, *Lugar* was a § 1983 action by an alleged debtor against a private creditor who had taken advantage of a Virginia prejudgment creditor remedy, in this case an attachment.[128] The

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the private conduct into state action and thereby make the state responsible. But Justice Rehnquist's discussion of compulsion is again shot through with equivocation and mischaracterization. For example, Justice Rehnquist quotes from *Adickes v. Kress* for the principle that only compulsion could make a state responsible for private conduct. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 156 (1978). But *Kress* held only that compulsion would clearly make a state responsible for private conduct, not that only compulsion would suffice. *Id.* at 164. In fact, the Court had never held that only compulsion made a state responsible for private conduct and nearly all of the state action cases rely on much less. *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). In addition, despite the fact that Justice Rehnquist seems to want to insist that only compulsion will do, he is at pains to argue that § 7-210 does not rise to the level of authorization or encouragement. The arguments would be irrelevant if authorization and encouragement weren't in fact among the traditional basis for finding state action. Among the clearest cases holding that encouragement was sufficient is *Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967), which struck down an amendment to the California Constitution prohibiting the State or local units of government from prohibiting racial discrimination in housing.

124. Sniadach v. Family Fin. Corp. of Bay View, 395 U.S. 337, 337 (1969).

125. 416 U.S. 600, 616 (1974).

126. 457 U.S. 922 (1982).

127. Between *Flagg Bros.* and *Lugar*, Justice O'Connor assumed the position vacated by Justice Stewart. The pattern of voting remained almost the same with Justice O'Connor replacing Justice Stewart's vote against the debtor. The majority in *Flagg Bros.* consisted of Justice Rehnquist, Chief Justice Burger, and Justices Stewart, Blackmun, and Powell. Justices Marshall, Stevens, and White, dissented. Brennan took no part in the decision. *See Flagg Bros.*, 436 U.S. at 166, 168. The votes in *Lugar* were almost the mirror image of those in *Flagg Bros.* with Justice O'Connor replacing Justice Stewart and Justice Blackmun providing the swing vote. Thus, the majority in *Lugar* consisted of the dissenters in *Flagg Bros.*, Justices White, Brennan, Marshall, and Stevens joined by Justice Blackmun. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor dissented. *Lugar*, 457 U.S. at 944.

128. *Lugar*, 457 U.S. at 925.

debtor alleged that by taking advantage of the attachment remedy, the creditor had acted jointly with the State of Virginia to deprive the debtor of his property without due process of law.[129] The debtor demanded compensatory and punitive damages.[130] The only significant difference between the state processes in *Flagg Bros.* and *Lugar* was that in *Lugar* the Virginia process was not purely self help. It required that a clerk of the court issue a writ to effectuate the remedy.[131] *Lugar* thus fell outside of the reasoning of *Flagg Bros.* and came squarely within the ambit of *Sniadach et al.*, as interpreted by Justice Rehnquist. Justice Blackmun left the majority in *Flagg Bros.* and joined the dissenters, thus creating a new majority that condemned the Virginia statute.[132] Writing for the new majority, Justice White distinguished *Lugar* along the lines set down in *Flagg Bros.* "We rely precisely upon the ground that the majority itself put forth in *Flagg Brothers* to distinguish that case from earlier prejudgment attachment cases: 'This total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditors' remedies.'"[133]

The dissenting opinions by Chief Justice Burger and Justice Powell also underscore the sham nature of Justice Rehnquist's analysis in *Flagg Bros.*[134] Neither dissent even mentions the grounds on which Justice Rehnquist distinguished *Flagg Bros.* from *Sniadach et al.* Chief Justice Burger, writing for himself alone, simply ignored fifty-five years of state action decisions, including *Flagg Bros.*, and declared that "[i]nvoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State."[135] Justice Powell, joined by Justices Rehnquist and O'Connor, attempted to distinguish the situation in *Lugar* from what he regarded as the sum of the Court's decisions on state action, citing only cases decided by the Rehnquist-Burger Court: "And where the State is not responsible for a private decision to behave in a certain way, the private action generally cannot be considered 'state action' within the meaning of our

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129. *Id.*

130. *Id.*

131. *See Lugar*, 457 U.S. 922 (1982).

132. Of all the votes between these two cases, Justice Blackmun's is the most difficult to fathom. The most obvious explanation is that he accepted the analysis in *Flagg Bros.* and stuck with it in *Lugar*. The remainder of the majority in *Lugar* obviously did not accept Justice Rehnquist's analysis in *Flagg Bros.* since each dissented in *Flagg Bros.* The remainder of the majority in *Flagg Bros.* who also participated in *Lugar* refused to follow the plain logic of *Flagg Bros.* in *Lugar*.

133. *Lugar*, 457 U.S. at 927 n.6.

134. *Id.* at 943-56.

135. *Id.* at 943 (Burger, C.J., dissenting).

cases."[136] Powell's reading of precedent was continuous with the past in that it appears to allow private parties to be treated as the state in some circumstances. Powell also, completely at odds with Justice Rehnquist's use of *Sniadach et al.*, distinguishes those cases because

> [n]one of the cases alleged that the private creditor was a joint actor with the State, and none involved a claim for damages against the creditor. Each case involved a state suit, not a federal action under § 1983. It therefore was unnecessary in any of these cases for this Court to consider whether the creditor, by virtue of instituting the attachment or garnishment, became a state actor or acted under color of state law.[137]

Justice Powell's version of state action arguably bears some relation to some parts of Justice Rehnquist's discussion in *Flagg Bros.*, but it fails completely to account for Justice Rehnquist's strained characterization of *Sniadach*, *Fuentes*, and *North Georgia Finishing*. It also alone would not have insulated a statute like § 7-210 as *Flagg Bros.* did from constitutional scrutiny in an appropriate action, presumably in state court. Its effect would be simply to deny a cause of action against the private creditor who took advantage of the state statute, leaving the question of the statute's validity to another, more appropriately framed action. Thus, the most plausible reading of *Flagg Bros.* is that Justice Rehnquist was willing to sacrifice coherence, not to mention any semblance of sound objective reasoning including deference to precedent, to create outcomes that would stand as precedent for both narrowing the state action doctrine and limiting a Due Process Clause that he perceived as too generous to debtors.[138] The strategy was effective in *Flagg*

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136. *Id.* at 949 (Powell, J., dissenting) (citing Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172-73 (1972)).

137. *Id.* at 952.

138. Paul Brest believes that Justice Rehnquist's view of § 7-210 as mere inaction rests on a commitment to what Brest characterizes as a very strong version of constitutional positivism. According to Brest, this version "regards all property interests as creatures of the state and accords the state plenary discretion to define the circumstances by which, and the procedures through which such interests are acquired, held, and lost." Brest, *supra* note 39, at 1297.

Needless to say, this is truly a very extreme view of the Constitution. It would render meaningless the Due Process Clause as well as the Takings Clause. For that reason it is also odd to regard the view as any version of positivism. Positivism simply narrows the class of what constitutes law properly speaking to only those rules that have been adopted by some agency with the authority to adopt laws. The Due Process Clause and the Takings Clause are both positive laws and thus any theory of *constitutional* positivism must regard them as law, and Brest does not suggest otherwise. But then it is not at all clear why he regards the view he attributes to Justice Rehnquist as any form of positivism.

Moreover, and perhaps more to the point, there is no reason to attribute such an extreme view to Justice Rehnquist. Justice Rehnquist's discussion in *Flagg Bros.* was grounded on a view of what constituted state action. Under that view, § 7-210 was not state action and therefore not subject to

Bros., but laid the groundwork for the embarrassment of *Lugar* just four years later.

In sum, by declaring self-help statutes to be other than state action, Justice Rehnquist was able to reach two immediate goals. The first was to dismiss a federal action that would have applied constitutional standards to private conduct, albeit private conduct authorized by a state statute. The second goal was to insulate a state prejudgment creditor's remedy against due process scrutiny, thus effectively setting a boundary, however perverse, to the generosity of *Sniadach et al.* Against the larger background of due process and the state action doctrine, the lasting changes wrought by *Flagg Bros.* are quite small, essentially limited to statutes authorizing self-help remedies. Justice Rehnquist attempted to limit more generally the circumstances in which private parties might be regarded as the state to those in which the state compels the private action. But the idea is obliterated by Justice Rehnquist's treatment of *Sniadach et al.* as examples of cases in which state action is present, thus clearly suggesting that the transformation of private conduct into state action is not limited to circumstances in which the state compels the conduct. The remedies in *Sniadach et al.* after all are no more mandatory than the warehouseman's lien law in *Flagg Bros.*

In the next section, I want to sketch another approach to state action that would give Justice Rehnquist half of what he tried to achieve in *Flagg Bros.*, excluding actions against private parties under the Fourteenth Amendment,

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constitutional scrutiny. It had nothing to do with the powers of the states viewed vaguely through some general constitutional theory or more specifically through the Due Process Clause. At best, it is consistent with the principal articulated in *DeShaney* that the Fourteenth Amendment imposes no positive obligations on the states. If the states have no positive obligations, then the failure of a state to act is not reviewable. The Constitution is only concerned with actions that the states take that change in some way the status quo.

I have shown that even if one were to adopt this point of view, Justice Rehnquist is nonetheless mistaken in regarding self help statutes as not involving state action, as essentially not altering the legal status quo.

Brest ascribes this doctrine to Justice Rehnquist in part on the basis of Justice Rehnquist's opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974). The plaintiff in *Arnett* challenged the adequacy of procedures prescribed by a U.S. statute for termination of a federal employee for cause. *Id.* at 138-39. The statutory right to termination only for cause was accompanied in the statute by the prescribed procedures for contesting the termination. *Id.* at 140-46. Justice Rehnquist, writing for a plurality, stated that "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* at 155. Brest may well be reading *Arnett* too broadly. Justice Rehnquist is careful in his opinion to distinguish the kind of property interest at stake in *Arnett*, essentially a contractual right, from all other kinds of property interests for which the Due Process Clause might require greater protection. He wrote, "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Id.*

but on the basis of more solid historical grounds. Those grounds, however, also require that the Court abjure its commitment, manifest in Justice Rehnquist's opinion in *DeShaney*, that the Fourteenth Amendment does not impose positive obligations on the states to protect people against people.

III.

Charles Black once remarked that "It is not too much to have said that the state action problem is the most important problem in American law. We cannot think about it too much; we ought to talk about it until we settle on a view both conceptually and functionally right."[139] If there is value in a decision like *Flagg Bros.*, it is to focus attention dramatically on the soundness of the state action doctrine itself and the vagaries of judicial activism, both liberal and conservative. What basis is there for applying the guarantees of the Fourteenth Amendment against private parties and private initiatives?

Justice Rehnquist's equivocal effort in *Flagg Bros.* to limit the doctrine to situations in which the state compels the private conduct only makes the paradox of state action more acute. Were the doctrine limited to those circumstances, we could plainly more intuitively say that the state is responsible for the private action, and even in a sense that the private action is the action of the state since it represents the fulfillment of a state initiative. But such logic still leaves unexplained why the private party could be held accountable for the conduct as well. In such a circumstance it would appear that the private party is, if anything, all the more blameless. The real function of the state action doctrine, after all, is to expand the protections of the Fourteenth Amendment to private initiatives. State initiatives are already plainly comprehended by each guarantee.

Under the pre-Rehnquist rhetoric, the connection was easier to make. Rather than emphasizing the attribution of the private activity to the state, the Court spoke more vaguely about the *involvement* of the state in private conduct, creating the possibility of talking about joint ventures between the states and private parties. The problem with this earlier formulation was that the rhetoric rarely accurately described the relationship between the state and the private party. Those relationships were rarely of the sort that in any other circumstance, or even intuitively, gave rise to joint responsibility. Even if they could have been characterized as such, there would only have been a

139. Black, *supra* note 11, at 70.

coincidence of interests and initiatives that would still not explain why the conduct of the private party could be regarded as state action for purposes of the guarantees of the Fourteenth Amendment. The language of the guarantees after all is quite plain:

> *No State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[140]

It refers to the "State[s]" and only to the States; not to "any person."[141]

The *Civil Rights Cases*,[142] often mistakenly invoked as the root of the modern doctrine, emphatically acknowledged the limitation of the duties created by § 1 and looked to state laws to vindicate wrongs committed by private parties. Writing for the Court, Justice Bradley held that "[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[143] A few pages later, he explained further:

> In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; . . . but if not sanctioned in some way by the state, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.[144]

The Court in *Burton v. Wilmington Parking Authority*[145] read the qualifiers in this passage to suggest that private action is state action when "supported by State authority in the shape of laws, customs, or judicial or executive proceedings."[146] Invoking the authority of the *Civil Rights Cases*, the Court in *Burton* held that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved

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140. U.S. CONST. amend. XIV, § 1 (emphasis added).
141. *Id.*
142. 109 U.S. 3 (1883).
143. *Id.* at 11.
144. *Id.* at 17.
145. 365 U.S. 715 (1961).
146. *Id.* at 721-22.

in it."[147] But the language of the *Civil Rights Cases* does not support the inference to the modern state-action corollary. The language of *Civil Rights Cases* discusses the civil rights guaranteed by the Constitution and it says of those civil rights, in the passive voice, that they are not violated by private actions unless those private actions are supported by State authority.[148] In context, it is clear that when State authority is added to the private conduct, it is not the private conduct that violates the guarantees of the Amendment, but the State authorization. Justice Bradley distinguished between what he referred to as private "violation" of rights on the one hand and on the other state "abrogation" of rights.[149] He explained,

> Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.[150]

The *Civil Rights Cases* were concerned with the power of Congress under § 5 of the Fourteenth Amendment and immediately with the legitimacy of the Civil Rights Act of 1875,[151] which was adopted under the claimed authority of § 5.[152] Section 5 grants to Congress "power to enforce, by appropriate legislation, the provisions of this article."[153] The nature of the rights given in § 1 is crucial to determine the bounds of Congress' power under § 5 because the Court in the *Civil Rights Cases* held that Congress' powers under § 5 were wholly remedial.[154] They operated only to enforce the prohibitions of § 1. Thus, the Court held, § 5 authorizes Congress "[t]o adopt appropriate

147. *Id.* at 722.

148. *Civil Rights Cases*, 109 U.S. at 17.

149. *Id.* at 14-18.

150. *Id.* at 17-18. Perhaps guided by the modern view of state action, Geoffrey Stone et al. in their widely used casebook on constitutional law quote the earlier portions of the *Civil Rights Cases* referred to in the text but omit Justice Bradley's discussion of the difference between 'violation' and 'abrogation' as well as his clear assumption that the Amendment imposes positive obligations on the States. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1695 (3d ed. 1996). Instead, they question whether a state might "invade" a right by not protecting its citizens. *Id.* at 1697. The answer to that query would appear to be that indeed a state would violate rights given by the Fourteenth Amendment if it were to abrogate, i.e, fail to adopt or enforce, certain rights protecting people against people.

151. Civil Rights Act of 1875, 18 Stat. 335 (1875).

152. *Civil Rights Cases*, 109 U.S. at 4.

153. U.S. CONST. amend. XIV, § 5.

154. *Civil Rights Cases*, 109 U.S. at 11-12.

legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous."[155]

The Civil Rights Act of 1875 failed under that reading because it created rights and a remedy without regard to whether any state had failed to provide a similar remedy or had sanctioned the conduct forbidden by the Act.[156] The Civil Rights Act of 1875 directly made it a crime to deny anyone, on account of their race and color, "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement. . . ."[157] The Court contrasted the provisions of the Civil Rights Act of 1875 with the prohibitions of the Civil Rights Act of 1866.[158] The Act of 1866 similarly created criminal sanctions but only against conduct committed "under color of any law, statute, ordinance, regulation, or custom. . . ."[159] The Court explained, "[t]his law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified."[160] The Act of 1875, by contrast, did not include the crucial condition that the actions purportedly covered by the Act be "under color of any [State] law[s] . . . ."[161] As a result, the Court held, "it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, . . . without referring in any manner to any supposed action of the State or its authorities."[162]

In sum, it appears as if the Court in the *Civil Rights Cases* would permit Congress, under § 5 of the Fourteenth Amendment, to create a federal cause of action against a private party, but only if the prohibited conduct is authorized by state law. The state authorization is necessary to the cause of action to assure that Congress is acting only to remedy the failure of a state to fulfill its obligations under § 1. The application of this understanding to the circumstances of *Flagg Bros.* is complicated by the fact that *Flagg Bros.* was brought under § 1983.[163] Section 1983, unlike the Civil Rights Act of 1866 or

155. *Id.* at 11.

156. *Id.* at 12-13.

157. *Id.* at 9 (quoting Civil Rights Act of 1875, 18 Stat. 335 (1875)).

158. *Id.* at 16-17, 22 (referring to 14 Stat. 27, reenacted with modifications in the Enforcement Act of 1870, 16 Stat. 140, ch. 114).

159. *Civil Rights Cases*, 109 U.S. at 16.

160. *Id.* at 16.

161. *Id.* at 14, 16.

162. *Id.* at 14.

163. 42 U.S.C. § 1983 (1994).

the Civil Rights Act of 1875, does not itself establish any new standards of conduct. It simply creates a private, federal cause of action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .[164]

Obviously, because § 1983 applies only to conduct under state law, under the analysis of the *Civil Rights Cases*, it is a valid exercise of Congress' powers under § 5 of the Fourteenth Amendment. In addition, in light of the analysis of the preceding part of this article, the conduct of Flagg Brothers was clearly under state law because it was authorized by § 7-210 of the New York Uniform Commercial Code.

The problem addressed in *Flagg Bros.* is that to be actionable under § 1983, the private conduct must also deprive the plaintiff of a right, privilege or immunity secured by the Constitution or some other law of the United States. The function of the state action doctrine, beginning with the *White Primary Cases* and to this day, is to convert private conduct into state action so that it might be said to violate the Fourteenth Amendment. If the private conduct can be deemed to be state action, then it may also violate the guarantees of the Fourteenth Amendment and thus provide the premise for an action under § 1983. But if we abjure the state action doctrine for the reasons argued above, then the only basis for an action against a private party under § 1983 is if the private conduct, still under color of state law, also violates some federal law. In the case of Mrs. Brooks, if there were no federal statute prohibiting self-help creditor remedies, her action against Flagg Brothers should have been dismissed for failure to state a claim under § 1983. The self-help may have been under state law, but it did not deprive Mrs. Brooks of any right given either by the Constitution or other federal law. Section 7-210 itself

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164. *Id.* Section 1983 is best understood in the context of other post-Civil War, Reconstruction Era civil rights acts. The Ku Klux Klan Act, of which § 1983 was a part, was among the last of those acts. Earlier and other acts, like the Civil Rights Acts of 1866 and 1875, discussed in the *Civil Rights Cases* and in the text, created substantive rights to equal treatment and then enforced those rights through criminal sanctions. Section 1983, on the other hand, created no new rights but did create a private cause of action, something missing from many of the earlier acts, in favor of the right bearer against any person who under color of state law violated a right given by the Constitution or another federal law. Thus § 1983 assumed the existence of laws like the Civil Rights Acts of 1866 and 1875 and the rights created in those statutes. Its purpose was to create a private cause of action for the vindication of the rights otherwise enforced, but not truly vindicated, by criminal sanctions. *See generally* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

may well have violated the Due Process Clause, and under *Sniadach et al.* surely did. But § 7-210 cannot be challenged in an action against a private party seeking damages under § 1983. The appropriate challenge would have been in the state courts, and failing relief there, in a petition for *certiorari* to the Supreme Court just as happened in *Sniadach, Mitchell,* and *North Georgia Finishing.*

But what then of the sincerely noble intentions of the Justices who fashioned the modern state action doctrine, and in doing so made the federal courts available to limit private racial discrimination? If the state action doctrine had not been created, many of the early cases discussed in this article from the *White Primary Cases* through *Burton* could not have been heard in the federal courts as § 1983 cases. The state action doctrine was essential to provide the possible violation of federal law necessary to state a § 1983 claim.

There are at least two responses to the concern. The first is that amending the Constitution is simply not within the role of the Supreme Court, no matter how salutary the amendment might be. The state action doctrine works a substantial change in the plainly expressed scheme of the Fourteenth Amendment. That Amendment creates rights against the states and the states only. As discussed previously, nothing in the state action decisions provides any sound justification for extending those rights against private parties as the Court has done. The Court itself in the *Civil Rights Cases* acknowledged the limitation: "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[165] For reasons that will be obvious in a moment, I do not want to pursue this reply any further.

The second reply to concern over the loss of the state action doctrine is that if we follow the interpretive methodology illustrated in this article and hew closely to the original intentions of the framers of the Fourteenth Amendment, then the larger problem that the state action doctrine was designed to address was in fact addressed by the framers of the Fourteenth Amendment. The state action doctrine was intended to assure the protection of certain interests against invasion by private agents by providing a federal cause of action for their vindication. It assumed, however, that the Fourteenth Amendment otherwise provided no protection whatsoever against individual invasion of those interests. The Court in *Shelley v. Kraemer*[166] for instance, believing itself to be interpreting the *Civil Rights Cases*, held that "[the

165. *Civil Rights Cases*, 109 U.S. at 11.
166. 334 U.S. 1 (1948).

Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[167] But this is simply wrong. When in the *Civil Rights Cases* Justice Bradley wrote, "[i]ndividual invasion of individual rights is not the subject-matter of the amendment," he meant merely that the Fourteenth Amendment does not itself create any rights against

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167. *Id.* at 13. *Shelley* is a marginal state action decision. It did not convert private conduct into state action or even discuss that aspect of the doctrine. Its contribution to the doctrine is its misreading of the *Civil Rights Cases* and the obvious observation that the decisions of state courts are state action. But *Shelley* is yet another decision in which the Court, guided by the same good intentions as in the more central state action decisions, ties itself in conceptual knots. *Shelley* began as an action in the Missouri state courts brought by the beneficiary of a racially restrictive deed covenant to enforce the covenant. *Id.* at 4-6. Based on its reading of the *Civil Rights Cases*, the Court held that the covenant was not invalid on constitutional grounds. *Id.* at 13. It then went on to hold, however, that the action of the Missouri courts in enforcing the covenant violated the Equal Protection Clause. *Id.* at 19-21.

There are at least two problems with the decision. In the first instance, there is something odd about a valid contract that is nevertheless not enforceable. The Court in *Shelley* held that

> the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

Id. at 13. But as Justice Harlan perspicuously observed fifteen years later, "a choice that can be enforced only by resort to 'self-help' has certainly become a greatly diluted right, if it has not indeed been totally destroyed." Peterson v. City of Greenville, 373 U.S. 244, 252 (1963) (Harlan, J., concurring). From a slightly different perspective, having declared that there is no shield in the Fourteenth Amendment against private discrimination, it is as if the Court finds that the people of the United States have reserved for themselves the liberty individually to discriminate in their private choices. But then the Court declares nevertheless that the same community cannot enforce the liberty that they reserved through the ordinary methods for giving permitted actions legal force, i.e., through the machinery of their institutions of self-governance. The Court's only rationale seemed to be that by allowing the courts to enforce such agreements, it would make them effective and thereby deprive blacks of the right to property. Of course, if people are at liberty to discriminate, there is nothing wrong with making those choices effective. Furthermore, enforcing a restrictive covenant does not deprive anyone of the right to own property in general. It merely makes effective the private decision not to permit one to acquire a legal interest in a particular parcel. But the Court already determined that there was nothing constitutionally infirm about such a private decision and implicitly that the Fourteenth Amendment imposed no duty on the states to prevent such decisions.

The second problem with *Shelley* is the way in which it applies the Equal Protection Clause to the judicial enforcement of the private racially restrictive agreement. The law of real covenants does not require racial restrictions. The racial restriction was purely a private initiative. Consequently, it is difficult to see how the judicial decision to enforce the restriction could be characterized as involving an intention on the part of the state to discriminate. At worse it reflects a failure of the state to protect a racial minority against the animosity of a racial majority. But the Court had already declared that the Fourteenth Amendment creates no shield against merely private discrimination. Presumably no shield includes no duty on the part of the state to protect people against people, and the Court does not suggest otherwise. In any event, the Court never again followed *Shelley*'s approach to Equal Protection. The fate of this approach was sealed in 1976 in *Washington v. Davis*, when the Court declared, "[t]he essential element of *de jure* segregation is 'a current condition of segregation resulting from *intentional* state action.'" *Washington*, 426 U.S. 229, 240 (1976) (emphasis added) (quoting Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 205 (1973)).

private parties that can be the subject of a federal lawsuit.[168] He went on in no uncertain terms to declare that "[p]ositive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, ..."[169] He later explained,

> An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, . . . or slander the good name of a fellow-citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. *This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied.*[170]

Bradley clearly distinguished between first order legal rights between private parties and a second order right between private parties and the states to have the states create the first order rights. It is protection against the abrogation of those first order rights, or in other words, the failure to provide for such rights in state laws, that Justice Bradley and the Court regarded as the "great seminal and fundamental wrong which was intended to be remedied."[171] Thus, contrary to the Court's later interpretation of the *Civil Rights Cases* in *Shelley*, the Fourteenth Amendment does indeed erect shields against some wrongful private conduct. It sets up the states as shields and gives to the Court the guarantees of § 1 as a sword to hold against their backs.

Presumably the particular rights that the Fourteenth Amendment requires of the States would include those mentioned by Justice Bradley above: a right to be free of intentional torts, to have contracts enforced, to be secure in one's property and reputation, and to be able to enter polls and cast one's vote. These are all first order rights to be enforced between private parties. Later in his opinion, Justice Bradley augmented the list of second order rights against the states as follows:

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168. *Civil Rights Cases*, 109 U.S. at 11.
169. *Id.*
170. *Id.* at 17-18 (emphasis added).
171. *Id.*

> Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment. . . . Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others.[172]

With respect to *Flagg Bros.*, it is interesting that Justice Bradley should mention allowing criminals to be seized and hung by the *posse comitatus* for what is that but another form of self-help. It is surely more extreme than a pre-judgement creditor remedy, but it is a form of self-help nonetheless, and condemned by the Court.

Bradley's interpretation of the intention of the Fourteenth Amendment, that the Amendment imposed an obligation on the states to protect people against people, is also substantially supported by the Amendment's history. To modern scholars, looking back over the larger span of constitutional history, beginning with the Constitution of 1789, the idea that the Fourteenth Amendment might obligate the states to take action rather than merely avoid certain actions appears to be a dramatic alteration in the original arrangements of federalism. The original Constitution imposed minimal restrictions on the states, and the guarantees of the Bill of Rights did not even apply to the states.[173] Gordon Wood has observed that "[e]ven to some eager Federalists, the new central government, as much of a consolidation as it may have been, still seemed to be concerned with 'objects of a general nature' and calculated to leave the preservation of individual rights to the states."[174]

But many of the framers of the Fourteenth Amendment did not regard the Amendment as altering in any substantial respect the relative authorities and obligations of the federal government and the states.[175] To most, it was merely

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172. *Id.* at 23-24.

173. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

174. GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 536 (1969). The Anti-Federalists naturally placed even greater emphasis on the role of the states. Herbert Storing read from the Anti-Federalist defense of federalism a belief in an inherent connection between the states and the preservation of individual liberty:

> The governments instituted to secure the rights spoken of by the Declaration of Independence are the state governments. They do the primary business that governments are supposed to do. The government of the Union supplements the state governments, especially by giving them an external strength that none of them could manage on its own. But in principle the general government is subordinate to the state governments.

HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15 (1981), *reprinted from* 1 THE COMPLETE ANTI-FEDERALIST 15 (Herbert J. Storing ed., 1981).

175. What follows is a much abbreviated version of an account that I provided in an earlier article. *See* Alan R. Madry, *Private Accountability and the Fourteenth Amendment; State Action, Federalism and*

the enactment into positive law of what they viewed as an inherent relationship between the nation and the states, albeit a relationship very different from the one imagined by the Founders. This is evident in the first instance in the way that editorial writers and members of Congress, from both the North and the South, conceived the debates over slavery and secession. In the minds of both the North and the South, these constitutional issues were philosophically framed in terms of more fundamental questions about sovereignty and allegiance and the reciprocal duty of protection. The power of a government to determine and defend fundamental rights went hand in hand with the right of the government to expect allegiance from its citizens, and both of those issues were aspects of a government that represented a sovereign people.[176] If the sovereign people were the people within their states, then that government had the duty and the necessary power to define and protect fundamental interests. It followed too, that those people, through their governments, could determine for themselves whether the conditions of their confederation had been violated and that they were entitled to depart the union.[177]

Southern apologists, heirs to the states-rights philosophy of the Anti-Federalists and the early Republicans, insisted that the Constitution retained the orientation of the earlier Articles of Confederation. The citizens of each state, within their states, retained their sovereignty and independence under the new Constitution.[178] The Constitution created no more than a federation of the several states. The federal government was the agent of the states with limited powers strictly adapted to its narrow functions.[179] From the peculiar metaphysics of the time, this view entailed the power in the people of each state, through their state governments, to determine when the compact had been broken and when a state therefore was justified in withdrawing from the union.[180] On this view too, because the citizens of the states owed their

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Congress, 59 MO. L. REV. 499 (1994).

176. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863, 872-73 (1986); JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, 334-51 (1978). Sovereignty was understood as the preeminent and comprehensive political power, not just within the scope of particular powers. Lincoln, reflecting the common understanding, defined sovereignty "a political community without a political superior. . . ." *Id.* at 873.

177. *See* KETTNER, *supra* note 176, at 334-35; *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1452-54 (1987); Kaczorowski, *supra* note 176, at 873.

178. *See* KETTNER, *supra* note 176, at 335-51; Amar, *supra* note 177, at 1452-55.

179. *See* Amar, *supra* note 177, at 1452; Kaczorowski, *supra* note 176, at 873.

180. *See* KETTNER, *supra* note 176, at 338.

principle allegiance to the states as the government of a sovereign people, it was the states, and not the federal government, which in turn had the power, and indeed the duty, to protect the rights of their citizens.[181] The Southern ideal of citizens sovereign within their states was reflected unequivocally in the preamble to the Constitution of the Confederacy framed soon after secession:

> We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this Constitution for the Confederate States of America.[182]

Adhering to the same metaphysical view of sovereignty as entailing certain inherent features, President Lincoln and the northern Republicans differed from their southern antagonists principally in insisting that sovereignty lay in the people of the nation as a whole. Indeed, many, including Lincoln, argued that after 1788 the states had no status outside of the Constitution: "The States have their status in the Union, and they have no other legal status. If they break from this, they can do so only against law and by revolution."[183] James Kettner summarized the position of the northern Republicans as follows: "Under the Constitution southerners were citizens of the United States, receiving protection from the national government, owing allegiance to the supreme law of the land, and legally obliged to submit to the will of the majority."[184] Robert Kaczorowski too observed that "[t]he most important question for the framers [of the post-Civil War Amendments] was whether the national or the state governments possessed primary authority to determine and secure the status and rights of American citizens."[185]

Even before Lee's surrender at Richmond on April 9, 1865, Republicans began to lay the foundation for exercising their claimed powers and responsibilities of national sovereignty. In 1864, the Senate approved the Thirteenth Amendment, abolishing slavery.[186] It failed to win the necessary

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181. *See id.*; Kaczorowski, *supra* note 176, at 873.

182. THE CONSTITUTION OF THE CONFEDERATE STATES OF AMERICA, Preamble. *See also* KETTNER, *supra* note 176, at 335-36.

183. *See* KETTNER, *supra* note 176, at 339 (quoting Lincoln's Message to Congress, July 4, 1861).

184. *Id.* at 340.

185. Kaczorowski, *supra* note 176, at 866-67.

186. U.S. CONST. amend. XIII, § 1. Section 1 of the Thirteenth Amendment reads in its entirety: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.*

two-thirds majority in the House and Lincoln made the Amendment a principle issue in the presidential campaign of that year. Following his reelection on January 31, 1865, by a margin of slightly over two to one, the House approved the Amendment and it was sent to the states for ratification, which it finally won in December, 1865. Many Republicans believed that the Thirteenth Amendment alone was sufficient to permit them fully to protect the natural rights denied to Blacks under slavery. In the Republican linkage of protective power and allegiance, citizenship was the linchpin. But it was precisely citizenship, indeed even the possibility of citizenship, that Justice Taney earlier had denied to the Black race in his infamous opinion in *Dred Scott v. Sandford*.[187] Even Taney, however, echoed the Republican understanding of national sovereignty. Were Blacks to be made citizens, he wrote, "they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government . . . ."[188]

Though the Thirteenth Amendment by its terms did not grant citizenship to the slaves freed by its ratification, many in the Republican party felt that it was unnecessary. Citizenship was entailed by the grant of freedom. In the first federal court decision interpreting the Thirteenth Amendment, Justice Noah Swayne, looking to many of the same sources cited by Republican lawmakers, English treatises and the common law of both England and the United States, wrote that "[t]he term 'citizen,' as understood in our law, is precisely analogous to the term subject, in the [English] common law . . ."[189] and, as "[a]ll persons born in the allegiance of the king are natural born subjects, . . . [so] all persons born in the allegiance of the United States are natural born citizens."[190] He concluded, therefore, "that the emancipation of a native born slave by removing the disability of slavery made him a citizen."[191]

Spurred on by the adoption of Black Codes throughout the South and the emergence of the Ku Klux Klan,[192] and relying on the newly ratified

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187. 60 U.S. (19 How.) 393, 404 (1856).

188. *Id.* at 423.

189. United States v. Rhodes, 27 F. Cas. 785, 788 (C.C. Ky. 1866) (No. 16,151). *Rhodes* concerned the validity and interpretation of the Civil Rights Act of 1866, enacted on the basis of the power granted to Congress in the second section of the Thirteenth Amendment. For a more thorough discussion of *Rhodes* and its treatment of the Civil Rights Act of 1866, see Kaczorowski, *supra* note 176, at 900-02.

190. *Rhodes*, 27 F. Cas. at 789.

191. *Id.*

192. *See generally* ERIC FONER, RECONSTRUCTION, AMERICA'S UNFINISHED REVOLUTION,

Thirteenth Amendment, the Thirty-ninth Congress assumed as its foremost task the establishment of federal protections for fundamental civil rights.[193] Soon after Congress convened in January, 1886, Lyman Trumball, Chair of the Senate Judiciary Committee, introduced two bills. The first was intended to extend the life of the Freedman's Bureau. The second, and by far the most important of the two, was the Civil Rights Bill which then became the Civil Rights Act of 1866. The language of the Bill was a clear reaffirmation of the broad Republican principles of national citizenship and the rights that attended it:

> [A]ll persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . .[194]

Following President Johnson's veto of the Act, Senator Trumbull urged its reenactment by drawing on the familiar Republican linkage between allegiance and protection:

> How is it that every person born in these United States owes allegiance to the Government? Everything that he is or has, his property and his life, may be taken by the Government of the United States in its defense . . . and can it be that . . . we have got a Government which is all-powerful to command the obedience of the citizen, but has not power to afford him protection? Is that all that this boasted American citizenship amounts to? . . . Sir, it cannot be. Such is not the meaning of our Constitution. Such is not the meaning of American citizenship. This Government, which would go to war to protect its meanest—I will not say citizen—inhabitant . . . in any foreign land whose rights were unjustly encroached upon, has certainly some power to protect its own citizens in their own country. Allegiance and protection are reciprocal rights.[195]

In the House, Representative Broomall struck the same chord:

> But throwing aside the letter of the Constitution, there are characteristics of Governments that belong to them as such, without which they would cease to be Governments. The rights and duties of allegiance and protection are corresponding rights and duties. . . . [Wherever] I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection I owe it no allegiance. . . .[196]

1863-1877, 198-200, 421-44 (1988).

193. *See* Kaczorowski, *supra* note 176, at 893-94 (citing remarks of Schuyler Colfax, Speaker of the House of Representatives opening the Thirty-ninth Congress).

194. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866).

195. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866).

196. *Id.* at 1263.

Broomall scoffed at the notion that the states were the proper guarantors of such protection because, he argued, "everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech, the right of transit, the right to domicil[e], the right to sue, the writ of *habeas corpus*, and the right of petition."[197]

President Johnson's veto of the Freedmen's Bureau and the Civil Rights bills stunned the Republican majority and brought home the necessity of placing national civil rights into the Constitution, beyond the possibility of future presidential vetoes.[198] In April, 1866, before Congress took up the vetoed Civil Rights Act, Congressman John Bingham of Ohio introduced a proposed constitutional amendment, the precursor to the Fourteenth Amendment. It provided:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.[199]

As witnessed by their adoption of the Civil Rights Act of 1866, the majority of Republicans believed that Congress already had the power purportedly granted by the proposed amendment. Bingham disagreed.[200] Bingham earlier had opposed adoption of the Civil Rights Bill because he held that under the Constitution as then written, the enforcement of civil rights lay with the states.[201] The Thirteenth Amendment, while barring slavery, did not change the original allocation of power between the federal government and the states.[202] For Bingham, another amendment was a necessary precursor to any further civil rights protection by Congress.[203] Even those who were confident of the constitutional legitimacy of the Civil Rights Act nonetheless were willing to preclude all doubt as well as obviate further presidential vetoes by clearly articulating the basis of congressional authority to protect national civil rights.

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197. *Id.*

198. *See* FONER, *supra* note 192, at 251.

199. CONG. GLOBE, 39th Cong., 1st Sess. 1033-34 (1866).

200. Kaczorowski, *supra* note 176, at 910.

201. *Id.*

202. Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMM. 235, 270 (1984).

203. Kaczorowski, *supra* note 176, at 913-14.

But at the same time that Bingham introduced his proposed fourteenth amendment, Republicans were also beginning to awakening to an unanticipated consequence of the Thirteenth Amendment. If the newly freed slaves enjoyed citizenship by virtue of their freedom and being native born, as the Republicans believed was the case, then they would all be counted in calculating Congressional representation. Prior to the war, only three-fifths of the slaves had been counted. Without suffrage for the freed slaves, a move that seemed unlikely at the time, an expanded number of southern representatives, in league with northern Democrats, would seize control of Congress.[204]

Early in March, with nearly all Republicans in favor, including Bingham, the House voted to send Bingham's proposed amendment to committee for revision in light of the newly perceived danger. Congressman Giles Hotchkiss of New York summarized the sentiments of those who feared the possibility of a southern domination of Congress:

> This amendment provides that Congress may pass laws to enforce these rights. Why not provide by an amendment to the Constitution that no State shall discriminate against any class of its citizens; and let that amendment stand as a part of the organic law of the land, subject only to be defeated by another constitutional amendment. We may pass laws here to-day, and the next Congress may wipe them out.[205]

In the mean time, on April 9, 1866, the House overrode the President's veto of the Civil Rights Act and it became law.

Near the end of April, the Joint Committee reported the revised, proposed Fourteenth Amendment to Congress. It was carefully adapted to strengthen national civil rights. Bingham's single grant of power to Congress was converted into the self-executing rights of the present § 1. Congress was, in addition, given the powers of the current § 5 to enforce those rights by appropriate legislation. Concerns over increased southern representation in the post war Congress were addressed in two new sections. Section 2 reduced the basis of representation in proportion to the number of males denied the right to vote and § 3 excluded from the privilege of voting in federal elections all those who participated in the insurrection against the federal government. A fourth Section prohibited payment of the Confederate debt. The grant of citizenship to all native born persons was added to § 1 on the floor of the

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204. FONER, *supra* note 192, at 252-55.

205. CONG. GLOBE, 39th Cong., 1st Sess. 1095 (1866) (quoted in Farber & Muench, *supra* note 202, at 271).

Senate. The Fourteenth Amendment was finally ratified on July 9, 1868, with the pro-ratification vote of South Carolina.

The ratification of the Fourteenth Amendment was followed quickly by the passage of the two additional civil rights statutes. The Enforcement Act of 1870[206] and the Ku Klux Klan Act of 1871[207] both criminalized the violation of additional rights not mentioned in the Civil Rights Act of 1866. Both provided the U.S. attorneys with the means to largely cripple the Ku Klux Klan over the next few years.[208] The Ku Klux Klan Act in addition included the present § 1983 discussed earlier which provided for a private causes of action for the violation of any right given by the Constitution or other laws of the United States.

Thus, the history of the Fourteenth Amendment, its role as a foundation to the Civil Rights Act of 1866, and the evolution of both the Civil Rights Act and the Fourteenth Amendment out of the rhetoric of the constitutional debates over slavery and secession abundantly demonstrate the clear and strong intentions of the framers of that Amendment to include in the Constitution a set of national civil rights. The specific rights meant to be nationalized included in the first instance those mentioned in the first eight Amendments to the Bill of Rights. Senator Bingham, addressing the contents of the Privileges and Immunities Clause, explained that they were largely defined by the first eight Amendments.[209] Those rights, however, were not exhausted by the Bill of Rights. The Bill of Rights, after all, did not guarantee rights to own and dispose of property, to contract or to sue and be sued, as did the Civil Rights Act that the Amendment was intended to support. Senator Howard, among others, discussed the Bill of Rights only in addition to the privileges and immunities of citizenship, which, he remarked, "are not and cannot be fully defined in their entire extent and precise nature. . . ."[210] To "gather some intimation of what probably will be the opinion of the judiciary, . . ."[211] he quoted at length from the opinion of Justice Bushrod Washington riding circuit in *Corfield v. Coryell*.[212] Giving the Comity Clause of Article IV a natural rights interpretation, Justice Washington declared that that Clause protected "those privileges and immunities which are, in their

206. Ch. 114, 16 Stat. 140 (1870).
207. Ch. 22, 17 Stat. 13 (1871).
208. *See* Kaczorowski, *supra* note 176, at 920-21.
209. Farber & Muench, *supra* note 202, at 271-72.
210. CONG. GLOBE, 39th Cong., 1st Sess. at 2765 (1866).
211. *Id.* at 2765.
212. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states. . . ."[213] Among those rights, he explained, were "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . ."[214] These are precisely the rights that Congress sought to secure in the Civil Rights Act of 1866 and the Enforcement and the Ku Klux Klan Acts, and which furthermore had to be anticipated by the Amendment to support Congressional lawmaking under § 5.

What prevented the Fourteenth Amendment from fulfilling its promise was the Court's almost immediate emasculation of the Privileges or Immunities Clause in 1873 in the *Slaughter-House Cases*.[215] Plaintiffs, a group of butchers plying their trade in New Orleans, invoked the Clause to challenge a monopoly granted by their own state legislature.[216] The Court recognized that using the Privileges or Immunities Clause to protect a citizen against its own state was a revolutionary alteration of the original arrangements of federalism.[217] It refused to interpret the Clause so broadly on the basis of two technical, altogether textual arguments.[218] First, so huge a change should not be premised on language as vague as that which appears in the Clause.[219] This is an argument familiar to constitutional jurisprudence. Justice Marshall appealed to the same principle to a similar end in *Barron v. Mayor & City Council of Baltimore*[220] when he refused to apply the Bill of Rights to the states.[221] Secondly, the Court noted that the Clause only protected the privileges and immunities of "citizens of the United States."[222] Because the first Citizenship Clause of the Amendment referred to both citizenship in the United States and the in the states, the Court assumed that the privileges and immunities that attended each citizenship differed.[223] It chose to interpret the privileges and immunities of "citizens of the United

213. *Id.* at 551.
214. *Id.* at 551-52.
215. 83 U.S. (16 Wall.) 36 (1872).
216. *Id.* at 57, 78.
217. *Id.* at 74-77.
218. *Id.* at 78-80.
219. *Id.*
220. 32 U.S. (7 Pet.) 242 (1833).
221. *See id.*
222. *Slaughter-House Cases*, 83 U.S. at 73.
223. *Id.* at 73-75.

States" to consist merely of those interests already protected under the original Constitution.[224]

What is most striking about the Court's analysis in the *Slaughter-House Cases* is its superficial reliance on mere default canons of textual interpretation. The Court was surely correct to require evidence more compelling than the vague language of the Clause before finding an intention to radically alter the arrangements of federalism. But by the same token, on a matter of such great importance the Court should have looked beyond the language of the Amendment to its very recent history to discern the actual intentions of the framers. Had it done so, of course, it would have recognized that the reference in the Clause to the "privileges or immunities of citizens of the United States" reflected the Republican commitment to the primacy of national citizenship and the reciprocal duties of allegiance and protection that primacy citizenship entailed.[225] Even Justice Bradley's dissenting opinion, which otherwise rang with the Republican terminology of citizenship and the "rights of citizens of any free government," did not make reference to any evidence of the intentions of the framers or ratifiers of the Amendment.[226]

It is not too much to say that the Court's decision in the *Slaughter-House Cases* reversed much of what the Civil War was about. Robert Kaczorowski observed that the *Slaughter-House Cases* "precluded the national government from protecting citizens in the South during the 1874 revival of political terrorism, and from preventing the establishment of a pattern of domination by Southern Conservative Democrats and white supremacists over Southern blacks and white Republicans."[227] Seen in the light of this history, Justice Bradley's opinion for the *Civil Rights Cases*, rather than the conservative decision it is frequently taken to be, was in fact an effort on the on the part of Justice Bradley to recover for the cause of civil rights ground lost in the *Slaughter-House Cases.* Given the Court's subsequent misreading of the *Civil Rights Cases*, exemplified by the dicta in *Shelley v. Kraemer*, the ground lost in the *Slaughter-House Cases* was not recovered until the advent of the state

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224. *Id.*

225. U.S. CONST. amend. XIV, § 1.

226. *Slaughter-House Cases*, 83 U.S. at 114. Justice Bradley wrote in dissent that

> citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. . . . A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.

Id. at 112-13.

227. Kaczorowski, *supra* note 176, at 938.

action doctrine, and then only imperfectly and in the most incoherent way, and subject as well to the political leanings of subsequent courts.[228]

Had the Court not erred so egregiously in the *Slaughter-House Cases*, and instead had preserved the intentions of the framers of the Fourteenth Amendment, the critical issues in *Flagg Bros.* could never have arisen. Presumably, the state action doctrine would never have been created. Justice Rehnquist would thus not have had the easy lever to shield § 7-210 of the New York Uniform Commercial Code from due process review. The States would have been regarded as constitutionally obligated to protect people against people. The failure of a state legislature or judiciary to provide appropriate relief would have been reviewable by the U.S. Supreme Court without the need to transform private parties into state actors to provide a federal forum for the vindication of rights. In addition, under the reasoning of the *Civil Rights Cases*, Congress under § 5 of the Fourteenth Amendment could create a federal cause of action against private parties who act under color of a state law that constitutes the failure of the state to meet its responsibilities under § 1.

Thus in *Flagg Bros.*, unless one or another federal civil rights statute might have been read to create a cause of action, the action against the private defendant should have been dismissed for failure to state a cause of action under § 1983. Mrs. Brooks could still have raised the due process issue in state court by filing a challenge to the proposed sale of her property. Had the New York courts decided against her, she would then have been able to seek review by the U.S. Supreme Court. At every level, Mrs. Brooks might have argued not only that § 7-210 of the New York Uniform Commercial Code failed under the Due Process Clause, *per Sniadach et al.*, but that in addition it failed to properly protect her interest in her property against invasion by another person.

IV.

The analysis of the last section also stands as a response to the state action scholarship preceding and following *Flagg Bros.* That scholarship largely accepted the premises of the state action doctrine, that the guarantees of § 1 of the Fourteenth Amendment should reach some private conduct, but

228. The same could be said of both substantive due process and the incorporation doctrine. Neither doctrine is founded on anything more than judicial activism, but, in both cases, what the doctrines sought to achieve, at their best, likely could have been achieved soundly under the privileges or immunities clause properly understood.

deplored the incoherence of the Court's rationalization of it. Among the most common ways that scholars sought to describe a more coherent state action test was by claiming that state action is in fact ubiquitous.[229] Paul Brest explained in his critique of *Flagg Bros.*: "More fundamentally, since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every 'private' action not prohibited by law."[230] Brest is not concerned that such a view would obliterate the distinction between the states and private parties and potentially flood the federal courts with actions by private parties against other private parties. He says,

> At this point, a critic might respond that if the state's protection of the creditor's possession makes his possession state action, then state action inheres in every assertion of a property interest. . . . [I]t fails as a reductio[n] argument against ubiquitous state action: The finding of state action in virtually all acts of possession hardly entails that anyone who claims an interest in property is entitled to a hearing before the possessor disposes of it. That is a question of *substantive* policy—as was the question whether the debtors in the garnishment cases were constitutionally entitled to a prior hearing.[231]

There are serious problems with the argument, however. In the first instance, it is simply not the case that a state can accurately be said to have authorized every private choice made by each of its citizens. That would appear to assume as a general principle that every private choice requires state permission, but permission will be assumed in the absence of a statute, regulation or judicial decision to the contrary. The more natural and accurate assumption is that people are legally at liberty to do as they please unless the state imposes a duty to refrain from the conduct. In the absence of explicitly imposed duties, we are essentially still in the state of nature—at liberty to do as we please. The state must act to alter that circumstance. The state is responsible for private conduct then only if the state has a duty to constrain the private conduct and fails. State inaction is surely reviewable, but only if one can allege a duty to act. But after the *Civil Rights Cases*, the Court never

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229. The argument appears to have had its origin in an article by Harold Horowitz. *See* Harold Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957). *See also* Alexander, *supra* note 11; Louis Henkin, Shelley v. Kraemer*: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); William W. Van Alstyne & Kenneth L. Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Williams, *supra* note 11.

230. Brest, *supra* note 39, at 1301.

231. *Id.* at 1313 (emphasis in original).

again held that a state has an obligation under the Fourteenth Amendment to protect people against people.

More crucially, though, even if we were to regard state action as ubiquitous, there is still nothing in the argument that supports the transformation of private conduct into state action subject to the guarantees of the Fourteenth Amendment. The argument would simply subject even the inaction of a state to scrutiny under the Amendment. It does not explain why or how the plain limitation of the Amendment to state action should be stretched to include private conduct. The argument appears to simply accept without question or any further justification the Court's *ipsi dixit* that state "involvement" in private conduct transforms that conduct into state conduct. But that is precisely the dilemma of state action that requires justification. As I have discussed above, it surely derives no support from the manifest intentions of the framers of the Amendment. We have seen that the framers manifestly intended that the Fourteenth Amendment would protect people against people, as the *Civil Rights Cases* held. But that protection would take the form of a second order right against the states to create first order rights between people. Should the state by law or custom not merely fail to provide that protection, but in addition demonstrate its disregard of its duties by authorizing contrary private action, then Congress under § 5 has the power to create remedial private causes of action to correct the failures of the state.

It was the failure of the Court to consider the intentions of the framers that led to the dilemma in the first instance in the *Slaughter-House Cases*. Furthermore, it is the continued failure of the Court to revisit its own errors that not only continues to perpetuate a horribly incoherent doctrine, but now, under the Rehnquist Court, also fails to adequately provide the Constitutional protections against private conduct the lack of which the *Civil Rights Cases* declared was the "great seminal and fundamental wrong which was intended to be remedied" by the Fourteenth Amendment.[232]

232. *Civil Rights Cases*, 109 U.S. at 17.