Cutting the Gordian Knot: State Action And Self-Help Repossession

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On November 11, 1974, the Supreme Court denied *certiorari* in the case of *Adams v. Southern California First National Bank*[1] leaving intact the Ninth Circuit's decision that self-help repossession, authorized by section 9-503 of the Uniform Commercial Code (hereinafter U.C.C.), does not violate the Constitution.[2] The circuit court based its decision on the finding that self-help repossession under section 9-503 does not involve state action. This article examines the *no state action* position with regard to private repossession and concludes that state action is a spurious issue in this case and in every other legal controversy. It then discusses the constitutional implications of the two most suspect elements of private repossession—(1) lack of prior hearing and (2) use of private force—for the purpose of indicating how courts should confront the real issues involved in repossession and analogous situations.

I. State Action in Private Repossession

Most legal scholars who have written on the constitutionality of private repossession have indicated that one of the principal issues to be resolved is whether there is sufficient state action to bring the Fourteenth Amendment into play.[3] But the search for state action is a funda-

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1. 419 U.S. 1006 (1974).

2. 492 F.2d 324 (9th Cir. 1973). Section 9-503 reads, in pertinent part: "Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed . . . without judicial process . . . if this can be done without breach of the peace . . . ."

3. For cases dealing with whether state action is involved in repossession under U.C.C. § 9-503, *see* Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Gary v. Darnell, 505 F.2d 741 (6th Cir. 1974); Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Brantley v. Union Bank & Trust Co., 498 F.2d 365 (5th Cir.), *cert. denied*, 419 U.S. 1034 (1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); Bichel Optical Laboratories, Inc. v. Mar-

mentally misguided quest. State action is present in every lawsuit be-

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quette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973); Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974); McDuffy v. Worthmore Furniture, Inc., 380 F. Supp. 257 (E.D. Va. 1974); Baker v. Keeble, 362 F. Supp. 355 (M.D. Ala. 1973); Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973); Johnson v. Associates Fin., Inc., 365 F. Supp. 1380 (S.D. Ill. 1973); Kinch v. Chrysler Credit Corp., 367 F. Supp. 436 (E.D. Tenn. 1973); Mayhugh v. Bill Allen Chevrolet, 371 F. Supp. 1 (W.D. Mo. 1973), *aff'd*, 496 F.2d 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Shelton v. General Elec. Credit Corp., 359 F. Supp. 1079 (M.D. Ga. 1973); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972); McCormick v. First Nat'l Bank, 322 F. Supp. 604 (S.D. Fla. 1971); John Deere Co. v. Catalano, 525 P.2d 1153 (Colo. Sup. Ct. 1974); King v. South Jersey Nat'l Bank, 66 N.J. 161, 330 A.2d 1 (1974); Brown v. United States Nat'l Bank, 265 Ore. 234, 509 P.2d 442 (1973); Giglio v. Bank of Del., 307 A.2d 816 (Del. Ct. of Ch. 1973); Northside Motors, Inc. v. Brinkley, 282 So. 2d 617 (Fla. Sup. Ct. 1973); Colvin v. Avco Fin. Servs., Inc., 12 UCC Rep. Serv. 25 (D. Utah 1973); Messenger v. Sandy Motors, Inc., 295 A.2d 402 (N.J. Super. Ct. 1972); Michel v. Rex-Noreco, Inc., 12 UCC Rep. Serv. 543 (D. Vt. 1972); Kipp v. Cozens, 11 UCC Rep. Serv. 1067 (Cal. Super. Ct. 1972).

For cases dealing with whether state action is involved in other self-help remedies, *see* Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Parks v. "Mr. Ford," 386 F. Supp. 1251 (E.D. Pa. 1975); Cockerel v. Caldwell, 378 F. Supp. 491 (W.D. Ky. 1974); Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594 (E.D. Mich. 1974); Nichols v. Tower Grove Bank, 362 F. Supp. 374 (E.D. Mo. 1973), *aff'd*, 497 F.2d 404 (8th Cir. 1974); Hernandez v. European Auto Collision, Inc., 346 F. Supp. 313 (E.D.N.Y. 1972), *rev'd on other grounds*, 487 F.2d 378 (2d Cir. 1973); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972); Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Holt v. Brown, 336 F. Supp. 2 (W.D. Ky. 1971); Kerrigan v. Boucher, 326 F. Supp. 647 (D. Conn.), *aff'd on other grounds*, 450 F.2d 487 (2d Cir. 1971); Santiago v. McElroy, 319 F. Supp. 284 (E.D. Penn. 1970); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

For law review articles discussing whether state action is involved in self-help remedies, *see* Brodsky, *Constitutionality of Self-Help Repossession Under the Uniform Commercial Code: The Eighth and Ninth Circuits Speak*, 19 S.D.L. REV. 295 (1974); Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1 (1973); Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUT. L. REV. 541, 569-70, 572-84 (1975); Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld* AND [*sic*] *a Proposed Salvation*, 51 ORE. L. REV. 302, 329 (1972); Clark & Landers, *Sniadach, Fuentes, and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 377-83 (1973); Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521, 552-54 (1973); Del Duca, *Pre-Notice, Pre-Hearing, Pre-Judgment Seizure of Assets—Self-Help Repossession Under UCC § 9-503, Its Antecedents and Future*, 79 DICK. L. REV. 211, 216 (1975); Hughes, *Creditors' Self-Help Remedies Under UCC Section 9-503: Violative of Due Process in Texas?*, 5 ST. MARY'S L. J. 701 (1974); Martin, *Secured Transactions*, 19 WAYNE L. REV. 593 (1973); McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Repossession and Ad-*

cause the laws of a state are being applied. Indeed, as *Shelley v.*

hesion Contract Issues, 26 HAST. L.J. 383, 396-405 (1974); McDermott, *The Supreme Court's Changing Attitude Toward Consumer Rpotection (sic) and Its Impact on Montana Prejudgment Remedies*, 36 MONT. L. REV. 165, 169-71 (1975); McDonnell, *Sniadach, The Replevin Cases and Self-Help Repossession—Due Process Tokenism?*, 14 B.C. IND. & COM. L. REV. 437 (1973); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 527, 568-70; Neth, *Repossession of Consumer Goods: Due Process for the Consumer: What's Due for the Creditor?*, 24 CASE W. RES. L. REV. 7, 50-63 (1972); Spak, *The Constitutionality of Repossession By Secured Creditors under Article 9-503 of the Uniform Commercial Code*, 10 HOUST. L. REV. 855 (1973); Spak & Spak, *Constitutional Attacks on Creditors' Self-Help Repossession Rights Under U.C.C. Section 9-503—Developments in Illinois Secured Transactions*, 24 DEPAUL L. REV. 378 (1975); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503; Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 962-63 (1974); Comment, *Creditors' Prehearing Remedies and Due Process*, 14 ARIZ. L. REV. 834, 839-45 (1972); Note, *Procedural Due Process—Post-Fuentes Constitutionality of Garagemen's Liens*, 54 B.U.L. REV. 542, 548-56 (1974); Comment, *A Proposal for a Constitutional Innkeepers' Lien Statute*, 24 BUFFALO L. REV. 369, 370-78 (1975); Comment, *Self-Help Repossessions Under UCC Section 9-503—"State Action"?*, 44 U. COLO. L. REV. 389 (1973); Note, *The Specter of State Action in Self-Help Repossession*, 5 CONN. L. REV. 294 (1972); Comment, *Mortgages—Does Foreclosure Under Power of Sale Violate Due Process Rights?*, 4 CUM.-SAM. L. REV. 507, 515-19 (1974); Comment, 50 DENVER L.J. 261, 267-74 (1973); Note, *Self-Help Repossession: The Constitutional Attack, the Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273 (1973); Comment, 1972 U. ILL. L.F. 635; Comment, *State Action Considerations and Economic Implications of Holding Self-Help Repossessions Unconstitutional*, 1973 LAW AND THE SOCIAL ORDER 707; Comment, *State Action and Waiver Implications of Self-Help Repossession*, 25 ME. L. REV. 27 (1973); Note, *Replevin and Non-Judicial Repossession in Light of Fuentes v. Shevin*, 3 MEMPHIS ST. U.L. REV. 125, 132-35 (1972); Note, *Security Interests: Self-Help Still an Available Method of Repossession*, 28 U. MIAMI L. REV. 231 (1973); Case Comment, 57 MINN. L. REV. 621 (1973); Note, *Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503*, 4 N.M.L. REV. 75, 77-92 (1973); Note, *The Growth of Procedural Due Process into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in Our Economic System,"* 66 NW. U.L. REV. 502 (1971); Comment, *Adams v. Southern California First National Bank: 9-503 Constitutional—The End of a Notable Beginning?*, 35 U. PITT. L. REV. 882 (1974); Note, *Summary Creditor Remedies: Going . . . Going . . . Gone?*, 10 SAN DIEGO L. REV. 292 (1973); Comment, *Prejudgment Replevin and Self-Help Repossession—Creditor Remedies of the Past: A Constiitutional Plan of Assault*, 17 ST. LOUIS U.L.J. 127 (1972); Note, *Self-Help Repossession Under the U.C.C.: Presence or Absence of State Action?*, 28 SW. L.J. 796 (1974); Note, *New York Creditor Remedies After Mitchell v. W. T. Grant Co.*, 26 SYRACUSE L. REV. 681 (1975); Comment, 24 SYRACUSE L. REV. 867 (1973); Case Comment, 6 TEX. TECH. U.L. REV. 1135 (1975); Comment, *Self-Help Repossession of Consumer Goods: A Constitutional Look at Section 9-503 of the Uniform Commercial Code*, 7 VAL. L. REV. 439, 459-62 (1973); Comment, *State Action and the Constituitonality of UCC § 9-503*, 30 WASH. & LEE L. REV. 547 (1973); Note, *Constitutional Torts: Section 1983 Redress for the Deprived Debtor*, 14 WM. & MARY L. REV. 627, 637 (1973).

Kraemer[4] correctly suggested,[5] and as this article demonstrates,[6] state action is present wherever a relationship has legal consequences.

Although always present, state action may assume a variety of forms, each carrying different constitutional implications. The four main forms of state action are: (1) "proprietary action" where the state acts through its agents;[7] (2) "mandatory action" where the state mandates that individuals act in a certain way; (3) "permissive action" where the state permits individuals to enjoy freedom of action by granting them an enforceable right[8] to act or not to act; (4) "permissive action plus special relation" where the state permits private individuals the same freedom as in (3) but additionally creates a special relationship with them in connection with that freedom.[9]

a. Proprietary and Mandatory Actions

Proprietary action includes such practices as hiring state employees

4. 334 U.S. 1 (1948). In *Shelley*, the Court struck down state court decisions upholding the right of homeowners to invoke a restrictive covenant which prevented another owner from selling his property to blacks.

5. Although the Supreme Court in *Shelley* correctly identified court enforcement of state law as state action, it did not see that all relationships are of legal consequence and thus can be the subject of judicial enforcement. See text accompanying notes 16-23 *infra*, and note 35 *infra*.

6. I do not want to imply that all commentators have overlooked the fact that state action is always present, although in various forms. *See* Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 So. CAL. L. REV. 208 (1957) [hereinafter cited as Horowitz]; Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961) [hereinafter cited as Van Alstyne & Karst]; Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962) [hereinafter cited as Henkin]; Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963); Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CAL. L. REV. 1 (1964) [hereinafter cited as Horowitz, *Racial Discriminiation*]; Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 DUKE L.J. 219 [hereinafter cited as Van Alstyne]. *See also* Note, *Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503*, 4 N.M.L. REV. 75, 77-92 (1973).

The position common to all of the above commentators and to this article is that state action is present wherever a relationship has legal consequences. (See text accompanying notes 16-23, *infra*.) The only real question is not whether state action is present, but whether the state action which *is* present is constitutional. *See* Horowitz, *supra*, at 209; Henkin, *supra*, at 481, 487-96.

7. *See* the discussion of the government's "enterprise capacity" in Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62-63 (1964).

8. I shall use "right" to refer to both rights and privileges in the Hohfeldian terminology. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING (1964). The distinction between Hohfeldian rights and privileges is irrelevant to the subject of state action. See also note 16 *infra*.

9. *See* Horowitz, *Racial Discrimination, supra* note 6, at 17: "The total state action in these cases is the combination of state participation and involvement and state law permitting the discrimination."

or admitting students to state law schools. Mandatory action includes such laws as those mandating safe driving or segregation of lunch counters or laws prohibiting the sale of obscene materials. No court has ever failed to find state action in either of these categories.

b. Permissive Action

The third form, permissive action, deserves extended attention because it is the key to the difficulties which the state action concept has engendered. Permissive action includes such laws as those that give property owners the right to sell or lease property to whomever they choose,[10] to enter into enforceable restrictive covenants,[11] to ban leafletting or picketing on their property,[12] and to restrict the use of their property to whomever they choose.[13] It also includes laws that give individuals the right to enter into associations[14] or to contract[15] with whomever they choose.

Permissive action exists against a backdrop of mandatory action. For example, laws forbidding trespass, battery, theft, breach of contract, and invasion of privacy represent mandatory actions restricting private individuals and state officials and are the ones invoked to enforce the rights and privileges granted by permissive actions.[16] A society with only

10. Reitman v. Mulkey, 387 U.S. 369 (1967). See discussion surrounding notes 17-22 *infra.*

11. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

12. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946).

13. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); Reitman v. Mulkey, 387 U.S. 369 (1967); Evans v. Newton, 382 U.S. 296 (1966); Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963).

14. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

15. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Bell v. Maryland, 378 U.S. 226 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963).

16. It is irrelevant to my thesis whether something is a law itself or is only part of a law (*see* Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823 (1972)), or whether what appear to be exceptions to laws are only the result of having those laws incompletely stated. Nor is it relevant whether permissive actions are really laws or whether only their mandatory complements can claim that status. See text accompanying notes 21-23, 31 *infra.* Similarly, it is irrelevant whether laws which specify how the powers over property are transferred or otherwise obtained are really laws or are only parts of laws imposing primary obligations or directing the imposition of sanctions. *See* H. HART, THE CONCEPT OF LAW, 35-38 (1961). Finally, it is irrelevant how my permissive-mandatory classification of state actions squares with Hohfeld's categories. *See* W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED TO JUDICIAL REASONING (1964). The issue of state action is unrelated to the jurisprudential positions mentioned above.

mandatory actions and no permissive ones would be totalitarian in the extreme, for there would be no room for individual choice. A society with only permissive actions would be anarchical, for there would be no restrictions of any sort on anyone.

Permissive actions, whether statutory or judicial in origin,[17] are just as much acts of the state as are proprietary and mandatory actions, and for that reason are just as much subject to the Fourteenth Amendment.[18] Even if one wished to deny that permissive actions were truly acts of the state, it would make no difference. As has been pointed out, except in a condition of anarchy, permissive state laws exist against a backdrop of mandatory actions, and the latter clearly constitute state action under any definition. Therefore, every case in which a permissive action is challenged can be viewed as one in which the complementary mandatory actions are challenged.[19] The attack in *Reitman v. Mulkey*[20] on the permissive action granting landowners the right to discriminate in the sale or leasing of their property could be viewed as a challenge to the law against trespass, a mandatory action, for unconstitutional overbreadth.[21]

Every case apparently involving a permissive action could in fact be set up to involve complementary mandatory actions. For example, the parties discriminated against in *Reitman* might have tendered rent and entered the premises, forcing the landlord to sue them in trespass. In fact, in *Snyder v. Prendergrast*, one of the cases included in *Reitman*,

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17. There is no reason to deny common-law rules the status of state action subject to the Fourteenth Amendment. In other words, there is no reason why a common-law rule cannot be unconstitutional. And it is clearly immaterial whether the common-law rule is codified by legislative enactment or is solely judge-made. *See* Shelley v. Kraemer, 334 U.S. 1 (1948), and quote therefrom at note 32 *infra*. *See also* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

18. *See* Van Alstyne & Karst, *supra* note 6, at 45-46; Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 45 [hereinafter cited as Winter].

19. *See* Horowitz, *Racial Discrimination, supra* note 6, at 9-10; Van Alstyne, *supra* note 6, at 239-40 n.42. *Compare* Truax v. Corrigan, 257 U.S. 312 (1921), *with* Black v. Cutter Laboratories, 351 U.S. 292 (1956).

20. 387 U.S. 369 (1967).

21. This ignores the fact to which the Court paid most attention in *Reitman, viz.*, the attempted repeal of specific anti-discrimination laws. The Court, in dictum, approved the law of trespass as applied to protect racial discrimination by property owners. In its holding, however, the Court found the repeal of the anti-discrimination laws to be constitutionally defective, for reasons that no one has explained to my satisfaction. *See also* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantial Equal Protection*, 1967 SUP. CT. REV. 39, 57.

the landlord was seeking eviction of an interracial couple, who sued to enjoin the eviction.[22]

Because there can be no permissive actions without complementary mandatory ones, and because every constitutional challenge to permissive actions can be converted into a challenge to their mandatory complements, there is no reason why permissive actions should not be deemed state action.[23]

Although the *existence* of state action is under this analysis a false issue even in the case of permissive actions, the *reasonableness* of state action remains an issue. A proprietary action by the state or a mandatory action directing the same act by private individuals may be unconstitutional, but it does not necessarily follow that a permissive action giving individuals an enforceable right to choose whether to do or not to do the same thing will also be unconstitutional. The state may have legitimate reasons for its permissive action which it does not have for its proprietary or mandatory action. The most prominent of these reasons is simply allowing individual freedom of choice.

The general state interest in allowing individual freedom of choice can be subdivided into at least three distinct interests: (1) promotion of certain values such as privacy, autonomy, association, and protection of sensibilities, or economic gain, which individuals have but states do not;[24] (2) fairness to individuals who have acquired property by allowing them to dispose of it as they choose even if no positive values other

22. Again I am assuming that the anti-discrimination laws are completely out of the picture.

23. It should be emphasized, perhaps, that the view of state action expressed in this article does not lead to the conclusion that individuals not acting as agents of the state can violate the Fourteenth Amendment. It is still the state and its agents who violate the Constitution by enforcing permissive actions and not the individual who has the permission. In other words, there is a difference between the permissive action and the permitted action. *See* the discussion of federal action under section 5 of the Fourteenth Amendment in Van Alstyne and Karst, *supra* note 6. *See also* Horowitz, *Racial Discrimination, supra* note 6, at 22, 38-39. *But see* Hill v. Toll, 320 F. Supp. 185, 187-88 (E.D. Pa. 1970); DeCarlo v. Joseph Horne & Co., 251 F. Supp. 935 (W.D. Pa. 1966).

It should also be emphasized that in some cases it will not be easy to determine whether the state is prohibiting an activity or permitting it. For example, mandatory action laws against an activity may not include criminal sanctions, and the civil remedies (damages, injunction) may be insufficient or non-existent. In such a case the state should be deemed to be permitting the activity, especially if it also prohibits the victim's self-help interference with those engaged in the activity.

24. *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39. Karst and Horowitz concentrate exclusively on this state interest.

than autonomy are promoted; (3) exemption of an area of life from state regulation, thereby reducing costs in terms of money, time, and governmental intrusion into private affairs.[25]

Determination of the constitutionality of permissive actions requires balancing these various state interests against the effects of allowing certain choices to be made by individuals. These effects increase in scope and severity if the individuals making the choices have large or strategic property holdings, or if many individuals act in concert or at least in a similar manner.[26]

One must examine the totality of laws and their impact to gauge the effect of allowing private choice in a particular area. For example, one must ask under what rules and with what results is property distributed. Has the state provided public services on a nondiscriminatory basis for those who are excluded by private discrimination? Determination of the constitutionality of a particular law in terms of equal protection or due process is usually in reality an assessment of the constitutionality of the entire system of laws as applied in a particular case (although some laws may be unconstitutional no matter against what backdrop of other laws they appear). But one need not conclude that only one system of distribution of property rights passes constitutional muster.[27]

25. In assessing these state interests one should ask whether the private individual is exercising choice with respect to the disposition of property given to him by the state. If he is, then fairness to him is not a state interest, unless the property is believed to be his by entitlement and not really within the state's discretion to give. Welfare in its various forms is treated constitutionally like an entitlement once it is provided, although the state is apparently not constitutionally required to provide it at all. Thus, welfare, unlike aid given individuals or organizations to carry out governmental functions on behalf of the taxpayers, is generally felt to be the recipient's property to use with no more restrictions than if it had been acquired by the recipient himself in another manner. The state has more legitimate reasons for allowing the welfare recipient to use the property in ways constitutionally prohibited to it than it does for allowing those performing governmental functions with taxpayers' funds to do so. But the state does have some legitimate reasons (e.g., efficiency) for allowing even those performing governmental functions to use the funds in ways prohibited to it. See notes 49-55 *infra*.

26. Henkin, *supra* note 6, at 487-96; Van Alstyne & Karst, *supra* note 6, at 7-8; Horowitz, *Racial Discrimination, supra* note 6, at 7, take the same general view about what factors should be weighed in determining the constitutionality of permissive actions. *See also* Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1118, 1120 (1960) [hereinafter cited as Lewis].

27. *See generally* Winter, *supra* note 18.

It should be safe to say that the equal protection clause of the Fourteenth Amendment at its most general level is a requirement of government impartiality towards all citizens except those who because of their acts deserve rewards or punishment. Thus, equal protection demands that a discrimination which burdens one group more than another be justified by some rational connection with a legitimate governmental purpose, i.e., a purpose that benefits even the least advantaged of groups affected by the discrimi-

One reason why permissive actions have created a dilemma for courts and commentators is that the state action involved on its face treats everyone equally, while, at the same time, it allows individual action which discriminates. Thus, the permissive actions struck down in *Shelley v. Kraemer*[28] and *Reitman v. Mulkey*[29] gave all property owners the right to covenant restrictively and to sell or lease their property to whomever they chose. These cases created problems, not because the state was not acting, but because the *state* was not discriminating in its actions, even though the private individuals who invoked the laws were discriminating. The Supreme Court confused the issue by writing as if the states' actions had been to discriminate racially. The Court, therefore, failed to analyze the real actions of the states to determine whether those actions, impartial and non-oppressive on their face, were in operation unfair or oppressive to certain persons or groups, and whether the value of freedom of choice was sufficient in the context of real estate transactions to justify the states' protection of it despite any adverse effects. By the same analysis, the right of company towns or shopping centers to invoke trespass laws to squelch speech could be considered oppressive and unfair, even though the right of landowners to invoke the trespass laws is in general fair and non-oppressive.[30]

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nation. *See also* the description of the maximin principle in J. RAWLS, A THEORY OF JUSTICE 152-57 (1971).

The due process clause functions, in its substantive mode, as an injunction against excessive infringement of the rights of citizens and, in its procedural mode, as an injunction against adjudications made without adequate procedural safeguards.

One might decide that any set of laws is constitutional within a given range. At one end of the range would be a set of laws exemplifying egalitarian principles like those of Rawls. *See* RAWLS *id.* At the other end would be a set with an initially fair distribution of rights and resources, but one that allows inequalities to occur as a result of luck in the distribution of talents, friendships, loved ones, etc. *See* R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). Any legislative choice would be constitutional so long as it represented an impartial and non-oppressive position between strict egalitarianism and libertarianism.

Van Alstyne and Karst, *supra* note 6, seem to believe that private racial discrimination in certain sectors should be upheld as constitutional only if the state is itself redistributing wealth in the form of education, housing, welfare, etc., on a nonracial basis. This apparently commits them to mandating, as a constitutional matter, a position somewhere beyond libertarianism. But they do not require strict egalitarianism; for they seem unconcerned as a constitutional matter with inequalities in the private sector brought about by discrimination against the untalented, the ugly, etc. *See* Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHILOS. & PUB. AFFAIRS 348 (1973); Michelman, *The Supreme Court 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

28. 334 U.S. 1 (1948).

29. 387 U.S. 369 (1967).

30. *See* cases cited at note 12 *supra*, and Horowitz, *supra* note 6, at 217-19.

One further example should suffice to make the point that the *reasonableness*, not the existence, of state action is the issue in every case involving permissive actions. Suppose a state law allowed whites but not blacks to discriminate racially in the sale or leasing of real property. It is unlikely that any court or commentator would deny that this permissive action for the benefit of whites constituted state action. The case, of course, might come to the courts as an attack on a mandatory action, either by persons discriminated against by whites, or by blacks who had attempted to discriminate themselves. However, as previously pointed out, *every* attack on a permissive action can be viewed as an attack on a mandatory action instead. The only difference between the permissive action just described and those in *Shelley, Reitman, et al*, is that the hypothetical is racially discriminatory on its face, while the latter were not.[31]

Shelley is the source of much of the confusion on state action. In *Shelley* the state action was to allow individuals the freedom to enter into enforceable racially restrictive covenants—a permissive action, the mandatory complement to which was the law mandating that covenants be kept. The Court applied the Fourteenth Amendment to the enforcement of the private decision to discriminate racially in the same way it would apply it to mandatory or proprietary action by the state effecting the state's own decision to discriminate racially. The Court concluded that because the latter actions would be unconstitutional, so was the former.[32]

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31. For an example of a law similar to the one above, *see* Horowitz, *supra* note 6, at 210-11.

32. "The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. . . . The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.

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. . . We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. . . ." Shelley v. Kraemer, 334 U.S. 1, 19-20 (1948).

A mandatory action effecting the same racially discriminatory result as the permissive action in *Shelley* might be a law compelling all property owners in particular neighborhoods to sell only to members of certain races regardless of whether they had covenanted to do so—i.e., a racial zoning law. *See* Buchanan v. Warley, 245 U.S. 60

Although *Shelley* was correct in treating the action in question as state action, it was wrong in assuming that state enforcement of a private decision could be no more reasonable than state enforcement of the state's own decisions effecting the same result. If *Shelley* were followed consistently on the latter point, all private action which the state could not constitutionally undertake itself or compel through mandatory actions would be unconstitutional. For example, a state could not, through a proprietary or mandatory action, give monetary aid to a particular church or to the Ku Klux Klan, or through a proprietary action invite only whites onto its property. The logic of *Shelley* would not permit private individuals to do so either if the state were called upon to enforce their choice. It is widely accepted that the Fourteenth Amendment was not intended to deny to individuals enforcement of all choices denied the states.[33] It is also widely accepted that the Fourteenth Amendment actually compels enforcement of some individual choices denied the states, such as giving one's money to a particular religion or political party.[34] For these reasons the logic of *Shelley* has not been followed.[35]

(1917). A proprietary action effecting the same result might be the state's leasing its property only to members of a particular race, or entering into restrictive covenants with adjoining land owners.

However, the mandatory actions (complements of the permissive action) actually involved in *Shelley* were "keep your covenants" and "do not trespass," not "only whites can live here" (i.e., racial zoning).

33. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959).

34. In some contexts the individual has a constitutional right to choose his associates and select those whom he wishes to benefit with his property on almost any basis that he desires. Moose Lodge No. 107 v. Irvis, 107 U.S. 163 (1972). *See also*, Sengstock & Sengstock, *Discrimination: A Constitutional Dilemma*, 9 WM. & MARY L. REV. 59 (1967); Note, *Section 1981 and Private Groups: The Right to Discriminate Versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975); Comment, *Jones v. Alfred H. Mayer Co. Extended to Private Education: Gonzalez v. Fairfax-Brewster School, Inc.*, 122 U. PA. L. REV. 471 (1973). The interesting question is how large is the area between the point at which the state is constitutionally forbidden to allow private discrimination and the point at which the state is constitutionally compelled to allow private discrimination. Assuming that *Shelley, Reitman, Marsh, Logan Valley, et al.*, are correct and that some laws permitting private discrimination are constitutionally unreasonable, can the state ever reasonably permit private discrimination which it is not constitutionally compelled to permit? (On the question of whether there is a middle ground in which the state is constitutionally free to allow or outlaw discrimination, *see* Henkin, *supra* note 6, at 487-96 and 503, especially 495 n.47. *See also* Van Alstyne & Karst, *Comment: Sit-Ins and State Action—Mr. Justice Douglas, Concurring*, 14 STAN. L. REV. 762 (1962). One reason there might be such a middle ground is that the costs of preventing discrimination might justify the state's refusal to prevent it. The state might determine the desirability of incurring those costs without having to commit itself to either position. Another reason might be that such a middle ground represents an impar-

Today, a finding that permissive state action is unconstitutional requires more than the conclusion that a proprietary or mandatory

tial, non-oppressive position between egalitarianism and libertarianism. See note 27 *supra.*

35. *See, e.g.*, Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1170 (5th Cir. 1975).

Some commentators have sought to limit the implications of Shelley v. Kraemer, 334 U.S. 1 (1948), for permissive actions by arguing that what was crucial in the case was that the state courts were forcing discrimination by one unwilling to discriminate. *See* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959). I believe such an analysis of *Shelley* is untenable for several reasons:

(1) The states were not forcing anyone who had paid consideration for the legal right to sell to blacks to discriminate against them. It is one thing to say that for constitutional reasons no one can withhold the rights associated with a fee interest in realty. It is quite another thing to say that where there is a restrictive covenant, no such legal right was withheld. Moreover, if *Shelley* were limited only to covenantors seeking relief from the terms of the covenant, it would not apply to reverters, rights of re-entry, powers of approval, etc., which would effect the same result in substance regardless of the desire of the seller to sell to a black. On the other hand, if *Shelley* did apply to these devices, it is even clearer that it is only a constitutional conclusion that the seller had ever acquired any right to transfer his property to blacks. (Henkin points out that the unwilling seller in *Shelley* was not himself being treated unequally; *his* claim would have to be in the nature of due process. Henkin also points out the unsympathetic nature of the seller. *Henkin, supra* note 6, at 478 n.10.) *See also* Horowitz, *supra* note 6, at 214.

(2) It seems unlikely that if the Supreme Court thought it reasonable for a state to allow private persons to discriminate in the sale of property, it would prevent the state from enforcing a contract to discriminate between the owner of property and his agent, even though the agent might decide he dislikes discriminating. Thus, if one owns a shoe store and desires to sell shoes only to whites, and nothing in the state law or the Constitution prevents such discrimination, the Court would undoubtedly allow the state to enforce a provision in a contract between the store owner and an employee which requires the latter to sell only to whites.

(3) Taken together, (1) and (2) suggest that it is no more unreasonable for the state to enforce covenants to discriminate than it is for the state to enforce one-party discrimination; or, at least, if it is more unreasonable, it is not because one party decides, after covenanting, that he does not wish to discriminate.

Other attempts to narrow *Shelley* also appear untenable:

(1) The fact that *Shelley* involved a restraint on alienation is irrelevant without more. Restraints on alienation are disfavored, if at all, as a matter of *state* public policy; and a state might decide that it does not object to such restraints.

(2) The fact that the covenant in *Shelley* could not be enforced by self-help but required court enforcement is also irrelevant. Surely it would not have made the state action more reasonable to have allowed the aggrieved co-covenantors the right to use self-help to prevent the black purchaser from occupying the land. Moreover, as I have pointed out before, even where self-help is allowed under state law, the state's judicial and enforcement machinery will stand ready to intervene at the behest of one party or the other and will in fact intervene if necessary to keep the peace. The owner of property may have the right under state law to use self-help to prevent a trespass. However, such a right to self-help does not indicate a condition of anarchy. Although the owner or rightful possessor has the right to use self-help, the trespasser does not. If the owner

action effecting the same result would be unconstitutional. The private action permitted usually must be deemed the performance of a "public function,"[36] or it must involve property that the private person has opened to the public.[37] However, courts and commentators have not

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or possessor forgoes his privilege to commit battery, and instead calls the police or sues, it seems unreasonable to deem this state aid unconstitutional while at the same time deeming constitutional the state's granting the privilege to commit battery to only one party. For the same position with respect to the irrelevance of the judicial enforcement versus self-help distinction, see Lewis, *supra* note 26, at 1097 n.52; Van Alstyne & Karst, *supra* note 6, at 37; Van Alstyne, *supra* note 6, at 236-37; and Comment, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 678-79 (1974) [hereinafter cited as Comment, *State Action*].

Finally, the holding in *Shelley* that it was unconstitutional for the state to enforce racially restrictive covenants, but not unconstitutional for the state to allow unenforceable restrictive covenants, does not mean there is some area in which there are permissive actions without mandatory counterparts (i.e., no state action). The permission to engage in unenforceable, racially restrictive covenants, left intact by the Supreme Court, has several mandatory counterparts. The landowner could enter into a restrictive covenant and adhere voluntarily to it without thereby losing his right to invoke the laws of trespass, battery, etc., against those whom the covenant excluded. *See* Lewis, *supra* note 26, at 1121-22 n.134, and Horowitz, *Racial Discrimination, supra* note 6, at 27.

36. In Marsh v. Alabama, 326 U.S. 501 (1946), the law of trespass (or its complement, the permission to landowners to exclude from their property whomever and whatever activities they choose) was held, in effect, unconstitutional as applied to protect a private corporation performing a "public function" from unwanted leafletting on its property, where had the state itself been performing the function it could not have constitutionally invoked the law. The "public function" approach is hopelessly vague in scope and rationale. It suggests either some static concept of governmental functions or the possibility that whatever is done by government must be done subject to the same restrictions when done privately, even though the private person may have purposes and interests without analogs on the governmental level. *See* Evans v. Newton, 382 U.S. 296 (1966). See also note 37 *infra*.

In Terry v. Adams, 345 U.S. 461 (1953), the public function theory was perverted by what was undoubtedly both a futile and unconstitutional Supreme Court attempt to prohibit racial bloc voting. The major basis of the decision was that the racial bloc was performing the governmental function of selecting candidates for office. But if there is any function in a democracy that is *not* governmental, it is deciding whom to support for office, even within the context of a bloc arrangement. To analyze *Terry* in terms of permissive actions, it was not only constitutional for Texas to permit private racial voting blocs, but it would have been unconstitutional not to permit them. For a contrary view of Terry v. Adams, *see* Van Alstyne & Karst, *supra* note 6, at 26. They would outlaw even religious parties which were successful.

37. In Amalgamated Food Employees Local 590 v. Logan Valley Plaza Inc., 391 U.S. 308 (1968), the law of trespass (or its permissive complement) was held, in effect, unconstitutional as applied to protect a privately owned shopping center, open to the public, from undesired picketing, where the state itself could not have invoked the law had it owned the shopping center and opened it to the public. *Cf.* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). The "open to the public" approach is more comprehensible than the "public function" approach, especially when applied to a large private holding. The private owner has less significant privacy or associational interests to protect, and allowing him absolute control over his property would have a great effect on those whom

approached the issue in terms of the reasonableness of the permissive state action, that is, the reasonableness of allowing and enforcing certain private choices. Instead they have considered only the private choice and its results and noted from time to time that the state is implicated in the action. Therefore, no consistent approach to permissive state action has developed. More often than not, courts and commentators have been preoccupied with whether the state action is "sufficient" rather than with whether it is unreasonable.[38]

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he excludes. *See* Henkin, *supra* note 6, at 499; Horowitz, *Racial Discrimination, supra* note 6, at 9; and Comment, *State Action, supra* note 35, at 697.

(Perhaps a legitimate use of the "public function" concept can be found in the area of free speech on premises "open to the public." Thus, we might say that the government has an obligation to provide speakers with access to the public in areas where the invasion of privacy or economic interests of others is minimal. The government therefore cannot allow a private shopping center [by invocation of state trespass laws] to deny speakers access to shoppers where the center itself has no privacy or economic interests affected [but what about *the center's speech interests*?], and where the government, were it the owner of the center, could not prevent the speech, either in the interests of the shoppers or the shops. The "public function," therefore, would be that of providing places suitable for access to the public. This concept of "public function" is significant not only because governments do provide such access to the public [e.g., by providing sidewalks, parks, etc.], but because governments are constitutionally compelled to do so, even where it means a "constitutional easement" for speech over private property with certain characteristics. In other words, "public function" is not a description of the activity of a private owner from which a constitutional conclusion follows, but a statement of the constitutional conclusion itself.)

38. *See, e.g.*, the following quote from the circuit court's opinion in Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974): "The test is not state involvement, but rather is significant state involvement. Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept." 492 F.2d at 330-31.

The confusion of sufficiency with reasonableness of state action is commented upon by Horowitz, *supra* note 6, at 208-9, and Van Alstyne, *supra* note 6, at 246. Of course, none of the authors mentioned in note 6 are guilty of this confusion, but they are exceptional.

One area where there has been considerable confusion regarding state action has been that of *de facto* segregation of public schools. Here, however, the problem has not been one of comparing a permissive state action with a mandatory or proprietary one effecting similar results, but instead has been one of comparing one mandatory action—"attend a racially designated school"—with another mandatory action—"attend the school in your neighborhood." The two mandatory actions may produce similar results in areas where the neighborhoods are racially homogeneous, but they have different purposes. Also, the neighborhood school law will produce a non-segregated school system whenever neighborhoods cease to be segregated. In other words, the correspondence of effect of the neighborhood school law with the racial school law is fortuitous and time-bound. *See* Morey v. Doud, 354 U.S. 457 (1957). But again, both laws are mandatory state actions, and the segregation resulting from the neighborhood school law is clearly the product of state action. Therefore, it is unnecessary to search for secret seg-

c. Permissive Action Plus Special Relation

Permissive state action, where there is also a relationship with the private person in connection with the permitted choices beyond their mere allowance and enforcement, presents, perhaps, the toughest problems. Examples of this type of state action are granting to the private actor monopoly status,[39] monetary subsidies,[40] tax exemptions,[41] em-

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regative intent on the part of school boards in order to attribute *de facto* segregation to the state. It is misleading to do so, especially when the remedy upon finding such an intent is to integrate the entire district rather than to restore neighborhood schools. *See* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOS. & PUB. AFFAIRS 3 (1974).

39. *Compare* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944), *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The receipt of an ordinary license, such as a building permit, health permit, etc., should not be considered as establishing a special relationship with the state as long as it does not grant a monopolistic or quasi-monopolistic status. Although in many cases the state would not be constitutionally compelled to grant the license without imposing certain restrictions upon the recipient, the issuance of an unrestricted license should be treated like any other permissive action which does not create a special relationship between the state and the recipient. Constitutionally it should make no difference that the state sends a certificate along with its grant of permission. *See* Van Alstyne & Karst, *supra* note 6; Horowitz, *Racial Discrimination, supra* note 6, at 15-16; Comment, *supra* note 35, at 685-90. Where there are a limited number of licenses, however, granting of the license without imposition of constitutionally allowable restrictions is more than a mere permission. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). *See also* Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973); Luças v. Wisconsin Elec. Power Co., 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973); Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir.), *vacated as moot*, 409 U.S. 815 (1972); Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972); Martin v. Pacific N.W. Bell Tel. Co., 441 F.2d 1116 (9th Cir.), *cert. denied*, 404 U.S. 873 (1971); Hawkins v. North Carolina Dental Soc'y, 355 F.2d 718 (4th Cir. 1966); Bronson v. Consolidated Edison Co., 350 F. Supp. 443 (S.D.N.Y. 1972); Hattell v. Public Serv. Co., 350 F. Supp. 240 (D. Colo. 1972); Stanford v. Gas Serv. Co., 346 F. Supp. 717 (D. Kan. 1972); Horowitz, *Racial Discrimination, supra* note 6, at 7.

40. *See* Gilmore v. Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973). *Cf.* Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973). *See also* Keller v. Kate Maremount Fdn., 504 F.2d 483 (9th Cir. 1974); Christhilf v. Annapolis Emergency Hosp. Ass'n, Inc., 496 F.2d 174 (4th Cir. 1974); Jackson v. Norton—Children's Hosp., Inc., 487 F.2d 502 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000 (1974); Doe v. Bellin Mem. Hosp., 479 F.2d 756 (7th Cir. 1973); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Weigand v. Afton View Apts., 473 F.2d 545 (8th Cir. 1973); Male v. Crossroads Associates, 469 F.2d 616 (2nd Cir. 1972); McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971); McGuane v. Chenango Court, Inc., 431 F.2d 1189 (2nd Cir. 1970), *cert. denied*, 401 U.S. 994 (1971); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970); Arrington v. City of Fairfield, 414 F.2d 687 (5th Cir. 1969); Sams v. Ohio Valley Gen. Hosp. Ass'n, 413 F.2d 826 (4th Cir. 1969); Powe v. Miles, 407 F.2d 73 (2nd Cir. 1968); Meredith v. Allen County War Mem. Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968); Cypress v. Newport News Gen.

ployment,[42] or lessee or vendee status,[43] combined with allowing certain

and Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134 (S.D.N.Y. 1968); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); McClellan v. University Heights, Inc., 338 F. Supp. 374 (D.R.I. 1972); Guillory v. Administrators of the Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962); Bonner v. Park Lake Housing Dev. Fund Corp., 70 Misc. 2d 325, 333 N.Y.S.2d 277 (Sup. Ct. 1972). Compare the government funds in these cases with welfare paid to individuals.

41. *See* Jackson v. Statler Fdn., 496 F.2d 623 (2d Cir. 1973), *cert. denied*, 420 U.S. 927 (1975); Weigand v. Afton View Apts., 473 F.2d 545 (8th Cir. 1973); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969); Falkenstein v. Department of Revenue, 350 F. Supp. 887 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973); McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Pitts v. Department of Revenue, 333 F. Supp. 662 (E.D. Wis. 1971); Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971); Guillory v. Administrators of the Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962); Horowitz, *Racial Discrimination, supra* note 6, at 16; Comment, *Tax Incentives as State Action*, 122 U. PA. L. REV. 414 (1973). *But see* Walz v. Tax Commission, 397 U.S. 664 (1970); Chicago Joint Bd., Amal. Cloth. Wkrs. v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970); Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971); Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L.J. 51 (1972).

42. Of course, if one is an agent of the state he is bound by those restrictions imposed on states by the Fourteenth Amendment. The state acts only through agents. However, should those who independently contract with the state be treated as though they were state agents for purposes of deciding whether the state must require them to act as it would be required to act? Or can a constitutional difference rest on the distinction between an agent and an independent contractor? See notes 45, 46 *infra*. *See also* cases cited at note 40 *supra*, and Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962).

43. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). The Supreme Court held that a private lessee in a state-owned building could not be allowed by the state to discriminate racially in selecting customers. The Court failed to mention whether the lessee would have to base its hiring of employees, as well as its selection of customers, solely on criteria available to the state in its proprietary capacity. For example, could the owner of the restaurant hire his brother-in-law as chef, even though his brother-in-law was objectively less qualified than other applicants when measured by criteria constitutionally permitted a state personnel officer hiring chefs for state-run restaurants? The Court also failed to discuss adequately whether the state was maximizing revenue from the lease because the lessee, if forced to cease discrimination, would not have taken the lease. *See* Lewis, *supra* note 26, at 1100-2. *See also* Muir v. Louisville Park Theatrical Ass'n., 347 U.S. 971 (1954); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Male v. Crossroads Associates, 469 F.2d 616 (2nd Cir. 1972); McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1972); McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971); Wimbish v. Pinellas County, Fla., 342 F.2d 804 (5th Cir. 1965); Smith v. Holiday Inns of America, Inc., 336 F.2d 630 (6th Cir. 1964); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962); City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957); Department of Conservation & Develop-

private actions which could not be constitutionally mandated or undertaken by the state itself. It may not be unreasonable for the state to allow private individuals to discriminate in providing services—but what if the state has also granted an individual a monopoly position with respect to provision of those services?[44] It may not be unreasonable for the state to allow a private school to admit only Catholics—but what if the school is receiving state aid?[45] It may not be unreasonable for the state to allow an employer to discriminate racially in hiring employees—but what if the state has entered into a contract with him, or leased its property to him?[46] These questions are extraordinarily difficult to answer, especially when the state is pursuing, through permissive action plus a special relation, a legitimate goal that it could have pursued through a proprietary or mandatory type of action, but only with certain constraints, such as no racial discrimination.[47]

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ment v. Tate, 231 F.2d 615 (4th Cir. 1956); Coffey v. State Educ. Fin. Comm'n., 296 F. Supp. 1389 (S.D. Miss. 1969); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961).

44. Conceivably there may be leigitimate reasons for the state to grant a monopoly status to a private person or firm that desires to discriminate in ways not permitted the state itself. Those reasons, however, would have to benefit those disadvantaged by the discrimination sufficiently to outweigh that disadvantage. See the discussion of the "maximin principle" in J. RAWLS, A THEORY OF JUSTICE, 152-57 (1971).

45. The state may save money by supporting private schools directly, or indirectly through tax credits or vouchers for fixed amounts less than the per student cost in the public schools. This support enables private schools to remain open and saves the taxpayers part of the cost of educating their pupils, without losing any redistributive effect in the financing of the public schools themselves. Or the state may consider money spent for education to be like welfare, spendable by the recipient with no strings attached as long as it is spent on specified items. Thus, as a welfare recipient can take a welfare check into the supermarket and discriminate among brands of tomatoes on grounds that the state could not use when purchasing tomatoes, so, it might be argued, should a pupil be able to spend his share of education money at any accredited institution, whether discriminatory or not. *See* Van Alstyne & Karst, *supra* note 6, at 7, 50, for similar examples (e.g., public housing tenants subletting only to whites). *See also* Lewis, *supra* note 26, at 1103; Horowitz, *Racial Discrimination, supra* note 6, at 13, 15.

46. The independent contractor who discriminates in hiring on grounds not available to the state may be more efficient than competing contractors or the state's own employees. One reason for his greater efficiency may be that his employees have long experience as a team. Another reason may be that integrated contractors have morale problems. It is generally assumed that a state cannot refuse to hire persons solely because the prejudices of its other employees would result in a decline of morale. (It is unclear to what extent the prejudices of the public can be considered in hiring state employees—for example, to what extent such prejudices can justify hiring black policemen for black neighborhoods.) Ironically, if the state did not contract with the lowest bidder because he had discriminatory hiring policies, then the state would be spending extra money to see that persons in a particular group obtained jobs on state projects, something it perhaps could not do directly.

47. See, e.g., notes 44-46 *supra.*

d. A Comparison: Sufficiency versus Reasonableness of State Action

The recent case of *Jackson v. Metropolitan Edison Company*[48] is an excellent vehicle for comparing the approach to state action presented here with the traditional search for "sufficient" state action. In *Jackson* a customer of a privately-owned public utility had her service discontinued without notice and hearing for nonpayment of bills. She claimed a denial of due process. Justice Rehnquist, writing for the majority, looked at the heavy state regulation of the company, its alleged monopoly status, the "public function" it performed, and the state authorization of its actions, and concluded:

> [T]he State of Pennsylvania is not sufficiently connected with respondent's action in terminating petitioner's service so as to make respondent's conduct in so doing attributable to the State for purposes of the Fourteenth Amendment. We therefore have no occasion to decide whether petitioner's claim to continued service was "property" for purposes of that Amendment, or whether "due process of law" would require a State taking similar action to accord petitioner the procedural rights for which she contends.[49]

According to the thesis of this article there was, of course, no state action issue in *Jackson*. The Court should have asked whether it would be constitutional for a state to permit a utility company with a state-granted monopoly status absolute discretion with respect to whom it would provide service. If the answer were "yes," the Court would have needed to go no further, for clearly a hearing would be of no benefit in the absence of some possible substantive right.[50]

If the answer were "no,"[51] the Court then should have asked whether the state could permit a utility company with a state-granted monopoly status to refuse service to persons who did not pay their bills. If the answer to this question were "no," then the Court would have to ascertain whether the company did in fact have a monopoly status and, if so, whether it was state-granted. However, the Court undoubtedly

48. 419 U.S. 345 (1974).

49. *Id.* at 358-59.

50. *Cf.* Note, *Procedural Due Process in Government-Subsidized Housing*, 86 HARV. L. REV. 880, 905-6 (1973) [hereinafter cited as Note, *Housing*].

51. The answer should have been "no" because it is unlikely that even a saving of the taxpayers' money (in the decision to provide utility service through privately-owned rather than state-owned companies) could justify a state's permitting the privately-owned companies freedom to choose their customers while also granting them protection from competition. The least advantaged persons, those denied service by the companies, would not be better off than they would be with state-provided service and a higher tax bill. See note 44 *supra*. *See also* Note, *Fourteenth Amendment Due Process in Terminations of Utility Services for Nonpayment*, 86 HARV. L. REV. 1477, 1488-91 (1973) [hereinafter cited as Note, *Terminations*].

would have answered "yes." Even a state-owned utility probably could constitutionally withhold service for nonpayment of bills. But even if a state-owned utility could not, surely a privately-owned utility could.

If a privately-owned utility company could refuse service to those who did not pay their bills, but could not refuse service at its whim, the final question would be whether a state could allow such a company to terminate service for nonpayment without notice and hearing. Contrary to what is usually the case, this permissive state action (or, if there were a state-granted monopoly, permissive state action plus special relationship) would not seem any more reasonable than would the comparable proprietary state action, that is, pre-hearing terminations by a state-owned utility. The private company's interest, saving money, would be the same interest the state would have in its proprietary action. The only difference between the two might lie in the state's greater ability to spread its losses through taxation.[52] However, this difference would not seem sufficient to justify a different outcome. Therefore, the final question could be changed to whether a *state*-owned utility could terminate service for nonpayment of bills without notice and a hearing. That question, never reached by the Supreme Court in *Jackson*, almost certainly would have been reached following the approach of this article.[53]

Reading through the majority opinion in *Jackson* one gets a strong sense of the emptiness of the traditional "search" for state action,[54] an emptiness which gives rise to such verbal evasions as "sifting facts and weighing circumstances."[55] The sources of this emptiness are: (1)

52. The losses I am referring to here are the losses due to delay in shutting off service to non-paying customers. If the required hearing is to be provided by the private utility company at its expense, rather than by the state through its judicial or administrative machinery, there might appear more reason to distinguish private from state-owned public utilities with respect to the duty to hold a pre-termination hearing. However, this would not be the case. If the state has a constitutional duty to hold pre-termination hearings where it owns the utility, it cannot avoid that duty in the context of privately-owned utilities by requiring the privately-owned utilities to hold the hearings themselves and refusing to pay the expenses of the required hearings. *Cf.* Note, *Housing, supra* note 50, at 893, 900, 908-10 (discussing hearings in privately-owned, publicly-subsidized housing projects).

53. See Part II *infra*, for a discussion of the considerations in determining at what point a person has a right to a hearing. For a discussion of the right to a hearing in the context of utility service terminations, see Comment, *Constitutional Restrictions on Termination of Services by Privately Owned Public Utilities*, 39 Mo. L. Rev. 205 (1974); Note, *Terminations, supra* note 51, at 1488-91.

54. For a good example of the traditional empty search, see the majority opinion in Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973).

55. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

not knowing the object of the search; (2) having the object of the search, that is, state action, already present; and (3) not examining what really should be examined, namely, the reasonableness of the state action.

The traditional approach to state action resulted in avoiding the important question in *Jackson*. The same approach in the area of self-help repossession is likely to result in the Supreme Court's missing the true question when and if it fully considers self-help repossession.[56] For just as in the case of termination of utility services without notice or hearing, in the area of repossession laws the usual rule probably does not hold, namely, that permissive actions (or permissive-plus-special-relationship state actions) may not be unconstitutional, even though a proprietary or mandatory state action implementing a similar decision by the state would be. In the first place, there is no reason (again, other than a deeper pocket) the state might have for allowing private repossession that it would not also have for allowing itself to effect a pre-hearing repossession whenever it is a creditor.[57] The state as landowner lacks many of the interests such as privacy, aesthetics and association which the private landowners wished to protect in *Shelley*; but the state as creditor has precisely the same interests in repossession that a private creditor has.[58]

Moreover, the germane comparison for this analysis is not between private, self-help repossession and repossession by the state as creditor, but is between private, self-help repossession and private, state-assisted

56. Of course, by denying *certiorari* in *Adams* the Court let stand the question-missing approach.

57. There might be more reason to distinguish between state and private repossessions and to find the private more reasonable if state officials received greater insulation from liability for wrongful repossession than private creditors. Dunham, *Due Process and Commercial Law*, 1972 SUP. CT. REV. 135, 150-52.

58. *But compare* Fuentes v. Shevin, 407 U.S. 67 (1972) (striking down replevin statutes allowing pre-hearing seizure), *with* Phillips v. Commissioner, 283 U.S. 589 (1931) (allowing pre-hearing assessment of tax liability).

The identity of state and private interests can also be found in other acts of the state as creditor, such as pre-hearing attachment, garnishment, etc. (*see* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)) and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969)), as well as in many other acts of the state in its various enterprise capacities (e.g., pre-hearing expulsion of students from public schools for the same reasons private schools would have [*see* Goss v. Lopez, 419 U.S. 565 (1975)], and firing employees for reasons a private employer would also have [*see* Arnett v. Kennedy, 416 U.S. 134 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972)]).

Where the state lacks reasons for pre-hearing action that a private person in an analogous position might have, then, of course, it would not automatically follow that the unconstitutionality of state pre-hearing action means the unconstitutionality of private pre-hearing action.

repossession. What is significant is that the courts have never had difficulty finding state action in the latter. If lack of a prior hearing is a constitutional infirmity in state-assisted repossession, then it is also a constitutional infirmity in comparable self-help repossession. The state has no reason for dispensing with a prior hearing when it allows the creditor to use self-help repossession that it does not have for dispensing with a prior hearing when it assists him. Indeed, because repossession by state agents instead of private creditors reduces the chances of violence and unnecessary intrusion, there is a stronger basis for holding permissive state actions which allow purely private repossession unconstitutional than for holding state-assisted repossessions unconstitutional.[59] Those courts and commentators who have anguished over whether the lack of state assistance in private repossessions allows such repossessions to escape Fourteenth Amendment restrictions have gone in the wrong direction. They have failed to see that a permissive type of state action is as much state action as other types, and in the case of repossession, unlike the usual case, less likely to be reasonable than the comparable other types. In the area of self-help repossession, state action is a bogus issue, at least insofar as its *absence* is seen as a reason for sustaining the practice. Self-help repossession may be constitutional, but it is probably despite, not because of, the absence of any state involvement beyond allowance plus enforcement.

The following sections examine the two aspects of self-help repossession which may render its allowance by the state unconstitutional: (1) the lack of notice to the debtor and an opportunity for him to be heard prior to the repossession on the question of his default or defenses; (2) the physical interference by one private party with another's possession.

II. The Right to a Prior Hearing

One consequence of allowing repossession under U.C.C. section

59. This means, of course, that if *Fuentes v. Shevin* is correctly decided, any self-help repossession which does not differ materially from the state-assisted repossession involved in *Fuentes* would be *a fortiori* unconstitutional. *See* Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUT. L. REV. 541, 570-71 (1975); Steinheimer, *Address—Summary Prejudgment Creditors' Remedies and Due Process of Law: Continuing Uncertainty After Mitchell v. W.T. Grant Company*, 32 WASH. & LEE L. REV. 79, 86-87 (1975); Note, *Self-Help Repossession Under the Uniform Commercial Code: The Constitutionality of Article 9, Section 503*, 4 N.M.L. REV. 75, 104 n.140 (1973); Note, *Summary Creditor Remedies: Going . . . Going . . . Gone?*, 10 SAN DIEGO L. REV. 292, 324 (1973). See also text accompanying note 99 *infra*.

9-503 is that a debtor loses control of the chattel without notice and prior to a hearing at which the merits of the dispute are resolved.

It is important to understand what the constitutional issue regarding notice and hearing in repossession and other cases *is*—and what it is *not*. The issue is *not* whether someone with a legal claim to "property" eventually shall have a hearing regarding that claim. This should be obvious, but much of the rhetoric decrying the deprivation of property without due process of law suggests that it is not.[60] The issue *is*: *when must parties* who have a dispute over some type of liberty, property or contractual right *receive a hearing and which, if either, party may act, pending the adjudication, as if he would win.* This issue of the timing of resort to the courts or other adjudicatory bodies is the issue involved in *Sniadach v. Family Finance Corp., Fuentes v. Shevin, Mitchell v. W.T. Grant Co.*, and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*; it is also the issue in *Goldberg v. Kelly, Board of Regents v. Roth, Perry v. Sinderman, Arnett v. Kennedy, Goss v. Lopez*, and *Jackson v. Metropolitan Edison Co.*[61] In order to see this more clearly it may be useful to

60. One commentator, for example, states: "The due process balance cannot be drawn solely in economic terms; rather, intangible factors must be taken into account, the most important of which is the strength of our ethical belief, grounded in the Constitution, that a person should not be deprived of his possessory interest in property without notice and an opportunity for a hearing. Cost is not irrelevant, but it must be analyzed within the broader framework." Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 970-71 (1974) [hereinafter cited as Yudof]. Because Yudof does not modify "deprived" by "temporarily," the implication is strong that a day in court *is* what is at stake. If Yudof does mean temporarily deprived, then his point is empty. However much we might believe that no one should be temporarily deprived of property without a prior hearing, we cannot do anything about it. See text accompanying notes 70-73 *infra*.

61. In Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), the Court struck down a Wisconsin statute permitting the garnishment of wages without notice and opportunity for hearing. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court struck down Florida and Pennsylvania replevin statutes allowing seizure without notice or hearing. The facts that a double value bond was required of the creditor and that the debtor could obtain the chattel upon the posting of his own bond were not deemed sufficient to sustain the statutes. In Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Court upheld Louisiana's sequestration procedure which allowed a creditor to seize the claimed chattel upon an *ex parte* application to a judge showing the basis of the creditor's claim and the posting of a bond. The debtor could put the creditor to proof of his claim immediately and could regain control of the chattel by posting a bond. In North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), the Court struck down a Georgia garnishment statute as applied to the garnishment of a corporation's bank account. The statute required the creditor to present an affidavit to a court clerk stating the amount due and apprehension of loss and to post a double value bond as well. The debtor could dissolve the garnishment by posting his own bond. The Court distinguished *Mitchell* on the grounds that the affidavit there had to be more than conclusory and had to be reviewed by a judge, and that the debtor was entitled to a hearing immediately after the

pause and examine briefly the place of the right to a hearing in the overall constitutional scheme.

It is necessary to begin with the distinction between legislative and adjudicative facts.[62] An adjudicative fact is one which a legislature or administrative agency cannot find and act upon without some sort of an adjudicative proceeding satisfying procedural due process, ordinarily a hearing at which affected parties can appear and dispute the fact.[63] By comparison, a legislative fact is one which need not be established at an adjudicative hearing[64] before it can be found and acted upon by the legislature or an administrative agency.[65] Where the validity of either

seizure. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Court held that due process required notice and hearing prior to termination of welfare benefits. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court held that Wisconsin did not have to provide a hearing for non-tenured teachers with one-year contracts prior to deciding not to retain them for another year. In Perry v. Sinderman, 408 U.S. 593 (1972), the Court decided that *de facto* tenure of a teacher employed in a state college would entitle him to a pre-termination hearing. In Arnett v. Kennedy, 416 U.S. 134 (1974), the Court upheld the Lloyd-Lafollette Act's procedures for removal of non-probationary federal employees. Those procedures did not afford a trial-type hearing until after removal. In Goss v. Lopez, 419 U.S. 565 (1975), the Court struck down an Ohio statute allowing 10-day suspensions of public school students without a hearing before or immediately after the order of suspension. *Jackson* has been discussed in the text accompanying notes 48-53 *supra*.

For other opinions dealing with the right to a prior hearing, *see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (seizure of yacht used for unlawful purposes); Wolff v. McDonnell, 418 U.S. 539 (1974) (loss of good-time credits); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (declaration that person could not be served liquor for one year).

62. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 (1958) [hereinafter cited as DAVIS].

63. *Id. See also* Note, *Housing, supra* note 50, at 897-98, 906.

64. Of course, the issue is very controversial concerning just what is an adjudicative hearing sufficient to comply with the requirement that only an adjudicative fact which has been properly established at such a hearing can justify governmental action. See note 69 *infra*. It may be the case that some adjudicative facts may be established through procedures bearing very little resemblance to hearings as we normally think of them. See note 69 *infra*. *See also* Subrin & Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 449, 460 (1974) [hereinafter cited as Subrin & Dykstra].

65. DAVIS, *supra* note 62, at § 7.02. Several factors complicate this neat distinction between legislative and adjudicative facts. To begin with, legislative and adjudicative facts generally differ only in degree, so that the line between them always appears somewhat arbitrary. Principles of morality and justice and the most basic social policies might be considered pure legislative facts. As we move to consideration of lower level policies, those which are the means to higher level ones—as, for example, when we move from "drive safely" to "drive 55 M.P.H. on the highway" to "drive 35 M.P.H. at this curve"—we encounter a gray area. (Ironically, some commentators urge the least judicial deference to legislative choice when the choice concerns abstract moral principles

legislative or administrative action depends upon the existence of adjudicative facts which have not been properly established at an adjudicative hearing, the action may be struck down as invalid on its face or as applied to a particular party (unless the party is allowed an adjudicative hearing at which the previous finding is disregarded).[66]

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rather than concrete social policies. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).)

Moreover, whenever judicial review of legislative or administrative action occurs, the party attacking the action can urge the non-existence of the legislative facts upon which the validity of the action depends, and will be doing so in an adjudicative setting. *See* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75. *See also* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 757 (1975); Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267-68 (1975). (Of course, if the court adopts a minimal review standard, the party challenging a legislative fact will have a more difficult burden of proof than when challenging an adjudicative fact.)

The legislative-adjudicative fact distinction is also ambiguous with respect to the status of facts about fact-finding procedures (i.e., which procedures minimize error, monetary and other costs, such as delay, etc.). The courts tend to treat facts about fact-finding as a species of legislative fact, but not one which entitles a legislative finding thereof to any special judicial deference.

Finally, the term adjudicative fact is infelicitous to the extent that it suggests no such fact can be acted upon *until* it has been established in an adjudication, and that it suggests a trial-type procedure is required to establish all facts of this type. Many non-trial type procedures for establishing adjudicative facts may qualify as comporting full due process, especially if they are the basis for action pending a more trial-like subsequent proceeding for final determination of adjudicative facts. (And, of course, many legislative facts are established before legislatures and administrative bodies in proceedings that resemble formal trials.)

66. When the validity of legislative action rests upon the existence of an adjudicative fact, two constitutional doctrines may be invoked to strike it down. First, the legislation may be deemed a bill of attainder, the essence of classical bills of attainder being that they were legislative findings of adjudicative facts. *See* U.S. CONST. art. 1, § 9, cl. 3, and § 10, cl. 1; United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946); Ely, *United States v. Lovett: Litigating the Separation of Powers*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1975); Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962). *See also* Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269, 284, 287-88 n.54 (1975).

Morey v. Doud, 354 U.S. 457 (1957), can be viewed as a bill of attainder case. In that case a statute regulating the sale of money orders created an exception by name for the American Express Company. The Supreme Court held that the exception violated the equal protection clause, despite having found that American Express possessed characteristics which would justify its exception. The vice of the statute was that it failed to specify those characteristics and instead "adjudicated" which entities possessed them at the time the statute was enacted. Similarly, the vice of a bill of attainder is that the relation between the class or person designated by the statute and the ideal class (in terms of permissible legislative purposes) is not of a timeless, causally or logically necessary quality, of which the legislature could take notice, but is instead a function of particular historical events.

The basic purpose of the procedural due process requirements associated with the right to a hearing on adjudicative facts—notice, the right to be heard, the right to present evidence, the right to cross-examine witnesses, the right to counsel, the right to an impartial

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Another constitutional doctrine used to invalidate legislation premised upon the existence of adjudicative facts is the irrebuttable presumption doctrine. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971). When the legitimacy of a governmental action depends entirely upon the existence of fact X, and the legislature declares that the action can be taken upon the finding (in an adjudicative proceeding) of adjudicative fact Y, the courts deem the legislative action as having created an irrebuttable presumption of X whenever Y is found. The courts will strike the legislation down if: (1) X does not always follow from a finding of Y, or, if Y is made the exclusive proof of X, not-X does not always follow from not-Y; (2) the courts do not believe that the efficiency gained by the presumption justifies making Y rather than X the essential adjudicative fact (efficiency being usually a second legislative goal in these statutes in addition to the goal to which X is related); and (3) no facts other than X and efficiency could justify the action. *See* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). See also note 69 *infra*, for discussion of the goal of efficiency. Because every equal protection case in which there is an imperfect fit between the legislative classification and its purpose or purposes can be viewed as raising an irrebuttable presumption problem, and because the key issue in equal protection cases is also whether the secondary goal of efficiency will sustain the action despite the imperfect fit, it is hard to predict when the Supreme Court will use irrebuttable presumption analysis and when it will use ordinary equal protection analysis. Compare the irrebuttable presumption cases above with, for example, Weinberger v. Salfi, 95 S. Ct. 2457 (1975); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). *See also* Mourning v. Family Publications Serv., 411 U.S. 356, 376-77 (1973). The choice may be one of consequence, for the Court generally employs a stricter standard of review with the irrebuttable presumption analysis. *See generally* Sewell, *Conclusive Presumptions and/or Substantive Due Process of Law*, 27 OKLA. L. REV. 151 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975); Note, *Irrebuttable Presumptions As An Alternative to Strict Scrutiny: From Rodriguez to LaFleur*, 62 GEO. L.J. 1173 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974). *See also* Tribe, *Structural Due Process*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 269 (1975).

Together, the bill of attainder clauses and the irrebuttable presumption doctrine, along with the techniques traditionally employed under the equal protection and due process clauses, the First Amendment, and other constitutional provisions, limit the purposes the legislature can pursue, mandate a high degree of congruence between legislative class and purposes, and require that the congruence be of a relatively timeless, necessary quality.

The dissent in *Morey* apparently felt that if the adjudicative facts about American Express could be established in an adjudicative proceeding, the Supreme Court should not invalidate the statute, but instead should wait until those facts no longer existed (or existed for other companies) and then invalidate the statute as applied. The difference between the majority and dissent can be viewed as one over how timeless must be the facts upon which the legislation's validity rests. The approach of the dissent that the

tribunal[67]—is to minimize error in the finding of adjudicative facts.[68] Every step towards eradicating error in the fact-finding process involves costs. These costs may be measured by loss of money, time, manpower, discipline, security, or privacy. Because error cannot be eliminated entirely, and because the costs of reducing it as much as would be possible with a total effort toward that end would be excessive, the most reasonable approach is to vary the requirements of due process (and

facts need not be very timeless is followed where administrative action is in question. So long as parties get a hearing on the adjudicative facts, the administrative action can be based upon them (and thus be very timebound in its validity). *See* Davis, *supra* note 62, at § 7.10. That is true, of course, as long as at the hearing no deference is accorded the prior administrative findings of adjudicative facts. *See* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 757 (1975). *But see* DAVIS, *supra* note 62, at § 7.10.

67. Whether there is a due process right to judicial review of administrative adjudication is very controversial. Judicial review by an Article III court does have the advantage of the independence of the judiciary secured by the Constitution, and such independence may be lacking in even those executive courts free from the control of the party agency. In addition, judicial review provides a chance to challenge legislative facts which support the legislative or administrative rule in question, and the sufficiency of evidence and procedures used in adjudication. Moreover, courts have more expertise regarding constitutional and other legal standards than do agencies. But judicial review is not a panacea, and it is possible to have an unwise or corrupt court of last resort as well as a wise and impartial agency. Whether due process requires judicial review, and the relation of that question to the scope of Congress's power under Article III to limit the jurisdiction of federal courts, are, fortunately, tangential to this article. Even if judicial review of administrative action could be eliminated by the federal and state legislative branches without violating the due process clauses of the Fifth or Fourteenth Amendments (or, in the case of federal courts, Article III), due process would still require a hearing or its equivalent before the administrative agency on all adjudicative facts. That requirement would bind the agency, even though the agency would rule on the sufficiency of the hearing and interpret all other legal standards, and even though no court would have jurisdiction to decide that a refusal by the agency to hold a hearing constituted a denial of due process.

If judicial review of administrative findings of adjudicative facts is a requirement of due process, then I assume the adjudicative proceeding must produce a record and a statement of the administrative findings (and perhaps the administrative rule being followed) so that the reviewing court can assess meaningfully the sufficiency of the evidence and the constitutionality of the action. If a proceeding satisfying due process is not held at the administrative level, but the facts found by the agency are adjudicative in nature, a judicial proceeding must occur which, when added to the administrative proceeding, will satisfy due process requirements for the finding of adjudicative facts. Clearly no deference should be accorded any finding of adjudicative facts in a proceeding not comporting with due process. See note 66 *supra*. *See generally* McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle for Judicial Review?*, 25 TEXAS L. REV. 1257 (1974); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 631-39 (1971).

68. *See* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1540 (1975) [hereinafter cited as Note, *Procedures*].

therefore the accuracy of the procedure) depending upon what is at stake in the dispute over the adjudicative facts.[69]

69. If the adjudicative facts in issue in a dispute over some governmental action relate to efficiency (e.g., the efficiency of a governmental employee) and efficiency is the proper value for the government to base its action upon (as it would be in most government personnel decisions but not, for example, in programs which confer rights based on need, such as welfare), then the proper due process procedures would be the most efficient (i.e., those which produced the optimum relation of error to their cost). In other words, in those areas where the government constitutionally can operate like a private enterprise, maximizing benefits relative to costs, its procedures for resolving disputes over adjudicative facts should be those procedures whose marginal costs equal the marginal benefit (in inefficiency detected) they produce. Such procedures might include particular management techniques bearing little if any resemblance to a trial-type proceeding. The only "right" of the present or potential governmental employee, unless he has a contract which protects him even when he is not the most qualified for the job, is to have the government act efficiently and to avoid, for example, preference towards less qualified employees for racial reasons. *See* Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFFAIRS 348 (1973). *But see* Subrin & Dykstra, *supra* note 64, at 471-72; Note, *Procedures*, supra note 68, at 1540. *See also* Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961); Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A.L. REV. 1052 (1972). (However, if being rejected for or fired from a government job affects a person's reputation more than being rejected for or fired from private employment, there may be a right to more than efficient adjudication procedures. And it should be born in mind that the discussion here concerns only those procedures constitutionally required to be paid for by the state itself. If the rejected employee is ready to pay the full cost of more extensive procedures in order to prove his qualifications, efficiency obviously cannot be invoked to deny him that opportunity.) (There are other areas where the government has some discretion to define substantive rights solely for utilitarian [efficient] reasons, and where the only "right" of the person affected by such a definition is to have the government's action in fact be efficient. In those areas, which include parts of private tort, property, and contract law, the government's procedures for adjudication permissibly might be designed solely to produce an efficient level of error, as long as the adjudication is restricted to "rights" within the area of discretion.) (Even where the due process procedures need only be efficient and perhaps need not even include a hearing, if administrative agency action is in question and judicial review is allowed or constitutionally mandated [see note 67 *supra*], there *is* something such review can accomplish: it can ensure that the substantive area is one where efficiency is properly a dominant value, that the procedures are designed to promote efficiency, and that the administrators are in fact following those procedures and are not using impermissible criteria, such as race, speech, etc., instead). For another area besides government employment where the proper adjudication procedures may bear little resemblance to a hearing, see DAVIS, *supra* note 62, at § 7.09 (discussing the use of on-the-spot inspections as alternatives to hearings in certain cases); Tyler v. Vickery, 517 F.2d 1089, 1103-5 (5th Cir. 1975) (holding reexamination to be an acceptable alternative to a hearing on a failing bar exam).

In areas where the government cannot act solely on the basis of efficiency because there are rights involved other than the general right of taxpayers to efficient governmental action, the cost-benefit approach to due process will not suffice. Even if the non-monetary costs could be reduced to a monetary or other common denominator, which is difficult enough in the areas where efficiency is a legitimate sole purpose, where efficiency is not a legitimate sole purpose the fair distribution of costs is as important or more important than their total. The cost of an error here is not merely part of

There is one cost of procedural due process that merits attention because it is the central cost in pre-hearing repossession and is also the cost over which several Supreme Court "right to hearing" battles have

the overall cost of the program to the taxpayers, but is a cost borne by a particular individual in the enjoyment of his rights. (Where the individual's "right" is merely an instrument for the accomplishment of general societal goals [*e.g.*, the "right" vindicated in Mapp v. Ohio, 367 U.S. 643 (1961), New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and in First Amendment overbreadth cases brought by those not within the unconstitutional applications of the statutes, such as Winters v. New York, 333 U.S. 507 (1948)], so that procedural costs are aligned against speech and privacy costs to the public in general, a cost-benefit approach might work if one could find a common denominator for the costs and benefits.) For example, although the government might be able constitutionally to revoke welfare, to the extent that welfare is provided, it must be provided according to the need and desert of the recipients, and not according to criteria such as race, politics, religion, hair color, etc. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *See also* DAVIS, *supra* note 62, at § 7.12. Possession of characteristics which make more efficient the adjudication of one's need and desert, unlike possession of characteristics which make more efficient the adjudication of one's employment credentials, is not itself relevant to need or desert and therefore cannot be used to distinguish among the needy and deserving.

Justice Rehnquist, writing in *Arnett v. Kennedy*, suggested that the government might be able to escape the requirements of procedural due process by qualifying the substantive rights it grants with limitations on the procedures for their vindication. Arnett v. Kennedy, 416 U.S. 134, 148-52 (1974). *See also* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1720 n.255 (1975); Comment, *Fear of Firing: Arnett v. Kennedy and the Protection of Federal Career Employees*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 472, 481-86 (1975); *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 83-90 (1974); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 [hereinafter cited as Comment, *Entitlement*]. The point to be made is that although Justice Rehnquist may be correct in the context of government employment and other similar contexts, substantive constitutional restrictions, including the restrictions regarding bills of attainder and irrebuttable presumptions (note 66 *supra*), limit generally the extent to which the government can qualify substance by procedure.

If cost-benefit analysis will not work for pure personal rights, and works best where the only right at stake is the general right of taxpayers to an efficient program, Rawls' maximin principle appears more promising. J. RAWLS, A THEORY OF JUSTICE, 152-57 (1971). (Rawls himself does not discuss at any length the problem of allocating resources to adjudication procedures. *See id.* at 240-41. Nor does his principal libertarian critic, Robert Nozick, offer a libertarian theory of just procedures of adjudication. *See* R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).) Maximin would mandate procedures that maximized the position of the least advantaged person. It would apparently require that an amount be spent on perfecting procedures of adjudication such that any greater expenditure would be to the disadvantage of that person who, in attempting to vindicate his rights, should win (from the standpoint of an omniscient observer), but who loses due to an error, the likelihood of which could have been reduced by incurring greater costs in the adjudicative process. If the consequence of an erroneous adjudication were death, such as in a capital criminal case, or abject poverty, such as in a determination of eligibility for welfare, maximin would mandate expenditures on perfecting adjudications up to the point where one's chances of death or poverty through diversion of resources from other areas and general social impoverishment equalled one's chances of

been fought. That cost is the time involved in the adjudicatory process itself. During that time only one party to the dispute can act as if he were the winner on the merits.[70] If the other party subsequently wins at the hearing, the losses he suffered during the hearing while the first party acted as if he were winner may not be recoupable.

death or poverty through an erroneous adjudication. If the consequence of an erroneous adjudication were less grave, then lower expenditures on procedures would be required. This seems intuitively correct, and our present institutions appear to be based roughly on this conception of procedural justice. *Cf.* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974). (One problem with the Rawlsian approach to procedural due process is whether such an approach makes sense in a society which does not follow the Rawlsian approach to problems of justice across the board. For example, can the amount we are required to spend on procedures be determined by maximin, but not the amount each person should be taxed to pay for those procedures? Or can the least advantaged person in the context of procedural due process be determined without reference to the general distribution of wealth?) (There is another frequently mentioned approach to deciding what costs procedural due process requires we incur. That approach requires no more than that we equalize the litigation resources of the adversaries, whatever those resources might be. Thus, whatever amount the government could spend to convict, the defendant would also be entitled to for his defense. Under this approach there might be a high incidence of erroneous adjudications, but everyone would seem to have an equal chance, at the outset, of suffering [or benefiting] from one. However, this approach does not differ materially from one in which all social goods are distributed through a lottery, and persons in Rawls' "original position" would probably choose a maximin approach to problems of justice in preference to a lottery approach. *See* J. RAWLS, A THEORY OF JUSTICE, 118-94 (1971). Also, this approach has no application to non-adversarial procedures for adjudication.)

What we end up with, then, is that procedures required by due process for finding adjudicative facts vary according to whether and which rights other than a general right to efficiency are involved, the gravity of the consequences of error, and the costs, monetary and non-monetary, which are involved. *See generally* Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545 (1971); Note, *Procedures, supra* note 68; Comment, *Entitlement, supra* note 69, at 120-21; Note, *Housing, supra* note 50, at 891-92.

Finally, all of what has been said in this footnote, with the exception of the discussion of equalizing litigants' resources, relates to the minimum procedures and resources which must be provided in adjudications. We generally allow a party to use resources beyond the minimum required by due process if he is willing to pay the costs involved, as we do, for example, when we allow privately-retained counsel to appear in situations where due process does not require counsel at all. *But see* Mayer v. Chicago, 404 U.S. 189 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *Cf.* Ross v. Moffitt, 417 U.S. 600 (1974).

For the related issue of litigation access fees, see Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I,* 1973 DUKE L.J. 1153; Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II,* 1974 DUKE L.J. 527.

70. Sometimes neither party can act as if he were the winner during the pendency of the action. Property which is the subject of a debtor-creditor dispute might be held by the state pending the outcome. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Similarly, although the state can incarcerate an alleged felon awaiting trial, it can do so only to ensure his appearance, and not for other penal purposes.

There is an unavoidable paradox here. Every interest, no matter how small, is theoretically protected by the due process right to some sort of hearing[71] on adjudicative facts.[72] Yet, the delay associated with the hearing itself may cause an irreparable loss to the eventual winner. A person may have the right to a hearing over a one dollar debt. But the delay suffered by the party who does not have the right to act as if he were the winner while he awaits the outcome of a hearing may result in much more than a one dollar unrecoverable loss. A person cannot be sentenced to a day in jail without a hearing at which the prosecution must prove guilt beyond a reasonable doubt. But he can be incarcerated for months pending trial after a hearing at which the standard was only probable cause;[72a] and he can be incarcerated two or three days without any hearing whatsoever (although the administrator—the arresting policeman—must have had probable cause for the arrest). Irreparable injury due to the temporary incarceration may be suffered by one who later proves his innocence at the required hearing. If this irreparable injury due to the time taken to adjudicate a dispute is deemed "property" or "liberty," then it is not and cannot be entirely true that no one can be deprived of "property" or "liberty" without due process of law.[73]

Sniadach, Fuentes, Mitchell and *Di-Chem*, as well as *Goldberg, Roth, Perry, Arnett, Jackson* and *Goss*, all involved what I call the timing issue, the issue of which party, if either, could act as if he were the winner during the pendency of the hearing. In each of these cases the eventual winner stood to incur a loss if the right to act as winner pending the adjudication were denied him. One party (the debtor in

71. By "hearing" here I also mean non-hearing adjudicative procedures in those areas where they are sufficient for full due process. See note 69 *supra*.

72. *See* Fuentes v. Shevin, 407 U.S. 67, 90 n.21 (1972).

72a. And the hearing need not be an adversary one. *See* Gerstein v. Pugh, 420 U.S. 103 (1975).

73. See note 60 *supra*. *See also* Note, *Terminations, supra* note 51, at 1484 n.42; Note, *The Growth of Procedural Due Process into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in Our Economic System,"* 66 NW. U.L. REV. 502, 508-9, 509-10 n.26, 524-25 (1971) [hereinafter cited as Note, *Due Process*].

Where the government is a party to the dispute it, of course, has no right to due process as such. But taxpayers and other citizens do have rights not to have inefficient employees in government jobs, ineligible recipients on the welfare rolls, or disruptive students in tax-supported schools. Where the dispute is between private parties, both parties have due process rights in the literal sense. *See also* Note, *Procedures, supra* note 68, at 1535.

Sniadach, Fuentes, Mitchell and *Di-Chem,* the public school teacher in *Perry* and *Roth,* the government employee in *Arnett,* the welfare recipient in *Goldberg,* the student in *Goss,* the utility user in *Jackson*) stood to suffer a temporary loss of control over property and (in *Perry, Roth, Goss* and *Arnett*) a temporary loss of status as well, when, with a good claim on the merits, he had a legitimate expectation that this would not happen.[74] The duration and extent of the loss depended upon such factors as whether he could regain control over the property by posting a bond,[75] how quickly the issue on the merits could be resolved in a due process hearing,[76] and upon how speedy and adequate were the restitutionary and other remedies provided.[77] At stake for the other party, where his claim was meritorious, was the loss of property because of waste, concealment, conveyance, destruction and/or judgment-proof status, as in *Sniadach, Fuentes, Mitchell* and *Di-Chem*; efficiency in handling personnel matters, such as hiring, firing and assignment, as in *Perry, Roth* and *Arnett*; or maintenance of discipline and order, as in *Arnett* and *Goss.*[78] At stake for both parties in some cases was the

74. Of course, even more would be at stake in cases such as *Roth, Perry, Arnett, Goldberg* and *Goss* if the courts accepted or accorded weight to determinations by administrators reached without a due process hearing.

"Appellants point to the fact that some process is provided under Ohio law by way of judicial review. OHIO REV. CODE § 2501.06 (Supp. 1973). Appellants do not cite any case in which this general administrative review statute has been used to appeal from a disciplinary decision by a school official. If it be assumed that it could be so used, it is for two reasons insufficient to save inadequate procedures at the school level. First, although new proof may be offered in a § 2501.06 proceeding, Shaker Coventry Corp. v. Shaker Heights Planning Comm'n, 18 Ohio App. 2d 27, 176 N.E.2d 332 (1961), the proceeding is not *de novo. In re* Lock, 33 Ohio App. 2d 177, 294 N.E.2d 230 (1972). Thus the decision by the school—even if made upon inadequate procedures—is entitled to weight in the court proceeding. . . ." Goss v. Lopez, 419 U.S. 565, 581-82, n.10 (1975).

If no reasons for the governmental action are given, the affected party will most likely have a more difficult time in court showing that action to be unconstitutional or otherwise unlawful. See note 67 *supra. See also* O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases,* 1970 SUP. CT. REV. 161, 188.

75. *See, e.g., Fuentes, Mitchell* and *Di-Chem.*

76. *See Fuentes, Mitchell* and *Di-Chem. See also* Goss v. Lopez, 419 U.S. 565, 582 n.10 (1975): ". . . Second, without a demonstration to the contrary, we must assume that delay will attend any § 2501.06 [judicial] proceeding, that the suspension will not be stayed pending hearing, and that the student meanwhile will irreparably lose his educational benefits." *See also* Fusari v. Steinberg, 419 U.S. 379, *reh. denied,* 420 U.S. 955 (1975).

77. *See, e.g., Fuentes, Mitchell* and *Di-Chem. See also* the quotation from *Goss v. Lopez, id.*

78. See note 85 *infra,* for governmental interests similar to maintenance of order which have been sufficient to allow pre-hearing governmental action adverse to private

burden of proof, which may have been very important.[79]

The Supreme Court response in all of these cases, except *Mitchell*, was to decide whether one party had a "property" interest of which he was deprived without notice and hearing. If the Court found he had a "property" interest, then, unless there were special circumstances,[80] a taking prior to a due process hearing was a deprivation of property without due process of law.[81] In other words, the party with the property interest had the right to act as winner pending the due process hearing. The Court seemed to define "property" by equating it with the status quo at the time the other party acted. Thus, in *Sniadach, Fuentes, Di-Chem* and *Goldberg*, the status quo found the debtors with full control over their money and other property and the welfare recipient receiving a monthly check for a certain amount. In *Perry* and *Roth*, however, the status quo for a teacher on a year-to-year contract was to be unemployed at the end of the year. His status was no different from that of the person initially applying for a teaching job or for welfare. On the other hand, for a teacher with tenure, the status quo was that of being employed. Hence, tenure converted employment into "property."

The problem with the "status quo" approach to the timing issue is that it is inflexible and fails to take account of the many factors which would, in certain cases, lead to a state's favoring the party seeking to change the status quo.[82] The real question is this: where there is a dispute, which party's interpretation of the facts is going to determine the status quo pending an adjudication? There is no reason at all, at least none that rises to the level of a constitutional mandate, for answering, as does the "status quo" approach, that it is the party who was entitled to the item in dispute when last the disputing parties agreed

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interests. The paradigmatic situation where pre-hearing governmental action is allowed occurs when a person is arrested and detained for commission of a crime. Of course, in such situations the Constitution requires a prompt probable cause hearing before a magistrate, except when the arrest is pursuant to a grand jury indictment.

79. In those cases where the administrative action could be challenged only in a judicial proceeding, the burden of proof of wrongful agency action would be on the affected individual. The burden might easily determine the outcome, especially where the reasons for the administrative action were unstated or unclear. *See* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 859-60.

80. See note 85 *infra*.

81. The court, of course, never reached the due process issue in *Jackson*. See text accompanying notes 48-53 *supra*.

82. See text accompanying notes 85-87 *infra*.

upon the facts.[83] It is true, as some commentators have pointed out,[84] that a unilateral determination by one party may upset the expectations of the other party and also may be made in bad faith. However, it is often ignored that these facts apply equally to both parties regardless of who is maintaining the status quo and who is upsetting it. For example, the creditor has expectations that he will continue to receive payments from the debtor, just as the debtor has expectations that he will continue to

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83. The status quo must be defined as of that time when both parties agreed upon the facts. Otherwise it would be a function of one party's or the other's interpretation and could not serve as a basis for deciding which party to favor pending a due process hearing.

"Possession" is even less satisfactory than "status quo" as a basis for resolving the timing issue. Although physical grasping *is* a brute fact, the "possession" involved in repossession is usually not an actual physical grasping, but a legal construct signifying the right to control. And the state which grants the debtor the right to control can be deemed, by permitting repossession, to have qualified that right in the following manner: *As against the creditor, the debtor's right to control does not exist whenever the creditor makes evident his intent to take control because of his belief that there has been a default. If there has been no default, the debtor's only recourse is in a subsequent suit.* At the moment the creditor begins to repossess, the debtor has no legal possession, at least not superior to the creditor's legal possession. At most the debtor can attain physical possession by physically grasping the item and wrongfully withholding it from the creditor.

Several examples illustrate in other situations the dependence of non-physical possession on the state's determination of the timing issue. X parks his car in a parking lot owned by Y. When he returns he owes Y a dollar. He gives Y what looks like a dollar bill, but Y says that it appears counterfeit to him and that he will not accept it. X denies that it is counterfeit. The car is still on Y's lot. X has the keys to it. Both men are 20 feet away from it. Who is in "possession"? Can it be determined until we know whether the state gives Y a lien on the car or gives X the right to drive it away in such situations? Or suppose Y is a contractor and X a subcontractor. Under the terms of the contract between them, X is allowed to drive one of Y's trucks both during and after work each day for the duration of the contract. X and Y have a dispute, and Y tells X that their contract is terminated. X declares that, as far as he is concerned, the contract is still in effect. X has parked Y's truck on the street adjacent to the jobsite and has the keys in his pocket. Both men are 20 feet from the truck. Who is in "possession"?

The Supreme Court in *Mitchell* appeared to recognize property rights could not resolve the timing issue because the state's resolution of the timing issue would be deemed a qualification of such rights: "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of seller as well." 416 U.S. at 604. *See also* Subrin & Dykstra, *supra* note 64, at 468-69; Comment, *Entitlement, supra* note 69, at 110-14; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 73-74 n.18 (1974).

84. *See, e.g.*, Yudof, *supra* note 60, at 977-78.

enjoy possession. Both are equally likely to act in bad faith in determining whether there has been a default.

The general factors which should be considered in deciding which party should be able to act as the winner during the pendency of the adjudication are: (1) which party can best afford the losses occasioned by delay (losses here include more than monetary losses), and which party's losses can be most easily restored;[85] (2) which party's losses will

85. *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 608 (1974); Note, *The Evolving Definition of Procedural Due Process in Debtor-Creditor Relations: From Sniadach to North Georgia Finishing*, 8 LOY. L.A.L. REV. 339, 352 (1975).

To the extent that the law can compensate the winning party for his losses (including those attributable to not being able to act as if he had won during the pendency of the hearing) without violating maximin and without over-chilling good faith prosecution and defense by losing parties, it clearly should. But the extent to which such losses are irreparable should weigh heavily in deciding which of the disputing parties should be allowed to act as if he were already the winner during the pendency of the action. Thus, not only can the government generally better afford losses than individuals because of its ability to spread the losses among the taxpayers, but it also can often more easily convert nonmonetary losses (*e.g.*, disorder in schools pending suspension or expulsion of troublemakers) into monetary ones (*e.g.*, by hiring more administrators, security personnel). On the other hand, a poor person deprived of the necessities of life pending an adjudication may not be able to survive until he can be compensated. (This fact would explain *Goldberg*, but not its apparent limitation to terminations of welfare as opposed to refusals to grant initially. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Comment, *Entitlement, supra* note 69, at 112-13 n.93. *See also* Randone v. Appellate Department, 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13 (1971); Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807, 862-64 (1975); Comment, *A Proposal for a Constitutional Innkeepers' Lien Statute*, 24 BUFFALO L. REV. 369, 383 (1975); Note, *Randone Revisited: Due Process Protection for Commercial Necessities*, 26 STAN. L. REV. 673 (1974); Note, *Terminations, supra* note 51, at 1482-83; Note, *Due Process, supra* note 73; Comment, *The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing*, 68 MICH. L. REV. 112, 119-28 (1969). Of course, there is a danger in characterizing the right to a prior hearing as one protecting a necessity of life when one moves outside the welfare area to the area of private disputes; for the debtor may be wrongfully holding in any case what represents in monetary value a necessity of life for the creditor but what is not a necessity for the debtor. Labels such as "creditor," "debtor," "wage earner," "corporation," etc., give rise oftentimes to very misleading stereotypes. *Compare* Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969), *with* Fuentes v. Shevin, 407 U.S. 67, 88-90 (1972) and North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 608 (1975).) Moreover, as far as I am aware, a vendee cannot use self-help against a vendor who has failed to deliver an item which is a necessity of life for the former; and this restriction has not engendered any serious constitutional attacks.

Sometimes there is an emergency of the type that were government unable to act as if it were the winner pending the adjudication, the public would suffer irreparable injury which it could afford less than the opposing party, whom it would usually be able to compensate. The Supreme Court has consistently upheld the right of the government to act prior to any hearing in such situations: "*Fuentes* reaffirmed . . . that, in limited circumstances, immediate seizure of a property interest, without an opportunity for prior

most affect the accuracy of the adjudication;[86] and (3) which party is most likely to be correct in his assertion that he should win (in light of the evidence known to the party making the claim, and the safeguards against his error, including the incentives not to make false claims).[87]

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hearing, is constitutionally permissible. Such circumstances are those in which 'the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standard of a narrowly drawn statute, that it was necessary and justified in the particular instance.' Fuentes v. Shevin, 407 U.S. 67 (1972). Thus, for example, due process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food (citation omitted); from a bank failure (citation omitted); from misbranded drugs (citation omitted); to aid the collection of taxes (citation omitted); or to aid the war effort (citation omitted)." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 678-79 (1974) (involving governmental seizure of a yacht used for unlawful purposes without providing the owner of the yacht with notice or a hearing). *See also* Fahey v. Mallonee, 332 U.S. 245 (1947); Dupuy v. Superior Ct., 15 Cal. 3d 23, 29-31 (1975); DAVIS, *supra* note 62, at § 7.08; Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L. REV. 531, 582-89, 629-31 (1975).

86. For example, a welfare applicant denied welfare may have insufficient resources with which to litigate effectively. And those who have lost their wages, their utility services, or their jobs may be unable to undertake extensive litigation to vindicate their rights. *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161, 201; Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 859-60; Note, *Terminations, supra* note 51, at 1482-99; Comment, *Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees*, 19 U.C.L.A.L. REV. 1052, 1062 (1972).

87. For example, in repossession cases such as *Fuentes* and *Mitchell*, there were substantial financial disincentives to creditors' erroneously declaring default and repossessing, including requirements that they post bonds for double the value of the chattel. Moreover, nonpayment is relatively easy for a creditor to ascertain (although defenses to nonpayment are more difficult to ascertain, especially given his adverse interests). *See* Mitchell v. W.T. Grant Co., 416 U.S. 600, 609-10 (1974). *See also* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975). Comment, *Constitutional Restrictions on Termination of Services by Privately Owned Public Utilities*, 39 MO. L. REV. 205, 215-16 (1974). In the welfare context, eligibility may be determined accurately a high percentage of the time as long as certain forms and procedures (less than required by due process) are used, even where there is a dispute. On the other hand, the welfare department employee may not have much of a direct incentive to make accurate determinations of eligibility. The Supreme Court has expressed a general preference for pre-hearing determinations of facts made by judges over those made by other government officials (*compare* Mitchell v. W.T. Grant Co., 416 U.S. 600, 615 (1974) *with* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975)), and for those made by government officials over those made by private individuals (*see* the quotation from *Calero-Toledo* at note 85 *supra*).

Of course, where it is permissible for efficiency to dictate which adjudicatory procedures will be used, it also should be permissible for it to dictate which party can act

More particularly, in deciding whether to uphold pre-hearing creditor action, courts should consider the following factors:

(1) Is the item in dispute a basic necessity for one of the parties?[88]

(2) Does the creditor have a security interest in the item or is such an interest being acquired by creditor's action, and, if the former, was the security interest acquired by contract?[89]

(3) Is the creditor allowed to take action whenever there is a default or only if there is a specific threat of loss of the security?[90]

(4) Is the protection afforded the dispossessed party adequate in case he ultimately wins (by virtue of security require-

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as if he were winner pending the adjudication. See note 69 *supra*.

For discussion of the considerations involved in the timing issue, *see generally*, Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975); Subrin & Dykstra, *supra* note 64; O'Neil, *Of Justice Delayed and Justice Denied:, The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161; Comment, *Entitlement, supra* note 69, at 120-21; Note, *The State University, Due Process and Summary Exclusions*, 26 HASTINGS L.J. 252 (1974); Note, *Terminations, supra* note 51; Note, *Housing, supra* note 50; Note, *Due Process, supra* note 73. Comment, *Constitutional Restrictions on Termination of Services By Privately Owned Public Utilities*, 39 Mo. L. REV. 205, 215-16 (1974).

88. See note 85 *supra*. The Court in *Fuentes* and again in *Di-Chem* rejected distinctions among types of property with respect to the requirement of pre-seizure hearings. And, of course, U.C.C. § 9-503 applies to all chattels, although it is most often used in connection with automobiles. *See generally* Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767, especially at 783-84 (1973) [hereinafter cited as Mentschikoff].

89. *See* McDermott, *The Supreme Court's Changing Attitude Toward Consumer Rpotection (sic) and Its Impact on Montana Prejudgment Remedies*, 36 MONT. L. REV. 165, 175-76 (1975); Steinheimer, *Summary Prejudgment Creditors' Remedies and Due Process of Law: Continuing Uncertainty After Mitchell v. W.T. Grant Co.*, 32 WASH. & LEE L. REV. 79, 84-85 (1975). Where there has been a bargain negotiated at arms-length, the terms of which permit the vendor unilaterally to declare default, it is not unfair to the vendee to permit the vendor to do so. It is unclear, however, whether the Court will distinguish between secured and unsecured creditors with respect to pre-hearing action. *See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606-7 (1975).

90. *Sniadach* and *Fuentes* both indicated possible approval of pre-hearing seizure of property where there is an immediate danger of destruction or concealment. *See* Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969); Fuentes v. Shevin, 407 U.S. 67, 93 (1972). *See also* Randone v. Appellate Department, 5 Cal. 3d 536, 556-57, 96 Cal. Rptr. 709, 488 P.2d 13 (1971); Note, *Procedures, supra* note 68, at 1531-32; Comment, *Self-Help Repossession: The Constitutional Attack, the Legislative Response, and the Economic Implications*, 62 GEO. L.J. 273, 291 (1973); Comment, *Self-Help Repossession: Fuentes and the Judicial Process*, 46 TEMP. L.Q. 540, 551 n.90, 552 (1973).

ments, speediness in holding the due process hearing on the merits,[91] the ability of the debtor to regain the property by posting his own bond, and adequacy of remedy,[92] including the creditor's insulation from liability for wrongful repossession, attachment, etc.[93])?

(5) Which party (the creditor or the debtor) is more often found to be legally entitled to the item when the merits are decided, and what procedures and incentives are present to ensure that the creditor action is justified (such as probable cause hearings before magistrates,[94] strict liability for wrongful repossession, attachment, etc.,[95] and security requirements)?[95a]

(6) Which party has the burden of proof at the post-seizure hearing, and how fair is that burden?

(7) What are the costs of alternatives in terms of availability of credit and in terms of burdens on the judicial system?[96]

Because it is quite difficult for courts to weigh these factors, and because creditors and debtors can adjust their behavior, within limits, to comply with laws concerning such things as security interests and repos-

91. *See* Mentschikoff, *supra* note 88, at 782; Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60, 106 (1972); Note, *The Future of Pre-Hearing Seizure in Idaho: Has the 1973 Amendment of the Claim and Delivery Statute Removed the Constitutional Cloud?*, 11 ID. L. REV. 247 (1975); Case Comment, 24 CATHOLIC L. REV. 637 (1975); Case Comment, 1975 U. ILL. L. FORUM 263; Note, *Self-Help Repossession of Consumer Goods: A Constitutional Look at Section 9-503 of the Uniform Commercial Code*, 7 VALPARAISO U.L. REV. 439, 455 (1973). *See also* Fusari v. Steinberg, 419 U.S. 379, *reh. denied*, 420 U.S. 955 (1975).

An article by Robert Scott contains an interesting discussion of the relation of the following factors to minimizing the costs of erroneous adjudications and delay to the party who should win on the merits: (1) whether the due process hearing is pre- or post-seizure; (2) if post-seizure, how soon after seizure it occurs; (3) the complexity of the factual issues; (4) whether the hearing is a final adjudication of the merits or merely a probable cause hearing; and (5) creditor and debtor bonds. Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).

92. Note the relation of this factor to (1) above.

93. *See* Dunham, *Due Process and Commercial Law*, 1972 SUP. CT. REV. 135, 150-52.

94. *Compare* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975), *with* Mitchell v. W.T. Grant Co., 416 U.S. 600, 616-20 (1974).

95. *See* W. PROSSER, LAW OF TORTS 83-84 (4th ed. 1971).

95a. *See* Scott, *Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process*, 61 VA. L. REV. 807 (1975).

96. *See* White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 510-30.

session rights, a state's package of laws relating to repossession should be struck down only in the most extreme cases. Too zealous a protection of the debtor, in addition to increasing the cost of credit, is arguably a denial of the creditor's right to due process,[97] just as too zealous a protection of the creditor has been held to be a denial of the debtor's right to due process.[98]

Fuentes would appear to invalidate all self-help repossession which is no more protective of the debtor than the laws in question in that case. The state action discussion in Part I demonstrated that state permission of private repossession, like all other state permission of private activity, is subject to the Fourteenth Amendment. Therefore, if state-assisted pre-hearing repossession is unconstitutional, then so, too, is self-help repossession where the only significant difference between the two lies in the presence or absence of state assistance. Surely the fact that the state has chosen to spend some money and manpower assisting creditors, perhaps to reduce the chance of violence, is irrelevant to requiring the state to hold a hearing and thus spend more. If anything, that fact would suggest that no hearing is constitutionally required, not the opposite.[99]

It appeared, after *Mitchell*, that the Supreme Court was abandoning the very mechanical *Fuentes* approach of protecting "property" interests,[100] and was weighing the various factors that I have said should be weighed. However, *Di-Chem* greatly restricts the significance of *Mitchell*.[101] Self-help repossession might still be constitutional under *Fuentes* and *Di-Chem* if: (1) the creditor could repossess only if there were a specific threat of loss of the item in dispute;[102] (2) the creditor had to establish the probability of such a threat and of default at a hearing before a magistrate immediately after the repossession, and perhaps, in addition, post a bond; (3) a full hearing on the merits would occur relatively soon thereafter;[102a] and (4) the debtor could re-

97. *See* Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond*, 28 RUT. L. REV. 541, 564 (1975); Note, *Procedures, supra* note 68, at 1531-32.

98. For discussion of the related problem of mechanics' liens, *see* Note, *The Constitutional Validity of Mechanics' Liens Under the Due Process Clause—A Reexamination After Mitchell and North Georgia*, 55 B.U.L. REV. 263 (1975).

99. See text accompanying note 59 *supra*.

100. See text accompanying notes 80-81 *supra*.

101. The *Di-Chem* decision seems clearly erroneous, given the security requirement and the ability of the debtor to regain the property by posting its own bond. Expedition seems no more important for the large corporate debtor than for the corporate creditor.

102. See note 90 *supra*.

102a. Case Comment, 24 CATHOLIC L. REV. 637 (1975); Case Comment, 1975 U.

gain control of the item by posting his own bond. U.C.C. section 9-503 by itself is not limited in these ways[103] and would therefore be unconstitutional under *Fuentes* and *Di-Chem* in many of its applications. But with additional safeguards section 9-503 can be made constitutional even under the restrictive[104] standards of those cases.

III. The Physical Interference Problem

Aside from the absence of prior notice and a hearing on the merits, self-help repossession also involves physical interference by a private party with another's control of property. At least one commentator has argued for the unconstitutionality of self-help repossession on this basis alone, asserting that the state is constitutionally compelled to maintain a monopoly over the right to effect involuntary transfers of property.[105] The "property" to which he refers includes "possession." Of course, "possession" is ordinarily not itself a brute fact, but is a legal conclusion drawn from facts. Although a debtor is sometimes in physical possession of property which he can actually grasp, most of the time he "possesses" the property by virtue of his legal right to maintain dominion and control over it. Repossession thus rarely involves a wresting away. Indeed, section 9-503 of the U.C.C. prohibits repossession which would result in a breach of the peace, and this prohibition has uniformly been interpreted to include any use of force against the debtor.[106]

When a person's possession of property is physical in the sense that he is actually grasping it, there are excellent reasons, such as the avoidance of violence, property damage, and, in some cases, intrusion into privacy, not to allow another individual to use self-help to wrest physical possession from him. Nevertheless, even where possession is physical there are instances when self-help probably should be, and usually is, allowed. If the one without physical possession has the legal right to possess, and the one with physical possession is a thief, self-help by the former is generally approved, within limits. Or if one with

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ILL. L. FORUM 263; Note, *The Future of Pre-Hearing Seizure in Idaho: Has the 1973 Amendment of the Claim and Delivery Statute Removed the Constitutional Cloud?*, 11 ID. L. REV. 247 (1975).

103. However, the debtor apparently does have the right under U.C.C. § 9-507 to an immediate mandatory injunction ordering return of the property if it was wrongfully seized, and he need not post a bond. *See* Mentschikoff, *supra* note 88, at 782.

104. Too restrictive, I would say.

105. Yudof, *supra* note 60, at 972-80.

106. *See* Brodsky, *Constitutionality of Self-Help Repossession Under the Uniform Commercial Code: The Eighth and Ninth Circuits Speak*, 19 S.D.L. REV. 295, 302-5 (1974); Mentschikoff, *supra* note 88, at 772, 782.

rightful physical possession of property in which another has an interest appears to be ready to abscond with that property or to destroy it, self-help generally may be used. In some instances it may be possible to call upon state officials to prevent the apparent theft or conversion and to take temporary custody in case the right to possess is disputed. But it will not always be so.

Cases of theft, conversion and destruction are not exceptional simply because in those cases the party using self-help is in the right.[107] The question here is whether the policy reasons for refusing the creditor the right to use self-help rise to the level of a constitutional restriction, assuming in the first instance that the creditor is otherwise entitled to take possession of the property. The fact that it has not been deemed unconstitutional for the states to allow self-help in cases of theft is at least instructive. Allowing self-help in such cases will lead in a number of instances to unnecessary violence and intrusion when the party seeking possession is mistaken about his right and meets resistance. Strict liability for such a mistake cannot ensure that there will be none.

Whatever might be the best policy for regulating self-help wresting away of physical possession, the type of possession which repossession is concerned with is legal, not physical.[108] At the time the creditor repossesses, the debtor usually is not grasping his car or his washing machine. The item may be located on real property which the debtor also possesses, or on property over which the debtor has no legal control.[109] What has been said about self-help repossession of items held physically applies *a fortiori* when possession of the items is a legal construct. Whatever the danger of violence, destruction and intrusion present in repossession of items not in someone's physical grasp, it does not usually exceed the danger present when the item is grasped.

The position against all private physical interference is simply far too broad. It is true that requiring the state to monopolize repossession would reduce the chance of violence. It is also true that it would reduce the number and scope of intrusions upon the privacy of the one in

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107. The law is generally that a party must have the right to possess in order to use self-help, and not merely a good-faith belief that he has such a right. *See* W. PROSSER, LAW OF TORTS 83-84 (4th ed. 1971). In other words, self-help to obtain possession is a strict liability activity.

108. See text accompanying note 106 *supra.*

109. But many decisions restrict the extent to which the repossessing creditor can come onto the debtor's real property. *See* Brodsky, *Constitutionality of Self-help Repossession under the Uniform Commercial Code: The Eighth and Ninth Circuits Speak,* 19 S.D.L. REV. 295, 302-5 (1974).

possession. But laws generally allow for a good deal of self-help in other situations where the intrusion is the same and violence perhaps just as likely. For example, an apparent victim of a theft using self-help, like a creditor, may be mistaken about his rights, and the thief or apparent thief from whom he seeks to obtain physical possession may be more likely than a typical debtor to resort to violence. Although the case *for* self-help in the creditor-debtor area is perhaps not as compelling as the case for it where theft or destruction of property appears to be imminent, there *is* a case for it. Officials cannot always be present to take custody of property to preserve it from theft, destruction, waste or other misuse whenever there is a dispute over who has the right to possess it. There is nothing in the brute facts from which one may conclude that the debtor is in possession which would make repossession by a creditor unreasonable, as long as done in a manner that minimizes the chances of violence and great intrusion. Merely because the state declares that such facts constitute legal possession by the debtor does not make creditor repossession unreasonable, for the same state also declares that the debtor's right to continue in possession is subordinate to the creditor's right to repossess. Some self-help repossession might be unreasonable if the state allowed the debtor to do certain things by virtue of his possession which in turn forced the creditor to take unreasonable steps to repossess.[110] For that reason I do not endorse any particular package of debtor rights to do things which frustrate repossessing creditors and creditor rights to repossess in the face of such frustrating activities; nor do I endorse U.C.C section 9-503, which may be unreasonable in the context of other state laws. But I cannot rule out *a priori* any form of self-help repossession on the ground that it involves private interference with "possession."

Conclusion

The *Mitchell* case seemed to indicate that the Supreme Court was weighing the proper factors where repossession was state-assisted and

110. "Even when repossession is called for, repossession by a private agent is likely to result in a greater affront to the debtor's privacy interest. The reason for this lies in the private repossessor's reliance on stealth to avoid detection for, if he is detected he must either desist or be guilty of a breach of peace. (Footnote omitted.) The difficulty is two-fold: first, the unwarned debtor will be unaware of his exposure and unable to take precautions to protect his privacy; second, the repossessor may increase the scope of his intrusion in order to avoid detection. The typical situation is that of the debtor who awakes to find his car missing—along with many of his personal belongings or papers which were contained in the car. (Footnote omitted.)" Yudof, *supra* note 60, at 979-80.

rejecting the much more absolutist approach of *Fuentes*. However, *Di-Chem* greatly constricted the significance of *Mitchell* in the area of state-assisted or initiated repossessions. At the same time the Court's denial of *certiorari* in *Adams v. Southern California First National Bank* and its approach to state action in *Jackson v. Metropolitan Edison Co.* indicate that self-help repossession like that authorized by U.C.C. section 9-503 will go unscrutinized, even where it is less protective of the debtor than state-assisted repossession of the type in *Fuentes*. Although, as I have indicated, some self-help repossession may not be unconstitutional, it certainly is not because of the absence of state action. Once again, an erroneous conception of the state action requirement has prevented the Supreme Court from reaching the true constitutional issues involved in a dispute.