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## Possessory Liens: The Need for Separate Due Process Analysis

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## POSSESSORY LIENS: THE NEED FOR SEPARATE DUE PROCESS ANALYSIS

Following the Supreme Court's 1969 decision in *Sniadach v. Family Finance Corp.*,<sup>1</sup> lower courts faced a wave of debtors' rights cases challenging the constitutionality of long-established creditors' remedies. Hesitant to expand the due process requirements newly applied in protection of the debtor, some courts confined the requirements of notice and hearing to circumstances which could "drive a wage earning family to the wall;"<sup>2</sup> other courts, eager to increase debtor protection, invalidated numerous creditors' remedies.<sup>3</sup> The

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1. 395 U.S. 337 (1969). *Sniadach's* wages had been garnished pursuant to a Wisconsin statute allowing garnishment or attachment upon the creditor's bare assertion of a default in loan repayment; she based her motion to dismiss the garnishment on the proposition that the fourteenth amendment clearly states that no state shall "deprive any person of life, liberty, or property, without due process of law." Sustaining the trial court's denial of the motion, the Wisconsin Supreme Court reasoned that the minimal nature of the deprivation, the opportunity for early attack, the available remedies for improper garnishment, and historical antecedents of the procedure defeated the applicability of the fourteenth amendment. *Family Fin. Corp. v. Sniadach*, 37 Wis. 2d 163, 154 N.W.2d 259 (1967). The United States Supreme Court preferred *Sniadach's* simple logic and reversed, holding that the Wisconsin garnishment procedure violated due process because it did not provide for notice and a hearing before the deprivation. 395 U.S. at 340-42. The creditor had "met the Constitution." See Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973).

2. 395 U.S. at 341-42. See, e.g., *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970)(replevin); *Lebowitz v. Forbes Leasing & Fin. Corp.*, 326 F. Supp. 1335 (E.D. Pa. 1971), cert. denied, 409 U.S. 843 (1972) (foreign attachment of bank account); *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971), rev'd sub nom. *Fuentes v. Shevin*, 407 U.S. 67 (1972)(replevin); *Black Watch Farms, Inc. v. Dick*, 323 F. Supp. 100 (D. Conn. 1971)(attachment of residence, no deprivation of use); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla.) (possession); *Tucker v. Burton*, 319 F. Supp. 567 (D.D.C. 1970) (wage garnishment); *American Olean Tile Co. v. Zimmerman*, 317 F. Supp. 150 (D. Hawaii 1970) (garnishment of corporate bank account and accounts receivable); *Young v. Ridley*, 309 F. Supp. 1308 (D.D.C. 1970) (power of sale under deed of trust); *Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), rev'd sub nom. *Fuentes v. Shevin*, 407 U.S. 67 (1972)(replevin); *Andrew Brown Co. v. Painters Warehouse, Inc.*, 11 Ariz. App. 571, 466 P.2d 790 (1970)(garnishment of accounts receivable); *Michael's Jewelers v. Handy*, 6 Conn. Cir. 103, 266 A.2d 904 (1969)(attachment of checking account); *Robinson v. Loyola Foundation, Inc.*, 236 So. 2d 154 (Dist. Ct. App. Fla. 1970)(attachment).

3. See, e.g., *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970)(landlord's lien statute); *Adams v. Egle*, 338 F. Supp. 614 (S.D. Cal. 1972), rev'd sub nom. *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), cert. denied, 95 S. Ct. 324 (1974)(repossession); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972) (innkeeper's lien); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970)(distrain); *Laprease v. Raymours Furniture Co.*,

nonanalytic approach of the courts clearly reflected that division of attitudes toward the new due process for debtors: whatever the holding, the rationale was often a mere citation of favorable precedent,<sup>4</sup> systematically omitting an analysis of the challenged creditor's remedy in relation to the evolving debtor due process requirements.

Although three years after *Sniadach*, the Supreme Court seemed to confirm in sweeping terms the expansion of debtor protections in *Fuentes v. Shevin*,<sup>5</sup> the Court more recently injected confusion into the field of debtor-creditor law in *Mitchell v. W.T. Grant Co.*<sup>6</sup> Despite the involvement of a procedure resembling that in *Fuentes*,<sup>7</sup>

315 F. Supp. 716 (N.D.N.Y. 1970)(replevin); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970) (innkeeper's lien); *Swarb v. Lennox*, 314 F. Supp. 1091 (E.D. Pa. 1970), *aff'd*, 405 U.S. 191 (1972) (confession of judgment); *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied*, 407 U.S. 924 (1972) (attachment); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (claim and delivery); *Jones Press, Inc. v. Motor Travel Servs., Inc.*, 286 Minn. 205, 176 N.W.2d 87 (1970) (garnishment of accounts receivable); *Larson v. Fetherston*, 44 Wis. 2d 712, 172 N.W.2d 20 (1969).

4. See, e.g., *Brunswick Corp. v. J & P, Inc.*, 424 F.2d 100 (10th Cir. 1970); *McCormick v. First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971); *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970).

5. 407 U.S. 67 (1972), *rev'g Fuentes v. Faircloth*, 317 F. Supp. 954 (S.D. Fla. 1970), and *Epps v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971). The Florida statute, [1967] Fla. Laws ch. 67-254, § 28 (amended 1973) (now FLA. STAT. ANN. §§ 78.01, 78.071, 78.075, 78.08 (Supp. 1974-75)), authorized issuance of a writ of replevin to a creditor who posted bond for twice the value of the property upon his assertion that he was entitled to possession. In Pennsylvania the writ issued upon an "affidavit of the value of the property to be replevied." PA. STAT. ANN. tit. 12, §§ 1073(a), 1976 (1967). In both states a clerk issued the writ, without judicial participation. The sheriff then had the duty to seize the property and sequester it for a period during which the debtor might post a counter bond and reacquire the property. If the debtor failed to post a bond, the creditor acquired the property. In Florida application for a writ was required to accompany filing on the merits; since Pennsylvania had no such requirement, the debtor bore responsibility for initiating an action.

Although *Sniadach* had been interpreted as requiring due process only in circumstances driving wage earners "to the wall," see note 2 *supra*, *Fuentes* rejected the notion that due process requirements embraced only necessities, clarifying that any significant taking of property, however temporary, would trigger due process requirements. 407 U.S. at 80-82. The notion that remedies for wrongful deprivation would suffice similarly was rejected. *Id.* at 82. Perhaps most significant for the emerging debtor-creditor due process law, possession and continued use were found to be constitutionally cognizable interests. *Id.* at 84-85.

6. 94 S. Ct. 1895 (1974). Louisiana's Code of Civil Procedure allowed a mortgage or lien holder a writ of sequestration to forestall waste or alienation of the encumbered property. The writ was obtainable on the creditor's ex parte application without notice to the debtor or an opportunity for a hearing. In the parish from which the case arose, the writ would issue only upon a verified affidavit and a judge's authority after the filing of a sufficient bond by the creditor. The debtor could seek dissolution, which was required unless the creditor proved grounds for issuance: existence of the debt, lien, and delinquency. *Id.* at 1899. Cf. notes 53-63 *infra* & accompanying text.

7. Speaking for three dissenting Justices, Justice Stewart noted that the Louisiana procedure was "remarkably similar to the statutory provisions at issue in *Fuentes v. Shevin*." 94 S. Ct. at 1910.

the *Mitchell* decision upheld a Louisiana lien law as a constitutionally sufficient accommodation of competing interests,<sup>8</sup> while the *Fuentes* decision had invalidated Florida and Pennsylvania replevin statutes for failure to provide due process to debtors. Whatever the ultimate effect of the *Mitchell* decision on debtor-creditor law, it has forced a needed reevaluation,<sup>9</sup> for, in the rush to rescue debtors, courts had neglected to consider distinctions among the various creditors' remedies.<sup>10</sup> These distinctions should determine the applicability of due process requirements.

One creditors' remedy with potentially significant unique characteristics is the possessory lien. Typically arising in favor of bailees who "add to" the liened chattel or in favor of others charged with a special duty,<sup>11</sup> possessory liens often involve an initial voluntary surrender of possession by the chattel owner<sup>12</sup> and operate extra-judicially.<sup>13</sup> Because these characteristics may distinguish a possessory lien from creditors' remedies that involve outright seizure, and because different possessory liens may differ in their operation, separate analyses of the applicability of due process requirements to different liens may contribute stability and predictability to debtor-creditor law. These characteristics of possessory liens must be judged against the historical, contemporary, and evolving legal standards against which creditors' remedies generally must be evaluated.

#### ANTECEDENTS OF THE MODERN LIEN—THE HISTORICAL TEST

Courts often have cited well-established common law antecedents among proffered reasons for sustaining the constitutionality of sum-

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8. *Id.* at 1900.

9. Further confusion and further need for evaluation has resulted from the Court's recent decision finding a lack of appropriate due process provisions in a Georgia garnishment statute, *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975). See notes 64-66 *infra* & accompanying text.

10. *Quebec v. Bud's Auto Serv.*, 32 Cal. App. 3d 257, 105 Cal. Rptr. 677 (Super. Ct. 1973) (rehearing granted), provides an example of a court's failure to note distinctions among the various creditors' remedies; the court merely analogized to seizure cases in invalidating a garageman's lien. The aid which *Quebec* offered the debtor was short lived, however, since *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), validated interim retention provisions. See notes 97-101 *infra* & accompanying text.

11. See notes 25-26 *infra* & accompanying text.

12. See note 31 *infra*.

13. See notes 117-22 *infra* & accompanying text.

mary creditors' remedies,<sup>14</sup> thereby advancing a historical test for judging the validity of longstanding procedures.<sup>15</sup> Their inquiries frequently focus upon the mere pedigree of the procedure and ignore the evolution of the essential elements of the remedy vis-a-vis concurrent legal developments. The exact historical origin of the possessory lien is disputed,<sup>16</sup> but its different antecedents provide the basis for an evaluation of its purpose within the legal system.

Although case law often ascribes the first possessory liens to the public callings which were bound by law to serve all comers,<sup>17</sup> at least one authority<sup>18</sup> traces the derivation to the failure of early common law to provide an action of implied contract, arguing that early courts devised the possessory lien to provide relief for those who had performed services on the goods of another but were precluded from suing for the reasonable value of their services.<sup>19</sup> Both theories reflect cured infirmities of the legal system; yet the remedy has been preserved, nourished, and expanded long after the problem disappeared.<sup>20</sup> Under the "public callings" theory, persons such as

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14. See, e.g., *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir. 1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), cert. denied, 95 S. Ct. 325 (1974); *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974); *Messenger v. Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (Super. Ct. 1972).

15. The logic of the historical test seems to be: "The lien is valid because it has always been valid." Such an approach clearly avoids the question of debtors' due process rights.

16. For a more detailed analysis of the history of various creditors' remedies, see Countryman, *The Bill of Rights and the Bill Collector*, 15 ARIZ. L. REV. 521 (1973).

17. The Supreme Court of Iowa has expressed this approach: "At common law an innkeeper entitled to a lien was one who held out his place as one for the entertainment of all respectable transient persons who chose to come to him. The lien was given largely because of his so holding himself out and his consequent duty to entertain all transients or travelers who offered themselves as guests." *Cedar Rapids Inv. Co. v. Commodore Hotel Co.*, 205 Iowa 736, 218 N.W. 510, 511 (1928). See also *W.C. Caye & Co. v. Milledgeville Banking Co.*, 91 Ga. App. 664, 86 S.E.2d 717 (1955); *A.G. Graben Motor Co. v. Brown Garage Co.*, 197 Iowa 453, 195 N.W. 752 (1923); *Halsey v. Svitak*, 163 Minn. 253, 203 N.W. 968 (1925); *George v. Walton*, 36 Ohio L. Abs. 306, 43 N.E.2d 515 (Ct. App. 1942); *Cook v. Prentice*, 13 Ore. 482, 11 P. 226 (1886); *Shaw v. Webb*, 131 Tenn. 173, 174 S.W. 273 (1915).

18. R. BROWN, *THE LAW OF PERSONAL PROPERTY* § 107, at 510 (2d ed. 1955).

19. Another commentator suggests that liens first may have been granted to ease the rigors of the constructive condition precedent of contract law. Williams, *Creditors' Prejudgment Remedies: Expanding Strictures on Traditional Rights*, 25 U. FLA. L. REV. 60, 88 (1972). The tradesman whose performance necessarily extended over a period of time was required to perform completely before becoming entitled to payment. RESTATEMENT OF CONTRACTS § 270 (1932). See also RESTATEMENT (SECOND) OF CONTRACTS § 259(2) (Tent. Draft No. 8, 1973).

20. Professor Countryman has noted: "Many of these creditors' remedies — and, in particular, many of the prejudgment remedies — find their antecedents in English practices. This in itself is not surprising. But many of these English practices date back to a very early and, from the debtor's viewpoint, rigorous time, and some of them we have continued to nourish long after they were abandoned by the English." Countryman, *supra* note 16, at 521.

innkeepers were given a lien on guests' property for reasonable charges because of the high duty of care imposed upon them.<sup>21</sup> That absolute duty of care has been abrogated,<sup>22</sup> but the lien has survived and has been expanded. For example, when the action of *assumpsit* became available for contracts implied in fact, courts preserved the creditor's possessory lien although the remedy was now severed from the evil it was instituted to correct.<sup>23</sup> Therefore, whichever theory justified its creation, the possessory lien outlived its initial justification, and its continued validity depends upon whether it can fulfill a contemporary legal need.<sup>24</sup>

Not only does the possessory lien appear to be an ancient remedy searching for a present problem, but statutes systematically have altered its essential features. At common law a bailee was granted a lien only if he was engaged in one of the several public callings upon which the law imposed special responsibility,<sup>25</sup> or if he had improved or increased the value of the bailed chattel by his labor.<sup>26</sup> In many jurisdictions, present statutes entitle additional classes of bailees to perfect a possessory lien,<sup>27</sup> and alter the substantive provi-

21. R. BROWN, *supra* note 18, § 107, at 510. See note 17 *supra*.

22. For a historical analysis leading to abrogation, see *Klim v. Jones*, 315 F. Supp. 109, 118-20 (N.D. Cal. 1970). See also *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 22 n.6, 300 N.E.2d 710, 715 n.6, 347 N.Y.S.2d 170, 177 n.6 (1973).

23. R. BROWN, *supra* note 18, § 107, at 510. Indeed, in 1816 the lien was extended to services performed by tradesmen under express contracts. *Chase v. Westmore*, 105 Eng. Rep. 1016 (K.B. 1816). In *Chase* Lord Ellenborough characterized authorities upholding the distinction between express and implied contracts for services as "contrary to reason and to the principles of law." *Id.* at 1018. He failed to recognize that the roots of the lien he expanded long since had been eradicated.

24. In discussing one closely related self-help remedy, one commentator concluded: That normal legal growth must be fatal to the remedy of distress is apparent. It is not only extrajudicial; it is strictly anti-social and anti-legal. It is opposed to fundamental legal conceptions. It can never be tolerated that a man should at the same time be both judge and executive officer in his own behalf. . . . If a system of law fully adapted to the capacity and purpose of man could come into existence without regard to antecedent conditions, distress would have no place in it. Legal evolution tends to bring all procedure into the category of legal process, and thus to eliminate self-help altogether. We, therefore, see early law gradually and surely disentangling itself from the meshes of this primitive institution.

3 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 285-86 (1906).

25. See note 17 *supra*.

26. See, e.g., *Clark Bros. & Co. v. Pou*, 20 F.2d 74 (4th Cir. 1927); *Moynihan Associates, Inc. v. Hanisch*, 56 Wis. 2d 185, 201 N.W.2d 534 (1972).

27. See generally L. JONES, *THE LAW OF LIENS* 93-104 (3d ed. 1914). For example, at common law only common carriers, not private carriers, were granted a lien for reasonable freight

sions of the lien. Statutes generally provide three forms of possessory liens. They grant a lien to repairmen or improvers such as artisans, craftsmen, or mechanics who actually perform work on a specific chattel.<sup>28</sup> Statutory provisions also assist holders of goods such as warehousemen, carriers, or others who are given possession of a chattel for storage or transportation.<sup>29</sup> Finally, the ancient common law lien survives in statutes giving innkeepers a lien on boarders' property, including goods which have not been placed

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charges. Statutes in some jurisdictions now extend the right to a lien to private carriers. *See Gulf Motor Lines, Inc. v. European Agencies, Inc.*, 155 So. 523 (La. App. 1934). Common law did not authorize a lien on behalf of the proprietor of a boarding, lodging, or rooming house. *See Halsey v. Svitak*, 163 Minn. 253, 203 N.W. 968 (1925); *Nance v. O.K. Houck Piano Co.*, 128 Tenn. 1, 155 S.W. 1172 (1913). Most state statutes award such a lien to these proprietors. *See, e.g., Nicholas v. Baldwin Piano Co.*, 71 Ind. App. 209, 123 N.E. 226 (1919); *Cedar Rapids Inv. Co. v. Commodore Hotel Co.*, 205 Iowa 736, 218 N.W. 510 (1928); *Friedrich Music House v. Harris*, 200 Mich. 421, 166 N.W. 869 (1918); *Halsey v. Svitak*, 163 Minn. 253, 203 N.W. 968 (1925); *McClain v. Williams*, 11 S.D. 227, 76 N.W. 930 (1898); *Nance v. O.K. Houck Piano Co.*, 128 Tenn. 1, 155 S.W. 172 (1913); *Fudge v. Downing*, 83 Utah 101, 27 P.2d 33 (1933); *Wertheimer-Swartz Shoe Co. v. Hotel Stevens Co.*, 38 Wash. 409, 80 P. 563 (1905).

28. For example, the New York statute provides: "A person who makes, alters, repairs or performs work or services of any nature and description upon, or in any way enhances the value of an article of personal property, at the request or with the consent of the owner, has a lien on such article, while lawfully in possession thereof, for his reasonable charges for the work done and materials furnished, and may retain possession thereof until such charges are paid." N.Y. LIEN LAW § 180 (McKinney Supp. 1974).

The New Jersey statute provides:

A garage keeper who shall store, maintain, keep or repair a motor vehicle or furnish gasoline, accessories or other supplies therefor, at the request or with the consent of the owner or his representative, shall have a lien upon the motor vehicle or any part thereof for the sum due for such storing, maintaining, keeping or repairing of such motor vehicle or for furnishing gasoline, accessories or other supplies therefor, and may, without process of law, detain the same at any time it is lawfully in his possession until the sum is paid."

N.J. STAT. ANN. § 2A:44-21 (Supp. 1974).

29. The Uniform Commercial Code provides: "A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law." UNIFORM COMMERCIAL CODE § 7-209(1). The Code also provides: "A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law. But against a purchaser for value of a negotiable bill of lading a carrier's lien is limited to charges stated in the bill or the applicable tariffs, or if no charges are stated then to a reasonable charge." *Id.* § 7-307(1). *See also* N.J. STAT. ANN. § 2A:44-21 (Supp. 1974).

specifically in the possession of the innkeeper.<sup>30</sup>

Whereas the common law founded the lien on the bailee's continued possession,<sup>31</sup> a statutory lien may remain valid after the surrender of possession,<sup>32</sup> often on the condition that the lienor file the lien

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30. The Illinois statute protects the innkeeper by providing: "Hotel, inn and boarding house keepers shall have a lien upon the baggage and other valuables of their guests or boarders brought into such hotel, inn or boarding house by such guests or boarders, for the proper charges due from such guests or boarders for their accommodations, board and lodgings and such extras as are furnished at their request." ILLINOIS ANN. STAT. ch. 82, § 57 (Smith-Hurd 1966). Similarly, the New York statute provides: "A keeper of a hotel, apartment hotel, inn, boarding house, rooming house or lodging house . . . has a lien upon, while in possession, and may detain the baggage and other property brought upon his premises by a guest, boarder, roomer or lodger, for the proper charges due him, on account of his accommodation, board, room and lodging, and such extras as are furnished at his request." N.Y. LIEN LAW § 181 (McKinney 1966).

Similar rights in tenants' chattels are often given landlords: "A landlord or his duly authorized agent may, for arrears of rent, distrain: a) the goods and chattels of his tenant, found upon the demised premises, except such as are by law exempt from distraint and except the goods and chattels of another in possession of the tenant." N.J. STAT. ANN. § 2A:33-6 (1952) (this remedy is not available against residential tenants, N.J. STAT. ANN. § 2A:33-1 (Supp. 1974)).

31. At common law possessory liens were of two types: the specific lien attached to a chattel for the indebtedness incurred from service upon the particular chattel only, while the general lien attached to the chattel for the indebtedness from the general account between the parties. See R. BROWN, *supra* note 18, § 107, at 511. Although the breadth of the lien varied, its foundation was set firmly in possession. See, Annot., 76 A.L.R.2d 1322 (1961); Annot., 25 A.L.R.2d 1037 (1952).

The term "lien" has been variously defined. It has been used indiscriminately to describe any special interest one may have in personalty or realty, the general property ownership of which is in another. See *Major Appliance Co. v. Gibson Refrig. Sales Corp.*, 254 F.2d 497 (5th Cir. 1958).

At common law, the lien was a right "in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied." *Hammonds v. Barclay*, 102 Eng. Rep. 356, 359 (K.B. 1802) (emphasis supplied). Possession was in the creditor-lienor although ownership remained in the debtor. Notwithstanding the value of the improvement wrought by his labor, the laborer had no common law lien unless he retained possession of the improved chattel; for example, one who made repairs on a locomotive which remained on the tracks of its owner was denied the lien. See *Burdick v. Marshall*, 8 S.D. 308, 66 N.W. 462 (1896).

A lien is both a proprietary interest, see, e.g., *City of Sanford v. McClelland*, 121 Fla. 253, 163 So. 513 (1935); *Dysart v. State Dep't of Public Health & Welfare*, 361 S.W.2d 347 (Mo. App. 1962); *Williamson v. Winningham*, 199 Okla. 393, 186 P.2d 644 (1947); *Swanson v. Graham*, 27 Wash. 2d 590, 179 P.2d 288 (1947), and a property right of sorts, see *Young v. J.A. Young Mach. & Supply Co.*, 203 Okla. 695, 224 P.2d 971 (1950), although it does not transfer title, see *Sullivan v. Wellborn*, 32 Cal. 2d 214, 195 P.2d 787 (1948); *Foeler v. Worthington*, 13 Colo. 559, 22 P. 960 (1889); *Mills v. Reneau*, 411 P.2d 516 (Okla. 1965). It is simply a right of the person in possession to retain that which is in his possession until certain of his demands are satisfied. *Smyth v. Fidelity & Deposit Co.*, 326 Pa. 391, 192 A. 640 (1937); *Potter v. Foster*, 16 Tenn. App. 324, 64 S.W.2d 520 (1932).

32. See, e.g., *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 76 N.W. 371 (1898) (corporation



pursuant to statute.<sup>33</sup> Some statutes have modified the common law requirement of uninterrupted possession<sup>34</sup> and under these statutes periodic use by the owner will not defeat the lien.<sup>35</sup> Today a statutory lien may supersede even the bailee's right to retain possession and allow a bailor to recover possession despite the lien.<sup>36</sup> Finally, the scope of the common law lien extended the rights of the lienor no further than detention until payment;<sup>37</sup> unless a power of sale was conferred by special agreement, the lienor could not lawfully sell the property to obtain reimbursement.<sup>38</sup> Under the statutes of various jurisdictions, however, provisions for sale have been added.<sup>39</sup>

In many instances, therefore, the creditors' remedy which survives judicial scrutiny partially on the strength of its longstanding existence shows little resemblance to its common law ancestor.<sup>40</sup> In light of these changes, it is necessary to reassess today's possessory lien and measure it against a more appropriate standard. In recent

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had statutorily created lien on stock of shareholder-debtor though not in possession of the stock).

33. See, e.g., *Olson v. Orr*, 94 Kan. 38, 145 P. 900 (1915); *Hiner v. Pitts*, 89 Ore. 602, 175 P. 133 (1918).

34. At common law, the lien claimant not only must be in actual physical possession, but he also must have the right to continue this exclusive possession without interruption. See, e.g., *Sears v. Wills*, 66 U.S. (1 Black) 108 (1861); *Lathrop Lumber Co. v. Fitts*, 208 Ala. 334, 94 So. 354 (1922); *Brown v. Harmon*, 59 Ga. App. 373, 1 S.E.2d 33 (1939); *Lembeck v. Jarvis Terminal Cold Storage Co.*, 69 N.J. 781, 63 A. 257 (1906). Therefore, if the parties understood that the owner could remove his property even temporarily, no lien existed. See Annot., 3 A.L.R. 664 (1919); Annot., 48 A.L.R.2d 804, 902 (1956). Thus the livery stable keeper was denied a lien at common law. So too, the garage keeper, who succeeded to the livery stable keeper's position, was precluded at common law from asserting the lien. See generally *Lambert v. Nicklass*, 45 W. Va. 527, 31 S.E. 951 (1898).

35. Some authority holds that the lien detaches while the property is out of the possession of the lienor, but reverts when the property is returned. See *Drummond v. Griffin*, 114 Me. 120, 95 A. 506 (1915); *North End Auto Park, Inc. v. Petringa Trucking Co.*, 337 Mass. 618, 150 N.E.2d 735 (1958).

36. See *J.M. Lowe Auto Co. v. Winkler*, 727 Ark. 433, 191 S.W. 927 (1917).

37. See *Hughes v. Aetna Ins. Co.*, 261 S.W.2d 942 (Mo. 1953); *Keystone Mfg. Co. v. Close*, 81 W. Va. 205, 94 S.E. 132 (1917); *Burrough v. Ely*, 54 W. Va. 118, 46 S.E. 371 (1903).

38. See *Whitlock v. Heard*, 13 Ala. 776 (1898).

39. See, e.g., *Chesapeake & O. Ry. v. Saulsberry*, 126 Ky. 179, 103 S.W. 254 (1907); *National Bond & Inv. Co. v. Haas*, 124 Neb. 631, 247 N.W. 563 (1933).

The Uniform Commercial Code allows enforcement of a carrier's or warehouseman's lien by public or private sale on commercially reasonable terms after notification of all those known to claim an interest in the goods. UNIFORM COMMERCIAL CODE §§ 7-210, 7-308. The Uniform Warehouse Receipts Act similarly allows sale to enforce a warehouseman's lien. UNIFORM WAREHOUSE RECEIPTS ACT § 33.

40. The Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 78 (1972), recognized the sparse similarities between today's creditors' remedies and their common law antecedents.

years the Supreme Court has made clear that the touchstone of such a reevaluation is the constitutional guarantee of due process of law.

### THE DUE PROCESS STANDARD

A two-step analysis determines the application of the due process guarantee of the fourteenth amendment to a challenged activity such as the operation of possessory liens. First, the examination must consider whether the challenged conduct comes within the scope of the guarantee: due process protection arises if state action<sup>41</sup> brings about a deprivation<sup>42</sup> of a constitutionally cognizable interest.<sup>43</sup> Challengers must meet each of those three requirements because the absence of any one removes the controverted conduct from the fourteenth amendment's protection.<sup>44</sup> After concluding that the

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41. See notes 109-58 *infra* & accompanying text.

42. See notes 72-108 *infra* & accompanying text.

43. See notes 48-71 *infra* & accompanying text.

44. Despite the emerging debtor-creditor due process law, a constitutionally cognizable interest may be affected without due process protections. The deprivation may occur without the requisite state action. See notes 132-37, 152-53 *infra* & accompanying text.

Further, an emergency may justify abandoning due process protection, or the debtor may waive his due process protections. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), clearly reject the notion that a creditor's interest in collecting, without more, is sufficient to create an emergency which would justify prehearing remedies. It is not clear, however, whether a creditor's interest ever could qualify as a "truly unusual" situation justifying such action. *Sniadach*, in fact, did allude to an extraordinary "governmental or creditor" interest. 395 U.S. at 339 (emphasis supplied). *Boddie v. Connecticut*, 401 U.S. 371 (1971), the language of which was used as the basis for the *Fuentes* emergency exception, 407 U.S. at 90, seemed to suggest that only a "governmental interest" would justify short circuiting due process protection. 401 U.S. at 378-79. In *Fuentes*, Justice Stewart enunciated three criteria for determining whether an "extraordinary situation" is present:

First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for 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 standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

407 U.S. at 91. Justice Stewart found objectionable the replevin statutes in *Fuentes* because they did not limit summary seizure to situations where there was an "immediate danger that a debtor will destroy or conceal disputed goods." *Id.* at 93. Despite the difficulty of characterizing a creditor's interest as "an important governmental or general public interest," some commentators have read that language as anticipating that a creditor might come within the *Fuentes* emergency exception. See, e.g., Clark & Landers, *supra* note 1, at 369; West & Berman, *The Issue of Sniadach*, 79 *Comm. L.J.* 49, 50 (1974). Another commentator has cautioned that since all litigation is an extraordinary situation because it represents a breakdown in the usual social process, expansion of the emergency exception could destroy the due process rule. See Rendleman, *The New Due Process: Rights and Remedies*, 3 *Ky.*

due process restraints apply, the investigation secondly must map the perimeter of the restraints.<sup>45</sup> Although such a mechanical checklist suggests a certainty of result, the preliminary conclusion regarding the scope of the due process guarantee depends on subtle factual variations;<sup>46</sup> after that conclusion, courts still must determine the specific protective procedures mandated by due process. The Supreme Court's repeated efforts in the past three years to forge a procedural due process standard applicable to the field of creditors' rights illustrates the difficulty of the task.<sup>47</sup>

### *Constitutionally Cognizable Interest*

The fourteenth amendment provides protection for life, liberty, and property,<sup>48</sup> the last of which is the constitutionally cognizable interest relevant to a debtor-creditor analysis. Courts have seized upon Justice Harlan's cogent concurrence in *Sniadach v. Family Finance Corp.*<sup>49</sup> to develop a concept of property focused upon its continued use and enjoyment and have fused that concept with Justice Stewart's subsequent analysis in *Fuentes v. Shevin*<sup>50</sup> to require notice and an opportunity for a hearing before curtailment of the mere use and enjoyment of property.<sup>51</sup> From *Sniadach* through

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L.J. 531, 583 (1975). Although the courts seem cognizant of that danger and thus far have restricted the use of the exception, two additional criteria have been proposed to obviate the danger. Commentators have suggested that a creditor be required to establish the absence of other assets to satisfy his claim should he prevail and establish a substantial probability of success on the merits. See Clark & Landers, *supra* note 1, at 370.

The Supreme Court in *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972), announced that due process rights of notice and an opportunity for hearing could be waived if the waiver is made "voluntarily, intelligently, and knowingly." *Id.* at 187. Such criteria necessarily require a case-by-case determination. An examination of the factors considered by the Court, however, casts doubt upon the applicability of the decision to the typical debtor-creditor relationship. See *id.* at 188.

45. See notes 159-88 *infra* & accompanying text.

46. See Clark & Landers, *supra* note 1, at 362-64.

47. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975); *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

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

49. 395 U.S. 337, 342 (1969).

50. 407 U.S. 67 (1972).

51. See, e.g., *Graff v. Nicholl*, 370 F. Supp. 974 (N.D. Ill. 1974); *Bay State Harness Horse R. & B. Ass'n v. PPG Industries, Inc.*, 365 F. Supp. 1299 (D. Mass. 1973); *Gunter v. Merchants Warren Nat'l Bank*, 360 F. Supp. 1085 (S.D. Me. 1973); *Lynch v. Household Fin. Co.*, 360 F. Supp. 720 (D. Conn. 1973); *Mason v. Garriss*, 360 F. Supp. 420 (N.D. Ga.), *modified*, 364 F. Supp. 452 (N.D. Ga. 1973); *Nork v. Superior Court*, 33 Cal. App. 3d 997, 109 Cal. Rptr.

*Fuentes* the inquiry followed the clearly defined two-step process generally applicable to due process questions.<sup>52</sup> Courts first determined whether the fourteenth amendment applied; then, in determining what the fourteenth amendment required, they balanced the competing interests of the debtor and creditor.

The opinions in *Mitchell v. W.T. Grant Co.*,<sup>53</sup> however, tend to obscure the line between the two separate inquiries,<sup>54</sup> in effect abandoning what one commentator has called the *Fuentes* "first define, then balance approach,"<sup>55</sup> in favor of a merged one-step evaluation which determines whether the debtor's interest is protected by balancing it against the creditor's interest. Because Louisiana law gave an installment seller a vendor's lien to secure the unpaid balance of the purchase price,<sup>56</sup> the Court in *Mitchell* concluded that "both seller and buyer had current, real interests in the property . . . . Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."<sup>57</sup> This duality of interest may be the basis for the *Mitchell* decision<sup>58</sup> despite the fact that, while accepting the premise of the

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428 (1973); *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973). *But cf.* *Harrison v. Morris*, 370 F. Supp. 142 (D.S.C. 1974); *Cook v. Carlson*, 364 F. Supp. 24 (D.S.D. 1973).

52. See notes 41-45 *supra* & accompanying text.

53. 94 S. Ct. 1895 (1974). See generally Note, *Mitchell v. W.T. Grant Co. — The Repossession of Fuentes*, 5 MEM. ST. U.L. REV. 74 (1974).

54. *Mitchell* appeared to place great reliance on the presence of dual interests in the sequestered property. See notes 56-61 *infra* & accompanying text. It is not clear, however, whether the effect of the dual interest was to defeat the finding of a constitutionally cognizable interest, thus negating the need for due process procedural protections, or whether the dual interest was merely a factor setting the parameters of due process requirements. See 94 S. Ct. at 1898, 1901. Since *Mitchell* arguably can be read either way, it will be discussed in both contexts.

55. Rendleman, *supra* note 44, at 542. In discussing *Board of Regents v. Roth*, 408 U.S. 564 (1972), Professor Rendleman explained the Court's approach:

In deciding whether due process was compelled, the Court looked to the presence, not the magnitude, of the citizen interest. It refused to balance state and citizen interests, observing "[W]e must look not to the 'weight' but to the nature of the interest at stake." Of course, the demonstration of liberty or property is a question of fact, and if either is shown, the state cannot act without due process. Once it has been determined that due process applies, i.e., that there is a cognizable liberty or property interest, the Court will "weigh" the citizen and state interests to determine what particular procedures due process requires.

Rendleman, *supra* note 44, at 547 (footnotes omitted).

56. LA. CIV. CODE art. 3227 (Slovenko 1961).

57. 94 S. Ct. at 1898.

58. The Court stated: "With this duality in mind, we are convinced that the Louisiana

*Fuentes* dissent, the *Mitchell* majority claimed not to overrule *Fuentes*.<sup>59</sup>

The different receptions given the dual interest argument in *Mitchell* and *Fuentes* can, of course, be explained by a shift in the Court's ideology,<sup>60</sup> but the anomaly can be resolved more satisfactorily by recognizing that under Louisiana personal property law any transfer of possession by the buyer defeated the vendor's lien.<sup>61</sup> The seller's interest in nontransfer by the debtor arguably was sufficient to create an interest in the property for the seller as well as the buyer. Since proper filing preserves the seller's security in jurisdictions governed by the Uniform Commercial Code,<sup>62</sup> *Mitchell's* impact may be limited to Louisiana; a narrower reading of the case, moreover, would confine its effect to Orleans Parish, the only Louisiana parish in which judges, at least nominally, issue writs of sequestration.<sup>63</sup>

Despite its apparent reliance in *Mitchell* on the dual interests of debtor and creditor, the Supreme Court in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,<sup>64</sup> found a Georgia garnishment statute<sup>65</sup> vulnerable for the reasons enumerated in *Fuentes* and distinguished *Mitchell* without mentioning the dual-interest factor.<sup>66</sup> The impact

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sequestration procedure is not invalid, either on its face or as applied." *Id.* at 1899.

59. The Court held that *Fuentes* did not require the invalidation of the Louisiana sequestration procedure. *Id.* at 1904. Nonetheless, Justice Powell, concurring in the result, concluded: "The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that the *Fuentes* opinion is overruled." *Id.* at 1908.

60. Justices Powell and Rehnquist did not take part in *Fuentes*, but voted with the majority in *Mitchell*. See *id.* at 1914 (dissenting opinion). If judicial turnover governs, one merely can join Justice Roberts in bemoaning the "restricted railroad ticket" approach of the Court and proceed to deal with the "new" law: "The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (dissenting opinion).

61. LA. CIV. CODE art. 3228 (Slovenko 1961). See 94 S. Ct. at 1901. See also *In re Trahan*, 283 F. Supp. 620 (W.D. La.), *aff'd*, 402 F.2d 796 (5th Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

62. See UNIFORM COMMERCIAL CODE § 9-307(2).

63. A footnote to the majority opinion seems to affirm the pivotal importance of the judicial participation. 94 S. Ct. at 1906 n.14. One commentator has resolved the apparent *Fuentes-Mitchell* conflict by construing the *Mitchell* approach as applicable only to written, consensually created liens. See Rendleman, *supra* note 44, at 555.

64. 95 S. Ct. 719 (1975).

65. GA. CODE ANN. § 46-101 (1974).

66. 95 S. Ct. at 722. *North Georgia Finishing* involved a statute authorizing garnishment upon presentation of an affidavit and bond to an authorized officer of the court. Garnishment

of the omission is unclear; indeed, the import of the entire decision is unclear. Because of what the dissent viewed as a studied effort at evasion,<sup>67</sup> however, it would seem premature to conclude from the Court's failure to discuss the dual-interest factor that it has been abrogated.

The effect of *Mitchell*, then, is uncertain, but if it extends beyond the boundaries of Louisiana, it may affect possessory liens, and the effects should differ among the various possessory liens according to the duality of interest. The repairman's lien, insofar as it is a detention provision,<sup>68</sup> appears insulated from due process attack under a *Mitchell* analysis balancing the interests of the debtor and the creditor to determine whether the debtor has a protected interest. Because the repairman usually has added material and labor to the chattel, he has incorporated something of his own into it and thereby creates in himself a property interest.<sup>69</sup> In a very real sense the property interest is dual, the repairman's interest arguably being more direct than that of a secured seller.

The holder's lien has less assurance of immunity from due process challenge under a *Mitchell* analysis. Although the carrier and warehouseman have provided the debtor-chattel owner with a service and, in the course of performing this service they necessarily have

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could be dissolved by the filing of a counter bond by the principal defendant. *Di-Chem* utilized that statute to garnish the bank account of North Georgia Finishing. *Id.* at 721. The Court distinguished *Mitchell* on several grounds: the writ of garnishment in *North Georgia Finishing* was issuable on a mere affidavit of the creditor or his attorney, without any requirement that the latter have personal knowledge of the facts; the affidavit only needed to contain conclusory allegations; the writ was issuable without participation by a judge; upon service of the writ the debtor was deprived of the use of the property in the hands of the garnishee; no provision existed for an "early hearing" on the issue of probable cause for the garnishment; and challenge to the garnishment could not be entertained without filing of a bond by the debtor. *Id.* at 722-23.

67. *Id.* at 726 (dissenting opinion).

68. Possessory liens typically consist of a detention provision and a sale provision. *See, e.g.,* N.Y. LIEN LAW § 184 (McKinney 1966); *id.* §§ 201, 202, 204 (McKinney Supp. 1974). *See* notes 37-39 *supra* & accompanying text.

69. One commentator has noted that such an analysis still may dodge the fundamental question which he perceives as the "genuineness of the putative creditor's claim." *See* Rendleman, *supra* note 44, at 557. Rendleman noted that if *Mitchell* is limited to written, consensually created liens, *see* note 63 *supra*, the security agreement is at least some evidence of the claim. Rendleman, *supra* note 44, at 558. Similarly, the voluntary surrender of possession by the debtor and the productive labor of the repairman may be seen as "some evidence" of the claim. Despite such evidence, garageman's lien cases frequently arise as disputes regarding the genuineness of the repairman's claim. *See, e.g.,* *Phillips v. Money*, 503 F.2d 990 (7th Cir. 1974); *Hernandez v. European Auto Collision, Inc.*, 407 F.2d 378 (2d Cir. 1973).

dealt with the chattel, they have not incorporated material into or increased the value of the chattel.<sup>70</sup> The asserted lien, therefore, occupies the middle ground between the repairman's lien, which arises from the incorporation of labor and materials into the chattel, and an attachment, which may arbitrarily effect a lien on a chattel unrelated to the controversy.<sup>71</sup> Despite their relation to the liened chattel, the holders' liens should not be accorded dual-interest status; otherwise, any creditor's claim arising from dealings in the disputed property would seem to qualify for such status, thereby obliterating *Fuentes*.

The dual-interest concept of *Mitchell* is even less applicable to the lien asserted by landlords and innkeepers. An innkeeper detains a guest's chattel not to protect it from waste or because the innkeeper has in any way improved the chattel; rather his interest lies in forcing rental payment. It is difficult to argue that such an interest in any direct way sprang from the withheld goods, for the debt has no direct relationship with the chattel, nor was possession of the chattel ever surrendered to the lienor.

### *Deprivation*

The search for a constitutionally cognizable interest leads to investigation of a second factor determining the applicability of the due process guarantee: the deprivation of that interest once found. *Fuentes* established that the length of the deprivation is insignificant, that even a short-term, temporary deprivation triggered due process restraints.<sup>72</sup> That case, however, is not particularly helpful in resolving the more fundamental issue of exactly what constitutes a fourteenth amendment deprivation of property.

*Fuentes* indicates that the seizure and removal of property by a sheriff is a clear fourteenth amendment deprivation, but does not specify what other creditor conduct may effect a deprivation.<sup>73</sup> Since

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70. A commodity can experience an increase in value when transported from an area of increased supply to an area of decreased supply. The transportation of fruits and vegetables from California to New York City in the winter season is such an example. Warehousing goods during a period of increased supply for release in a period of decreased supply has a similar result. Since the carrier or warehouseman has not modified the chattel itself, however, it is difficult to label his interest a property interest.

71. It has been contended that seizure of property for jurisdictional purposes is seldom justified. See generally Note, *Quasi In Rem Jurisdiction and Due Process Requirements*, 82 YALE L.J. 1023, 1032-36 (1973).

72. 407 U.S. 67, 84-85 (1972).

73. Commentators generally have posed the question without positing a solution. See, e.g.,

statutory possessory liens typically contain both a detention provision and a sale provision, these provisions must be measured separately against the due process standard to determine whether a deprivation arises. Sale of a retained chattel without notice and an opportunity for a hearing undoubtedly works a fourteenth amendment deprivation. Such a sale extinguishes all property rights of the debtor, a permanent deprivation more severe than the temporary deprivation voided in *Fuentes*.<sup>74</sup> In the case of the detention provision of a possessory lien, however, possession in some sense previously has been surrendered to the lienor. The absence of seizure and removal as in *Fuentes* supports an argument that no deprivation has occurred, an argument that is strongest for repairmen's and holders' liens, but weaker for innkeepers' liens where possession has not in any real sense been relinquished by the debtor.

Unfortunately for the developing body of law, several recent cases have failed to deal with the detention provisions of challenged possessory liens. In *Hernandez v. European Auto Collision, Inc.*<sup>75</sup> an automobile owner challenged both the detention and sale provisions of the New York Lien Law<sup>76</sup> which allowed a garageman to detain an automobile until the owner paid both storage and repair charges,<sup>77</sup> but the debtor's failure to request the return of his car or

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Clark & Landers, *supra* note 1: "But one may wonder whether any alteration of possession or ownership short of a physical taking is a 'deprivation' within the fourteenth amendment. For example, is the placing of a lien on the debtor's property without notice and hearing unconstitutional?" *Id.* at 363. When the lien was merely a record lien involving no obstruction to use or possession, merely encumbering title, some courts have characterized the deprivation as "de minimus" and abrogated requirements of prior notice and a hearing. See *Cook v. Carlson*, 364 F. Supp. 24 (D.S.D. 1973).

74. Deprivations more severe than in those *Fuentes* have been noted on numerous occasions:

Comparing the Lien Law here to the replevin statutes struck down in *Fuentes*, there would appear to be an even greater disregard for the basic elements of due process. The sale of the lien goods, for example, completely extinguishes the possibility of any future right of repossession in the event of ultimate success on the merits; replevin, in contrast, is a provisional remedy intended to preserve the integrity of the goods pending trial on the underlying claim.

*Hernandez v. European Auto Collision, Inc.*, 487 F.2d 378, 385 (2d Cir. 1973) (concurring opinion). See also *Cockerel v. Caldwell*, 378 F. Supp. 491, 493 (W.D. Ky. 1974); *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 156, 520 P.2d 961, 965, 113 Cal. Rptr. 145, 151 (1974).

75. 487 F.2d 378 (2d Cir. 1973).

76. N.Y. LIEN LAW § 184 (McKinney 1966); *id.* §§ 201, 202, 204 (McKinney Supp. 1974).

77. After Hernandez's automobile suffered damage in a collision, he requested that an employee of European Auto Collision tow the car to the corporation's garage and estimate



to tender reasonable charges mooted his challenge to the detention provision of the lien law.<sup>78</sup> Since the concurring justices also regarded the challenge to the detention provision as nonjusticiable,<sup>79</sup> their conclusion that the debtor's initial voluntary relinquishment of possession did not distinguish *Hernandez* from the seizure cases<sup>80</sup> was confined to the sale provision. The reasoning upon which their conclusion was based, however, seems equally applicable to the detention provision.<sup>81</sup> In another case, *Mason v. Garris*,<sup>82</sup> the plaintiffs

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the cost of repair; he specifically requested that the corporation not repair the car until after an insurance estimate. Contrary to those instructions, European Auto Collision repaired the automobile and asserted its garageman's lien. *Id.* at 381. See Note, *Procedural Due Process—Post-Fuentes Constitutionality of Garagemen's Liens*, 54 B.U.L. REV. 542, 545-46 (1974); Note, *The Extension of Due Process Requirements to Lien Enforcement Provisions—The Potential Impact on Iowa Law*, 59 IOWA L. REV. 1226 (1974); Comment, *The Constitutionality of Garagemen's Liens*, 5 U. TOL. L. REV. 311 (1974).

78. 487 F.2d at 382.

79. *Id.* at 383 (concurring opinion). Judge Timbers based the argument that the detention claim was no longer justiciable on the lack of available relief for the accomplished sale of the automobile. *Id.* at 387.

80. The concurring opinion concluded:

As I read the cases, however, it is the deprivation of a significant *property interest* that gives rise to the requirement of a prior opportunity to be heard. Here, it is true that [the debtor] in a sense voluntarily delivered his car for the purpose of temporary storage and perhaps eventual repair. But it cannot be seriously contended that at the same time he voluntarily relinquished his property interest in the car. Indeed, the law is clear that, while a bailment creates a new property interest in the bailee, it does not divest the bailor of his continuing interest and title. I find little, if any, significance in the fact that the initial delivery of the car was voluntary. I would not distinguish this case from the seizure cases on that ground.

*Id.* at 384-85 (concurring opinion)(citations omitted).

81. A New York court employed the same reasoning in invalidating the detention provision of New York's warehouseman's lien. *Jones v. Banner Moving & Storage, Inc.*, 78 Misc. 2d 726, 358 N.Y.S.2d 885 (Sup. Ct. 1974). See notes 91-96 *infra* & accompanying text.

82. 360 F. Supp. 420 (N.D. Ga.), *modified*, 364 F. Supp. 452 (N.D. Ga. 1973). The case combined two class actions challenging the constitutionality of Georgia's mechanic's lien statute. In *Mason v. Garris* the debtor loaned her automobile to a friend who, when it began to malfunction, had it towed to the creditor's service station. The debtor claimed that, because of the absence of a contract for repairs, she had a good defense to the creditor's attempted lien foreclosure. *Id.* at 421-22. In *Allen v. Rosser*, the debtor contracted with the creditor for automobile repairs at an agreed price of \$257.85. After surrender of possession, the creditor informed her that there would be an additional charge of \$100. Unwilling and unable to pay the additional fee, the debtor requested the return of her automobile unrepaired, but the creditor indicated that all repairs had been made and asserted his lien for \$357.85. *Id.* at 422. See Note, *Procedural Due Process—Post-Fuentes Constitutionality of Garagemen's Liens*, 54 B.U.L. REV. 542 (1974); Note, *The Extension of Due Process Requirements to Lien Enforcement Provisions—The Potential Impact on Iowa Law*, 59 IOWA L. REV. 1226 (1974).

failed to attack that portion of the Georgia statute which allowed mechanics to retain vehicles,<sup>83</sup> but the the court's conclusion that voluntary surrender failed to avoid due process requirements<sup>84</sup> arguably is equally applicable to a detention provision. In a third case, *Straley v. Gassaway Motor Co.*,<sup>85</sup> the court failed to consider separately the detention and sale provisions of the West Virginia improver's lien law,<sup>86</sup> summarily holding it unconstitutional on the argument that the repairman's lien was "less satisfying of due process requirements" than previously invalidated landlord's distress procedures.<sup>87</sup>

Despite the uncertain applicability of the three decisions to the detention provision of repairmen's liens, one commentator has argued that the reasoning of the three cases implies that a deprivation occurs when the lienor retains, or decides to retain, possession of the chattel.<sup>88</sup> Analyzing various creditors' remedies in light of *Fuentes*, other commentators also have rejected the thesis that original voluntary surrender avoids the deprivation requisite to invoke the fourteenth amendment. They argue that the relinquishment was for a limited and specific purpose, and, in view of the consumer's expectation, a deprivation occurs upon refusal to return retained goods,<sup>89</sup> an argument markedly similar to the rejection by the *Hernandez* and *Mason* courts of the contention that voluntary surrender cured objections to the sale provisions.<sup>90</sup>

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83. GA. STAT. ANN. § 68-423a (Supp. 1974). See 360 F. Supp. at 423.

84. The court in *Mason* considered whether the voluntary surrender created a significant property interest in the mechanic rising to the level of the "use" interest of the automobile owner. Thus, that court seemed to be construing the voluntary surrender as a factor in balancing the interests of the two parties, rather than as a factor in determining whether a deprivation had occurred. 360 F. Supp. at 424.

85. 359 F. Supp. 902 (S.D.W. Va. 1973). The creditor garage estimated that transmission repairs on the debtor's automobile would cost between \$60 and \$70. Upon making the repairs, the garage demanded \$230.11, a cost exceeding the \$150 value of the automobile. After the debtor refused payment, the creditor asserted a repairman's lien. *Id.* at 902. See Note, *Procedural Due Process—Post-Fuentes Constitutionality of Garagemen's Liens*, 54 B.U.L. REV. 542 (1974); Note, *The Extension of Due Process Requirements to Lien Enforcement Provisions—The Potential Impact on Iowa Law*, 59 IOWA L. REV. 1226 (1974).

86. W. VA. CODE ANN. § 38-11-3 (1966); *id.* § 38-11-14 (Supp. 1974).

87. 359 F. Supp. at 905.

88. Note, *The Extension of Due Process Requirements to Lien Enforcement Provisions—The Potential Impact on Iowa Law*, 59 IOWA L. REV. 1226, 1234 (1974).

89. See Clark & Landers, *supra* note 1, at 386.

90. See notes 75-84 *supra* & accompanying text.

On preliminary examination, *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd*, 460 F.2d 1064 (2d Cir.), *cert. denied*, 406 U.S. 961 (1972) (pre-

Among those courts which have confronted directly the detention provisions of possessory liens, one found the detention aspect of the New York warehouseman's lien indistinguishable in its consequences from the seizure statutes. In *Jones v. Banner Moving & Storage, Inc.*<sup>91</sup> a tenant had been evicted from her apartment while she was outside of the state; after the storage company obtained possession of her personal property from her 18-year-old daughter, the tenant was notified that unless the storage bill was paid, her possessions would be sold at public sale. She then challenged the constitutionality of sections 7-209 and 7-210 of the New York Uniform Commercial Code,<sup>92</sup> grounding her argument on the due process requirements of both the United States and New York constitutions. Invalidating the detention provision,<sup>93</sup> the court found the lack of seizure irrelevant to the deprivation issue: "If it is the deprivation of a tangible property right or a significant property interest that gives rise to the requirement of an opportunity to be heard, it would seem that the method of deprivation is immaterial. Whether the use of property is denied because it is taken away by seizure, or if it is denied because it is withheld from a party's use by an asserted lien, a deprivation nevertheless occurs."<sup>94</sup>

The court demonstrated persuasive logic at that point in the opinion, but it then measured the New York warehouseman's lien against the *Mitchell* requirements. The court distinguished *Mitchell* by noting that since possession was in the defendant storage com-

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*Fuentes* case challenging constitutionality of warehouseman's lien), appears to rely upon the voluntary delivery to reject a finding of deprivation. The court summarily stated three "material differences" between the Wisconsin statute attacked in *Sniadach* and the New York warehouseman's lien opposed in *Magro*:

First, the property here involved has been voluntarily and knowingly delivered to the party seeking to execute on it. Second, the statute in question here specifically provides for notice, and the bailor may enter the courts to obtain redress after receipt of that notice. Third, the deprivation of property which has been voluntarily parted with for long periods of time cannot be held to have the same disastrous effect as those "specialized type[s] of property" referred to by the Court in *Sniadach*.

338 F. Supp. at 467. A more detailed examination of the opinion, however, shows that the court relied on the voluntary surrender to establish the absence of a "specialized type of property" rather than a lack of deprivation. *Id.* at 468. *Fuentes* refuted the notion that the due process requirements of *Sniadach* applied only to "necessaries," thereby minimizing the effect of the *Magro* opinion. See note 5 *supra*.

91. 78 Misc. 2d 726, 358 N.Y.S.2d 885 (Sup. Ct. 1974).

92. N.Y. U.C.C. §§ 7-209, 7-210 (McKinney 1964).

93. 78 Misc. 2d at \_\_\_\_, 358 N.Y.S.2d at 900.

94. *Id.* at \_\_\_\_, 358 N.Y.S.2d at 896 (citation omitted).

pany rather than in the plaintiff, there was no risk of transfer or concealment.<sup>95</sup> This retention of possession, however, was what the court found unconstitutional,<sup>96</sup> and the court's decision, therefore, prevented the very retention of possession which it recited as one distinction removing the case from the *Mitchell* rule. The court's contradiction suggests an inadequate understanding of due process considerations, a weakness which may eliminate the support that the *Jones* decision provides for the view that mere detention constitutes a constitutionally significant deprivation.

Notwithstanding these arguments by courts and commentators that detention constitutes deprivation,<sup>97</sup> the Supreme Court of California reached a contrary result in *Adams v. Department of Motor Vehicles*.<sup>98</sup> The court distinguished between the detention and sale provisions of the California garageman's lien law when measuring that statute against the deprivation element of the due process standard, holding the interim retention provision compatible with due process.<sup>99</sup> Emphasizing that the garageman was in rightful possession at the time he asserted his lien, the court reversed the familiar deprivation argument by noting that, were the retention provision to be struck down, "the garageman would be deprived of his possessory interest precisely as were the debtors in *Shevin* and *Blair*."<sup>100</sup> It based its decision upon the general legal policy of protecting a vested possessory right until competing claims have been judicially determined.<sup>101</sup> As in *Fuentes*, the emphasis was on preserving the status quo; unlike *Fuentes* and the majority of its progeny, this emphasis in *Adams* favored the creditor asserting a garageman's lien.

The Court of Appeals for the Seventh Circuit joined the California court in its preserve-the-status-quo approach to the deprivation issue in *Phillips v. Money*,<sup>102</sup> a due process challenge to an Indiana statute<sup>103</sup> sanctioning summary detention of a vehicle until the pay-

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95. *Id.* at —, 358 N.Y.S.2d at 898.

96. *Id.* at —, 358 N.Y.S.2d at 900.

97. See notes 88-96 *supra* & accompanying text.

98. 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

99. *Id.* at 154, 520 P.2d at 966, 113 Cal. Rptr. at 150.

100. *Id.* at 155, 520 P.2d at 966, 113 Cal. Rptr. at 150. See *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

101. 11 Cal. 3d at 155 n.15, 520 P.2d at 966 n.15, 113 Cal. Rptr. at 150 n.15.

102. 503 F.2d 990 (7th Cir. 1974).

103. IND. CODE § 9-9-5-6 (1971).

ment of a repair bill. After disposing of the challenge on the basis that no state action was involved,<sup>104</sup> the court stated that, even assuming the existence of state action, it would not invalidate the Indiana procedure.<sup>105</sup> It argued that both *Fuentes* and *Mitchell* were distinguishable because the procedures challenged in those cases required a seizure from the debtor, thereby altering the status quo: "In contrast here the voluntary surrender of the motor vehicle to the garageman, albeit for the limited purpose of performing authorized repairs, results in the garageman having both a legal property interest, in the form of a lien, and actual possession. Interference with the *status quo* would be necessary to enable the owner to regain possession prior to final judgment."<sup>106</sup> As in *Adams*, the court regarded the creditor's rightful possession of the lienated chattel as obviating the question of any deprivation of the debtor's interest.

Courts apparently have not faced the voluntary surrender argument in the context of the innkeeper's lien. The cases unanimously speak of a "seizure," rather than a "retention," of the debtor's property,<sup>107</sup> thus reinforcing the contention that guests or tenants have not relinquished possession willfully.<sup>108</sup> Whatever the persuasiveness of the *Adams-Phillips* rationale as applied to repairmen's and holders' liens, innkeepers' liens clearly would seem to work a deprivation.

### *State Action*

Despite the deprivation of a constitutionally cognizable interest, due process protections still will not attach unless state action is present.<sup>109</sup> Analysis of the state action question is difficult because, in reality, no state can act; a state is capable of acting only through individuals. At the other extreme, no conduct is entirely private

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104. See note 135 *infra* & accompanying text.

105. 503 F.2d at 994.

106. *Id.* at 994-95.

107. For example, the Court of Appeals of New York concluded: "In resolving the conflicting interests and in light of the feasible alternatives, we believe the guest's interest in possession and use of his property outweighs the innkeeper's interest in summarily seizing that property to secure the payment of charges." *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 22, 300 N.E.2d 710, 715, 347 N.Y.S.2d 170, 176-77 (1973) (footnotes omitted).

108. See Comment, *The Future of Creditors' Remedies in New York: The Impact of Fuentes and Blye*, 38 ALBANY L. REV. 467, 471 n.36 (1974).

109. The Supreme Court made clear in 1883 that the fourteenth amendment does not prohibit private incursions upon constitutional rights: "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment." *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

because, if a state fails to prohibit conduct, it implicitly sanctions it. Courts have had to fashion a definition of state action between the two extremes,<sup>110</sup> but because they originally did so in the context of finding racial discrimination violative of the equal protection clause, definitions of state action well may be broader for equal protection purposes than for due process purposes.<sup>111</sup> Since the his-

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110. Since the Uniform Commercial Code seems to envision replevin and self-help repossession as alternatives, the *Fuentes* invalidation of replevin might be a death knell to the closely related self-help repossession. See UNIFORM COMMERCIAL CODE § 9-503. Thus far the finding of a lack of state action, however, has preserved the self-help remedy in the majority of the decided cases. See Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1973). Cases holding self-help repossession to be state action include the following: *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974); *Boland v. Essex County Bank & Trust*, 361 F. Supp. 917 (D. Mass. 1973); *Adams v. Egle*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 95 S. Ct. 325 (1974). See also *Lee v. Cooper*, 2 Pov. L. REP. ¶ 19,206 (D.N.J. 1974) (repairman's lien); *Cockerel v. Caldwell*, 378 F. Supp. 491 (W.D. Ky. 1974) (garageman's lien); *Northrip v. Federal Nat'l Mortgage Ass'n*, 372 F. Supp. 594 (E.D. Mich. 1974) (mortgage foreclosure); *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974) (garageman's lien).

Those cases are outnumbered by those holding self-help repossession not to constitute state action: *Turner v. Impala Motors*, 503 F.2d 607 (6th Cir. 1974); *Gibbs v. Titelman*, 502 F.2d 1107 (3d Cir. 1974); *Brantley v. Union Bank & Trust Co.*, 498 F.2d 365 (5th Cir.), *cert. denied*, 95 S. Ct. 517 (1974); *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir.), *cert. denied*, 95 S. Ct. 329 (1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974); *Calderon v. United Furniture Co.*, 371 F. Supp. 572 (S.D. Tex. 1973); *Mayhugh v. Bill Allen Chevrolet*, 371 F. Supp. 1 (W.D. Mo. 1973), *aff'd sub nom. Nowlin v. Professional Auto Sales*, 496 F.2d 16 (8th Cir.), *cert. denied*, 95 S. Ct. 328 (1974); *Kinch v. Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973); *Nichols v. Tower Grove Bank*, 362 F. Supp. 374 (E.D. Mo. 1973), *aff'd*, 497 F.2d 404 (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. Hauelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First Nat'l Exch. Bank*, 348 F. Supp. 672 (W.D. Va. 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); *Kipp v. Cozens*, 40 Cal. App. 3d 709, 115 Cal. Rptr. 423 (Ct. App. 1974). See also *Phillips v. Money*, 503 F.2d 990 (7th Cir. 1974) (garageman's lien); *Melara v. Kennedy*, 2 Pov. L. REP. ¶ 19,603 (N.D. Cal. 1974) (warehouseman's lien); *Leisure Estates of America v. Carmel Dev. Co.*, 371 F. Supp. 556 (S.D. Tex. 1974) (repossession under deed of trust); *Bichel Optical Labs., Inc. v. Marquette Nat'l Bank*, 336 F. Supp. 1368 (D. Minn. 1971), *aff'd*, 487 F.2d 906 (8th Cir. 1973) (bank seizure of accounts receivable); *Kruger v. Wells Fargo Bank*, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974) (bank setoff); *Sifuentes v. Weed*, 525 P.2d 1157 (Colo. 1974) (issuance of title to reposessor).

111. See, e.g., *Lefcourt v. Legal Aid Soc'y*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); *Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970); *Edwards v. Habib*, 397 F.2d 687, 693 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969); *Bight v. Isenbarger*, 314 F. Supp. 1382, 1392-93 (N.D. Ind. 1970), *aff'd on other grounds*, 445 F.2d 412 (7th Cir. 1971). See also *Burke & Reber, State Action, Congressional Power and Creditors' Rights: An Essay on the Four-*

torical roots of the fourteenth amendment<sup>112</sup> have not restricted expansion of due process into areas unrelated to racial discrimination,<sup>113</sup> however, restriction of the state action element to selective topic areas would appear unjustified.<sup>114</sup> The Supreme Court,

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*teenth Amendment*, 46 SO. CAL. L. REV. 1003, 1073 (1973) [hereinafter cited as *Essay on the Fourteenth Amendment*, part 1].

112. The fourteenth amendment is one member of the post-Civil War trio of constitutional amendments designed to eliminate slavery and racial discrimination. The thirteenth amendment abolished both slavery and involuntary servitude except as punishment for a crime. The fifteenth amendment prohibited the denial or any abridgment of the right to vote "on account of race, color, or previous condition of servitude." The original purpose of the fourteenth amendment was to eradicate racial discrimination in all its forms: "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967). For a general discussion, see J. TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950). Recognizing that purpose, two opposing camps are divided on the extent to which the historical roots of the amendment limit present-day application of the state action doctrine. See note 114 *infra*.

113. Besides the 1969 expansion into debtor-creditor relations in *Sniadach*, the Supreme Court has dealt with the due process clause in relation to procedures for terminating welfare assistance, *Goldberg v. Kelly*, 397 U.S. 254 (1970); suspending a driver's license, *Bell v. Burson*, 402 U.S. 535 (1971); evicting a tenant, *Lindsey v. Normet*, 405 U.S. 56 (1972); prohibiting local access to liquor, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and terminating public employment, *Perry v. Sindermann*, 408 U.S. 593 (1972). Other procedures challenged on due process grounds include sterilization of mental retardants, *Wyatt v. Aderholdt*, 368 F. Supp. 1382 (M.D. Ala. 1973); expulsion of a student from a military academy, *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972), and *Brown v. Knowlton*, 370 F. Supp. 1119 (S.D.N.Y. 1974); exclusion of an individual from a college campus, *Braxton v. Municipal Court*, 10 Cal. 3d 138, 514 P.2d 697, 109 Cal. Rptr. 897 (1973); termination of disability benefits, *Williams v. Weinberger*, 360 F. Supp. 1349 (N.D. Ga. 1973); termination of unemployment compensation, *Crow v. California Dep't of Human Resources Dev.*, 490 F.2d 580 (9th Cir. 1973), *vacated and remanded*, 95 S. Ct. 1110 (1975), and *Pregent v. New Hampshire Dep't of Employment Sec.*, 361 F. Supp. 782 (D.N.H. 1973), *vacated*, 94 S. Ct. 2595 (1974); termination of township poor relief, *Brooks v. Center Township*, 485 F.2d 383 (7th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974); impounding of trespassing cattle, *McVay v. United States*, 481 F.2d 615 (5th Cir. 1973); impounding of abandoned automobiles, *Graff v. Nicholl*, 370 F. Supp. 974 (N.D. Ill. 1974); impounding of infringing articles, *Jondora Music Publ. Co. v. Melody Recordings, Inc.*, 362 F. Supp. 494 (D.N.J. 1973); destruction of a public nuisance, *Traylor v. City of Amarillo*, 492 F.2d 1156 (5th Cir. 1974), and *Pioneer Sav. & Loan Co. v. City of Cleveland*, 479 F.2d 595 (6th Cir. 1973); seizure of automobiles used to transport narcotics, *United States v. One 1967 Porsche*, 492 F.2d 893 (9th Cir. 1974); and ejection of a tenant from public housing, *Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

114. Perhaps the disagreement concerns not the extent to which courts should limit the doctrine, but the extent to which the racial context has influenced the courts in developing the state action doctrine. The question arises: Would the courts have developed the doctrine differently had the cases arisen originally on other than racial grounds? One viewpoint answers the question affirmatively. See *Essay on the Fourteenth Amendment*, part 1, *supra* note 111, at 1040. According to this view, the courts stretched the state action doctrine to its outer

moreover, specifically rejected distinctions between personal and property rights in *Lynch v. Household Finance Corp.*<sup>115</sup>: "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right . . ."<sup>116</sup> Such comments by the Court bolster the argument for a single definition of state action.

Possessory liens and their methods of enforcement vary among jurisdictions in particulars which may determine the state action issue. The Georgia garageman's lien statute voided in *Mason v. Garriss*<sup>117</sup> provided for enforcement by state officials through a levy and sale; similarly, the Kentucky and West Virginia landlord lien statutes<sup>118</sup> invalidated in *Holt v. Brown*<sup>119</sup> and *Shaffer v. Holbrook*<sup>120</sup> required that an officer of the court issue the writ. The state action in such cases is apparent.<sup>121</sup> Other possessory liens operate extra-judicially, private parties asserting and enforcing them without state assistance, but the state in some manner frequently recognizes the transfer following the sale<sup>122</sup> and thereby sets off the state action

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limits to aid racial minorities who were thought to have little chance of forcing the political process to respond; following enactment of legislation to protect minorities, the doctrine should be restricted. See *id.* at 1040. The opposing view finds the "state function" and "entwinement" theories easily transplantable, if not indigenous, to the area of debtor-creditor due process law and implicitly rejects the notion that the evolution of the state action doctrine would have varied had it occurred in a context other than that of racial discrimination. See Clark & Landers, *supra* note 1, at 377-83.

115. 405 U.S. 538 (1972).

116. *Id.* at 552. *Lynch* established that property rights are entitled to protection as great as that given personal rights. Other cases have established that due process does not afford greater protection for property than for personal liberty. See *United States v. One 1967 Porsche*, 492 F.2d 893 (9th Cir. 1974).

117. 360 F. Supp. 420, *modified*, 364 F. Supp. 452 (N.D. Ga. 1973). See notes 82-84 *supra* & accompanying text.

118. KY. REV. STAT. ANN. §§ 383.040, 383.050 (1972); W. VA. CODE ANN. § 37-6-12 (1966).

119. 336 F. Supp. 2 (W.D. Ky. 1971).

120. 346 F. Supp. 762 (S.D.W. Va. 1972).

121. The Supreme Court did not discuss the state action issue in *Sniadach*, *Fuentes*, or *Mitchell*, because of the participation by state agents. Although the creditor's lawyer served the garnishee in *Sniadach*, the clerk of the court issued the summons. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 338 (1969). The sheriff accomplished the repossession in *Fuentes* after a writ of replevin was issued. *Fuentes v. Shevin*, 407 U.S. 67, 69 (1972). A judge issued the writs of sequestration in *Mitchell*. *Mitchell v. W.T. Grant Co.*, 94 S. Ct. 1895, 1899 (1974).

122. After the sale of the liened chattel, the state frequently issues title to the purchaser. Recent cases have declined to find state action, arguing that the debtor's best interest is to have title transferred in case of an accident, *Kipp v. Cozens*, 40 Cal. App. 3d 709, 717, 115



debate. If state action is to be found in the context of extrajudicial possessory liens, it usually is premised on the "state function" theory of state action or on some blend of the closely related "state authorization," "state encouragement," or "state entwinement" theories.

The "state function" theory is derived from a series of Supreme Court cases holding private action to be the equivalent of state action when the state had "delegated" to a private party an activity which the state normally would perform. The theory encompasses the so-called "white primary" cases,<sup>123</sup> requiring political parties to comply with antidiscrimination rules in conducting primary elections, as well as cases holding certain private property to be the equivalent of public property for the exercise of first amendment rights.<sup>124</sup> Those favoring a restricted state action doctrine would confine these cases to their facts, explaining them on the basis of the fundamental rights involved: prevention of the effective disenfranchisement of blacks and facilitation of the exercise of the first amendment's "preferred freedoms."<sup>125</sup>

Regardless of the origin of the theory, courts have utilized the often expansive language of those state function cases to find state action in the context of possessory liens.<sup>126</sup> Considering the constitutionality of a landlord's statutorily sanctioned seizure in *Hall v. Garson*,<sup>127</sup> the Court of Appeals for the Fifth Circuit noted that the

Cal. Rptr. 423, 428 (Ct. App. 1974), or to give him tax credit, *Sifuentes v. Weed*, 525 P.2d 1157 (Colo. 1974), or that such procedure is merely ministerial, *cf. id.*, and serves the public purpose of orderliness, *Kipp v. Cozens*, *supra*. See also *Gibbs v. Titelman*, 502 F.2d 1107 (3d Cir. 1974).

123. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Condon*, 286 U.S. 73 (1932).

124. *Amalgamated Food Local 590 v. Logan Valley Plaza*, 391 U.S. 308 (1968) (shopping plaza); *Marsh v. Alabama*, 326 U.S. 501 (1946) (company town).

125. See *Essay on the Fourteenth Amendment*, part 1, *supra* note 111.

126. See, e.g., *Hall v. Garson*, 430 F.2d 430 (5th Cir. 1970); *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974); *Barber v. Rader*, 350 F. Supp. 183 (S.D. Fla. 1972); *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 95 S. Ct. 325 (1974); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390 (N.D. Ill. 1972); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Blye v. Globe-Wernicke Realty Co.*, 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

127. 430 F.2d 430 (5th Cir. 1970). A landlord had seized a tenant's portable television pursuant to a Texas statute recognizing a lien on the personal property of tenants in favor of a landlord and authorizing seizure. *Id.* at 432-33. The district court had dismissed the suit on the grounds that the civil rights statutes did not confer jurisdiction. See *id.* at 433-34.

seizure was "an act that possesses many, if not all, of the characteristics of an act of the State."<sup>128</sup> The court emphasized that since the execution of a lien traditionally had been the function of a state officer, the statute vested in the landlord authority normally exercised by the state.<sup>129</sup> An innkeeper's execution of his lien similarly was found to constitute state action in *Blye v. Globe-Wernike Realty Co.*,<sup>130</sup> concerning a hotel resident who was locked out of her room and whose personal property was seized when she fell behind in rental payments. Despite the innkeeper's argument that the absence of any participation by a state official in the seizure eliminated the need to afford due process to the resident, the court found the "state function" test satisfied: "In this State, the execution of a lien, be it a conventional security interest, a writ of attachment, or a judgment lien traditionally has been the function of the Sheriff. On this view, State action can be found in an innkeeper's execution on his own lien."<sup>131</sup> As in *Hall*, the *Blye* court focused upon the seizure aspect of the innkeeper's lien to find state action under the "state function" theory.

Because the original voluntary surrender associated with repairmen's and holders' liens avoids actual seizure, however, it has been suggested that a repairman, warehouseman, or carrier stands less in the place of a sheriff.<sup>132</sup> Sustaining the validity of certain Indiana statutes<sup>133</sup> sanctioning summary detention of a vehicle, the Court of Appeals for the Seventh Circuit in *Phillips v. Money*<sup>134</sup> rejected a finding of state action on all theories, including state function: "Whenever 'state action' has been found on this 'delegation of state function' theory, the creditor has actively seized the property, has entered the dwelling of the debtor, or has been pervasively regulated

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128. *Id.* at 439.

129. *Id.* The court of appeals remanded *Hall* to the district court which, in an unreported memorandum decision, denied the requested injunctive relief and dismissed the complaint. On a second appeal, the court of appeals relied upon the fact that the statute "authorized" the challenged conduct in finding that it affronted due process. *Hall v. Garson*, 468 F.2d 845 (5th Cir. 1972). See notes 140-53 *infra* & accompanying text for discussion of the state authorization theory of state action.

130. 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

131. *Id.* at 20, 300 N.E.2d at 713-14, 347 N.Y.S.2d at 175 (citations omitted).

132. Clark & Landers, *supra* note 1, at 389. But see Note, *The Extension of Due Process Requirements to Lien Enforcement Provisions — The Potential Impact on Iowa Law*, 59 IOWA L. REV. 1226, 1239 n.118 (1974).

133. IND. CODE §§ 9-9-5-6, 32-8-31-1, 32-8-31-3, 32-8-31-5 (1971).

134. 503 F.2d 990 (7th Cir. 1974).

by the state.”<sup>135</sup> A federal district court in *Melara v. Kennedy*<sup>136</sup> likewise preserved California warehousemen’s liens,<sup>137</sup> reasoning that they were enforced by means of private or public sales without state intervention or participation; warehousemen, consequently, did not exercise a traditional state function. The “state function” theory of state action apparently has limited applicability to possessory liens because traditionally no governmental action is involved in liens enforced by the refusal to restore property originally surrendered to the lienor.<sup>138</sup> Therefore, although the theory should allow finding state action in the exercise of innkeepers’ liens, it does not support a finding of state action in repairmen’s liens or holders’ liens.<sup>139</sup>

A second state action theory employed in possessory lien challenges evolved from the “authorization” and “encouragement” language in a number of Supreme Court decisions.<sup>140</sup> “Authorization,” “encouragement,” and “entwinement” appear to be shades of the same basic concept: when a state creates or recognizes private rights, state involvement in the enforcement of such rights is sufficient to constitute state action. This second theory draws its greatest support from the Supreme Court’s decision in *Reitman v. Mulkey*,<sup>141</sup> invalidating an amendment to the California constitution,<sup>142</sup> the effect of which was to repeal fair-housing legislation.

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135. *Id.* at 993 (footnotes omitted). The court noted the disagreement among other courts concerning the persuasiveness of the state function argument as applied to self-help repossession, landlord’s liens, and utility cutoffs, finding the argument unpersuasive as applied to a repairman’s refusal to redeliver. *Id.*

136. 2 P.O.V. L. REP. ¶ 19,603 (N.D. Cal. 1974). The court denied the right to bring an action under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), to a plaintiff whose goods were subject to a warehouseman’s lien for unpaid storage charges.

137. CAL. COMM. CODE § 7210 (West 1964).

138. See note 31 *supra*.

139. Nonetheless, it could be argued that traditional participation by a state official is not a prerequisite of the state function theory. Since the state traditionally reserves to itself the machinery for resolving disputes, it abdicates a state function to an individual when it allows a creditor to assert and enforce a lien: “It has been noted that where the creditor is empowered, whether by common law or by statute, to unilaterally resolve a conflict, he is acting within a sphere reserved for the state alone and, therefore, his power, like state power, must be fettered by the restraints of due process.” *Shirley v. State Nat’l Bank*, 493 F.2d 739, 747 (2d Cir.) (dissenting opinion), *cert. denied*, 95 S. Ct. 329 (1974).

140. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Railway Employees’ Dep’t v. Hanson*, 351 U.S. 225 (1956); *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914). *But cf. Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Evans v. Abney*, 396 U.S. 435 (1970).

141. 387 U.S. 369 (1967).

142. CAL. CONST. art. I, § 26 (1964).

Despite the contention of the state that the amendment was neutral regarding racial discrimination, the Supreme Court found that the amendment authorized private discrimination and "significantly encourage[d] and involve[d] the State in private discriminations."<sup>143</sup>

Unless the *Reitman* state action rationale is confined to racial discrimination, it appears to support a finding of state action when a private party employs the statutorily sanctioned possessory lien.<sup>144</sup> Relying primarily upon *Reitman*, federal district courts in *Klim v. Jones*<sup>145</sup> and *Collins v. Viceroy Hotel Corp.*<sup>146</sup> invalidated California and Illinois innkeepers' lien laws, the operation of which was entirely extrajudicial;<sup>147</sup> the landlords' private conduct met the state action requirement because the statutes "encouraged" the conduct.<sup>148</sup> Statutes creating repairmen's and holders' liens clearly au-

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143. 387 U.S. at 381.

144. One court appeared to hold that the enactment of a statute constituted state action, although a circularity of reasoning detracts from the persuasiveness of the apparent holding. In *Cockerel v. Caldwell*, 378 F. Supp. 491 (W.D. Ky. 1974), the court said that "direct, legislative embodiments of the public will, in the form of statutes, can be similarly considered actions of the state, even where they codify the common law, when the consequence of the statute enables private citizens to act in derogation of the Constitution." *Id.* at 494. The court found the derogation of the Constitution in the authorization for the garageman to "act in derogation of the Fourteenth Amendment." *Id.* Thus, in determining the presence or absence of state action, without which there is no violation of the fourteenth amendment, the court relied on the "fact" that the fourteenth amendment was violated.

In its consideration of the validity of the detention provision after a motion to alter and amend an order, the court misread *Adams v. Department of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974), as finding no state action due to the original voluntary delivery of possession. 378 F. Supp. at 498. In fact, *Adams* specifically found state action. 11 Cal. 3d at 153, 520 P.2d at 965, 113 Cal. Rptr. at 149. See notes 98-101 *supra* & accompanying text. *Adams* found the garageman's possession significant in finding a property interest in the garageman and in precluding a finding of debtor deprivation. *Id.* at 155, 520 P.2d at 966, 113 Cal. Rptr. at 150.

145. 315 F. Supp. 109 (N.D. Cal. 1970).

146. 338 F. Supp. 390 (N.D. Ill. 1972).

147. CAL. CIV. CODE § 1861 (West Supp. 1974); ILL. REV. STAT. ch. 71, § 2 (1973); *id.* ch. 82, § 57.

148. The courts in *Klim* and *Collins* went on to find that the statutes were not mere codifications of rights granted landlords at common law. 338 F. Supp. at 395-96. *Klim* concluded that enforcement of the lien was possible solely by virtue of the statute exempting the landlord from common law liability for conversion, forcible entry, and trespass. 315 F. Supp. at 114. If the *Reitman* theory has viability outside the racial context in which it was developed, the finding that a lien exists solely by virtue of a statute would seem unnecessary to buttress the state action finding. Commentators indeed have expressed the view that a law's age or its historical underpinnings are irrelevant for state action purposes. See Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 So. CAL. L. REV. 1, 47, 51-52 (1973) [hereinafter cited as *Essay on*

thorize and arguably encourage any deprivation which may result from their utilization, thereby rendering themselves vulnerable to the second state action theory. The state's involvement is significant in many instances; a state's department of motor vehicles, for example, frequently transfers title to an automobile after sale pursuant to a statutory garageman's lien.<sup>149</sup> State statutes often establish priorities between the lienor and other secured creditors or bona fide purchasers; for example Uniform Commercial Code section 9-310 sets out such a system of priorities, thereby involving states which adopt those priorities in the substantive law of creditors' rights.<sup>150</sup> Recent commentators have noted: "State law has so occupied the field . . . that public regulation merges indistinguishably with the private remedy."<sup>151</sup>

While the *Reitman* theory offers a greater possibility for finding state action than the narrower state function theory, the Court of Appeals for the Seventh Circuit rejected the former theory in *Phillips v. Money*:<sup>152</sup> "[T]he enactment of statutes or recognition of the common law (permitting retention of possession by a garageman for claimed unpaid charges) is not to be deemed affirmative support such that 'state action' occurs, and the state merely establishes the legal context in which individuals conduct their private affairs."<sup>153</sup> Courts reviewing extrajudicial creditors' remedies often

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*the Fourteenth Amendment*, part 2]; Note, *Procedural Due Process — Post-Fuentes Constitutionality of Garagemen's Liens*, 54 B.U.L. REV. 542, 551-52 (1974). See also *Cockerel v. Caldwell*, 378 F. Supp. 491, 494 (W.D. Ky. 1974). Even were such an inquiry relevant, a common law-statutory dichotomy would add little clarity to the analysis. Courts then would be required to ascertain what the common law was, whether the statute has changed it, and if the change is significant enough to constitute state action. See Note, *Procedural Due Process — Post-Fuentes Constitutionality of Garagemen's Liens*, 54 B.U.L. REV. 542, 552 (1974). Such an analysis could lead to the anomalous result of having state action for fourteenth amendment purposes vary among jurisdictions. See *Essay on the Fourteenth Amendment*, part 2, *supra*, at 47.

149. See note 122 *supra*.

150. See *Clark & Landers*, *supra* note 1, at 388.

151. *Id.*

152. 503 F.2d 990 (7th Cir. 1974).

153. *Id.* at 994 (footnote omitted). In reaching that conclusion, the court relied on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), where the Supreme Court appeared to retreat from the expansive state action doctrine previously developed. The Court held in *Moose Lodge* that, absent a showing that the regulation was intended overtly or covertly to encourage discrimination, a regulatory scheme operated by a state's liquor board did not implicate the state in a private club's discriminatory guest practice sufficiently to make those practices state actions. *Id.* at 171-77. See also *Essay on the Fourteenth Amendment*, part 1, *supra* note 111, at 1112-13.

fear that since statutes regulate many aspects of purely private behavior, finding state action in statutes recognizing private remedies "would cast the shadow of state action over all activity,"<sup>154</sup> and that the line between purely private action and state action would be obliterated were it drawn to include what has been called "passive state action."<sup>155</sup> Although aware of the inherent contradiction in the "passive action" argument, the courts accepting it are attempting to define state action in a social policy context: if the purpose of the fourteenth amendment is to prevent misuse of power, it should encompass an individual wielding power granted by the state as readily as it encompasses state agents exercising state power. In the field of constitutional protections, consideration of social policy may well constitute a more useful analytical tool than the historical analysis associated with the state function theory.<sup>156</sup>

The unfounded fear that state action would engulf private action if such involvement is found in self-help repossession or possessory liens arises because the issue simply has been stated too broadly. The question is not whether all conduct sanctioned by statute constitutes state action, but whether characteristics unique to the operation of certain possessory liens support a finding of state action. Unjustified interference with possessory rights normally constitutes the tort of conversion; both conversion actions and due process guarantees are meant to protect citizens' possessory rights.<sup>157</sup> Conversion actions prevent the private abuse of power; due process, the public abuse. Enabling statutes authorize creditor conduct which if privately done in the absence of sanction could constitute conversion, and if performed by a state agent would create a fourteenth amendment denial of due process. The issue more precisely stated, therefore, is whether creditor enabling statutes are to form a hybrid procedure immune from attack both as private conversion and due

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154. *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324, 330 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974).

155. *Gibbs v. Titelman*, 369 F. Supp. 38, 47 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974).

156. An approach emphasizing social purpose in definition is not unusual. In resolving the question of what passes under Bankruptcy Act section 70a(5), 11 U.S.C. § 110(a)(j) (1970), to the trustee in bankruptcy, the Supreme Court adopted a social purpose definition of property to place accrued vacation pay beyond the trustee's reach. *Lines v. Frederick*, 400 U.S. 18 (1970).

157. See Rendleman, *supra* note 44, at 570; cf. McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections*, 60 VA. L. REV. 1, 26-27 (1974).

process denial. State action must be found to avoid such immunization.<sup>158</sup>

### *Procedures Mandated by Due Process*

Upon determining that state action<sup>159</sup> will cause a deprivation<sup>160</sup> of a debtor's constitutionally cognizable interest,<sup>161</sup> courts must apply procedural due process protections of notice and hearing.<sup>162</sup>

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158. It has been suggested that a state action finding in the debtor-creditor context is an attempt to interpose the fourteenth amendment between debtor and creditor, rather than between citizen and state as contemplated by the amendment. *Essay on the Fourteenth Amendment*, part 2, *supra* note 148, at 54. That statement of the amendment's purpose is deceiving since it neglects to explain why such a shield was deemed necessary for citizens: a citizen is helpless against the power of the state. Even Burke and Reber recognize this purpose of the amendment. *Essay on the Fourteenth Amendment*, part 1, *supra* note 111, at 1012. To buttress their arguments against the use of the fourteenth amendment in the debtor-creditor context, however, they note that the state action limitation "also preserves important institutional interests in federalism, private structuring of relationships, and allocation of responsibility between legislative and judicial branches." *Id.* Their language must be read carefully. They do not claim that the fourteenth amendment contemplated those so-called institutional interests; the Constitution indeed dealt with each of those interests prior to the fourteenth amendment. The purpose of the fourteenth amendment was to protect the individual from the arbitrary exercise of power by the state, a purpose which seems to vitiate many of the arguments advanced by Burke and Reber.

Power is the essential factor in the state action formula. See *Fuentes v. Shevin*, 407 U.S. 67, 93 (1972); *Shirley v. State Nat'l Bank*, 493 F.2d 739, 747 (2d Cir. 1974) (dissenting opinion); *Watson v. Branch County Bank*, 380 F. Supp. 945, 973 (W.D. Mich. 1974); *Gibbs v. Titelman*, 369 F. Supp. 38, 48 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir. 1974). The creditor enabling statute clothes the creditor with a power which is concurrent with the state's power. The state action therefore occurs when the power is delegated. *Gibbs v. Titelman*, *supra* at 47-48.

Ironically, the Supreme Court struck down the replevin statutes involved in *Fuentes* due to the lack of state participation in the procedure. To prevent misuse, the Court required a judicial determination before the possessory interest was disturbed. "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The state acts largely in the dark." 407 U.S. at 93 (footnotes omitted). In *Fuentes* the absence of state participation necessitated relief, while a technically drawn state action requirement would deny relief in the absence of this participation.

159. See notes 109-58 *supra* & accompanying text.

160. See notes 72-108 *supra* & accompanying text.

161. See notes 48-71 *supra* & accompanying text.

162. The Supreme Court stated in *Grannis v. Ordean*, 234 U.S. 385, 394 (1914): "The fundamental requisite of due process is the opportunity to be heard." The precise nature of the hearing required for the protection of debtors has not been specified by the Court. See Resnick, *Consumer Arbitration as an Alternative to Judicial Preseizure Replevin Proceedings*, 16 WM. & MARY L. REV. 269 (1974).

From its initial treatment in *Sniadach* until its restraint in *Mitchell*, the Supreme Court continuously expanded debtor due process, extending fourteenth amendment protection to additional types of debtors and curtailing a number of creditors' summary remedies. During that expansion, the *Fuentes* holding seemed to establish an inflexible requirement for notice and an opportunity for a hearing before depriving a debtor, even temporarily, of a protected interest.<sup>163</sup> Because of the apparent inflexibility of the *Fuentes* prior-hearing rule<sup>164</sup> and the factual similarity of *Fuentes* and *Mitchell*,<sup>165</sup> some commentators have interpreted *Mitchell* as overruling *Fuentes*, at least regarding the prior-hearing requirement<sup>166</sup> since *Mitchell* upheld the Louisiana sequestration procedure partly because the statute allowed the debtor to seek an immediate postseizure hearing.<sup>167</sup> This rationale was at odds with the Court's conclusion in *Fuentes* that a wrong may not be done merely because it can be undone,<sup>168</sup> the *Fuentes* conclusion appearing to be an implicit rejection of postdeprivation hearings. Thus, although *Mitchell* pur-

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163. The *Fuentes* opinion is replete with references to the necessity of a hearing before deprivation:

This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing "appropriate to the nature of the case," and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," the Court has traditionally insisted that whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

407 U.S. at 82 (citations omitted). See also Note, *Mitchell v. W.T. Grant Co.—The Repossession of Fuentes*, 5 MEM. ST. U.L. REV. 74 (1974).

164. Justice Powell noted, when concurring in *Mitchell*: "It seems to me, however, that it was unnecessary for the *Fuentes* opinion to have adopted so broad and inflexible a rule . . ." 94 S. Ct. at 1908.

165. See note 7 *supra*.

166. See Note, *Changing Concepts of Consumer Due Process in the Supreme Court — The New Conservative Majority Bids Farewell to Fuentes*, 60 IOWA L. REV. 262, 284, 286-87 (1974); Comment, *Commercial Transactions: The Future of Self-Help Repossession*, 8 JOHN MARSHALL J. PRAC. & PRO. 96, 104 (1974); Note, *Mitchell v. W.T. Grant — The Repossession of Fuentes*, 5 MEM. ST. U.L. REV. 74, 87 (1974); 5 CUMBERLAND-SAMFORD L. REV. 136, 141 (1974).

167. Although a concurring Justice intimated the contrary, 94 S. Ct. at 1909 ("An opportunity for an adversary hearing must then be accorded promptly . . ."), the Court recognized that the postdeprivation hearing in *Mitchell* was not automatic: "Finally, the debtor may immediately have a full hearing on the matter of possession following the execution of the writ . . ." *Id.* at 1901 (emphasis supplied). See also LA. CODE CIV. PROC. ANN. art. 3506 (West 1961).

168. 407 U.S. at 84-87.



ported not to change the law,<sup>169</sup> some contraction of the expansive due process protection developing in the wake of *Fuentes* seemed an inevitable result of the *Mitchell* decision.<sup>170</sup>

At the height of the confusion about reconciling *Fuentes* and *Mitchell*,<sup>171</sup> the Court appeared to compound the uncertainty by holding Georgia's prejudgment garnishment procedure<sup>172</sup> unconstitutional on the basis of *Fuentes*. The dissent in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*<sup>173</sup> criticized the majority for sparse comparisons and evasion:

The Court once again—for the third time in less than three years—struggles with what it regards as the due process aspects of a State's old and long-unattacked commercial statutes designed to afford a way for relief to a creditor against a delinquent debtor. On this third occasion, the Court, it seems to me, does little more than make very general and very sparse comparisons of the present case with *Fuentes v. Shevin* on the one hand, and with *Mitchell v. W.T. Grant Co.* on the other; concludes that this case resembles *Fuentes* more than it does *Mitchell*; and then strikes down the Georgia statutory structure as offensive of due process. One gains the impression . . . that the Court is endeavoring to say as little as possible in explaining just why the Supreme Court of Georgia is being reversed.<sup>174</sup>

The dissent's criticism of the majority, however, may have indicated an effective reconciliation of *Fuentes*, *Mitchell*, and *North Georgia Finishing*. Interpreting the Court to say "that this case resembles *Fuentes* more than it does *Mitchell*,"<sup>175</sup> the dissent suggested that the Court was using those cases as reference points on a

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169. The *Mitchell* court anticipated no adverse effect on cases decided in the shadow of *Fuentes*. 94 S. Ct. at 1914.

170. The "inevitable contraction" of *Fuentes* by *Mitchell* has proven somewhat illusory following the Court's decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 95 S. Ct. 719 (1975). See notes 64-67 *supra* & accompanying text. A separate opinion by Justice Stewart noted: "It is gratifying to note that my report of the demise of *Fuentes v. Shevin* seems to have been greatly exaggerated." 95 S. Ct. at 723 (concurring opinion) (footnotes omitted). Similarly, Mr. Justice Powell's concurrence viewed the majority's opinion as a resuscitation of *Fuentes* and a relegation of *Mitchell* to its narrow factual setting. *Id.* at 723-26. See also notes 173-76 *infra* & accompanying text.

171. See Note, *Mitchell v. W.T. Grant — The Repossession of Fuentes*, 5 MEM. ST. U.L. REV. 74, 82, 89 (1974).

172. GA. CODE ANN. § 46-101 (1974).

173. 95 S. Ct. 719, 726 (1975).

174. *Id.* at 726 (dissenting opinion).

175. *Id.*

continuum of due process procedural requirements.<sup>176</sup>

An examination of specific characteristics of different state creditor remedies can determine where the remedy falls on that procedural continuum. The Court in *Mitchell* provided guidance about which factors may be relevant to such an inquiry by its focus on the factors which distinguish that case from *Fuentes*. While also relying upon the duality of interests in the lien property,<sup>177</sup> *Mitchell* further distinguished *Fuentes* by emphasizing the loss of the vendor's lien upon transfer of the chattel,<sup>178</sup> Louisiana's requirement that the creditor allege specific facts,<sup>179</sup> the debtor's statutory right to seek an immediate dissolution hearing,<sup>180</sup> and Orleans Parish's requirement that a judge review the allegations.<sup>181</sup> Taken alone, no one of those factors seemed sufficient to distinguish *Fuentes*<sup>182</sup>: the interest of the installment seller in *Fuentes* was remarkably similar to that of the vendor in *Mitchell*; judicial review of even specific allegations was of limited due process relevance when the allegations could not be contradicted prior to the deprivation;<sup>183</sup> despite its immediacy, the postdeprivation dissolution hearing did not satisfy the requirement of a prior hearing. The risk of loss of the vendor's peculiar interest, when taken with judicial participation in the process, was sufficient to place the case on the continuum of due process requirements short of the *Fuentes* point requiring a prior hearing, but at a point requiring an immediate opportunity for a post-deprivation hearing.

An interpretation of *Mitchell* and *Fuentes* as presenting a continuum of due process procedural requirements represents a return to

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176. The *Mitchell* court suggested the existence of a continuum in concluding that "*Fuentes* was decided against a factual and legal background sufficiently different from that now before us . . . ." 94 S. Ct. at 1904.

177. "With this duality in mind, we are convinced that the Louisiana sequestration procedure is not invalid, either on its face or as applied." *Id.* at 1899.

178. *Id.* at 1900-01.

179. *Id.* at 1904.

180. *Id.* at 1901.

181. *Id.* at 1904. A number of courts have regarded judicial participation as the factor distinguishing *Fuentes* and *Mitchell*. See *Turner v. Impala Motors*, 508 F.2d 607, 610 (6th Cir. 1974); *Watson v. Branch County Bank*, 380 F. Supp. 945, 971 (W.D. Mich. 1974); *Garcia v. Krause*, 380 F. Supp. 1254, 1258-59 (S.D. Tex. 1974); *Woods v. Tennessee*, 378 F. Supp. 1364, 1366 (S.D. Tenn. 1974); *Jones v. Banner Moving & Storage Inc.*, 78 Misc. 2d 726, 358 N.Y.S.2d 885 (Sup. Ct. 1974).

182. In his dissent in *Mitchell*, Mr. Justice Stewart points out that insufficiency. *Id.* at 1910-14 (dissenting opinion).

183. *Id.* at 1912 (dissenting opinion).

a flexible due process standard<sup>184</sup> under which courts can analyze separately various creditor remedies. *Fuentes* itself can be placed in the mainstream of that flexible approach, for despite its insistence upon a prior hearing, *Fuentes* stated the issue for its consideration to be "whether procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another."<sup>185</sup> *North Georgia Finishing* similarly falls on the continuum of due process procedural requirements under that flexible approach. A number of the *Mitchell* factors were absent in that case<sup>186</sup> and its place on the continuum consequently was nearer *Fuentes*, at a point requiring a prior hearing.<sup>187</sup> Determination of due process requirements, therefore, depends on the "mix" of factors necessary<sup>188</sup> to allow a postdeprivation hearing and on the peculiarities of particular possessory lien statutes.

### PROSPECTUS

The continuing uncertainty surrounding both the analysis of the *Mitchell* decision and the scope of the state action doctrine<sup>189</sup> ren-

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184. "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). See also *Stanley v. Illinois*, 405 U.S. 645, 650 (1972); *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 710 (1945); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 351 (1938).

185. 407 U.S. at 80 (first emphasis supplied).

186. 95 S. Ct. at 722-23. See note 66 *supra*.

187. While relying on *Fuentes* for its decision in *North Georgia Finishing*, the Court sought to avoid the impression of returning to a mechanical prior-hearing rule and couched the due process requirement in terms of "opportunity for an early hearing." 95 S. Ct. at 722 (emphasis supplied). Precisely what that language was intended to mean is unclear. The Court's discussion of *Sniadach* and *Fuentes* seemed to imply that a hearing prior to the taking would be required. *Id.* In distinguishing the facts of *Mitchell*, however, the Court pointed out that the Georgia statute made no provision for a hearing following deprivation, absent payment of a bond. *Id.* at 723. While it might be argued that the Court's choice of language in *North Georgia Finishing* indicated that an early, rather than prior, hearing would in all circumstances be sufficient to fulfill the requirements of due process, the Court's reaffirmation of *Sniadach* and *Fuentes* seemed to negate that interpretation. Nonetheless, the discussion of those latter two cases in *North Georgia Finishing* omitted any specific reference to the requirement of a prior hearing clearly set out in the original cases. See *id.* at 722.

188. See Comment, *Commercial Transactions: The Future of Self-Help Repossession*, 8 JOHN MARSHALL J. PRAC. & PROC. 96, 103 (1974); Note, *Mitchell v. W.T. Grant Co.—The Repossession of Fuentes*, 5 MEM. ST. U.L. REV. 74, 87-88 (1974).

189. The direction the Court will take on the state action question is difficult to predict. With lower courts waiting for guidance, the Court recently denied certiorari to a trio of cases which might have illuminated the issue. *Shirley v. State Nat'l Bank*, 493 F.2d 739 (2d Cir.),

ders uncertain any conclusion about the future of the various possessory liens. The elements of the due process guarantee suggest that possessory liens are vulnerable to constitutional challenges in varying degrees with gradations necessitating separate judicial analyses.

Innkeepers' liens probably will continue to fall to fourteenth amendment challenges. The lack of original surrender of possession necessitates a seizure,<sup>190</sup> and a state action finding usually can be premised upon the state function theory;<sup>191</sup> this same absence of surrender of possession to the lienor prevents the application of the preserve-the-status-quo approach to defeat a finding of debtor deprivation.<sup>192</sup> Further, the landlord-tenant relationship would not seem to provide a basis for finding dual interest,<sup>193</sup> whether the *Mitchell* dual-interest criterion speaks to the presence of a constitutionally cognizable interest and the need for due process,<sup>194</sup> or whether dual interest is merely one of the multiple factors to be considered in assessing the procedural requirements of due process.<sup>195</sup> Therefore, because innkeepers' liens employ state action to deprive an individual of a constitutionally cognizable interest, due process protections are mandated.

Repairmen's and holders' liens appear more immune from due process attack, the former more so than the latter. Both involve an

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*cert. denied*, 95 S. Ct. 329 (1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir.), *cert. denied*, 95 S. Ct. 325 (1974); *Nowlin v. Professional Auto Sales*, 426 F.2d 16 (8th Cir.), *cert. denied*, 95 S. Ct. 328 (1974). Although a decision by the Court in those cases would have aided the state action analysis for possessory liens, it may not have been determinative. Those cases involved challenges to self-help repossession undertaken pursuant to the Uniform Commercial Code. In *Adams* the appeal maintained that the California statutory scheme conferred both judicial and police power on the secured creditor and that when the state abdicated such functions they retained the characteristics of an act of the state. *Adams v. Southern Cal. First Nat'l Bank*, No. 73-1842 (U.S., filed June 7, 1974), *cert. denied*, 95 S. Ct. 325 (1974). See 2 *Pov. L. REP.* ¶ 16,023 (1974). In *Nowlin* the petitioner argued that the statutory scheme delegated the power of the state to private parties, insisting that such *ex parte* procedure violated the most basic concept of due process. *Nowlin v. Professional Auto Sales*, No. 73-1897 (U.S., filed June 19, 1974), *cert. denied*, 95 S. Ct. 328 (1974). See 2 *Pov. L. REP.* ¶ 16,025 (1974). Speculation about the Court's direction, however, cannot overlook the fact that the two most recent appointees, Justices Powell and Rehnquist, voted with the six-person majority in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), a case generally thought to be a step backward from the expansive state action doctrine developed in the equal protection cases. See note 153 *supra* & accompanying text.

190. See notes 107-08 *supra* & accompanying text.

191. See notes 123-39 *supra* & accompanying text.

192. See notes 106-08 *supra* & accompanying text.

193. See text following note 71 *supra*.

194. See notes 53-71 *supra* & accompanying text.

195. See notes 177-88 *supra* & accompanying text.

original voluntary surrender of possession by the debtor,<sup>196</sup> rendering the state function theory of state action unavailable.<sup>197</sup> It has been contended, however, that courts should define state action to include lesser degrees of governmental involvement than a state function;<sup>198</sup> such a broadened definition would encompass many possessory liens in which possession is surrendered. The surrender of possession not only impedes a finding of state action, but also may prevent a finding of debtor deprivation because of the recently developed approach emphasizing the preservation of the status quo.<sup>199</sup> Moreover, if *Mitchell's* dual-interest concept speaks to the presence of a constitutionally cognizable interest, the repairman's peculiar interest in the property may be analogous to that of the Louisiana vendor, thereby overcoming the finding of a protected interest in the debtor.<sup>200</sup>

It has been contended, however, that the interest of the carrier or warehouseman should not rise to the status of a protected dual interest.<sup>201</sup> If the duality of interests is merely a factor determining the procedural requirements of due process, repairmen's liens involve a peculiar risk of loss which suggests the sufficiency of an immediate postdeprivation hearing, but the lien's procedural sufficiency will depend upon what combination of the *Mitchell* factors, including judicial participation, must be present to allow the substitution of a postdeprivation hearing for a predeprivation hearing.<sup>202</sup> Apparently lacking a dual interest, holders' liens would not seem to allow a postdeprivation hearing if due process is required in the enforcement of such liens.

*Mitchell* indicated the need for separate analyses of the due process requirements of creditor remedies and, taken with *Fuentes* and *North Georgia Finishing*, presented a flexible due process standard. Under that standard debtor due process requirements form a continuum, upon which each possessory lien lies. The placement of a particular possessory lien upon the continuum varies according to the specific characteristics of different liens. While the continuum

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196. See notes 74-108 *supra* & accompanying text.

197. See notes 132-39 *supra* & accompanying text.

198. See notes 144-58 *supra* & accompanying text.

199. See notes 98-106 *supra* & accompanying text.

200. See notes 68-69 *supra* & accompanying text.

201. See notes 70-71 *supra* & accompanying text.

202. See notes 177-88 *supra* & accompanying text.

creates a general reference, the three Supreme Court decisions provide little specific guidance for locating other remedies on the continuum. The Court's continuing examination of closely related constitutional issues, moreover, permits uncertainties to remain, the resolution of which may determine the fate of particular possessory liens. The breadth of the state action doctrine remains unclear, the effect of voluntary surrender of possession on the deprivation element has created conflict, and the concept of a dual debtor-creditor interest may speak to the existence of a constitutionally cognizable interest in finding that due process protections attach or may address the form of procedural due process required after the finding that those protections attach. Because of the number of unresolved variables which may determine the specific due process requirements of each remedy, courts should move quickly to crystallize the evolving debtor-creditor due process law into a predictable body of law upon which both debtors and creditors can rely in ordering their affairs.