Creditors' Remedies: Does the State Help Those Who Help Themselves

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CREDITORS' REMEDIES: DOES THE STATE HELP THOSE WHO HELP THEMSELVES?

I. INTRODUCTION

Recent constitutional challenges to creditors' statutory self-help remedies and prejudgment procedures have raised a substantial question concerning the present parameters of the "state action" doctrine, which limits the protection afforded by the fourteenth amendment to those individuals whose rights have been abridged through the activities or conduct of the state. The typical security agreement provides that upon default the secured party can take possession of the asset or chattel from the debtor. Depending upon the law of the jurisdiction, the creditor generally has recourse to one of two statutory methods of repossession: he can act pursuant to a statute authorizing some form of judicial process or official involvement, possibly including the assistance of a state officer or agent; or, under a self-help repossession statute, he can recover the collateral on his own without explicitly invoking the aid of the state itself. Since in many cases neither type of statute provides for notice or a formal hearing prior to repossession, the debtor, even if he admits default, may challenge the validity of the repossession on fourteenth amendment due process grounds. Whether his constitutional claim is adjudicated, however, depends on the court's finding some measure of state action in the injury alleged.


2. The fourteenth amendment provides in pertinent part:

[Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV., § 1.

The Civil Rights Act of 1871, which provides a cause of action for persons whose constitutional rights have been violated, stresses the necessity for state involvement:

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


Action which is merely private in nature is not within the prohibition of the fourteenth amendment nor does the right of action for such private acts fall within section 1983. Civil Rights Cases, 109 U.S. 3 (1883). See Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961).

3. See notes 16-47 and accompanying text infra.

In a series of opinions beginning with *Sniadach v. Family Finance Corp.*, the Supreme Court of the United States implicitly found state action present where the statute provided for some form of judicial process and official assistance. Yet a number of lower courts have recently refused to find statutory self-help remedies unconstitutional on the ground that, absent such visible manifestations of state involvement, there was no state action sufficient to establish a deprivation of constitutional rights. These decisions have the effect of indirectly sanctioning self-help remedies and prejudgment procedures without consideration of the constitutional claims.

The scope of this Comment is confined to an evaluation of whether these lower court holdings with respect to state action are consistent with the pronouncements of the Supreme Court in this area. More specifically, the question posed is whether self-help repossession statutes are immune from fourteenth amendment due process challenges merely because they fail to provide for judicial process or actual involvement by a state official.

This Comment first discusses four Supreme Court cases — *Sniadach v. Family Finance Corp.*, *Fuentes v. Shevin*, *Mitchell v. W. T. Grant's Co.*, and *North Georgia Finishing, Inc. v. Di-Chem, Inc.* — in which the due process question was adjudicated but in which the state action question was not explicitly considered. An attempt is made to identify those elements which could conceivably have given rise to the requisite finding of state action. It will be submitted that while the most obvious nexus between the state and the repossession procedure was the authorization of judicial process or the assistance of state officials, a close reading of the cases suggests an alternative ground upon which state action could have been established — the existence of the statute itself. The focus in the next section is upon *Gibbs v. Titleman*, a recent Third Circuit decision which embodies the typical analysis employed by those courts which reject all allegations of state action in situations involving self-help legis-

11. 502 F.2d 1107 (3d Cir. 1974).
lation. *Gibbs* is contrasted with the Supreme Court cases presented in the preceding sections in order to illustrate the dimensions of the state action controversy.

The Comment then considers three Supreme Court cases, *Shelley v. Kraemer*,12 *Reitman v. Mulkey*,13 and *Moose Lodge No. 107 v. Irvis*,14 which explicitly discuss state action principles outside the context of debtor-creditor relations. It will be submitted, first of all, that these cases demonstrate that state action can exist even where judicial process and active official assistance are lacking, and second, that when read in conjunction with the *Sniadach* series of decisions, they cast substantial doubt upon the resolution of the state action question in self-help cases such as *Gibbs*. A brief final section summarizes the foregoing analysis and raises certain questions concerning the future of the state action requirement in self-help repossession cases.

II. *Sniadach, Fuentes, Mitchell, and North Georgia Finishing: A State Action Analysis*

Any court considering whether a given creditor's remedy involves state action must consider the recent Supreme Court decisions dealing with debtors' due process rights. Although the Court did not explicitly discuss state action principles in those cases, it is reasonable to assume that it found state action present, since otherwise the fourteenth amendment issues could not have been entertained.15

In a 1969 case, *Sniadach v. Family Finance Corp.*,16 the Supreme Court struck down a Wisconsin prejudgment garnishment statute17 on

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### Pertinent provisions of the Wisconsin prejudgment garnishment statute

- **Section 267.02(1)(a)(1):**
  - Provides one instance when the garnishment action may be initiated:
    1. A plaintiff may commence a garnishment action at any time after:
       a. A summons is issued. In an action for damages founded upon contract, express or implied....

### Wisconsin Statutes

  - The requirements as to the filing of the garnishment action are contained in sections 267.10(1), (2), which provide:
    1. Before delivery of the garnishee summons and complaint to be served, a copy of each shall be filed with or mailed to the clerk of the court.
    2. Within 10 days following service of the garnishee summons and complaint on the garnishee and notice thereof to the principal defendant, whichever is later, the plaintiff shall file the original garnishee summons and complaint with the clerk of the court.

### Garnishment Action

- **Id. § 267.10(1), (2):**
  - The garnishment action is initiated by requesting the clerk of the court to issue a garnishee summons. *Id. § 267.04(1).* The statute states:
    1. Upon payment to the clerk of court of a clerk's fee of $2 and a suit tax...
the ground that it violated petitioner’s right to due process of law. An examination of the possible connections of the State of Wisconsin to the garnishment procedure reveals two bases upon which the Court could have established the requisite state action. First and most obvious was the action of the clerk of the court in issuing the garnishee summons — a clear indication of direct involvement by the state. Yet the Court, in describing the Wisconsin garnishment procedure, minimized the impact and importance of the clerk’s role:

What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor’s lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen. 

...to the plaintiff or his attorney; the summons form may be in blank, but must carry the court seal.

Id. The garnishment action is “commenced by the service of a garnishee summons and annexed verified complaint.” Id. § 267.04(3).

The garnishment is accomplished by the plaintiff or his attorney serving the garnishee summons and complaint on the garnishee and, within 10 days after such service, notice of the service and the summons in the principal action is to be served on the principal defendant. Id. § 267.07(1).

The allegations necessary in the garnishee complaint are outlined in section 267.05(1):

The garnishee complaint in a garnishment action before judgment must allege the existence of one of the grounds for garnishment mentioned in § 267.02(1)(a), the amount of the plaintiff’s claim against the defendant, above all offsets, known to the plaintiff, and that plaintiff believes that the named garnishee is indebted to or has property in his possession or under his control belonging to the defendant (naming him) and that such indebtedness or property is, to the best of plaintiff’s knowledge and belief, not exempt from execution.

Id. § 267.05(1).

Section 267.16(1) provides:

No trial shall be had of the garnishment action until the plaintiff has judgment in the principal action and if the defendant has judgment the garnishment action shall be dismissed with costs.

Id. § 267.16(1).

Briefly then, the garnishment procedure before judgment operated in Sniadach as follows: The plaintiff-creditor or his lawyer requested a garnishee summons from the clerk of the court. The blank summons was issued automatically upon the payment of the clerk’s fee and a suit tax. The creditor or his lawyer completed the garnishee summons and also drew the garnishment complaint. A copy of the summons and the complaint was filed or mailed to the clerk of the court. The garnishee was then served, and within 10 days, the defendant was served the above along with a summons in the principal action. Upon service of the garnishee, the wages were frozen, regardless of whether the defendant had yet received his notice of service. See 395 U.S. at 338-39.

18. 395 U.S. at 342.

19. The Wisconsin Supreme Court did not discuss the potential problem of state action. See Family Fin. Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).


It would appear, then, that the clerk performed a purely ministerial function; the issuance of the summons was not discretionary, since the garnishment procedure could be initiated solely upon payment of clerk's fees and a suit tax without any preliminary judicial finding analogous to the concept of probable cause. In short, once the clerk had mechanically issued the blank summons, the operation of the statute was left to the control of private parties.

Since the clerk performed a mere perfunctory and passive role in initiating the garnishment procedure, it is arguable that the authorizing statute itself was of primary importance with respect to state action. To be sure, several factors militate against concluding that the presence of the statute alone was sufficient for the purposes of state action. For example, the garnishment procedure authorized by the Wisconsin statute

22. It should be explained that the defendant in Sniadach argued as one ground of relief in the state court that there had been an assumption of judicial powers by the clerk of the court in violation of article 7, section 2 of the Wisconsin Constitution. 37 Wis. 2d at 174-77, 154 N.W.2d at 266. The Wisconsin Supreme Court apparently sanctioned an extension of the power of the clerk beyond that which existed according to the terms of the statute. See note 17 supra. Merely at the request of the creditor and the payment of fees, a blank summons would be issued to the creditor by the clerk. The completed summons and the garnishee complaint would be filed with the clerk prior to service on the garnishee and the defendant. Significantly, the statute provided that failure to comply with the filing requirements would require that the garnishment action be dismissed. See id. Thus, although the Wisconsin Supreme Court assumed that a clerk may dismiss the action for failure to comply with section 267.10 of the Wisconsin statute or with the requisites of the garnishee complaint contained in section 267.05(1), such power is not expressly authorized to the clerk by the statute.

And, as a practical matter, the garnishment may have already gone into effect prior to the dismissal. The majority opinion of the Wisconsin Supreme Court apparently viewed the conduct of the clerk as ministerial. See 37 Wis. 2d at 176-77, 154 N.W.2d at 266. The dissenting opinion agreed with the majority on this point, stating:

I agree with the court's rationale that the only determination required of the clerk is a ministerial one, that is, it is only necessary for the plaintiff to set forth in the language of the statute the basis upon which the summons is requested. This is not a determination of probable cause. It is not a judicial function and is not constitutionally prohibited [by the Wisconsin Constitution].

Id. at 185, 154 N.W.2d at 271 (Heffernan, J., dissenting).

It is submitted that the activation of the garnishment procedure required no affirmative action whatsoever once the blank summons was issued. The wages could have been frozen regardless of the possibility of dismissal imposed by section 267.10(3).


25. Arguably, the form of the garnishee summons created substantial state action, not by the act of any state official, but by indirect means. The form of the summons provided for a caption entitled, "State of Wisconsin County." The notice provision in the form began, "The State of Wisconsin, to Said Garnishee." See Wis. Stat. Ann. § 267.04(2) (Supp. 1975). The form also contains the seal of the court. Id. The use of such a form would create the appearance of affixing the state's imprimatur to the procedure.

Although it may be that this form could be annexed to the conduct of the clerk of the court, thereby causing his ministerial act to become greater direct state involvement, it would appear that this form is, in substance, only a part of the statutory procedure and has no relationship with the involvement of the clerk which retains its de minimis character.
was permissive; it did not compel the creditor's use of the garnishment machinery but merely made it available. Since it allowed a private decision as to whether it would be employed, it in no way forced upon the creditor a state-prescribed remedy. But significantly, the Wisconsin statute arose in derogation of the common law of the state, creating a right in the creditor unknown prior to its enactment. Thus, it can be inferred that the state, in enacting such a remedy, had indeed thrust itself into the debtor-creditor arena.

The second creditor-remedy case was *Fuentes v. Shevin*, decided in 1972. In *Fuentes*, the Supreme Court held Florida and Pennsylvania replevin statutes unconstitutional in that they denied procedural due process. *Fuentes* involved a creditor remedy which, in two obvious aspects, represented some connection with the state. First, there were the actions of the clerk of the court in Florida and the prothonotary of the

26. See id. § 267.02(1) (a)(1). For the text of this section, see note 17 supra. 27. Skalecki v. Frederick, 31 Wis. 2d 496, 143 N.W.2d 520 (1966); Markman v. Becker, 6 Wis. 2d 438, 95 N.W.2d 233 (1959); Mahrle v. Engle, 261 Wis. 485, 53 N.W.2d 176 (1952); State v. Pauli, 126 Wis. 65, 104 N.W. 1007 (1905). 28. 407 U.S. 67 (1972). Decided together with *Fuentes* was *Parham v. Cortese* on appeal from the United States District Court for the Eastern District of Pennsylvania. *Id.* For the District Court opinions in these cases, see *Parham v. Cortese*, 326 F. Supp. 127 (E.D. Pa. 1971); *Fuentes v. Shevin*, 317 F. Supp. 954 (S.D. Fla. 1970).

29. Section 78.01 of the Florida Replevin statute provided:

Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided . . . .


Section 78.07 provided:

Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be repleived conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff in the action.


The Pennsylvania statute provided authorization for writs of replevin:

It shall and may be lawful for the justices of each county in this province to grant writs of replevin, in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law.

PA. STAT. ANN. tit. 12, § 1821 (1967).

30. A significant aspect of *Fuentes* was that it clearly established that *Sniadach* was not limited to situations where the property taken was considered to be necessary to the debtor. 407 U.S. at 89. The Court discussed the issue in the following manner:

No doubt, there may be many gradations in the "importance" or "necessity" of various consumer goods. Stoves could be compared to television sets, or beds could be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. It is not the business of a court adjudicating due process rights to make its own critical evaluation of [consumer] choices and protect only the ones that, by its own lights, are "necessary."

*Id.* at 89–90 (footnote omitted).
court in Pennsylvania in issuing the writs of replevin.\textsuperscript{31} Second, state officials executed the writs in both states,\textsuperscript{32} a factor absent in \textit{Sniadach}.\textsuperscript{33}

While it would appear that the two-pronged involvement of the state — the action of the clerk plus the seizure by state officials — would alone support a finding of state action,\textsuperscript{34} the Court, as in \textit{Sniadach}, emphasized the real lack of knowing and active state participation in the replevin procedure:

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 participates in the decision to seek a writ; no state official reviews the basis for the claim to repossess; 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.\textsuperscript{35}

This language supports the proposition that here, as in \textit{Sniadach}, the actual involvement of state officials was not the only possible basis of

\begin{itemize}
\item[31.] See note 29 supra. In Pennsylvania the procedure by which the replevin was to be obtained was described in Rule 1073 of the Pennsylvania Rules of Civil Procedure:
\begin{itemize}
\item[(a)] An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with
\begin{itemize}
\item[(1)] the plaintiff’s affidavit of the value of the property to be replevied, and
\item[(2)] the plaintiff’s bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if plaintiff fails to maintain his right of possession of the property, he shall pay to the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.
\end{itemize}
\end{itemize}
\end{itemize}

\begin{itemize}
\item[32.] The Florida statute provided:
\begin{itemize}
\item[(a)] The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.
\end{itemize}
\end{itemize}

\begin{itemize}
\item[33.] PA. R. Civ. P. 1077(b).
\end{itemize}

\begin{itemize}
\item[34.] The Court narrowed the issue in the following manner:
\begin{itemize}
\item[(a)] The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing \textit{before} the state authorizes its agents to seize property in the possession of a person upon the application of another.
\end{itemize}
\end{itemize}

\begin{itemize}
\item[35.] Id. at 81.
\end{itemize}
state action. First, since the role of the state was deemphasized, the statute itself emerges as a possible connection between the state and the debtor. Second, the Court’s implication that the state, having enacted legislation to establish a creditor remedy procedure, had a concurrent duty to conform the procedure to constitutional standards, emphasized the importance of the state’s enactment of procedures which make certain remedies available to private parties.

Of the recent debtor-creditor cases decided by the Supreme Court, Mitchell v. W. T. Grant’s Co. presented perhaps the clearest case of active judicial process and official involvement. In Mitchell, the plaintiffs unsuccessfully attacked Louisiana’s sequestration procedure on fourteenth amendment due process grounds. Here, as in Fuentes, the writ was executed by a sheriff, but unlike either Sniadach or Fuentes, the writ of sequestration was issued by a judge upon a “clear showing” of cause rather than by a clerk of the court. Nevertheless, the importance of the statute itself as a basis for state action should not be minimized. The Court’s discussion, for instance, revealed an awareness of the state’s role as an active shaper and creator of rights made available to private parties through the authorizing statute. Even more significantly, the Louisiana statute provided that in all areas outside Orleans Parish, the situs of Mitchell, only the clerk of the court, not a judge, could issue the writ of sequestration. In light of Sniadach and Fuentes, it is reasonable to assume that in a great many cases arising under the statute, the state’s involvement would be characterized as passive rather than active, the clerk’s ministerial role replacing the discretion of the judge, and that consequently the legislation itself would emerge as an alternative basis of state action.

36. See text accompanying note 35 supra.
38. The applicable Louisiana statute provided:

When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.

LA. CODE CIV. PRO. ANN. art. 3571 (West 1961).
39. In an opinion by Mr. Justice White, who dissented in Fuentes, 407 U.S. at 97, the Court held that the statutory sequestration procedure complied with procedural due process, in that it “effects a constitutional accommodation of the conflicting interests of the parties.” 416 U.S. at 607.
40. See LA. CODE CIV. PRO. ANN. art. 3504 (West 1961).
41. Id. art. 281-86 (West 1960).
42. For example, in discussing the potential depreciation in the value of the goods while in the buyer’s possession, the court noted that “[t]he State of Louisiana was entitled to recognize this reality and to provide somewhat more protection for the seller.” 416 U.S. at 608.
43. Id. at 606. See LA. CODE CIV. PRO. ANN. art. 281-83 (West 1960).
Finally, in *North Georgia Finishing, Inc. v. Di-Chem*, the most recent Supreme Court case in this area, the Court declared a Georgia statute invalid for failure to provide adequate notice and hearing in connection with the issuance of the writ. Here a corporate bank account was impounded by a writ of garnishment issued by a court clerk and without participation by a judicial officer. Although the action of the court clerk would appear indicative of active state participation in the garnishment process, the Court minimized its importance by contrasting the clerk's purely perfunctory role with the more meaningful judicial determination in *Mitchell*. Once again, it would seem that the mere presence of the garnishment statute, investing certain rights to private parties, cannot be disregarded as a source of state action.

To summarize, in *Sniadach*, *Fuentes*, *Mitchell*, and *North Georgia Finishing* the issue of state action never reached the surface of the Supreme Court's discussion, yet its decision to adjudicate plaintiffs' constitutional claims reveals that the Court must have found the requisite state action present. Considered as a whole, the four cases demonstrate that the state action requirement is clearly fulfilled where the statute authorizes some form of judicial process or actual involvement by a state official. Furthermore, an analysis of the Court's reasoning suggests an alternative ground sufficient to support a finding of state action — the existence of state legislation itself.

III. *Gibbs v. Titleman* — No State Action

In light of the state action principles implied by the *Sniadach* series of decisions, it is useful at this point to contrast a typical lower court self-help repossession case in which state action was found lacking. *Gibbs v. Titleman* involved a due process attack on certain provisions of the

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44. 419 U.S. 601 (1975). As noted by Justice Stewart in his concurring opinion, *North Georgia Finishing* marked the continuing vitality of *Fuentes*, the demise of which had been reported in *Mitchell*. *Id.* at 608 (Stewart, J., concurring).

45. The relevant portions of the Georgia statute are as follows:

In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the... wages of any person residing in this State... Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained.


46. Section 46-102 of the garnishment statute provides:

The plaintiff, his agent, or attorney at law shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due...

*Id.* § 46-102.

47. 419 U.S. at 607.

48. 502 F.2d 1107 (3d Cir. 1974).
Pennsylvania Motor Vehicle Sales Finance Act (Motor Vehicle Act) and the Pennsylvania Uniform Commercial Code. Each of the plaintiffs financed the purchase of an automobile either through an installment sale contract or a loan agreement which required periodic payments over a specified period of time. As collateral security for the indebtedness, each created a security interest in his automobile. The agreements provided that in event of default the creditor would have the right to retake the automobile with or without judicial process. The substance of the contractual provisions conformed to the standards set by the two Pennsylvania statutes, which in essence provided that, if the creditor chose not to initiate formal court proceedings, he could, upon default, immediately seize the debtor's property, so long as the repossession was effectuated in a lawful manner.

The plaintiffs contended that the state statutes were unconstitutional insofar as they permitted creditors, upon default by the debtor, to repossess automobiles peaceably without resort to judicial process. On these facts the district court found that there was sufficient state involvement to constitute state action and held that lack of prior notice and an opportunity to be heard rendered the extrajudicial repossession unconstitutional. On appeal, however, the Third Circuit found that no state action was present, thus precluding a reconsideration of the due process question on the merits. Before discussing the Third Circuit opinion, a brief review of the lower court opinion is necessary.


When the buyer shall be in default in the payment of any amount due under a motor vehicle installment sale contract or when the buyer has committed any other breach of contract, which is by the contract specifically made a ground for retaking the motor vehicle, the seller or any holder, who has lawfully acquired such contract, may retake possession thereof. Unless the motor vehicle can be retaken without breach of the peace, it shall be retaken by legal process, but nothing herein shall be construed to authorize a violation of the criminal law.

Id. § 623(A) (emphasis added).


Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 9-504.

Id. § 9-503(1) (emphasis added).

51. 502 F.2d at 1109.

52. See notes 46 & 47 supra.


54. Id. at 54-59.

55. 302 F.2d at 1110.
A. The District Court Opinion

The district court defined the state action issue as requiring a determination of whether repossession by the defendants, who were private persons, was performed "under color of any state law, statute, ordinance, regulation, custom or usage." Noting the division of authority on this issue, the court summarized and commented upon the principal bases which courts have utilized to support a finding of no state action.

The court first considered the proposition that self-help procedures have a "well-established heritage in the common law, which has precedential value that exists notwithstanding the remedy's statutory codification." In other words, since self-help actions were founded at common law long before they were codified, the mere existence of a repossession statute would not constitute state action. The district court, however, found self-help repossession to be an historically unsound remedy. In the opinion of the court, the alleged precedential value of self-help actions was nil, for while they may have fulfilled a valid need in past ages, their importance was minimal due to the fact that modern, sophisticated judicial systems are entirely capable of redressing those injuries which result from the debtor-creditor relationship. It would appear, then, that by enacting self-help legislation, the state had preserved a remedy which historically was bound for extinction.

The second basis upon which courts have held state action to be lacking in self-help repossession cases is the passive nature of the state's involvement. Such passive involvement is present "where a statute merely

57. See cases cited in 369 F. Supp. at 45.
59. Self-help remedies were known at common law as distress or distraint. 369 F. Supp. at 45-46.
60. In Fuentes, counsel for Florida argued that since the constitutionality of the replevin procedure had been recognized even when it was contained only in the common law, it was not now subject to attack. 32 L. Ed. 2d 929. This argument, it is submitted, failed to heed the differences between the replevin statutes and their common law counterparts. One important distinction, which the Fuentes Court itself noted, was that the statutes provided for an ex parte proceeding, whereas the common law did not. 407 U.S. at 78.
61. 369 F. Supp. at 47. The court quoted Professor Street discussing self-help, in stating:

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 certainly 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.

Id. at 46, quoting 3 T. Street, The Foundations of Legal Liability 285 (1906).
allows for a certain act of a private individual to occur," whereas active involvement manifests itself where a statute "compels an event" or where there is direct action by a state official. The district court rejected this distinction, declaring that since self-help statutes give the creditor an advantage over the debtor, they clothe the creditor with a "power which can only truly be consistent with the state." In viewing the issue in this manner, the court relied heavily upon language in Fuentes which directed itself to state power, and which the district court construed as "not the power to have a deputy sheriff or constable act as your collection agency, [but rather] the power to decide your rights are greater than another's." Simply by permitting self-help repossession, concluded the court, the state extended to the creditor a license to perform a state function, and as such, his actions were reviewable under the fourteenth amendment.

B. The Court of Appeals Decision

In resolving the state action question on appeal, the Third Circuit summarily distinguished Gibbs from Sniadach, Fuentes, and Mitchell, stating that, unlike those Supreme Court cases in which state action was clearly present, the seizures complained of in Gibbs "were effected by private individuals without the aid of any state official." Finding no direct state involvement in either of the Pennsylvania statutes in question, the court addressed itself to two claims upon which plaintiffs had based their claim of state action:

63. 369 F. Supp. at 47.
64. Id.
65. 369 F. Supp. at 48. In rejecting the active-passive distinction, the district court stated: "This power has no less an impact on the person whose goods are taken when the state does not compel the power be used." Id. As a result of this rejection, the court refrained from deciding whether the existence of the Motor Vehicle Sales Finance Act constituted direct or passive state action. Id. at 47-48 n.17.
66. Id. at 48.
67. 407 U.S. at 93. See text accompanying note 35 supra.
68. It is arguable that the district court misinterpreted the term because the power referred to in Fuentes was not the power to decide rights, but rather the power or ability of the state to control the operation of its own legal processes. Nevertheless, the idea expressed in the district court's interpretation is of some import. While the reposseor may not be "clothed" in the sense that he acts qua state official, he does act with the support of state law. In other words, he is clothed with a statutory justification for his acts committed as an individual.
69. 369 F. Supp. at 48.
70. 502 F.2d at 1110. See also Bond v. Dentzer, 494 F.2d 302, 305 (2d Cir. 1974), where the Second Circuit responded similarly. This summary distinction, especially in light of the minor action of the clerk in Sniadach, denotes a judicial disposition to immediately escape the broad range of Sniadach and Fuentes. It is difficult to understand why a court cannot analyze the virtually non-existent action by a state official in Sniadach and conclude that, but for the statutory procedure, there was no direct state official involvement. Compare the wage assignment statute in Bond, 494 F.2d 308, with the garnishment statute in Sniadach. See note 17 supra. By omitting the act of any state official, New York had accomplished a procedure virtually identical to that struck down in Sniadach.
71. 502 F.2d at 1110.
1) By comprehensively regulating the field of automobile financing, without prohibiting the practice of self-help repossession, the State of Pennsylvania has become so involved and has so encouraged this private remedy that it becomes "state action," or

2) by allowing the practice of self-help repossession, the State of Pennsylvania has abdicated or delegated to private individuals a traditional state function, thus infusing the private act of repossession with "state action."

The court rejected plaintiffs' first contention on numerous grounds. First, because self-help repossession statutes had been permitted at common law prior to the enactment of the Motor Vehicle Act, the codification of the remedy failed to change the long-established rights of the creditor. Similarly, the court insisted with little comment that private repossessions were not infused with state action merely because the state chose to enact section 9–503 of the Uniform Commercial Code, which codified the common law self-help remedy as positive law.

Second, the court characterized the Motor Vehicle Act as neutral on its face, since it neither "compelled nor prohibited" the contested seizures. Under the Act, self-help repossession was a private remedy enforced by private conduct pursuant to a privately negotiated agreement. The impetus for the alleged constitutional violation being private, there was no significant state involvement. Indeed, the court stressed that to hold that every attempt on the part of the state to regulate comprehensively an area of private conduct gives rise to state action would virtually obliterate the distinction between state and private action. Finally, the court noted that the intent of the provision was not to encourage the creditor's conduct but rather to "curb the abuses associated with private repossession" by limiting the situations where such a remedy was possible. In the opinion of the Third Circuit, then, whatever encouragement emanated from the statutes was only "indirect and highly conjectural."

In rejecting the plaintiffs' second contention — that state action existed in the delegation to private individuals of a function traditionally performed by the state — the circuit court stressed that, since the common law had

72. Id.
73. Id. at 1111.
76. 502 F.2d at 1110.
77. Id. at 1112.
78. Id. at 1111–12.
79. Id. at 1111.
recognized repossession as a private remedy, it never had been a traditional function of the state. In line with this view the court narrowly interpreted "state action," as used in Fuentes, to mean action by "state officers to accomplish the seizures for the creditor," thus explicitly rejecting the more expansive reading of the district court. In the opinion of the Third Circuit, then, Pennsylvania had not delegated a traditional state function to the creditor in codifying the self-help remedies.

Thus, while the district court in Gibbs found in self-help repossession statutes a repository of state involvement, the court of appeals found such statutes wholly devoid of any element which would support a finding of state action. Significantly, both courts found the Sniadach line of cases germane to their respective, albeit contrary, purposes. The substance of the lower court opinion would appear to buttress the view that, even in the absence of judicial process or actual state involvement, the mere existence of the statute is a sufficient manifestation of state action. Contrariwise, the court of appeals took the view that it is precisely the more visible and obvious incidents of state involvement which are essential to give rise to a finding of state action.

IV. A Resolution of the State Action Issue

Given the distinction between self-help statutes and those provisions which authorize some measure of actual state involvement, it would seem that the Gibbs court was on solid ground in summarily distinguishing Sniadach, Fuentes, and Mitchell from the facts before it. It is submitted, however, that three Supreme Court cases dealing explicitly with the state action question in contexts other than that of debtor-creditor rights, Shelley v. Kraemer, Reitman v. Mulkey, and Moose Lodge No. 107 v. Irvis together support the proposition that some form of judicial process or actual involvement by a state official is not essential for a finding of state action. Consequently, these cases shed light upon the potential dimensions of state action in the Sniadach series of decisions and cast serious doubt upon the Third Circuit's disposition of the state action question in Gibbs.

80. Id. at 1114.
81. See text accompanying note 35 supra.
82. 502 F.2d at 1114. The court focused on language in a footnote in Fuentes which seemingly supported this holding: "[A]t common law a creditor could 'invoke state power' through the action of debt or detinue or alternatively a 'creditor could . . . proceed without the use of state power, through self-help, by 'distraining' the property before a judgment.'" Id., quoting 407 U.S. at 79 n.12 (emphasis added by the Gibbs Court). In addition, the dissent of Mr. Justice White, 407 U.S. at 12, was read as clearly distinguishing between state action and purely private action such as repossession. 502 F.2d at 1114.
83. See text accompanying note 64 supra.
84. 334 U.S. 1 (1948).
A. Shelley, Reitman, and Irvis

Petitioners in Shelley v. Kraemer\(^87\) were blacks who had purchased houses from white owners notwithstanding the fact that the properties were subject to racially restrictive covenants. In an action brought by other landowners whose properties were also subject to the agreement, the state court enforced the covenant and divested the petitioners of title.\(^88\) The Supreme Court held that even though the state had not created the property restrictions by statute or local ordinance, and even though the discrimination was in the first instance pursuant to a private agreement, the state's enforcement of the covenants brought the case within the equal protection clause of the fourteenth amendment.\(^89\)

In reviewing the state action principles to be applied, the Court emphasized that the action of state courts and judicial officers in their official capacities, including the action of state courts in enforcing substantive common law rules,\(^90\) was state action for purposes of the fourteenth amendment.\(^91\) Yet the Court appeared to broaden this definition by suggesting that state action included "exertions of state power in all forms,"\(^92\) and that "state authority in the shape of laws, customs, or judicial or executive proceedings" was void if violative of the fourteenth amendment.\(^93\) The Court expressly characterized the state's common law as state law.\(^94\)

The question of whether, as Shelley intimated, state codification of a common law right, as opposed to the state's enforcement of that right, was

\(^87\) 334 U.S. 1 (1948).

\(^88\) Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946).

\(^89\) Id. at 20.

\(^90\) Id. at 17. The cases cited by the Shelley Court for this proposition all involved situations where the common law was unconstitutional as applied. See, e.g., Bridges v. California, 314 U.S. 252 (1941) (conviction for common law contempt violative of constitutional rights of freedoms of speech and of press); American Fed'n of Labor v. Swing, 312 U.S. 321 (1941) (common law policy limiting peaceful picketing by labor unions abridges constitutional right of freedom of discussion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (conviction for common law breach of the peace violative of constitutional rights of freedom of speech and of religion). Nonetheless, it would be difficult to strike down an argument that common law may be unconstitutional in substance. See 334 U.S. at 19 & n.22.

\(^91\) 334 U.S. at 14.

\(^92\) Id. at 20.

\(^93\) 334 U.S. at 14, quoting the Civil Rights Cases, 109 U.S. 3, 17 (1883). In a footnote, the Shelley Court summarized the different descriptions of state action contained in the Civil Rights Cases:

["The operation of State laws, and the action of State officers executive or judicial"; "State laws and State proceedings"; "State law ... or some State action through its officers or agents"; "State laws and acts done under State authority"; "State laws, or State action of some kind"; "such laws as the States may adopt or enforce"; "such acts and proceedings as the States may commit or take"; "State legislation or action"; "State law or State authority."]


\(^94\) See 334 U.S. at 17 n.19 where the Shelley Court specifically refers to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), stating: "it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State."
an exertion of "state power" and thus state action was considered in a different light by the Court in Reitman v. Mulkey. Reitman involved an equal protection attack upon section 26 of article one of the California constitution, which prohibited the state from limiting the ability of any person to transfer real property as he or she may desire. Plaintiffs alleged that the defendants had refused to rent them an apartment solely because of their race. Although no state officials were involved, the Court affirmed the California Supreme Court ruling that the enactment of the section connected the state to the private discrimination since it effectively encouraged the defendant's conduct.

The California Supreme Court had found that the immediate design and intent of section 26 was to nullify existing state laws concerned with the right of private persons to discriminate in transactions involving the transfer of real property. Thus, section 26 established "a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment should state action be involved." The second part of the California decision had sought to determine whether there was the necessary "significant state involvement." In deciding this issue in the affirmative, the California court had analyzed prior Supreme Court decisions and found that state action could exist even if there were only encouragement of the private conduct and not compulsion. According to the California Supreme Court, the legislative action "authorized private discrimination." Therefore, the California

95. 387 U.S. 369 (1967).
96. The provision states in pertinent part:
   Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses. CAL. CONST. art. I, § 26. The provision was submitted to the California electorate as proposition 14 in a statewide ballot in 1964. 387 U.S. at 370-71.
97. 387 U.S. at 372.
100. 64 Cal. 2d at 534, 413 P.2d at 829, 50 Cal. Rptr. at 885.
101. Id. at 536, 413 P.2d at 830, 50 Cal. Rptr. at 886.
102. Id. at 540, 413 P.2d at 832, 50 Cal. Rptr. at 888. The test laid down by the Supreme Court in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), was whether to "some significant extent the state in any of its manifestations has been found to have become involved in [the private conduct]." Id. at 722. The California court had to determine the involvement of the state was significant since it had conceded that a state was permitted a neutral position and that there was no requirement under the fourteenth amendment that a state was bound to forbid private discrimination. 64 Cal. 2d at 540, 413 P.2d at 832, 50 Cal. Rptr. at 888. It is interesting to note that in the Supreme Court decision Justice Harlan believed that there was "no question" as to the presence of state action, seemingly on the basis of the existence of section 26 itself. 387 U.S. at 392 (Harlan, J., dissenting).
104. 64 Cal. 2d at 542, 413 P.2d at 837, 50 Cal. Rptr. at 890.
court concluded that the state had become unconstitutionally involved and that consequently, section 26 was violative of the fourteenth amendment.105

In upholding the state court decision, the Supreme Court described the rationale underlying the encouragement theory in the following manner:

The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of state government. Those practicing racial discriminations need no longer solely rely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.106

The principle espoused in Reitman, then, was that because of some form of state authority, private persons who would normally act on the basis of personal beliefs could now point to external justification for their conduct in the form of expressly manifested authority.

The limitations of the "encouragement" theory were considered by the Supreme Court in Moose Lodge No. 107 v. Irvis.107 In that case, plaintiff, a black guest at Moose Lodge, asserted that there had been a violation of his equal protection rights as a result of defendant's refusal to serve him alcoholic beverages. State action was allegedly founded on the licensing by the Pennsylvania State Liquor Control Board of private organizations such as Moose Lodge for the dispensing of alcoholic beverages.108 The Court, with four members dissenting, held state action lacking on the facts of this case.

Initially, the Irvis Court noted that the "impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination."109 Yet the court stressed that not every form of state involvement — such as the regulations at issue or state benefits and services — would constitute state action for purposes of the fourteenth amendment.110 Where there existed a private

105. Id. at 543, 413 P.2d at 837, 50 Cal. Rptr. at 890.
106. 387 U.S. at 377. This language need not be limited to state constitutional provisions. This "authority" can include state statutes as well as state constitutions, since such statutes offer external justification to private parties to make certain decisions regarding their course of conduct. See, e.g., Adickes v. Kress & Co., 398 U.S. 144, 197 (1970) (Brennan, J., concurring in part and dissenting in part), where Justice Brennan apparently viewed the Reitman rationale as applicable to both constitutional and legislative enactments.
108. Id. at 165.
109. Id. at 172. It should be noted that this language focuses upon the impetus for the private conduct, stating that it does not necessarily have to arise from the state. However, in the self-help cases, such impetus may in fact be created by the existence of the statutory provisions and therefore not "purely private." See id. at 173. A creditor, with knowledge of and on the authority of the self-help legislation, may in fact initiate self-help procedures. It is submitted that without such legislation, this self-help conduct may not have occurred.
110. Id. at 173. It may be significant that, as examples of benefits and services, the Irvis Court listed electricity, water, and police and fire protection, that is, necessities of life. It should be noted that such services are also given to religious institu-
impetus for the conduct, the state must be "`significantly involved . . . with
the invidious discrimination.'"

The Court found that with one exception, the regulations of the Pennsylvania Liquor Control Board played absolutely no part in establishing or enforcing the discriminatory membership policies of Moose Lodge. 112

The one exception which gave rise to state action grew out of the Board's promulgation of a regulation requiring the private organizations which had received licenses to comply strictly with their own constitutions and by-laws. 113 Since the constitution and by-laws of Moose Lodge contained provisions and policies which were discriminatory with respect to membership and guest requirements, 114 the regulation in effect required Moose Lodge to enforce discriminatory policies, thereby giving state approval to them. Consequently, the Court enjoined the application of the regulation as violating the equal protection clause. 115

Thus, in Shelley, Reitman, and Irvis, the Supreme Court found state action present even in the absence of official involvement or judicial process. In Reitman the Court approved the proposition implied in Shelley that the existence of state law could itself be state action due to its influence upon the decisionmaking processes of private persons. While Irvis might be described as imposing a qualitative limitation upon the encouragement doctrine, it is submitted that the two cases are generally consistent. Taken together, Reitman and Irvis suggest that where state law gives no impetus to private conduct, there must be significant state involvement, but where the state law encourages the private conduct, even incidentally, the law itself will support a finding of state action.

B. Shelley, Reitman, and Irvis Applied to Gibbs

It is submitted that Shelley, Reitman, and Irvis should be determinative of the state action issue in self-help cases such as Gibbs, both as direct precedent and for the support they provide for the state action principles implied in Sniadach and its successors. Shelley stands for the proposition...
that state law, including common law, whether it creates a right or merely enforces a previously existing right, must conform to the requirements of the fourteenth amendment.\footnote{116} It is thus arguable that any state law qualifies as state action per se.\footnote{117} Consequently, the Gibbs conclusion that it is the statutory provision for judicial process or the participation of state officials that alone gives rise to state action is difficult to justify.

Shelley is also significant with respect to the reasoning of a number of lower courts that the common law existence of the right to self-help repossession negates state action even if the law is subsequently codified.\footnote{118} Shelley held that the common law of a state is to be considered as state law;\footnote{119} thus, whether codification of the common law exists or not, there is state action.\footnote{120} Due to the common law origins of self-help repossession, it would seem that Gibbs necessarily involved state action.

Reitman also should control the state action question involved in Gibbs. Underlying Reitman, which involved a neutral constitutional provision not expressly or directly encouraging private discrimination,\footnote{121} was the rationale that through such legislation the state provided an external justification for private conduct.\footnote{122} The self-help cases, by contrast, involve legislation which is not in any sense neutral but expressly authorizes private conduct which deprives the debtor of property without notice or hearing. It is submitted that this is a more compelling factual situation than that which existed in Reitman: if encouragement can be found where the legislation prescribes no particular activity whatsoever, then certainly it is present where statutory authority exists for the precise course of conduct undertaken by the creditor. Hence, Reitman should control outright the theory of state action set forth in the self-help cases.

In much the same sense, self-help statutes differ noticeably from the liquor control provisions upheld in Irvis. In Irvis the Court appeared to limit the applicability of the “encouragement” theory to those situations in which the state statute bore some demonstrable relation to the contested private conduct.\footnote{123} While it is at least arguable that the regulatory scheme in Irvis had only a tenuous connection with the private discrimination of Moose Lodge, self-help provisions do influence the conduct of the creditor and the rights arising from his or her relationship with the debtor. Indeed, it is important to remember that to the extent that the Irvis statute af-

\begin{itemize}
\item \footnote{116}{See notes 90-94 and accompanying text \textit{supra}.}
\item \footnote{117}{Id.}
\item \footnote{118}{See note 58 and accompanying text \textit{supra}.}
\item \footnote{119}{See note 94 and accompanying text \textit{supra}.}
\item \footnote{120}{Prior to the landmark case of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), wherein the Supreme Court held that a federal court sitting in a diversity case was bound to apply the common law of the state, there may have been some question as to whether “state law” for purposes of the Civil Rights Act was to be construed as it was defined in Swift v. Tyson, 41 U.S. 1 (1842) as applying only to the positive law of a state, \textit{i.e.}, legislation.}
\item \footnote{121}{See note 96 \textit{supra}.}
\item \footnote{122}{See text accompanying note 106 \textit{supra}.}
\item \footnote{123}{See notes 110 & 111 and accompanying text \textit{supra}.}
\end{itemize}
fected the Moose Lodge owner's discriminatory conduct, its application was enjoined.124 Thus, since in self-help cases the creditor is authorized by the statute to act in a certain manner, this should satisfy the more stringent encouragement test proposed in Irvis.

In Gibbs, however, the Third Circuit found Reitman inapplicable125 and determined that Irvis controlled the situation at bar. Reitman was distinguished as "vastly dissimilar" since it involved a state constitutional amendment authorizing private conduct theretofore prohibited, whereas the self-help remedy in Gibbs had been authorized at common law long before its codification.126 So, too, since the creation and enforcement of, as well as the motivation for, self-help repossession were private in nature, there was no "significant" state involvement as required under Irvis.127

It is submitted, however, that the court failed to perceive that self-help statutes do have a telling effect upon the conduct of private parties. The creditor, approached by the debtor whose property has been seized, can say: "Look, the state lets me do this, the law says so, I have the right." Thus, the debtor is faced with a situation in which state authority has apparently validated the creditor's conduct; it is conceivable that the

124. See notes 113-15 and accompanying text supra.

 Defendants in Gibbs sought to distinguish Reitman and Adickes as racial discrimination cases. The district court rejected this distinction, stating:

Since Congress has chosen not to distinguish between constitutionally protected rights in § § 1983, this Court can only assume that the amount of state involvement necessary to constitute "color of state law" for a deprivation of one constitutional right would equal the amount of state involvement necessary for another constitutional right.

369 F. Supp. at 49.

But the suggestion that the standard against which state action is measured is different in equal protection claims than it is in due process claims has arisen in several federal court cases. See, e.g., Jackson v. The Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Lefcourt v. Legal Aid Soc'y, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); Wolin v. Port of New York Auth., 382 F.2d 83, 89 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1969). See also Powe v. Miles, 407 F.2d 73, 81-82 (2d Cir. 1968). At least one commentator has also suggested that there exists such a double state action standard; but he has also pointed out that as yet, the Supreme Court has not addressed itself to this possibility. See Comment, State Action and the Burger Court, 60 Va. L. Rev. 840, 860-61 (1974).

126. 502 F.2d at 1111.
127. Id. at 1110-11. The court cited Irvis for the proposition that where the impetus for the act is private, the state must be significantly involved. But, two questions arise. First, the court assumed the impetus for the act was private, the assumption being made on the basis of certain contractual provisions in the standard sales contracts. See 502 F.2d at 1110. See also id. at 1109 n.5. It appears that the question of impetus would be a question of fact, since the statutes did probably exist prior to the formulation of the standard sales contracts. Thus, this case is distinguishable from Irvis. Second, it also appears that the Reitman Court mandate for a court to assess the potential impact of official action in determining whether the state has significantly involved itself . . . ." in the private conduct was ignored. 387 U.S. at 380.
debtor, observing the seemingly insurmountable obstacle imposed against recovery of his property, will fail to take any action in response. In Sniadach, Fuentes, Mitchell, and North Georgia, some process was begun whereby the debtor at some future time would be able to present the facts as he or she saw them. In self-help situations, however, state law supports apparently "absolute" repossession. Purely private conduct, then, is not that at all. Rather, to the debtor, it appears that the creditor and the state are acting as one. Thus, even if, as the Third Circuit had argued, the creditor's conduct was permitted at common law, even if such conduct was intended to be tempered by the enactment of the self-help statute, and even if its impetus may be characterized as private, significant state involvement in the form of encouragement nevertheless emanates from the self-help repossession statutes.

In light of Shelley, Reitman, and Irvis, it is arguable that the Gibbs court erred in facilely distinguishing the Sniadach series of cases on the ground that no direct government action was involved. As suggested previously, Sniadach and its successors would appear to contain a double element of state action. Since the Supreme Court minimized the importance of the more obvious incidents of state involvement, such as the role of the clerk, the inference can be drawn that the statute itself provided a sufficient nexus with the state. While this implicit statute qua state action argument is admittedly not as obvious as the existence of judicial process or the action of the clerk in assisting the creditor, Shelley, Reitman, and Irvis explicitly provide support for this proposition. All three cases demonstrated that state action can be present even where state officials or judicial process are not involved. Shelley emphasized the role of state law itself as state action, while Reitman and Irvis described the encouragement generated by state legislation upon the conduct of private parties. Thus, in Sniadach, Fuentes, and Mitchell, state action could have been based not merely upon the state's assistance in the repossession procedure, but rather primarily upon the existence of the statute itself and the encouragement it provided to conduct which might otherwise have remained dormant.

V. CONCLUSION

In Sniadach, Fuentes and their successors, the Supreme Court initiated an expansive attack on the constitutionality of creditors' remedies, and courts on the whole were responsive to the due process requirements that these cases established. Numerous recent lower court decisions, however, have indirectly negated the effect of the High Court cases by failing to find state action even though state legislation did in fact exist. As

128. See text accompanying notes 16 to 47 supra.
129. See text accompanying notes 92-94 supra.
130. See text accompanying note 115 supra.
131. See Burke & Reber, supra note 1, at 1-9.
132. See cases cited in note 6 supra.
a consequence, these self-help repossession statutes became invulnerable to challenges based on the fourteenth amendment.

Generally, the process of decision in the self-help cases has been to distinguish Sniadach and its progeny on the ground that they involved either judicial process or action by a state official. Yet it has been demonstrated that these more obvious manifestations of state involvement are not essential to a finding of state action. Thus, the lower courts should be subject to severe criticism for allowing the states to ignore the standards set by the Supreme Court by merely establishing a procedure devoid of any direct official action by a state officer and declaring the subsequent legislation to be simply a codification of the common law of self-help.183

This result appears contrary to the reasoning of the Supreme Court in Shelley that the common law is state law and therefore may be state action; to the decisions in Reitman and Irvis under which self-help statutes, qua statutes, can be said to encourage and authorize a creditor's course of conduct; and to the implications in Sniadach, Fuentes, Mitchell, and North Georgia Finishing that official involvement may indeed be of less significance than the bare existence of the authorizing statute itself. The inference to be drawn, then, is that any court considering the state action question in self-help repossession cases should interpret Sniadach and its successors in light of Supreme Court decisions such as Shelley, Reitman, and Irvis.

The result of decisions such as Gibbs has been to deny debtors the opportunity to argue their due process claims. Regardless of how the constitutional issue is ultimately resolved on the merits, it is submitted that the debtor should not be denied access to the courts on the basis of the questionable holding that no state action exists. It could indeed be argued that the application of this holding is itself a denial of the debtor's due process rights.

Robert G. Edinger

133. See note 70 supra.