Creditors' Remedies As State Action

Although a century has passed since the inception of the state action doctrine,[1] the meaning of "state action" remains obscure. The Supreme Court's definitions of that term have generated widespread confusion[2] and provoked vigorous criticism.[3] Some commentators have concluded that the state action decisions are simply ideologically inspired manipulations of the doctrine.[4] That suspicion has been fueled by the stark contrast between the Warren Court's expansion[5] and the Burger Court's contraction[6] of the contours of state action.[7]

The conceptual disarray has been aggravated—and in the minds of some critics can be explained[8]—by changes in the factual contexts of

1. The doctrine was born in the Civil Rights Cases, 109 U.S. 3 (1883). The Court there declared unconstitutional §§ 1 and 2 of the Civil Rights Act of 1875, which forbade racial discrimination with respect to inns, public conveyances, theaters, and other places of public amusement. The Court held that although Congress could proscribe state laws that required such discrimination, it could not forbid private individuals, acting on their own initiative, from engaging in racial discrimination. *Id.* at 17-18.

2. *Compare* Henkin, Shelley v. Kraemer: *Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 477 (1962) (doctrine cannot be as broad as Court's language suggests) *and* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29 (1959) (state action cases lack rational theory of decision) *with* Nevin, *State Action: The Significant State Involvement Doctrine After* Moose Lodge *and* Jackson, 14 IDAHO L. REV. 647, 674 (1978) (state action theory coherent).

3. Many commentators argue that the state action doctrine is analytically unsupportable and should be discarded. *See, e.g.*, Alexander, *Cutting the Gordian Knot: State Action and Self-Help Repossession*, 2 HASTINGS CONST. L.Q. 893, 893-95 (1975); Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 208-09 (1957). Others contend that because state inaction can be an effective method of abridging constitutional rights, the doctrine should be modified to require positive state activity under certain circumstances. *See, e.g.*, Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 108 (1967); Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 855 (1966). Even those commentators who support the Court's state action decisions acknowledge that they are more readily explicable in public-policy than in doctrinal terms. *See, e.g.*, Nevin, *supra* note 2, at 648; Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 4-5, 57-58 (1961).

4. *E.g.*, Nerken, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the* Civil Rights Cases *and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297, 361-63 (1977); Wechsler, *supra* note 2, at 29.

5. *See* pp. 541-44 *infra*.

6. *See* p. 544 *infra*.

7. The doctrinal shift has not gone unnoticed by legal scholars. *See, e.g.*, Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATH. U.L. REV. 39 (1972); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974). One commentator has attempted to correlate that shift with changes in the membership of the Supreme Court. *See* Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479, 505-06 (1975).

8. *See, e.g.*, Van Alstyne & Karst, *supra* note 3, at 4-5 ("state action" is shorthand for balancing-of-interests test); Note, *State Action and the United States Junior Chamber of Commerce*, 43 GEO. WASH. L. REV. 1407, 1414-15 (1975) (historical and economic reasons for lower threshold of state action in equal protection cases).

state action cases. Once aimed exclusively at state attempts to evade substantive proscriptions of discrimination,[9] the cases recently have begun to challenge the constitutionality of state procedural schemes, irrespective of their substantive ends.[10] Courts have made little effort to adapt theories of state action developed in the former context to the latter. They have relied upon rigid categories of public-versus-private activities instead of developing a coherent state action theory applicable to conflicts over procedure.[11] The Supreme Court's latest application of the state action doctrine in the procedural context was the 1978 decision of *Flagg Brothers v. Brooks*.[12] In that case the Court held that self-help repossession under the Uniform Commercial Code (U.C.C.) does not constitute state action and that due process requirements are therefore inapplicable to such repossessions.[13]

This Note contends that the *Flagg Brothers* Court erred by failing to apply the "significant state-involvement" test of state action that has been developed in equal protection cases. The Note demonstrates that a state's decision to promote a particular procedural framework for private action is a substantive decision and therefore must satisfy con-

9. *See* note 70 *infra*.

10. *See* note 71 *infra*.

11. *E.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 156-60 (1978); *see* notes 27-30, 100 *infra* (citing cases).

12. 436 U.S. 149 (1978).

13. *Id.* at 157-66. The case has been widely criticized. *See, e.g., The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 120-31 (1978) (rationale avoids important questions) [hereinafter cited as *Supreme Court Term*]; 46 GEO. WASH. L. REV. 500 (1978) (lower court decision correct).

A judgment as to the constitutionality of the Uniform Commercial Code's self-help remedies had been long awaited, with commentators battling over the due process and state action issues that such a challenge would present. The due process literature debates both the public-policy justifications for allowing self-help remedies, *compare* White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 531 (cost of abolishing self-help repossession prohibitive) *with* Yudof, *Reflections on Private Repossession, Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 967-72 (1974) (benefits of abolition outweigh costs), and the doctrinal considerations, *compare* Brabham, Sniadach *Through* Di-Chem *and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes*, 12 U. RICH. L. REV. 157, 199 (1977) (Virginia attachment and detinue provisions not violative of due process) *with* Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 372 (1973) (self-help violates notice and hearing requirements). The state action literature debates the doctrinal merits of finding state action. *Compare* Catz & Robinson, *Due Process and Creditor's Remedies: From* Sniadach *and* Fuentes *to* Mitchell, North Georgia *and Beyond*, 28 RUTGERS L. REV. 541, 579-84 (1975) (theories for finding state action) *and* McCall, *Due Process and Consumer Protection: Concepts and Realities in Procedure and Substance—Repossession and Adhesion Contract Issues*, 26 HASTINGS L.J. 383 (1974) (repossession is nondelegable state function) *with* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (pt. 3), 47 S. CAL. L. REV. 1, 54 (1973) (repossession is private function) *and* Note, *State Action and the Constitutionality of U.C.C. § 9-503*, 30 WASH. & LEE L. REV. 547, 573 (1973) (finding state action in self-help repossession would make concept meaningless).

stitutional norms. Applying this theory to self-help repossession under the U.C.C., the Note concludes that, contrary to the Court's decision in *Flagg Brothers*, such repossessions constitute state action.

I. Development of the State Action Doctrine

Many of the guarantees of individual rights enshrined in the Constitution protect only against governmental abridgement.[14] The significance of that limitation first became apparent in 1883, when the Supreme Court held in the *Civil Rights Cases*[15] that the Fourteenth Amendment did not grant Congress the authority to proscribe purely private acts of racial discrimination.[16] Though Congress eventually overcame that particular hurdle,[17] the state action doctrine has remained a barrier to the extension of various constitutional guarantees.[18]

A. *Initial Ebb and Flow*

The Supreme Court's initial interpretation of the state action limitation was narrow and inflexible;[19] nothing short of overt official involvement or state-mandated activities sufficed to trigger Fourteenth Amendment concerns.[20] That interpretation seriously undercut the

14. The Fourteenth and Fifteenth Amendments by their terms apply only to governmental actions. First Amendment guarantees, as incorporated through the due process clause of the Fourteenth Amendment, also are applicable only to state actions. *See* Yackle, *supra* note 7, at 489.

15. 109 U.S. 3 (1883).

16. *Id.* at 11-12.

17. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (1964) (codified at 42 U.S.C. §§ 2000a to 2000h-(6) (1976)), enacted under Congress's commerce power, contains provisions nearly identical to those contained in the first two sections of the Civil Rights Act of 1875. *See* Quinn, *State Action: A Pathology and a Proposed Cure*, 64 CALIF. L. REV. 146, 150 (1976). The Act has survived constitutional challenges. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

18. *See* Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 44 (state action as barrier to development of constitutional obligation to reduce economic inequality). Not all commentators have found this result undesirable. *See, e.g.*, Wechsler, *supra* note 2, at 31 (courts should resist temptation to abandon state action doctrine). Even so vociferous a critic of the state action doctrine as Professor Black advocates that some individual actions be free from the constraints of the equal protection, due process, and free speech doctrines. Black, *supra* note 3, at 100-01.

19. Yackle, *supra* note 7, at 484-86 (doctrine "wooden").

20. Though the state action doctrine was not formally announced until the Civil Rights Cases, 109 U.S. 3 (1883), three earlier cases foreshadowed it. *See* United States v. Harris, 106 U.S. 629, 639 (1882) (Congress cannot outlaw lynching because private activity); *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879) ("prohibitions of the Fourteenth Amendment are addressed to the States"); United States v. Cruikshank, 92 U.S. 542, 554 (1876) (Fourteenth Amendment "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States.")

impact of the Civil War amendments. The states avoided the new constitutional edicts by delegating important functions to private parties and by encouraging, rather than requiring, racial discrimination by individuals.[21]

For sixty years, the Court tolerated those evasionary tactics. Not until 1940 did the Supreme Court broaden the state action concept to encompass acts other than those mandated by the state. In *Smith v. Allwright*,[22] the Court held that the acts of private individuals could constitute state action when those acts became part of the "machinery" by which the state performed its duties.[23]

Allwright spawned two theories of state action that were later used to extend the reach of the Fourteenth Amendment.[24] One theory

21. *See* J. FRANKLIN, FROM SLAVERY TO FREEDOM 338-43 (3d ed. 1967); R. KLUGER, SIMPLE JUSTICE 60-65, 84-89 (1975). The classic use of that strategy was in the context of primary elections. State legislatures delegated increasing amounts of power to political parties in order to insulate efforts to nullify black suffrage from attacks under the Fifteenth Amendment. The tactic was effective for many years. *See* note 23 *infra*.

Prior to the approval of Jim Crow laws in Plessy v. Ferguson, 163 U.S. 537 (1896), states encouraged other forms of private discrimination by repealing the common law duties of innkeepers and common carriers to provide service to all who requested it. *See* Nerken, *supra* note 4, at 317-18. After *Plessy*, such repeals occurred whenever needed to legitimate merchants' refusals to serve blacks. *See id.* at 318-19. Evasion by delegation is not a historical relic. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down state constitutional amendment barring open-housing legislation); Evans v. Newton, 382 U.S. 296 (1966) (placing public park in private hands not sufficient to evade desegregation).

22. 321 U.S. 649 (1944).

23. *Id.* at 664. *Allwright* was one of a long line of "white primary" cases. Recognizing that white control over selection of the general-election candidates would vitiate black suffrage, southern legislatures delegated the power to conduct primary elections to private political parties in the hope that exclusion of blacks from primaries by those parties would not be attributable to the state. Litigation over the strategy centered on the laws of Texas. In Nixon v. Herndon, 273 U.S. 536 (1927), the Court struck down a Texas statute prohibiting blacks from participating in party primaries. *Id.* at 541. The Texas legislature responded by authorizing the party executive committee to set the qualifications for voting in primaries. The Court then found the state implicated in the discrimination because the committee was its agent for the purpose of determining voter qualifications. Nixon v. Condon, 286 U.S. 73, 83-85 (1932). The legislature's next effort was more successful. In Grovey v. Townsend, 295 U.S. 45 (1935), the Court upheld the right of a private political party, acting pursuant to a vote of its state convention, to exclude blacks from its primaries. *Id.* at 54-55. Nine years later, despite the absence of any new factual developments, the Court overruled that decision in Smith v. Allwright, 321 U.S. 649 (1944). In the last case of the series, the Court ruled that primaries run by a private political party that had little contact with the state and that operated in only one county must nevertheless be open to blacks. Terry v. Adams, 345 U.S. 461, 469 (1953). Elections continue to receive special protection in the state action decisions. *See, e.g.*, Tiryak v. Jordan, 472 F. Supp. 822, 824 (E.D. Pa. 1979) (poll-watching a public function and thus state action).

24. The original "official action" doctrine has survived, and its three elements—the definitions of official, official act, and resulting from an official act—have gradually been broadened. The first element to be expanded was the definition of a state official. In 1945, the Court overruled its decision in *Ex parte* Virginia, 100 U.S. 339 (1879), and held that illegal actions undertaken by an official acting pursuant to his legitimate authority

evolved into the public-function test; the other, into what has been variously characterized as the "significant state-involvement," "state encouragement," or "symbiotic relationship" test.

B. *The Public-Function Test*

The public-function theory of state action focuses on the nature of the activity in question. Some activities, the Court has held, are so inextricably intertwined with the proper functioning of the governmental entity that they are deemed to be state functions regardless of how or by whom they are performed.[25] For example, the conduct of elections,[26] the operation of parks[27] and schools,[28] and the management

constituted state action. Screws v. United States, 325 U.S. 91, 110-11 (1945). Some judges have attempted to extend that doctrine so that the conduct of individuals blatantly disregarding the limits of their authority, though for reasons tangentially related to that authority, constitutes state action. *See, e.g.*, Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 556 (9th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975) (Hufstedler, J., dissenting) (bail bondsmen pretending to be state policemen should establish state action).

The definition of a state act has also been enlarged. Traditionally, the "purely ministerial acts of 'minor governmental functionaries'" have been disregarded in state action determinations. Flagg Bros. v. Brooks, 436 U.S. 149, 173-74 (1978) (Stevens, J., dissenting) (quoting Parks v. "Mr. Ford," 556 F.2d 132, 148 (3d Cir. 1977) (Adams, J., concurring)). A recent decision, however, appears to base a finding of state action on precisely such acts. *See* Dieffenbach v. Attorney Gen., 604 F.2d 187, 194 (2d Cir. 1979) (court clerk's issuance of writ "apparently" enough to warrant state action finding).

The temporal nexus, too, has been widened. All acts that follow directly from an official act are now attributed to the state actor. *See, e.g.*, McCollan v. Tate, 575 F.2d 509, 512 (5th Cir. 1978), *cert. granted sub nom.* Baker v. McCollan, 439 U.S. 1114 (1979) (attribution from deputized officers to sheriff); Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1341-42 (9th Cir. 1977) (imposition of garagemen's lien subsequent to towing car at request of state police officer held state action); Tedeschi v. Blackwood, 410 F. Supp. 34, 41-42 (D. Conn. 1976) (same).

25. *E.g.*, Marsh v. Alabama, 326 U.S. 501, 507-08 (1946) (operation of business district in company town is state action). For a discussion of the public-function theory and its problems, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-5, at 1163-67 (1978). For an interesting suggestion as to how judges should deal with the public-function argument, see Parks v. "Mr. Ford," 556 F.2d 132, 146 (3d Cir. 1977) (Adams, J., concurring) (doctrine is evolving concept based on social needs).

26. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 469 (1953); Smith v. Allwright, 321 U.S. 649, 664 (1944); Tiryak v. Jordan, 472 F. Supp. 822, 824 (E.D. Pa. 1979).

27. Evans v. Newton, 382 U.S. 296, 301-02 (1966). *Evans* remains an isolated example of application of the public-function doctrine in a recreational context. In a subsequent decision upholding the closing of public pools in the face of a desegregation order, the Court avoided the public-function argument entirely. Palmer v. Thompson, 403 U.S. 217, 220-24 (1971). Although the Court has barred city officials from permitting private segregated-school groups to use public recreational facilities, Gilmore v. City of Montgomery, 417 U.S. 556 (1974), the rationale for the decision was that grants of access constituted impermissible state aid to segregated schools, *id.* at 570 n.10.

28. *E.g.*, Griffin v. County School Bd., 377 U.S. 218, 230-31 (1964); Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 44-45 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961). The Court has described the provision of schooling as "perhaps the most important function of state and local governments," Brown v. Board of Educ., 347 U.S. 483, 493

of central business districts[29] must always comport with constitutional standards. Though recent cases have not challenged the premises of the public-function theory, they have cut back substantially on the number and type of functions deemed public.[30]

C. *The Significant State-Involvement Theory*

The second state action theory focuses on the government's involvement in a particular activity. This theory rests on *Smith v. Allwright*'s declaration that state establishment of a procedure that entrusts private parties with certain powers can be construed as state endorsement of the manner in which those parties exercise that power.[31] According to this theory, ostensibly private actions are attributable to the state if they occur within a governmental framework that has so encouraged them that the state can be deemed responsible for the acts.[32] States

(1954), and has been especially harsh on efforts to maintain segregated schools. In addition to applying the public-function theory in cases such as *Griffin* and *Bush*, the Court has struck down every type of state aid to segregated schools on the ground that no matter how trivial its fiscal impact, such aid constitutes significant state involvement in a discriminatory activity. *See, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (use of public recreational fields); Norwood v. Harrison, 413 U.S. 455 (1973) (school textbook lending program worth $6 per student).

29. Marsh v. Alabama, 326 U.S. 501 (1946) (business district in company-owned town). The Court refused to extend the doctrine to include a common analogue of business districts, the shopping center, in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and Hudgens v. NLRB, 424 U.S. 507 (1976), although it had initially done so for First Amendment reasons in Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

30. *See* Alexander, *supra* note 3, at 904-06 & nn.36-37 (criticizing Court's manipulation of public-function doctrine); *cf.* Note, *Caveat Venditor: Greater Restriction of Remedial Self-Help in Consumer Transactions*, 9 SUFFOLK U.L. REV. 756, 765-71 (1975) (discussing implications for due process cases of cutback in public-function doctrine). In addition to retrenchment in the First Amendment context, *see* note 29 *supra*, and unwillingness to apply the parks doctrine to other recreational facilities, *see* note 27 *supra*, the Supreme Court has been unresponsive to pleas for expansion of the doctrine into new areas. *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149, 157-64 (1978) (self-help remedies); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-54 (1974) (public utility); Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 119-21 (1973) (broadcast journalism). The Court has also restricted the language of the public-function test. Whereas the Court previously had required only that the defendant have exhibited "attributes of government," Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring), or have opened "up his property for use by the public in general," Marsh v. Alabama, 326 U.S. 501, 506 (1946), it now requires functions to be those " 'traditionally exclusively reserved to the state,' " Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)); *cf. id.* at 172-73 (Stevens, J., dissenting) (exclusivity test not required or supported by precedent).

31. Smith v. Allwright, 321 U.S. 649, 664 (1944).

32. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 473 (1953) (Frankfurter, J., concurring) ("vital requirement is State responsibility"); Public Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (approval of musical broadcasts on public buses constitutes state action); Catz & Robinson, *supra* note 13, at 573-79 (private acts state action if "clothed" with state authority).

may, in short, encourage only private conduct that comports with the Constitution.[33]

The critical determination under this theory is at what point the state's involvement in an activity warrants imposition of constitutional constraints. In the 1960's, the Supreme Court moved toward requiring that all discriminatory activities affected by some governmental framework conform to constitutional standards.[34] That approach, however, would ultimately have obliterated the distinction between private and state actions.[35] Unwilling to take that step,[36] the Burger Court retreated in *Moose Lodge No. 107 v. Irvis*[37] and *Jackson v. Metropolitan Edison Co.*[38] by adopting the requirement that a "close nexus" exist between the general governmental framework and the specific activity challenged before state action could be found.[39]

33. Alexander, *supra* note 3, at 907-09 (state encouragement of unconstitutional activities forbidden); *see, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 376 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

34. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 150-52 (1970) (enforcement of trespass law unconstitutional because of discriminatory purpose); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (state must act to forbid discrimination if pervasive interdependence exists); *cf.* Silard, *supra* note 3, at 855 (Court moving in 1969 toward replacing state action doctrine with affirmative state obligation to promote equality).

35. Obliteration would occur because no private action is totally unaffected by governmental influences. The pervasiveness of government regulation and subsidization would be enough to make almost all private activity state action under this test. Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (pts. 1-2), 46 S. CAL. L. REV. 1003, 1113-14 (1973); *cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 n.7 (1974) (listing wide range of regulated activities).

Some commentators have argued that mere governmental acquiescence in a private decision is a form of state action. Leaving an area open to private ordering does not relieve the state of responsibility for enforcing those choices once made. As illustrated in Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of restrictive housing covenant state action), that responsibility can require the state to enforce private choices that violate constitutional norms. Because even "private" actions depend upon government enforcement mechanisms, governmental acquiescence in an activity thereby involves the government in that activity. For a fuller exposition of this theory, see Alexander, *supra* note 3, at 894-99; Horowitz, *supra* note 3, at 208-09. Many commentators have supported this expansive interpretation of the state action doctrine, *e.g.*, Silard, *supra* note 3, at 872, though it has perturbed others, *e.g.*, *Supreme Court Term, supra* note 13, at 127.

36. Some commentators have linked this reluctance to the Court's commitment to values of federalism and judicial restraint. *See* p. 538 *supra*.

37. 407 U.S. 163 (1972).

38. 419 U.S. 345 (1974).

39. In the leading state action case preceding Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court described the significant state-involvement test as an *ad hoc* one: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). Accordingly, the plaintiff in *Moose Lodge* based his state action claim on the state's grant of a license to, and corresponding regulation of, the club being challenged. 407 U.S. at 171. The Court rejected that argument on the grounds that the state's involvement in no way fostered or encouraged racial discrimina-

The close-nexus requirement went beyond the Court's existing significant state-involvement test by requiring more than extensive regulation of an activity.[40] The regulation had to bear a direct causal relationship to the challenged aspect of the activity.[41] The Court rejected the position that interdependence of state and private actions in one aspect of an activity necessarily implicated the state in all aspects of that activity.[42]

To date the close-nexus test has been applied only as a negative requirement—that is, as the basis for rejecting claims of state action.[43] The potential positive attributes of the close-nexus requirement remain unexplored. Those attributes can be developed by closer analysis of the significant state-involvement test.

II. Provision of a Procedural Framework as State Action

The significant state-involvement test historically has been invoked only in the face of pervasive interaction between the state and the private parties participating in the challenged activity. *Moose Lodge* and *Jackson* added a second tier to that barrier: the requirement of a close nexus. Though the exact requirements of that test are uncertain, analysis of past cases and the Court's treatment of those cases in *Moose Lodge* and *Jackson* provides some guidance.

tion and that the state reaped no benefits from it; the state therefore could not be held responsible for the discriminatory activity. *Id.* at 175-77.

In Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the constitutional challenge to a public utility's termination procedures suggested two bases for a finding of state action: the extensive regulation of the utility by a state agency, *id.* at 350, and the agency's approval of the challenged termination procedures, which were included in a state-required tariff, *id.* at 354-55. The Court rejected both claims and held that the utility's procedures did not constitute state action. *Id.* at 358-59. The nexus between the agency's regulatory power and the utility's termination procedures was not sufficiently close to implicate the state in the utility's conduct. *Id.* at 351-54. The tariff itself could not provide that nexus because the agency never analyzed the portion that contained the termination procedures. *Id.* at 354-55. Inclusion of those procedures in the tariff "amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired." *Id.* at 357; *cf.* Cantor v. Detroit Edison Co., 428 U.S. 579, 584-85 (1976) (utility tariff not sufficient grounds for claiming state action defense in antitrust suit).

These two cases together represented a profound shift in the significant state-involvement branch of state action doctrine. Yackle, *supra* note 7, at 509, 516-17.

40. *See* note 39 *supra.*

41. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358-59 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972).

42. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

43. The Supreme Court has decided only three cases under the close-nexus test: *Moose Lodge, Jackson,* and Flagg Bros. v. Brooks, 436 U.S. 149 (1978). The plaintiff lost in each. For a survey of lower court decisions that have applied the test, see Nevin, *supra* note 2, at 651-66.

A. *Pervasive Interaction*

Pervasiveness of interaction is determined by both the number and the extent of contacts between a state and the ostensibly private activity.[44] The contacts can assume a variety of forms: financial subsidies that aid or direct an activity,[45] regulations that shape the manner in which the activity is performed,[46] or licensing procedures that constrain the activity.[47] The more complete the government's actual or potential control of the activity, the greater is the likelihood that the interaction will be deemed pervasive.[48]

B. *Close Nexus*

The close-nexus test adds to the state action doctrine the requirement that government involvement with the private activity must directly encourage that aspect of the activity alleged to be unconstitutional.[49] Despite the fluctuations in the state action doctrine,[50] a consensus as to what constitutes government encouragement of a private activity has existed since the enunciation of the significant state-involvement test in *Smith v. Allwright*.[51] The Court has identified two general methods of encouragement, each corresponding to a basis of state power: legitimation, and control of private ordering.

44. *See* Nevin, *supra* note 2, at 666-71 (describing contacts meeting nexus requirement).

45. The subsidy can be monetary, *see, e.g.*, Briscoe v. Bock, 540 F.2d 392 (8th Cir. 1976) (receipt of federal funds); New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975) (program grants), or in-kind, *see, e.g.*, Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (use of public recreational fields); Norwood v. Harrison, 413 U.S. 455 (1973) (school textbooks).

46. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (regulation of public utility); Smith v. Allwright, 321 U.S. 649 (1944) (regulation of election procedures).

47. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (broadcast license); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (liquor license).

48. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350-51 (1974) (finding of state action more likely if government regulation extensive and detailed); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 174-75 (1972) (distinguishing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), on pervasiveness of contacts); Newsom v. Vanderbilt Univ., 453 F. Supp. 401, 420 (M.D. Tenn. 1978) (extensive regulation increases probability of finding state action).

49. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (failure to establish nexus between regulation and challenged private act defeats state action claim); New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 858 (2d Cir. 1975) (failure to relate federal grants to sexist membership policy defeats state action claim); Yackle, *supra* note 7, at 517 (courts require close connection between state action and challenged conduct).

50. *See* pp. 540-45 *supra*.

51. 321 U.S. 649 (1944).

1. *Legitimation*

Legitimation is the process by which the government places its imprimatur on a particular activity.[52] It usually takes the form of explicit statutory approval.[53] In some cases, however, the interaction between the state and the private activity is so complete that the state's failure to disapprove the challenged action can be deemed to be deliberate and thus to constitute legitimation.[54]

The theory behind the legitimation approach to state action analysis is often couched in metaphysical terms.[55] The Court's underlying ob-

52. Legitimation has been the basis for a finding of state action in a number of cases. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952). The Court provided the clearest statement of the legitimation test in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354-57 (1974).

53. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369, 376-77 (1967) (enactment of barrier to open-housing laws considered express authorization of private right to discriminate); Public Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952) (streetcar company's use of piped-music system in buses constitutes state action because regulatory agency dismissed investigation of practice after favorable report).

54. The Court has found the interaction sufficiently pervasive in only two cases: Reitman v. Mulkey, 387 U.S. 369, 375 (1967), and Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961). *Reitman* involved more than mere inaction or failure to regulate, for the state had, by popular referendum, enacted a constitutional amendment repealing open-housing legislation and forbidding enactment of similar legislation. In light of the amendment's political context, the California Supreme Court concluded that the amendment constituted explicit constitutional authorization of discrimination, and the Supreme Court adopted that finding. 387 U.S. at 376. The obvious evasionary intent led the Court to overcome its reluctance to allow inaction to be the basis of a state action finding. *Id.; see* note 57 *infra* (role of intent in state action decisions).

Burton is a more difficult case to explain, in part because the decision was significantly different from the Court's subsequent restatement of it. The actual decision merely speculated that the state might have profited from its lessee's discriminatory practices. 365 U.S. at 725. The Court subsequently seized upon that possibility to argue that the state's pecuniary interests explained and tainted its permissiveness. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175-76 (1972); *cf.* Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 596 (3d Cir. 1979) (state racing commission not in symbiotic relationship with private racetrack because not joint venturer for profit). In short, to the extent that failure to disapprove an action constitutes a continuing variant of the legitimation theory of state action, only a showing of definite evasive intent brings it into play.

55. A number of judges argue that silent advocacy of actions that violate constitutional norms, even if more apparent than real, undermines the state's commitment to the Constitution and should be forbidden. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 465 (1973) (Constitution obligates state to avoid appearance of aiding segregated academies); Shirley v. State Nat'l Bank, 493 F.2d 739, 746 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974) (Kaufman, C.J., dissenting) ("clothing" unconstitutional actions with legitimacy "utterly inconsistent" with state obligations). This concern has been greatest in cases involving racial discrimination. For instance, in *Norwood*, the Court held unconstitutional a state schoolbook lending program that granted private segregated academies books worth $6 per student per year. Though the Court spoke of the program as "giving significant aid" to those academies, the de minimis financial impact of the program, coupled with the Court's acknowledgment that no actual supportive impact had been found, 413 U.S. at 465, made

jection, however, is eminently practical: authorization promotes evasion of constitutional commands.[56] Legitimation of nongovernmental alternatives to various public activities has long been the central vehicle for evading proscriptions of governmental discrimination.[57] Moreover, legitimation can have a publicizing effect: authorization of private discriminatory action may increase public awareness of that option.[58]

2. *Control of Private Ordering*

A second method of encouragement is state manipulation of ostensibly private systems of ordering. A private system of ordering is that system of relationships and pattern of actions created by the free choice of autonomous individuals.[59] The U.C.C. is the paradigm of a private

clear that the Court was primarily concerned with the moral support signified by the program.

According to some commentators, the race cases have invoked a lower threshold for finding state action. *See, e.g.*, Nevin, *supra* note 2, at 674. *Norwood* is an excellent illustration of how that lower threshold can be reached while remaining within the confines of a generalized state action test. The Court cited Brown v. Board of Educ., 347 U.S. 483 (1954), for the proposition that any discrimination will pervade the entire educational experience; any aid to a segregated school thus aids discrimination. 413 U.S. at 469-70. By contrast, the Court maintained that aid to parochial schools violates the First Amendment establishment clause only if used to support the religious classes; the religious atmosphere of a school does not pervade the entire educational process. *Id.* That distinction enables the Court to emasculate the close-nexus test in race cases by a judicial sleight-of-hand: any nexus is assumed in that context to be a close nexus.

56. *See, e.g.*, Black, *supra* note 3, at 73 (inaction most efficient way to deny protection); Quinn, *supra* note 17, at 152-55 (removing inaction as basis of state action finding is overly broad restriction leading to anomalous results).

57. Reitman v. Mulkey, 387 U.S. 369, 383 (1967) (Douglas, J., concurring); Nerken, *supra* note 4, at 316-20 (discussing state's role in corporate decision to segregate railroad). The problem of evasion has proven particularly vexing because the distinction between state and private action often appears to be strictly one of form. The Court has generally detected and frustrated evasionary tactics. *See* note 23 *supra* (white primary cases); Evans v. Newton, 382 U.S. 296, 301 (1966) (transfer of ownership of segregated park from municipality to private board of trustees insufficient change to avoid duty to desegregate); Black, *supra* note 3, at 84-91 (discussing Court's response to evasion); Yackle, *supra* note 7, at 486-89 (discussing impact of evasion on state action doctrine). *But cf.* Palmer v. Thompson, 403 U.S. 217, 220 (1971) (closing public swimming pools in face of desegregation order not unconstitutional); Evans v. Abney, 396 U.S. 435, 445 (1970) (dissolution of trust that owns park sufficient to avoid desegregation order).

58. *See* Catz & Robinson, *supra* note 13, at 582. Despite the apparent acceptance of this argument in Reitman v. Mulkey, 387 U.S. 369 (1967), the claim has been advanced without success in the creditor's remedies context, *see, e.g.*, Gibbs v. Titelman, 502 F.2d 1107, 1111 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974) (encouragement indirect and highly conjectural).

59. *See, e.g.*, Parks v. "Mr. Ford," 556 F.2d 132, 155 (3d Cir. 1977) (Gibbons, J., concurring) (area with no interest for collective society); Burke & Reber, *supra* note 35, at 1016-17 (1973) (freedom of individuals to structure their affairs); *Supreme Court Term*, *supra* note 13, at 129-30 (system of private acts and relationships). Even the most vociferous critics of the state action doctrine agree that some genuinely private systems of ordering exist and should be preserved. *See, e.g.*, Black, *supra* note 3, at 100-03; Van Alstyne & Karst, *supra* note 3, at 7-8.

system of ordering. It establishes a framework within which private parties can resolve contractual disputes on their own terms.

Ideally, the governmental framework within which private choices are made would be neutral—that is, no governmentally created factors should induce an individual to choose one alternative over another. The private nature of the choice is destroyed when governmental incentives skew the framework toward a particular outcome.[60]

The state engages in manipulation whenever it weights particular factors that enter into private calculations so as to tilt the balance toward a particular outcome.[61] The state can accomplish that manipulation in a number of ways: by erecting procedural barriers to the disfavored outcome,[62] by eliminating barriers to the preferred outcome,[63] or by providing financial incentives that promote the preferred outcome.[64] Such schemes are often subtle, maintaining the illusion of private choice long after the combination of government incentives and disincentives has made every choice but one practically untenable.[65]

Any governmental framework has some nonneutral effects on private activities undertaken with reference to it.[66] Some additional element therefore is necessary to prevent all private activity from being deemed

60. *Compare* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175-77 (1972) (no state action when liquor regulations have neutral effect on discriminatory policies) *with* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (state action when discrimination necessary to pay rentals established by state). Though the Court in *Burton* never found explicitly that the lessee's discrimination was needed to generate the state's rental fees, the Court has so explained that case since its establishment of the "close-nexus" test. *See* note 54 *supra.*

61. The Court has referred to that phenomenon as "fostering" an outcome. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358 (1974) (no fostering because lack of nexus); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972) (possession of liquor license did not foster membership policies).

62. *E.g.,* Hunter v. Erickson, 393 U.S. 385, 390-92 (1969) (city charter amendment preventing implementation of open-housing ordinance without referendum); Reitman v. Mulkey, 387 U.S. 369 (1967) (requirement of constitutional amendment to enact fair-housing laws).

63. *E.g.,* Reitman v. Mulkey, 387 U.S. 369 (1967) (state repealed open-housing statutes); Smith v. Allwright, 321 U.S. 649 (1944) (state changed laws regulating political party to make discrimination legally possible).

64. *E.g.,* Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (support for segregated schools through provision of athletic facilities); Norwood v. Harrison, 413 U.S. 455 (1973) (support for segregated schools through provision of textbooks).

65. *Compare* Bell v. Maryland, 378 U.S. 226, 245-46 (1964) (Douglas, J., dissenting) (state refusal to outlaw segregated restaurants meant restaurants had to be segregated) *and* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (financial viability of municipal parking garage required lessee restaurant to segregate) *with* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (liquor license unrelated to membership policies).

66. Without the provision of such necessities as sewers, police protection, water, electricity, and other municipal services, few institutions could survive. At a very generalized level, therefore, the state supports all private activities. *See* note 35 *supra*; Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (any state-benefit or state-regulation test would emasculate doctrine because state furnishes many municipal services).

state action.[67] That element is provided by the requirement that the private choice be the direct result of the government's pervasive involvement in the activity. Pervasiveness of interaction not only strengthens the government's control over the activity and magnifies any encouraging effects, but also indicates the scope of the government's interest in, and involvement with, the activity. The greater that interest and involvement, the more likely it is that the effects of that involvement are necessary outgrowths of the state's attempt to order the whole activity.[68] Any encouragement, though perhaps not the result of a conscious government decision, will be an integral part of the complex, symbiotic relationship between the activity's private performers and governmental sponsors. It is this intent to shape an activity in a way that makes the challenged outcomes more probable, if not certain, that makes a governmental framework constitute state action.[69]

67. Van Alstyne & Karst, *supra* note 3, at 33-34; *see* Burke & Reber, *supra* note 35, at 1114 (generalized impact test would destroy state action distinction). The Court's recognition of that danger led to adoption of the close-nexus test. *See* pp. 544-45 *supra*.

68. *See* p. 546 *supra*. In the case of the U.C.C., for example, governmental provision of a comprehensive framework for the ordering of private commercial contracts has eliminated the need for parties to bargain over specific terms. Failure to utilize the system would require parties to incur enormous additional costs. In these circumstances, the governmentally established framework, though not mandatory, virtually eliminates the use of alternative, privately established systems of ordering.

69. In order to justify expansions of the state action theory in race cases, the Court seized on the presence of an intent to evade the dictates of the Fourteenth and Fifteenth Amendments. *See* note 23 *supra* (expansion of doctrine to prevent evasion of Fifteenth Amendment through primary elections); note 54 *supra* (inaction as legitimation in cases of overt discriminatory intent). Though the emphasis upon intent has sometimes resulted in questionable decisions, *see* note 35 *supra* (reasoning of Shelley v. Kraemer, 334 U.S. 1 (1948), could obliterate public/private distinction); Terry v. Adams, 345 U.S. 461, 492-94 (1953) (Minton, J., dissenting) (majority's logic could signal end of all political interest groups), it has proven to be the best method of determining the impact of ostensibly permissive laws, *see* L. TRIBE, *supra* note 25, § 18-2, at 1150-51 (ambiguity of state inaction creates analytic problems for state action tests); Alexander, *supra* note 3, at 901 (motivation relevant because effect of permissive frameworks ambiguous).

The intent test has played the opposite role in due process cases, in which courts have based findings of no state action on the absence of such evasionary intent. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 n.17 (1974) (no suggestion in record that Utility Commission "intended either overtly or covertly to encourage the practice"); Wagner v. Sheltz, 471 F. Supp. 903, 909 (D. Conn. 1979) (procedure established in patients' bill of rights exempt from due process review because adopted to curb greater abuses).

The search for evasionary intent per se in due process cases is almost invariably futile. The conscious desire to violate constitutional commands present in racial discrimination cases is usually absent from the due process cases; in the latter, the violation is often an inadvertent consequence of advancing other social goals. *See, e.g.*, Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 342 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974) (Hufstedler, J., dissenting) (discussing economic and administrative benefits of self-help remedies); Wagner v. Sheltz, 471 F. Supp. 903, 909 (D. Conn. 1979) (procedure established in patients' bill of rights exempt from due process review because adopted to curb greater abuses). The fact that these constitutional violations are inadvertent does not excuse

C. *Establishment of a Procedural Framework as Significant State-Involvement*

State action cases historically have focused upon the government's role in influencing private parties' substantive decisions to practice racial discrimination. Though it was the state's end that was objectionable, the cases turned upon whether the means utilized by the state to accomplish that end could be deemed to constitute state action.[70]

In recent years, state action cases increasingly have involved due process challenges to the procedures that private parties employ to reach decisions that are substantively unassailable.[71] If a procedure fails to meet constitutional norms, however, the decision to utilize it is itself an objectionable substantive decision. The question presented is identical to that posed in the first context: whether the means utilized by the state to encourage private parties to rely upon the procedure can be deemed to constitute state action. The significant state-involvement test is equally applicable to this new context.

1. *Pervasive Interaction*

The bare establishment of a procedure is not enough to constitute significant state involvement. The government must have sufficient control over the activity to encourage the use of that procedure—that is, the procedure must be part of a general framework of government regulation. The more comprehensive the regulation and the more control the government exercises over the activity, the more likely there are to be governmental incentives to use the procedure. As the government's involvement in an activity grows, moreover, the likelihood increases that the results represent tacit government policy.[72]

them; what matters is the necessary consequence of the state's encouragement, not the underlying motive. The Court must ask, not whether the state intended to violate the Constitution, but rather whether it intended to shape a private party's conduct in a way that would lead to such violations.

Courts can discover intent to shape private conduct through the same indicia that they have used to infer evasionary legislative intent: pervasive interaction and symbiosis. *See* note 48 *supra* (pervasiveness as indication of intent to control); note 54 *supra* (symbiosis as indication of intent to control).

70. In most state action cases of recent decades, the practice under review was conceded to be discriminatory; the issue for the Court was whether the private actor was bound by the equal protection clause. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

71. *E.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (warehousemen's lien enforcement procedures); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (utility termination procedures); *see* Nevin, *supra* note 2, at 649-53 (surveying challenges to self-help seizure); *id.* at 665-66 (surveying challenges to utility termination procedures).

72. *See* note 69 *supra*; Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 341 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974) (Hufstedler, J., dissenting).

2. *Close Nexus*

Though establishment of a procedure may directly affect a subsequent decision,[73] that establishment need not influence all facets of the procedure utilized; large areas may be left to private choice.[74] Accordingly, the existence of a close nexus between the procedures established and the actions challenged is highly relevant.

As the government becomes more intimately involved with the details of the enactment, the claim that inclusion of certain details and exclusion of others did not represent an intentional policy choice becomes untenable.[75] Government participation can be deemed to legitimate the procedure adopted.

Government establishment of a procedure can interfere with private ordering on two levels. First, the procedure may be skewed to encourage a particular substantive choice.[76] Alternatively, the government may skew the framework within which the procedure operates so as to encourage the procedure's use irrespective of the substantive implications; employing the procedure may itself constitute a substantive policy promoted by the government.[77]

In sum, whether the government's establishment of a procedure to be utilized by private parties constitutes state action depends upon both

73. *See* pp. 554-55 *infra* (effect of establishment of U.C.C. on decision to rely upon self-help remedies).

74. The "procedure" established may consist of no more than a general authorization of a certain type of procedure, *see, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974) (tariff merely reserves right to terminate for nonpayment), or may explicitly leave some aspects of the procedure open to private ordering, *see, e.g.*, Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 31-32 (6th Cir. 1975) (federal mortgage regulations left foreclosure proceedings to private lenders).

75. The government usurps private ordering by reducing the number of alternatives open to private choice; in the extreme case—compulsion—the government reduces the number of available choices to one. The greater the number of options the government eliminates, the clearer it becomes that the government favors the remaining ones. *Cf.* Male v. Crossroads Assocs., 469 F.2d 616, 622 (2d Cir. 1972) (inferring state intent to regulate tenant selection procedures from antidiscrimination clauses in management contract).

76. The white-primary laws, *see* note 23 *supra*, are examples of this type of skewing. Such laws involved the deliberate establishment of election procedures that made exclusion of blacks easier, more effective, and therefore more attractive to racist political groups. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 662-64 (1944) (segregated party membership and primaries given favored position in electoral process). The laws skewed the general election results toward white-supported candidates. *Cf.* Terry v. Adams, 345 U.S. 461, 469-70 (1953) (only candidates of whites' party won general elections).

77. The creditors' remedies provisions of the U.C.C. exemplify the promotion of a procedure as an end in itself. *See* pp. 554-57 *infra*. The model-procedure provisions in some of the other 69 uniform laws adopted since enactment of the Code are similar in that respect. *See* Burke & Reber, *supra* note 35, at 1104 n.405 (discussing trend toward codification).

the nature of the procedure and the relationship between that procedure and the challenged activity. The significant state-involvement test provides the appropriate analytic vehicle for addressing that question.[78]

III. *Flagg Brothers* Revisited

The Supreme Court's decision in *Flagg Brothers v. Brooks*,[79] that a warehouseman's use of state-established procedures to convert his lien into good title involved no state action, threatens to emasculate the significant state-involvement test.[80] The activity at issue in *Flagg Brothers*—use of a procedure provided in U.C.C. section 7-210—was part of a broad state scheme of commercial regulation. The Court's establishment of state compulsion as a prerequisite to finding state action ignored the post-*Allwright* doctrinal evolution, including the Burger Court's own significant state-involvement decisions. State action can exist even when the procedural framework is permissive.

78. In dismissing due process challenges to U.C.C. remedies for lack of state action, courts have skirted the issue of significant state involvement. Despite the Court's application of the encouragement theory of state action in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no state action found), some circuits have blithely declared that that theory cannot be used in the due process context. *See* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 332-33 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); Note, *supra* note 30, at 771-72.

The avoidance seems to result from concern that application of the theory in due process cases would subject to constitutional review every private decision affected by some statute. *See, e.g.*, Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 332-33 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974); Burke & Reber, *supra* note 35, at 1109; Note, *supra* note 13, at 572-73.

That concern is unwarranted. The decision in *Moose Lodge* demonstrates that the significant state-involvement theory need not reach all private activity even in the context of racial discrimination. *See* note 39 *supra* (discussing *Moose Lodge*); pp. 554-55 *infra* (comparing *Jackson* with *Flagg Brothers*). *But see* note 55 *supra* (mechanism exists to escape close-nexus limitation in race cases). Far from reenacting the conceptual debacle of Shelley v. Kraemer, 334 U.S. 1 (1948), *see* note 35 *supra* (*Shelley* rationale obliterates public/private distinction), the significant state-involvement test effectively distinguishes between situations in which the government consistently structures a private response from those in which it acquiesces in a private decision.

Once a court finds that, by interfering directly in the decisionmaking process, the state has substantially eliminated private choice, the fact that such interference violates one constitutional imperative rather than another should be irrelevant. The state action requirement in each case is derived from the same section of the Constitution. No rationale justifies interpreting that section differently simply because it is to be applied to state infringement of different rights.

79. 436 U.S. 149 (1978).

80. The respondents' brief in *Flagg Brothers* lumped the public function and encouragement arguments under one heading. Brief for Respondents at i, Flagg Bros. v. Brooks, 436 U.S. 149 (1978). The resultant disorganization was primarily at the expense of the significant state-involvement doctrine. *See id.* at 34-40.

A. *Section 7-210 of the Uniform Commercial Code*

The Uniform Commercial Code was the culmination of decades of collaboration by lawyers, scholars, and legislators to mold the diverse and often conflicting strands of commercial law into a coherent whole.[81] It attempts to streamline the commercial process by defining and regulating every aspect of commercial contractual relationships.[82]

Section 7-210, the provision at issue in *Flagg Brothers*, follows the rest of the Code and merely establishes a presumption that the procedure set forth in the Code should be used by warehousemen to convert their liens into good title. That presumption can be rebutted by specific, conflicting contractual provisions.[83] In the absence of such provisions, however, section 7-210 defines the rights and responsibilities of the contracting parties.[84] The contract between Flagg Brothers and Shirley Brooks contained no conflicting provisions.[85]

Unlike the situations in *Moose Lodge* and *Jackson*, the challenged actions of the defendant in *Flagg Brothers* were explicitly authorized by the terms of the pervasive governmental regulations.[86] Moreover,

81. The Uniform Commercial Code was drafted over a period of twenty years and underwent extensive revisions. *See* Schnader, *Foreword* to AMERICAN LAW INSTITUTE, 1 UNIFORM LAWS ANNOTATED: UNIFORM COMMERCIAL CODE x-xi (1976) (discussing drafting and enactment process); Carrington, *A Foreword to the Study of the Uniform Commercial Code*, 14 WYO. L.J. 17, 18-20 (1959) (U.C.C. "the most thoroughly considered statute ever proposed for enactment").

82. *See* NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE, *General Comment* to AMERICAN LAW INSTITUTE, *supra* note 81, at xv-xvii (uniformity to be achieved through viewing U.C.C. as integrated whole); Rockefeller, *Governor's Memorandum of Approval, reprinted in* 1 N.Y.U.C.C. xiii-xv (McKinney 1964) (New York adoption of U.C.C. "a major step toward enactment of a single uniform body of commercial law throughout the United States"). Achieving uniformity of creditors' remedies was considered one of the Code's accomplishments. *See* AMERICAN LAW INSTITUTE, 3 UNIFORM LAWS ANNOTATED: UNIFORM COMMERCIAL CODE § 9-101, Comment (1976) (goal of Code "to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty").

83. *See* AMERICAN LAW INSTITUTE, *supra* note 81, § 1-102(3) & Comment 2.

84. *Id.*

85. Both the District Court and the Court of Appeals rejected Flagg Brothers' contention that Brooks was bound by the "Combined Uniform Household Goods Bill of Lading and Freight Bill" that she received several days after her furniture had been moved and stored pursuant to an oral agreement. That document "in minute print referred to sale by the warehouseman in the event of nonpayment of storage charges." Brooks v. Flagg Bros., 553 F.2d 764, 767 n.3 (2d Cir. 1977), *rev'd on other grounds*, 436 U.S. 149 (1978). The oral agreement extended only to the price of the transaction and ignored the question of remedies. *Id.* at 767.

86. With the exception of one provision that the Court struck down as unconstitutional, the plaintiff in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), could not show that the liquor regulations had any impact on the members' decision to discriminate. *Id.* at 175. Similarly, in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), the tariff provisions pointed to by the plaintiff did not specifically authorize the exact actions

the regulations directly encouraged those aspects of the activity challenged as unconstitutional.

1. *Legitimation of an Unconstitutional Procedure*

By explicitly authorizing Flagg Brothers to act as it did, section 7-210 legitimated those actions. The length and detail of the statute,[87] and the specific and positive terms in which its provisions are couched, belie the claim that it merely authorizes a self-help remedy without encouraging its use.[88] Though designed to facilitate private action, the Code confines such action within carefully circumscribed bounds. Its precision evinces the comprehensiveness with which private ordering has been supplanted by governmental influences.[89]

2. *Replacement of Private Ordering*

In addition to the Code's specific legitimation of unconstitutional actions by private individuals, the governmental framework within which section 7-210 operates—the U.C.C.—encourages the use of those procedures. By erecting procedural and financial barriers to the use of alternative procedures, the Code reflects and effectuates the intention that individuals utilize the authorized, but constitutionally defective, procedure instead of establishing their own.[90]

taken or explicitly favor one construction of the challenged provision over another. *Id.* at 346 n.1. Moreover, the procedure was never specifically approved by the state and may have been inserted into the tariff unnecessarily. *Id.* at 354-55.

By contrast, § 7-210 explicitly details the very aspects of the sale provisions that Brooks was challenging: the notice and hearing requirements. *See* note 88 *infra*. The section was specifically approved by New York State when it enacted the New York U.C.C. after completion of a three-year, six-volume study. *See* Rockefeller, *supra* note 82, at xiii-xiv.

87. The statute begins by authorizing warehousemen to enforce liens on stored goods by public sale "in a commercially reasonable manner." The next 2000 words define "commercially reasonable manner."

88. Section 7-210 specifies exclusive enforcement methods. Section 7-210(2) begins: "A warehouseman's lien . . . may be enforced only as follows. . . ." Moreover, its exclusive provisions detail the very aspects of the procedure challenged by the plaintiff in *Flagg Brothers*. Section 7-210(c) provides for ten days notice of the sale and specifies the form that notice must take. The section does not provide for a presale hearing; a debtor can obtain one only by seeking replevin, which requires the posting of a bond twice the value of the goods held. Flagg Bros. v. Brooks, 436 U.S. 149, 166-67 (1978) (Marshall, J., dissenting).

Even those courts that refuse to find state action in repossessions and sales made pursuant to U.C.C. procedures acknowledge that the specificity of the statute encourages use of the procedures by reducing creditors' risks; creditors know that if they adhere to the detailed procedure, courts will uphold their actions. *See, e.g.*, Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 28 (6th Cir. 1975); Turner v. Impala Motors, 503 F.2d 607, 611 (6th Cir. 1974).

89. *See* note 75 *supra* (narrowing of choices indicates government control).

90. For purposes of the state action analysis, this Note has assumed that the procedures provided by § 2-710 are constitutionally defective. Had the Court found state action pres-

The most significant disincentive to individual adoption of alternative procedures is the presumptive inclusion of section 7-210 in private contracts.[91] This factor is aggravated by the parties' disparities in knowledge and bargaining power. The debtor—the party likely to be adversely affected by section 7-210's remedy—is unlikely to know of its existence.[92] He will thus be unable to use the bargaining power available to him to modify the procedure.[93] Because the creditor stands to benefit from section 7-210, he will generally avoid sharing his knowledge with the buyer for fear of objection to inclusion of the provision

ent and reached the merits in *Flagg Brothers*, it might have ruled that the self-help procedures established in U.C.C. §§ 7-210 and 9-504 did not violate due process. Due process doctrine with respect to summary remedies is in a state of flux. *Compare* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (summary remedy violates due process) *and* Fuentes v. Shevin, 407 U.S. 67 (1972) (ex parte replevin violates due process) *and* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (ex parte wage garnishment violates due process) *with* Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (summary sequestration does not violate due process). Commentators have found untenable the Court's distinctions between acceptable and flawed procedures. *See, e.g.*, Catz & Robinson, *supra* note 13, at 556-68; Steinheimer, *Summary Prejudgment Creditors' Remedies and Due Process of Law: Continuing Uncertainty After* Mitchell v. W.T. Grant Company, 32 WASH. & LEE L. REV. 79 (1975). A due process challenge to the U.C.C. self-help provisions would present a new opportunity to resolve the disputed notice and hearing issues. Catz & Robinson, *supra* note 13, at 570-72.

91. *See* note 83 *supra*.

92. *See* Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld And a Proposed Salvation*, 51 OR. L. REV. 302, 302-04 (1972) (suggesting practical reasons for debtor's lack of knowledge); Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 372-73 (1976) (discussing economic factors responsible for debtor's lack of knowledge).

93. *See* Trebilcock, *supra* note 92, at 370-71 (applying economic theory to contract model).

The issue of whether the availability of self-help repossession procedures is on balance beneficial to the debtor class has been hotly debated. *Compare* Brabham, *supra* note 13, at 191 (costs of self-help repossession outweigh benefits) *and* White, *supra* note 13, at 531 (same) *with* Yudof, *supra* note 13, at 967-72 (benefits outweigh costs) *and* Note, *Creditor Remedies: Providing Due Process at a Discount*, 28 U. FLA. L. REV. 143 (1975) (same).

The debate does not consider the relative cost of institutionalizing self-help remedies instead of requiring that they be included in individual contracts. The unfairness arises from a procedural defect; the failure of the parties to bargain over inclusion of the provision means that its value to them is not taken into account in the contract price and that the debtor thereby suffers a hidden price increase.

Requiring contractual agreement upon summary creditors' remedies is not a novel proposal. *See* Anderson, *A Proposed Solution for the Commercial World to the Sniadach-Fuentes Problem: Contractual Waiver*, 78 COM. L.J. 283, 286-87 (1973) (suggesting *Fuentes* requires post-default waiver of hearing). Commentators have differed as to the efficacy of such requirements. *Compare* White, *supra* note 13, at 509 (no one reads contract clauses) *with* McCall, *supra* note 13, at 407 (knowing waiver valuable in most cases) *and* Note, *supra* note 30, at 771 (without statute authorizing creditors' self-help, creditors would need conspicuous, separately signed agreements to authorize summary remedies). Nevertheless, elimination of the presumptive inclusion of self-help remedies would certainly help those debtors who, like Brooks, had entered into oral agreements.

in the contract.[94] By providing that silence will result in the section's inclusion, the state has effectively encouraged creditors to utilize the state-established procedure.

The government's involvement in self-help repossession, through establishment of a procedure by which warehousemen can convert their liens into good title, satisfies the significant state-involvement, close-nexus test. The government's control of the commercial contracting process is pervasive and has a significant impact on private contractual agreements.[95] By promoting procedures that fail to comport with constitutional norms, the state violates the due process clause.

B. *The Permissiveness Fallacy*

The Court's failure in *Flagg Brothers* to recognize the nexus between the governmental framework and the process of dispute resolution stemmed in part from the posture of the case. Flagg Brothers was

94. *See* Trebilcock, *supra* note 92, at 372-73 (nondisclosure is in creditor's economic interest).

95. The significance of the U.C.C.'s impact varies among jurisdictions. Although it merely codified common law rights in some, in others it granted warehousemen wholly new powers. *Compare* Cox Bakeries of N.D., Inc. v. Timm Moving & Storage, Inc., 554 F.2d 356, 358-59 (8th Cir. 1977) (§ 7-210 constitutes state action in North Dakota because prior to U.C.C. sheriff enforced foreclosure of warehousemen's lien) *with* Melara v. Kennedy, 541 F.2d 802, 805-06 (9th Cir. 1976) (§ 7-210 not state action because California permitted private enforcement of warehousemen's liens for over century). *See* McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1973) (tracing uneven history of self-help remedies). Irrespective of its initial impact, the U.C.C. has a continuing impact on private ordering: creditors rely upon, and take advantage of, its provisions. *See, e.g.*, Parks v. "Mr. Ford," 556 F.2d 132, 157 (3d Cir. 1977) (Gibbons, J., concurring) (garageman's lien enforced under color of state law); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974) (creditors acted with knowledge of and pursuant to statute); *id.* at 340 (Byrne, J., dissenting) (bank relied on state law to repossess).

Notwithstanding judicial rhetoric about the benefits to debtors of state regulation of creditor's remedies, *see, e.g.*, Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 27 (6th Cir. 1975); Gibbs v. Titelman, 502 F.2d 1107, 1112 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974), many commentators have concluded that the net effect of the U.C.C. is to increase the number of self-help repossessions, *see, e.g.*, Catz & Robinson, *supra* note 13, at 582-83 (U.C.C. encouragement more overt than encouragement in *Reitman*); Clark, *supra* note 92, at 306-18 (U.C.C. is anticonsumer); Note, *supra* note 30, at 770-72 (repossession statutes encourage surprise repossessions).

Supporters of the self-help provisions contend that private arrangements would be similar to those authorized by the U.C.C. and that the U.C.C.'s impact on private ordering is thus not significant enough to warrant imposing constitutional restrictions upon the procedure. *See* Flagg Bros. v. Brooks, 436 U.S. 149, 162 n.12 (1978). That claim ignores the economic benefits to the creditor from presumptive inclusion of the provisions. More important, the fact that private parties might have adopted procedures that violate due process norms does not justify allowing the state to promote such procedures; that reasoning would suggest that Jim Crow laws were tolerable because blacks and whites would have ridden in separate train cars even absent the laws.

susceptible to liability under 42 U.S.C. § 1983[96] only if its actions were attributable to the state.[97] Accordingly, the Court began its inquiry by focusing on that question.[98] The Court canvassed and rejected three bases for such attribution: that Flagg Brothers' actions could be traced to the involvement of a state official, that the actions amounted to performance of a public function, and that the state had so encouraged the actions as to be responsible for them.[99]

The Court's analysis of the first two bases, though arguably incorrect,[100] nevertheless found substantial precedential support. But in addressing the state-encouragement argument, the Court elevated to critical importance a hitherto insignificant feature: the permissive nature of the state's involvement.[101] The Court's concentration on whether Flagg Brothers' conduct was attributable to the state led to the conclusion that Flagg Brothers' voluntary decision to use section

96. 42 U.S.C. § 1983 (1976) (giving victims right of action against civil rights violators).

97. Flagg Bros. v. Brooks, 436 U.S. 149, 153-56 (1978).

98. *Id.* at 157 ("Thus, the only issue presented by this case is whether Flagg Brothers' action may fairly be attributed to the State of New York.")

99. *Id.* at 157-66.

100. The Court could easily have found state action under the official-action or public-function theories. The Court might have held that the marshal's involvement in transferring the property implicated the state, insofar as the warehousemen's subsequent imposition of a lien and the ultimate threat of sale followed directly from that transfer. *See* note 24 *supra* (explanation of official action doctrine); Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1341 (9th Cir. 1977) (imposition of garageman's lien subsequent to towing of car at request of state police officer was state action); Tedeschi v. Blackwood, 410 F. Supp. 34, 41-42 (D. Conn. 1976) (same).

The ruling that nonconsensual transfer of property does not constitute a public function was equally questionable. Though the Court attempted to justify that conclusion on historical grounds, 436 U.S. at 161-62, it implicitly recognized the inadequacy of the distinction elsewhere in the opinion, *see id.* at 163. After holding that nonconsensual transfer was not a public function because it was not a duty reserved exclusively to the state, *id.* at 161, the Court explicitly reserved judgment as to the public nature of "such functions as education, fire and police protection, and tax collection," *id.* at 163, some of which have never been performed exclusively by the state, *see, e.g.*, Janusaitis v. Middlebury Vol. Fire Dep't, 607 F.2d 17 (2d Cir. 1979) (private voluntary fire department as state action). Moreover, the Court's argument was historically inaccurate; at least in New York, lien enforcement was traditionally the exclusive prerogative of the state sheriff. 436 U.S. at 167-68 (Marshall, J., dissenting).

The basic problem with the public function decision was less the Court's reasoning than the doctrine itself. Some public function cases have rested on explicit legislative directives. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102-03, 110 (1973) (congressional directive that editorial function remain in private hands); Northrip v. Federal Nat'l Mortgage Ass'n, 527 F.2d 23, 31-32 (6th Cir. 1975) (foreclosure of federal mortgages purposely excluded from federal control). Others, however, have rested simply upon the judge's opinion of what constitutes a public function. *See, e.g.*, Gibbs v. Titelman, 369 F. Supp. 38, 45-47 (E.D. Pa. 1973), *rev'd*, 502 F.2d 1107 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974) (distraint is public function).

101. Flagg Bros. v. Brooks, 436 U.S. 149, 164-66 (1978) (U.C.C. permitted but did not compel Flagg Brothers' actions); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 810 & n.16 (S.D.N.Y. 1979) (*Flagg Bros.* holds state action exists only if state compels private act).

7-210 absolved the state of responsibility for the repossession.[102] The Court emphasized the similarity between Flagg Brothers' actions and traditional private repossession remedies in order to buttress the illusion that Flagg Brothers' decision was its own and not the government's.[103]

The dichotomy between mandatory and permissive state frameworks was a false one. The Court had rejected that dichotomy as far back as its decision in *Smith v. Allwright.*[104] Since 1940, the test of the sufficiency of the state's involvement has turned on the significance of its effect on private ordering. Compulsion is the most extreme effect. But both practically and theoretically, government intrusion into private ordering can exist as readily in a permissive as in a mandatory environment.[105] Given a sufficiently encouraging governmental framework, an independent private choice can reflect governmental priorities as certainly as if that choice had been mandated by the state.[106]

The dissenting opinion of Justice Stevens was the only opinion in *Flagg Brothers* that isolated the real issue of the case: whether the state's exercise of its power to "define and control" the transaction warranted imposition of constitutional safeguards upon that transaction.[107] If the significant state-involvement test is to remain meaningful, the answer to that question must be, yes. Like the activities presented in *Moose Lodge* and *Jackson,* the commercial transactions at issue in *Flagg Brothers* are pervasively regulated by the state.[108] Unlike the activities challenged in *Moose Lodge* and *Jackson,* the procedure by which warehousemen convert liens into good title is also perva-

102. Flagg Bros. v. Brooks, 436 U.S. 149, 164-65 (1978). The Court characterized the state's involvement as a mere denial of judicial relief, implying that Flagg's choice to execute the lien was reached without consideration of the statutory scheme.

103. *Id.* at 162 n.12 (proposed sale not significant departure from traditional private arrangements).

104. 321 U.S. 649 (1944). The Court found Texas' permissive framework for political primaries as conducive to racial discrimination as a mandatory framework and accordingly held that it violated equal protection. *Id.* at 664-65. The mandatory/permissive distinction flies in the face of other precedent. The Court found state action in Reitman v. Mulkey, 387 U.S. 369 (1967), Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), and Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952), despite the fact that each involved permissive frameworks; in none of those cases was the objectionable activity mandated by the government. In fact, in Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956), the Court held that individual action made possible by the existence of a permissive federal framework—granting unions the right to vote for closed shop—constituted state action. *Id.* at 232.

105. *See* pp. 548-49 *supra.*

106. *See* note 65 *supra* (segregation encouraged by state framework).

107. Flagg Bros. v. Brooks, 436 U.S. 149, 174 (1978) (Stevens, J., dissenting).

108. *See* p. 554 *supra.*

sively regulated by the state.[109] That regulation, moreover, directly encourages the due process violations complained of.[110] It is an encouragement that cannot be deemed accidental.[111] The nexus between state establishment of procedures and private invocation of them is sufficiently close to call into play the safeguards of the Fourteenth Amendment.

109. *See* pp. 554-55 *supra.*

110. *See* pp. 555-57 *supra.*

111. *See* note 69 *supra* (determination and relevance of motivation in state action decisions). Not only does the U.C.C. supply the needed pervasiveness, but the states' benefits from the existence of self-help remedies also establish the symbiotic relationship. *See, e.g.,* Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 342 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006 (1974) (Hufstedler, J., dissenting) (economic and administrative benefits flow to the state from self-help).