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ENFORCEMENT OF A WAREHOUSEMAN’S LIEN AS STATE ACTION

Brooks v. Flagg Bros.

An individual commencing an action under section 1983 of the Civil Rights Act of 1871 for violation of his constitutional rights must establish that the conduct complained of constitutes action taken under color of state law. The allegation of state action is essential since neither section 1983 nor the fourteenth amendment imposes constitutional limitations on the actions of private individuals. This requirement has created difficulties, however, since the

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   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.

2 See id.

3 Courts have construed the “under color of” state law language of § 1983 to require the same showing of state action required under the fourteenth amendment. United States v. Price, 383 U.S. 787, 794 n.7 (1966); Monroe v. Pape, 365 U.S. 167, 171 (1961).


   Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overruled, in the name of equality, if the strictures of the [Fourteenth] Amendment were applied to governmental and private action without distinction.

Id. at 250 (Harlan, J., concurring). For a general overview of the history and development of
courts are often called upon to examine activities in which state involvement appears minimal. Where conduct is actually performed by a state official or state agency, the existence of state action is clear. Where the conduct is that of a private individual acting pursuant to a state statute, however, resolution of the state action question becomes problematic. One statutory provision giving rise to such a state action controversy, Uniform Commercial Code section 7-210, provides for private enforcement of a warehouseman's lien by the sale of goods in the warehouseman's possession.


See, e.g., Monroe v. Pape, 365 U.S. 167 (1961) (participation by city police officers); Williams v. United States, 341 U.S. 97 (1951) (wrongful conduct by special police officer); Robinson v. Jordan, 494 F.2d 793 (6th Cir. 1974) (per curiam) (action performed by physician in capacity as county health officer); People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974) (public school teacher involved in illegal search). But see People v. Wright, 249 Cal. App. 2d 692, 57 Cal. Rptr. 781 (Ct. App. 1967) (guard employed by government operated hospital not required to administer Miranda warnings). The state action question becomes more complicated when both a state official or agency and a private person or enterprise jointly participate in a given activity. As the participation of the public employee becomes more remote, a finding of state action becomes less likely. Lewis, The Meaning of State Action, 60 Colum. L. Rev. 1083, 1086-89 (1960).


If a statute creates an "affirmative causal link between state . . . policy and the challenged conduct," state action exists. Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 553 (9th Cir. 1974). A sufficient connection between the state legislation and the private act is established when the statute actually compels, or at least encourages, conduct by private individuals. See notes 53-55 and accompanying text infra. Similarly, if a "symbiotic relationship" is created whereby the state and the private party actively become partners, each conferring a "variety of . . . benefits" on the other, the private conduct will be deemed state action. Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961); see notes 49-52 and accompanying text infra.

State action is also found where a statutory provision delegates a purely public function to a private person. See, e.g., Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973) (execution of an innkeeper's lien was a traditional function of the sheriff). But see Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150 (7th Cir. 1975), cert. denied, 424 U.S. 928 (1976); Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975) (extrajudicial execution of an innkeeper's lien does not amount to state action).

U.C.C. § 7-209 provides a warehouseman with "a lien against the bailor on the goods
Recently, in *Brooks v. Flagg Bros.*, the Second Circuit ruled that a warehouseman's enforcement of a lien by the sale of goods pursuant to section 7-210 is state action for the purpose of a section 1983 suit. After her eviction from a Mount Vernon, New York, apartment in June 1973, plaintiff Brooks arranged to have her furniture and household possessions stored by defendant Flagg Brothers, Inc. A dispute over the storage charges arose, and, upon her refusal to pay the alleged amount due, plaintiff was notified that her goods would be sold if the balance was not paid. Shortly thereafter Brooks instituted an action in federal district court, claiming that the threatened sale, authorized by section 7-210 of the New York Uniform Commercial Code (U.C.C.), would deprive her of due process in violation of section 1983 of the Civil Rights Act of 1871. Finding that a warehouseman's sale of goods under section 7-210 does not constitute state action, the district court dismissed the com-

covered by a warehouse receipt . . . for charges for storage or transportation . . ." A warehouseman may enforce this lien, under U.C.C. § 7-210(2), "by auction [sale held] at a specified time and place." *Id.* § 7-210(2)(c).


11 553 F.2d at 766. Although the complaint also challenged § 7-209, which grants the lien to the warehouseman, this issue was not raised on appeal. *Id.* at 769 n.10.

12 *Id.* at 766-67.

13 *Id.* at 767. Brooks claimed that she was originally quoted a price of $65 per month which would cover both moving and storage. Immediately after her goods were loaded on defendant's truck, she was informed that the initial storage charges amounted to $178. Reluctantly, she paid this amount but shortly thereafter was billed for an additional $156 allegedly due on the first month's charge. *Id.*

14 *Id.* After the filing of the action, counsel for the parties reached an agreement under which Brooks was permitted to regain possession of her furniture without paying the disputed charges. *Id.* at 768.


16 Since the action was dismissed by the district court for lack of state action, the due process question was never reached. This result is common in cases dealing with claims under § 1983. See, e.g., Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976); Phillips v. Money, 503 F.2d 590 (7th Cir. 1974), cert. denied, 420 U.S. 934 (1975); James v. Pinnix, 485 F.2d 206 (5th Cir. 1974); Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974).

In cases in which the merits of the challenges to § 7-210 have been examined, courts have reached differing results. In *Magro v. Lentini Bros. Moving & Storage Co.*, 338 F. Supp. 464 (E.D.N.Y. 1971), *aff'd per curiam*, 460 F.2d 1064 (2d Cir.), cert. denied, 406 U.S. 961 (1972), the court concluded that it was unnecessary to decide the state action question because the operation of § 7-210 would not violate the plaintiff's constitutional rights. 338 F. Supp. at 466. The decision rested on three important factors: first, plaintiffs voluntarily and knowingly delivered their property to the warehousemen; second, § 7-210 provides sufficient notice before sale giving the owner an opportunity to obtain redress from the courts; third, the property involved was not of such a nature that deprivation of it would cause serious injury to the owner. *Id.* at 467. In contrast, the court in *Jones v. Banner Moving & Storage, Inc.*, 78 Misc. 2d 762, 358 N.Y.S.2d 885 (Sup. Ct. Kings County 1974), *modified*, 48 App. Div. 2d 928, 369 N.Y.S.2d 804 (2d Dep't 1975), held that the sale of goods pursuant to § 7-210 is unconsti-
plaint.17

A divided Second Circuit reversed the lower court. Judge Bryan, writing for the majority,18 initially observed that "[t]he under color of state law provision [of] § 1983 is equivalent to the state action requirement of the fourteenth amendment."19 Pointing out that a myriad of factors are relevant in determining whether state action is present in a particular instance, the court reasoned that the pertinent considerations in Brooks were U.C.C. § 7-210's expansion of a warehouseman's common law remedies and its

tutional, because the statute does not provide the lienee a presale opportunity for a judicial hearing. Mere notice that the goods will be sold, as required by the statute, was deemed insufficient to satisfy due process requirements. A "prejudgment seizure . . . without an order of a judge or of a court of competent jurisdiction [is] unconstitutional." 78 Misc. 2d at 771, 358 N.Y.S.2d at 895 (quoting Laprease v. Raymours Furniture Co., 315 F. Supp. 716, 725 (N.D.N.Y. 1970)). The Jones court found Magro unpersuasive due to, inter alia, its different factual setting. 78 Misc. 2d at 775, 358 N.Y.S.2d at 899.


17 404 F. Supp. at 1061. Before the state action question was reached, the district court considered the motion of Gloria Jones, who also was evicted from her home by a Mount Vernon marshal, to intervene as a party plaintiff. 63 F.R.D. 409 (S.D.N.Y. 1974). The court permitted her to intervene under FED. R. Civ. P. 24(b)(2) because the legal issues involved were identical to those presented in the Brooks action. 63 F.R.D. at 415. In the same order permitting Jones' intervention, the court granted the motion of the New York Attorney General and four storage associations to intervene as party defendants, since they shared a common interest in upholding the constitutionality of § 7-210. In addition to the intervention issue, the lower court was presented with a class action question which it never resolved. Brooks had sought relief on behalf of herself and the class of persons whose property was subject to sale pursuant to § 7-210. 404 F. Supp. at 1060. Plaintiff had proposed a class of defendants consisting of "all warehousemen . . . who impose liens and subject goods to sale pursuant to [the] New York Uniform Commercial Code . . . ." Id. On appeal, the Second Circuit, in its opinion reversing the lower court's resolution of the state action issue, urged that the class action question be resolved immediately since it may bear heavily on the due process claims. 553 F.2d at 774-75. The class action issue also is relevant to the question of justiciability. Since both Brooks and Jones were allowed to reclaim their property before the suit was resolved, an actual controversy may no longer exist. The plaintiffs may continue to represent a class of persons whose property is stored in warehouses, however, as long as a real controversy is present between the class and the defendant. See Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Sosna v. Iowa, 419 U.S. 393 (1975).

19 The Second Circuit panel consisted of Circuit Judge Timbers and District Judges Bryan and Holden. Judge Timbers joined Judge Bryan in the majority opinion, while Judge Holden dissented.

553 F.2d at 766 n.2.
delegation of a traditional state power to a private person.\textsuperscript{20} Although a warehouseman’s lien was recognized at common law, Judge Bryan found, such lien was enforceable only through judicial proceedings.\textsuperscript{21} In addition, the common law lien was limited to the particular property for which the charges were owed.\textsuperscript{22} In the \textit{Brooks} court’s view, by enacting section 7-210 the state expanded a warehouseman’s authority by allowing him to satisfy his lien without judicial proceedings.\textsuperscript{23} The Second Circuit concluded that section 7-210 thus effects “a complete circumvention of the judicial process, by installing the warehouseman as the final and interested judge of any dispute over storage charges, and as the sheriff who will enforce his own decisions.”\textsuperscript{24} In addition to expanding the warehouseman’s common law rights, Judge Bryan noted, the U.C.C. provision delegates a traditional state function, the power to execute upon a lien, to private warehousemen.\textsuperscript{25} Reasoning that New York’s enactment of the statute therefore significantly enhanced the legal position of a warehouseman, the \textit{Brooks} panel concluded that the latter’s enforcement of a 7-210 lien constitutes state action under section 1983.\textsuperscript{26} In support of this conclusion, the \textit{Brooks} majority pointed to a recent decision of a three-judge district court\textsuperscript{27} in which it is suggested that a garageman’s sale of an abandoned automobile, pur-

\textsuperscript{20} \textit{Id.} at 771.
\textsuperscript{21} \textit{Id.} at 771-72.
\textsuperscript{22} \textit{Id.}
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.} at 772.
\textsuperscript{25} \textit{Id.} at 771-72.
\textsuperscript{27} \textit{Tedeschi v. Blackwood}, 410 F. Supp. 34, 42 (D. Conn. 1976). At issue in \textit{Tedeschi} was \textit{Conn. Gen. Stat. Ann. § 14-150(e)(f)} (West Supp. 1978), which permitted a police officer to seize any apparently abandoned automobile. The statute authorized the garageman storing such a vehicle to sell it in order to recover unpaid storage and towing charges. \textit{Id.} Concluding that the statutory scheme involved state action since the seizure process was initiated by a state official, the \textit{Tedeschi} court went on to state that the statutory sale authorization was a sufficient independent ground upon which to predicate a finding of state action. 410 F. Supp. at 42. Since \textit{§ 14-150} did not afford the plaintiff an opportunity to be heard, the \textit{Tedeschi} court concluded that its operation violated plaintiff’s constitutional rights. \textit{Id.} at 45.
suant to statutory lien enforcement procedure, amounts to state action.\textsuperscript{28}

In a dissenting opinion, Judge Holden rejected the approach adopted by the majority.\textsuperscript{29} As an alternative, the dissent focused on the actual involvement of the state in the 7-210 sale finding that such involvement did not rise to a sufficient level to convert the warehouseman's conduct into state action.\textsuperscript{30} Noting that section 7-210 does not compel a warehouseman to pursue the remedy it affords or establish a mutual relationship between the warehouseman and the state,\textsuperscript{31} the dissent concluded that the controversy was essentially a private one in which the defendant storage company merely chose to utilize the private remedy authorized by section 7-210.\textsuperscript{32}

\begin{footnotesize}
\begin{itemize}
\item[28] 553 F.2d at 773-74. In reaching its conclusion, the Second Circuit relied upon two of its earlier decisions, Bond v. Dentzer, 494 F.2d 302 (2d Cir.), cert. denied, 419 U.S. 837 (1974), and Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir.), cert. denied, 419 U.S. 1009 (1974). In Shirley, an action was commenced by the owner of an automobile which was repossessed pursuant to a state statute. Dismissing the complaint for failure to state a claim under 42 U.S.C. § 1983 (1970), Judge Mulligan noted that the right of peaceful repossession without a court order was recognized at common law. 493 F.2d at 742. Similarly, a § 1983 action challenging the New York wage assignment statutes, N.Y. BANKING LAW §§ 340-362 (McKinney 1976 & Supp. 1977-1978); N.Y. PERS. PROP. LAW §§ 46-49b (McKinney 1971 & Supp. 1977-1978), was dismissed for lack of state action in Bond. 494 F.2d at 311. Basing its use of the expansion of common law remedies test on the authority of these two decisions, the Brooks court noted that in both cases state action was held to be absent, since the challenged statutes merely codified and did not expand traditional common law remedies. 553 F.2d at 773.
\item[29] 553 F.2d at 775-76 (Holden, J., dissenting). Judge Holden's rejection of the expansion of common law remedies test was based on two factors: first, that warehousemen were granted a possessory lien on goods for unpaid charges at common law, and second, that enforcement of the lien has been a private function since 1879. Id. at 775.
\item[30] Id. at 775-76.
\item[31] Id. at 776. The dissenting opinion pointed out a common problem encountered by courts dealing with a situation where a private individual is authorized to act under state law. While the usual predicate for a finding of state action is significant government participation in the private activity, by delegating its power to private persons the state divorces itself from the private conduct. Thus, in such cases the tests applied focus upon whether the private conduct is "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966), quoted in Brooks v. Flagg Bros., 553 F.2d at 775 (Holden, J., dissenting). Judge Holden concluded that the essentially private nature of transactions between warehousemen and their customers results in an insufficient connection between the state and the remedy authorized by § 7-210 to lead to a finding of state action. 553 F.2d at 775 (Holden, J., dissenting).
\item[32] 553 F.2d at 776. Both the First and Seventh Circuits share Judge Holden's view that enforcement of a lien is essentially a private action. In Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975), the court ruled that a Massachusetts statute, MASS. GEN. LAWS ANN. ch. 255, § 23 (West 1959), affording an innkeeper the right to enforce a lien on property of absconding guests did not sufficiently involve the state in the enforcement process to give rise to a finding of state action. 512 F.2d at 202, 205. The court stated that the "legislature has made the seizing and holding of property a matter of a private creditor invoking a private remedy."
\end{itemize}
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The Second Circuit decision in *Brooks* seems to reflect the current judicial interest in protecting a debtor's due process rights against unrestrained efforts by creditors to secure payment of debts.\(^3\) Unfortunately, however, in reaching its conclusion, the *Brooks* majority appears to have deemphasized the state action requirement contained in section 1983. An analysis of the *Brooks* situation under the criteria utilized by the court, it is submitted, reveals that the court's finding of state action is questionable.

Central to any state action inquiry is an examination of actual government participation in the private activity.\(^3\) Under the warehouseman's lien enforcement procedure prescribed in the U.C.C., such participation appears minimal. By permitting a warehouseman to unilaterally enforce his lien, a state enacting section 7-210 in effect divorces itself from any involvement in the private activity.\(^3\) It is true that a grant of power to a private individual through statutory enactment or constitutional amendment may render that person's conduct characterizable as state action within the meaning of section 1983.\(^3\) In a case such as *Brooks*, however, where there are no additional factors manifesting significant government participation, the delegation is an insufficient connection to satisfy the state action requirement.\(^3\)

Although the private activities authorized by the statute do not involve a significant degree of actual government participation,

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\(^3\) See, e.g., *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969), wherein it is stated: [D]ue process is afforded only by the kinds of “notice” and “hearing” which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use.

\(^3\) Similarly, the Seventh Circuit rejected a contention that because the sheriff traditionally executed a lien on personal property, the delegation of that function to a private person rendered the latter's actions those of the state: "At most it is one that has been shared by the state with private persons." *Anastasia v. Cosmopolitan Nat'l Bank*, 527 F.2d 150, 157-58 (7th Cir. 1975), cert. denied, 424 U.S. 928 (1976).

\(^3\) See also *Clark & Landers*, *The New Due Process: Rights and Remedies*, 63 Ky. L.J. 531, 535-43 (1975).


state involvement may nonetheless be found under several different theories. Pursuant to the expansion of common law remedies test applied in *Brooks*, the focus is on the statute's enhancement of the individual's common law remedies.\(^\text{38}\) While the provisions of section 7-210 expand the warehouseman's common law rights,\(^\text{39}\) this factor by itself is not sufficient to support the *Brooks* holding.\(^\text{40}\) Moreover, as Judge Holden pointed out in his dissent, the common law test may not accurately reflect the degree of involvement on the part of the state.\(^\text{41}\) The question whether a statute creates a new right for private individuals or merely codifies existing rights seems irrelevant to the state action determination, as it does not reveal "the impact of the law upon [the] private [activity]."\(^\text{42}\) Related to the


\(^{39}\) It is clear that a warehouseman's lien was recognized by the common law. See Harbor View Marine Corp. v. Braudy, 189 F.2d 481, 483 (1st Cir. 1951); Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, 18 P.2d 351 (Ct. App. 1933); Note, Procedural Due Process—Post-Fuentes Constitutionality of Garagemen's Liens, 54 B.U.L. Rev. 542, 543-44 (1974) [hereinafter cited as Procedural Due Process]. This lien entitled the warehouseman to retain goods stored until charges on them had been paid, Jewett v. City Transfer & Storage Co., 128 Cal. App. 556, 18 P.2d 351 (Ct. App. 1933), but terminated upon delivery of the goods to the bailor. Shingleur-Johnson Co. v. Canton Cotton Warehouse Co., 78 Miss. 875, 29 So. 770 (1901). The lien attached only to the goods for which the charges were owed. See, e.g., Marks v. New Orleans Cold Storage Co., 107 La. 172, 31 So. 671 (1901); Southern Attractions v. Grau, 93 So. 2d 120 (Fla. 1958). To obtain enforcement, the warehouseman had to resort to judicial proceedings. See Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1900); R. Brown, THE LAW OF PERSONAL PROPERTY § 14.1, at 446 (3d ed. 1975).

The lien provisions of the U.C.C. expand the warehouseman's common law rights in two respects. Under U.C.C. § 7-210, the warehouseman is permitted to enforce the lien himself. See Schmidt v. Cohen Transfer & Storage Co., 170 Colo. 550, 463 P.2d 445 (1970) (statute permitting warehouseman to sell goods expanded his common law remedies). In addition, the statute allows the lien to attach to goods other than those for which payment is due. See N.Y.U.C.C. § 7-209 (McKinney 1966) which provides: "If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods . . . the warehouseman also has a lien against him for such charges and expenses . . . ." Id. § 7-209(1).


\(^{41}\) 553 F.2d at 775 (Holden, J., dissenting).

expansion of the common law remedies standard is the public function theory, which permits a finding of state action where a statute delegates a state power to a private individual. In applying this test, the Second Circuit observed that execution of a warehouseman's lien was an activity traditionally performed by the sheriff, and concluded that statutory authorization of a private sale amounted to a delegation of a state function. It is suggested, however, that the state function rationale does not require a finding of state action in every instance in which a private individual engages in some activity previously performed by the state. Prior decisions have suggested that the doctrine's use is limited to those situations wherein the service is one that "the state itself is under an affirmative duty to . . . [perform]." Under this analysis, the state function test is applied only to those actions which are per-

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3 See, e.g., Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953). Writing for the majority in Evans, Justice Douglas explained the state function rationale as follows: "[W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations." 382 U.S. at 299. See Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Colum. L. Rev. 656, 692-93 (1974) [hereinafter cited as Constitutional Restrictions]. When the state action inquiry arises in connection with a challenge to a lienholder's distraint of personal property pursuant to state law, application of the state function test has often been held inappropriate. See, e.g., Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976); Gibbs v. Titelman, 502 F.2d 1107 (3d Cir.), cert. denied, 419 U.S. 1039 (1974); Smith v. Bekins Moving & Storage Co., 384 F. Supp. 1261 (E.D. Pa. 1974). But see Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

4 553 F.2d at 771-72. A warehouseman’s lien generally was enforced through a foreclosure proceeding. See Howard v. J.P. Paulson Co., 41 Utah 490, 127 P. 284 (1912). The property subject to the lien could be divested only by foreclosure sale. Hansel v. Hartford Court Trust Co., 133 Conn. 181, 14 A.2d 666 (1946); Hurt v. Edwards, 347 Mo. 667, 148 S.W.2d 542 (1941); Christiansen v. Strand, 82 S.D. 416, 147 N.W.2d 415 (1966). The sale usually was conducted by a sheriff or a constable. See Race v. Dada, 102 N.Y. 298, 6 N.E. 592 (1886); Union Dime Sav. Inst. v. Andariase, 83 N.Y. 174 (1880).

5 553 F.2d at 771.

6 See Evans v. Newton, 382 U.S. 296, 300 (1966). Only those activities which "traditionally [serve] the community," such as police and fire departments, as opposed to social clubs, educational institutions, "and other like organizations in the private sector" constitute state action when delegated to private persons. Id. at 302; accord, Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968).

7 New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 860 (2d Cir. 1975). In Terry v. Adams, 345 U.S. 461 (1953), the Supreme Court recognized that by repealing legislation governing primary elections, the state was in effect delegating to a private political organization its duty to regulate elections. Id. at 466. Similarly, in Marsh v. Alabama, 326 U.S. 501 (1946), the Court held that even though a town may be owned and managed by a private corporation, an individual may not be denied his constitutional protections because the state has "[permitted] a corporation to govern a community of citizens." Id. at 509. Applying this rule, the Second Circuit, in Perez v. Sugarman, 499 F.2d 761 (2d Cir. 1974), held that where a private institution is given custody of abandoned children, it is carrying out a traditional public function and is thus subject to suit under § 1983. Id. at 765.
formed solely by the state. Since the execution of a lien is not an exclusively governmental function, the private sale of property pursuant to section 7-210 does not amount to state action under this theory.48

Although not applied by the Second Circuit, additional theories developed by the court also seem relevant to the Brooks situation. One such criterion, the "symbiotic relationship" test, leads to a finding of state action when it is shown that a "rendering of mutual benefits between a private creditor and the state"49 causes the two to become in effect "partners in a joint effort."50 In addition, there must be an element of control by the state over the private individual sufficient to give rise to the inference that the latter is acting on behalf of the state.51 Once this symbiotic relationship is found to exist, the courts will deem the actions of the private persons to be those of the state.52 State action may also be found if the state encourages or compels a private individual to act in a designated manner.53 Mere authorization of private conduct, however, is not

48 See Anastasia v. Cosmopolitan Nat'l Bank, 527 F.2d 150, 157-58 (7th Cir. 1975), cert. denied, 424 U.S. 928 (1976); Davis v. Richmond, 512 F.2d 201, 205 (1st Cir. 1975); Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968). The public function theory has been held inapplicable in other situations where the challenged activity was not deemed a traditional state function. See, e.g., Magill v. Avonworth Baseball Conference, 516 F.2d 1328 (3d Cir. 1975) (private use of public baseball fields); Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973) (national bank's seizure of borrower's collateral).

49 Melara v. Kennedy, 541 F.2d 802 (9th Cir. 1976). The symbiotic relationship standard, also known as the entwinement test, requires a finding that the state is financially or otherwise interdependent with the private activity. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). In Burton a relationship between the state and a private restaurant located in a building owned and operated by a state agency was held to satisfy this test, as the state had in effect become a partner of the restaurant. Id. at 725. A symbiotic relationship may also be found to exist where a private institution receives a substantial grant or loan from the state, see, e.g., Weise v. Syracuse Univ., 522 F.2d 397, 407 (2d Cir. 1975); Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), as well as where "the state has elected to place its power, property and prestige behind the defendant's actions," Ve-Ri-Tas v. Advertising Review Council, 411 F. Supp. 1012, 1016 (D. Colo. 1976); see Kletschka v. Driver, 411 F.2d 436, 449 (2d Cir. 1969); Weiss v. J.C. Penney Co., 414 F. Supp. 52, 54 (N.D. Ill. 1976) (mem.); Milner v. National School of Health Tech., 409 F. Supp. 1389, 1393 (E.D. Pa. 1976); Rackin v. University of Pa., 386 F. Supp. 992, 1002-04 (E.D. Pa. 1974).


53 Reitman v. Mulkey, 387 U.S. 369, 380-81 (1967). Reitman involved a challenge to Cal. CONST. art 1, § 26 which permitted private discrimination in real property conveyancing by prohibiting the state from interfering in any way with the right of an individual to freely dispose of his property. Because this amendment encouraged discrimination, the Court reasoned, it provided a sufficient basis for finding that the state was significantly involved in the private discrimination. 387 U.S. at 381. See Collins v. Viceroy Hotel Corp., 338 F. Supp.
enough to satisfy this standard; the private acts must be required by state or local law or custom in order to become the state's responsibility.

It is submitted that a finding of state action in Brooks could not be properly premised upon either of these two tests. Indeed, the Ninth Circuit has determined that the governmental involvement in the warehouseman's sale is too insignificant to warrant a finding of state action under any standard. Rather than confining its inquiry to a few salient considerations, that court attempted to examine all the factors suggestive of the state's actual involvement in the lien enforcement procedure. Rejecting the expansion of common law remedies and state function theories relied upon in Brooks, the Ninth Circuit went on to conclude that there existed no "symbiotic" relationship between the state and the warehouseman and no state encouragement of the challenged activity. Moreover, it was ob-


36 It was found by the Brooks dissent, see note 31 and accompanying text supra, that since § 7-210 neither commands the warehouseman's conduct nor creates a relationship between the warehouseman and the government, a finding of state action may not be premised upon the encouragement of private activity or symbiotic relationship tests. 553 F.2d at 776 (Holden, J., dissenting).

37 541 F.2d 802 (9th Cir. 1976). In Melara, a homeowner's dispute arose between the plaintiff and a warehouseman over charges allegedly due for the storage of goods. When the storage company notified the plaintiff that the goods would be sold, an action under § 1983 was instituted. 541 F.2d at 803.

38 541 F.2d at 805. The court characterized the "lack of common law origin" as a "factor of dubious worth." Id.

39 Id. at 807-08.

40 Id. at 807. The Ninth Circuit found that the Melara situation would not support a "finding that a 'symbiotic relationship' existed between the private actor and the state . . . ." Id. at 806. According to that court, the relationship of the state and the warehouseman under § 7-210 is more closely akin to that of regulator-regulatee or licensor-licensee. Id. at 807.

41 Id. The Melara court also found that there exists a relationship between the property
served that mere regulation of a private activity will not convert such conduct into state action.62

Despite the Brooks court’s awareness of the broader inquiry conducted by the Ninth Circuit and other federal courts in suits challenging statutory remedies afforded to creditors,63 it limited its analysis to the state function and expansion of common law reme-
dies standards. It is suggested that had the Second Circuit undertaken a more extensive examination of the Brooks controversy, utilizing the other factors clearly relevant to a state action inquiry, it might have concluded that the involvement on the part of the state was insufficient to convert the storage company's conduct into state action.

The Brooks decision seems to suggest a recent trend in the Second Circuit toward liberal application of the state action requirement of section 1983 in order to protect the individual's constitutional rights. While this concern for individual rights is salutary, it is submitted that the Second Circuit in Brooks has overlooked the important purpose underlying the state action requirement. In so doing, the court may have restrained the liberty of certain private individuals by subjecting them to limitations not imposed by section 1983 or the fourteenth amendment. It is hoped that the Second Circuit will continue its efforts to protect individual rights, but in a manner that does not unduly minimize the importance of the state action doctrine.

Marian A. Campbell

Editor's Note: As The Second Circuit Note goes to print, the Supreme Court has reversed Brooks. 46 U.S.L.W. 4438 (U.S. May 15, 1978). Rejecting the "public function" theory, the Court found that the resolution of debtor-creditor disputes was not traditionally an exclusive state function. The Court noted, moreover, that the New York statutory scheme does not compel any action on the part of warehousemen. It was concluded, therefore, that there exists insufficient state involvement to convert the warehouseman's conduct into state action. Thus, the Supreme Court has resolved the conflict between the Second and Ninth Circuits by opting for the position of the latter court.

44 In Weise v. Syracuse Univ., 522 F.2d 397, 408 (2d Cir. 1975), and Jackson v. Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), the Second Circuit found that state action may be predicated upon the state's financial assistance, in the form of tax exemptions, to private institutions. Although it traditionally has been held that grants of tax exemptions or benefits are insufficient to satisfy state action requirements unless additional elements revealing sufficient government participation are present, see, e.g., Walz v. Tax Comm'n, 397 U.S. 664 (1970); New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1974); Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), cert. denied, 419 U.S. 874 (1974), the Jackson and Weise courts reasoned that a less demanding state action standard should be applied where basic civil liberties are at issue, see 522 F.2d at 406; 496 F.2d at 628-29, 635.

45 See note 4 supra.