STATE ACTION AND WAGE ASSIGNMENTS: DUE PROCESS FOR THE DEBTOR?

The United States Supreme Court has declared certain creditor's prejudgment remedies unconstitutional, holding that the taking of the property of a debtor allegedly in default without providing him either prior notice and an opportunity to be heard or a prompt post-seizure hearing is a denial of due process.[1] Although this doctrine has done much to

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1. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (Georgia statute permitting writ of garnishment to be issued by court clerk without provision for early hearing held unconstitutional); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin statutes which authorized sheriff to seize debtor's property without prior notice and hearing violated due process); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wage garnishment statute which did not provide for prior notice and hearing held unconstitutional). *Sniadach* was interpreted by many courts to have mandated prior notice and hearing only in instances in which the deprivation of property would cause undue hardship to the debtor. *See, e.g.*, Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 105 (10th Cir. 1970); Black Watch Farms, Inc. v. Dick, 323 F. Supp. 100, 102 (D. Conn. 1971). In subsequent decisions, however, the Court indicated that its decision was not intended to be so limited, that notice and opportunity to be heard must be afforded whenever the state is involved in any deprivation of a significant property interest. Boddie v. Connecticut, 401 U.S. 371, 379 (1971); *see* Fuentes v. Shevin, *supra* at 86; Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelley, 397 U.S. 254, 262 (1970). This "property interest" has been held to include the continued use of goods prior to any final determination of right to ultimate possession or ownership. Fuentes v. Shevin, *supra* at 86. The Court emphasized the high value which Americans have always placed upon a person's right to enjoy his property free from governmental interference, noting that when the state acts to deprive a person of his possessions it has a duty to follow a fair process of decisionmaking and to protect against arbitrary encroachments. It further noted that the danger of an unfair or mistaken taking is particularly great when the state seizes goods upon the application, and for the benefit, of a private party. *Id.* at 80-81.

Although *Fuentes* had apparently established the principle that due process required that a debtor be given notice and a hearing prior to any deprivation of his property, subsequent decisions have indicated that this requirement is not absolute. Noting that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation," the Court in Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974), *quoting* Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961), upheld a Louisiana statute under which a judge had issued a writ of sequestration against the property of a debtor allegedly in default on the purchase of household goods without first providing him notice and an opportunity to be heard. *Sniadach* was distinguished on the basis of the property involved. The Court recognized that a vendor creditor had an interest in the physical condition of

protect the debtor from arbitrary seizure of his property, its application is limited to situations in which the exercise of the remedy satisfies the state action requirement of the fourteenth amendment.[2]

One creditor remedy in which the existence of state action has been debated is the wage assignment.[3] In *Bond v. Dentzer*[4] a wage assignment was executed by plaintiff as security for a loan from a finance company. When she stopped making payments, the loan company held her in default and filed a copy of the wage assignment with her employer as authorized by Article 3-A of the New York Personal Property Laws. Plaintiff claimed that she had received no notice of the creditor's intent to enforce the assignment.[5]

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the goods in the debtor's possession which might justify their seizure pending a final determination of rights. This interest was lacking in the case of wages. *Id.* at 614-15.

Fuentes, although involving similar property, was also distinguished on factual grounds, the Court finding that the Louisiana statute protected the debtor against arbitrary dispossession while the statutes struck down in *Fuentes* did not. *Id.* at 615-18. The Court specifically cited the fact that Louisiana required that the writ be judicially authorized, that the creditor present more than mere conclusory allegations to obtain the court order, and that the debtor could immediately move to dissolve the writ, which had to be ordered unless the creditor proved the grounds upon which the writ was issued. *Id.* at 616-18. These provisions were absent in the *Fuentes* statutes. *Id.* at 615-18; *see* Fuentes v. Shevin, *supra.* The importance of these safeguards was re-emphasized in North Georgia Finishing Inc. v. Di-Chem, Inc., *supra,* in which the Court, while finding the Georgia garnishment statute unconstitutional by denying the debtor a hearing prior to the taking of his property, also noted that it lacked the saving characteristics of the statute in *Mitchell. Id.* at 607. For a discussion of *Mitchell* and *Fuentes* see 10 URBAN L. ANN. 243 (1975).

2. *See* notes 10-26 and accompanying text *infra.* The state action hurdle must be met before there is any consideration of procedural due process requirements. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (no mention of procedural due process issue since no state action found); Adams v. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert denied,* 419 U.S. 1006 (1974) (self-help remedy not state action).

3. A wage assignment transfers "a debtor's wages without resort to judicial process. . . . [A] creditor, acting pursuant to a state statute, merely presents a copy of the assignment . . . to the [debtor's] employer who then transfers the debtor's wages to the assignee." Comment, *Wage Assignments: A Creditor Remedy in Need of Reform,* 18 WAYNE L. REV. 1535 (1972). Generally there is no prior notice to the debtor, and any "defenses [he may have] do not prevent the assignment's operation unless . . . [he] takes affirmative court action by seeking an injunction." *Id.* at 1535-36.

4. 494 F.2d (2d Cir.), *cert. denied,* 419 U.S. 837 (1974).

5. Plaintiff's action was joined with that of another debtor who had also been declared in default by a loan company and whose wage assignment had been

In a suit against the loan companies, plaintiffs alleged a violation of 42 U.S.C. § 1983.[6] They moved for a summary judgment that sections 46-49 of Article 3-A of the New York Personal Property Laws were unconstitutional. The federal district court, finding state action for federal question jurisdiction,[7] declared the challenged laws unconstitutional on their face and as applied insofar as they provided for the enforcement of a wage assignment without affording the debtor meaningful notice and opportunity to be heard.[8] The court of appeals reversed the decision

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filed with her employer without notice. The second plaintiff claimed defenses of fraud and deceit to bar enforcement of the assignment. *Id.* at 304.

6. 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.

42 U.S.C. § 1983 (1970). The "under color of state law" requirement has been treated as the equivalent of the state action requirement of the fourteenth amendment. United States v. Price, 383 U.S. 787, 794-95 n.7 (1966); *see* notes 10-26 and accompanying text *infra*. For a discussion of the history of § 1983 see Monroe v. Pape, 365 U.S. 167, 171-87 (1961).

7. Federal district courts have original jurisdiction over any civil action arising under § 1983. *See* 28 U.S.C. 1343(3) (1970). Since state action is a requirement of § 1983, it is thus also necessary if the court is to assert its jurisdiction under § 1343(3). The district court found state action because of a mutuality of interest between the state and creditors, state encouragement of the acts complained of, and a delegation of traditional state functions. 362 F. Supp. 1373, 1378-81 (N.D.N.Y. 1973). For further discussion of these bases for finding state action see notes 10-26 and accompanying text *infra*.

8. 362 F. Supp. at 388-89. New York law established the procedures to be used in the assignment of earnings. N.Y. PERS. PROP. LAW §§ 46-c(a), (b) (McKinney 1962) provided that the assignment be made in a separate written instrument in which all printed material was in at least eight-point type, that the transaction to which the assignment related be described fully and that certain sections of the property laws be summarized on the face or back of the instrument. N.Y. PERS. PROP. LAW § 47e (McKinney 1962), *as amended,* Act of April 4, 1962, ch. 310, § 310 [1962] Laws of N.Y. 1817-18, *and* Act of April 24, 1962, ch. 690, § 13 [1962] Laws of N.Y. 3168, provided for the vacation of an assignment upon application of the assignor, his employer or any person having an interest, by a court judgment in a special proceeding. N.Y. PERS. PROP. LAW § 48 (McKinney 1962), required that an assignee of future earnings wait 21 days after default by the assignor, notify the assignor of the default, and wait another ten days before filing the assignment with the employer. N.Y. PERS. PROP. LAW § 48-a, 2(a) (McKinney 1962), *as amended,* Act of April 4, 1962, ch. 310, § 311 [1962] laws of N.Y. 1818-19, limited the amount collectible in any month to no more than ten percent of the assignor's future earnings payable in each month, and N.Y. PERS. PROP. LAW § 48-b (McKinney 1962),

on the merits, finding "no significant involvement of the State in the challenged conduct."[9]

The concept of state action has developed in the context of litigation under the fourteenth amendment.[10] In an early interpretation of the

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prohibited the withholding of earnings unless they amounted to at least 25 dollars per week. Nowhere was it required that a hearing be provided *before* the wage assignment was filed with the debtor's employer (a hearing to vacate the assignment would occur only after the attachment and only if the debtor or other interested party initiated suit). It should also be noted that the provision requiring prior notice to the debtor was apparently unenforced in *Bond*; both plaintiffs claimed no prior knowledge of their creditors' intent yet had their wages attached.

New York has since modified its laws governing wage assignments, but these revisions were not under consideration in the *Bond* decisions. Some of the changes are minor; N.Y. PERS. PROP. LAW § 48(1) (McKinney 1962), *as amended,* (Supp. 1974), now requires that the assignee wait at least 20 days after notifying the debtor of default before filing the assignment with the employer, while N.Y. PERS. PROP. LAW § 48-b (McKinney 1962), *as amended,* (Supp. 1974), exempts the first $85 of the debtor's weekly wages from assignment. More significant are the new provisions affecting the filing and vacating of wage assignments which appear to meet the due process standards of the *Sniadach-Fuentes-Mitchell-Di-Chem* line of cases. *See* note 1 *supra.* Sections 48(3), (4) now entitle the debtor to assert defenses to the instrument or the debt secured by it *prior* to its filing with the employer. If the defenses are asserted in the precribed manner (mailing a notice to the assignee stating the facts constituting the basis of the defense within ten days after receipt of the notification of default), a court order authorizing the filing must be obtained. The assignee must institute a special proceeding in a court of record to obtain such an order and provide the assignor with at least eight days notice of the application. If the assignor contests and a hearing is held, it is the assignee who bears the burden of proof. N.Y. PERS. PROP. LAW §§ 48(3), (4) (Supp. 1974). If the assignor fails to assert defenses prior to filing and later brings suit to vacate the assignment, § 47-e(5) now provides that all defenses may still be considered and that the burden of proof is on the assignee. The section also permits the court to grant whatever interim relief it deems appropriate which could protect the debtor from undue hardship until a final adjudication has been made. N.Y. PERS. PROP. LAW § 47-e(5) (Supp. 1974).

9. 494 F.2d at 312.

10. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1. The fourteenth amendment was enacted to protect the rights of emancipated slaves in the South. *See* Civil Rights Cases, 109 U.S. 3, 22-23 (1883); *Ex parte* Virginia, 100 U.S. 339, 344-45 (1879); Slaughterhouse Cases, 83 U.S. 36, 70-71 (1872). The Civil Rights Act of 1871, chap. 22, 17 Stat. 13, was passed as a means of enforcing the amendment's provisions by creating a cause of action for the deprivation of rights,

amendment, the Supreme Court held that its scope was limited to instances in which the state had acted to deny an individual his rights,[11] and that it did not extend to the deprivation of rights by a private party.[12] The Court has not departed from this interpretation but in recent years has been willing to find state involvement in conduct which appears to be merely private in nature.[13] No formula has been devised for finding state action in such an instance;[14] the Court makes its determination case by case.[15] Several principles exist, however, which appear to underlie the Court's decisions. Private action becomes state action when the state has influenced the choice of conduct of the private party[16] or when the

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privileges and immunities taken under color of state law. *See* Monroe v. Pape, 365 U.S. 167, 171-87 (1961). It was later adopted substantially unchanged as 42 U.S.C. § 1983 (1970). *See* note 6 *supra*. The cases which have shaped the state action concept have been primarily concerned with racial discrimination and denials of equal protection. *See* notes 18-26 and accompanying text *infra*.

11. Civil Rights Cases, 109 U.S. 3, 17-18 (1883). A state acts through its legislative, judicial or executive authorities. *Ex parte* Virginia, 100 U.S. 339, 347 (1879).

When a state agency or officer acts directly to deny another his rights, the relationship between the state and deprivation is clear and state action will be found. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972) (state officers acting pursuant to state statute); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (court clerk issued summons at request of creditor's lawyer).

12. This constitutes merely a private wrong for which redress may be obtained from the state. Civil Rights Cases, 109 U.S. 3, 17 (1883).

13. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (private party's refusal to rent to blacks in violation of state statute held to be state action); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (coffee shop's racially discriminatory policies found to be state action); Smith v. Allwright, 321 U.S. 649 (1944) (exclusion of blacks from primary elections by Democratic party held to be state action). It has been suggested that the Court's increased willingness to find state action in areas which had previously been deemed private stems from the abdication of local responsibility for assuring racial equality. Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

14. The Court has deemed the formulation of an infallible test for determining whether the state has become significantly involved in private discriminations to be an "impossible task" which it "has never attempted." Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

15. The Court has noted that "only by sifting facts and weighing circumstances can a nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

16. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional amendment that changed state policy from prohibiting discrimination to permitting it found to have influenced personal choice; state action found);

state has involved itself in the conduct of the private party to such a significant extent that the latter's actions may be attributable to the state.[17]

The Supreme Court has recognized several ways by which a state may influence the private party in his choice of action. The most direct is when a state law compels the private party to deny another his rights.[18] The private party has no meaningful choice; he must comply with the law or face sanctions. Sufficient state influence for state action purposes has also been found when the state does not expressly order a private party to discriminate, but instead encourages or authorizes him to do so.[19]

Peterson v. Greenville, 373 U.S. 244 (1963) (state statute requiring segregation of races in restaurant found to take the decision from the realm of private choice; state action found).

17. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (state found to be joint participant in business enterprise); Smith v. Allwright, 321 U.S. 649 (1944) (state's delegation of power to Democratic party found to make party agent of the state, hence state action).

18. *See* Peterson v. Greenville, 373 U.S. 244 (1963). The Court held that the existence of a city ordinance requiring segregation in restaurant facilities constituted state action for "[w]hen the state has commanded a particular result, it has saved to itself the power to determine and thereby 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice." *Id.* at 248. A custom or usage within the state which has the force of law may also influence choice and is sufficient to find state involvement. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 162-69 (1970).

19. Encouragement has been found when the state has indicated a policy of favoring discrimination. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948). In *Reitman* an amendment to the California constitution was challenged that prohibited the state from abridging the right of private parties to sell or rent their property to whomever they pleased, rendering unlawful all existing anti-discriminatory legislation. Although the Court acknowledged that state neutrality on the matter of discrimination would not constitute state action, it felt that by expressly changing its policy, California had not been neutral and had, in fact, encouraged discrimination. Reitman v. Mulkey, *supra* at 376-77. *Shelley* and *Barrows* involved the enforcement of restrictive covenants by state courts. In *Shelley* the Court held that the fact that enforcement of the restrictive agreement was directed by the common law policy of the state did not immunize the judicial action from the operation of the fourteenth amendment. Shelley v. Kraemer, *supra* at 20. The Court found that by enforcing the agreement, the state had made available to the covenantors "the full coercive power of government to deny to petitioner . . . the enjoyment of property rights." *Id.* at 19. The Court in *Barrows* held that the award of damages in a suit against a co-covenantor who had sold to a black constituted state action. It found that the state, in permitting damage judgments, induced prospective sellers of restricted land to refuse to sell to non-Caucasians. Barrows v. Jackson, *supra* at 254.

The rationale appears to be that a private party, given the choice of discriminating, will do so if he knows that the state will support his actions.[20]

The Court has attributed actions of a private party to the state on several different theories. When the private party and the state act together to deny another his rights, the state's participation provides such "aid, comfort, or incentive"[21] to the private party that he may be deemed to be acting under color of state law.[22] State action has been found when

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A state statute which authorizes a private party to take actions which would deny another his rights has also been found to influence the private party's choice of action. *E.g.*, McCabe v. Atchison, Topeka & Santa Fe Ry. Co., 235 U.S. 151 (1914). The Court held that state action could be predicated upon a statute which was construed to permit the railroad to provide sleeping cars for whites but not for blacks. It found that the state's permission amounted to an authorization to discriminate and held such authorization to be violative of the fourteenth amendment. *Id.* at 160-62. State statutes which permit the proprietor of an establishment to refuse service to anyone he may choose have also been construed as authorizing discrimination and have been used as a basis for finding state action. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 195-201 (1970) (Brennan, J., concurring); Burton v. Wilmington Parking Authority, 365 U.S. 715, 726-27 (1961) (Stewart, J., concurring).

The recent decision of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), indicates that state authorization of the challenged conduct may not always constitute state action. The Court, holding that state utility commission approval of a utility's request for permission to terminate service to nonpaying customers was not state action, emphasized that the utility, and not the state, had proposed the practice. It implied that in order to support a finding of state action, in instances in which the private party is the initiator, the state must have done more than merely approve or fail to overturn the practice; nothing less than a direct order would suffice. *Id.* at 357. Whether the issue of private party initiative was intended to distinguish *Jackson* on its facts from the *Reitman-Shelley-Barrows-McCabe* holdings that state sanction need not be in the form of an affirmative command for state action purposes, or whether *Jackson* marks a sharp departure from these cases is uncertain, since the Court made no reference to them in rendering its decision. Equally unclear is the extent to which the unique nature of state-regulated, privately-owned utilities may have influenced the Court's determination. *See* note 23 *infra.*

20. The Court, finding state action in *Reitman v. Mulkey,* stated: "Those practicing racial discrimination need no longer rely solely on *their personal choice.* They could now invoke express . . . authority, free from censure or interference of any kind from official sources." Reitman v. Mulkey, 387 U.S. 369, 377 (1967) (emphasis added).

21. Adickes v. S.H. Kress & Co., 398 U.S. 144, 212 (1970) (Brennan, J., concurring).

22. *See id.* at 162-69, in which the Court held that if the store owner had discriminated on the basis of race pursuant to a state enforced custom, he was a participant in a joint activity with the state and acting "under color of" that custom for purposes of § 1983, *and* United States v. Price, 383 U.S. 787

a state has become extensively involved in a private enterprise, on the theory that this involvement creates a partnership between the private business and the state.[23] If the enterprise deprives an individual of his

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(1966), in which private persons were held to have acted under color of state law when they conspired with police officials to murder civil rights workers.

23. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), which involved the discriminatory actions of a private coffee shop located in facilities leased from the state. The state received income through lease payments and the use of an adjacent parking structure by patrons. It was specifically noted that the racial policies of the coffee shop benefited business and therefore the state. The Court found that the conduct of the coffee shop constituted state action because the state had "so far insinuated itself into a position of interdependence with [the coffee shop] that it must be recognized as a joint participant in the challenged activity." *Id.* at 725.

The mere fact that the state licenses, regulates or confers any benefit upon a private party is insufficient to make the actions of the latter violative of the fourteenth amendment. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). The Court requires that the regulation or benefit be closely connected to the challenged conduct. *Compare id., with* Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952). In *Moose Lodge* the Court found that the state licensing regulations could not be shown to foster or encourage discrimination and refused to find state action in the granting of a liquor license to a private club which practiced discrimination. The Court in *Pollak,* however, held that state action existed in the regulation of a transit company by a governmental agency. The Court found that the Public Utilities Commission, in dismissing complaints about the playing of radios on buses and allowing the practice to continue, had endorsed actions which could result in a violation of rights under the first and fifth amendments. The Court itself has distinguished the results of these two cases on the basis of whether the state, through its regulations, had encouraged the challenged conduct, noting that "[u]nlike the situation in *Public Utilities Comm'n v. Pollak,* 343 U.S. 451 (1952), where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge." Moose Lodge No. 107 v. Irvis, *supra* at 175-76 n.3.

The decision in the recent case of Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), implies that in order to support a finding of state action, the endorsement of the challenged conduct by a state regulatory agency must be direct and explicit rather than merely tacit. The Court held that there was no state action when the state utility commission approved a request by a utility for permission to terminate services to nonpaying customers. The request had been submitted as part of a tariff seeking increased rates which the commission approved without making a determination of the merits of the challenged provision. The Court distinguished *Pollak* on the basis that in that case, approval came after an investigation of the challenged conduct. *Id.* at 356-57.

There is some indication, however, that *Jackson* may be limited to its particular facts. In reaching its decision the Court noted the unique nature of state-regulated, privately-owned utilities and the fact that such a business may frequently be required by the state regulatory scheme to obtain approval from an agency for practices a less regulated business would be free to institute without

rights, the state, as a partner, is held responsible for the deprivation.[24] The state may also be implicated in private conduct when it has delegated the power to perform a function traditionally performed by the state to a private party, and that power is used to deny another his rights.[25] The Court has held that the recipient of such a power becomes, in effect, an agent of the state and is deemed to be acting on its behalf.[26]

The court in *Bond* refused to hold that state action was present in the seizure of the debtors' wages, distinguishing *Sniadach v. Family Finance Corp.*[27] and *Fuentes v. Shevin,*[28] because no state officer had been involved in the taking.[29] It also found that the state had not influenced the loan companies in their choice of conduct[30] because it had not

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approval from a regulatory body. *Id.* The Court thus seems to indicate that under those circumstances a greater showing of state approval may be required. This is consistent with the Court's often reiterated position that there are no rigid rules for determining state action and that individual circumstances must be considered. *See* notes 14-15 and accompanying text *supra.*

24. *See, e.g.,* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952).

25. *See* Smith v. Allwright, 321 U.S. 649 (1944) (state found to have delegated power to set voter qualifications in primary elections to Democratic party); *cf.* Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Evans v. Newton, 382 U.S. 296 (1966); Marsh v. Alabama, 326 U.S. 501 (1946). In *Logan Valley* and *Marsh,* state action was found because the private entities, a shopping center and a company town, respectively, were deemed to have the attributes of a public entity. In *Evans* the Court found that although the city had transferred its trusteeship of a park restricted to whites only to private trustees, the continued operation of the park on a restricted basis constituted state action. It concluded that the municipal character of the park could not be altered by a substitution of trustees, and held that in managing the park, the trustees were performing a public function. Evans v. Newton, *supra* at 302.

26. *See* Smith v. Allwright, 321 U.S. 649 (1944), in which the Court, examining Texas law, found that the

> statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State insofar as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.

Id. at 663.

27. 395 U.S. 337 (1969); *see* note 1 *supra.*

28. 407 U.S. 67 (1972); *see* note 1 *supra.*

29. 494 F.2d at 305. If a state officer had been involved, state action would have been found. *See* note 11 *supra.*

30. *See* notes 18-20 and accompanying text *supra.*

expressly ordered the companies to deny debtors their rights.[31] A closer examination of the circumstances, however, shows that the state did take action to that effect. New York, by its personal property laws, mandated the procedures to be followed by the loan companies in enforcing wage assignments.[32] These procedures did not afford the debtor the opportunity to be heard.[33] The loan companies could collect on the wage assignment only as prescribed by the laws, hence, only by denying the debtor procedural due process. The result is as if the state had expressly ordered the challenged conduct.

The facts of the case were also held to preclude a finding of state action on an "encouragement" theory.[34] The court based this holding on a comparison of *Bond* with *Reitman v. Mulkey*,[35] in which the Supreme Court found that the state had encouraged a private party's refusal to rent an apartment to blacks. *Reitman* was distinguished because there the state policy regarding discrimination had been expressly changed by law, and the law had been immunized from attack by courts and local agencies.[36] By refusing to find "encouragement" in *Bond* on the basis of these distinctions, the court demonstrated a misunderstanding of the Supreme Court's approach to state action. The Court has never set hard and fast rules for finding sufficient state involvement[37] but rather has looked to the total effect of the state's activity.[38] The elements which the *Bond* court deemed crucial to support a finding of state encouragement are relevant only to the extent that they may be shown to have influenced private conduct. The court should have considered the fact that the state,

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31. 494 F.2d at 307-09.

32. N.Y. PERS. PROP. LAW § 46-b (McKinney 1962), states that assignments for future earnings are collectible only by the procedures set out in other sections of the law.

33. These sections contained no provision for meaningful notice and opportunity to be heard before the wage assignment is filed with the debtor's employer. *See* note 8 *supra.*

34. 494 F.2d at 307-11; *see* notes 19-20 and accompanying text *supra.*

35. 387 U.S. 369 (1967).

36. 494 F.2d at 310-11. The court found that in *Bond* the challenged legislation was a mere codification of the common law and that the legislature was still free to prohibit wage assignments if it chose to do so. It also emphasized that while the law in *Reitman* was regressive in nature, the New York law was intended to provide greater protection for the debtor. *Id.*

37. *See* note 14 and accompanying text *supra.*

38. *See* note 15 and accompanping text *supra;* cases cited notes 16-26.

through its laws governing the assignment of wages, had embodied a policy of denying a debtor procedural due process, and that the loan companies had relied on this policy when they acted.[39]

The *Bond* court also refused to hold that the conduct of the loan companies was attributable to the state, rejecting the theory that the state had become so entwined in their activities that a partnership had been formed.[40] It found that neither party had benefited from the relationship[41] and held that the state's licensing of the loan companies was insufficient to warrant a finding of state action.[42] In reaching this decision the court arguably ignored the broader implications of the facts. By allowing the loan companies to unilaterally determine default and attach wages, the New York laws conferred an economic benefit upon both parties, saving each the expenses of a judicial adjudication. Furthermore, the statute provided the loan companies increased leverage in dealing with people seeking loans[43] and helped stimulate the state's economy by encouraging consumer credit.[44] The facts also indicate that the

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39. The court held that since the New York laws merely codified the common law and did not change the state's policy, a finding of state action was precluded. It ignored holdings that actions taken pursuant to a common law policy which result in a denial of rights are not immunized from the fourteenth amendment. *See* note 19 *supra.* Hence, the fact that New York had always followed a policy of allowing a creditor to seize a debtor's property without first providing him with notice and an opportunity to be heard, and had merely embodied that policy in its law, would not lessen its involvement if that policy was relied upon in the enforcement of a wage assignment.

40. 494 F.2d at 305-07.

41. *Id.* at 306.

42. *Id.*

43. The district court in *Bond* found that the statutes made the wage assignment agreements so advantageous to the finance companies that they were contracts of adhesion. 362 F. Supp. at 1380. The Supreme Court, analyzing a similar statute authorizing prejudgment seizure of property, found that finance companies could use this advantageous legal procedure to increase their already disproportionate balance of bargaining power. It also noted that the loan companies could coerce the debtor into refinancing his loan or into not asserting what might be a meritorious defense against the debt. Sniadach v. Family Fin. Corp., 395 U.S. 337, 341 (1969). *See* Note, *Protecting the Low Income Consumer: Procedural Due Process Revisited,* 14 WM. & MARY L. REV. 337 (1972).

44. *Cf.* Adams v. First Nat'l Bank, 492 F.2d 324, 342 (9th Cir. 1973) (dissenting opinion), *cert. denied,* 419 U.S. 1006 (1974). It was noted that California's statutory authorization to creditors to seize automobiles without prior notice or hearing reduced the creditor's costs of repossession for the purpose

state's involvement is far more extensive than mere licensing of the loan companies to do business; through its regulations it gave affirmative approval to the denial of procedural due process. This approval is shown by the state's imposition of legal liability upon the debtor's employer for failure to make payments when presented with a valid wage assignment, regardless of whether or not the debtor had, in fact, defaulted.[45] It is this type of affirmative endorsement which the Supreme Court has deemed sufficient for a finding of state action.[46]

The theory that the loan companies were performing a traditional state function was also rejected in *Bond*. The court reasoned that since wage assignments had always operated as a private levy without a court order, the state had no authority to delegate to the loan companies.[47] This historical approach ignores an underlying governmental function of binding conflicts resolution.[48] By unilaterally determining default and seizing property without consent,[49] the loan companies performed an adjudicative function which belongs exclusively to the state;[50] hence a finding of state action is warranted.[51]

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of stimulating the flow of consumer credit for the benefit of the state's economy. In *Bond* the increased leverage of the loan companies would also induce them to extend more credit to consumers, thereby benefiting the state.

45. N.Y. PERS. PROP. LAW §§ 46-b, 48-a (McKinney Supp. 1974); *see* Continental Purchasing Co. v. Van Raalte Co., 251 App. Div. 151, 295 N.Y.S. 867 (1937) (employer held liable for failure to withhold wages after served with wage assignment).

46. *See* note 23 *supra.*

47. 494 F.2d at 311; *see* notes 25-26 and accompanying text *supra.*

48. The state has a monopoly over techniques for binding conflicts resolution. It alone is empowered to determine the legal rights of parties and to enforce those rights. Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971).

49. The element of mutual consent makes the difference between "binding conflicts resolution," a state function, and "private structuring and repair," a private function; it is present in the latter and absent in the former. Shirley v. State Nat'l Bank, 493 F.2d 739, 747 (2d Cir.) (dissenting opinion), *cert. denied*, 419 U.S. 1009 (1974). In *Bond* the debtors had consented to the assignment of their wages *only upon default.* The issue of default, however, was never adjudicated, hence the debtors could not have been found to have consented to the taking of their property.

50. *Cf.* Hall v. Garson, 430 F.2d 430 (5th Cir. 1970); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970). In both cases a private landlord's seizure of tenant's property, pursuant to statute, was found to constitute state action since the action of entering another's home and seizing his goods possessed the characteristics of an act of the state.

51. *See* notes 25-26 and accompanying text *supra.*

The state, through its laws authorizing and regulating the use of wage assignments, has thus involved itself in the conduct of the loan companies to an extent which the Supreme Court, in other instances, has deemed to constitute state action. Since there is state action in the exercise of the remedy, there should be a determination on whether the debtor should be afforded notice and an opportunity to be heard before being denied his property.[52] The wage assignment fails to provide these procedural due process protections;[53] it is yet another creditor remedy which should be adjudged unconstitutional.[54]

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52. *See* notes 1-2 and accompanying text *supra.* It should be noted that although *Mitchell* held that the right to prior notice and hearing is not absolute, such notice and hearing is required when wages are involved. Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (Court acknowledged the special nature of wages as property); *see* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

53. *See* note 3 *supra.*

54. *See* note 1 and accompanying text *supra.*