DEBTOR AND CREDITOR—DUE PROCESS—SELF-HELP REPOSSESSION DOES NOT CONSTITUTE STATE ACTION FOR PURPOSES OF THE FOURTEENTH AMENDMENT, IT IS NOT PER SE UNCONSCIONABLE, NOR DOES IT VIOLATE THE NEW JERSEY CONSTITUTION—*King v. South Jersey National Bank*, 66 N.J. 161, 330 A.2d 1 (1974).

On January 24, 1972, William B. King discovered that his automobile was missing from a private parking area behind his apartment building. The Camden police informed King that his car had not been stolen but had been repossessed by representatives of the South Jersey National Bank,[1] the assignee of an installment sales contract which King had entered into when he purchased the car.[2] The contract granted to the seller and its assignees a security interest in the automobile to secure payment of the debt.[3] It included an acceleration clause,[4] a clause incorporating by reference all pertinent remedies available under the New Jersey Uniform Commercial Code,[5] and a separate provision allowing for self-help repossession in the event of default by the buyer.[6] When King defaulted in his pay-

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[1] Brief of Plaintiff-Appellants at 4, King v. South Jersey Nat'l Bank, 66 N.J. 161, 330 A.2d 1 (1974) [hereinafter cited as Brief of Plaintiff].

[2] King v. South Jersey Nat'l Bank, 66 N.J. 161, 166, 330 A.2d 1, 3 (1974). The sales agreement was a form contract provided by the bank. Brief of Plaintiff, *supra* note 1, at 3.

[3] King v. South Jersey Nat'l Bank, 66 N.J. 161, 166, 330 A.2d 1, 3 (1974).

[4] *Id.* at 166, 330 A.2d at 4. Although late payments had been accepted by the bank previously, King's failure to make timely payments in December of 1971 and in January of 1972 triggered the repossession of his car. Brief of Plaintiff, *supra* note 1, at 3–4. King's offer to pay the defaulted payment after repossession was rejected by the bank. The bank invoked its right to accelerate and demanded the full balance due before it would return the car. 66 N.J. at 166, 330 A.2d at 4. *See* UNIFORM COMMERCIAL CODE § 9–506, Comment, which suggests that if the agreement contains an acceleration clause which expressly makes the full balance due on the default of one installment, then the debtor may redeem only by tendering the entire balance.

[5] King v. South Jersey Nat'l Bank, 66 N.J. 161, 166, 330 A.2d 1, 3 (1974). N.J. STAT. ANN. § 12A:9–503 (1962) provides in pertinent part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

N.J. STAT. ANN. § 12A:9–504 (1962) provides in part:

> A secured party after default may sell, lease or otherwise dispose of any or all of the collateral . . . .

This is a verbatim adoption of UNIFORM COMMERCIAL CODE § 9–503–04.

[6] King v. South Jersey Nat'l Bank, 66 N.J. 161, 166, 330 A.2d 1, 3 (1974). For a general discussion of Article 9 of the Uniform Commercial Code as it applies to consumer contracts see Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 ORE. L. REV. 302 (1972).

ments, the bank relied on these provisions and repossessed the automobile without providing King notice of the repossession or affording him a prior hearing to challenge the seizure.[7]

Subsequent to the repossession, King brought an action in the chancery division of the superior court, and obtained a temporary restraint of the sale of his automobile.[8] King then filed an amended complaint,[9] seeking a declaratory judgment that the acceleration clause was unconscionable, and that N.J. STAT. ANN. § 12A:9–503, permitting self-help repossession, was "unconstitutional on its face and as applied" since it authorized a deprivation of property without notice or prior hearing.[10] The court granted the bank summary judgment, holding that section 9–503 was constitutional and rejecting the unconscionability claim.[11] King appealed, and while the case was pending unheard in the appellate division, the New Jersey supreme court granted certification.[12]

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[7] King v. South Jersey Nat'l Bank, 66 N.J. 161, 166, 330 A.2d 1, 4 (1974).

[8] *Id.* at 166, 330 A.2d at 4. The parties agreed in later negotiations, formalized by a consent order, that the vehicle be returned to King. In return, he was to pay his account up to date including all late charges. The consent order specifically provided that King would be given a thirty-day grace period on his monthly payments before he would be considered in default. Joint Appendix of Appellants and Respondent at 28a–29a, King v. South Jersey Nat'l Bank, 66 N.J. 161, 330 A.2d 1 (1974) [hereinafter cited as Joint Appendix].

[9] King v. South Jersey Nat'l Bank, 66 N.J. 161, 166, 330 A.2d 1, 4 (1974). The only significant change in the amended complaint was the addition of a claim that the Bank's action constituted an unreasonable seizure in violation of Article I, paragraph 7 of the Constitution of the State of New Jersey. Joint Appendix, *supra* note 8, at 38a. Neither complaint alleged a violation of Article I, paragraph 1 of the constitution, which was dealt with at length in both the majority and dissenting opinions. King v. South Jersey Nat'l Bank, 66 N.J. 161, 177–79, 181, 191–94, 330 A.2d 1, 9–10, 11, 17–19 (1974).

[10] Joint Appendix, *supra* note 8, at 38a–39a. This was the third count of King's amended complaint. The first count sought damages for the unlawful conversion of the automobile. This count was dismissed by the chancery division, and the New Jersey supreme court determined that any action for unlawful conversion of the automobile would ultimately depend upon its decision regarding the third count of the complaint. King v. South Jersey Nat'l Bank, 66 N.J. 161, 166–67, 330 A.2d 1, 4 (1974). The second count sought damages for the unlawful conversion of personal property inside the automobile. *Id.* at 167, 330 A.2d at 4. This count was later dismissed by mutual agreement. *Id.* at 167 n.4, 330 A.2d at 4.

[11] *Id.* at 167, 330 A.2d at 4. The court based its decision on Messenger v. Sandy Motors, Inc., 121 N.J. Super. 1, 295 A.2d 402 (Ch. 1972). Joint Appendix, *supra* note 8, at 8a. The court in *Messenger* held that the codification of the common law right of self-help did not constitute state action, and, therefore, self-help was not a violation of procedural due process under the fourteenth amendment. Messenger v. Sandy Motors, Inc., *supra* at 8, 17, 295 A.2d at 405, 410. For a discussion of *Messenger* see Note, *Uniform Commercial Code—Self-Help Repossession Under Section 9–503 Does Not Violate the Fourteenth Amendment*, 4 SETON HALL L. REV. 629 (1973).

[12] King v. South Jersey Nat'l Bank, 63 N.J. 561, 310 A.2d 476 (1973).

In *King v. South Jersey National Bank*,[13] the Supreme Court of New Jersey affirmed the judgment of the chancery division, holding that the state was not involved in the bank's act of self-help repossession—thus the necessary "state action" required to invoke the procedural due process protection of the fourteenth amendment was absent.[14] The court further held that self-help did not abridge any fundamental constitutional rights and was therefore not violative of the New Jersey constitution.[15] Finally, the court denied plaintiff's assertion that the acceleration clause in the contract was unconscionable.[16]

The right of a secured party to repossess the collateral upon default has been described as "the secured creditor's ultimate weapon against a defaulting debtor."[17] Although debtors have succeeded in partially disarming the creditors' arsenal of *ex parte* prejudgment remedies, notably in the areas of wage garnishment[18] and replevin,[19] challenges to self-help have met with little success.[20] The attacks against self-help are generally based upon federal constitutional grounds, alleging a violation of the due process clause of the fourteenth amendment.[21] Occasionally, however, debtors have attempted

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[13] 66 N.J. 161, 330 A.2d 1 (1974).

[14] *Id.* at 172, 179, 330 A.2d at 7, 10. U.S. CONST. amend. XIV, § 1, states in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." For a discussion of the fourteenth amendment state-action requirement see notes 23–26 *infra* and accompanying text.

[15] 66 N.J. at 178, 330 A.2d at 10.

[16] *Id.* at 169–70, 330 A.2d at 5. The court relied upon the fact that it is an accepted commercial practice to provide for acceleration of payments in a retail installment contract, and "[i]n the absence of extraordinary circumstances," it would not declare remedies secured by a private contractual agreement unconscionable. It applied this same reasoning in summarily dismissing any claim that the self-help clause of the contract was unconscionable. *Id.*

[17] J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 26–5 (1972).

[18] Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). *Sniadach*, the seminal case in the creditor remedy area, " 'unleashed a barrage of due process attacks on virtually every form of action . . . in which summary proceedings without notice and hearing were formerly permissible.' " Del Duca, *Pre-Notice, Pre-Hearing, Pre-Judgment Seizure of Assets—Self-Help Repossession Under UCC § 9–503: Its Antecedents and Future*, 79 DICKINSON L. REV. 211, 212 (1975) (footnote omitted) (quoting from Amram & Schulman, *Annual Survey of Pennsylvania Legal Developments—Civil Practice and Procedure*, 45 PA. B. ASS'N Q. 167, 171 (1974)).

[19] Fuentes v. Shevin, 407 U.S. 67 (1972).

[20] For a list of federal and state court cases holding that self-help repossession is a valid contractual remedy not involving state action see 66 N.J. at 168–69 n.6, 330 A.2d at 5.

[21] *See, e.g.*, Cook v. Lilly, 208 S.E.2d 784, 785 (W. Va. 1974) (repossession of mobile home); John Deere Co. v. Catalano, 525 P.2d 1153, 1154 (Colo. 1974) (repossession of farm equipment).

to overturn self-help remedies by proceeding under a state constitution's due process clause.[22]

A federal constitutional challenge to self-help turns on whether the exercise of the creditor's remedy under attack can somehow be attributed to the state, notwithstanding that self-help was privately contracted for and that, upon default, repossession was accomplished without the aid of state agents. If the state is not involved, self-help remains a purely private act outside the purview of the fourteenth amendment.[23] A problem arises, however, in cases where closer scrutiny of ostensibly private activity reveals substantial state involvement.[24] The United States Supreme Court has recognized that

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The majority of cases attacking self-help have been brought in federal courts under 42 U.S.C. § 1983 (1970) and its jurisdictional counterpart, 28 U.S.C. § 1343 (1970). *See, e.g.*, Gibbs v. Titelman, 502 F.2d 1107, 1109 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16, 16 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Turner v. Impala Motors, 503 F.2d 607, 608 (6th Cir. 1974).

42 U.S.C. § 1983 (1970) creates a civil cause of action for violation of federal civil rights under color of state law. Courts have construed the under-color-of-law requirement in section 1983 as the equivalent of the state action requirement under the fourteenth amendment. *See, e.g.*, United States v. Price, 383 U.S. 787, 794 n.7 (1966); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 329 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

The debtor's inability to show state action results in a dismissal of the case for failure to state a claim upon which relief can be granted and precludes an examination of self-help on the merits. *See* Nichols v. Tower Grove Bank, 497 F.2d 404, 406 (8th Cir. 1974).

[22] 66 N.J. at 177, 330 A.2d at 9; Cook v. Lilly, 208 S.E.2d 784, 785, 786 (W. Va. 1974). The due process clause of the West Virginia constitution does not, on its face, require state action. W. VA. CONST. art. 3, § 10. Nevertheless, the *Cook* court indicated that some degree of state involvement was necessary to invoke the protections of that clause. Cook v. Lilly, *supra* at 785, 786.

[23] The Supreme Court in the Civil Rights Cases, 109 U.S. 3 (1883), first emphasized the difference between state and private action, noting that the fourteenth amendment does not prohibit "[i]ndividual invasion of individual rights," but that "the prohibitions of the amendment are against State laws and acts done under State authority." *Id.* at 11, 13.

[24] *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). In *Burton*, a private corporation which operated restaurant facilities on premises it leased from a Delaware state agency refused service to a person solely on the basis of his color. *Id.* at 716. The Court held that the corporation was not acting in a purely private capacity. The operation by the state of the remainder of the building as a parking facility and the status of the state as lessor conferred a mutual benefit on both the state and the private party. *Id.* at 724. The state had placed its power and prestige behind the discrimination and had become "a joint participant in the challenged activity." *Id.* at 725. Therefore, there was sufficient state action to bring the private discrimination within the scope of the equal protection clause of the fourteenth amendment. *Id.* at 726.

Perhaps cognizant that its analysis might be accorded an expansive reading in later state-action cases by parties desiring to command fourteenth amendment protection, the Court limited its holding:

[W]hen a State leases public property in the manner and for the purpose shown

formulating a precise indicator of state involvement is an unachievable task, since the state's sphere of activity may tangentially touch upon many areas of private action.[25] Only when this involvement becomes "significant" does the private act fall within the scope of the fourteenth amendment.[26]

Debtors have fashioned numerous arguments to support their contention that self-help repossession is tainted to a significant degree by state involvement. Although these arguments often overlap, several distinct theories are discernible. The plaintiff in *King* advanced what have become traditional arguments in self-help cases.[27] He first contended that codification of self-help through adoption of the Uniform Commercial Code (UCC) represented a state policy which authorized and encouraged the bank to proceed with extra-judicial repossession.[28] He maintained that the ultimate source of authority for self-help was section 9–503, not the security agreement, and that the bank had "clothed its conduct with the authority of state law" when it incorporated this section, by reference, into the security agreement.[29]

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to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee . . . .

Id.

[25] *Id.* at 722, 725–26.

[26] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). For a general discussion of state action see Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (pts. 1 & 2), 46 S. CAL. L. REV. 1003, 1034 (1973), (pt. 3), 47 S. CAL. L. REV. 1 (1973). The authors suggest the following analytical approach to determine if state action exists:

> With respect to each factual situation, the following questions should be asked and answered before a conclusion is reached concerning state action: (1) Precisely what is the nature of the challenged conduct? (2) What is the relationship, if any, of the state to that conduct? (3) If a relationship is found, what is the character and significance of that relationship? Is the party challenging "state action," or is he really challenging private action and complaining that the state has not acted affirmatively to shield him from it?

46 S. CAL. L. REV. at 1042.

[27] *See* Burke & Reber, *supra* note 26, 47 S. CAL. L. REV. at 4, where it is stated:

> [D]ebtors attempting to establish the presence of state action in the exercise of the various self-help remedies . . . have necessarily relied on the "public function" cases, the "state regulation" cases, the cases mentioning "authorization" and "encouragement," and the decision in *Reitman v. Mulkey* [, 387 U.S. 369 (1967)].

(Footnotes omitted.) For cases in which the above challenges have been raised by debtors see, *e.g.*, Turner v. Impala Motors, 503 F.2d 607, 609 (6th Cir. 1974) (authorization and encouragement); Gibbs v. Titelman, 502 F.2d 1107, 1110 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974) (comprehensive state regulation and public function); James v. Pinnix, 495 F.2d 206, 208 (5th Cir. 1974) (*Reitman v. Mulkey* decision).

[28] *See* Brief of Plaintiff, *supra* note 1, at 8–15.

[29] *Id.* at 13–14.

The *King* court rejected plaintiff's contention, reasoning that the bank's act of self-help repossession was based solely upon the private contractual right embodied in the security agreement.[30] Chief Justice Hughes, speaking for the majority, placed great emphasis upon the historical toleration of self-help—a right which "has roots deep in the common law."[31] The court held that, by enacting section 9–503, the state did nothing more than codify this pre-existing common law right. Mere codification, "neither commanding nor forbidding" the private remedy provided for in the contract, did not constitute the "affirmative and significant" action the court deemed necessary to render self-help repossession "vulnerable" to the fourteenth amendment.[32]

The plaintiff in *King* also offered the rationale presented in *Reitman v. Mulkey*[33] to support his contention that codification of self-help evidenced state action.[34] In *Reitman*, state action was found

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[30] 66 N.J. at 176, 330 A.2d at 8. Although most self-help cases have been decided on the basis of a contractual provision authorizing repossession in event of default, at least one court has held that "the presence or absence of contractual consent by the [debtor] to self-help action" would not modify its finding that state action was not present. Colvin v. Avco Financial Servs. of Ogden, Inc., 12 U.C.C. REP. SERV. 25, 27 (D. Utah 1973).

[31] 66 N.J. at 170, 330 A.2d at 5. For an in-depth discussion of the historical antecedents of self-help repossession see McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58 (1973). That author concluded:

> The right to repossess upon default has been available to holders of a security interest in collateral either by statute, common law, or agreement of the parties in the United States virtually since the beginnings of the republic.

Id. at 81.

[32] 66 N.J. at 175, 330 A.2d at 8. Justice Clifford, concurring with the majority, took the court to task for placing undue emphasis upon the passive and neutral aspect of the legislature's codification of self-help. He stated:

> The legislature did something when it enacted N.J.S.A. 12A:9–503. The state was not passive. In effect, it sanctioned and perhaps even encouraged creditors in their use of self-help repossession. But I do not understand that act to be the sort of affirmative conduct giving rise to state action of a constitutional grain. . . .
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> . . . The statute in no way commands the creditor . . . it simply authorizes. And mere authorization of private conduct does not *ex necessitate* comprise "state action."

Id. at 180, 330 A.2d at 11.

[33] 387 U.S. 369 (1967).

[34] Brief of Plaintiff, *supra* note 1, at 9–10. Other debtors have relied on the *Reitman* analysis to support their claims that state action exists. These arguments, however, have been soundly rejected by the courts. *See, e.g.*, James v. Pinnix, 495 F.2d 206, 208–09 (5th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

See also Burke & Reber, *supra* note 26, 46 S. CAL. L. REV. at 1074, where the authors observe:

> The Supreme Court's decision in *Reitman v. Mulkey* was widely touted as the harbinger of great expansion in fourteenth amendment state action doctrine. The

when California, by popular referendum, amended its constitution to protect the right of private individuals to discriminate in the sale of housing.[35] The United States Supreme Court, agreeing with the decision of the state supreme court, held that the challenged amendment was more than a neutral enactment.[36] By elevating the common law right to discriminate in the sale of real property to the level of a state constitutional right, the amendment had the effect of encouraging discrimination and was therefore invalid.[37] The *King* court rejected the *Reitman* analogy and adopted the prevailing view that codification of self-help does not rise to the level of authorization and encouragement condemned by the *Reitman* Court.[38] Furthermore, the court indicated that the *Reitman* rationale was to be limited to the area of racial discrimination.[39]

An additional argument advanced by King was that by virtue of the comprehensive statutory regulations controlling procedures for repossession, subsequent resale, and deficiency judgments,[40] "the

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Court's opinion contained language which seemed to presage findings of state action in situations which could not have been anticipated under prior decisions. But history seems to have belied these forecasts . . . .

(Footnotes omitted.)

[35] 387 U.S. at 370–71, 380–81.

[36] Mr. Justice White, speaking for the majority, noted without criticism the California court's observation that in some instances a state could maintain a neutral statutory policy permitting private discrimination without significantly involving itself in the private act. *Id.* at 374–75.

[37] *Id.* at 381.

[38] 66 N.J. at 175, 330 A.2d at 8. For cases considering and rejecting the *Reitman* analogy see Gibbs v. Titelman, 502 F.2d 1107, 1111 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); James v. Pinnix, 495 F.2d 206, 208–09 (5th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 744 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974).

[39] 66 N.J. at 175 & n.12, 330 A.2d at 8. Most courts have distinguished the racial discrimination cases as involving a special constitutional right and have therefore held the state action analysis in those cases inapplicable to self-help repossession. *See, e.g.*, Turner v. Impala Motors, 503 F.2d 607, 611 (6th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 744–45 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 333 n.24 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974). However, in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 373–74 (1974), Justice Marshall, in a dissenting opinion, stated that the majority's reasoning leading to a refusal to find state action in a utility termination case would seem to apply equally to the racial discrimination area: "The Court has not adopted the notion, accepted elsewhere, that different standards should apply to state action analysis when different constitutional claims are presented." For a similar criticism of the distinction made by some federal courts between state action requirements in racial discrimination suits and state action requirements in self-help repossession cases see Comment, *State Action and Waiver Implications of Self-Help Repossession*, 25 ME. L. REV. 27, 32–33 (1973).

[40] Brief of Plaintiff, *supra* note 1, at 15–17. The plaintiff presented the New Jersey statutory procedure that a secured party must follow after repossession in order to transfer the title of the repossessed vehicle and to resell the vehicle:

State ha[d] 'so far insinuated itself into a position of interdependence' " with the bank that it had become an active and joint participant in the repossession process.[41] The court acknowledged that the state had established statutory procedures which the repossessor must follow to transfer title or to effectuate resale of the repossessed vehicle, but the nexus between the private nature of self-help and the subsequent conduct regulated was deemed insufficient to warrant a finding of state action.[42] Moreover, the court noted that these regulations "would be operative, in the case of a motor vehicle, even had it been repossessed after notice and a judicial hearing."[43]

As a final state action argument, King contended that the bank performed a "public function" by seizing the automobile.[44] He maintained that the resolution of competing proprietary claims and the enforcement of those decisions by a seizure of property are uniquely functions of the state. Therefore, King argued that when the bank repossessed his automobile pursuant to section 9–503, it did so as an agent of the state.[45] The court dismissed this argument by noting that "the state was not even an apparent participant" in the repossession process, and that the bank's power to exercise self-help was derived solely from its private contractual right.[46] The court's rejection of King's arguments is no doubt correct from the standpoint of precedent. The vast majority of state and federal courts which have con-

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(1) Notice of Seizure of Motor Vehicle, Form CO–55 . . . is filed with the state of New Jersey Department of Public Safety, Division of Motor Vehicles . . . .

(2) Notice of Sale of the vehicle is sent the debtor pursuant to N.J.S. 12A:9–504.

(3) The repossessed vehicle is advertised for sale in a local newspaper pursuant to the provisions of N.J.S. 12A:9–504.

(4) Application for Repossession Certificate of Ownership and Certificate of Compliance per Article 9 of U.C.C. (N.J.S. 12A:9–101, et seq.) Form CO–57 . . . is filed [with the State of New Jersey Department of Public Safety, Division of Motor Vehicles].

(5) After the sale of the repossessed vehicle the secured party sends to the State of New Jersey . . . [a] copy of letter sent to the debtor by certified mail indicating proof of service, proof of publication of advertisement, a copy of the security agreement and a check for $3.00 for a new Certificate of Ownership. All this to comply with N.J.S. 39:10–15.

Id. at 16–17.

[41] *Id.* at 15 (quoting from Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961)). For a discussion of *Burton* see note 24 *supra*.

[42] 66 N.J. at 176–77, 330 A.2d at 9.

[43] *Id.* at 176, 330 A.2d at 9.

[44] Brief of Plaintiff, *supra* note 1, at 19–21.

[45] *Id.* at 19–20.

[46] 66 N.J. at 176, 330 A.2d at 9.

sidered the question have refused to find state action in self-help repossession.[47]

Justice Pashman, nevertheless, dissented from the majority's state action decision. He maintained that the question of state action was largely a factual one depending in part upon "local conditions."[48] Contending that the majority had "somewhat overstate[d] the historical pedigree of self-help repossession,"[49] he argued that the state, through codification, had placed its imprimatur on what previously had been an uncertain remedy.[50] This, coupled with the extensive scheme of state regulation, was deemed sufficient, by Justice Pashman, to support a finding of state action.[51] Thus determining that state action existed, Justice Pashman would be guided by the analysis formulated by the United States Supreme Court in *Fuentes v. Shevin*.[52] In that case, the Court found that even a temporary deprivation by the state of the debtor's possessory interest in property was protected by the fourteenth amendment.[53] As Justice Pashman stated:

> The principles set out in *Fuentes* would clearly require prior notice and hearing on the facts of the present case. The interests of the parties [in *King*] are indistinguishable . . . .[54]

Though the interests of the parties in *King* may be similar to those in *Fuentes*, the action of the state was not. In *Fuentes*, the state

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[47] *Id.* at 181 & n.1, 330 A.2d at 11. At least seven circuit courts have considered challenges to the constitutionality of self-help and have dismissed the cases for failure to state a cause of action, holding that no state action exists in self-help. The United States Supreme Court has denied certiorari in six of these cases. *See* Brantley v. Union Bank & Trust Co., 498 F.2d 365, 366 (5th Cir.), *cert. denied*, 419 U.S. 1034 (1974); Gibbs v. Titelman, 502 F.2d 1107, 1114, 1115 (3d Cir.), *cert. denied*, 419 U.S. 1039 (1974); Fletcher v. Rhode Island Hospital Trust Nat'l Bank, 496 F.2d 927, 929 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16, 17 (8th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 338 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974); Shirley v. State Nat'l Bank, 493 F.2d 739, 745 (2d Cir.), *cert. denied*, 419 U.S. 1009 (1974). There is no indication that certiorari was applied for in Turner v. Impala Motors, 503 F.2d 607 (6th Cir. 1974).

For state court decisions in this area see, *e.g.*, Cook v. Lilly, 208 S.E.2d 784 (W. Va. 1974); John Deere Co. v. Catalano, 525 P.2d 1153 (Colo. 1974).

[48] 66 N.J. at 189, 330 A.2d at 15–16. Justice Pashman, recognizing that self-help repossession is generally confined to automobiles, directed his dissent particularly to this fact, stating that "[e]ven temporary deprivation of the use of a car may have serious consequences" to individuals using their automobiles for commuting to work or necessary shopping. *Id.* at 185, 330 A.2d at 14.

[49] *Id.* at 190 n.6, 330 A.2d at 16.

[50] *Id.* at 190–91 n.6, 330 A.2d at 16–17.

[51] *See id.* at 181–83, 190, 330 A.2d at 12–13, 16–17.

[52] 407 U.S. 67 (1972).

[53] *Id.* at 84–85.

[54] 66 N.J. at 187, 330 A.2d at 14.

officers and agents were directly involved in effectuating the creditor's summary remedy.[55] No such direct state involvement was present in *King*. Furthermore, as Justice Pashman concedes, the "well-nigh overwhelming weight of authority on this much litigated question" has failed to find that codification or regulation of self-help amounts to state action.[56] Finally, a recent decision of the United States Supreme Court, handed down after *King*, supports the majority's resolution of the state action issue.

In *Jackson v. Metropolitan Edison Co.*,[57] the plaintiff contended that a privately owned utility's termination of her electrical service, without notice or opportunity for a hearing, constituted state action in violation of the due process clause of the fourteenth amendment.[58] The Court considered a number of state action theories in testing whether the state was significantly involved in the termination process. Among these were "authorization," "regulation," and "public function."[59]

Paralleling King's codification arguments, the plaintiff in *Jackson* claimed that since the defendant utility had reserved the right to summarily terminate service in a general tariff provision on file with the Public Utilities Commission, and since that state agency had failed to prohibit or object to the provision, it had authorized and encouraged the summary termination practice.[60] The Court determined that the PUC's failure to object to the contested provision at most only authorized the utility to elect to terminate service at its discretion.[61] It drew a distinction between a neutral authorization by the

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[55] In Fuentes v. Shevin, 407 U.S. 67 (1972), creditors, pursuant to state law, could obtain prejudgment writs of replevin on *ex parte* application to an officer of the court. *Id.* at 70–72. A sheriff would then execute the writ by seizing the property in dispute. *Id.* at 75, 77.

[56] 66 N.J. at 180–81, 330 A.2d at 11 (footnote omitted).

[57] 419 U.S. 345 (1974).

[58] *Id.* at 346–48. Although *Jackson* is not a self-help repossession case, the issues resolved by the Court's analysis parallel the state action issue generally raised by debtors in self-help cases—that is, at what point is the state sufficiently involved in an ostensibly private act so as to attribute that act to the state. At least one federal court has noted that the utility summary termination cases are meaningful in analyzing state action challenges to self-help based on the argument of comprehensive state regulation. Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 334–35 (9th Cir.), *cert. denied*, 419 U.S. 1006 (1974).

[59] 419 U.S. at 350–54. For a detailed analysis of these and other state action theories see generally Burke & Reber, *supra* note 26, 46 S. CAL. L. REV. at 1050–74, 1091–1109; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 665–66, 685–98 (1974).

[60] 419 U.S. at 354–57.

[61] *Id.* at 357.

state, whereby a private party is permitted to act, and an imperative authorization, where the state commands or orders a private act.[62] The former, where the impetus comes from the private party exercising a choice permitted by state law, was deemed not to be state action.[63]

Turning to the regulation issue, the Court noted that a private utility is more heavily regulated than other private entities. That factor, without more, was not considered sufficient to support a claim of state action:[64]

> [T]he inquiry must be whether there is a *sufficiently close nexus* between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.[65]

The *Jackson* Court also refused to find that the utility, by providing an "essential public service," was exercising a public function. The Court indicated that the "public function" cases were to be narrowly interpreted, and only applied to those situations where a private entity engages in an activity "traditionally the exclusive prerogative of the State."[66] Thus, the Court concluded that the state was not sufficiently involved in the termination process to warrant a finding of state action.[67] The *Jackson* decision, coupled with the prevailing view of the lower federal courts, would seem to preclude a finding of state involvement in self-help sufficient to invoke the protections of the due process clause of the fourteenth amendment.

Although the authority of the federal courts under the fourteenth amendment is circumscribed by the requirement of state action and

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[62] *Id.*

[63] *Id.*

[64] *Id.* at 350–51.

[65] *Id.* at 351 (emphasis added). The Court's refusal to find state action in such a comprehensively regulated industry as a utility strongly suggests that future challenges to self-help based on the regulation theory will be unsuccessful.

[66] *Id.* at 352–53. The petitioner in *Jackson* faced the same state action obstacle that debtors encounter when challenging self-help on federal grounds—an inability to get to the merits of the case. The *Jackson* Court restricted its analysis to whether state action existed, and specifically stated that it did not reach either of the other issues raised by petitioner, namely, whether her entitlement to electrical service under state law was a property interest deserving of due process protection, or, if there were state action, what process would be due. *Id.* at 348 n.2, 359.

While *Jackson* is offered here primarily for the Court's state action analysis, summary termination by the utility company may be viewed as a form of self-help repossession if the right to reasonably continuous utility service is judged a property interest. Although the Court declined to reach that issue, it indicated that even if the interest in continuing utility service were a property interest, the *private* nature of termination would still place that act beyond the purview of the fourteenth amendment. *Id.* at 348 n.2.

[67] *Id.* at 358–59.

limited by the doctrine of federalism,[68] state courts are not so restricted.[69] The task of safeguarding the rights of individuals in their everyday relationships and conduct rests primarily with the states.[70] Therefore, it is in the state courts that debtors may find a more appropriate and receptive forum for their challenges to self-help. Recognizing this fundamental distinction, Justice Pashman continued his dissent, urging the state court to exercise its "power to advance or retard the development of a consumer market place based on principles of good faith and fair dealing."[71] To advance these ideals, he would find self-help invalid under the state constitution[72] and on grounds of unconscionability.[73]

Examining the New Jersey constitution, Justice Pashman contended that the debtor's possessory interest in property subject to self-help repossession was entitled to protection under article 1, paragraph 1 of that document,[74] which "has consistently been construed to protect citizens against deprivation of property without due process."[75] Further, he argued that paragraph 1 could be read to protect citizens not only from state interference, but also from "purely

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[68] The Supreme Court has stated that the principles of federalism operate as a necessary restraint upon federal courts in a system which is sensitive "to the legitimate interests of both State and National Governments." Younger v. Harris, 401 U.S. 37, 44 (1971).

[69] *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 490, 303 A.2d 273, 282 (1973), *cert. denied*, 414 U.S. 976 (1973), where the court stated that in an equal protection analysis under the state constitution

> there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances.

[70] *See* Burke & Reber, *supra* note 26, 46 S. CAL. L. REV. at 1015–16, for a discussion of the limitations of the fourteenth amendment and the role of the states in regulating the private affairs of individuals. *See also* Note, *Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271, 274–75 (1973), wherein the suggestion is made that since "the Supreme Court has assumed a less activist posture" with respect to federal-state relations, an increased responsibility falls upon the states to safeguard individual rights and liberties.

[71] 66 N.J. at 181, 330 A.2d at 11.

[72] *Id.* at 194, 330 A.2d at 19.

[73] *Id.* at 198–99, 330 A.2d at 21.

[74] N.J. CONST. art. 1, ¶ 1 provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, *of acquiring, possessing, and protecting property*, and of pursuing and obtaining safety and happiness.

(Emphasis added.)

[75] 66 N.J. at 91, 330 A.2d at 17.

private interference with property rights."[76] He found it unnecessary to determine whether the state constitution required "merely a relaxed state action requirement or no requirement at all of state action,"[77] since under either construction the debtor was entitled to due process before he could be deprived of his possessory interest in the automobile.[78]

After removing the obstacle of state action and determining that King was entitled to due process protection, Justice Pashman again looked to the *Fuentes* line of cases for guidance.[79] Recognizing that those decisions are not binding on state courts construing their own constitutions,[80] Justice Pashman nevertheless argued that they con-

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[76] *Id.* at 194, 330 A.2d at 18. Both the majority and dissent acknowledged that New Jersey courts have previously found that article 1 protects the rights of individuals from private as well as state encroachment. *See id.* at 177, 194, 330 A.2d at 9–10, 18. For example, in Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 175 A.2d 639 (1961) the plaintiffs, employees of defendants, alleged they were wrongfully discharged by defendants because of their membership in a union. Charges were filed with the National Labor Relations Board, which rejected jurisdiction, maintaining defendants were insufficiently involved with interstate commerce. *Id.* at 191–92, 175 A.2d at 640–41. Plaintiffs then brought suit in superior court contending that their right to organize and bargain collectively, protected by article 1, paragraph 19, of the New Jersey constitution, had been violated. The chancery court dismissed for lack of jurisdiction. *Id.* at 191–93, 175 A.2d at 640–41. On appeal, the Supreme Court of New Jersey considered the defendants' contentions that the constitutional provisions safeguarded these guaranteed rights only from legislative or judicial encroachment and responded:

> We agree that the Legislature or the judiciary cannot abridge these rights, but *the constitutional provision reaches beyond governmental action. It also protects employees against the acts of individuals who would abridge these rights.*

Id. at 196, 175 A.2d at 643 (emphasis added). Thus, the court held that private infringement of individual rights guaranteed by the state constitution stated a cause of action. *See also* Note, *supra* note 70, at 338–39, which offers an excellent profile of the role of the New Jersey courts under the state's bill of rights and which suggests that there is no requirement of state action under article 1 of the New Jersey constitution.

[77] 66 N.J. at 194, 330 A.2d at 19.

[78] *Id.*

[79] *Id.* at 195, 330 A.2d at 19. Although those cases dealt with the question of what procedural safeguards must be afforded a debtor before his property could be seized by state agents or officers, the court's analysis becomes significant in light of Justice Pashman's contention that, under the New Jersey constitution, due process attaches to self-help repossession even when the state is not an active participant. The major cases in which the United States Supreme Court has considered the procedural due process question as applied to creditor's remedies are: North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (*ex parte* issuance of writ of garnishment) (decided subsequent to *King*); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) (issue of writ of sequestration on *ex parte* application to judge); Fuentes v. Shevin, 407 U.S. 67 (1972) (issue of prejudgment writ of replevin on *ex parte* application to a court clerk); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (wage garnishment by *ex parte* application to clerk of the court).

[80] In reference to Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), Justice Pashman

tain persuasive authority as to the form of due process required in self-help repossession. Therefore, he would adopt the posture of the *Fuentes* Court.[81]

In *Fuentes*, the Court determined that notwithstanding the fact that the debtor lacked "full legal title to the . . . goods," he was entitled to notice and a pre-seizure hearing before he could be deprived of his possessory interest.[82] Following this rationale, Justice Pashman looked to the competing interests of the parties to determine what procedures should control the repossession process.[83] He determined that the creditor was interested primarily in protecting his security and thereby guaranteeing the repayment of his loan.[84] The debtor's interest was that of continued use and possession of "what may well be an essential piece of personal property."[85] In his view, the balance weighed heavily on the side of the debtor.[86] The proper constitutional accommodation of these interests would therefore be to temporarily safeguard the debtor's possessory interest—"a significant property interest"[87]—unless extraordinary circumstances[88] dictated otherwise:

> The debtor is entitled to remain undisturbed in his possession unless the creditor notifies him prior to seizing the goods and demon-

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noted "that in construing the Constitution of 1947 we are not bound to adopt retrogressive decisions of the United States Supreme Court." 66 N.J. at 195–96 n.7, 330 A.2d at 19. *See* Robinson v. Cahill, 62 N.J. 473, 490, 303 A.2d 273, 282 (1973), *cert. denied*, 414 U.S. 976 (1973), where the court stated:

> The question whether the equal protection demand of our State Constitution is offended remains for us to decide. Conceivably a State Constitution could be more demanding.

[81] 66 N.J. at 195–96 & n.7, 330 A.2d at 19.

[82] Fuentes v. Shevin, 407 U.S. 67, 80–86 (1972).

[83] Justice Pashman reviewed the policy considerations advanced by creditors and courts as support for their contentions that due process standards should not apply in self-help. These considerations include "the administrative convenience of creditors, the possible burden on the courts, and the effects . . . on the cost and availability of consumer credit." 66 N.J. at 197, 330 A.2d at 21. He observed that administrative convenience should not be sought at the expense of citizen's rights; nor should the possibility of an increased work load discourage courts from providing relief. *Id.* at 197–98, 330 A.2d at 20–21. Finally, Justice Pashman rejected the claims that application of due process to self-help would result in an increase in the cost and a reduction in the availability of credit. He viewed these claims as speculative, and irrelevant to an analysis of constitutional rights. *Id.* at 198, 330 A.2d at 21.

[84] *Id.* at 195, 330 A.2d at 19.

[85] *Id.*

[86] *Id.*

[87] 407 U.S. at 87.

[88] 66 N.J. at 195, 330 A.2d at 19. This is in accord with *Fuentes*, wherein the Court conceded that "[t]here are 'extraordinary situations' that justify postponing notice and

> strates at a suitable preseizure hearing that he is likely to be able to prove that he is entitled to immediate possession.[89]

Although the *King* majority acknowledged that the provisions of the New Jersey constitution enabled the court to look beyond traditional concepts of state action, it refused to find that self-help abridged any fundamental rights.[90] The court's reasoning was based on the principles of *Mitchell v. W. T. Grant*,[91] which, it contended, had "severely limited, if not overruled" *Fuentes*.[92] At issue in *Mitchell* was whether a sheriff's seizure of certain household goods pursuant to a writ of sequestration issued under Louisiana law violated due process.[93] The *Mitchell* Court found a duality of interest in the seized property. The interest of the creditor, created by a state vendor's lien and "measured by the unpaid balance of the purchase price," was balanced against the possessory interest of the debtor.[94] Concluding that the sequestration process, which provided for sworn affidavits to support the *ex parte* writ and a prompt post-seizure hearing, effected a "constitutional accommodation of" both these interests, the Court found the "procedure as a whole" compatible with due process.[95]

Applying this rationale, the *King* majority reasoned that the same duality of interests existed in the repossessed automobile at issue.[96] Since the court determined that this duality had been created by bargaining and contracting in a manner "inoffensive to law, morals, honesty or public policy," it found that no issue of fundamental rights was involved.[97] Since neither party's interest rose to constitutional dimensions, both were measured by the terms of the private contract.[98] The court concluded that if it interfered with the agreement between the parties, it would "itself, encroach upon [a] fundamental right by withdrawing from the parties their traditional freedom to contract."[99] The *King* court's heavy reliance on the right to contract may distort the true interests of the parties. Freedom to contract is not an abso-

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opportunity for a hearing. . . . These situations, however, must be truly unusual." 407 U.S. at 90 (footnote & citation omitted).

[89] 66 N.J. at 195, 330 A.2d at 19.

[90] *Id.* at 177–78, 330 A.2d at 9–10.

[91] 416 U.S. 600 (1974).

[92] 66 N.J. at 165 n.2, 330 A.2d at 3.

[93] 416 U.S. at 602–03.

[94] *Id.* at 604.

[95] *Id.* at 610.

[96] 66 N.J. at 178, 330 A.2d at 10.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 179, 330 A.2d at 10.

lute right; and, when contract terms are unduly restrictive of either party's fundamental rights, courts have not hesitated to reject the offending provisions.[100]

Reliance on *Mitchell* is also questionable. Central to the *Mitchell* Court's decision was a determination that the Louisiana sequestration procedure contained sufficient safeguards to protect the debtor against abuses of the *ex parte* seizure.[101] These procedural protections are absent in self-help repossession.[102] Furthermore, the United States Supreme Court's decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[103] rendered subsequent to *King*, appears on the surface to have reaffirmed *Fuentes*,[104] or, at least, to have reiterated the Court's policy of expanding the "concepts of procedural due process" in the creditor remedy area.[105]

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[100] *See, e.g.*, Walsche v. Sherlock, 110 N.J. Eq. 223, 245, 159 A. 661, 670 (Ch. 1932), where the court, in reference to the rights enumerated in article 1, paragraph 1 of the 1844 New Jersey constitution (the same rights as found in the 1947 constitution) stated:

> Those unalienable rights being guaranteed by the constitution, any contract, unreasonably restrictive thereof, is necessarily void. I do not suggest that every contract restrictive of constitutional rights is void. Mutual advantages arising from such contracts equal to the burdens assumed or privileges curtailed may justify an individual in waiving constitutional rights. But those rights which the constitution recognizes as unalienable will be preserved by the courts notwithstanding individual contracts of waiver especially where the public interest is affected because that interest transcends the will or whim of the individual.

Accord, Collins v. International Alliance of Stage Employees, 119 N.J. Eq. 230, 241, 182 A. 37, 43 (Ch. 1935).

[101] 416 U.S. at 605–07.

[102] *See, e.g.*, 66 N.J. at 188, 330 A.2d at 15, where Justice Pashman stated that "[p]lainly, none of the procedural factors that saved the Louisiana statute is present in this case."

[103] 419 U.S. 601 (1975).

[104] *Id.* at 605–06. Justice Stewart, concurring, remarked: "It is gratifying to note that my report of the demise of Fuentes v. Shevin . . . seems to have been greatly exaggerated." *Id.* at 608 (citations omitted).

[105] *Id.* at 610 (Powell, J., concurring). In *North Georgia*, the Court struck down as unconstitutional a Georgia statute that permitted a writ of garnishment to issue upon a plaintiff's *ex parte* application (a) if a suit were pending, (b) if the plaintiff, by affidavit, stated the amount allegedly due, and (c) if the writ were not issued, he would have " 'reason to apprehend the loss of the [amount due] or some part thereof.' " *Id.* at 601–08. The controversy was between two corporate parties, and the writ attached to defendant's bank account. *Id.* at 607–08. The Supreme Court distinguished *Mitchell* and relied upon *Fuentes*, stating:

> The Georgia statute is vulnerable for the same reasons [demonstrated in *Fuentes*]. Here, a bank account, surely a form of property, was impounded and, absent a bond, put totally beyond use during the pendency of the litigation on the alleged debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer.

Id. at 606.

In addition to his contention that self-help repossession violates both federal and state due process, Justice Pashman would find the contractual provisions for self-help, contained in the standard form installment sales agreement, unconscionable.[106] Admitting that his position was "novel," and that the standards for finding unconscionability are somewhat vague, he viewed the issue as largely a factual one to be assayed "in light of its own peculiar commercial context."[107] He noted that the offending provision was part of a form contract entered into by parties of unequal bargaining power, the effect of which was "to put the consumer wholly at the mercy of the secured creditor [who] may seize the goods based upon a secret and unexpressed allegation of default."[108] Determining that this self-help provision would not have been accepted by a reasonable consumer with an opportunity to bargain on equal terms, Justice Pashman would hold these terms of the contract unconscionable.[109]

To arrive at this conclusion, Justice Pashman was constrained to consider the fact that although the codification of self-help had been deemed, by the majority, insufficient to support a finding of state action, section 9–503 was, nonetheless, an expression of legislative

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The Court determined that the procedural safeguards that had saved the sequestration procedure in *Mitchell* were absent in the present case. *Id.* at 606–07.

Another distinguishing factor, unarticulated by the Court, was that in *Mitchell*, the Court determined that there was a duality of property interest created by the vendor-vendee relationship since the creditor had a prior interest in the seized property. Mitchell v. W. T. Grant Co., 416 U.S. 600, 604 (1974). This duality was absent in *North Georgia*.

[106] 66 N.J. at 198–99, 330 A.2d at 21. Justice Pashman cited the unconscionability provisions of Article 2 of the New Jersey Uniform Commercial Code as applicable to "[secured] transactions under Article 9 which are incidental to sales." *Id.* at 199 n.9, 330 A.2d at 21. *Cf.* Unico v. Owen, 50 N.J. 101, 124–25, 232 A.2d 405, 418 (1967).

N.J. STAT. ANN. § 12A:2–302(1) (1962) provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

[107] 66 N.J. at 199, 202, 330 A.2d at 21, 23.

[108] *Id.* at 200, 330 A.2d at 22.

[109] *Id.* at 200–01, 330 A.2d at 22. It is well established that New Jersey courts can invalidate contracts which they find to be unconscionable as contrary to public policy. For example, in Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 408, 161 A.2d 69, 97 (1960), the New Jersey supreme court declared a disclaimer of implied warranties in a consumer contract void as against public policy. *See also* Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967), in which the court stated that consumers must be protected against unconscionable clauses and it is "the policy of our state . . . to protect conditional vendees against imposition by conditional vendors and installment sellers." *Id.* at 124, 232 A.2d at 418.

—and therefore public—policy.[110] He attempted to overcome this obstacle by suggesting that the intent of the legislature was not fairly expressed in Article 9, and particularly section 9–503. To demonstrate, Justice Pashman examined the history and purpose of Article 9, determining that when the drafters of the UCC decided "not to deal with the concededly special problems of consumers but to write a single unified law applicable to all commercial transactions,"[111] they intended that the states adopting Article 9 would also enact legislation dealing with consumer transactions on a local level.[112] Noting this, he argued that Article 9 was not drafted to specifically apply to the area of consumer installment sales, and therefore concluded that the legislature's action need be given only slight weight in testing for unconscionability.[113]

This analysis seems to impute the intent of the drafters of the Uniform Commercial Code to that of the New Jersey legislature. The legislature is deemed to be aware of its own enactments,[114] and Justice Pashman fails to point to any supplementing legislation that

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[110] 66 N.J. at 201, 330 A.2d at 22. *See* Singer Co. v. Gardner, 65 N.J. 403, 323 A.2d 457 (1974). In *Singer*, the lower court had held what it considered "a cross-collateral security agreement" unconscionable. *Id.* at 412–13, 323 A.2d at 463. The supreme court reversed, holding that cross-collateral security agreements were not per se unconscionable, and admonishing the trial court for its willingness to declare unconscionable a financing agreement "specifically sanctioned" by the legislature through the adoption of the UCC which provides for such arrangements. The court argued that "at the very least this statutory section should have been weighted in any determination of unconscionability under section 2–302." *Id.* at 413–14, 323 A.2d at 463–64.

[111] 66 N.J. at 201, 330 A.2d at 22.

[112] *Id.* The history of Article 9 supports Justice Pashman's contention that that Article was not intended to be all-inclusive.

The draft of 1949 originally made a distinction between consumer and commercial repossession and "contained provisions requiring . . . notice . . . before repossessing if the collateral was a consumer good" on which "60 percent of the purchase price" was paid. McCall, *The Past as Prologue: A History of the Right to Repossess*, 47 S. CAL. L. REV. 58, 77 (1973). This provision was subsequently deleted in deference to the belief that the states could better deal with reform legislation in the consumer area. *Id.* at 77–78. This decision is manifested in UNIFORM COMMERCIAL CODE § 9–101, Comment 1, which states in part:

> Consumer installment sales and consumer loans present special problems of a nature which makes special regulation of them inappropriate in a general commercial codification. . . . While this Article applies generally to security interests in consumer goods, it is not designed to supersede [state] regulatory legislation . . . .

[113] 66 N.J. at 201, 330 A.2d at 22.

[114] *See, e.g.*, State v. Federanko, 26 N.J. 119, 129, 139 A.2d 30, 36 (1958), wherein the court stated:

> The Legislature is presumed to be familiar with its own enactments, with judicial declarations relating to them, and to have passed or preserved cognate laws

would show the legislature did not intend self-help to apply to consumer transactions.[115] The legislature still remains the final arbiter of public policy,[116] and, as stated by a previous court,

> [t]he court cannot substitute its conception of sound public policy for that entertained by the legislature, if there be no disregard of a constitutional mandate.[117]

Therefore, despite Justice Pashman's novel approach, the codification of self-help repossession remains a formidable impediment to any finding that the remedy is per se unconscionable.

It is now apparent that the standard challenges to self-help based on federal constitutional grounds will not prevail because of debtors' inability to satisfy the state action requirement. In this respect, the *King* court's refusal to find state action merely confirms in New Jersey what has previously been accepted by the vast majority of courts considering the question[118] and is consonant with the current state action stance of the United States Supreme Court.[119]

The primary significance of *King* is found in the analysis of self-help remedies under the state constitution. Recent decisions of the United States Supreme Court have clearly expanded the procedural

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with the intention that they be construed to serve a useful and consistent purpose.

Accord, Barringer v. Miele, 6 N.J. 139, 144, 77 A.2d 895, 897 (1951).

[115] The Retail Installment Sales Act, N.J. STAT. ANN. § 17:16C–1 to –103 was enacted by the legislature to protect the average consumer. Steffenauer v. Mytelka & Rose, Inc., 87 N.J. Super. 506, 513, 210 A.2d 88, 94 (Ch. 1965), *aff'd*, 46 N.J. 299, 216 A.2d 585 (1966). This act includes purchases under motor vehicle installment contracts, N.J. STAT. ANN. § 17:16C–1, but the legislature has not included within the statute's provisions a prohibition of self-help repossession. It has, however, prohibited certain clauses that may be particularly onerous to consumers. Under this act, a retail installment sales agreement may *not* contain:

1) A provision that permits the seller to accelerate the balance if he "deems himself to be insecure." N.J. STAT. ANN. § 17:16C–35.
2) A provision "whereby the retail buyer waives any right of action against the retail seller." N.J. STAT. ANN. § 17:16C–36.
3) A "power of attorney to confess judgment." N.J. STAT. ANN. § 17:16C–37.

[116] *See, e.g.*, Weintraub, *Judicial Legislation*, 81 N.J.L.J. 545, 549 (1958), wherein the former Chief Justice of the Supreme Court of New Jersey urged the judiciary to be aware of its law-making power, but emphasized that

> [t]here of course are restraints on this judicial role. Foremost, is the duty of the judiciary to respect the paramount authority of the legislature when the legislature does act. . . . The ultimate arbiter of public policy (apart from constitutional limitations) must be the popular branch of government.

[117] State *ex rel.* State Bd. of Milk Control v. Newark Milk Co., 118 N.J. Eq. 504, 519, 179 A. 116, 124 (Ct. Err. & App. 1935).

[118] 66 N.J. at 181, 330 A.2d at 11 (footnote omitted).

[119] *See* notes 57–67 *supra* and accompanying text.

due process protection afforded debtors,[120] and this posture by the Court will continue to encourage debtors to mount challenges to self-help. The state courts may, however, prove to be more successful forums for these challenges, particularly where the degree of state action required to invoke the due process protections of the state constitution is less than that required under the fourteenth amendment.[121] Once determining that due process applies to self-help transactions, and that an encumbered possessory interest is a constitutionally protected property right, state courts will be in a position to reach the merits of the self-help controversy. The appropriate form of due process required will then depend upon whether the state court chooses to adopt the *Fuentes* Court's approach, requiring preseizure hearings in all cases, the "duality of interests" approach of the *Mitchell* Court, or some intermediate standard.

Efforts in state courts to restrain abuses in self-help activity may be impeded by judicial reluctance to remedy what is considered by some to be a legislative responsibility.[122] Nevertheless, the concept of

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[120] *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 610 (1975) (Powell, J., concurring), where the Justice stated:

> the Court in the past unanimously approved prejudgment attachment liens similar to those at issue in this case. . . . But the recent expansion of concepts of procedural due process requires a more careful assessment of the nature of the governmental function served by the challenged procedure and of the costs the procedure exacts of private interests.

(Citations omitted.) *See also* cases cited note 79 *supra*.

[121] The California supreme court has noted that

> California courts have long preserved the individual's right to notice and a meaningful hearing in instances in which a significant deprivation is threatened by a *private* entity, as well as by a governmental body.

Randone v. Appellate Dept., Super. Ct., 5 Cal. 3d 536, 550 n.11, 488 P.2d 13, 22, 96 Cal. Rptr. 709, 718 (1971) (emphasis in original). Other states do not have the word "state" included within their due process clause. For example, the New York constitution provides in part: "No person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. 1, § 6.

Whether a particular state's constitution includes the same state action requirement as that of the fourteenth amendment, a lesser requirement, or no requirement of state action at all must be determined on a case-by-case basis, since

> it is often hard to say whether a state constitution has a state action requirement because in many states the point has not been litigated and the constitutional language is ambiguous. It is, moreover, somewhat misleading to speak of a state constitution as either having or not having a state action requirement because it may have such a requirement for some provisions and not for others.

Note, *supra* note 70, at 297 n.143.

[122] This reluctance is evidenced in the *King* opinion where the majority asserted its refusal to " 'sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.' " 66 N.J. at 179, 330 A.2d at 11 (quoting from Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

private, unsupervised seizures must be more fully examined by both bodies in the light of today's consumer marketplace, and must not be judged by what has been permitted in the past.[123]

Edward J. Frisch

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[123] The National Commission on Consumer Finance has prepared a detailed study of creditors' rights and has recommended to Congress that

> [w]ith full understanding of its probable impact, . . . that prior to repossession—whether with or without judicial process—the debtor must be given notice of the claim against him and the opportunity to be heard on the merits of the underlying claim.

NATIONAL COMM'N ON CONSUMER FINANCE, REPORT ON CONSUMER CREDIT IN THE UNITED STATES 30 (1972). The Commission further stated "this recommendation is based on the concept that an individual has the right to continued 'use and possession of property (free) from arbitrary encroachment.'" *Id.* (footnote omitted) (quoting from Fuentes v. Shevin, 407 U.S. 67, 82 (1972)).