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Steve H. Nickles

STATE ACTION AND STATUTORY LIENS IN ARKANSAS — A REJOINDER TO PROFESSOR MALTZ

*Steve H. Nickles**

Convention usually limits a rejoinder to a few pages. Fortunately, however, a response which is brief in relation to my original article[1] is all that is necessary or warranted in this case. I thank the *Journal*'s editors for giving me the opportunity to present it.

Possessory Liens and State Action.

The issue in *Flagg Brothers, Inc. v. Brooks*[2] is under what circumstances the action of a possessory lienor to enforce his lien may fairly be attributed to the state so that a debtor cannot be deprived of his property without due process of law. Professor Maltz interprets the decision as holding that state action will be found under the public function rubric when the debtor has *no remedy* whereby he can challenge the lawfulness of the property's actual or threatened disposition by the lienor.[3] I agree with him so far, but the problem is that he goes no further.

He interprets *Flagg Brothers* as holding that this is the *only* instance where state action will be found under the delegated public function doctrine,[4] at least as it is applied to cases involving disputes between creditors and debtors. If *any* remedy or *"some* opportunity . . ."[5] exists whereby the debtor can challenge the sale, "the state, through the courts, still retains the ultimate authority to determine whether the disposition of goods was in fact lawful."[6] Maltz concludes that by retaining such authority the state has not delegated to the lienor a function traditionally reserved exclusively to the state. He also concludes that the availability to the debtor of *any* remedy is sufficient to establish the state's retention of this authority. This is the precise point on which we disagree.

I argue that the efficacy of the available remedies, and not simply their availability, is important in the search for state action

* Associate Professor of Law, University of Arkansas (Fayetteville).

1. Nickles, *Creditors' Provisional Remedies and Debtors' Due Process Rights: Statutory Liens in Arkansas*, 32 ARK. L. REV. 185 (1978).

2. 436 U.S. 149 (1978).

3. *See* Maltz, *State Action and Statutory Liens in Arkansas — A Reply to Professor Nickles*, 2 UALR L. J. 357, 362 (1979).

4. *See id.*

5. *Id.* (emphasis in original).

6. *Id.*

in this type of case under the public function doctrine.[7] This idea is not completely unknown even to Professor Maltz. He argues in another not totally unrelated context that with respect to the state action question, the quality of a thing is equally as significant as its existence.[8] The essence of my reasoning is that judicial remedies were created unequal. Some are better suited or more effective for resolving a particular dispute or redressing a particular wrong. This notion is foreign to no one, and the United States Supreme Court has embraced it.[9] The next step in my reasoning is a short one: Having no effective remedy or "real choice," as I use that term in my article,[10] is, for all practical purposes, like having none at all. And Maltz and I agree that where a debtor is without any remedy to challenge a possessory lienor's disposition of the collateral, the creditor's action is attributable to the state.[11]

The debtor in *Flagg Brothers* unquestionably had at least one potentially effective remedy under New York law, *i.e.*, a replevin action against the warehouseman.[12] State action was therefore lacking in that case. But I argue that a property owner in Arkansas has no efficacious remedy to challenge a sale by a vehicle repairman asserting a lien under Arkansas Statutes Annotated title 51, chapter 4.[13] This means that state action is present, and the statute is unconstitutional unless it provides the procedural safeguards required to afford the debtor due process of law. My conclusion that it fails to provide them[14] is not disputed by Professor Maltz.

Maltz does dispute my contention[15] that replevin is unavailable in Arkansas to a debtor whose property has been impounded by a creditor asserting a vehicle repairmen's lien.[16] If the debtor can sue to replevy his property, then the situation is clearly governed by the holding in *Flagg Brothers* with respect to the public function theory

7. *See* Nickles, *supra* note 1, at 243-46.

8. *See* Maltz, *supra* note 3, at 366-67.

9. *See* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978). And *see* Nickles, *supra* note 1, at 245. Professor Maltz is correct when he asserts that "there was no problem [in *Craft*] in finding state action without resort to the sovereign function doctrine." Maltz, *supra* note 3, at 362 n.36. But I did not cite the case for that position. I used it merely to illustrate the Court's awareness that some remedies are more effective than others.

10. *See* Nickles, *supra* note 1, at 244 *et seq.*

11. *See* Maltz, *supra* note 3, at 362.

12. The Court in *Flagg Brothers* presumed that the debtor "could have sought to replevy her goods at any time under state law. *See* N. Y. Civ. Prac. Law § 7101 *et seq.* (McKinney 1963)." 436 U.S. at 160.

13. ARK. STAT. ANN. §§ 51-404 to -412 (Repl. 1971).

14. *See* Nickles, *supra* note 1, at 226-36.

15. *See id.* at 224.

16. *See* Maltz, *supra* note 3, at 359-60.

of state action because that remedy provides an effective way to challenge the lawfulness of a threatened sale. Maltz's argument that replevin is available is not totally untenable,[17] but the authority he relies upon[18] is not as overtly supportive as he pretends it to be. When the question of the constitutionality of the vehicle repairmen's lien reaches the Arkansas Supreme Court, I hope this issue will be clarified. Professor Maltz does not discuss, as I do in my article, the availability of remedies other than replevin.[19] Therefore, I will not rehash here the question whether there are others that may be effective.[20] If he is content to allow the state action question under the public function rubric to hinge on the availability of replevin, then so am I. But a finding of state action in this context does not depend solely upon the invocation of the public function doctrine.

Professor Maltz fails to discern the differences between a warehouseman's sale under UCC Article 7 and one under a vehicle repairmen's lien law. They differ in several respects including the extent of overt official involvement which was totally lacking in *Flagg Brothers.*[21] The state is actively involved when an automobile is sold pursuant to a repairmen's lien.[22] The Court of Appeals of New York believes this difference is substantial and significant after *Flagg Brothers.*[23] State action may then be found without any reli-

17. *See* Nickles, *supra* note 1, at 225 n.166.

18. Smith v. Checker Cab Co., 208 Ark. 99, 184 S.W.2d 901 (1945).

19. *See* Nickles, *supra* note 1, at 244-45.

20. *See id.*

21. *See* 436 U.S. at 157.

22. A vehicle repairman has three different remedial rights under Arkansas statutory law. *See* Nickles, *supra* note 1, at 214-17. The exercise of his right to perpetuate a lien when he releases possession of an automobile and to enforce it in court clearly involves the state as an active participant in the process. *See id.* at 235-36. But even when the lienor retains possession and sells the vehicle himself, the state becomes actively involved. *See id.* at 230-35 and 233 n.201. *Cf. id.* at 219 n.152 (regarding the state's involvement in effecting transfer of the certificate of title when an Article 9 secured party sells a vehicle subject to registration).

23. In Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 379 N.E.2d 1169 (1978), the court noted:

> There are, of course, substantial differences between the private sale of goods authorized by the warehouseman's lien law and the private sale authorized by [New York's statute authorizing a garageman to foreclose his possessory lien for repair and storage charges] . . . . Critical to the determination in *Flagg Bros.* that the private sale did not constitute State action was the "total absence of overt official involvement." Here, that overt governmental involvement absent in *Flagg Bros.* is present to some degree. In this State, title to an automobile cannot be transferred, and thus a sale cannot be accomplished under the Lien Law, without registration of the vehicle by the Department of Motor Vehicles and its issuance of a certificate of title. Thus, the fact that initiation of the sale stems from a private

ance on the delegated public function rubric which was the principal theory urged in *Flagg Brothers* and the only one considered by Maltz in his analysis of possessory liens. Debtors' lawyers and the courts will not be as content to ignore such important differences between lien procedures and alternative theories of state action.

Non-possessory Liens and State Action.

Professor Maltz also tries to argue that the Arkansas materialmen's lien statute[24] is immune from scrutiny under the due process clause. I have persuaded him that such a lien deprives the landowner of a property interest within the purview of the fourteenth amendment.[25] I welcome his support of this proposition and thank him for it. He argues once again, however, that the deprivation cannot be attributed to the state under any established state action doctrine, although admittedly "the issue is not quite as clear [as he believes it is] in cases dealing with possessory liens."[26] His decision to hedge a little demonstrates sound judgment. Ample authority and good reasons support the view that no genuine legal issue exists on the question of state action in the context of materialmen's liens.

Professor Maltz cannot cite a single case directly supporting his position that state action is lacking. No court deciding a modern constitutional challenge to a materialmen's lien statute has resolved the case on a finding of insufficient state action. He does not marshal any support for his thesis from among secondary sources. Legal scholars and other writers routinely reach the opposite conclusion.[27]

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source does not detract from the necessity that the garageman invoke both the power of the sovereign and the participation of public officials to bring about the involuntary transfer of title. The power of the State utilized to implement the involuntary transfer of title pursuant to the Lien Law may be sufficiently analagous to the issuance of a writ by a court clerk in *Sniadach v. Family Fin. Corp., Fuentes v. Shevin* and *North Ga. Finishing v. Di-Chem* to support a finding of overt State involvement in the garagemen's sale.

Id. at 379 N.E.2d at 1173 n.2 (citations omitted). It was unnecessary for the court to decide this issue, however, because of its determination that the challenged provisions of the law violated the due process clause of the state constitution.

24. ARK. STAT. ANN. §§ 51-601 *et seq.* (Repl. 1971).

25. *See* Maltz, *supra* note 3, at 357.

26. *Id.* at 368.

27. For example, the authors of the most recently published treatise on real property law include in their book a section devoted to the constitutionality of mechanics' liens. *See* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 12.5 (1979). They conclude that the lack of state action is not among the reasons why modern challenges to these procedures have sometimes failed. They have been unsuccessful

either because courts have been unwilling to find a significant deprivation of prop-

Maltz chooses to ignore completely the most relevant authorities. He even refrains from criticizing or distinguishing a single decision among several holding that state action is present.[28] He must believe that *Flagg Brothers* makes all the difference, yet he is relegated to picking through the opinion to find a footnote here and a suggestion there which support his so-called "proper analysis."[29] Nothing in *Flagg Brothers* directly bolsters his position, and the reason is very plain even to the casual observer. The case is clearly distinguishable even on its face from one involving a materialmen's lien.

First, the primary contention that state action was present in *Flagg Brothers* is based on the delegated public function rubric.[30] But Maltz's analysis begins with the assumption that this doctrine is inapplicable to a materialmen's lien case.[31] Second, in response to an argument based on another state action theory,[32] the Court said in *Flagg Brothers* that "the crux of [the debtors'] complaint is not that the State *has* acted, but that it has *refused* to act."[33] But Maltz concedes that in a materialmen's lien case the focus of the state action analysis must be on the state's *affirmative* role.[34] Third, the issue in *Flagg Brothers* concerns the presence of state action when the lien is enforced by a private party and not when it is created. But Maltz admits that state action is present at the stage of enforcing a materialmen's lien and focuses his analysis on the creation stage.[35] Fourth, overt official involvement was totally ab-

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> erty or because appropriate constitutional accomodations have been found within the statutory scheme itself. Some well reasoned recent opinions, however, have discerned a significant deprivation of property in the imposition of mechanics' liens. Once this threshold is crossed, *state action is easily found;* the remaining question is whether adequate safeguards exist.

Id. at 748-49 (emphasis added). Even the most recent student work analyzing a materialmen's lien statute concludes that "the taking involves state action . . . . The federal and state courts which have considered the constitutional validity of mechanics' liens and which have discussed state action have uniformly held that the process constitutes state action." Comment, *Are Due Process Requirements Met Under Idaho's Mechanics' and Materialmen's Lien Statute?*, 15 IDAHO L. REV. 115, 138-39 (1978-79).

28. *See, e.g.*, Connolly Dev., Inc. v. Superior Court of Merced County, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976); Barry Properties, Inc. v. Fick Bros. Roofing Co., 277 Md. 15, 353 A.2d 222 (1976); Williams & Works, Inc. v. Springfield Corp., 81 Mich. App. 355, 265 N.W.2d 328 (1978).

29. Maltz, *supra* note 3, at 368.

30. *See* 436 U.S. at 157.

31. *See* Maltz, *supra* note 3, at 364.

32. As an alternative basis for finding state action, the debtors in *Flagg Brothers* argued that the creditor's "proposed action is properly attributable to the State because the State has authorized and encourage it in enacting § 7-210." 436 U.S. at 164.

33. 436 U.S. at 166.

34. *See* Maltz, *supra* note 3, at 364.

35. *See id.* at 365.

sent from the facts in *Flagg Brothers.*[36] Even before the enforcement stage, this is not the case with a materialmen's lien, and Maltz himself realizes it.[37] Fifth, the courts frequently have concluded that the ancestry of a creditor's remedy is material to the state action question.[38] The warehousemen's lien asserted in *Flagg Brothers* was recognized at common law,[39] and UCC Article 7 merely codifies and regulates it. The Court suggested this fact in the *Flagg Brothers* opinion.[40] The materialmen's lien, however, is purely a creature of statute[41] designed originally not to perpetuate traditionally private arrangements but to encourage and facilitate private construction activity.[42]

Maltz's analysis fails to account fully for these facile distinctions between *Flagg Brothers* and a materialmen's lien case. More important, however, is his utter failure to appreciate the significance of the most basic differences between the two types of cases. The debtor in *Flagg Brothers* attempted to establish state action on the basis of the state's *inaction.* A landowner contesting the validity of a materialmen's lien argues that state action should be found on the basis of the state's *involvement.* The state has described the circumstances under which and the extent to which the lien will arise;[43] it arises by operation of law; it cannot be perpetuated without a filing with the clerk of a state court[44] or suing there;[45] it cannot be filed in the usual case without notice which may be served by a state official;[46] it becomes a cloud on record title when it is indexed in a recording system established and maintained by state offi-

36. *See* 436 U.S. at 157.

37. *See* Maltz, *supra* note 3, at 366-67. And *see* pp. 377-78 *infra.*

38. Whether a remedy was recognized and permitted as part of the common law is not the *sole* test for deciding the state action issue but *a* factor the courts have often considered. *See, e.g.*, Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 330, 337 (9th Cir. 1973), the leading case on the lack of state action when a secured party asserts his right to repossess collateral under UCC § 9-503. *See also* Parks v. "Mr. Ford," 556 F.2d 132 (3d Cir. 1977). There the court found no state action when a repairman retained a debtor's automobile pursuant to Pennsylvania's garagemen's lien law. *But see* Nickles, *supra* note 1, at 217-25. The Third Circuit believed "that the ancient origin of the challenged activity is highly relevant." 556 F.2d at 138.

39. *See* 1 L. JONES, A TREATISE ON THE LAW OF LIENS §§ 967-76 (1888).

40. *See* 436 U.S. at 162 n.12.

41. *See* Nickles, *supra* note 1, at 191.

42. *See id.* at 190.

43. *See* ARK. STAT. ANN. § 51-601 (1971). *See also* Nickles, *supra* note 1, at 188 n.22.

44. *See* ARK. STAT. ANN. § 51-613 (1971).

45. *See* Burks v. Sims, 230 Ark. 170, 321 S.W.2d 767 (1959). And *See* Nickles, *supra* note 1, at 189 n.24.

46. *See* ARK. STAT. ANN. § 51-608 (1971).

cials;[47] it can only be foreclosed by suing in state court to enforce it;[48] and its value to the creditor rests on the priorities the state establishes[49] and the threat of enforcement by the state.

In spite of all this state involvement, however, Maltz argues that only semantic clumsiness permits the conclusion "that because action by the government ('state action') establishes the right to deprive a person of property, then the deprivation itself must be subject to the structures of the fourteenth amendment."[50] He cites *Jackson v. Metropolitan Edison Co.*[51] as authority for the proposition that "any such argument is untenable."[52] The debtor argued in *Jackson* that she was entitled to due process protection when utility service to her residence was terminated. The state action claim which Maltz refers to in this case was based on the argument that "the State 'has specifically authorized and approved' the termination practice."[53] The Supreme Court did reject this argument, but Professor Maltz fails to explain why it was rejected. I will. First, the state's only connection with the termination practice was the power company's filing with the Public Utility Commission a general tariff which contained a provision stating the company's intention to terminate service for non-payment.[54] Second, state law may not have required the filing of a tariff provision dealing with termination practices.[55] Third, the state did not scrutinize or expressly approve the practice employed in this case.[56] Fourth, the state may not have had the authority to disapprove it.[57] Fifth, nothing suggested that the state in any way encouraged the practice.[58] Sixth, the utility company had the right to terminate service at common law before the advent of state regulation.[59] And, seventh, the utility and not the state established or initiated the termination remedy.[60] In essence, then, the state "has not put its weight on the side of the proposed practice . . . ."[61]

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47. *See id.* § 51-614.
48. *See id.* § 51-615.
49. *See id.* §§ 51-605, -607.
50. Maltz, *supra* note 3 at 364.
51. 419 U.S. 345 (1974).
52. Maltz, *supra* note 3, at 364.
53. 419 U.S. at 354.
54. *See id.* at 355.
55. *See id.*
56. *See id.* at 354.
57. *See id.* at 355.
58. *See id.* at 357 n.17.
59. *See id.* at 354 n.11.
60. *See id.* at 357.
61. 419 U.S. at 357.

Compare the materialmen's lien case. The state's connections are extensive. The state not only approved the procedure but established it to encourage construction activity in the private sector. No group of suppliers and contractors initiated the remedy at some annual meeting and then followed it in the absence of state disapproval. The state initiated it by making it generally available in the first place and providing that in any particular case a lien will arise by operation of law. No creditor had the right to such a remedy at common law, and the reason it is valuable to him today is because the state has put its weight on the side of the lien by establishing, perpetuating and enforcing it.

The basic distinction between *Jackson* and a case involving a materialmen's lien is a simple one, but it, too, is overlooked by Professor Maltz. *Jackson* involved a debtor whose real complaint was that the state *had failed to act.* So did *Flagg Brothers.* When the debtor in the *Flagg Brothers* case argued state action on the basis of a statute authorizing the lienor to sell the debtor's property, the Supreme Court observed that her complaint was essentially that the state had *"refused* to act."[62] *Jackson* and *Flagg Brothers* are both state "inaction" cases. But a landowner whose property is subjected to a materialmen's lien is in the position of wishing that the state had not acted and praying that it will act no more.

The majority's opinion in *Flagg Brothers* rests upon the initial assumption that "as a factual matter any person with sufficient physical power may deprive a person of his property . . . ."[63] This was true of the power company in *Jackson.* Whether or not the state authorized the utility's termination practice, the company had the power (no pun intended) to terminate service. This was also true of the creditor in *Flagg Brothers.* He already had possession of the debtor's goods, and he had the power to sell them with or without statutory authorization. But, as Maltz concedes, "where nonpossessory liens are involved, the lienholder will have no interest or control of the property unless the interest [and presumably the control] is created by state law."[64] A claim of state action may be based, as it was in *Jackson* and *Flagg Brothers,* on the state's refusal to act to prevent the happening of some activity within the power, if not the right, of the actor. Or it may be based, as it is in the case of a materialmen's lien, on the state's involvement in giving the actor a right, and therefore a power, he otherwise would not have. There is

62. 436 U.S. at 166.
63. *Id.* at 157.
64. Maltz, *supra* note 3, at 364.

a fundamental difference. The Supreme Court in other cases has recognized its importance to the state action issue under the fourteenth amendment.[65] But Maltz does not appreciate the difference. He even fails to deal with the more superficial distinctions between a case like *Jackson* and one involving a materialmen's lien. His analysis is thereby rendered fatally defective.

Professor Maltz also either overlooks or fails to appreciate fully the extent of the direct involvement of state officials under the Arkansas materialmen's lien statute. The Court in *Flagg Brothers* began its analysis of the case by noting the *"total* absence of overt official involvement . . . ."[66] Maltz realizes that the creditor must file an account of his claim with the circuit court clerk in order to perpetuate a lien.[67] But the professor concludes either that accepting accounts for filing is not overt involvement or, more likely, that this involvement is not sufficiently substantial to support a finding of state action.[68] First, however, this involvement of state officials, regardless of its degree, distinguishes a materialmen's lien case from *Flagg Brothers.* Second, the only authority Maltz cites for attaching significance to the "quality" or "degree" or "extent" of officials' actions for the purpose of finding state action is an inference drawn

65. For example, compare Shelley v. Kraemer, 334 U.S. 1 (1948) with Rice v. Sioux City Mem'l Park Cemetery, 349 U.S. 70 (1955).

66. 436 U.S. at 157 (emphasis added).

67. *See* Maltz, *supra* note 3, at 366.

68. *See id.* at 366-67. Professor Maltz tries to minimize the clerk's role when an account is filed pursuant to ARK. STAT. ANN. § 51-613 (Repl. 1971). According to him, "the statutes only require that the lien claimant file his lien with the clerk, rather than making recordation by the clerk a prerequisite to enforcement." Maltz, *supra* note 3, at 367. Therefore, he concludes, "all of the actions necessary to establish the lien claimant's rights are taken by private parties rather than government officials." *Id.* But as a practical matter, however, I know of no way to file anything with a clerk without the clerk's participation and cooperation. The statute does not provide that the lien claimant file the account himself at the courthouse; it requires that the filing be made with the clerk there. And this filing is clearly a prerequisite to the enforcement of a lien. The statute could not be clearer. Filing an account is "the duty of every person who wishes to avail himself of this act . . . ." ARK. STAT. ANN. § 51-613 (Repl. 1971). And *see* authorities cited Nickles, *supra* note 1, at 193 n.54. The only alternative is the timely filing of a suit to enforce the lien. *See* authorities cited *id.* at 189 n.24. Also, the steps of filing an account with the clerk and recording it by the clerk are practically inseparable. An account cannot be recorded until it is filed, and filing one is a virtually meaningless exercise unless it is recorded. And it is the clerk, not the lien claimant, who abstracts and indexes an account. *See* ARK. STAT. ANN. § 51-614 (Repl. 1971). Finally, whether or not proper recordation is a prerequisite to lien enforcement, recordation is a duty imposed upon the clerk by statute and thereby actively involves a state official in the lien procedure. *See id.* And this involvement is critically important to the process because it establishes the lien of record and contributes substantially to the restriction on free alienability suffered by the landowner.

from a footnote in *Flagg Brothers.*[69] Now who is arguing that it is the efficacy of a thing and not its mere existence which is critical to the state action analysis?[70] And, finally, long before the enforcement stage state officials do more than simply accept accounts for filing. For instance, an account cannot be filed in many cases unless the landowner is notified.[71] The notice may be served by a public officer.[72] Also, the clerk is required by law to index liens as part of a recordation system established and maintained by state officials.[73] The filing and indexing creates and continues *of record* a cloud on the landowner's title. A cloud on title restricts the owner's ability to sell or encumber the property. And it is the restriction on free alienability which *is* the deprivation of a signficiant property interest resulting from the imposition of a materialmen's lien.[74] Maltz himself agrees with me on this last issue.[75] Also, a lien can be perpetuated in the absence of filing only by the initiation of a suit to enforce it.[76] Overt official involvement with a procedure clearly supports a finding of state action,[77] and state officials are directly and extensively involved in the Arkansas materialmen's lien procedure long before the enforcement stage.

The basis of Professor Maltz's conclusion regarding the lack of state action in the assertion of a materialmen's lien cannot rest on traditionally accepted reasoning about the state action question. The courts deciding the question prior to *Flagg Brothers* have used that very reasoning to find state action. Notwithstanding the persuasiveness of their analyses, Maltz's own analysis is defective. First, he does not fully appreciate the importance of distinguishing between a claim of state action based on the state's failure to act and one based on the state's active involvement. Second, he fails to account for the full extent of overt official involvement under the Arkansas statute. And the basis of his conclusion cannot rest directly on *Flagg Brothers* because that case is clearly distinguishable from one involving a materialmen's lien.

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69. *See* Maltz, *supra* note 3, at 366-67 and n.57.

70. *See id.* at 366-67, and *see* pp. 369-70 *supra.*

71. *See* ARK. STAT. ANN. § 51-608 (Repl. 1971).

72. *See id.*

73. *See id.* And *see* note 68 *supra.*

74. *See* Nickles, *supra* note 1, at 192-97.

75. *See* Maltz, *supra* note 3, at 357.

76. Burks v. Sims, 230 Ark. 170, 321 S.W.2d 767 (1959), and *see* Nickles, *supra* note 1, at 189 n.24.

77. *See, e.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

The only other possible basis for Maltz's conclusion is his perception that "the *Flagg Brothers* Court evinced a strong generalized hostility to the prospect of finding state action in cases dealing with the simple creation of commercial liens."[78] But this is only his perception based on an inference he draws from a case not involving the question whether the imposition of any type of lien constitutes state action and not involving a materialmen's lien statute requiring the affirmative involvement of the state and active participation by its officials. He apparently would have his reader believe that after *Flagg Brothers,* state action can never be found when a creditor benefits and a debtor suffers because of a statutory lien. But his analysis fails to support this belief and nothing in *Flagg Brothers* warrants it. The Court itself cautioned that its opinion should *not* be interpreted "to say that dispute resolution between creditors and debtors involves a category of human affairs that is never subject to constitutional constraints."[79] The materialmen's lien statute in Arkansas is subject to those constraints and is unconstitutional in failing to comply with them.

Conclusion.

Professor Maltz accuses me of imagining constitutional problems with some of Arkansas' lien statutes.[80] I am content to let the reader and the courts decide which of us is imagining things. He advises his readers that "not every unfair law is unconstitutional."[81] But I have observed that over the last decade the courts have declared unconstitutional statutes creating a wide array of creditors remedies which many believe are unfair in today's world. Materialmen's and vehicle repairmen's liens have not been spared. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[82] And I do not doubt, as Professor Maltz apparently does, that beneath the language of the fourteenth amendment live the fundamental but *dynamic* notions of justice and fairness.

Regardless of the ultimate resolution of the issues about which Professor Maltz and I disagree, I am delighted to have a colleague

78. Maltz, *supra* note 3, at 363.

79. 436 U.S. at 162 n.12.

80. *See* Maltz, *supra* note 3, at 368.

81. *Id.*

82. Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J., writing the majority opinion).

engage me in such a debate. I hope, as I am sure he does, that this public airing of our views will help delineate and develop the questions which the judges will finally decide. By helping in this way we will have contributed to the law's progression and, after all, that is part of what legal educators are supposed to do.