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STATE ACTION AND STATUTORY LIENS IN ARKANSAS — A REPLY TO PROFESSOR NICKLES

*Earl M. Maltz**

In an article in the summer, 1978 issue of the *ARKANSAS LAW REVIEW*, Professor Steve Nickles argues that certain Arkansas statutes which grant liens to specific classes of creditors violate the United States Constitution.¹ His contention is that because of a lack of procedural safeguards, the statutory imposition or recognition of such a lien is a taking of the debtor's property without due process of law and therefore violates the fourteenth amendment. Following his lead, a number of lower courts in Arkansas have ruled that Arkansas' mechanics' and materialmen's lien statutes are unconstitutional.²

This article will argue that Professor Nickles and the lower state courts are wrong on this issue. The focus of the article will be rather narrow. No contention will be made that the imposition of such a lien does not deprive a debtor of a property interest within the meaning of the Constitution; on this point Professor Nickles' argument is persuasive.³ Nor will there be any extended discussion of the type of process which is due the debtor assuming that the fourteenth amendment does constrain the imposition of the liens.⁴ Instead, the discussion will center on the question of whether the acquisition of statutory liens by creditors and constitutes "state action"—a prerequisite for the applicability of any of the protections of the fourteenth amendment.⁵

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

2. *Miesner v. Robinson*, No. CTV-75-103 (Benton County Cir. Ct. 1978); *Wickes v. Cook*, No. E78-520 (Craighead County Ch. Dec. 12, 1978); *United Energy Savers, Inc. v. Romontio*, No. 78-3549 (Pulaski County Ch. Jan 29, 1979). The Wickes case has been appealed to the Arkansas Supreme Court.

3. See Nickles, *supra* note 1, at 192-97. See also *Roundhouse Constr. Corp. v. Telesco Masons Supply Co.*, 168 Conn. 371, 362 A.2d 778, *vacated and remanded*, 423 U.S. 809 (1975), *reaffirmed*, 170 Conn. 155, 365 A.2d 393, *cert. denied*, 429 U.S. 889 (1976); *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 277 Md. 15, 353 A.2d 222 (1976). *But see, e.g., Spielman-Fond, Inc. v. Hanson's Inc.*, 379 F. Supp. 997 (D. Ariz. 1973) (three-judge court) (*per curiam*), *aff'd without opinion*, 417 U.S. 901 (1974); *Connolly Dev. Inc. v. Superior Ct. of Merced County*, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976).

4. See Nickles, *supra* note 1, at 199. *But see* Note 64, *infra*.

5. See, *e.g., Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978); *Civil Rights Cases*, 109 U.S. 3, 17-18 (1883).

I. POSSESSORY LIENS — OR “I KNOW WHAT THE COURT SAID IT MEANT, BUT WHAT IT REALLY MEANT WAS. . .”

The leading case dealing with the question of state action in the context of a statutorily-created possessory lien is *Flagg Brothers v. Brooks*.⁶ There the Court considered the constitutionality of sections 7-209 and 7-210 of the Uniform Commercial Code,⁷ which provide that a warehouseman has a lien against a bailor for storage and related charges on goods covered by a warehouse receipt, and that this lien may be enforced by the warehouseman through the sale of the covered goods without resort to judicial process.⁸ The claim of the debtor in *Flagg Brothers* was that consummating such a sale without granting a prior hearing to the bailor constituted a deprivation of property without due process of law. The threshold question was whether the sale in fact constituted state action within the meaning of the fourteenth amendment. Those challenging the law relied primarily on the argument that the sales should be considered governmental action because the state had delegated to the warehousemen the “traditional sovereign function” of resolving disputes between debtors and creditors.⁹

The Supreme Court rejected this argument, as well as the contention that the fourteenth amendment applied because the state had “authorized and encouraged” the sale under section 7-210.¹⁰ Justice Rehnquist’s majority opinion distinguished cases dealing with the conduct of elections¹¹ and control of public streets¹² as involving functions traditionally *exclusively* reserved to the state. By contrast, the creditors and debtors were seen as having a “far wider number of choices” for resolving their disputes, with resort to the government being only one of these choices.¹³ Thus, the Court concluded that no state action was involved in the sale and therefore that there could have been no violation of the due process clause in the sale of the goods.

On its face, *Flagg Brothers* would appear to undermine any due process attacks on possessory liens — unless, of course, the lien-

6. 436 U.S. 149 (1978).

7. Codified in Arkansas at Ark. Stat. Ann § 85-7-209 (Cum. Supp. 1977) and ARK. STAT. ANN. § 85-7-210 (Add. 1961).

8. *See id.*

9. *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978).

10. *See id.* at 164-66.

11. *See, e.g., Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

12. *See Marsh v. Alabama*, 326 U.S. 501 (1946).

13. *Flagg Bros. v. Brooks*, 436 U.S. 149, 158-62 (1978).

holder comes into court to enforce his lien or employs some other state officer in its enforcement. Nonetheless, Professor Nickles argues that the *Flagg Brothers* rationale is inapplicable to vehicle repairmen's liens in Arkansas.¹⁴ His argument revolves around the contention that references in the opinion to the availability of damage and replevin remedies in *Flagg Brothers*, in addition to similar references to the possibility of negotiated waivers of the lien or of the right to sale, belie any attempt to characterize the case as resting on the question of whether the state has traditionally had the exclusive right to perform the function at issue;¹⁵ rather, he suggests, the analysis must focus on "the extent of the authorization (or delegation) and not simply with the degree to which the function's exercise has traditionally been associated only with the state."¹⁶ But, Professor Nickles argues, application of this formulation necessarily involves an analysis of the probable efficacy of each of the various options available to the debtors.¹⁷ He further contends that a damage remedy is likely to be at best of limited efficacy and that debtors will generally have insufficient bargaining leverage to obtain waivers from repairmen. Thus he concludes that replevin is the debtor's only effective recourse.¹⁸ But he further argues that replevin is unavailable in Arkansas against one claiming to hold under a repairmen's lien,¹⁹ and therefore, whatever the appropriate result in New York where replevin is available, state action analysis leads to the conclusion that constitutional due process requirements are implicated where a repairman claims a lien in Arkansas.²⁰

Initially, Professor Nickles' argument that replevin is not available in Arkansas in cases dealing with repairmen's liens is overstated at best. For support of this position, he relies on *Smith v. Checker Cab Co.*²¹ *Checker Cab* was a suit by a taxicab company for replevin of an automobile from a garage. In defense, the garage argued that it held the automobile pursuant to a lien for payment

14. Nickles, *supra* note 1, at 240-47. *Flagg Brothers* was decided after the main portion of the Nickles article had been sent to press. However, he prepared an "Addendum" in which he argues that notwithstanding the *Flagg Brothers* decision, state action should be found in cases dealing with Arkansas' vehicle repairmen's lien statute, ARK. STAT. ANN. § 51-404 (1971).

15. Nickles, *supra* note 1, at 243.

16. *Id.*

17. *Id.* at 244.

18. *Id.* at 244-46.

19. *Id.* at 246. *See id.* at 224.

20. *Id.* at 247.

21. 208 Ark. 99, 184 S.W.2d 901 (1945). *See* Nickles, *supra* note 1, at 224 n. 164.

for repairs which the taxicab company had requested to be made.²² The taxicab company contended that no such repairs had been made. A jury found that labor valued at \$350 had in fact been performed,²³ and the court held that replevin was inappropriate because no tender of payment for the services had ever been made.²⁴

Professor Nickles argues that *Checker Cab* effectively leaves a debtor in Arkansas without a means to have a disputed bill adjudicated in a replevin proceeding.²⁵ But in *Checker Cab* the disputed claim was adjudicated, with the jury finding that the repairman was owed \$350. Further, the case is clearly limited to a situation where no payment has been tendered, with the court clearly implying that if payment had been offered, then the debtor would have been entitled to replevin.²⁶ There is language in the opinion from which it might be inferred that the owner of the taxicab would have had to tender the entire amount claimed by the repairman.²⁷ But such a result would be contrary to the basic concept of the lien statutes, as Professor Nickles seems to concede.²⁸ A repairman only has a lien "for the sums of money *due*" for the work which he has done²⁹ — an amount which may well differ from the amount claimed by the repairman. Once the amount due is tendered, the lien is extinguished, the repairman no longer has any right in the goods and the owner therefore has a right to immediate possession under a writ of replevin.

Thus, if there is a dispute over what amount is due, the debtor could petition for a writ of replevin, claiming that he had tendered the amount due. The repairman would then answer that the amount tendered was less than the amount due. Pursuant to the Arkansas statutes, the court would then hold an evidentiary hearing and if the debtor makes a *prima facie* showing that he has tendered the proper amount, he will be awarded possession pending final disposition³⁰ (assuming, of course, that other procedural prerequisites are satisfied). It is difficult to see precisely what protections that Professor Nickles envisions which are not available in Arkansas.³¹

22. *Smith v. Checker Cab Co.*, 208 Ark. 99, 100, 184 S.W.2d 901 (1945).

23. *Id.*

24. *Id.* at 101, 184 S.W.2d at 902.

25. Nickles, *supra* note 1, at 224.

26. *See Smith v. Checker Cab Co.*, 208 Ark. 99, 101, 184 S.W.2d 901, 902 (1945).

27. *See id.* (stating that judgment was "without prejudice to the right to maintain another action if and when the *bill for repairs* has been paid or tendered") (emphasis added).

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

29. ARK. STAT. ANN. § 51-404 (1971) (emphasis added).

30. *See ARK. STAT. ANN.* § 34-2121 (Cum. Supp. 1978).

31. This is not to suggest that there are no differences at all between the procedural

In a sense, the question of the extent to which a replevin remedy is available to debtors in Arkansas is almost a side issue. Far more important is Professor Nickles' general proposition that the applicability of *Flagg Brothers* in situations involving possessory liens will depend upon the exact nature of the local remedies available.³² This contention seems to directly contradict the statement of the *Flagg Brothers* Court that, "[w]hatever the particular remedies available under New York law, we do not consider a more detailed description of them necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function."³³

Professor Nickles recognizes that this language suggests that state action analysis does not depend on the extent to which available remedies might give effective protection to the debtor's interest.³⁴ He avoids the problem by finding this statement in conflict with the Court's earlier reference to the damage and replevin remedies — both of which require access to state courts — as viable alternatives to the debtor's passively acquiescing in the sale of his goods.³⁵ Having discovered such a conflict, he feels free to resolve it by arguing that the decision in *Flagg Brothers* did in fact depend upon the details of the available remedial scheme — essentially asserting that the above-quoted passage has no meaning.

Initially, the juxtaposition of the quoted statement and the references to the New York remedies, with the former immediately following the latter, seems to suggest that Justice Rehnquist anticipated that some might make just such an argument as that put forward by Professor Nickles and was seeking to eliminate any possibility that the *Flagg Brothers* opinion would be so narrowly construed. But, in any event, there is no inevitable conflict between a reference to some remedies on the one hand and an assertion of the

prerequisites for maintenance of a replevin action in New York and the requirements which must be satisfied in order to obtain a similar remedy in Arkansas. For example, in New York, it appears that no tender of payment is necessary in order for a debtor to reclaim property held pursuant to a repairmen's lien. See *Feldman v. Diak*, 229 N.Y.S.2d 147 (Sup. Ct. 1962). By contrast, *Checker Cab* clearly holds that such tender is a prerequisite to replevin in Arkansas.

However, such procedural differences do not strengthen Professor Nickles' contention. The gravamen of his argument is that replevin is essentially unavailable in Arkansas; the fact that the remedy may be marginally more difficult to obtain than it would be in New York does little to advance this position.

32. See Nickles, *supra* note 1, at 242.

33. 436 U.S. at 161 (footnote omitted).

34. Nickles, *supra* note 1, at 243.

35. *Id.*

irrelevance of the details of those remedies on the other. For while the existence of any specific remedy is not relevant to the question of state action under the *Flagg Brothers* approach, the existence of *some* opportunity for the debtor to challenge the lawfulness of the consummation of a sale—either before or after the sale actually takes place—may be critical. If there is such a remedy, the only decision which has been “delegated” to the lienholder is that of the initial question of whether to sell or hold the goods; the state, through the courts, still retains the ultimate authority to determine whether the disposition of goods was in fact lawful. By contrast, if no such remedy exists, then the state will have in effect delegated the latter function—clearly one traditionally reserved exclusively to the state—to the lienholder.

But if a debtor has a remedy, it makes little difference for these purposes whether the form of the remedy is a replevin action, an action for damages, or some other type of lawsuit. Whatever the appropriate form of action, the state will not have granted to the lienholder the power to make any binding determination of the lawfulness or unlawfulness of the retention or sale of the goods; rather, this power will be left in an arm of the government—the judiciary. The fact that the debtor may be reluctant (for whatever reason) to invoke the remedy provided by the government is irrelevant for determining which sovereign functions, if any, have been delegated to the lienholder. Conceptually it is impossible to see how any debtor (or for that matter the entire class of debtors) can transfer a sovereign prerogative from the state to the lienholders simply by refusing to invoke a remedy which the state has provided.³⁶

Thus viewed, the portions of the *Flagg Brothers* opinion which Professor Nickles finds to be in conflict can be seen as forming part of a coherent pattern of analysis. Further, there are other clear indications that the opinion is intended to be read broadly rather than seen as based on the particular remedies available in New

36. Professor Nickles relies on *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), as authority for the proposition that “most members of the Court also believe a damages action is not a real choice for a debtor.” Nickles, *supra* note 1, at 245. *Craft* dealt with a termination of a customer’s utility service by a utility company owned by a city; thus, there was no problem in finding state action without resort to the sovereign function doctrine. Compare *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), discussed in text at notes 40-44, *infra*. The discussion to which Professor Nickles refers, see *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-21 and n.26, took place in the context of the Court’s discussion of what process is due — an area in which a balancing methodology is well-established. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). There is no indication anywhere in *Craft* that a similar approach is to be applied to the question of whether state action is present.

York. For example, at one point the majority states that “[o]ur analysis requires no parsing of the difference between various commercial liens and other remedies to support the conclusion that *this entire field of activity* is outside the scope of [the sovereign function doctrine.]”³⁷ The opinion also suggests that “even if we were inclined to extend the sovereign-function doctrine . . . the field of private commercial transactions would be a particularly inappropriate area into which to expand it.”³⁸ In the face of such clear language, any attempt to limit the scope of the decision based on the remedies available to the debtor in a given state can only be based on an analytical framework fundamentally at odds with that adopted by the *Flagg Brothers* Court.

II. NON-POSSESSORY LIENS³⁹

At any number of points during the majority opinion, 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.⁴⁰ Nonetheless, the differences between the circumstances under which non-possessory liens are created are sufficiently different from those surrounding possessory liens as to require separate analysis. Professor Nickles finds the differences sufficiently significant that while engaging in extensive justifications for the finding of state action in connection with possessory liens, he feels secure with an almost casual reference to the problem in his discussion of mechanics’ and materialmen’s liens.⁴¹

One important distinction is in the precise theory under which the state action issue is decided. In *Flagg Brothers* and the other possessory lien cases, the primary contention is that the lienholder, although essentially a private entity has in effect become the state

37. *Flagg Bros. v. Brooks*, 436 U.S. 149, 162 (1978) (emphasis added).

38. *Id.* at 163.

39. Since the publication of the Nickles article, the laws governing mechanics’ and materialmen’s liens in Arkansas have been amended to provide that certain liens may not be obtained unless notice is first given to the landowner. See Act 741 of 1979. However, this amendment does not render moot the issues discussed in the section of the article dealing with non-possessory liens. First, although not entirely clear, the amendments seem to apply only to liens based on the supplying of materials; there apparently has been no change in the laws governing liens based on the value of labor performed. Further, many of the issues discussed in the Nickles article are also relevant to liens which remain unaffected by the new statute. See, e.g., ARK. STAT. ANN. § 51-301, 51-905 (1971).

40. See text at notes 36-38, *supra*.

41. See Nickles, *supra* note 1, at 192 n. 48, citing *Connolly Dev. Inc. v. Superior Ct. of Merced Cty.*, 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).

by having been given the authority to perform a traditional sovereign function - the sequestration and sale of goods to satisfy a debt. By contrast, when considering a non-possessory lien, no claim could be made that a materialman or mechanic is performing a sovereign function by entering into and completing a contract to work on any given property.

Instead, in a case involving a mechanic's lien, the focus is on the state's role in the creation of the interest at issue. In *Flagg Brothers*, in the absence of any action at all by the state, the warehouseman could retain possession of the debtor's goods and sell them; the warehouseman's lien statutes are simply a statutory embodiment of the state's choice not to act. But where non-possessory liens are involved, the lienholder will have no interest in or control of the property unless that interest is created by state law.

At this stage it would be easy to fall into the semantic trap of concluding 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 strictures of the fourteenth amendment. *Jackson v. Metropolitan Edison Co.*⁴² makes clear, however, that any such argument is untenable. There a privately-owned utility company, holding a certificate of convenience from the Pennsylvania Utility Commission and subject to extensive regulation by that Commission, had discontinued a customer's electrical service.⁴³ The customer claimed that this constituted a deprivation of property without due process of law in violation of the fourteenth amendment.⁴⁴ Apparently accepting the assumption that the utility was required to obtain state approval for termination procedures,⁴⁵ the Court nonetheless rejected the due process argument, concluding that the termination did not constitute state action. The majority opinion argued that "[the utility's] exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment."⁴⁶

Given cases such as *Metropolitan Edison*, it becomes critical to

42. 419 U.S. 345 (1974).

43. *Id.* at 346-47.

44. *Id.* at 347-48.

45. At one point, the majority states that "it is less than clear under state law that the utility was even required to file [the termination procedure provision] as part of its tariff or that the Commission would have had the power to disapprove it." 419 U.S. at 355 (footnote omitted). However, for the remainder of the opinion, the Court seemed to proceed on the assumption that filing and approval was required. *See id.* at 356-59.

46. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) (footnote omitted).

focus on the question of what part of the process of establishment and enforcement of mechanics' and materialmen's liens is being relied upon as constituting state action which deprives a person of a property right. The Nickles article is not concerned with the procedural requirements which must be satisfied by a tribunal or other state body in adjudicating the question of whether a given claimed lien actually exists under state law, or the type of notice and hearing which must be granted to a property holder prior to sequestration or sale of the property by a state official to satisfy the debt. State action is concededly present at that stage, and the question of what procedural requirements are mandated by the Constitution would be determined by the principles established by such cases as *Sniadach v. Family Finance Corp.*,⁴⁷ *Fuentes v. Shevin*,⁴⁸ *Mitchell v. W.T. Grant Co.*⁴⁹ and *North Georgia Finishing, Inc. v. Di-Chem., Inc.*⁵⁰ Instead, the Nickles article focuses on the pre-enforcement stage — the time during which the lien claimant is taking the steps which will be necessary to establish his claim if the matter should ever be placed before a court.⁵¹ If the necessary state action is to be discovered at this point, it must be found in either the legislative action defining statutorily the conditions under which mechanics and materialmen are entitled to liens generally, or in the steps which are taken in each individual case to establish the lien.

Any argument that state action may be found based upon the statutory description of when a lien attaches is foreclosed by a footnote to *Flagg Brothers*. There one of the arguments made was that state action was present because the warehouseman was statutorily authorized to terminate the debtor's property interest by selling the stored goods.⁵² Responding to this contention, Justice Rehnquist stated that

it is undoubtedly true, that. . . "respondents have a property interest in the possessions that the warehouseman proposes to sell." But that property interest is not a monolithic, abstract concept hovering in the legal stratosphere. It is a bundle of rights in personalty, the metes and bounds of which are determined by the decisional and statutory law of the State of New York. The validity of

47. 395 U.S. 337 (1969).

48. 407 U.S. 67 (1972).

49. 416 U.S. 600 (1974).

50. 419 U.S. 601 (1975).

51. See, e.g. Nickles, *supra* note 1, at 199-200 (discussing perfection requirement).

For a detailed description of the steps necessary to acquire and perfect a lien, see Nickles, *supra* note 1, at 187-90.

52. *Flagg Bros. v. Brooks*, 436 U.S. 149, 164-66 (1978).

the property interest in these possessions which respondents previously acquired from some other private person depends on New York law, and the manner in which that same property interest in these same possessions may be lost or transferred to still another private person likewise depends on New York Law. *It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state officials or state process were ever involved in enforcing that body of law.*⁵³

Mechanics' and materialmen's lien statutes are nothing more than a part of "the body of property law" of the state of Arkansas. Thus, under the *Flagg Brothers* rationale, their mere enactment and existence cannot constitute state action.

The remaining possible source for a finding of state action lies in the steps which must be taken to acquire each individual lien. Certainly there is no warrant to find such action in the simple agreement between the lien claimant and the owner (or his agent) to perform work on the property to which the lien attaches. Such an agreement is purely a matter of negotiation between two private parties, typically with no state involvement whatsoever. Further there is no requirement that this agreement grant a lien to the contractor or materialmen; nothing in state law prevents the owner from obtaining a waiver of lien rights prior to the initiation of any work on the relevant property.⁵⁴

This leaves only the filing requirement⁵⁵ as a potential conceptual basis upon which to ground a finding of state action. The argument would be that unlike the agreement between the contractor and the owner, the filing process necessarily involves a state official — under Arkansas law, the clerk of the local circuit court.⁵⁶ The force of this argument is lessened considerably by language in *Flagg*

53. *Id.* at 160 n.10 (emphasis added). See also *id.* at 164-66.

54. *People's Bldg. & Loan Ass'n v. Leslie Lumber Co.*, 183 Ark. 800, 38 S.W.2d 759 (1931).

In fairness, it should be noted that a property owner must take considerable care to insure that all liens against his property which might arise from a given construction project have been waived. Merely to obtain such a waiver from the contractor is insufficient; rather, the owner must be certain that all materialmen who supply goods used in the project have notice of this waiver. *People's Bldg. & Loan Ass'n v. Leslie Lumber Co.*, 183 Ark. 800, 38 S.W.2d 759 (1931); *Cost v. Newport Builders' Supply & Hardware Co.*, 85 Ark. 407, 108 S.W. 509 (1908).

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

56. *Id.*

Brothers which strongly suggests that performance of mere ministerial acts such as the recordation of liens by state employees does not constitute governmental action within the meaning of the fourteenth amendment.⁵⁷ This position makes considerable sense in terms of the policy considerations underlying the state action requirement. The fourteenth amendment was intended to protect certain substantive interests against the type of coercive force which the state can exert due to its monopoly on final dispute resolution procedures and the right to use force to enforce its will.⁵⁸ The mere act of filing a lien claim does not implicate this coercive force in any way; the clerk does not purport to pass on the validity of any such claim but simply maintains a file through which interested persons can see what claims private parties *believe* they have against any given piece of property. Any final determination of the existence and amount of the lien is left to the judicial proceedings which may be instituted to enforce the lien.⁵⁹

But even if some states' recording procedures provided a sufficient predicate for a finding of state action, such a finding would be plainly inappropriate given the Arkansas statutes. Filing is not necessary to create the lien; it is valid for 120 days without any attempt to file.⁶⁰ Further, even after that time, when filing is a prerequisite to enforcement of the lien, no act is required of any state official; 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.⁶¹ Moreover, while there is no case on point regarding mechanics' liens, it seems highly probably that the courts would follow the rule established for mortgages that improper recordation does not affect the priority of the lien⁶² — especially in view of the fact that the statute granting mechanics' and materialmen's liens priority over subsequent encumbrances makes no mention at all of the recordation.⁶³ Thus, all of the actions necessary to fully establish the lien claimant's rights are taken by private parties rather than governmental officials.

57. See 436 U.S. at 160-61 n.10 (by implication) (In *Sniadach, Fuentes and Di-Chem*, fourteenth amendment protections attached "not because . . . a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia." (emphasis added)).

58. See Civil Rights Cases, 109 U.S. 3, 17-18 (1883).

59. See ARK. STAT. ANN. § 51-607 to 622 (1971).

60. See Nickles, *supra* note 1 at 193 n.52, 199 n.78, and authorities cited therein.

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

62. *Oats v. Walls*, 28 Ark. 244 (1873).

63. ARK. STAT. ANN. § 51-607 (1971).

In short, although the issue is not quite as clear as in cases dealing with possessory liens, proper analysis nonetheless leads to the conclusion that there is not state action involved in the acquisition by private parties of mechanics' and materialmen's liens. Any question of what notice and hearing would be required by the due process clause in the event that state action was present is therefore entirely moot.⁶⁴

Conclusion

This comment is not intended to express an opinion on the fairness of the imposition of any of the liens imposed by the Arkansas statutes. Certainly strong arguments can be made that some of the liens impose inequitable burdens on property owners. But not every unfair law is unconstitutional; in most cases, the responsibility for correcting such unfairness is left with the legislature. And it is with the legislature that the responsibility for correcting any deficiencies with the various Arkansas lien statutes lies. The General Assembly should carefully weigh the competing arguments for and against reform, unfettered by any imagined constitutional defects in the current scheme.

64. A strong argument can be made that even prior to the amendments discussed at note 39, *supra*, the existence of the statutes themselves provided notice sufficient to satisfy the requirements of the due process clause (even assuming that the requisite state action was present). Certainly the statutes cannot be seen as so vague that the property owner is not given warning of the consequences of his actions, *see generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). In the absence of such vagueness, the state is normally allowed to presume that a person is aware of the contents of the statutes. *See, e.g.*, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Cole v. Railroad Retirement Bd.*, 289 F.2d 65, 68 (8th Cir. 1961).