The Burger Court Opinion Writing Database

Flagg Brothers, Inc. v. Brooks

436 U.S. 149 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 2, 1978

Dear Bill:

Re: 77-25;37-42 Flagg Brothers, Inc., v. Brooks

I join your April 10 draft.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 14, 1978

RE: Nos. 77-25, 37 & 42 Flagg Bros., Lefkowitz, et al. v. Brooks

Dear Bill:

Will you please indicate at the end of your opinion in the above that I took no part in the consideration or decision of this case.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 16, 1978

Re: Nos. 77-25, 77-37, & 77-42,
Flagg Brothers, Inc. v. Brooks

Dear Bill,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1978

Re: 77-25, 77-37, and 77-42
Flagg Brothers, Inc. v.
Brooks, etc.

Dear Bill,

I shall await John Stevens' writings in this case.

Sincerely,

Mr. Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1978

Re: 77-25, 77-37, & 77-42
Flagg Brothers, Inc.
v. Brooks, etc.

Dear John,

Please join me in your dissent in this case.

Sincerely,

B

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: Nos. 77-25, 77-37, 77-42, Flagg Brothers v. Brooks

I vote to affirm the judgment of the Court of Appeals. Cases like this one require us to develop some core notion of what governments do. We would all presumably agree that, if a State turned over its function of issuing drivers' licenses to a private company, the company could not refuse to issue a license to an individual because it did not like his race. This case involves another area of traditional state involvement: the nonconsensual resolution of disputes. Quite apart from the argument about what was required at common law, the normal assumption of most of us, I suspect, has been that one private individual cannot execute a lien on another individual's property by forced sale; only the sheriff can conduct such a sale, after the courts have issued a writ of execution. The intervention of the courts and the sheriff ensures both that a sale is necessary and that the sale is conducted fairly; it is precisely to provide assurances of this sort that the State exists.

It should be emphasized that the procedural safeguards in UCC § 7-210 may well be equivalent to those provided in the past through the courts and sheriffs' sales, or at least may be adequate for due process purposes; this issue is not before us. But it is worth noting the anomaly that will be created if we hold that no procedural protections of any kind are required for a warehouseman's sale (because such a sale does not involve "state action"). Such a holding would mean that a person would have more procedural protection when the State, a neutral party intervening between opposing sides, conducts a forced sale than when an interested party decides for himself that a sale is warranted and further decides how the sale will be conducted. This result is the opposite of what common sense would dictate: that the more power that is given to an interested party, the more procedural safeguards should be imposed for the benefit of the other party whose property is being sold.

T.M.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 13, 1978

Re: Nos. 77-25, 77-37, and 77-42 - Flagg Brothers, Inc. v. Brooks, Etc.

Dear Bill:

I have concluded that I must write a short dissent.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–25, 77–37, AND 77–42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77–25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77–37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77–42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

MR. JUSTICE MARSHALL, dissenting.

Although I join my Brother STEVENS' dissenting opinion, I write separately to emphasize certain aspects of the majority opinion that I find particularly disturbing.

I cannot remain silent as the Court demonstrates, not for the first time, an attitude of callous indifference to the realities of life for the poor. See, *e. g., Beal* v. *Doe,* 432 U. S. 438, 455–457 (1977) (dissenting opinion); *United States* v. *Kras,* 409 U. S. 434, 458–460 (1973) (dissenting opinion). It blandly asserts that "respondent Jones . . . could have sought to replevy her goods at any time under state law." *Ante,* at 10.

p.4

5 MAY 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–25, 77–37, AND 77–42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77–25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77–37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77–42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

MR. JUSTICE MARSHALL, dissenting.

Although I join my Brother STEVENS' dissenting opinion, I write separately to emphasize certain aspects of the majority opinion that I find particularly disturbing.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 17, 1978

Re: No. 77-25 - Flagg Brothers, Inc. v. Brooks
No. 77-37 - Lefkowitz v. Brooks
No. 77-42 - American Warehousemen's Association v. Brooks

Dear Bill:

Please join me in your circulation of April 10.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

March 14, 1978

77-25 Flagg Bros., Inc. v. Brooks
(and related cases)

Dear Bill:

May I share with you some thoughts about your opinion (second draft) for the Court.

1. Part III is devoted to respondent's primary contention that New York has delegated a power "traditionally exclusively reserved to the state". You state (p. 8) that "our previous cases establish only two such areas" (i.e., areas exclusively reserved to the state). You identify these as elections and situations analogous to Marsh v. Alabama.

I cannot say (at least without far more thought and research) that these are the only two areas of exclusivity. Indeed, in your second draft you added a paragraph at the end of Part III (pp. 11, 12) identifying functions that certainly have become exclusive. I would think your Part III, with relatively modest revision, could be changed to cite the "two areas" you now rely upon, as merely examples. There now seems to be some tension between the first and last paragraphs in Part III.

I also inquire whether you think your discussion of Evans v. Newton (p. 10 n. 8) can be viewed as inconsistent with your reference to Evans in Jackson v. Metropolitan Edison. It was there listed as one of the cases finding "state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State." 419 U.S., at 352.

2. I would confront directly the principal argument that both respondents and John Stevens advance. That argument, as I understand it, is not simply that conflict resolution is a traditional, exclusive function of the sovereign. Rather, it is that the power of nonconsensual transfer of one's goods to another is a traditional province of the sovereign. Although you appear to discount reliance on "historical precedents" (p. 11), in my opinion the lessons of history provide the most reliable restraints against the type of delegation of sovereign power envisioned in John's parade of horribles on p. 3 of his dissent. The important point is that whatever the history of the particular lien involved in this case, self-help has been an integral part of the common-law of creditor remedies. The lien in this case, particularly because it is burdened by procedural constraints and provides for a compensatory remedy and judicial relief against abuse, is not such a departure from the common law that the conduct of the private actors must be ascribed to the state. Compare Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944); Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956).

I also would not yield on the particular history of the warehousemen's lien. The prototype of the New York statute was enacted about 100 years ago. The present provision of the Uniform Commercial Code is the law in 49 states and the District of Columbia, having been adopted by the legislative bodies in these jurisdictions after perhaps the most careful consideration of any of the uniform state laws. Whatever the common law may have been until the industrial revolution and the great surge of commercialism of the past century, it has long been recognized that some functions that properly could be exercised by the state alone should be left to private action within boundaries defined by the state and subject to judicial relief if abused.

I consider that the most persuasive historical antecedents here are those of the past century mentioned above. Thus, I would rely specifically and strongly upon this history. It simply is not true, in New York or elsewhere, that in the last century sheriffs and the courts have been performing any part of the function at issue here. The uniformity of state law demonstrates this.

If my understanding of the situation is correct, perhaps you would be willing to make revisions along the foregoing lines. I would then happy to join you. Otherwise, I will join the judgment and probably write a brief concurring opinion.

As Potter has joined you, I am sending him a copy of this letter.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: Mr. Justice Stewart

April 6, 1978

PERSONAL

No. 77-25 Flagg Bros. v. Brooks

Dear Bill:

The polite impatience reflected in your letter of April 5 is fully justified. I am glad not to be hearing what you are saying about me in your Chambers! My letter of March 14, and your third draft, passed "like ships in the night". Thus, although we were closer together, relatively little that I suggested had been included. Nevertheless, I owed you a prompt response that has not been forthcoming. My apologies.

I suppose my reluctance to join you "as is" stems, at least in part, from my own unsureness in this area. It seems to me that you have written quite sweepingly, and - where I cannot see possible ramifications - this makes me a bit nervous. In any event, I enclose a copy of your third draft on which I have suggested a few changes. I suppose, in sum, they amount to very little. For the most part, they relate back to the thoughts I voiced in my letter of March 14.

The one substantive point that concerns me the most is whether some of your language (pp. 11-13) will be read as suggesting that all dispute resolutions between creditors and debtors are free from constitutional restraints. I am confident you do not mean this, as I read your discussion as focused on the "sovereign function doctrine" argument as presented in this case. I have suggested a footnote for page 13 that would relieve my apprehension - unjustified as it may be.

As I stated in my letter of March 14, I attach a good deal more weight to history than does your opinion. I

still think this would be desirable, but do not make further elaboration of it a precondition to my joining. The substance of my proposed note on page 13, however, should be stated somewhere.

Let me know what you think about the suggestions I have indicated on your third draft.

Sincerely,

Mr. Jusitce Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 10, 1978

No. 77-25 Flagg Brothers, Inc. v. Brooks

Dear Bill:

Please join me in the 4th draft of your opinion circulated today.

Sincerely,

L.F.P.

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: FEB 13 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–25, 77–37, AND 77–42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77–25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77–37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77–42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented by this case is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code § 7–210,[1]

[1] The challenged statute reads in full:

"§ 7—210. Enforcement of Warehouseman's Lien

"(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such

—J

Pp 2,5,6,10-12
& Footnotes renumbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: FEB 16 1978

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–25, 77–37, AND 77–42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77–25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77–37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77–42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1978

Re: No. 77-25 - Flagg Bros., Inc. v. Brooks

Dear Lewis:

Thank you for your letter of March 14th, commenting on my second draft of the proposed Court opinion in this case.

My intention in the first part of Part III was to simply state that the Court had held that two powers associated with sovereignty had been "exclusively reserved to the state". The last portion of Part III simply leaves open the question of whether there may be additional such functions, since I felt (just as you say in your letter) that I could not say without far more thought that these were the only two. But I feel I can say that these were the only two that have actually been decided by the Court.

I personally think Evans v. Newton was wrongly decided, and that Evans v. Abney, 396 U.S. 435, decided four Terms later over the dissent of Bill Brennan, joined by Bill Douglas who had written Evans v. Newton, limited the earlier case to its facts. I feel I am justified, therefore, in doing likewise, and that the sentence following the mention of Newton in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353, phrasing the question in terms of "a power delegated . . . by the

state which has traditionally associated with sovereignty, such as eminent domain . . ." likewise justifies the treatment of Newton.

I do fully agree with your historical comment and have incorporated large parts of your page 2 in my revised draft in response to John's dissent which will circulate either Wednesday or Thursday. I do not think I can make it the main theme of the opinion, because that would result in a rule being constitutionally sufficient in one state but being invalid in a neighboring state.

I would appreciate your letting me know after you have had a chance to see my revised draft responding to John's dissent whether you think I have adequately covered the points you made, whether there are any other changes which I could make in it and still adhere to my main theme, or whether you feel obliged notwithstanding my attempt to incorporate some of your suggestions to nonetheless concur only in the judgment.

Sincerely,

Ben

Mr. Justice Powell

Copy to Mr. Justice Stewart

1

PP 10-14

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: MAR 15 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–25, 77–37, AND 77–42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77–25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77–37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77–42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented by this case is whether a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York Uniform Commercial Code § 7–210,[1]

[1] The challenged statute reads in full:

"§ 7—210. Enforcement of Warehouseman's Lien

"(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such

J

Pp 8,9,10,13+17

Renumbered Footnotes

P 1D

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: APR 10 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-25, 77-37, AND 77-42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77-25 v.
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77-37 v.
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77-42 v.
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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WHR;
I have concluded that I must write a short dissent. HAB

To: The Chief Justice
Mr. Justice Brenna
Mr. Justice Stewar
Mr. Justice White
Mr. Justice Marsha
Mr. Justice Blackm
Mr. Justice Powell
Mr. Justice Steven

From: Mr Justice Rehn

Circulated: _____

Recirculated: MAY

May 5, 1978

Pp 6, 10

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–25, 77–37, AND 77–42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77–25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77–37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77–42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1978]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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Brennan 077

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 22, 1978

MEMORANDUM TO THE CONFERENCE

Re: Case heretofore held for Nos. 77-25, 77-37, 77-42, Flagg Brothers, Inc. v. Brooks

No. 77-5063 - Scott v. Federal National Mortgage Associat
Appellants' predecessors in title had executed a mortgage agre
ment including a power of sale provision empowering the truste
in the event of default to dispose of the property by public sale after notice by publication. In 1963 the mortgage was assigned to FNMA. In 1968 appellants purchased the property; their deed recited that the conveyance was subject to the mort
and appellants specifically agreed to pay the note. After appellants failed to pay the monthly installments for fourteen months, the trustee foreclosed the mortgage under the power of sale provision, as permitted by Missouri statutes, and title passed to FNMA. When appellants refused to vacate the premis
FNMA brought this unlawful detainer action, and appellants co
claimed for a declaratory judgment that the trustee's deed was invalid on the grounds that the Missouri statutes violated the Fourteenth Amendment and that the participation of FNMA, alle
a federal instrumentality, violated the Fifth Amendment. The state courts granted judgment for FNMA, concluding that FNMA was not a federal instrumentality, and that the case involved nothing more than the enforcement of a private contractual agreement.

In light of Flagg Bros., there is no merit in appellants' contention that this foreclosure was the act of the State of

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 13, 1978

Re: 77-25; 77-37; 77-42 - Flagg Brothers v. Brooks

Dear Bill:

Although it may not hang together when I put it on paper, I still plan to try my hand at a dissent.

Respectfully,

Mr. Justice Rehnquist

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

MAR 13 '78

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–25, 77–37, AND 77–42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77–25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77–37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77–42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1978]

MR. JUSTICE STEVENS, dissenting.

Respondents contend that petitioner's proposed sale of their property to third parties will violate the Due Process Clause of the Fourteenth Amendment. Assuming, *arguendo*, that the procedure to be followed would be inadequate if the sale were conducted by state officials, the Court holds that respondents have no federal protection because the case involves nothing more than a *private* deprivation of their property without due process of law. In my judgment the Court's holding is fundamentally inconsistent with, if not foreclosed by, our prior decisions which have imposed procedural restrictions on the

pp. 1-3, 7
minor stylistic changes

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAY 10 '78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-25, 77-37, AND 77-42

Flagg Brothers, Inc., Etc., et al., Petitioners,
77-25 *v.*
Shirley Herriott Brooks et al.

Louis J. Lefkowitz, Attorney General of New York, Petitioner,
77-37 *v.*
Shirley Herriott Brooks et al.

American Warehousemen's Association, and The International Association of Refrigerated Warehouses, Inc., Petitioners,
77-42 *v.*
Shirley Herriott Brooks et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

MR. JUSTICE STEVENS, with whom MR. JUSTICE WHITE and MR. JUSTICE MARSHALL join, dissenting.

Respondents contend that petitioner's proposed sale of their property to third parties will violate the Due Process Clause of the Fourteenth Amendment. Assuming, *arguendo*, that the procedure to be followed would be inadequate if the sale were conducted by state officials, the Court holds that respondents have no federal protection because the case involves nothing more than a *private* deprivation of their property without due process of law. In my judgment the Court's holding is fundamentally inconsistent with, if not foreclosed by, our prior decisions which have imposed procedural restrictions on the