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# ARE FANNIE MAE AND FREDDIE MAC STATE ACTORS? STATE ACTION, DUE PROCESS, AND NONJUDICIAL FORECLOSURE<sup>†</sup>

## ABSTRACT

*This Comment considers whether the federal conservatorship of Fannie Mae and Freddie Mac transformed these entities into state actors subject to constitutional constraints. In particular, it analyzes whether Fannie Mae and Freddie Mac must provide homeowners with due process—namely notice and an opportunity to be heard—when they initiate nonjudicial foreclosures.*

*This Comment surveys and applies five state action tests set forth by the Supreme Court to determine whether nonjudicial foreclosures initiated by Fannie Mae and Freddie Mac must satisfy due process requirements. Application of the state action tests from *Lebron* and *Brentwood Academy* most persuasively suggest that nonjudicial foreclosures initiated by Fannie Mae and Freddie Mac must satisfy due process requirements. Although a number of federal district courts and one circuit court of appeals hold that the test embodied by *Lebron* requires permanent government control to render the entity a state actor, this Comment argues that indefinite control—exhibited by the federal conservatorship—suffices. Alternatively, this Comment argues that pervasive federal entwinement with Fannie Mae and Freddie Mac renders their conduct state action under the test set forth in *Brentwood Academy*, notwithstanding satisfaction of the *Lebron* test.*

*To the author's knowledge, no case or academic work has explicitly applied the entwinement test to post-conservatorship Fannie Mae and Freddie Mac. This Comment concludes that Fannie Mae and Freddie Mac are state actors under the entwinement test. However, because courts are reluctant to find state action where the government regulates the secondary mortgage market, it remains unlikely that Fannie Mae and Freddie Mac will be required to provide notice and an opportunity to be heard to homeowners facing nonjudicial foreclosure.*

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<sup>†</sup> This Comment won the 2015 ABA Forum on Affordable Housing & Community Development Law Student Writing Competition.

## INTRODUCTION

In response to the mortgage crisis of 2008, Congress passed the Housing and Economic Recovery Act (HERA).<sup>1</sup> HERA created the Federal Housing Finance Agency (FHFA), an independent government agency tasked with the regulation of Fannie Mae and Freddie Mac.<sup>2</sup> HERA authorized the Director of the FHFA to appoint the FHFA as conservator of Fannie and Freddie<sup>3</sup> and, on September 7, 2008, the Secretary of the U.S. Treasury announced that both Fannie and Freddie had been taken into federal conservatorship.<sup>4</sup> As conservator, the FHFA “assumed the power of the board of directors and management of both corporations.”<sup>5</sup>

The conservatorship of Fannie and Freddie marked a dramatic corporate restructuring that raises potentially great constitutional questions. One such question is whether the “deprivatization” of Fannie and Freddie transformed these entities into state actors, such that they are subject to constitutional constraints.<sup>6</sup> This question is particularly relevant in the context of nonjudicial foreclosure because state actors, unlike private lenders, are required to afford due process to homeowners.<sup>7</sup> Such nonjudicial foreclosure is the predominant method of foreclosure in a majority of states.<sup>8</sup> Considering both that Fannie

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<sup>1</sup> Housing and Economic Recovery Act of 2008 (HERA), 12 U.S.C. § 4501 (2012).

<sup>2</sup> 12 U.S.C. § 4511(a), (b)(2) (2008). The corporate names of Fannie Mae and Freddie Mac are the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHMLC). *See infra* Part III. For present purposes, “Fannie” and “Freddie” refer to FNMA and FHMLC respectively.

<sup>3</sup> 12 U.S.C. § 4513(a)(3)(A) (2012).

<sup>4</sup> Press Release, Henry M. Paulson, Jr., Treasury Sec’y, U.S. Dep’t of the Treasury, Statement on Treasury & Fed. Housing Fin. Agency Action to Protect Fin. Markets and Taxpayers (Sept. 7, 2008), <http://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx>.

<sup>5</sup> GRANT S. NELSON, DALE A. WHITMAN, ANN M. BURKHART & R. WILSON FREYERMUTH, *REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT* 691 (8th ed. 2009).

<sup>6</sup> A number of scholars have addressed this question. *See, e.g.*, NELSON ET AL., *supra* note 5, at 690–92; Florence Wagman Roisman, *Protecting Homeowners from Non-Judicial Foreclosure of Mortgages Held by Fannie Mae and Freddie Mac*, 43 *REAL ESTATE L.J.* 125, 127–29 (2014); Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 *PEPP. L. REV.* 583, 615–16 (2010); FRANK S. ALEXANDER ET AL., *GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW* § 13.2(b) (database updated Oct. 2014).

<sup>7</sup> U.S. CONST. amends. V, XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53–54 (1993) (“[A homeowner’s] right to maintain control over his home . . . is a private interest of historic and continuing importance.”); ALEXANDER ET AL., *supra* note 6, § 13.2(a) (“The due process requirements of the United States Constitution are applicable only if there is a deprivation of property as a result of state or federal action.”).

<sup>8</sup> GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* § 7.11, at 600–01 (5th ed. 2007); NELSON ET AL., *supra* note 5, at 641 (nonjudicial foreclosure permitted in about 60% of jurisdictions);

and Freddie own or guarantee over half the mortgages in the United States<sup>9</sup> and that millions of homeowners have lost—and will continue to lose—their homes through foreclosure,<sup>10</sup> answering this state action<sup>11</sup> question is more than mental gymnastics. The answer, in turn, will determine the due process rights of millions of homeowners.

Most scholars considering whether Fannie and Freddie are state actors have applied the test announced by the Supreme Court in *Lebron v. National Railroad Passenger Corp.*<sup>12</sup> to determine whether, post-conservatorship, Fannie and Freddie are “part of the government.”<sup>13</sup> Under the *Lebron* test, an entity is a state actor if two prongs are satisfied: government purpose and government control.<sup>14</sup> Courts that have considered this issue in recent years have almost unanimously found that Fannie and Freddie do not satisfy the *Lebron* test.<sup>15</sup> Although there is consensus that Fannie and Freddie satisfy the first prong of the *Lebron* test because they were created for the furtherance of government objectives,<sup>16</sup> to date, courts have held that the entities fail the second, government-control prong because the FHFA conservatorship is not permanent.<sup>17</sup>

Alternatively, Professor Florence Roisman contends that the proper test is a bright-line rule: “[I]f ‘a direct federal instrumentality’ is the foreclosing

Frank Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. OF BANKING & FIN. L. 341, 350 (2012).

<sup>9</sup> FED. HOUS. FIN. AGENCY, REPORT TO CONGRESS: 2012, at 6 (2013), [http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2012\\_AnnualReportToCongress\\_508.pdf](http://www.fhfa.gov/AboutUs/Reports/ReportDocuments/2012_AnnualReportToCongress_508.pdf).

<sup>10</sup> Roisman, *supra* note 6, at 126.

<sup>11</sup> For present purposes, “state action” also refers to federal action. *See infra* note 63.

<sup>12</sup> 513 U.S. 374 (1995).

<sup>13</sup> *See* NELSON ET AL., *supra* note 5, at 692; Nelson, *supra* note 6, at 616; ALEXANDER ET AL., *supra* note 6, § 13.2(b) (“[B]oth elements of the *Lebron* test for a federal instrumentality appear to be met for Fannie Mae and Freddie Mac.”).

<sup>14</sup> *See infra* note 76.

<sup>15</sup> *Mik v. Fed. Home Loan Mortg. Corp.*, 743 F.3d 149, 168 (6th Cir. 2014); *Narra v. Fannie Mae*, No. 2:13-cv-12282, 2014 WL 505571, at \*4 (E.D. Mich. Feb. 7, 2014); *Kapla v. Fed. Nat’l Mortg. Ass’n (In re Kapla)*, No. 11-68878, 2014 WL 346019, at \*4 (E.D. Mich. Jan. 30, 2014); *Hermiz v. Fed. Home Loan Mortg. Corp. (In re Hermiz)*, No. 13-11199, 2013 WL 3353928, at \*3 (E.D. Mich. July 3, 2013); *May v. Wells Fargo Bank, N.A.*, No. 4:11-3516, 2013 WL 3207511, at \*4–5 (S.D. Tex. June 24, 2013); *Bernard v. Fed. Nat. Mortg. Ass’n*, No. 12-14680, 2013 WL 1282016, at \*3 (E.D. Mich. Mar. 27, 2013); *Fannie Mae v. Mandry*, No. 12-13236, 2013 WL 687056, at \*4 (E.D. Mich. Feb. 26, 2013); *Lopez v. Bank of Am., N.A.*, 920 F. Supp. 2d 798, 801 (W.D. Mich. 2013); *Syriani v. Freddie Mac Multiclass Certificates*, Series 3365, No. CV 12-3035-JFW, 2012 WL 6200251, at \*4 (C.D. Cal. July 10, 2012); *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 96 (D.D.C. 2012).

<sup>16</sup> *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397–400 (1995).

<sup>17</sup> *See infra* note 86.

mortgagee, then the requisite federal action exists, and a court will apply [F]ifth [A]mendment due process standards to test the constitutionality of the foreclosure.”<sup>18</sup> But courts are not likely to find Fannie and Freddie to be state actors by application of the bright-line rule either. Application of the bright-line rule<sup>19</sup> to the FHFA presupposes that the FHFA is the foreclosing mortgagee when Fannie and Freddie foreclose on homes. Although the FHFA “conduct[s] all business of the regulated entit[ies],”<sup>20</sup> the FHFA does not directly foreclose upon mortgages. The relationship between the FHFA and the foreclosure action is more attenuated: the FHFA operates Fannie and Freddie under conservatorship; Fannie and Freddie initiate foreclosures; and servicers, who “usually are the originating lenders,” effect foreclosures as agents of Fannie and Freddie.<sup>21</sup> Because the FHFA is not the directly foreclosing entity, determining that the FHFA is a state actor would not necessarily render as state action the conduct of private servicers foreclosing on behalf of Fannie and Freddie. In other words, a court might consider the FHFA a state actor but not impute the actions of Fannie’s and Freddie’s agents to the FHFA. Without addressing whether action by Fannie and Freddie is action by the FHFA, this Comment argues that the entities themselves are state actors.

This Comment proposes a novel approach to determine whether Fannie and Freddie are state actors. It applies the entanglement state action exception<sup>22</sup> to Fannie and Freddie, arguing that even if both are private entities, their operation under federal conservatorship constitutes sufficient government involvement to render Fannie’s and Freddie’s conduct “fairly attributable to the state.”<sup>23</sup> This entanglement analysis eschews both the *Lebron* test and the bright-line rule because it does not consider whether the entities are “part of the government,” but instead considers the extent of government involvement with Fannie’s and Freddie’s conduct.<sup>24</sup>

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<sup>18</sup> Roisman, *supra* note 6, at 174–75 (citing NELSON & WHITMAN, *supra* note 8, at 689). Because Fannie and Freddie are operated under FHFA conservatorship, and because the FHFA is a direct government instrumentality, Professor Roisman concludes that foreclosures by Fannie and Freddie satisfy the bright-line rule. Moreover, Professor Roisman argues that foreclosures by Fannie and Freddie would constitute state action even if the *Lebron* test were proper. *Id.* at 179.

<sup>19</sup> *Id.*

<sup>20</sup> 12 U.S.C. § 4617(b)(2)(B)(i), (iii) (2012).

<sup>21</sup> NELSON & WHITMAN, *supra* note 8, § 11.3; Roisman, *supra* note 6, at 126–27.

<sup>22</sup> For present purposes, “entanglement” includes the “entwinement” test embodied by *Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 531 U.S. 288, 297 (2001).

<sup>23</sup> *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982).

<sup>24</sup> See *infra* note 91.

This Comment proceeds in four Parts. Part I discusses the nature of nonjudicial foreclosure and its due process implications. Part II provides background to the state action doctrine and surveys *Lebron* and the entanglement line of cases for tests to determine whether Fannie and Freddie are state actors. Part III discusses Fannie and Freddie before and after conservatorship and analyzes the nature and degree of governmental involvement under the FHFA conservatorship. Part IV applies the state action analyses to Fannie and Freddie and concludes that both entities are state actors under the *Lebron* and entanglement tests.

## I. CONSTITUTIONAL IMPLICATIONS OF NONJUDICIAL FORECLOSURE

This Part describes foreclosure, the process by which a mortgagee initiates the sale of real property standing as security for an underlying debt.<sup>25</sup> Next, it contrasts the two most common types of foreclosure in the United States. Finally, it considers state action and the requirements of due process in the context of judicial and nonjudicial foreclosure.

### A. Foreclosure Generally

A mortgage is the “transfer by a debtor-mortgagor to a creditor-mortgagee of a real estate interest, to be held as security for the performance of an obligation.”<sup>26</sup> This obligation is typically the payment of a debt evinced by a promissory note.<sup>27</sup> In the event of default by the mortgagor, a mortgagee may protect its financial interest by electing to accelerate, declaring the whole amount of the mortgage debt due and payable.<sup>28</sup> When a mortgagor fails to tender payment to redeem the mortgage, a foreclosure sale ensues, and the proceeds of the sale are applied to the outstanding mortgage debt held by the mortgagee.<sup>29</sup>

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<sup>25</sup> ALEXANDER ET AL., *supra* note 6, § 1.1.

<sup>26</sup> NELSON ET AL., *supra* note 5, at 100. What is colloquially called a mortgage consists of two documents: the promissory note, which evinces the mortgagor’s obligation, and the security instrument. The security instrument goes by different names in different jurisdictions. For present purposes, “mortgage” refers also to “deed of trust,” the security instrument used most commonly in power of sale jurisdictions. NELSON & WHITMAN, *supra* note 8, § 7.19, at 633.

<sup>27</sup> NELSON ET AL., *supra* note 5, at 100.

<sup>28</sup> NELSON & WHITMAN, *supra* note 8, § 7.6, at 580.

<sup>29</sup> *Id.* § 7.11, at 600.

### B. *Judicial and Nonjudicial Foreclosure*

The two most common types of foreclosure in the United States are judicial and nonjudicial, or “power of sale,” foreclosure.<sup>30</sup> Judicial foreclosure is available in every jurisdiction.<sup>31</sup> As the name suggests, this mechanism requires a judge to enter an order authorizing the sale of the underlying security property. Compared to nonjudicial foreclosure, judicial foreclosure is complicated and time-consuming. It requires filing a foreclosure bill of complaint; service of process; a hearing; judgment; notice of sale to the mortgagor; sale and issuance of a certificate of sale; judicial determination of claimants’ right to surplus; possible redemptions from foreclosure; and possible entry of a decree for a deficiency.<sup>32</sup>

In contrast, nonjudicial foreclosure—permitted in approximately 60% of jurisdictions in the United States—does not typically involve judicial intervention.<sup>33</sup> After some degree of notice prescribed by state statute, property is sold at a public sale conducted by the mortgagee, a public official, or some other third party.<sup>34</sup> Because nonjudicial foreclosure is cheaper and faster than judicial foreclosure, it has become the predominant method of foreclosure in jurisdictions that permit it.<sup>35</sup> But increased expediency is not without cost: because nonjudicial foreclosure eschews the procedural requirements of judicial foreclosure, it raises federal constitutional due process concerns.<sup>36</sup>

### C. *Due Process and Foreclosure*

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit the deprivation of life, liberty, or property without due process of law.<sup>37</sup> Due process typically requires notice and an opportunity to be heard.<sup>38</sup> Such notice

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<sup>30</sup> *Id.* §§ 7.11, 7.19.

<sup>31</sup> Judicial foreclosure is the exclusive method of foreclosure in at least 40% of the states. *Id.* § 7.11, at 601.

<sup>32</sup> RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.2 cmt. a (AM. LAW INST. 1997); NELSON & WHITMAN, *supra* note 8, § 7.11, at 601.

<sup>33</sup> Jack Jones & J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 TENN. L. REV. 279, 293–94 (1984); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.2 cmt. a (AM. LAW INST. 1997).

<sup>34</sup> NELSON & WHITMAN, *supra* note 8, §§ 7.11, 7.19.

<sup>35</sup> *Id.* Such foreclosure sales are authorized because, in a deed under power of sale, the mortgagor appoints the mortgagee as its attorney-in-fact for purposes of conducting foreclosure. ALEXANDER ET AL., *supra* note 6, § 8:9.

<sup>36</sup> See *Scott v. Paisley*, 271 U.S. 632, 634 (1926).

<sup>37</sup> U.S. CONST. amends. V, XIV.

<sup>38</sup> See *Londoner v. City of Denver*, 210 U.S. 373, 386 (1908).

must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.”<sup>39</sup> The timing and particularities of the hearing requirement depend on the severity of the deprivation at stake.<sup>40</sup> A homeowner’s equitable or legal title to real property, the subject of a foreclosure action, has long been recognized as a constitutionally protected property interest.<sup>41</sup> Given the severity of foreclosure—loss of the mortgagor’s home—due process in the foreclosure context requires the opportunity for a pre-deprivation hearing.<sup>42</sup>

Judicial foreclosure, properly conducted, satisfies due process requirements because it requires service of process and a hearing.<sup>43</sup> In contrast, the notice requirements of nonjudicial foreclosure are almost universally less demanding than those of judicial foreclosure,<sup>44</sup> and all but two power of sale jurisdictions permit foreclosure sale without an opportunity for a hearing.<sup>45</sup> As such, nonjudicial foreclosure raises due process concerns not implicated by judicial foreclosure.<sup>46</sup> The constitutional requirements of due process, however, only apply to a mortgagee upon a finding of state action.<sup>47</sup>

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<sup>39</sup> *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Although *Mullane* considered sufficiency of notice to beneficiaries of a common trust fund, its holding extends to the mortgage context. *See, e.g., Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 (1984) (“[U]nless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.”).

<sup>40</sup> *Goldberg v. Kelly*, 397 U.S. 254, 266–67 (1970) (concluding that a hearing was required before the deprivation of a property interest).

<sup>41</sup> *Roisman*, *supra* note 6, at 142, 142 n.88 (citing *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53–54 (1993) (stating that a homeowner’s “right to maintain control over his home . . . is a private interest of historic and continuing importance”).

<sup>42</sup> *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972) (requiring judicial hearing prior to prejudgment garnishment of chattel security). “If *Fuentes* requires some type of hearing before chattel security may be seized even temporarily, surely it may be argued that the due process clause does not permit the *permanent* taking of real estate security by passage of title with no opportunity for a hearing *at all*.” NELSON & WHITMAN, *supra* note 8, § 7.25, at 676.

<sup>43</sup> *See* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.2 cmt. a (AM. LAW INST. 1997) (“A typical proceeding entails . . . service of the complaint on the owner . . . [and] a judicial hearing.”).

<sup>44</sup> *See, e.g., Ga. Code Ann.* §§ 9-13-141, 44-14-162, -162.2 (West 2015); *Miss. Code Ann.* § 89-1-55 (2014) (requiring notice of publication in the form of newspaper advertisement).

<sup>45</sup> NELSON & WHITMAN, *supra* note 8, at 634, 634 n.7.

<sup>46</sup> *Scott v. Paisley*, 271 U.S. 632, 635–36 (1926).

<sup>47</sup> *See, e.g., Pappas v. E. Sav. Bank*, 911 A.2d 1230, 1237 (D.C. 2006) (holding that nonjudicial foreclosure absent governmental action is not restricted by due process).

#### D. *The State Action Requirement*

On its face, the Constitution only protects individual rights and liberties from action taken by the government.<sup>48</sup> Thus, even if a state power of sale statute does not satisfy due process requirements, state action must be found before constitutional protections apply.<sup>49</sup> Although state law authorizes and prescribes requirements for nonjudicial foreclosure,<sup>50</sup> the legislative authorization of nonjudicial foreclosure, without more, is not sufficient to trigger due process requirements.<sup>51</sup> Where the foreclosing party is a governmental actor, state action is implicated and due process requirements must be met.<sup>52</sup> Where governmental agencies or entities are indirectly involved—where they guarantee or subsidize a mortgage containing authorization for power of sale foreclosure—cases are less clear.<sup>53</sup> Because Fannie and Freddie are publicly owned but federally chartered,<sup>54</sup> the state action analysis is especially nuanced. The following Part considers six state action analyses that will be applied to Fannie and Freddie in Part IV.

### II. STATE ACTION ANALYSES FOR GOVERNMENT ENTITIES AND PRIVATE ACTORS

The threshold question in assessing a constitutional claim is whether the action at issue constitutes “state action.”<sup>55</sup> Courts have long distinguished between “deprivation by the State, subject to [constitutional] scrutiny under its provisions, and private conduct . . . against which the Fourteenth [and Fifth]

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<sup>48</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 519 (4th ed. 2011).

<sup>49</sup> NELSON & WHITMAN, *supra* note 8, at 682.

<sup>50</sup> RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.2 cmt. a (AM. LAW INST. 1997) (“[P]ower of sale . . . is generally available only where authorized by statute and the mortgage instrument.”). *See, e.g.*, ALA. CODE § 35-10-12 (West 2015) (prescribing requirements for power of sale foreclosure); GA. CODE ANN. § 44-14-180 (West 2015) (prescribing requirements for power of sale foreclosure).

<sup>51</sup> *See* Scott v. Paisley, 271 U.S. 632, 636 (1926); Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 367 (1993).

<sup>52</sup> *See, e.g.*, Johnson v. Dep’t of Agric., 734 F.2d 774 (11th Cir. 1984) (applying due process requirements to foreclosure proceedings initiated by the Farmers Home Administration (FmHA)); Lehner v. United States, 685 F.2d 1187, 1190–91 (9th Cir. 1982) (applying due process requirements to foreclosure initiated by HUD).

<sup>53</sup> ALEXANDER ET AL., *supra* note 6, § 13.2(b).

<sup>54</sup> *See infra* Part III.

<sup>55</sup> Jackson v. Metro. Edison Co., 419 U.S. 345, 348 n.2 (1974) (“Because of our conclusion on the threshold question of state action, we do not reach questions relating to the existence of a property interest or of what procedural guarantees the Fourteenth Amendment would require if a property interest were found to exist.”).

Amendment[s] offer[] no shield.”<sup>56</sup> However, exceptions to the state action requirement exist, such that certain kinds of private conduct are attributable to the government and must comply with constitutional safeguards.<sup>57</sup>

In determining whether state action is implicated in a particular case, it is useful to distinguish the actor charged with the deprivation from the nature of the activity causing the deprivation.<sup>58</sup> Identifying the actor as a governmental actor will almost always implicate state action, regardless of the nature of the activity.<sup>59</sup> Likewise, identifying the activity as “traditionally the exclusive prerogative of the State” will almost always implicate state action, even if a private actor performs the activity.<sup>60</sup> Alternatively, there exist cases of private-public “entanglement” where a governmental actor “affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution.”<sup>61</sup> In these cases, the analysis must consider whether the actions of a private actor are “fairly attributable to the state.”<sup>62</sup>

First, this Part will dispose of two preliminary state action concerns: the false dichotomy between state action and federal action, and the transsubstantivity of the state action doctrine. Second, it will consider the state action test set forth in *Lebron*. Third, it will survey five categories of entanglement state action analyses.

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<sup>56</sup> *Id.* at 349 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)). The *Civil Rights Cases*, 109 U.S. 3 (1883), are “credited with mandating the requirement for state action.” CHEMERINSKY, *supra* note 48, at 520.

<sup>57</sup> There are two major exceptions by which courts classify otherwise private conduct as state action. First, the public function exception finds state action “in the exercise by a private entity of powers traditionally exclusively reserved to the State.” *Jackson*, 419 U.S. at 352. Second, the entanglement exception requires private conduct to comply with constitutional safeguards if it is “fairly attributable to the state.” *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

<sup>58</sup> Katie Lamb Balthrop, *Locating the Sphere of State Action in the Context of Mortgage Foreclosure by Federally-Related Entities 5* (April 13, 2009) (unpublished manuscript) (on file with author).

<sup>59</sup> *See, e.g.*, *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (imposing First Amendment restrictions on Amtrak after determining it was a governmental actor); *Horvath v. Westport Library Ass’n*, 362 F.3d 147, 152–53 (2d Cir. 2004) (imposing due process restrictions on library after determining it was a governmental actor).

<sup>60</sup> *See, e.g.*, *Jackson*, 419 U.S. at 353, 358–59 (state action not implicated because the operation of a public utility is not a public function); *Terry v. Adams*, 345 U.S. 461, 476–77 (1953) (state action implicated because the operation of primary elections is a public function); *Marsh v. Alabama*, 326 U.S. 501, 507–08 (1946) (state action implicated where a private corporation owned and regulated an area containing both commercial and residential districts because the regulation of a town is a public function). This Comment does not consider the public function exception because “[m]ortgage foreclosures through power of sale agreements are not powers of a governmental nature.” *Northrip v. Fed. Nat’l Mortg. Ass’n*, 527 F.2d 23, 31 (6th Cir. 1975).

<sup>61</sup> CHEMERINSKY, *supra* note 48, at 539.

<sup>62</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

### A. Preliminary State Action Concerns

For present purposes, there is no distinction between “state action” (i.e., states qua states) and “federal action” because courts use the same analysis to determine whether an actor is susceptible to Fifth and Fourteenth Amendment constitutional claims.<sup>63</sup> Although the FHFA conservatorship of Fannie and Freddie involves federal action, jurisprudence considering state action is equally applicable to determining whether the entities are state actors. For present purposes, “state actor” also refers to federal actors.

The state action doctrine is transsubstantive; determining an entity to be a state actor for the purposes of one kind of constitutional claim renders that entity a state actor generally.<sup>64</sup> For example, although the Court in *Lebron* considered a First Amendment claim, the *Lebron* test is not unique to First Amendment cases.<sup>65</sup> Rather, the *Lebron* test is applicable to other constitutional claims.<sup>66</sup> Thus, Fannie and Freddie may be determined state actors for the purposes of due process by tests originally arising under different constitutional claims.

The state is, to some extent, involved with all private action resulting in the deprivation of constitutional values.<sup>67</sup> Distinguishing between gradations of

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<sup>63</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 114–21 (1973) (relying on cases assessing both federal action and state action); 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 996 (4th ed. 2007) (“The phrase ‘state action’ is a misnomer because the issue arises in an identical manner when the federal government or its agents are involved in a case.”); ALEXANDER ET AL., *supra* note 6, § 13.2 (“Courts have viewed the assessment of state action (for purposes of the Fourteenth Amendment) and federal action (for the Fifth Amendment) to be the same analysis.”).

<sup>64</sup> See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 475 (2007); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 847 (2001).

<sup>65</sup> The Court explicitly conflated the state action requirement for the First Amendment and for constitutional claims in general. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding Amtrak to be “part of the Government for the purposes of the First Amendment” and “an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution” (emphasis added)).

<sup>66</sup> One caveat to transsubstantivity deserves mention. Although state action analyses are generally exportable from one constitutional context to another, “a review of the decisions indicates that the Court has been much more likely to apply the [state action] exceptions in cases involving race discrimination than in cases involving other constitutional claims.” CHEMERINSKY, *supra* note 48, at 530.

<sup>67</sup> See, e.g., LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND?: A CONCEPTUAL ANALYSIS WITH PRACTICAL IMPLICATIONS 76 (1988) (arguing that wherever a state affords legal repercussions to transactions between persons there is state action); Kevin Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 349–50 (1990)

government involvement has produced a complex and seemingly inconsistent state action doctrine.<sup>68</sup> This Comment does not attempt to demystify the conceptual framework for determining a state actor.<sup>69</sup> Rather, it parses Court precedent to determine whether Fannie and Freddie might qualify as state actors by virtue of the FHFA conservatorship.

Fannie and Freddie could be considered state actors through two distinct analyses. First, Fannie and Freddie might be “part of the government” under the *Lebron* test, in which case there is no need to resort to an exception rendering private action attributable to the government. Alternatively, if Fannie and Freddie are not “part of the government” under the *Lebron* test, the entities could still be considered state actors if there exists sufficient government involvement to attribute their actions to the state. Because state action analyses are “necessarily fact-bound,”<sup>70</sup> the facts and reasoning of *Lebron* and the entanglement cases are addressed in turn.

### *B. The Lebron Test: When an Entity is “Part of the Government”*

In *Lebron v. National Railroad Passenger Corp.*, the Supreme Court considered whether Amtrak was subject to constitutional constraints.<sup>71</sup> The petitioner entered into a contract with a third-party company to lease a billboard in Amtrak’s Pennsylvania Station.<sup>72</sup> “Amtrak’s vice-president disapproved the advertisement, invoking Amtrak’s policy . . . ‘that it will not allow political advertising on the . . . advertising sign.’”<sup>73</sup> The petitioner filed suit, claiming that Amtrak’s refusal to place his advertisement violated his constitutional rights.<sup>74</sup>

The Court concluded that Amtrak was “part of the government” and held that where “the Government creates a corporation by special law, for the

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(arguing that because “state action” could be construed as all-encompassing, the term must be viewed as a term of art).

<sup>68</sup> See Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 95 (1967) (remarking that the state action doctrine is “a conceptual disaster area”).

<sup>69</sup> For such an attempt, see John Dorsett Niles et al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 902–04 (2011).

<sup>70</sup> *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982).

<sup>71</sup> 513 U.S. 374, 378 (1995).

<sup>72</sup> *Id.* at 376. The billboard was of “colossal proportions . . . approximately 103 feet long and 10 feet high.” *Id.*

<sup>73</sup> *Id.* at 377.

<sup>74</sup> *Id.*

furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”<sup>75</sup> This analysis “is understood to [have] establish[ed] a two prong [state action] test: government purpose and government control.”<sup>76</sup>

First, assessing Amtrak’s government purpose, the Court found that Amtrak was created “explicitly for the furtherance of federal governmental goals”<sup>77</sup>—namely to avert the threatened extinction of passenger trains.<sup>78</sup> The Court noted that Amtrak’s charter stated, “[P]ublic convenience and necessity require the continuance and improvement of rail passenger service.”<sup>79</sup> Second, assessing the extent of government control of Amtrak, the Court found persuasive that eight of Amtrak’s nine directors were appointed directly by the President,<sup>80</sup> and that the United States held all of the preferred stock in Amtrak<sup>81</sup> while subsidizing Amtrak’s perennial losses.<sup>82</sup> The Court noted, “Amtrak is not merely in the temporary control of the Government (as a private corporation whose stock comes into federal ownership might be).”<sup>83</sup> No weight was placed on the fact that Amtrak’s charter disclaimed status as a federal agency.<sup>84</sup>

Importantly, the Court explicitly found Amtrak to be a government entity and, as such, subject to constitutional constraints. It did not base its reasoning on an analysis of Amtrak being a private actor subject to constitutional scrutiny because of its relationship with the government.<sup>85</sup> Thus, the *Lebron* test is properly understood to determine when an entity is “part of the government”; Amtrak could have failed the *Lebron* test but still have qualified as a state actor if the government was sufficiently involved with the action at issue.

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<sup>75</sup> *Id.* at 400.

<sup>76</sup> Roisman, *supra* note 6, at 157.

<sup>77</sup> *Lebron*, 513 U.S. at 397.

<sup>78</sup> *Id.* at 383.

<sup>79</sup> *Id.* at 384 (quoting RAIL PASSENGER SERVICE ACT OF 1970 § 101, 84 Stat. 1328) (emphasis omitted).

<sup>80</sup> *Id.* at 385.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 398.

<sup>84</sup> *Id.* at 392; *accord* *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1231 (2015) (“Congressional pronouncements . . . are not dispositive as to Amtrak’s status as a government entity.” (citations omitted)).

<sup>85</sup> *Lebron*, 513 U.S. at 378 (“We have held once and said many times, that actions of private entities can sometimes be regarded as governmental action for constitutional purposes. . . . It may be unnecessary to traverse that difficult terrain in the present case, since *Lebron*’s first argument is that Amtrak is not a private entity but Government itself.”).

The *Lebron* decision left unanswered whether government control must be literally permanent. The Court found the government-control prong satisfied where the government “retains for itself permanent authority to appoint a majority of the directors” of Amtrak.<sup>86</sup> Read narrowly, government control of an indefinite, but not explicitly permanent, duration might not satisfy the test. However, read broadly, permanent control might be just one of many possible indicia of government control.<sup>87</sup> Indefinite authority to appoint 100% of a corporation’s directors might suffice by itself. Perhaps *Lebron* was an easy case and Amtrak was so clearly a “part of the government” that the Court’s finding of permanent control to appoint a majority of directors is not a minimum, but well within the realm of government control sufficient to render an entity “part of the government.” Indeed, permanence in the context of statutes and regulations—which are always subject to amendment or repeal—has little inherent meaning.<sup>88</sup> Lower courts are left to grapple with these questions, the resolution of which is highly relevant to the case of Fannie and Freddie, because the FHFA retains indefinite, but not “permanent,” control of both entities.<sup>89</sup>

### *C. The Entanglement Doctrine: When Private Action Is Attributable to the State*

Although “most rights secured by the Constitution are protected only against infringement by governments,”<sup>90</sup> otherwise private conduct qualifies as

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<sup>86</sup> *Id.* at 400.

<sup>87</sup> Roisman, *supra* note 6, at 185. The Supreme Court recently addressed Amtrak’s constitutional status in *Department of Transportation v. Ass’n of American Railroads*, 135 S. Ct. 1225 (2015). Notably, the Court did not mention permanence of government control in its analysis:

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government’s benefit.

*Id.* at 1232.

<sup>88</sup> Roisman, *supra* note 6, at 185.

<sup>89</sup> See *FAQs: Questions and Answers on Conservatorship*, FED. HOUSING FIN. AGENCY (Sept. 7, 2008), <http://www.fhfa.gov/Media/PublicAffairs/Pages/Fact-Sheet-Questions-and-Answers-on-Conservatorship.aspx> (“Upon the Director’s determination that the Conservator’s plan to restore the Company to a safe and solvent condition has been completed successfully, the Director will issue an order terminating the conservatorship. At present, there is no exact time frame that can be given as to when this conservatorship may end.”).

<sup>90</sup> *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978).

state action if the deprivation is “fairly attributable to the State.”<sup>91</sup> Under the entanglement exception, constitutional requirements must be satisfied if the government “affirmatively authorizes, encourages, or facilitates private conduct that violates the Constitution.”<sup>92</sup> Cases considering when the action of a private entity is fairly attributable to the state are not easily distilled into tests like that of *Lebron*.<sup>93</sup> Although the following cases do not lend themselves to mechanical formulas,<sup>94</sup> they provide a basis from which to argue for state action by precedent and analogy. Entanglement analyses are presented in five categories: (1) private-public symbiosis; (2) government encouragement; (3) sufficient nexus; (4) joint participation; and (5) entwinement.<sup>95</sup>

### *I. Private-Public Symbiosis*

In *Burton v. Wilmington Parking Authority*, the Supreme Court found state action where the relationship between a private restaurant and a state agency conferred mutual benefits.<sup>96</sup> The appellant sued the Wilmington Parking Authority (Parking Authority), a Delaware state agency, claiming violations of the Equal Protection Clause.<sup>97</sup> A private restaurant refused to serve the appellant food or drink because he was an African-American.<sup>98</sup> The restaurant leased space from, and was located within, a parking complex owned and operated by the Parking Authority.<sup>99</sup> The Court considered whether the “degree of state participation and involvement in discriminatory action” was sufficient to impute the conduct of the restaurant to the state.<sup>100</sup>

The Court found that the relationship conferred mutual benefits on the restaurant and the Parking Authority: the Parking Authority conducted upkeep and maintenance on the facility with public funds;<sup>101</sup> the restaurant benefited

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<sup>91</sup> *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

<sup>92</sup> CHEMERINSKY, *supra* note 48, at 539.

<sup>93</sup> *Id.* at 530 (“It is difficult, if not impossible, to draw a meaningful line as to the point where the involvement is great enough to require the private action to comply with the Constitution.”).

<sup>94</sup> Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221, 221 (“[T]here are no generally accepted formulas for determining when a sufficient amount of government action is present in a practice to justify subjecting it to constitutional restraints.”).

<sup>95</sup> Although these categories of analysis are not hermetically sealed, they provide a useful analytical framework for application to Fannie and Freddie in Part IV.

<sup>96</sup> 365 U.S. 715, 724 (1961).

<sup>97</sup> *Id.* at 716.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 724.

<sup>101</sup> *Id.* at 723.

from the Parking Authority's tax-exempt status,<sup>102</sup> and the relationship afforded customers a convenient place to park, which created additional demand for the Parking Authority's parking facilities.<sup>103</sup> "[B]enefits mutually conferred," the Court held, "together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."<sup>104</sup> Although the Parking Authority took no affirmative action in discriminating against the appellant, the "Authority, and through it the State . . . has elected to place its power, property, and prestige" behind the conduct.<sup>105</sup>

The Court in *Burton* offered no bright-line rule for when the government is sufficiently involved with a private entity to constitute state action.<sup>106</sup> Nonetheless, the case stands for the proposition that a "symbiotic relationship" between the state and a private entity will render conduct of the entity attributable to the state.<sup>107</sup> *Burton* has not been overruled, but because the Court is "much more likely to apply the [state action] exceptions in cases involving race discrimination,"<sup>108</sup> its applicability in cases involving other constitutional claims is uncertain.

## 2. Government Encouragement

A decade after *Burton*, the Court considered whether the state grant of a liquor license to Moose Lodge, a private club that restricted membership to white males, could render the club's discrimination state action for the purposes of equal protection.<sup>109</sup> In *Moose Lodge No. 107 v. Irvis*, the appellee sued the private club and the Pennsylvania Liquor Authority (Liquor Authority) after being refused service.<sup>110</sup> The appellee argued that the club's

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<sup>102</sup> *Id.* at 719.

<sup>103</sup> *Id.* at 724.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 725.

<sup>106</sup> *Id.* at 722 ("[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which '[t]his Court has never attempted.'" (quoting *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947))).

<sup>107</sup> CHEMERINSKY, *supra* note 48, at 544.

<sup>108</sup> *Id.* at 530.

<sup>109</sup> *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 165–66 (1972).

<sup>110</sup> *Id.* at 164–65.

refusal of service was state action because the Liquor Authority authorized and regulated the sale of alcohol on the club's premises.<sup>111</sup>

The Court found that the relationship between the Liquor Authority and club did not approach the "symbiotic relationship between lessor and lessee that was present in *Burton*."<sup>112</sup> Although the Liquor Authority conferred a benefit on the club and had authority to regulate it, the Court declined to find state action in every instance where a "private entity receives any sort of benefit or service at all from the State, or [where] it is subject to regulation in any degree whatever."<sup>113</sup> Distinguishing Moose Lodge from the restaurant in *Burton*, the Court found, "In short, while Eagle was a public restaurant in a public building, Moose Lodge is a private social club in a private building."<sup>114</sup> Next, the Court considered the extent of government regulation, holding that the Liquor Authority's regulation of Moose Lodge did not sufficiently implicate the state.<sup>115</sup> Although the Court acknowledged that state regulation of the club was "detailed . . . in some particulars, it cannot be said to foster or encourage racial discrimination."<sup>116</sup>

It is unclear whether the distinction between state participation in *Burton* and *Moose Lodge* is one of degree or kind. Both cases involved state nonfeasance and arose in the context of equal protection, where the Court is most likely to find state action.<sup>117</sup> Neither the Liquor Authority in *Moose Lodge* nor the Parking Authority in *Burton* actively enforced the discriminatory policies of the private actor.<sup>118</sup> But, while the Court found state action in *Burton* because "the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation,"<sup>119</sup> it failed to find state action in *Moose Lodge* although the Liquor Authority could have conditioned its grant of liquor licenses to private clubs on non-discriminatory membership policies.<sup>120</sup>

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<sup>111</sup> *Id.* at 165.

<sup>112</sup> *Id.* at 175.

<sup>113</sup> *Id.* at 173.

<sup>114</sup> *Id.* at 175.

<sup>115</sup> *Id.* at 177.

<sup>116</sup> *Id.* at 176–77.

<sup>117</sup> *See supra* note 66.

<sup>118</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) ("By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (emphasis added)).

<sup>119</sup> *Id.*

<sup>120</sup> CHEMERINSKY, *supra* note 48, at 545.

The Court's analysis in *Moose Lodge* is best understood in two parts. First, the Court contrasted the *nature* of the lessor-lessee relationship in *Burton* with that of the Liquor Authority and Moose Lodge.<sup>121</sup> This analysis focused on mutuality of benefits conferred by the relationship; the Court concluded that the symbiosis present in *Burton* was lacking in *Moose Lodge*.<sup>122</sup> Second, the Court considered the *extent* of regulation exercised by the Liquor Authority over Moose Lodge.<sup>123</sup> This inquiry, seemingly distinct from the previous, considered whether the extent of regulation can be said to "foster or encourage" the constitutional deprivation.<sup>124</sup> Thus, it is plausible that an extensive regulatory scheme, even absent the symbiosis present in *Burton*, could satisfy the state action requirement if the regulation fosters or encourages the private action.<sup>125</sup> Both analyses would be applied two years later in *Jackson v. Metropolitan Edison Co.*

### 3. *Sufficient Nexus*

In *Jackson v. Metropolitan Edison Co.*, the Supreme Court formulated a new test for state action: "[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."<sup>126</sup> Citing *Burton*, the Court admonished that a detailed factual inquiry concerning the nature of state involvement is required to determine whether the test is met.<sup>127</sup>

The petitioner, Jackson, sued Metropolitan Edison, a privately owned and operated utility company, claiming due process violations under the Fourteenth Amendment.<sup>128</sup> Jackson argued that the company's termination of electrical service to her home without notice after alleged nonpayment constituted a deprivation of property in violation of the Fourteenth Amendment.<sup>129</sup> Jackson contended that the company's termination of her service was attributable to the state because the company was subject to extensive regulation by the

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<sup>121</sup> *Moose Lodge*, 407 U.S. at 175.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 176–77.

<sup>124</sup> *Id.*

<sup>125</sup> *See infra* Part I.D.

<sup>126</sup> 419 U.S. 345, 351 (1974).

<sup>127</sup> *Id.* (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961)).

<sup>128</sup> *Id.* at 346–48.

<sup>129</sup> *Id.*

Pennsylvania Public Utility Commission (Commission).<sup>130</sup> The Court's state action analysis considered both the extent of government regulation and the symbiosis between the utility company and the Commission.<sup>131</sup>

First, considering the extent of government regulation, the Court noted, "extensive and detailed" state regulation of a business "does not by itself convert its action into that of the State."<sup>132</sup> The Court acknowledged that the utility company was "subject to a form of extensive regulation by the State in a way that most other business enterprises are not."<sup>133</sup> But, citing *Moose Lodge*, the Court emphasized that the state regulation, though "extensive . . . cannot be said to in any way foster or encourage" the deprivation.<sup>134</sup> The Court noted that the company had filed with the Commission a general provision stating its right to terminate service for nonpayment.<sup>135</sup> The only connection between the Commission and the company's termination provision was a "simple notice filing with the Commission and the lack of any Commission action to prohibit it."<sup>136</sup> The Court held that mere approval by the Commission of a regulated company's provision, "where the commission has not put its own weight on the side of the proposed practice by ordering it," does not render the company's practice state action.<sup>137</sup>

Second, the Court failed to find a symbiotic relationship between the company and the Commission.<sup>138</sup> Distinguishing *Burton*, the Court found the Commission had not "so far insinuated itself in a position of interdependence . . . that it was a joint participant in the enterprise."<sup>139</sup> Although the company paid state taxes and was subject to extensive regulation,

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<sup>130</sup> *Id.* at 358. The Pennsylvania Public Utility Commission empowered the utility company to deliver electricity to the area encompassing Jackson's residence and provided the right to discontinue service to any customer on reasonable notice of nonpayment. Jackson argued alternatively that state action was present because "respondent provides an essential public service . . . and hence performs a 'public function.'" *Id.* at 352. The Court rejected this argument but set forth the current formulation of the public function exception: there is state action "in the exercise by a private entity of powers traditionally exclusively reserved to the State." *Id.*

<sup>131</sup> *See infra* notes 132–41.

<sup>132</sup> *Jackson*, 419 U.S. at 350.

<sup>133</sup> *Id.* at 358.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 354.

<sup>136</sup> *Id.* at 355.

<sup>137</sup> *Id.* at 357.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 357–58.

such a relationship did not make the state “in any realistic sense a partner or even a joint venturer” in the enterprise.<sup>140</sup>

In conclusion, the Court found that the extent of government regulation and absence of a symbiotic relationship did not constitute a sufficient nexus to render the company’s termination of Jackson’s service attributable to the state.<sup>141</sup> It appears that the “sufficient nexus” test encompasses both the “private-public symbiosis” test of *Burton* and “foster or encourage” test of *Moose Lodge*; it is thus better understood as a reformulation of previous tests than a new one.<sup>142</sup>

#### 4. *Joint Participation*

Eight years later, in *Lugar v. Edmonson Oil Co.*, the Court applied a different two-part analysis to assess whether conduct causing the deprivation of a constitutional right is fairly attributable to the State: (1) “the deprivation must be caused by the exercise of some right or privilege created by the State or a rule of conduct imposed by it or by a person for whom it is responsible”; and (2) “the party charged with the deprivation must be a person who may be fairly said to be a state actor . . . [either] because he [or she] is a state official, because he [or she] has acted together with or has obtained significant aid from state officials, or because his [or her] conduct is otherwise chargeable to the state.”<sup>143</sup> This analysis focused on both the nature of the action and the identity of the actor.

The Court found the facts of *Lugar* satisfied this two-part test.<sup>144</sup> The petitioner, an operator of a truck stop in Virginia, was indebted to Edmondson Oil Company (Company).<sup>145</sup> Fearing that the petitioner would dispose of his property to defeat his creditors, the Company sought prejudgment attachment of the petitioner’s property in state court pursuant to state law.<sup>146</sup> The court clerk issued a writ of attachment, which was subsequently executed by a county sheriff.<sup>147</sup>

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<sup>140</sup> *Id.* at 358 (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176–77 (1972)).

<sup>141</sup> *Id.* at 358–59.

<sup>142</sup> It is a tautology to state that private action may be fairly attributed to the state when the relationship between the action and the state is sufficiently close.

<sup>143</sup> 457 U.S. 922, 937 (1982).

<sup>144</sup> *Id.* at 942.

<sup>145</sup> *Id.* at 924.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 924.

The first prong was satisfied because the Court found that the claimed deprivation—prejudgment attachment of petitioner’s property—resulted from the exercise of a state-created procedural scheme.<sup>148</sup> Further, the Court found that the participation of the sheriff, a “state official,” satisfied the second prong of the analysis.<sup>149</sup> In other words, state action exists where a private party causes a constitutional deprivation pursuant to state-created law and with the aid of a state official.

The Court’s analysis appears straightforward but is not easily reconciled with *Flagg Bros. v. Brooks*,<sup>150</sup> decided only four years prior. In that case, the petitioner was evicted from her home, and the city marshal arranged for her furniture to be stored in the respondent’s warehouse.<sup>151</sup> After nonpayment, the warehouse-creditor threatened to sell the petitioner’s furniture pursuant to a state-created self-help provision.<sup>152</sup> Ultimately, the Court held that the creditor’s action could not be “fairly attributed” to the state because of the “total absence of overt official involvement.”<sup>153</sup>

Although the participation of the state sheriff in *Lugar* distinguishes its facts from *Flagg Bros.*, this might be a distinction without a difference. In both cases, the state created the statutory scheme facilitating the property deprivation; the procedure in *Lugar* required the participation of a sheriff,<sup>154</sup> while the procedure in *Flagg Bros.* did not.<sup>155</sup> The involvement of a state official in *Lugar* occurred precisely because the state law required it.<sup>156</sup> If the rationale in *Lugar* is that the joint participation of the sheriff in the property deprivation endorses the act, such that it is attributable to the state, it is unclear why this rationale ought not apply where the state, through legislation, endorses a deprivation ex ante. Despite the shortcomings of the second prong, the *Lugar* test has been applied in subsequent cases.<sup>157</sup>

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<sup>148</sup> *Id.* at 941.

<sup>149</sup> *Id.*

<sup>150</sup> 436 U.S. 149 (1978).

<sup>151</sup> *Id.* at 153.

<sup>152</sup> *Id.* at 153, 156 (citing N.Y. U.C.C. LAW § 7-210).

<sup>153</sup> *Id.* at 157.

<sup>154</sup> *See supra* note 149.

<sup>155</sup> *See supra* note 153.

<sup>156</sup> CHEMERINSKY, *supra* note 48, at 543.

<sup>157</sup> *See, e.g.*, *Georgia v. McCollum*, 500 U.S. 42, 52 (1992); *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

### 5. *Entwinement*

The latest Supreme Court case to recognize state action by virtue of government involvement with a private actor is *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.<sup>158</sup> In *Brentwood*, the Tennessee Secondary School Athletic Association (TSSAA), a private organization comprised of Tennessee schools that regulated high school athletics, suspended Brentwood Academy's (Academy) athletic program pursuant to a TSSAA rule prohibiting "undue influence" in recruitment practices.<sup>159</sup> The Court held that the TSSAA was sufficiently "entwined" with the government to make it a state actor for the purposes of the Academy's constitutional claims.<sup>160</sup>

First, the Court restated the sufficient nexus test from *Jackson*,<sup>161</sup> but qualified that "[w]hat is fairly attributable to the state is a matter of normative judgment, and the criteria lack rigid simplicity."<sup>162</sup> No one set of circumstances is "absolutely sufficient, for there may be some countervailing reason against attributing activity to the government."<sup>163</sup> This language suggests a balancing test, where facts tending to attribute private activity to the government are weighed against "countervailing reasons."<sup>164</sup>

The Court found that the "nominally private" status of TSSAA was converted to state action by "pervasive entwinement of public institutions and public officials" in its workings.<sup>165</sup> The relationship between the TSSAA and public institutions evinced both "bottom-up" and "top-down" entwinement.<sup>166</sup> From the bottom-up, 84% of TSSAA members were public schools, and

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<sup>158</sup> 531 U.S. 288, 291 (2001).

<sup>159</sup> *Id.* at 291–93.

<sup>160</sup> It remains unclear whether *Brentwood* carves a new "entwinement" state action exception or falls within the entanglement exception. The Court did not use the term "entanglement" or apply the public function exception. CHEMERINSKY, *supra* note 48, at 539. The Court used the term "entwinement" in *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."). However, entwinement was not considered a distinct state action test; the issue was whether a park is a "public facility" that "serves the community." *Id.* at 301–02.

<sup>161</sup> *Brentwood*, 531 U.S. at 295 ("[S]tate action may be found if . . . there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974))).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 295–96. The Court found such a "countervailing reason" in *Polk County v. Dodson*, 454 U.S. 312, 322 n.13 (1981) (holding that county-employed public defender was not a state actor because the public defender did "not act on behalf of the State," but as the "State's adversary").

<sup>164</sup> *Brentwood*, 531 U.S. at 295.

<sup>165</sup> *Id.* at 298.

<sup>166</sup> *See infra* notes 167–70.

representatives from those schools would select members of the TSSAA legislative council and board;<sup>167</sup> the majority of TSSAA funding came from gate receipts at public school sporting events, such that “the Association . . . enjoys the schools’ moneymaking capacity as its own.”<sup>168</sup> The TSSAA would be unrecognizable without the membership and financial support of public school officials, who “overwhelmingly perform all but the purely ministerial acts by which the Association exists.”<sup>169</sup> From the top-down, State Board members served as members of the TSSAA legislative council and board, and TSSAA employees were eligible for membership in the state retirement system.<sup>170</sup> Such a showing of entwinement, the Court held, requires that the private organization be “judged by constitutional standards.”<sup>171</sup>

Four dissenting Justices argued that the majority holding extended the state action doctrine beyond existing precedent.<sup>172</sup> Although public schools did provide a portion of TSSAA funding, “nothing in the record suggest[ed] that the State ha[d] encouraged” the TSSAA in enforcing the disputed rule.<sup>173</sup> The dissent’s concern lends credibility to an expansive entwinement exception: pervasive government involvement with nominally private conduct can make such conduct fairly attributable to the government, even if the government does not foster or encourage the conduct.

#### *D. Fair Attribution: The Principle Underlying Entanglement*

The Court has declined to answer “whether these different [state action] tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court.”<sup>174</sup> Members of the Court have acknowledged, however, that the tests all have a common purpose: to determine “whether an action ‘can fairly be attributed to the State.’”<sup>175</sup> Although the analysis is “necessarily fact-bound,” it is possible to extrapolate underlying principles warranting fair attribution of private conduct to the government.<sup>176</sup>

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<sup>167</sup> See *Brentwood*, 531 U.S. at 300.

<sup>168</sup> *Id.* at 299.

<sup>169</sup> *Id.* at 300.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 302.

<sup>172</sup> *Id.* at 305 (Thomas, J., dissenting).

<sup>173</sup> *Id.* at 310.

<sup>174</sup> *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 (1982).

<sup>175</sup> *Brentwood*, 531 U.S. at 306 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

<sup>176</sup> *Lugar*, 457 U.S. at 939.

Before *Brentwood*, fair attribution required a finding of private-public symbiosis,<sup>177</sup> government regulation fostering or encouraging a constitutional deprivation,<sup>178</sup> a “sufficient nexus” between the government and private actor causing the deprivation,<sup>179</sup> or joint participation between a state and private actor in the exercise of a state-created right.<sup>180</sup> For the foregoing tests, fair attribution requires more than government acquiescence in the deprivation.

First, symbiosis requires that extensive benefits be mutually conferred to support a finding that the state “has elected to place its power . . . behind the conduct.”<sup>181</sup> Second, government regulation, even when extensive, falls short of state action where it “cannot be said . . . to foster or encourage” the unconstitutional conduct.<sup>182</sup> Third, joint participation supports a finding of state action because it indicates the state is a “willful participant” in the deprivation.<sup>183</sup> For these tests, state action is only found where the government, either actively or by virtue of a symbiotic relationship with the private actor, affirmatively authorizes, encourages, or facilitates a constitutional violation.<sup>184</sup>

In contrast, *Brentwood* suggests that private conduct can be fairly attributed to the state absent government authorization, encouragement, or facilitation of the constitutional violation. The majority opinion focused not on whether the government encouraged the particular TSSAA rule permitting the deprivation, but rather on the relationship between the government and TSSAA. In other words, the Court analyzed the connection between the state and the private *actor*, not the connection between the state and the private *action*. This analysis is peculiar considering that the *Brentwood* opinion began with a restatement of the “sufficient nexus” test,<sup>185</sup> which examines the nexus “between the State and the challenged *action*”<sup>186</sup>—not the private *actor*.<sup>187</sup>

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<sup>177</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

<sup>178</sup> *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176–77 (1972).

<sup>179</sup> The sufficient nexus test as stated in *Jackson v. Metropolitan Edison Co.* is not a conceptually distinct state action test. *See supra* note 142.

<sup>180</sup> *Lugar*, 457 U.S. at 941.

<sup>181</sup> *Burton*, 365 U.S. at 725. Subsequent cases made clear that state action does not exist in every instance where a “private entity receives any sort of benefit or service at all from the State, or if it is subject to regulation in any degree whatever.” *Moose Lodge*, 407 U.S. at 173.

<sup>182</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358 (1974); *Moose Lodge*, 407 U.S. at 176–77.

<sup>183</sup> *Lugar*, 457 U.S. at 941 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)).

<sup>184</sup> CHEMERINSKY *supra* note 48, at 551.

<sup>185</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athl. Ass’n*, 531 U.S. 288, 295 (2001).

<sup>186</sup> *Jackson*, 419 U.S. at 351 (emphasis added).

<sup>187</sup> This analysis departs from *Moose Lodge*, where the Court examined the connection between the Liquor Authority and the racist member policy, and *Jackson*, where the Court analyzed the connection between the Utility Commission and the termination provision. *See supra* text accompanying notes 112, 133.

Thus, post-*Brentwood*, pervasive government involvement with a private actor may fairly attribute an otherwise private deprivation to the government, even where the government does not foster or encourage the alleged deprivation. Pervasive government involvement, however, might fall short in the face of a “countervailing reason.”<sup>188</sup>

### III. CREATION, PURPOSE, AND REGULATION OF FANNIE, FREDDIE, AND GINNIE

This Part provides the necessary groundwork for application of the foregoing state action tests to Fannie and Freddie. Ginnie Mae,<sup>189</sup> another federal entity involved in the mortgage market, provides a useful contrast to Fannie and Freddie. This Part first considers the creation of Fannie, Freddie, and Ginnie. Second, it describes Congress’ purpose in chartering the three entities. Next, it evaluates the deprivatization of Fannie and Freddie under the HERA. Finally, it assesses the extent of government regulation exercised over Fannie and Freddie under the FHFA conservatorship.

#### A. *History and Purpose of the Entities*

The federal government has become increasingly involved in the mortgage market over the past eighty years.<sup>190</sup> Congress has chartered several agencies and corporations to improve the functioning of the residential mortgage market.<sup>191</sup> Some of these entities exist as pure government agencies within the Cabinet. For example, the Department of Housing and Urban Development (HUD), through the Federal Housing Administration (FHA), provides mortgage insurance and home loans to qualifying mortgagors,<sup>192</sup> the Department of Veterans Affairs (VA) provides partial mortgage guarantees and loans to qualifying veterans.<sup>193</sup> Others, such as Fannie and Freddie, are not

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Both cases distinguished between the extent of state regulation of the private actors and the state’s relationship with the alleged deprivation.

<sup>188</sup> *Brentwood*, 531 U.S. at 296.

<sup>189</sup> Ginnie Mae’s corporate name is the Government National Mortgage Association (GNMA). 12 U.S.C. § 1717(a)(2)(A) (2012).

<sup>190</sup> See ALEXANDER ET AL., *supra* note 6, § 12.1(b) (noting the federal government has been a market regulator, a market participant by originating and holding mortgages, and an indirect market participant by insuring and guaranteeing loans).

<sup>191</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 932.

<sup>192</sup> 12 U.S.C. §§ 1707–1709 (2012).

<sup>193</sup> 38 U.S.C. § 3702 (2012); 12 U.S.C. §§ 3711–3712 (2006); NELSON & WHITMAN, *supra* note 8, § 11.3, at 932.

pure government agencies.<sup>194</sup> Although established by congressional charter, the independence of such entities complicates the state action analysis.

### 1. *The Creation of Fannie and Ginnie*

Fannie and Ginnie were originally created as a single entity, the Federal National Mortgage Association (FNMA), in 1938.<sup>195</sup> The Administrator of the FHA chartered the FNMA to provide liquidity to the mortgage market by purchasing FHA-insured mortgages.<sup>196</sup> The FNMA was originally “wholly owned and administered by the federal government” but, in 1954, became a “mixed ownership” corporation owned in part by private shareholders.<sup>197</sup> The Housing and Urban Development Act of 1968 divided the FNMA into two separate entities<sup>198</sup>—Fannie and Ginnie—“each of which inherited a portion of the original FNMA’s duties.”<sup>199</sup>

Ginnie emerged as a “pure federal agency” within the HUD.<sup>200</sup> Ginnie retained the FNMA’s pre-1954 mortgage portfolio and continued to purchase mortgages insured by the FHA, VA, and Farmers Home Administration (FmHA).<sup>201</sup> In contrast, Fannie was reconstituted as a government-sponsored entity—a privately owned and operated corporation with “certain ties to the federal government.”<sup>202</sup> Its function is to continue purchasing residential and other mortgages from lenders, providing liquidity to the mortgage market.<sup>203</sup> Unlike Ginnie, which is limited to the purchase of FHA-insured and VA-guaranteed mortgages,<sup>204</sup> Fannie is authorized to purchase conventional residential mortgages.<sup>205</sup>

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<sup>194</sup> See *infra* notes 197, 210.

<sup>195</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 932, 932 n.4 (“Fannie Mae’s original charter was contained in Title III of the National Housing Act, 48 Stat. 1246 (1938).”).

<sup>196</sup> See Implementing Authority of HUD Over Conduct of Secondary Market Operations of FNMA, 43 Fed. Reg. 36201 (Aug. 15, 1978). FNMA’s charter was later expanded to allow the purchase of VA-guaranteed mortgages. ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 57 (2d ed. 2010).

<sup>197</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 932.

<sup>198</sup> 12 U.S.C. § 1716(b) (2012).

<sup>199</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 932.

<sup>200</sup> *Id.* at 932–33; see 12 U.S.C. § 1717(a)(2)(A) (2012).

<sup>201</sup> 12 U.S.C. § 1716(b) (2012); Regulations Implementing Authority of HUD Over Conduct of Secondary Market Operations of FNMA, 43 Fed. Reg. 36200, 36202 (Aug. 15, 1978).

<sup>202</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 933.

<sup>203</sup> *Id.*

<sup>204</sup> See 12 U.S.C. §§ 1716, 1716(b) (2012).

<sup>205</sup> SCHWARTZ, *supra* note 196, at 57.

## 2. *The Creation of Freddie*

Two years after the separation of Fannie and Ginnie, Freddie was born.<sup>206</sup> Freddie Mac—originally known as the Federal Home Loan Mortgage Corporation (FHLMC)—was created by the Emergency Home Finance Act<sup>207</sup> to compete with the newly privatized Fannie and to expand the secondary mortgage market for the savings and loan industry.<sup>208</sup>

Although “Fannie Mae and Freddie Mac began life quite differently, they have become increasingly similar.”<sup>209</sup> Freddie was originally a public corporation, owned by the Federal Home Loan Bank System and governed by the Federal Home Loan Bank Board (FHLBB), but Freddie was privatized after the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).<sup>210</sup> FIRREA abolished the FHLBB and “gave Freddie Mac a new board structure virtually identical to Fannie Mae’s.”<sup>211</sup> Like Fannie, Freddie is authorized to purchase conventional residential mortgages in addition to FHA-insured and VA-guaranteed mortgages.<sup>212</sup>

## 3. *The Purpose of Ginnie, Fannie, and Freddie*

### a. *Ginnie*

Ginnie was established by Congress to liquidate the existing FNMA portfolio of “special assistance” loans and to take over special assistance functions previously handled by the FNMA, including the purchase of government-insured loans.<sup>213</sup> Many of these loans are deemed important to

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<sup>206</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 933 (citing 12 U.S.C. § 1451 (2012)).

<sup>207</sup> *Id.*

<sup>208</sup> Alexander, *supra* note 51, at 321 (citing Federal Home Loan Mortgage Corporation Act of 1970 §§ 301–310, Pub. L. No. 91–351, 84 Stat. 451, 454–55 (codified as amended at 12 U.S.C. §§ 1451–1459 (1988 & Supp. II 1990))) (Congress created FHLMC primarily to assist savings and loan associations through the purchase of VA, FHA, and conventional loans).

<sup>209</sup> See NELSON & WHITMAN, *supra* note 8, § 11.3, at 934.

<sup>210</sup> See *id.* at 932, 934.

<sup>211</sup> See *id.* at 934. Until 2008, Fannie’s board of directors consisted of eighteen persons, five of whom were appointed by the President of the United States and thirteen of whom were elected by shareholders. Compare 12 U.S.C. § 1723(b) (2006) (“[Fannie] shall have a board of directors, which shall consist of eighteen persons . . .”), with 12 U.S.C. § 1723(b) (2012) (“[Fannie] shall have a board of directors, which shall consist of 13 persons . . .”).

<sup>212</sup> See NELSON & WHITMAN, *supra* note 8, § 11.3, at 933.

<sup>213</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 938 (citing 12 U.S.C. § 1717(a)(2)(A) (2012)).

national housing policy but are unattractive to private lenders.<sup>214</sup> Although Ginnie furthers important policy goals by purchasing special assistance loans, Ginnie has not affected the mortgage market as significantly as Fannie and Freddie because Ginnie is only permitted to purchase government-insured and government-guaranteed loans.<sup>215</sup>

Ginnie has most significantly affected the mortgage market by guaranteeing mortgage-backed, pass-through securities.<sup>216</sup> In these transactions, lending institutions sell securities to investors that are collateralized by pools of residential mortgages individually insured by the FHA or VA.<sup>217</sup> Investors receive monthly payments “corresponding to the payments due on the underlying mortgages.”<sup>218</sup> Because Ginnie is an agency of the federal government under the HUD, its guarantees represent the full faith and credit of the U.S. government.<sup>219</sup> The Ginnie guarantee thus allows investors to collect on securities even if the underlying mortgages experience default; with such a strong guarantee, securities are “highly liquid and salable at relatively low interest yields.”<sup>220</sup>

#### *b. Fannie and Freddie*

Fannie and Freddie were created to enhance the availability of mortgage credit across the nation.<sup>221</sup> The entities do so by purchasing mortgages from lenders who use the proceeds to issue more mortgage loans.<sup>222</sup> These mortgage purchase operations require “huge amounts of capital.”<sup>223</sup> Fannie and Freddie are authorized to raise capital to support their operations in three ways: issuing stock (both common and preferred); issuing bonds and notes; and issuing mortgage-backed securities (MBS).<sup>224</sup> Most mortgages purchased by Fannie

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<sup>214</sup> For example, Ginnie inherited from the FNMA many “below-market-interest-rate mortgages” under an FHA-subsidized apartment program. *See id.* These mortgages bore a mere 3% interest rate. *See id.* Ginnie also holds and purchases loans in urban renewal projects and Indian reservations. *See id.*

<sup>215</sup> *See* 12 U.S.C. § 1716, 1716(b) (2012).

<sup>216</sup> *See* NELSON & WHITMAN, *supra* note 8, § 11.3, at 938; NELSON ET AL., *supra* note 5, at 485.

<sup>217</sup> *See* NELSON ET AL., *supra* note 5, at 485.

<sup>218</sup> *Id.*

<sup>219</sup> *See* 12 U.S.C. § 1721 (2012); NELSON ET AL., *supra* note 5, at 485.

<sup>220</sup> *See* NELSON ET AL., *supra* note 5, at 485.

<sup>221</sup> *See Government-Sponsored Enterprises: A Framework for Strengthening GSE Governance and Oversight: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 108th Cong. (2004) [hereinafter *Government-Sponsored Enterprises*] (statement of David M. Walker, Comptroller General of the United States), reprinted in NELSON ET AL., *supra* note 5, at 923.

<sup>222</sup> *See id.* at 924.

<sup>223</sup> NELSON & WHITMAN, *supra* note 8, § 11.3, at 934.

<sup>224</sup> *See id.* § 11.3, at 934–35.

and Freddie are placed in mortgage pools to support the sale of MBS, although some are maintained in the entities' portfolios.<sup>225</sup>

There are three notable differences between Ginnie, Fannie, and Freddie. First, Ginnie is not authorized to purchase conventional mortgages, while Fannie and Freddie have been authorized to do so since 1970.<sup>226</sup> Second, Ginnie is only authorized to issue guarantees of MBS,<sup>227</sup> while Fannie and Freddie may sell MBS directly to investors.<sup>228</sup> Third, the federal government explicitly backs Ginnie guarantees, while Fannie- and Freddie-issued MBS are not explicitly backed by the full faith and credit of the U.S. government.<sup>229</sup>

Although Fannie and Freddie are not federally owned and operated under the HUD like Ginnie,<sup>230</sup> prior to the passage of the HERA, the entities were subject to broad regulation by the Secretary of the HUD.<sup>231</sup> Extensive federal regulation led markets to perceive an implied federal guarantee on Fannie's and Freddie's obligations.<sup>232</sup> This implied guarantee allowed Fannie and Freddie to borrow at interest rates below those of private corporate competitors and to extend credit to financial institutions at favorable rates.<sup>233</sup> Thus, although Fannie and Freddie were privately owned,<sup>234</sup> they have enjoyed the same cost advantage as Ginnie. This implied guarantee would significantly contribute to the financial downturn of both entities, ultimately leading to their privatization in 2008.<sup>235</sup>

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<sup>225</sup> See *Government-Sponsored Enterprises*, *supra* note 221, at 924.

<sup>226</sup> See NELSON & WHITMAN, *supra* note 8, § 11.3, at 933.

<sup>227</sup> *Investor FAQ*, FREDDIE MAC, [www.freddiemac.com/investors/faq.html#differ](http://www.freddiemac.com/investors/faq.html#differ) (last visited July 20, 2015).

<sup>228</sup> See NELSON & WHITMAN, *supra* note 5, § 11.3, at 934.

<sup>229</sup> See 12 U.S.C. § 4501 (2012) (abrogating liability for Fannie's and Freddie's debt); NELSON & WHITMAN, *supra* note 8, § 11.3, at 938–39.

<sup>230</sup> See *supra* notes 225–228.

<sup>231</sup> See 12 U.S.C. §§ 4511, 4513 (2006), *amended by* Housing and Economic Recovery Act, Pub. L. No. 110-289, § 1101, 122 Stat. 2661 (2008). The Office of Federal Housing Enterprise Oversight (OFHEO) regulated both Fannie and Freddie. See 12 U.S.C. § 1723a(k) (2006) (Fannie); 12 U.S.C. § 1452(b)(2) (2006) (Freddie). The OFHEO's regulatory authority included "control of annual dividends, increases in total debt, and the issuance of particular debt or equity securities." See NELSON & WHITMAN, *supra* note 8, § 11.3, at 934 n.11.

<sup>232</sup> See Carrie Stradley Lavargna, *Government-Sponsored Enterprises Are "Too Big to Fail": Balancing Public and Private Interests*, 44 HASTINGS L.J. 991, 992–93 (1993).

<sup>233</sup> See *Government-Sponsored Enterprises*, *supra* note 221, at 925.

<sup>234</sup> See SCHWARTZ, *supra* note 196, at 57.

<sup>235</sup> See NELSON ET AL., *supra* note 5, at 489.

## B. *The Deprivatization of Fannie and Freddie*

In response to the mortgage crisis of 2008, Congress expanded federal regulation of Fannie and Freddie with the passage of the HERA.<sup>236</sup> Well before the HERA, it was clear that Fannie and Freddie posed systemic risks to the stability of domestic and international financial systems.<sup>237</sup> These risks materialized as interest rates—which “beginning in 2001, were lower than at any time in the Twentieth Century”—began to climb.<sup>238</sup> Recently popularized adjustable rate mortgages (ARMs)<sup>239</sup> began to reset at new, higher market interest rates, substantially increasing mortgagors’ monthly payments.<sup>240</sup> Borrowers increasingly defaulted and the condition of the housing market worsened, eroding investor confidence in Fannie and Freddie.<sup>241</sup> In 2008 alone, Fannie and Freddie lost more than \$108 billion.<sup>242</sup>

### 1. *The Passage of HERA*

Congress sought to ameliorate the housing crisis with the Housing and Economic Recovery Act, which, among other things, established the Federal Housing and Finance Agency (FHFA).<sup>243</sup> The FHFA, an “independent agency of the federal government,”<sup>244</sup> assumed the supervisory and regulatory functions previously performed by the Secretary of the HUD and the OFHEO—and then some.<sup>245</sup> The FHFA was granted “broad authority to regulate”<sup>246</sup> Fannie and Freddie to ensure the entities operated in a “safe and

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<sup>236</sup> Housing and Economic Recovery Act of 2008 (HERA), 12 U.S.C. §§ 4501–4509 (2012); see 154 CONG. REC. H7857-04 (daily ed. Sept. 9, 2008) (statement of Rep. Stearns), 2008 WL 4146807 (Westlaw).

<sup>237</sup> Due to their extensive sale of MBS, if Fannie and Freddie were to become insolvent, financial market participants depending on payments from MBS would in turn be unable to meet their financial obligations. See *Government-Sponsored Enterprises*, *supra* note 221, at 925–26.

<sup>238</sup> See NELSON ET AL., *supra* note 5, at 486–88.

<sup>239</sup> An adjustable-rate mortgage enables lenders to “periodically modify the interest rate over the life of the loan as market rates change,” shifting risk of rate fluctuations to borrowers. *Id.* at 965.

<sup>240</sup> NELSON ET AL., *supra* note 5, at 488. A full treatment of the housing crisis, even if possible, is outside the scope of this Comment. For a more in-depth discussion of its underlying causes, see Nelson, *supra* note 6, at 584–85.

<sup>241</sup> See Nelson, *supra* note 6, at 585, 585 n.9.

<sup>242</sup> See CONG. OVERSIGHT PANEL, DECEMBER OVERSIGHT REPORT: A REVIEW OF TREASURY’S FORECLOSURE PREVENTION PROGRAMS 73 (Dec. 14, 2010).

<sup>243</sup> See Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654 (codified at 12 U.S.C. §§ 4501–4509 (2012)); 12 U.S.C. § 4511 (2012).

<sup>244</sup> See 12 U.S.C. § 4511(a) (2012).

<sup>245</sup> See *supra* note 5.

<sup>246</sup> Theresa R. DiVenti, *Fannie Mae and Freddie Mac: Past, Present, and Future*, 11 CITYSCAPE 231, 232 (2009), <http://www.huduser.org/periodicals/cityscape/vol11num3/ch11.pdf>.

sound manner.”<sup>247</sup> The Director of the fledgling FHFA was empowered to “appoint the [FHFA] as conservator” for Fannie and Freddie.<sup>248</sup>

## 2. *The FHFA Conservatorship*

The condition of Fannie and Freddie continued to decline in the weeks following the passage of HERA.<sup>249</sup> By September 2008, stock prices for Fannie and Freddie had fallen by 90% and were at an all-time low.<sup>250</sup> At the close of markets on September 5, 2008, “Fannie Mae was trading at \$5.50 and Freddie Mac at \$4, down from \$70 and \$65” the previous year.<sup>251</sup> Two days later, with the concurrence of the Secretary of the Treasury and the Chairman of the Board of Governors of the Federal Reserve, the FHFA placed Fannie and Freddie into federal conservatorship.<sup>252</sup> Before conservatorship, the HERA increased the *degree* to which the federal government regulated the entities.<sup>253</sup> Placement into conservatorship, however, marked a difference in *kind*: the FHFA not only regulates the entities—it *operates* them.

As conservator, the FHFA assumed the power of Fannie’s and Freddie’s boards of directors and management.<sup>254</sup> The FHFA immediately replaced the CEOs, nonexecutive chairmen, and boards of directors of Fannie and Freddie, all of whom now report to the FHFA.<sup>255</sup> In order to avert the systemic risk posed by Fannie’s and Freddie’s debt and MBS portfolios, the Treasury and the entities executed the Senior Preferred Stock Purchase Agreement (the SPSPA).<sup>256</sup>

<sup>247</sup> See 12 U.S.C. § 4513(a)(1)(B)(i) (2012).

<sup>248</sup> See 12 U.S.C. § 4617(a)(1) (2012).

<sup>249</sup> See 154 CONG. REC. H7857-04 (daily ed. Sept. 9, 2008) (statement of Rep. Stearns), 2008 WL 4146807 (Westlaw).

<sup>250</sup> See *id.*

<sup>251</sup> See Katie Lamb Balthrop, *Locating the Sphere of State Action in the Context of Mortgage Foreclosure by Federally-Related Entities* 44 (April 13, 2009) (unpublished manuscript) (on file with author) (citing Stephen Labaton & Andrew Ross Sorkin, *U.S. Rescue Seen at Hand for 2 Mortgage Giants*, N.Y. TIMES (Sept. 5, 2008), <http://www.nytimes.com/2008/09/06/business/06fannie.html>).

<sup>252</sup> Press Release, Henry M. Paulson, Jr., Treasury Sec’y, U.S. Dep’t of the Treasury, Statement on Treasury & Fed. Housing Fin. Agency Action to Protect Fin. Markets and Taxpayers (Sept. 7, 2008), <http://www.treasury.gov/press-center/press-releases/Pages/hp1129.aspx>.

<sup>253</sup> See *supra* note 245–48.

<sup>254</sup> See Nelson, *supra* note 6, at 616.

<sup>255</sup> *Id.* (citing U.S. Dep’t of Treasury, Fed. Hou. Fin. Agency, Fact Sheet: Questions and Answers on Conservatorship, [www.treasury.gov/press-center/press-releases/Documents/fhfa\\_consrv\\_faq\\_090708hp1128.pdf](http://www.treasury.gov/press-center/press-releases/Documents/fhfa_consrv_faq_090708hp1128.pdf) (last visited Aug. 13, 2015)).

<sup>256</sup> See U.S. Treasury Dep’t Office of Public Affairs, Fact Sheet: Treasury Senior Preferred Stock Purchase Agreement (Sept. 7, 2008), [http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-8-7\\_SPSPA\\_FactSheet\\_508.pdf](http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2008-8-7_SPSPA_FactSheet_508.pdf) [hereinafter *U.S. Treasury Dep’t Office of Public Affairs*].

Interestingly, the Treasury ascribed partial responsibility to the U.S. government for the entities' financial predicament.<sup>257</sup> The Treasury attributed investor overconfidence—a product of the perceived federal guarantee on MBS issued by Fannie and Freddie—to “ambiguities in their [c]ongressional charters,” and stated, “These ambiguities fostered enormous growth in GSE [government-sponsored enterprise] debt outstanding.”<sup>258</sup> The Treasury believed the SPSPA to be the “most effective means of averting systemic risk . . . [and] more efficient than a one-time equity injection.”<sup>259</sup>

The terms of the Agreement were as follows: the Treasury committed \$100 billion to each entity to back obligations owed to Fannie's and Freddie's creditors and MBS holders,<sup>260</sup> in return, Fannie and Freddie each agreed to issue to the Treasury \$100 billion of preferred senior stock with a 10% coupon,<sup>261</sup> in addition to warrants for the purchase of common stock of each entity at a nominal price (a few cents per share).<sup>262</sup> If exercised, the federal government would receive a 79.9% ownership stake in each corporation.<sup>263</sup> Since their placement into conservatorship, Fannie and Freddie have received \$187.5 billion in taxpayer support.<sup>264</sup>

There is no predicted termination date of the FHFA conservatorship.<sup>265</sup> Although the FHFA Director is authorized to terminate the conservatorship upon a determination that Fannie or Freddie has “returned to a safe and solvent condition,”<sup>266</sup> the FHFA has indicated that the conservatorship would remain in place for the foreseeable future.<sup>267</sup> Scholars agree that the FHFA conservatorship is not likely to end any time soon.<sup>268</sup>

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<sup>257</sup> *See id.*

<sup>258</sup> *See id.*

<sup>259</sup> *See id.*

<sup>260</sup> *See id.* The Stock Agreement was subsequently amended to raise the maximum aggregate amount of funding to the greater of \$200 billion, or \$200 billion plus the cumulative amount funded through December 2012 less any surplus. Second Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement, at 1–2 (Dec. 24, 2009), [http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-12-24\\_SPSPA\\_FannieMae\\_Amendment2\\_508.pdf](http://www.fhfa.gov/Conservatorship/Documents/Senior-Preferred-Stock-Agree/2009-12-24_SPSPA_FannieMae_Amendment2_508.pdf).

<sup>261</sup> *See U.S. Treasury Dep't Office of Public Affairs, supra note 256; Nelson, supra note 6, at 616.*

<sup>262</sup> *See Nelson, supra note 6, at 616.*

<sup>263</sup> *See U.S. Treasury Dep't Office of Public Affairs, supra note 256.*

<sup>264</sup> *See* FED. HOUS. FIN. AGENCY, REPORT TO CONGRESS: 2013, at 1 (2014).

<sup>265</sup> *See FAQs: Questions and Answers on Conservatorship*, FED. HOUS. FIN. AGENCY (Sept. 7, 2008) <http://www.fhfa.gov/Media/PublicAffairs/Pages/Fact-Sheet-Questions-and-Answers-on-Conservatorship.aspx> (“At present, there is no exact time frame that can be given as to when this conservatorship may end.”).

<sup>266</sup> *See* 12 C.F.R. § 1252 (2009), 2009 WL 210842.

<sup>267</sup> FED. HOUS. FIN. AGENCY, *A Strategic Plan For Enterprise Conservatorships: The Next Chapter in a Story that Needs an Ending*, in 2011 REPORT TO CONGRESS 111 (2012) (explaining that the FHFA expects to

#### IV. APPLICATION OF STATE ACTION ANALYSES TO FANNIE AND FREDDIE

This Part applies the state action analyses discussed in Part II to Fannie and Freddie. The inquiry is whether Fannie and Freddie must satisfy due process requirements when they initiate nonjudicial foreclosure. Section A applies the *Lebron* test to Fannie and Freddie to determine whether the entities are “part of the government.” Section B applies the entanglement analyses to determine whether nonjudicial foreclosures initiated by Fannie and Freddie are attributable to the state. Because Fannie and Freddie have become increasingly similar in structure and purpose and are regulated by the FHFA under nearly identical terms,<sup>269</sup> application of the foregoing analyses applies equally to both.

##### A. Applying the *Lebron* Test

*Lebron* articulated a two-prong test to determine if an entity is “part of the government”: government purpose and government control.<sup>270</sup> Application of the test must consider whether the government created Fannie and Freddie “for the furtherance of governmental objectives” and whether the government exercises sufficient control over the entities.<sup>271</sup>

##### 1. Government Purpose

Fannie and Freddie satisfied the first prong of the *Lebron* test well before the passage of HERA. Congress chartered the FNMA in 1938 and subsequently reconstituted Fannie as a government-sponsored entity in 1968.<sup>272</sup> Congress chartered the FHLMC in 1970 and reconstituted Freddie as a government-sponsored entity, much like Fannie, in 1989.<sup>273</sup> Both entities were created for the furtherance of governmental objectives, namely to strengthen the secondary mortgage market.<sup>274</sup> Indeed, scholars and courts

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continue its role as conservator “over the next few years”); Roisman, *supra* note 6, at 187, 187 n.318 (citing FHFA OIG 2013 Semiannual Report (stating there is “no near-term resolution in sight”)).

<sup>268</sup> See Nelson, *supra* note 6, at 616 (“[T]he federal government controls each entity for the foreseeable future.”); Roisman, *supra* note 6, at 186–87 (explaining that federal control over Fannie and Freddie is “permanent” in the sense that it will “continue into the indefinite future”).

<sup>269</sup> See *supra* notes 256–59.

<sup>270</sup> See *supra* note 76.

<sup>271</sup> *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

<sup>272</sup> 12 U.S.C. § 1716, 1716(b); see *supra* note 202.

<sup>273</sup> See *supra* note 210.

<sup>274</sup> NELSON ET AL., *supra* note 5, at 691.

agreed that, even pre-conservatorship, Fannie and Freddie satisfied the first prong.<sup>275</sup>

## 2. Government Control

Whether Fannie and Freddie satisfy the second prong is less clear. Pre-conservatorship, courts acknowledged that the government exercised control over the entities but concluded that such control fell short of the *Lebron* requirement. For example, in *American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, the Ninth Circuit Court of Appeals held that Freddie failed the government control prong because the “governance structure of Freddie Mac affords the government far less control over that corporation’s operations than it had over Amtrak’s operations in *Lebron*.”<sup>276</sup> Even pre-*Lebron*, the Sixth Circuit Court of Appeals concluded that government regulation of Fannie was not sufficient to implicate state action.<sup>277</sup>

Pre-conservatorship, the regulatory power exercised by the Secretary of HUD and OHFEO over the entities fell short of government control over Amtrak in *Lebron*: both Fannie and Freddie were privately owned; their common stock was publicly traded; and the government appointed fewer than one-third of the entities’ directors.<sup>278</sup> In contrast, eight of Amtrak’s nine directors were appointed directly by the President, and the government held all of Amtrak’s preferred stock and subsidized its perennial losses.<sup>279</sup> This analysis, however, “may very well have been rendered obsolete”<sup>280</sup> by imposition of the FHFA conservatorship.

Post-conservatorship, regulatory and financial control exercised by the FHFA over Fannie and Freddie exceeds that evinced in *Lebron*. In *Lebron*, the Court found indicative of government regulatory control that the President appoints a majority of Amtrak’s board.<sup>281</sup> As conservator, one of FHFA’s first

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<sup>275</sup> See *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Ass’n*, 75 F.3d 1401, 1407 (9th Cir. 1996); *Northrip v. Fed. Nat’l Mortg. Ass’n*, 527 F.2d 23, 30 (6th Cir. 1975); Daniel E. Blegen, *The Constitutionality of Power of Sale Foreclosures by Federal Government Entities*, 62 MO. L. REV. 425, 445 (1997) (“Both [Fannie and Freddie] satisfy the first prong of [*Lebron*], because they were both formed by the government to further governmental objectives.”); Roisman, *supra* note 6, at 179, 179 n.273 (“Fannie and Freddie pre-conservatorship were held to have satisfied the government purpose prong of *Lebron*.”).

<sup>276</sup> 75 F.3d at 1408.

<sup>277</sup> *Northrip*, 527 F.2d at 32 (analogizing Fannie to the public utility in *Jackson*).

<sup>278</sup> Blegen, *supra* note 275, at 441.

<sup>279</sup> *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 385 (1995).

<sup>280</sup> NELSON ET AL., *supra* note 5, at 691.

<sup>281</sup> *Lebron*, 513 U.S. at 397–99.

actions was to “fundamentally change[] . . . [the entities’] management and governance practices by appointing new CEOs, nonexecutive chairmen, and boards of directors to both Enterprises.”<sup>282</sup> What’s more, the FHFA wields the whole power of Fannie’s and Freddie’s board.<sup>283</sup> Thus, regardless of how the board is appointed in the future, the FHFA calls the shots: the FHFA has issued to the boards of both entities specific directives to reduce their risk profiles;<sup>284</sup> prioritize foreclosure prevention operations;<sup>285</sup> alter single-family guarantee charges;<sup>286</sup> consolidate sale programs,<sup>287</sup> and reduce multifamily business volume.<sup>288</sup> The FHFA’s authority to micromanage the activities of the entities demonstrates more government control than with Amtrak, where the President could appoint a majority of directors but lacked authority to subsequently direct the corporation’s affairs.

Further, the FHFA has assumed extensive financial control over Fannie and Freddie. The *Lebron* Court found persuasive that the government held all Amtrak’s preferred stock in exchange for subsidizing Amtrak’s perennial losses.<sup>289</sup> Similarly, the SPSPA executed between the Treasury and entities effectively subsidizes the entities’ perennial losses; to date, the entities have received over \$187.5 billion in taxpayer support.<sup>290</sup> In exchange for such massive monetary infusions, Fannie and Freddie issued to the Treasury \$200 billion in senior preferred stock with a 10% coupon and, more importantly, warrants for the purchase of common stock of each entity for a few cents per share.<sup>291</sup> If exercised, “the federal government [would] receive a 79.9% ownership stake in each corporation.”<sup>292</sup> Thus, the SPSPA demonstrates the same kind of financial control found dispositive in *Lebron*. Until a surprising development of case law, scholars agreed that the FHFA conservatorship satisfied both prongs of the *Lebron* test.<sup>293</sup>

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<sup>282</sup> Roisman, *supra* note 6, at 135 (citing Conservatorship and Receivership, 76 Fed. Reg. 35724-01 (June 6, 2011) (codified as amended 12 C.F.R. pts. 1229, 1237)).

<sup>283</sup> Nelson, *supra* note 6, at 616.

<sup>284</sup> FED. HOUS. FIN. AGENCY, REPORT TO CONGRESS: 2013, at 8 (2014).

<sup>285</sup> FED. HOUS. FIN. AGENCY, REPORT TO CONGRESS: 2012, at 70 (2013).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 14. For a fuller discussion of FHFA control over the entities, see Roisman, *supra* note 6, 179–80.

<sup>289</sup> *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 385 (1995).

<sup>290</sup> FED. HOUS. FIN. AGENCY, REPORT TO CONGRESS: 2013, at 1 (2014).

<sup>291</sup> Nelson, *supra* note 6, at 616.

<sup>292</sup> *Id.*; see *U.S. Treasury Dep’t Office of Public Affairs*, *supra* note 256.

<sup>293</sup> Nelson, *supra* note 6, at 616; ALEXANDER ET AL., *supra* note 6, § 13.2(b).

### 3. *An Unexpected Outcome: Herron v. Fannie Mae*

The District Court for the District of Columbia departed from the expected outcome in *Herron v. Fannie Mae*.<sup>294</sup> In *Herron*, a former employee of Fannie alleged that termination of her employment violated the First Amendment.<sup>295</sup> Herron argued that imposition of the FHFA conservatorship transformed Fannie into a state actor because the government exercises absolute regulatory and financial control over Fannie for an indefinite amount of time.<sup>296</sup> The court applied the *Lebron* test to determine whether Fannie was a federal actor and held that the second prong was not satisfied because the FHFA conservatorship was not permanent.<sup>297</sup>

The court examined, in some detail, the extent of regulatory and financial control exercised by the FHFA over Fannie.<sup>298</sup> Despite finding extensive government control, the *Herron* court held that Fannie was not a federal actor because, “under the *Lebron* framework, *permanent* government control is required.”<sup>299</sup> In so doing, the *Herron* court distinguished itself as the first to read “permanent control” as dispositive, rather than merely probative, of government control sufficient to render a corporation “part of the government.”<sup>300</sup> Although the court conceded the FHFA retained *indefinite* control over Fannie, such control fell short of the permanence requirement.<sup>301</sup>

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<sup>294</sup> 857 F. Supp. 2d 87 (D.D.C. 2012).

<sup>295</sup> *Id.* at 88.

<sup>296</sup> *Id.* at 95.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 90.

[A]s conservator, FHFA is empowered to ‘(i) take over assets of and operation of [Fannie] with all the powers of the shareholders, the directors, and the officers of the regulated entity and conduct all business of the regulated entity; (ii) collect all obligations and money due [Fannie]; (iii) perform all functions of [Fannie] in the name of [Fannie] which are consistent with the appointment as conservator or receiver; (iv) preserve and conserve the assets and property of [Fannie]; and (v) provide by contract for assistance in fulfilling any function, activity, action or duty of the Agency as conservator.’ Stip. ¶ 52 (quoting 12 U.S.C. § 4617(b)(2)(B)). FHFA as conservator reconstituted Fannie Mae’s Board of Directors, who now serve on behalf of FHFA.

*Id.*

<sup>299</sup> *Id.* at 95 (emphasis added).

<sup>300</sup> Memorandum from Christopher Pottratz to Florence Roisman on “Permanence cases” (Oct. 1, 2012) (on file with author) (explaining that, of the 225 cases that cited to *Lebron* at the time *Herron* was decided, *Herron* was the only case to discuss a requirement of permanence). Permanence of control was not considered at all in *American Bankers Mortgage Corp.*, 75 F.3d 1401 (9th Cir. 1996). In that case, the Ninth Circuit distilled from *Lebron* “two relevant criteria for judging Freddie Mac’s status as a federal entity”: “the extent to which its objectives are governmental and the extent to which the government directs and controls the corporation’s pursuit of those objectives.” *Id.* at 1406. The Ninth Circuit concluded that pre-conservatorship

It is far from clear that *Lebron* requires government control to be literally permanent.<sup>302</sup> The *Lebron* Court found the government control prong satisfied where the government “retains for itself permanent authority to appoint a majority of the directors” of Amtrak.<sup>303</sup> The *Herron* court effectively inserts the word “only” into the holding of *Lebron*, making each factor indispensable. But the *Lebron* Court did not explicitly mandate that state action could only be found where the government retains permanent control to appoint more than 50% of a corporation’s directors; indefinite authority to appoint 100% of a corporation’s directors might have sufficed. The *Herron* court did not acknowledge the plausibility of such a reading.

The *Herron* court’s treatment of *Lebron* has attracted scholarly criticism.<sup>304</sup> Professor Roisman argues, “The word [permanence] should not be used as a shibboleth to immunize FHFA from responsibility for compliance with the Constitution.”<sup>305</sup> This argument is in keeping with the theme of *Lebron*, where the Court admonished “[i]t surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.”<sup>306</sup> Although *Herron* defied scholarly predictions and applied a questionable formulation of the *Lebron* test, some lower courts and the Sixth Circuit Court of Appeals have followed *Herron* without scrutinizing the merits of the permanence requirement.<sup>307</sup>

The Sixth Circuit Court of Appeals decision is the most intriguing. In *Mik v. Federal Home Loan Mortgage Corp.*, the court used only one paragraph to determine that Freddie is not a government actor.<sup>308</sup> The court cited two

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Freddie was not a government actor because “the government does not control the operation of Freddie Mac through its appointees.” *Id.* at 1406–09. Considering that the FHFA replaced Freddie’s board of directors and currently micromanages its affairs, Freddie would likely be a state actor under the court’s reasoning.

<sup>301</sup> *Herron*, 857 F. Supp. 2d at 95.

<sup>302</sup> See *supra* Part II.B.

<sup>303</sup> *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995).

<sup>304</sup> See Roisman, *supra* note 6, at 179 (“[If] the Lebron standard were applicable here, it was satisfied. *Herron* and the courts following it were wrong in holding otherwise.”); Eugene Volokh, *Fannie Mae Is Not a Government Actor for Constitutional Purposes, Despite Federal Takeover*, VOLOKH CONSPIRACY (May 1, 2012, 3:02 PM), <http://volokh.com/2012/05/01/fannie-mae-is-not-a-government-actor-for-constitutional-purposes-despite-federal-takeover/> (“I’m not sure [*Herron*] is right. The government is in some measure bound by the First Amendment . . . even when it’s running entities that could be run privately . . . nor do I see a difference between temporary control by the government and permanent control.”).

<sup>305</sup> Roisman, *supra* note 6, at 185.

<sup>306</sup> *Lebron*, 513 U.S. at 397.

<sup>307</sup> See *supra* note 15.

<sup>308</sup> 743 F.3d 149, 168 (6th Cir. 2014).

cases.<sup>309</sup> The first, *American Bankers Mortgage Corp.*,<sup>310</sup> was decided pre-conservatorship and did not consider permanence a requirement of government control.<sup>311</sup> The second, *Syriani v. Freddie Mac Multiclass Certificates*, relied entirely upon the permanence requirement espoused in *Herron*.<sup>312</sup> The *Mik* court's reasoning, however thin, enjoys stare decisis in lower courts within the Sixth Circuit.<sup>313</sup>

Until another court provides an independent analysis<sup>314</sup> of *Herron*'s reasoning and recognizes how it distorts *Lebron*, Fannie and Freddie are not likely to be found governmental actors by that test. Even if such an independent analysis does not occur, however, failure of the *Lebron* test does not foreclose finding Fannie and Freddie to be state actors—at least two alternatives remain. First, the FHFA is almost certainly a governmental actor; it is an independent federal agency purely within the Executive branch.<sup>315</sup> A court might decide that Fannie and Freddie are indistinguishable from the FHFA, in which case the entities might be state actors in a derivative sense.<sup>316</sup> Alternatively, and as considered below, the entities might be state actors under an entanglement test.

### B. Applying the Entanglement Analyses

Even if Fannie and Freddie are determined to be private actors under *Lebron*, their conduct may be fairly attributable to the state and thus subject to constitutional constraints.<sup>317</sup> Failure or satisfaction of a particular state action

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<sup>309</sup> *Id.*

<sup>310</sup> *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1406–09 (9th Cir. 1996).

<sup>311</sup> *See supra* note 300.

<sup>312</sup> 2012 WL 6200251, at \*4 (C.D. Cal. July 10, 2012).

<sup>313</sup> The Sixth Circuit recently undermined *Mik*'s precedential value. Although the *Mik* court clearly concluded that Freddie is not a government actor, the Sixth Circuit has since wavered on that premise. *See Rush v. Mac*, No. 14-1476, 2015 WL 4069807, at \*5 (6th Cir. July 6, 2015) (“[E]ven if Freddie Mac is a government actor by reason of the conservatorship of the Federal Housing Finance Agency, its compliance with Michigan’s foreclosure-by-advertisement procedures satisfied the requirements of the Due Process Clause.”); *see also Garcia v. Fed. Nat’l Mortg. Ass’n*, 782 F.3d 736 (6th Cir. 2015).

<sup>314</sup> The Supreme Court encourages such an independent analysis in *Department of Transportation v. Ass’n of American Railroads*. 135 S. Ct. 1225 (2015); *see supra* note 87.

<sup>315</sup> 12 U.S.C. § 4511 (2006).

<sup>316</sup> *See Roisman, supra* note 6, at 175 (“FHFA is a federal agency; the foreclosures are effected by FHFA; therefore, the Fifth Amendment applies.”). The Sixth Circuit recently lent credibility to Roisman’s argument, noting, “We have not addressed the questions of whether the Federal Housing Finance Agency is a state actor and what restrictions the Due Process Clause may impose on the Agency in its direction of Fannie Mae. We find it unnecessary to wade into that discussion in this case.” *Garcia*, 782 F.3d at 740.

<sup>317</sup> The “sufficient nexus” test from *Jackson* is not independently applied in this section because the test is merely a reformulation of “fair attribution.” *See supra* discussion following note 141.

test is not dispositive because the entanglement inquiry is “necessarily fact-bound.”<sup>318</sup> Nonetheless, application of the tests reveals factors that can be considered in determining whether Fannie and Freddie must satisfy due process requirements when they initiate nonjudicial foreclosure.

### *1. Private-Public Symbiosis*

First, the Court in *Burton* provides that when the government and a private actor confer on each other extensive mutual benefits, symbiosis may indicate a “degree of state participation and involvement” sufficient to find state action.<sup>319</sup>

Even pre-conservatorship, the federal government, Fannie, and Freddie conferred some degree of benefits on one another. Pursuant to their charters, the entities furthered the governmental purpose of providing liquidity to the mortgage market by purchasing both government-insured and private mortgages.<sup>320</sup> In return, Fannie- and Freddie-issued MBSs enjoyed a perceived implicit guarantee on their obligations, allowing the entities to borrow at interest rates below that of private corporate competitors and to extend credit to financial institutions at favorable rates.<sup>321</sup> Congress did not formally abrogate liability until 2006.<sup>322</sup> In fact, the Treasury explicitly acknowledged that the government inflated investor confidence in the entities: “ambiguities in [Fannie’s and Freddie’s] [c]ongressional charters . . . fostered the enormous growth in GSE debt outstanding.”<sup>323</sup>

Post-conservatorship, symbiosis is more evident. At the time HERA was passed, the relationship between the entities and the government was more accurately described as parasitic; the government prepared itself to assume a massive financial and regulatory burden to avert economic catastrophe in the housing market. But once the FHFA placed Fannie and Freddie into conservatorship, the nature of the relationship changed. The SPSPA marked a tremendous monetary infusion—to date, \$187.5 billion—of taxpayer dollars to back obligations owed to the entities’ creditors and MBS holders.<sup>324</sup> In return, Fannie and Freddie issued the Treasury \$200 billion of preferred senior stock

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<sup>318</sup> See *supra* note 174.

<sup>319</sup> *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

<sup>320</sup> See *supra* note 212.

<sup>321</sup> *Government-Sponsored Enterprises*, *supra* note 221, at 925.

<sup>322</sup> 12 U.S.C. § 4503 (2012).

<sup>323</sup> *U.S. Treasury Dep’t Office of Public Affairs*, *supra* note 256.

<sup>324</sup> FED. HOUS. FIN. AGENCY, REPORT TO CONGRESS: 2013, at 1 (2014).

with a 10% coupon,<sup>325</sup> in addition to warrants for the purchase of common stock at a few cents per share which, if exercised, would give the federal government a 79.9% ownership stake in each corporation.<sup>326</sup> The Treasury recoups cumulative cash dividends from the entities that, under the terms of the SPSPA, do not offset or pay down prior draws from the Treasury.<sup>327</sup> In short, without intervention by the federal government, Fannie and Freddie would likely have collapsed; without cash dividends and stock sales from the entities, the federal government would not likely recover its investment.

Put simply, the federal government created the entities by statute and resurrected the entities by subsequent statutory conservatorship. But for the financial and regulatory assistance of the federal government, Fannie- and Freddie-initiated foreclosures could not occur. Although the applicability of *Burton* to cases outside the context of race discrimination is uncertain,<sup>328</sup> the Court is “most likely to find state action based on entanglement if it can be shown that . . . the government is facilitating private conduct that otherwise would not occur.”<sup>329</sup> On balance, the symbiosis analysis suggests a degree of state participation and involvement that requires Fannie and Freddie to satisfy due process requirements when they initiate nonjudicial foreclosures.

## 2. Government Encouragement

Second, the Court held in *Moose Lodge* and *Jackson* that extensive government regulation of a private entity does not impute state action unless it can be said to “foster or encourage” the constitutional deprivation.<sup>330</sup> State action was not established in either case because the state did not play an active role in the alleged unconstitutional deprivation. In *Moose Lodge*, the Court found the Liquor Authority played “absolutely no part in establishing or enforcing the membership or guest policies of the club” that excluded the appellant on racial grounds,<sup>331</sup> in *Jackson*, the Utility Commission approved

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<sup>325</sup> Nelson, *supra* note 6, at 616.

<sup>326</sup> *Id.* (citing U.S. Dep’t of Treasury, Fed. Hous. Fin. Agency, Fact Sheet: Treasury Senior Preferred Stock Purchase Agreement (Sept. 7, 2008), [http://www.treasury.gov/press-center/press-releases/Documents/pspa\\_factsheet\\_090708%20hp1128.pdf](http://www.treasury.gov/press-center/press-releases/Documents/pspa_factsheet_090708%20hp1128.pdf)).

<sup>327</sup> FED. HOUS. FIN. AGENCY, REPORT TO CONGRESS: 2013, at iii (2014).

<sup>328</sup> See *supra* note 66.

<sup>329</sup> CHEMERINSKY, *supra* note 48, at 551.

<sup>330</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 358 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176–77 (1972).

<sup>331</sup> *Moose Lodge*, 407 U.S. at 175.

the utility's termination provision but "[did] not put its own weight on the side of the proposed practice by ordering it."<sup>332</sup>

In *Northrip v. Federal National Mortgage Ass'n*, pre-conservatorship and pre-*Lebron*, the Sixth Circuit Court of Appeals held that Fannie was analogous to the public utility in *Jackson* and thus not a state actor.<sup>333</sup> The Sixth Circuit assessed the degree of government regulation over Fannie, analyzing the composition and appointment of members of the board of directors, the supervisory and regulatory power exercised by the HUD, the public availability of Fannie's shares, and Fannie's ability to borrow from the U.S. Treasury.<sup>334</sup> Despite extensive regulation by the federal government, the court concluded that state action was not implicated.<sup>335</sup> Further, the court noted that the privatization of Fannie<sup>336</sup> evinced congressional intent to dissociate itself from Fannie's operations "because it was not appropriate for the government to be involved in the operation of a secondary mortgage market."<sup>337</sup>

Every indicium of government control that the Sixth Circuit found lacking in *Northrip* has been dramatically altered under the conservatorship. At the time *Northrip* was decided, the government appointed one-third of Fannie's board,<sup>338</sup> since then, the FHFA appointed new CEOs, nonexecutive chairmen, and boards of directors to Fannie, all of whom now report directly to the FHFA.<sup>339</sup> The Secretary of HUD had authority to require that a portion of Fannie's mortgage purchases promote housing "for low and moderate income families, but with reasonable economic return to the corporation";<sup>340</sup> the FHFA currently has "broad authority" to regulate and control almost every aspect of Fannie's operations.<sup>341</sup> The Secretary of Treasury "also ha[d] some control over FNMA in relation to the issuance of debt securities and borrowing";<sup>342</sup> under the SPSPA, the Treasury committed \$200 billion to back the obligations of the entities.<sup>343</sup> Likewise, congressional intent to dissociate the government from the secondary mortgage market was undone by virtue of the FHFA

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<sup>332</sup> *Jackson*, 419 U.S. at 357.

<sup>333</sup> 527 F.2d 23, 31–32 (6th Cir. 1975).

<sup>334</sup> *Id.* at 30–32.

<sup>335</sup> *Id.* at 33.

<sup>336</sup> *See supra* note 203.

<sup>337</sup> *Northrip*, 527 F.2d at 32.

<sup>338</sup> *Id.*

<sup>339</sup> *See supra* note 282.

<sup>340</sup> *Northrip*, 527 F.2d at 30.

<sup>341</sup> DiVenti, *supra* note 246, at 232; *see* 12 U.S.C. § 4513(a)(1)(B) (2012); *supra* notes 282–91.

<sup>342</sup> *Northrip*, 527 F.2d at 30–31.

<sup>343</sup> *See U.S. Treasury Dep't Office of Public Affairs*, *supra* note 256; *supra* note 291.

conservatorship, which effectively deprivatized Fannie and Freddie.<sup>344</sup> In short, *Northrip* would come out differently today.

The *Northrip* analysis speaks to the relationship between the government and Fannie without respect to the particular act of nonjudicial foreclosure.<sup>345</sup> Under the *Moose Lodge* and *Jackson* standard, even pervasive government regulation of a private actor falls short of state action where the regulation cannot be said to foster or encourage the particular deprivation.<sup>346</sup> However, the FHFA does more than merely regulate Fannie and Freddie.<sup>347</sup> Unlike the Liquor Authority in *Moose Lodge* or the Utility Commission in *Jackson*, the FHFA plays an active role in effecting a constitutional deprivation.<sup>348</sup> Thus, the government fosters and encourages nonjudicial foreclosures initiated by Fannie and Freddie because the FHFA has the power to decide what form of foreclosure the entities shall follow.

### 3. Joint Participation

Third, *Lugar* provided a two-part test for determining state action: first, “the deprivation must be caused by the exercise of some right or privilege created by the State”; second, “the party charged with the deprivation must be a person who may be fairly said to be a state actor. . . . [either] because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.”<sup>349</sup>

The first prong is satisfied when Fannie and Freddie initiate nonjudicial foreclosures because power of sale foreclosure is a right created by the state.<sup>350</sup> But, consistent with *Lugar*, courts and scholars maintain that legislative authorization of nonjudicial foreclosure, without more, does not constitute sufficient state action to trigger due process requirements.<sup>351</sup> It is uncertain

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<sup>344</sup> See *supra* note 340.

<sup>345</sup> See *supra* note 334. The *Northrip* analysis is more akin to that of *Brentwood*, where “pervasive entwinement of public institutions and public officials” can compel attribution of private conduct to the state, even if government involvement does not foster or encourage the conduct. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001).

<sup>346</sup> See *supra* note 331.

<sup>347</sup> See *supra* note 255.

<sup>348</sup> Roisman, *supra* note 6, at 176–82.

<sup>349</sup> *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

<sup>350</sup> See *supra* note 50.

<sup>351</sup> See Alexander, *supra* note 51, at 367; see also ALEXANDER ET AL., *supra* note 6, § 13.2 (“Thus far, each court which has reviewed Georgia power of sale foreclosures initiated by nongovernmental entities has

why a constitutionally deficient process endorsed by a state legislature is not fairly attributable to the state absent further involvement by a state official. Indeed, the risk of erroneous deprivations seems greater where a statute permits a private individual to resort to self-help rather than requiring the assistance of a state official. Nonetheless, nonjudicial foreclosures initiated by Fannie and Freddie would not satisfy the *Lugar* test unless (1) the entities “may fairly be said to be . . . state actor[s],” or (2) the entities have “acted together with or . . . obtained significant aid from state officials.”<sup>352</sup> The first option raises the core question. The second option is viable in two scenarios.

First, Fannie and Freddie “obtain[] significant aid from state officials” when a state power of sale statute requires the participation of a state actor. Minnesota, for example, requires that a sheriff conduct the foreclosure sale.<sup>353</sup> Indeed, the Court found state action in *Lugar* but not in *Flagg Bros.*; the distinguishing fact was that prejudgment attachment in *Lugar* required execution by a county sheriff.<sup>354</sup> Such official involvement was absent in *Flagg Bros.*, where the state statute provided for self-help.<sup>355</sup> Although some courts have held that a sheriff’s role in the foreclosure sale is too incidental to constitute state action,<sup>356</sup> a plain reading of *Lugar* demands that Fannie and Freddie satisfy due process requirements when they initiate nonjudicial power of sale foreclosures in states requiring the involvement of a sheriff at the foreclosure sale.

Second, Fannie and Freddie “act[] together with . . . state officials” because the FHFA—a federal agency—controls the entities’ operations.<sup>357</sup> Further, the entities “obtain[ed] significant aid from state officials” in the form of Treasury funding.<sup>358</sup> Thus, application of the *Lugar* test suggests that Fannie and Freddie must satisfy due process requirements when they initiate nonjudicial foreclosures, regardless whether the state statute requires the involvement of a sheriff at the foreclosure sale.

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concluded that state action is missing. These decisions have rejected both facial attacks on power of sale foreclosures, as well as arguments that . . . statutory prescription of foreclosure procedures . . . give rise to state action when viewed as involvement in the private remedy.”)

<sup>352</sup> *Lugar*, 457 U.S. at 937.

<sup>353</sup> MINN. STAT. ANN. § 580.06 (West 2015).

<sup>354</sup> *Lugar*, 457 U.S. at 927, 941.

<sup>355</sup> *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978).

<sup>356</sup> See NELSON & WHITMAN, *supra* note 8, § 7.27, at 688 (5th ed. 2007); Kathleen Barry, Comment, *The Constitutionality of Maine’s Real Estate Foreclosure Statutes*, 32 ME. L. REV. 147, 158 (1980).

<sup>357</sup> See *supra* text accompanying notes 253–55 (discussing the extent to which the FHFA controls the entities).

<sup>358</sup> *Lugar*, 457 U.S. at 937; see *supra* note 232.

#### 4. *Entwinement*

Fourth, and most importantly, *Brentwood* makes plausible that private conduct could be fairly attributable to the state absent government authorization, encouragement, or facilitation of the constitutional violation. Unlike the encouragement or sufficient nexus test, the entwinement analysis focuses on the relationship between the government and the private *actor*, rather than the private *action*.<sup>359</sup> In *Brentwood*, the Court searched for both “bottom-up” and “top-down” entwinement.<sup>360</sup> Both kinds of entwinement are present with respect to the FHFA conservatorship of Fannie and Freddie.

In *Brentwood*, the Court found “bottom-up” entwinement where government actors appointed a majority of TSSAA legislative council and board members;<sup>361</sup> the FHFA effectively appointed the entire boards of directors of both Fannie and Freddie at the onset of the conservatorship.<sup>362</sup> In *Brentwood*, TSSAA funding came from gate receipts at public school sporting events, allowing the TSSAA to “enjoy[] the schools’ moneymaking capacity as its own.”<sup>363</sup> Similarly, Fannie and Freddie have been kept solvent with infusions from the U.S. Treasury,<sup>364</sup> such that the entities enjoy the government’s moneymaking capacity as their own. The TSSAA would be unrecognizable without the membership and financial support of public officials, who “overwhelmingly perform all but the purely ministerial acts by which the Association exists.”<sup>365</sup> Similarly, Fannie and Freddie owe their very existence to their congressional charters and subsequent government intervention.<sup>366</sup>

The *Brentwood* Court, in its analysis of “top-down” entwinement, noted that State Board members serve as members of the legislative council and board, and that TSSAA employees are eligible for state retirement benefits.<sup>367</sup> The FHFA conservatorship evinces even stronger “top-down” entwinement with the entities. First, the Director of the FHFA controls all litigation

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<sup>359</sup> See *supra* discussion preceding note 186.

<sup>360</sup> See *Brentwood Acad. v. Tenn. Secondary School Athl. Ass’n*, 531 U.S. 288, 298–300 (2001); *supra* note 167.

<sup>361</sup> *Brentwood*, 531 U.S. at 298–99.

<sup>362</sup> See *supra* discussion preceding note 282.

<sup>363</sup> *Brentwood*, 531 U.S. at 299.

<sup>364</sup> See *supra* note 290.

<sup>365</sup> *Brentwood*, 531 U.S. at 300.

<sup>366</sup> See *supra* discussion preceding note 328.

<sup>367</sup> *Brentwood*, 531 U.S. at 300.

concerning Fannie and Freddie.<sup>368</sup> Second, the Director may limit the compensation of Fannie's and Freddie's executive officers to amounts reasonably comparable with analogous public institutions, and may withhold compensation entirely while it determines the reasonableness of compensation.<sup>369</sup> Third, the Director establishes regulatory standards relating to a variety of conduct: adequacy of internal audit systems; management of interest rate risk exposure; management of market risk; management of asset and investment portfolio growth; and "such other operational and management standards as the Director determines to be appropriate."<sup>370</sup> The FHFA accomplishes these goals through the issuance of directives to Fannie and Freddie.<sup>371</sup>

The entwinement analysis looks much like the government control prong of the *Lebron* test. The key, however, is that no plausible reading of *Brentwood* requires permanence. In *Brentwood*, the Court found persuasive that 84% of TSSAA members were public schools;<sup>372</sup> nowhere did the Court indicate that its finding of state action was contingent on public schools perpetually dominating TSSAA membership. Thus, the entwinement analysis avoids the permanence requirement articulated in *Herron*. Notably, the plaintiff in *Herron* argued that the government "is so entwined with Fannie Mae as to have created a public entity subject to constitutional restrictions."<sup>373</sup> The *Herron* court's analysis of the entwinement question consisted of three sentences:

*Brentwood* did not change the law of conservatorship and receivership. As described above, a conservator or receiver steps into the shoes of the private entity—it assumes the private status of the entity. Fannie Mae was a private entity; when FHFA took over as conservator of Fannie Mae, it stepped into Fannie Mae's private role.<sup>374</sup>

Roisman argues that the *Herron* court misunderstood the effect of conservatorship:

The case on which the *Herron* court relied for its "shoes" metaphor . . . .

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<sup>368</sup> 12 U.S.C. § 4513(c) (2012).

<sup>369</sup> 12 U.S.C. § 4518(a), (c) (2012).

<sup>370</sup> 12 U.S.C. § 4513(a) (2012).

<sup>371</sup> See *supra* notes 284–91.

<sup>372</sup> *Brentwood*, 531 U.S. at 298.

<sup>373</sup> *Herron v. Fannie Mae*, 857 F. Supp. 2d 87, 96 (D.D.C. 2012).

<sup>374</sup> *Id.* (citations omitted).

... does not stand for the proposition that when the FDIC—or any other federal entity—is a receiver, the federal entity becomes a private actor for all purposes. Quite to the contrary, Supreme Court decisions that describe the FDIC as stepping into the shoes of an insolvent entity hold that federal, not state, law controls in some situations and make clear that *constitutional claims always lie against the receiver*.<sup>375</sup>

No case citing *Herron* has considered the entwinement standard. Therefore, it is unlikely that the *Herron* court's conclusory treatment of the *Brentwood* analysis would enjoy the precedential effect of its *Lebron* analysis, even among lower courts within the Sixth Circuit. However, as noted in the *Brentwood* dissent, the entwinement test is considerably broader than previous state action analyses espoused by the Court.<sup>376</sup> Courts may be reluctant to extend the entwinement analysis in the context of Fannie and Freddie. And because state action is highly fact-intensive, even if the FHFA conservatorship of Fannie and Freddie evinces the level of entwinement found in *Brentwood*, the inquiry is not over. *Brentwood* provided that no one set of circumstances is “absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.”<sup>377</sup>

### C. *An Exception to State Action?*

Reluctance to find state action in the context of nonjudicial foreclosure might suggest an emerging exception to the state action doctrine. The Eighth Circuit Court of Appeals expressed an unwillingness to find state action in the context of nonjudicial foreclosure in *Warren v. Government National Mortgage Ass'n*.<sup>378</sup> The Eighth Circuit held that Ginnie was not a federal actor susceptible to due process claims.<sup>379</sup> The case has received sharp criticism, and rightfully so: Ginnie is wholly owned by the federal government, operates under federal government authority, and serves exclusively governmental purposes.<sup>380</sup> Analyzed under *Lebron*, Ginnie “is certain to be considered a federal actor for Fifth Amendment purposes, thereby invalidating *Warren*.”<sup>381</sup>

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<sup>375</sup> Roisman, *supra* note 6, at 189–90 (emphasis added).

<sup>376</sup> *Brentwood*, 531 U.S. at 305 (Thomas, J., dissenting).

<sup>377</sup> *Id.* at 295–96 (majority opinion).

<sup>378</sup> 611 F.2d 1229, 1235 (8th Cir. 1980).

<sup>379</sup> *Id.* at 1233.

<sup>380</sup> See *supra* notes 200–02.

<sup>381</sup> Blegen, *supra* note 275, at 445–46.

However, some scholars suggest that decisions like *Warren*, and perhaps *Herron*, are not a misapplication of state action tests, but rather an exception to the general doctrine. Professors Grant Nelson and Dale Whitman interpret the court as suggesting that even the United States can act in a proprietary or commercial, as opposed to governmental, fashion and that foreclosure of mortgages can be classified as proprietary or commercial activity.<sup>382</sup> Professor Frank Alexander has termed this argument the “market participant exception,”<sup>383</sup> familiar to the context of the Dormant Commerce Clause.<sup>384</sup>

The “countervailing interest” language from *Brentwood* could be used to effectively carve a “market participant” exception from the entwinement analysis. Such a reading could reconcile the holdings of *Warren* and *Herron* with those of *Lebron* and *Brentwood*. However, the “countervailing interest” should not be used to carve a market participant exception. The Court gave no indication in *Lebron* or, more recently, *Department of Transportation v. Ass’n of American Railroads*, that an important government interest may trump a finding of state action.<sup>385</sup> If, however, courts decide that government action in the secondary mortgage market is simply too important a function to require the strictures of due process, an explicit exception to the state action doctrine would be preferable to the misapplication of pre-existing state action tests.

#### CONCLUSION

The passage of HERA and placement of Fannie and Freddie into FHFA conservatorship marked a dramatic corporate restructuring that raises constitutional questions. One such question is whether the conservatorship transformed Fannie and Freddie into state actors, such that the entities must satisfy due process requirements when they initiate nonjudicial foreclosures. The importance of this question is difficult to overstate. Thousands of homeowners have received constitutionally deficient notice and have been denied the opportunity for a hearing because many nonjudicial foreclosure statutes require mere notice by publication.

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<sup>382</sup> NELSON & WHITMAN, *supra* note 8, § 7.28, at 690.

<sup>383</sup> Alexander, *supra* note 51, at 362–64.

<sup>384</sup> See ROTUNDA & NOWAK, *supra* note 63, § 11.9, at 246–47 (discussing the market participant exception to the Dormant Commerce Clause).

<sup>385</sup> 135 S. Ct. 1225, 1232–33 (2015) (“[I]n its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution’s separation of powers provisions. And that exercise of governmental power *must be consistent with the design and requirements of the Constitution*, including those provisions relating to the separation of powers.” (emphasis added)).

Homeowners deserve more. The Constitution guarantees homeowners the right to notice, reasonably calculated to apprise them of an impending foreclosure, and an opportunity to be heard. However, the right to due process is without a remedy unless the foreclosing entity is a state actor. The good news for homeowners is that the plain language of *Lebron* and *Brentwood* suggests that Fannie and Freddie are state actors. The bad news is that cases like *Herron* and *Mik* have held otherwise. Courts in such cases have either misapplied precedent or created an implicit exception to the state action tests.

Consequently, courts can harmonize state action cases like *Lebron* and *Brentwood* with cases like *Herron* and *Mik* in two ways. The first—and doctrinally consistent—course of action would be to overrule cases like *Herron* and *Mik*. The second would be to create an explicit market participant exception for government action in the secondary mortgage market. Such an exception, while of cold comfort to homeowners, would at least reconcile an increasingly inconsistent body of law.

Although doctrinally aberrant, such an exception is not unreasonable. Determining that Fannie and Freddie are state actors would impose costly procedural hurdles on government-funded entities still recovering from financial collapse. Safeguarding the health of the secondary mortgage market is a legitimate government interest, but it is not without significant cost. Courts must consider whether homeowners' due process rights are too high a price to pay for protecting the secondary mortgage market. To eschew the question is to misapply precedent and confound an already conceptually muddy doctrine.

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