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Protecting Homeowners from Non-Judicial Foreclosure of Mortgages held by Fannie Mae and Freddie Mac

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PROTECTING HOMEOWNERS FROM NON-JUDICIAL FORECLOSURE OF MORTGAGES HELD BY FANNIE MAE AND FREDDIE MAC[*]

Florence Wagman Roisman[**]

> "His experience . . . had disabused him of any hope that the government would intercede to prevent rich corporations from doing bad things to poor people."
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> Michael Lewis, The Big Short: Inside the Doomsday Machine at 155 (2010) (writing about Steve Eisman)

Between 2008 and 2012, millions of homeowners in the United States lost their homes through foreclosure.[1] Millions more will lose their homes in the future: as of June 2012, there

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[*]Technically, what is foreclosed is the equity of redemption of a mortgage. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.5 at 577 (5th ed. 2007). Throughout this article, "mortgage" includes "deed of trust." See id. § 1.6.

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I dedicate this article to the memory of Ralph J. Temple, a brilliant advocate for civil rights and civil liberties whose crusade for justice could be halted only by his death.

[1]Editorial, *Still Depressed, After All These Years*, N.Y. Times, June 23, 2012, http://www.nytimes.com/2012/06/24/opinion/sunday/housing-still-depressed-after-all-these-

was a backlog of about two million loans in foreclosure and "[a]nother 11.1 million homeowners owe[d] more on their mortgages than their homes are worth . . . ."[2] Many of these foreclosures were and will be conducted on behalf of Fannie Mae ("Fannie") and Freddie Mac ("Freddie"), which own or guarantee more than half the mortgages in the United States.[3]

When Fannie and Freddie initiate foreclosures, they act not in their own names, but through "servicers," which usually are the originating lenders.[4] The servicers follow state law.[5] In about

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years.html (stating that five million homes had been lost to foreclosure in those years); *1.8 Million U.S. Properties with Foreclosure Filings in 2012*, RealtyTrac.com, http://www.realtytrac.com/content/foreclosure-market-report/2012-year-end-foreclosure-market-report-7547 (last visited June 14, 2013) (reporting 11,751,459 foreclosure filings on U.S. properties between 2008 and the end of 2012).

[2]*The State of the Nation's Housing 2012,* Joint Center for Housing Studies of Harvard University, 1 (June 14, 2012); *see also Still Depressed, After All These Years, supra* note 1 (stating that "another five million [foreclosures are] expected between now and 2015 . . . "); *The State of the Nation's Housing 2013*, Joint Center for Housing Studies of Harvard University 10 (June 26, 2013) (stating that 10.4 million homeowners were underwater through the fourth quarter of 2012).

[3]*The Present Condition and Future Status of Fannie Mae and Freddie Mac: Hearings before Subcomm. on Capital Markets of the of the H. Comm. on Financial Services*, 111th Cong. Sess. 1 (June 3, 2009) (statement of Hon. James B. Lockhart III, Director of Federal Housing Finance Agency (FHFA)); *see also* Fed. Hous. Fin. Agency, A Strategic Plan For Enterprise Conservatorship: The Next Chapter in a Story that Needs an Ending 14, 17 (2012), reprinted in Fed. Hous. Fin. Agency, 2011 Report to Congress 118, 121 (2012) [hereinafter The Next Chapter] and Fed. Hous. Fin. Agency, 2011 Report to Congress, 3 (2012) [hereinafter FHFA 2011 Report to Congress] (stating that Fannie and Freddie together purchase or guarantee "roughly three of every four mortgages originated" in the U.S.); *see also* Fed. Hous. Fin. Agency, 2012 Report to Congress 6 (2013) (stating that Fannie and Freddie guaranteed 77% of mortgages that originated in the U.S. in 2012).

The official names of "Fannie" and "Freddie" are, respectively, the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 11.3 at 932-933 (5th ed. 2007).

[4]Nelson & Whitman, *supra* note 3, § 11.3 at 932. A "servicer" is the entity that receives payments from a borrower, "including amounts for escrow accounts," and makes payments of principal, interest, or otherwise, with respect to amounts received from the borrower." Cranston-Gonzales National Affordable Housing (Servicer) Act, Pub. L. No. 101-625, 104 Stat. 4079 (1999) (codified as amended at 12 U.S.C. § 2605(i)(2) (2010)). *See* Nat'l Consumer Law Ctr., Foreclosures: Defenses, Workouts, and Mortgage Servicing § 8.2.1 (3d ed. 2010); Diane E.

forty per cent of the jurisdictions in the United States, state law requires judicial foreclosure – sale after a court action in equity.[6] In the other United States jurisdictions, however, the predominant method is non-judicial or power-of-sale foreclosure, which requires no participation by a court.[7]

Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L. Rev. 755, 765-768 (2011) (discussing the roles of servicers); Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, at 81, 90 (2011) (stating that "mortgage securitization effectively makes servicers principal-less agents" and that there is "an endemic principal-agent conflict between investors and servicers").

A "majority of the mortgage loan servicing is performed at the largest financial institutions," which generally are national banks supervised by the OCC. Dep't of the Treasury, Office of Inspector General, Audit Report OIG-12-054, Safety and Soundness: OCC's Supervision of National Bank's Foreclosure Practices 3 (May 31, 2012) (stating also at note 4 that data "from eight national banks and one thrift with the largest mortgage servicing portfolios represents 63 percent of all first-lien residential mortgages outstanding in the country").

[5]Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N. C. L. Rev. 293, 350 (1993); Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 Pepp. L. Rev. 583, 586 (2010).

[6]Nelson & Whitman, *supra* note 3, §§ 7.11 at 600-601, 7.12, 1.4 at 9.

[7]Nelson & Whitman, *supra* note 3, §§ 7.19 at 633, 1.4 at 9; *see* Frank Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 Rev. of Banking & Fin. L. 341, 350 (2011-12) (discussing the difficulty of categorizing some states as "judicial" or "nonjudicial" and providing a list "deliberately . . . more inclusive in favor of the nonjudicial category," showing 33 states and the District of Columbia); for other totals, *see* J. Michael Collins, Ken Lam, & Christopher E. Herbert, *State Mortgage Foreclosure Policies & Lender Interventions: Impacts on Borrower Behavior in Default*, 30 J. of Policy Analysis & Management 216, 222 (2011) (chart showing 20-22 states in which judicial foreclosure is the exclusive or dominant method); R. Wilson Freyermuth, *Foreclosure by Arbitration?*, 37 Pepp. L. Rev. 459, 465 (2010) (identifying thirty-one states and the District of Columbia as jurisdictions permitting non-judicial foreclosure, but showing that authority limited in various ways (e.g., for deeds of trust only, for mortgages only, or, as in Maine, only where premises are held for "business, commercial, or agricultural purpose")); Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 Me. L. Rev. 17, 19 and n.5; and Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 Emory Bankr. Dev. J. 139, 144 (2006) (stating that twenty-nine states have enacted statutes allowing power of sale foreclosure and that approximately half the states employ some form of nonjudicial foreclosure).

When government action is involved in a foreclosure, the constitutional due process requirements of the Fifth and Fourteenth Amendments must be satisfied.[8] When government action has been involved, many state statutes authorizing non-judicial foreclosure have been held to "violate the notice and hearing requirements contained in the due process clauses of the Fifth and Fourteenth Amendments . . . ."[9] Thus, if foreclosure of mortgages held by Fannie and Freddie is effected by a government actor, the foreclosing entity (and its agent, the servicer) cannot use non-judicial foreclosure processes that do not satisfy due process requirements.

Although Fannie originally was created as a federal agency, from 1968 (for Fannie) and 1970 (for Freddie), until September 7, 2008, Fannie and Freddie were partly private, partly public, "Government Sponsored Entities (GSEs)," and commentators and courts generally considered that Fannie and Freddie were not federal agencies for purposes of determining whether they might foreclose without satisfying due process requirements.[10] On September 7, 2008, however, Fannie and Freddie were placed in federal conservatorship, with a federal agency, the Federal Housing Finance Agency (FHFA), as the conservator.[11] Since September 7, 2008, the federal government has exercised total control over Fannie and Freddie: Fannie and Freddie are "effectively owned by the government; Treasury has guaranteed their debts and FHFA has all the powers of the management, board, and shareholders of the GSEs."[12] Until 2013, virtually all the money that supported Fannie and Freddie came from the U.S. Treasury and U.S. taxpayers.[13]

The thesis of this article is that, post-conservatorship, a homeowner faced with foreclosure on

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[8]U.S. Const., amend. V and XIV; Nelson & Whitman, *supra* note 3, §§ 7.24 at 671, 7.27, 7.28, 7.30.

[9]Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 610; *see id*. at 610-612 for a review of and citations to cases holding power of sale statutes unconstitutional for inadequate notice or opportunity for hearing.

[10]Nelson & Whitman, *supra* note 3, § 7.28 at 690-691; Northrip v. Fed. Nat'l Mortg. Ass'n, 527 F.2d 23 (6th Cir. 1975); *see infra* pp 30-32 .

[11]For a description of the status of Fannie and Freddie, *see infra* pp. – .

[12]Cong. Oversight Panel, *A Review of Treasury's Foreclosure Prevention Programs* 73 (Dec. 14, 2010).

[13] *Returning Private Capital to Mortgage Markets: A Fundamental For Housing Finance Reform: Before the S. Comm. on Banking, Housing, and Urban Affairs Subcomm. on Securities, Insurance, and Investment*, 113th Cong. (May 14, 2013) (statement of Phillip Swagel).

behalf of Fannie or Freddie is entitled to due process of law before losing her or his home.[14] This means that foreclosures on behalf of Fannie or Freddie may not employ non-judicial foreclosure procedures that do not satisfy due process requirements. This issue has important implications for homeowners because many foreclosures are initiated and conducted improperly, and in non-judicial foreclosure jurisdictions homeowners are at most risk of losing their homes through defective foreclosures, since they usually are not entitled to any hearing before foreclosure, and no court action is required before foreclosure.[15]

Parts I through III below provide background information necessary to address this issue. Part I discusses the status of Fannie, Freddie, and FHFA; Part II, the nature of foreclosure proceedings; and Part III, constitutional problems with regard to non-judicial foreclosure. Part IV reviews the law regarding federal action in foreclosure, including Fannie and Freddie pre-conservatorship; Part V addresses Fannie and Freddie post-conservatorship, discusses recent cases involving FHFA, and concludes that mortgages held by Fannie and Freddie cannot be

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[14]I make no claim to originality in advancing this thesis: experts preceded me. *See* Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 Pepp. L. Rev. 583 (2010); Frank S. Alexander, Georgia Real Estate Finance and Foreclosure Law, § 13.2(b) (3d ed. 2012), *available at* Westlaw [hereinafter Georgia Real Estate]; Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart, & R. Wilson Freyermuth, Real Estate Transfer, Finance, and Development 690-692 (8th ed. 2006). This article presents a different basis for the thesis and a response to recent decisions that take a contrary position.

[15]For discussions of "careless and, at times, fraudulent" conduct of foreclosures, *see, e.g.*, Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 Loyola Consumer L. Rev. 562, 564-7 (2012); Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The* Ibanez *Time Bomb?*, 4 Wm. & Mary Bus. L. Rev. 111, 119-131 (2013); Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 Me. L. Rev. 17, 19-22, 25-27 (2011) (discussing "false affidavits, reckless claims, and improper notarizations"); Consent decree, United States, et al v. Bank of America Corp., J.P. Morgan Chase & Co., Wells Fargo & Co., Citigroup Inc., and Ally Financial Inc., (Bankr. D.C. Cir. 2012) (No. 12-0361) available at http://www.justice.gov/opa/opa_mortgage-service.htm. With respect to the heavier burdens on homeowners in states that allow non-judicial foreclosure, *see* Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 Emory Bankr. Dev. J. 139 (2006).

Note also that the settlement among 49 state attorneys general, the U.S. Department of Justice, and major servicers does not apply to mortgages held by Fannie and Freddie. Consent decree, U.S. et al v. Bank of America Corp., *supra.*

foreclosed without satisfying due process standards.[16]

I. THE STATUS OF FANNIE, FREDDIE, AND FHFA.

Congress created Fannie Mae in 1938 as "the Federal National Mortgage Association (FNMA), wholly owned and administered by the federal government."[17] In 1954, Congress made FNMA a "'mixed ownership' corporation, owned partly by private shareholders."[18] In 1968, FNMA was divided into the Government National Mortgage Association (GNMA), "a pure federal agency," and Fannie Mae, "a privately owned and managed corporation, although with certain ties to the federal government . . . ."[19]

Congress created Freddie Mac in 1970; in 1989, in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), Congress "privatize[d]" Freddie to make it very much like Fannie.[20] Thus, from 1970 until September 7, 2008, Fannie and Freddie were

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[16]This article does not consider the alternative argument that even if FHFA, Fannie, and Freddie were not federal agencies, they might be required to satisfy due process standards if their actions were sufficiently associated with federal action. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001); Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982). It also does not consider alternative ways of foreclosing mortgages held by Fannie and Freddie. *See* Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at ; Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at .

[17]Nelson & Whitman, *supra* note 3, § 11.3 at 932.

[18] *Id.*

[19] *Id.* at 932-33

[20]*Id.* at 933-34; Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, § 731, 103 Stat. 430 (codified as amended at 12 U.S.C. §§ 1811 - 1833e). *See* Liberty Mortg. Banking, Ltd. v. Fed. Home Loan Mortg. Corp., 822 F. Supp. 956, 958 (E.D. N.Y. 1993) (reviewing the legislative history and stating that "[t]he legislative history of FIRREA suggests that the purpose of the 1989 amendments was to privatize the management and operations of Freddie Mac" in the way that Fannie had been privatized in 1968).

The principal difference between Fannie and Freddie was that, originally, Fannie purchased mortgages from banks and Freddie purchased mortgages from thrifts, but for many years Fannie and Freddie have competed with each other for all mortgage business. See Alan S. Blinder, After the Music Stopped: The Financial Crisis, the Response, and the Work Ahead 115 (2013); Ann Graham, *Introduction: Reforming the Secondary Mortgage Market*, 35 Hamline L. Rev. 327, 330 (2-11-12); Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage*

Government Sponsored Entities (GSEs), operating under combinations of private ownership, public and private board management, and federal regulatory supervision.[21]

The primary activity of Fannie and Freddie is to purchase mortgage loans so that loan originators have more capital with which to make more mortgage loans.[22] They hold some of these mortgages in their portfolios, but "most mortgages are placed in mortgage pools to support MBS [mortgage-backed securities]."[23] MBS issued by Fannie and Freddie may be held by those entities or sold to investors; Fannie and Freddie "guarantee the timely payment of interest and principal on MBS that they issue."[24]

In order to raise the "huge amounts of capital [required] to finance their mortgage purchasing operations," Fannie and Freddie were authorized to issue stock, bonds, [and] notes" as well as

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Instruments: The Forgotten Benefit to Homeowners, 72 Mo. L. Rev. 1077, 1081 (2007).

[21] Nelson &Whitman, *supra* note 3, at 933-34.

[22]*Government Sponsored Enterprises: A Framework for Strengthening GSE Governance and Oversight*: *Before the S. Comm. on Banking, Housing, and Urban Affairs*, 108th Cong. (2004) (statement of David M. Walker, Comptroller General of the United States), also found at U.S. Gov't Accountability Office, GAO-04-269T 4 [hereinafter *Walker Statement*]. Excerpts from the *Walker Statement* are reproduced in Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 923-927. For fuller discussions of Fannie and Freddie, *see*, Ingrid Gould Ellen, John Napier Tye, & Mark A. Willis, *The Secondary Market for Housing Finance in the United States: A Brief Overview*, *in* The American Mortgage System: Crisis and Reform 7 (Susan M. Wachter & Marvin M. Smith eds. 2011); Andrea J. Boyack, *Laudable Goals and Unintended Consequences: The Role and Control of Fannie Mae and Freddie Mac*, 60 Am. U. L. Rev. 1489 (2011); Robin Paul Malloy, *The Secondary Mortgage Market – A Catalyst for Change in Real Estate Transactions*, 39 Sw. L. J. 991 (1986); Nelson & Whitman, *supra* note 3, at 933-935 (describing the variety of government objectives Fannie and Freddie were to advance).

[23]*Walker Statement*, *supra* note 22, at 4-5, reprinted in Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 924.

[24]*Walker Statement*, *supra* note 22, at 5, reprinted in Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 924; *see also* Fed. Hous. Fin. Agency, Office of Inspector Gen., WPR-2012-02, Fannie Mae and Freddie Mac: Where the Taxpayers' Money Went 7 (2012) (describing these functions and noting that the Enterprises charge a fee for the guarantee) [hereinafter FHFA OIG, Taxpayers' Money].

mortgage-backed securities.[25] Although their debt was "not technically a full-faith-and-credit liability of the United States government, the capital markets . . . assume[d] that the government would remedy any default, and the instruments command[ed] interest rates nearly as low as direct government agency debt."[26]

It long had been recognized that Fannie and Freddie posed substantial systemic risks to the U.S. and international financial systems.[27] By 2008, in the crisis that afflicted the U.S. mortgage market generally, Fannie and Freddie were in serious trouble; by July, "[t]he press and investors in the U.S. and around the world were losing confidence in Fannie's and Freddie's viability."[28] (Combined, they lost more than $108 billion in that year.[29]) Treasury Secretary Henry Paulson

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[25]Nelson & Whitman, *supra* note 3, at 934-35.

[26] Nelson & Whitman, *supra* note 3, at 934-35; *Walker Statement*, *supra* note 22, at 6, reprinted in Nelson, Whitman, Burkhart, & Whitman, *supra* note 22, at 925; Ellen, Tye, & Willis, *The Secondary Market for Housing Finance in the United States*, in The American Mortgage System, *supra* note 22, at 9.

[27]*See* N. Eric Weiss et al., Cong. Research Serv. RL 34623, Housing and Economic Reform Act of 2008 1 (stating that "In recent years, Fannie Mae and Freddie Mac . . . have faced a series of accounting and financial problems"); *Walker Statement, supra* note 22, at 6, reprinted in Nelson, Whitman, Burkhart, & Whitman, *supra* note 22, at 925; Henry M. Paulson, Jr., On the Brink: Inside the Race to Stop the Collapse of the Global Financial System 55 (2010) (stating, with respect to 2006, when he became Secretary of the Treasury, that "the administration and the Fed had warned for years about the dangers these companies posed, and it didn't take a genius to see that something had to be done"); *id.* at 438 (stating that "[m]any had warned for years of impending calamity at Fannie Mae and Freddie Mac, but only when those institutions faced outright collapse did lawmakers enact reforms"); Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report 309-31 (Jan. 2011) (quoting former OFHEO Director James Lockhart as testifying that "From the fall of 2007, to the conservatorships, it was a tightrope with no safety net . . .").

[28]Paulson, *supra* note 27, at 142 *et seq*.; Fin. Crisis Inquiry Comm'n, *supra* note 27, at 311-14.

[29]Cong. Oversight Panel, 111th Cong., December 2010 Oversight Report: A Review of Treasury's Foreclosure Prevention Programs 73; Paulson, *supra* note 27, at 147 (stating that Fannie and Freddie "lost almost half of their value" in one week in July 2008).

proposed asking Congress "for emergency powers on the GSEs."[30] "[M]any in Congress . . . conclude[d] that Fannie . . . [and] Freddie . . .need[ed] a stronger regulator."[31]

On July 30, 2008, Congress passed the Housing and Economic Recovery Act of 2008 (HERA).[32] HERA established a new entity, the Federal Housing Finance Agency (FHFA), with "broad authority to regulate" Fannie and Freddie.[33] The Director of FHFA was given "general regulatory authority over" Fannie and Freddie (as well as the Federal Home Loan Banks and the Office of Finance)[34] and was directed to ensure, among other things, that Fannie and Freddie operate "in a safe and sound manner"; "foster liquid, efficient competitive, and resilient national housing finance markets"; comply "with this chapter and the rules, regulations, guidelines, and orders issued under this chapter and the authorizing statutes"; carry out their "statutory mission[s] only through activities that are authorized under and consistent with this chapter and the authorizing statutes"; and assure that "the activities of each regulated entity and the manner in which such regulated entity is operated are consistent with the public interest."[35] The Director also was authorized "to appoint the Agency [FHFA] as conservator or receiver for Fannie and Freddie,[36] although it was required to consult with the Chairman of the Board of Governors of the

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[30]Paulson, *supra* note 27, at 143; *see id.* at 144 (stating that President Bush "said it was unthinkable to let Fannie and Freddie fail – they would take down the capital markets and the dollar, and hurt the U.S. around the world"); *id*. at 147 (stating that "more than $5 trillion in debt [was] either guaranteed or issued by Fannie and Freddie"); *see also* Bethany McLean & Joe Nocera, All the Devils are Here: The Hidden History of the Financial Crisis 353 (2010).

[31]Weiss, *supra* note 27, at 1.

[32] Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended at 12 U.S.C. § 4501 et seq.) For a discussion of HERA, *see* N. Eric Weiss, Cong. Research Serv., RL 34623, Housing and Economic Recovery Act of 2008 (Dec. 5, 2008).

[33]Weiss, *supra* note 32, at 1.

[34]12 U.S.C. § 4511 (2008).

[35]12 U.S.C. § 4513(a)(1)(B) (2008).

[36]12 U.S.C. § 4617(a)(1) (2008); Dep't of Treasury & Dep't Hous. and Urban Dev., Reforming America's Housing Finance Market 24 (2011) [hereinafter Reforming the Housing Market].

Federal Reserve System before doing so.[37] HERA also created the Federal Housing Finance Oversight Board, whose members are the Secretaries of the Treasury and Housing and Urban Development, the Chair of the Securities and Exchange Commission, and the FHFA Director, who chairs the Board.[38]

Congress designated FHFA "an independent agency of the Federal Government"[39] and authorized the Director to issue regulations, using notice and opportunity for public comment pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 553.[40] HERA also authorized the Department of the Treasury "to lend or invest an unlimited amount of money in [Fannie and Freddie] . . . in the event of financial or mortgage market emergencies."[41]

The "GSEs' situation [grew] . . . increasingly dire."[42] Secretary Paulson concluded that Fannie and Freddie should be put into conservatorship.[43] He made this decision with the concurrence of the Chairman of the Federal Reserve Board, Ben Bernanke, and the Office of the Comptroller of the Currency.[44] They secured the approval of President George W. Bush, and

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[37]Weiss, *supra* note 32, at 5; 12 U.S.C. § 4513(a)(3)(A) (2008).

[38]Weiss, *supra* note 32, at 6; 12 U.S.C. § 4513a (2008).

[39]Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 1311, 106 Stat. 3952, as amended Housing and Economic Recovery Act of 2008 (HERA), Pub. L. No. 110-289 § 1101, 122 Stat. 2661.

[40]Housing and Community Development Act, *supra* note 29, at § 13
19G; HERA, *supra* note 39, at § 1107, 122 Stat. 2672 (codified as amended at 12 U.S.C. § 4526).

[41]Weiss, *supra* note 32, at 1-2 (explaining that Treasury's authority extends to the Federal Home Loan Banks as well as to Fannie and Freddie). This authority expired on Dec. 31, 2009. *Id*.

[42]Paulson, *supra* note 27, at 161; Fin. Crisis Inquiry Comm'n, *supra* note 27, at 317.

[43]Paulson, *supra* note 27, at 162-64 (stating that his initial conclusion had been that they should be put into receivership, but he then was persuaded that conservatorship was preferable).

[44]Paulson, *supra* note 27, at 1, 2, 6. Secretary Paulson begins his memoir with the story of the conservatorship and his statement that it was he who "had proposed that we seize control of the companies . . . ." *Id*. at 1. Mr. John Dugan was Comptroller of the Currency. *Id*. at ix.

then persuaded James Lockhart, the Director of FHFA.[45] The concurrence of FHFA was essential, Secretary Paulson wrote, because "only FHFA had the statutory power to put Fannie and Freddie into conservatorship. We had to convince its people that this was the right thing to do, while making sure to let them feel they were still in charge."[46] On September 7, 2008, FHFA put Fannie and Freddie into conservatorship.[47]

With the imposition of the conservatorship, "FHFA immediately . . . fundamentally changed Enterprise management and governance practices by appointing new CEOs, nonexecutive chairmen, and boards of directors to both Enterprises . . . ."[48] "Under conservatorship, FHFA is responsible for the overall management of both institutions . . . . [A]ll lobbying by the Enterprises was immediately stopped and neither departing CEO received 'golden parachute'

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[45] *Id*. at 2-3, 5-7; Fin. Crisis Inquiry Comm'n, *supra* note 27, at 318.

[46] Paulson, *supra* note 27, at 6; *id*. at 165-6 (stating that "[a]ny Treasury investment would be conditioned on conservatorship").

[47] Press Release, Henry M. Paulson, Jr., Treasury Sec'y, U.S. Dep't of the Treasury, Statement on Treasury and Federal Housing Finance Agency Action to Protect Financial Markets and Taxpayers (Sept. 7, 2008), available at http://www.treasury.gov/press-center/press-releases/hp1128.aspx; Press Release, U.S. Dep't of the Treasury, Fact Sheet: FHFA Conservatorship 3 (Sept. 7, 2008), available at http://www.treasury.gov/press-center/press-releases/Documents/fhfa_consrv_faq_090708.pdf; Statement of FHFA Director James B. Lockhart 5-6 (Sept. 7, 2008) available at http://www.fhfa.gov/webfiles/23/FHFAStatement9708.final.pdf; Paulson, *supra* note 27, at 170 (stating that "[o]n Friday afternoon, September 5, we met with management of the companies; on Saturday, September 6, we met with their boards, which agreed to the takeover; and on Sunday, we announced that we had placed Fannie Mae and Freddie Mac into conservatorship"). Weiss, *supra* note 32, at 1 (conservatorship imposed on Sept. 7).

[48] Conservatorship and Receivership, 76 Fed. Reg. 35724-01 (June 6, 2011) (codified as amended 12 C.F.R. pts. 1229, 1237). The appointment of nonexecutive chairmen responded to the longstanding criticism of the fact that the Chief Executive Officers (CEOs) of Fannie and Freddie served as chairmen of their respective boards of directors. "In addition, Fannie Mae's COO and CFO [Chief Operating Officer and Chief Financial Officer] both serve as vice chairmen of the board." *Walker Statement*, *supra* note 22, at 10. As the Comptroller General noted, this was "not consistent with model governance theory that calls for an independent board and chair" (*id*. at 2) and had been the subject of regulators' criticism since at least 2003 (*id*. at 10).

payments. The FHFA Director also eliminated dividends on all common and preferred stock."[49]

Meeting the capital markets' expectations, Treasury "agreed to exercise its authority under HERA to provide financial support . . . so both Fannie Mae and Freddie Mac could honor their debt and guarantees."[50] Treasury developed "three finance facilities": "the GSE Credit Facility, the MBS Purchase Program, and the Senior Preferred Stock Purchase Agreement. These . . . allow . . . Treasury to provide liquidity to the Enterprises and the market . . . ."[51] In addition, the Federal Reserve announced total purchases of GSE MBS of up to $1.25 trillion and purchases of agency debt of up to $200 billion.[52]

In May 2012, FHFA reported that from September 6, 2008 through the end of 2011, "Treasury invested approximately $185 billion" in the two companies[53]; in February, FHFA reported that the GSEs' "ongoing operations are entirely dependent on taxpayer support . . . ."[54]

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[49]Fed. Hous. Fin. Agency, Federal Housing Finance Agency Strategic Plan 2009-2014 21 [Hereinafter FHFA Strategic Plan 2009-2014].

[50]Reforming the Housing Market, *supra* note 36, at 7.

[51]FHFA Strategic Plan 2009-2014, *supra* note 49, at 22. Treasury later created the Temporary Credit and Liquidity Program and the New Issue Bond Program. The GSE Credit Facility Program terminated on December 31, 2009. *See* Dep't of Treasury, Housing and Government Sponsored Enterprises FY 2012 at 1; *see also* Dep't of Treasury, Housing and Government Sponsored Enterprises FY 2013 at 3.

[52]FHFA Strategic Plan 2009-2014, *supra* note 49, at 22; Fed. Hous. Fin. Agency, Office Inspector Gen., AUD-2011-001, Audit of Federal Housing Finance Agency's Consumer Complaint Process, At a Glance (2011).

[53]Fed. Hous. Fin. Agency, Office of the Inspector Gen., WPR-2013-002, Analysis of 2012 Amendments to Senior Preferred Stock Purchase Agreement, At a Glance (2013).

[54]The Next Chapter, *supra* note 3, 5; FHFA 2011 Report to Congress, *supra* note 3, at iii. Treasury uses its Preferred Stock Purchase Agreements (PSPAs) to control Fannie and Freddie. *See, e.g.*, Dep't of Treasury & Dep't Hous. and Urban Dev., Reforming America's Housing Finance Market 2, 9, 13 (2011) [hereinafter Reforming the Housing Market] (stating that "The PSPAs require a reduction in this risk-taking by winding down their investment portfolios at an annual pace of no less than 10 percent"); *see also* Fed. Hous. Fin. Agency, *supra* note 3, at 6 (stating that Fannie and Freddie will now pay the Treasury a quarterly net worth sweep rather than a 10% dividend).

FHFA said that Fannie and Freddie "have depleted all of their shareholders' equity and are operating with financial support from the Treasury. . . ."[55] Fannie and Freddie "are being kept solvent through infusions of Treasury funds."[56] "[T]he U.S. taxpayers, . . . through the Treasury Agreements[,] provide infusions of cash to make up any quarterly net worth deficits . . . ."[57] FHFA reported to Congress in June of 2012 that Fannie and Freddie have "and will continue to realize credit losses from mortgages originated in the several years prior to conservatorship."[58] The "draws the companies have taken from the Treasury are so large they cannot be repaid under any foreseeable scenarios."[59]

What will happen to Fannie and Freddie has been the subject of much debate and is unclear.[60] In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress required Treasury to conduct a study of and submit recommendations for the GSEs; this has been done.[61]

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[55]FHFA 2011 Report to Congress, *supra* note 3, at iii; *see also*, Fed. Hous. Fin. Agency, 2010 Report to Congress iv (2011); *see also* FHFA 2012 Report to Congress, *supra* note 3, at iii.

[56]Conservatorship and Receivership, 76 Fed. Reg. 35724-01 35726 (June 6, 2011) (to be codified as amended at 12 CFR parts 1229, 1237).

[57] *Id.*

[58]FHFA 2011 Report to Congress, *supra* note 3, at iii; *see also* FHFA 2012 Report to Congress, *supra* note 3, at iii.

[59]The Next Chapter, *supra* note 3, at 9; FHFA OIG, Taxpayers' Money, *supra* note 24, at 15.

[60]*See* Cong. Oversight Panel, *supra* note 29, at 73 (stating that since September 7, 2008, "the GSEs' legal status has been unclear"); Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 928 (stating that "[o]nce the current financial and real estate crises have passed, Fannie's and Freddie's futures are uncertain").

[61]Cong. Oversight Panel, *supra* note 29, at 74; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1074, 124 Stat. 1376 (2010); Reforming the Housing Market, *supra* note 36, at 12. Treasury and HUD have said that they propose to "wind down both institutions" "at a deliberate pace," meanwhile announcing an unwavering "commitment to ensuring" that both "have sufficient capital to honor any guarantees issued now or in the future and meet any of their debt obligations. . . ." *See also id*. at 13 (". . . we will seek opportunities, wherever possible, to accelerate Fannie Mae and Freddie Mac's withdrawal" from the housing market); *id*. at 24 (reaffirming commitment to maintaining ability of Fannie Mae and Freddie Mac to meet their obligations).

Most recently, in its Strategic Plan for 2009-2014, FHFA has said that "FHFA will need to continue to monitor the market situation closely, working with the Treasury Department, the Federal Reserve, and other regulators. FHFA will guide the Enterprises' activities and decisions and improve their operations to ensure that they are safe and sound and yet continue to provide liquidity and stability to the housing market."[62] FHFA makes no prediction about the end of the conservatorship, noting only as the fourth of its performance goals for conservatorship: "Work with the Administration and Congress to develop an effective structure for Enterprises to emerge from conservatorship."[63]

II. THE NATURE OF THE FORECLOSURE ACTION; JUDICIAL AND NON-JUDICIAL FORECLOSURE.

At English common law, when a landowner gave a mortgage in return for a loan of money, the mortgagee took title to the property, subject to the condition subsequent that title would return to the mortgagor if the mortgagor repaid the money due on a date certain (the "law day").[64] The condition gradually was displaced by a "covenant by the mortgagee to reconvey upon full performance by the mortgagor."[65] At common law, if the mortgagor failed to pay the sum due on the law day, the mortgagee's title became absolute.[66] The reason for the mortgagor's failure to pay on that day was irrelevant.[67]

This inflexible rule of the common law courts was ameliorated by the Court of Chancery, which (along with the ecclesiastical courts) exercised jurisdiction "over matters connected with breach of faith . . . "[68] In 1456, in the first known instance of Chancery's assuming jurisdiction

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[62]FHFA Strategic Plan 2009-2014, *supra* note 49, at 30.

[63]*Id*. at 33.

[64]Nelson & Whitman, *supra* note 3, § 1.2 at 6-7.

[65]*Id*. at 7.

[66]*Id*.

[67]*Id*.

[68]R.W. Turner, The Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally 17-18 (1931); *see id*. at xi-xii (Harold Dexter Hazeltine, General Preface, stating that " . . .the debtor's right of redemption, viewed in equity as an estate, is a mitigation of the rigour of the common-law conception of a mortgage; for, even after the legal day for redemption has passed and the land has been forfeited at law for non-payment of the debt,

over a mortgage transaction and ordering a reconveyance of the property to the mortgagor, "[r]elief was probably given . . . on the general grounds of conscience, by reason of such unfair circumstances, amounting to gross fraud and oppression on the part of the mortgagee."[69] Other early cases in which Chancery ordered reconveyance to the mortgagor may have involved grossly unjust conduct by the mortgagee, but as early as the reign of Edward IV (1461-1483), "it seems probable that a general jurisdiction to decree a reconveyance without having regard to any actual circumstances had already been established."[70] By the early seventeenth century, "the Chancellor's demand for special circumstances showing hardship were discarded, and relief was given as of course in all cases save where it was held that such relief was inequitable."[71] The rubric under which Chancery gave this protection to the mortgagor was the creation and protection of the mortgagor's "equity of redemption," an equitable estate that enabled the mortgagor to reclaim his interest in the property.[72]

Along with the equity of redemption, in the seventeenth century, Chancery also created an action that allowed the mortgagee to secure title to the property by foreclosing the equity of redemption.[73] To some extent, courts protected the homeowner's right to redeem the property,

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the chancery allows redemption").

[69]Turner, *supra* note 68, at 21-22 (stating that relief "was probably the more readily given owing to the unjust imprisonment of the debtor; since at that time the Chancellor's jurisdiction was mostly concerned with unjust imprisonments and various offences against the person, and not with uses . . . " but noting that, even at that time, Chancery seemed to have the generally recognized authority to decree reconveyance to the mortgagor even in "the absence of any express proviso for redemption").

[70]*Id*. at 23.

[71]*Id*. at 27; *see also id*. at 25-26; *accord*, Nelson & Whitman, *supra* note 3, § 1.3 at 7 (stating that "by the 17th century, . . . the mortgagor was able, as a matter of course and right, to redeem his land from the mortgagee if he tendered the principal and interest within a reasonable time after law day").

[72]Nelson & Whitman, *supra* note 3, § 1.3 at 7-8; Turner, *supra* note 68, at xxvi (quoting Hazeltine's statement that " . . . in the case of the mortgage the forfeiture, although it continued to be theoretically operative at law, was prevented in practice by means of the equity of redemption").

[73]Nelson &Whitman, *supra* note 3, § 1.3 at 7-8; Turner, *supra* note 68, at 27-28 (stating that the "first decree of foreclosure reported seems to be in 1629").

generally refusing to enforce "attempts by a mortgagee to have the mortgagor at the inception of the mortgage transaction waive his right to be foreclosed in the event of a default. . . ."[74] Courts have insisted that "an unwilling mortgagor cannot lose his equity of redemption . . . unless there has been a valid foreclosure . . . .; this is known as the "*prohibition against clogging the mortgagor's equity of redemption*."[75]

A significant modification of this principle, however, is present in jurisdictions that allow the mortgagor to "agree" to non-judicial foreclosure. Indeed, at least in some jurisdictions, the non-judicial power of sale was developed specifically as a contractual way of eviscerating the equity of redemption. "Through inventive legal draftsmanship, the deed of trust with power of sale was created," and the power of sale subsequently was extended from deeds of trust to mortgages in some jurisdictions.[76] The deed of trust with power of sale "was an ingenious contractual device designed to strip mortgagors of their equitable right of redemption . . . ."[77]

As the power of sale gave creditors substantial power to abuse debtors, "when the abuses became intolerable," jurisdictions that had recognized the power of sale provided "[l]egislative relief."[78] Some commentators have said that, at least in those jurisdictions that previously had recognized the contractual power of sale, state power of sale legislation was "wholly designed in both purpose and effect to restrict creditors in the untrammeled exercise of their contractual rights under deeds of trust on real property."[79] In any event, many jurisdictions in the United States now

[74]Nelson & Whitman, *supra* note 3, § 3.1 at 37 (stating that"[t]his principle is uniformly recognized today in this country . . . ."); *see also id*. §§ 3.1 - 3.3.

[75]*Id*. § 1.4 at 9 (emphasis in original); *see* C. Phillip Johnson, *Full Gospel Ministries, Inc. v. Investors Fin. Services, LLC.*, 12 A.3d 1207 (Md. 2011).

[76]William M. Burke & David J. Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 S. Cal. L. Rev. 1, 25-27 (1973-1974) (explaining the developments in California law).

[77]*Id*. at 31-32.

[78]*Id.* at 27 (discussing California law).

[79]*Id*. at 32. *See also* Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1172-3 (5th Cir. 1975) (stating that powers of sale "were sufficiently commonplace in 1774 to prompt New York to enact a statute to regulate their use"); Northrip v. Fed. Nat'l Mortg. Ass'n, 527 F.2d 23, 26-27 (6th Cir. 1975) (stating that a power of sale remedy in a mortgage was recognized in Michigan "as a part of common law even before the first statute dealing with the subject was

do allow mortgagees to avoid the courts and effect foreclosure by following a statute which provides that, "after varying types and degrees of notice to the parties, the property is sold at a public sale, either by some public official such as a sheriff, by the mortgagee, or by some other third party."[80]

Non-judicial foreclosure generally is available only when it has been authorized in the loan documents.[81] Since non-judicial foreclosure is easier, faster, and less expensive for lenders than is judicial foreclosure,[82] and since loan documents usually are prepared by lenders,[83] non-judicial foreclosures are the rule in states that authorize them.[84] While non-judicial foreclosure may be more efficient and less costly than judicial foreclosure,[85] the titles it produces may be defective,

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enacted" and that "the state, by enacting this statute, acted to regulate and standardize a recognized practice"); Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1128 n. 16 (Mass. 2012) (stating that "[m]ortgages containing a power of sale existed at least as early as one hundred years before enactment of the statutory power") and *id*. at 1126-28 (stating that statutes must be strictly followed in power of sale foreclosures). Other jurisdictions may have adopted power-of-sale statutes to allow creditors the same authority they had elsewhere.

[80]Nelson & Whitman, *supra* note 3, § 1.4 at 9.

[81]*Id*.

[82]*Id*. (stating that judicial foreclosure is "time-consuming and costly"); Collins, Lam, & Herbert, *supra* note 7, at 218.

[83]Freyermuth, *Foreclosure by Arbitration?*, *supra* note 7, at 508 (stating that "given the influence of the modern secondary mortgage market and standardized mortgage forms, there is no meaningful negotiation over mortgage terms in the residential context").

[84] *Foreclosure Laws and Procedures by State*, RealtyTrac, http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp (visited June 6, 2013) (showing that nonjudicial foreclosures are more commonly used in states that allow both); *see also* Collins, Lam, & Herbert, *supra* note 7, at 222.

[85]Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 586 (describing nonjudicial or power of sale procedures as "relatively efficient and fair"); *id*. at 588. It is worthy of note that Professor Nelson, "a long-time mortgage teacher" (*id*. at 584), prefers non-judicial to judicial foreclosure.

particularly when the mortgages have been securitized.[86]

III. CONSTITUTIONAL PROBLEMS WITH NON-JUDICIAL FORECLOSURE.

When a homeowner gives a mortgage, the homeowner/mortgagor retains equitable title to the property and, in some jurisdictions, legal title as well.[87] It is well established that retaining equitable or legal title to the home is a constitutionally protected property interest under the Due Process Clauses of the Fifth and Fourteenth Amendments, which prohibit the deprivation of property without due process of law.[88] The central requirements of the Due Process Clauses are adequate notice and an opportunity to be heard.[89] "The purpose of this requirement is not only to ensure abstract fair play to the individual" but "to minimize substantively unfair or mistaken deprivations of property . . . ."[90] These principles establish that if a foreclosure action involves the

[86]Nelson & Whitman, *supra* note 3, § 7.19 at 636; *see also id*. § 7.18; Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 Loyola Consumer L. Rev. 562, 563 (2012); Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The* Ibanez *Time Bomb?*, 4 Wm. & Mary Bus. L. Rev. 111 (2013).

[87] In a "title theory" state, the mortgage transfers legal title to the mortgagee, but the homeowner/mortgagor holds equitable title; in a "lien theory" state, the homeowner/mortgagor holds both legal and equitable title to the home. Nelson & Whitman, *supra* note 3, § 4.1 at 135.

[88]U.S. Const. amend. V, XIV; *see* United States v. James Daniel Good Real Property, 510 U.S. 43, 53-4 (1993) (stating that a homeowner's "right to maintain control over his home . . is a private interest of historic and continuing importance"); Law v. U.S. Dep't of Agric., 366 F.Supp. 1233, 1238 n. 6 (N.D. Ga. 1973) (stating that "[t]he equity of a debtor in realty is 'a significant property interest' and the unimpaired right to its use without the threat of summary foreclosure would appear to fall well within the Supreme Court language" of Fuentes v. Shevin, 407 U.S. 67 (1972) and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)); Freeman v. Fed. Deposit Ins. Corp., 56 F.3d 1394, 1403 (D.C. Cir. 1995) (stating that "[u]ndoubtedly, the Freemans have a constitutionally protected property interest in their home"); *cf.* United States v. Gen. Motors Corp., 323 U.S. 373 (1945) (holding that tenants also have a constitutionally protected interest in the property they lease).

[89]*James Daniel Good*, 510 U.S. at 53 (stating that "[t]he right to prior notice and a hearing is central to the Constitution's command of due process").

[90]*Id.* (quoting Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972)).

requisite federal or state action, notice and an opportunity to be heard generally would be required prior to foreclosure.[91] While a homeowner might waive this constitutional protection, such purported waivers are subject to searching scrutiny.[92]

Many non-judicial foreclosure procedures do not satisfy constitutional due process requirements; both notice and hearing provisions may be deficient.[93] As to notice, in Mullane v. Central Hanover Bank & Trust Co. (1950), involving notice to beneficiaries of a trust fund, the Supreme Court invalidated a statute that required only notice by publication.[94] The Court held that notice must be "reasonably calculated . . . to apprise interested parties . . ." and that when "the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."[95] In Mennonite Board of Missions v. Adams (1983), the Court held that a mortgagee was entitled to better notice than by publication and posting, stating that "when the mortgagee is identified in a

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Professors Nelson and Whitman describe "one significant aberrational decision" (Nelson & Whitman, *supra* note 3, at 672), Fed. Deposit Ins. Corp. v. Morrison, 747 F.2d 610 (11th Cir. 1984), *rehearing denied*, 763 F.2d 419 (1985) (defining a mortgagor's interest as time-limited so that there has been no deprivation) and noting that *Morrison* has been criticized in *Davis Oil Co. v. Mills*, 873 F.2d 774, 786 (5th Cir. 1989), *rehearing denied*, 877 F.2d 972 (5th Cir. 1989)). *Morrison* also predates the 1993 decision in *James Daniel Good* and the 2006 decision in Jones v. Flowers. Perhaps most significantly, *Morrison* predates the Supreme Court's decision in Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), in which the Court rejected the "bitter with the sweet" theory of the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), which is a significant buttress for the decision in *Morrison* (747 F.2d at 615, n. 10). *See Loudermill*, 470 U.S. at 541 (stating that the "'bitter with the sweet' approach misconceives the constitutional guarantee. . . . . 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty.").

92*See, e.g.*, Johnson v. U.S. Dep't of Agric., 734 F.2d 774, 784 (11th Cir. 1984) (stating that there is a "strong presumption against waiver"); *see also* Gonzalez v. Cnty. of Hidalgo, 489 F.2d 1043, 1046 (5th Cir. 1973) (requiring specific proof of a knowing and voluntary waiver).

93The material in this and the following paragraph summarize Nelson & Whitman, *supra* note 64, §§ 7.24 (notice), 7.25 (hearing), and 7.26 (waiver).

94Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

95*Mullane*, 339 U.S. at 318.

mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*."[96] In Jones v. Flowers (2006), the Court held that even when notice of a proposed tax sale had been mailed, if the notice is returned to the sender, the state may be required to "take additional reasonable steps to attempt to provide notice . . ., if it is practicable to do so."[97]

In light of these decisions, Professors Nelson and Whitman have concluded that, when government action is present, "and absent a valid waiver . . . of constitutional notice rights, it is difficult to escape the conclusion that the notice provisions of many state power of sale statutes are unconstitutional."[98] "Certainly," they write, "those that require only notice to owners by publication and posting must fail to pass constitutional muster,"[99] and "statutes that fail to provide for notice by mail or personal service to junior lienors" probably also are unconstitutional.[100] Professors Nelson and Whitman also suggest that the considerations discussed "probably also doom those statutes that provide for notice by mail or personal service both for the mortgagor and the owner, but for others only if they previously have recorded a request to receive it."[101] Courts have agreed with this analysis, invalidating non-judicial foreclosures on behalf of government entities because of inadequate notice.[102]

The absence of provision for opportunity for hearing also may make power of sale statutes

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[96]Mennonite Board of Missions v. Adams, 462 U.S. 791, 798 (1983).

[97]Jones v. Flowers, 547 U.S. 220, 221 (2006).

[98]Nelson & Whitman, *supra* note 3, § 7.24 at 671.

[99] *Id.*

[100]Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 610-611, citing authorities; Nelson & Whitman, *supra* note 3, § 7.24 at 671-3, citing authorities.

[101] *Id.* § 7.24 at 673.

[102]*See, e.g.*, Ricker v. United States, 417 F. Supp. 133, 138 (D. Me. 1976), *order supplemented*, 434 F. Supp. 1251 (1976) (non-judicial foreclosure of direct loan from Farmers Home Administration, notice by publication inadequate under *Mullane* where name and address are known or easily ascertained); Turner v. Blackburn, 389 F. Supp. 1250 (W.D. N.C. 1975) (three judge district court) (notice by publication or posting constitutionally insufficient).

unconstitutional.[103] "Most state power of sale statutes make no provision for a hearing for the mortgagor or other junior interests," and several federal courts have held "that power of sale foreclosure violates [the] Fifth Amendment . . . unless it requires 'a hearing at which [mortgagors] could challenge both the legal right of [the mortgagee] to foreclose and the propriety of the decision to do so.'"[104]

There has been much consideration of the kind and degree of government action that implicates the Due Process Clauses. At one end of the spectrum, courts generally have held that the bare provision of legislative authorization for power of sale foreclosure is not enough state action to require due process.[105] At the other end, government action generally is held to be present where a government agency is the mortgagee which initiates the foreclosure.[106]

Federal agencies and federally-involved corporations are related to mortgagee initiation of foreclosure in a variety of ways. Part IV below surveys this area of the law.

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[103]Nelson & Whitman, *supra* note 3, § 7.25 at 676 (stating that "a strong argument may be made that power of sale foreclosure statutes which do not provide the opportunity for a hearing prior to the foreclosure sale violate the due process hearing requirement . . . ").

[104]Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 611-612, citing authorities and noting that the hearing need not be judicial; Nelson & Whitman, *supra* note 3, § 7.25 at 676-9 (same, also citing authorities); *but see* Burke & Reber, *supra* note 76, at 28-29, especially note 583 (discussing early cases holding that state power of sale statutes satisfy due process requirements and cases that find waivers of due process rights).

[105]Nelson & Whitman, *supra* note 3, § 7.27; Alexander, *Federal Intervention*, *supra* note 5, at 367 (stating that "Where there is no other form of government involvement, the Supreme Court has held that contractually authorized power of sale foreclosures are not subject to constitutional due process notice requirements," citing Scott v. Paisley, 271 U.S. 632, 636 (1926)). *See also*, for a full discussion, Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166 (5th Cir. 1975) (Wisdom, J.).

[106]Nelson & Whitman, *supra* note 3, § 7.28 at 689 (stating that "the presence of the government as a mortgagee provides the 'governmental action' necessary to reach the constitutional issues").

IV. FEDERAL ACTION IN FORECLOSURE, INCLUDING FANNIE AND FREDDIE PRE-CONSERVATORSHIP.

In the twentieth and into the twenty-first century, the federal government has played "a large variety of markedly different roles" with respect to real estate financing.[107] As Professor Alexander has explained, the federal government has been "a market regulator," "a direct market participant by originating and holding mortgages, . . . an indirect market participant by insuring and guaranteeing loans [and] . . . a market catalyst and stimulator . . ."[108] Some federal entities are

> direct mortgage lenders (Farmers Home Administration or Rural Housing Service), insurers and guarantors of residential mortgage loans (Federal Housing Administration and Veteran's Administration loans), guarantors of commercial loans (Small Business Administration loans), and multifamily residential loan originators and insurers (HUD loans). The Federal Deposit Insurance Corporation and the Resolution Trust Corporation became the holders of one of the largest mortgage portfolios in the country by virtue of the widespread banking failures of the 1980s. Ginnie Mae provides much-needed capital to the mortgage market by guaranteeing federally-related mortgage loans. Freddie Mac and Fannie Mae serve a similar function and also create mortgage-backed securities to provide additional capital to the mortgage market.[109]

Whether a foreclosure involves federal action and therefore requires compliance with due process standards generally turns on two things: the nature of the federal actor and the role it plays in the foreclosure. The Supreme Court has not ruled on what constitutes federal action for due process purposes in the foreclosure context. Lower courts and several scholars have, however, considered that question in a variety of contexts, including those of Fannie and Freddie. This Part describes how courts and scholars treated these situations before 2008; Part V considers how precedent and principle should be applied to FHFA, Fannie, and Freddie post-conservatorship.

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[107]Alexander, *Federal Intervention*, *supra* note 5, at 311.

[108]*Id.*

[109]Alexander, Georgia Real Estate, *supra* note 14, § 12.1(b) (2012); Alexander, *Federal Intervention*, *supra* note 5, at 368.

A frequently proffered bright line rule is that if "a direct federal instrumentality" is the foreclosing mortgagee, then "the requisite 'federal action' exists, and a court will apply fifth amendment due process standards to test the constitutionality of the foreclosure."[110] Scholars have endorsed this rule, and several courts have applied it, notably in cases involving loans to homeowners from the Department of Agriculture (USDA), through an agency formerly called the Farmers Home Administration (FmHA).[111] The reasoning of these courts was well expressed in Ricker v. United States, an FmHA case.: "the foreclosure and sale were initiated and carried out by federal employees acting on behalf of the federal government: they plainly were bound to observe the requirements of the Fifth Amendment."[112] In Johnson v. U.S. Department of Agriculture, the Eleventh Circuit, like other courts, held that such a loan is "protected by the due process clause of the Fifth Amendment"; that, at "a minimum, due process assures notice and a meaningful opportunity to be heard before a right or interest is forfeited"; and therefore that non-judicial foreclosure is constitutionally inadequate.[113] Indeed, in Johnson, the Department of Agriculture

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[110]Nelson & Whitman, *supra* note 3, § 7.28 at 689; Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 613; Alexander, Georgia Real Estate, *supra* note 14, § 13.2(a).

[111]*See* Nat'l Consumer Law Center, *supra* note 4, §3.4.1. 42 U.S.C. §§ 1480-1490 (2012); Alexander, *Federal Intervention*, *supra* note 5, at 368, note 10; Nelson & Whitman, *supra* note 3, §§ 7.24 at 671, 7.27, 7.28, 7.30 (stating that in such cases, "numerous federal courts . . . routinely either expressly find or assume the presence of federal action . . . ."; *accord*, Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 614.

[112] Ricker v. United States, 417 F.Supp. 133, 138 (D. Me. 1976).

[113]Johnson v. U.S. Dep't of Agric., 734 F. 2d 774, 782 (11th Cir. 1984) (interlocutory appeal from denial of preliminary injunction, deciding "that there is a substantial likelihood that the plaintiffs will prevail on the merits of their due process claims"); *accord*, Allison v. Block, 723 F.2d 631 (8th Cir. 1983); Matzke v. Block, 564 F. Supp. 1157, 1164 (D. Kan. 1983) ("foreclosure of a United States lien in real property or chattels is a government action which affects a debtor's property interest and, therefore, must be accomplished in accordance with due process under the Fifth Amendment") (dictum: the court based its decision on statutory interpretation, not the constitutional issue, *id*. at 1168), *aff'd in part, rev'd in part*, 732 F.2d 799 (10th Cir. 1984); United States v. Ford, 551 F. Supp. 1101 (N.D. Miss. 1982); Rau v. Cavenaugh [sic], 500 F. Supp. 204, 206 (D. S.D. 1980) ("Plaintiff's interest in her FmHA financed home is a property interest protected by the fifth amendment") (held: no waiver, and notice inadequate); United States v. White, 429 F. Supp. 1245, 1250 (D. Miss. 1977), *on remand from* 543 F.2d 1139 (5th Cir. 1976) (power of sale foreclosure by Farmers Home Administration of U.S. Department of Agriculture does not satisfy Fifth Amendment; homeowners did not waive their constitutional

conceded that there was a "right to due process," but argued that an administrative procedure prescribed by regulation was "functionally equivalent to a judicial foreclosure" and therefore satisfied the due process requirement.[114] As discussed in Johnson, FmHA earlier had entered into a consent decree providing that although Georgia law permitted non-judicial foreclosure, "all FmHA loans in Georgia shall be foreclosed through the judicial process." [115]

A similar analysis has been applied when the U.S. Department of Housing and Urban Development (HUD) initiates a foreclosure.[116] Most of HUD's programs involve insured rather than direct loans, but when a mortgagor has defaulted, and HUD satisfies the mortgagee's insurance claim, HUD becomes the owner and holder of the note and mortgage.[117] When HUD in that situation institutes a foreclosure, this principle would dictate that Fifth Amendment due process requirements be satisfied.[118] To some extent, Congress acted to meet these requirements in the

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rights); Ricker v. United States, 417 F. Supp. 133, 138 (D. Me. 1976) ("It cannot be doubted that the Rickers were 'deprived of . . . property, without due process of law' in violation of the Fifth Amendment. First, the foreclosure and sale were initiated and carried out by federal employees acting on behalf of the federal government: they plainly were bound to observe the requirements of the Fifth Amendment"), *order supplemented*, 434 F.Supp. 1251 (1976).

[114]*Johnson* 734 F.2d at 783. The Eleventh Circuit indicated some doubt about this, noting, inter alia, that with a judicial foreclosure, "a hearing will occur *automatically*, unlike the FmHA procedure which requires the borrower to initiate the hearing." *Id*. (emphasis in original).

[115] *Id.* at 785 (discussing Williams v. Butz, No. CV-176-173 (S.D. Ga. 1979).

[116]Nelson & Whitman, *supra* note 3, § 7.28 at 689; Alexander, Georgia Real Estate, *supra* note 14, § 13.2(a).

[117] 1 Department of Housing and Urban Development, Housing and Development Reporter §7:4 (2012) ("[I]f efforts to cure the default are unsuccessful, HUD will pay off the mortgage insurance to cover the lender's loss. The payment may be made through an assignment of the mortgage to HUD . . .").

[118]Nelson & Whitman, *supra* note 3, § 7.28 at 689 (stating that this analysis applies "where the Federal Housing Administration (FHA) opts to take an assignment of an FHA insured mortgage that is in default and then forecloses"); Alexander, Georgia Real Estate, *supra* note 14, § 13.2(a); Lehner v. United States, 685 F.2d 1187, 1190 (9th Cir. 1982) (stating, with regard to a mortgage on a hospital, that "[w]hen the Government acts as mortgagee, clearly the mortgagor has a right to notice and a hearing prior to the sale").

Single Family and Multifamily Mortgage Foreclosure Acts, which allow non-judicial foreclosure but prescribe notice requirements that may satisfy due process; in addition, HUD by regulation has created an opportunity for an informal hearing in some circumstances.[119]

This bright line rule is sharpened by contrast with situations where a federal agency guarantees or insures private mortgages, but it is the private mortgagees that initiate foreclosures. Scholars, courts, and the agencies have not agreed about whether enough government action is present to require satisfaction of due process requirements. Most of the discussion and litigation on this point involves the Veterans Administration (VA) and HUD.

The agency known as the VA (the Department of Veterans Affairs since 1988), both makes direct home mortgage loans and guarantees repayment of loans made by private lenders.[120] The reported cases regarding due process requirements involve guaranteed loans.[121] In these cases, when

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[119] HUD Single Family Mortgage Foreclosure Act of 1994, Pub. L. No. 103-327, Title II, 108 Stat. 2316 (codified as amended at 12 U.S.C. §§ 3751-3758 (2013)); HUD Multifamily Mortgage Foreclosure Act of 1981, Pub. L. No. 97-35, Title III, 95 Stat. 422 (codified as amended at 12 U.S.C. §§ 3701-3717 (2013)); 24 C.F.R. §§ 27.1-27.123 (2013) (requiring, in 27.5, an opportunity under the Multifamily Act for the mortgagor "informally to present reasons why the mortgage should not be foreclosed"); *see* Lisbon Square v. United States, 856 F. Supp. 482, 489 (E.D. Wis. 1994) (stating that "[b]y offering a mortgagor a chance to explain the failure to make mortgage payments, HUD provides all of the due process required by the Fifth Amendment"). *See also,* Nelson & Whitman, *supra* note 3, § 7.19 at 635; Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 639-40; Alexander, Georgia Real Estate, *supra* note 14, § 12.3(a) (describing the Single Family Mortgage Foreclosure Act as "potentially the most expansive federal preemption of state mortgage laws in history"). For criticism of these statutes as possibly not providing constitutionally adequate notice or opportunity for hearing, *see also* Patrick A. Randolph, Jr., *The New Federal Foreclosure Laws*, 49 Okla. L. Rev. 123 (1996).

[120] Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988) (codified as amended at 38 USC 301) (1998) (Veterans Affairs becomes an executive agency and renamed Department of Veterans Affairs); 38 U.S.C. §§ 3701 et seq. (2012) (the Home Loan Guarantee Program); 38 U.S.C. § 3711 (1998) (direct loans to veterans). For a description of both the home loan guaranty program and direct loan program, *see* 2 Housing and Development Reporter: Reference File §§ 8:3-8:13 (2012).

[121]The analysis above regarding direct loans from USDA should apply also to "direct loans made by the Department of Veterans Affairs (VA)" as well as to situations "where the Federal Housing Administration (FHA) opts to take an assignment of an FHA insured mortgage

the homeowner has defaulted, the "VA may either purchase the loan, or advise the lender to go forward with foreclosure."[122] For the lender to secure the VA's promised reimbursement, the lender is required to "follow the VA's instructions . . . as to the appropriate method and timing of foreclosure."[123]

Several courts have held that when the private lender forecloses pursuant to the VA's instructions, the homeowner is entitled to due process of law under the Fifth Amendment.[124] In 1981, the Seventh Circuit held that "[f]ailure to give the [veteran] notice [of a motion to set aside a foreclosure] raises serious due process questions in any attempt to saddle them with an increased deficiency").[125]

In 1982, however, the Ninth Circuit decided Rank v. Nimmo, which looks in a different direction.[126] The issue there was not whether non-judicial foreclosure could be employed but rather whether the homeowner could challenge the VA's failure to take an assignment of or "refund" the mortgage. The court rejected the Ranks' due process claim on the ground that there had been no government action, saying that the foreclosure had been effected by a private lender under a valid contract.[127] The court did not discuss the VA's having instructed the lender to foreclose or orchestrated the foreclosure; the court says simply that the lender "sent to the VA . . .a Notice of Intention to Foreclose" and the VA told the mortgagors "that it could do nothing for them."[128]

The test the Rank court applied to determine whether there had been federal action was the

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that is in default and then forecloses." Nelson & Whitman, *supra* note 3, § 7.28 at 689; Alexander, Georgia Real Estate, *supra* note 14, § 13.2(a).

[122]Vail v. Brown, 841 F.Supp. 909, 912 (D. Minn. 1994) (citing 38 U.S.C. § 3732(c)(3) (1991)).

[123]Carter v. Derwinski, 987 F.2d 611, 612 (9th Cir. 1993) (en banc); Vail v. Brown, 841 F.Supp. 909, 912 (citing 38 C.F.R. 36.4324(f) (1993)).

[124]Alexander, *Federal Intervention*, *supra* note 5, at 369.

[125] Mortg. Assoc., Inc. v. Cleland, 651 F.2d 476, 479 (7th Cir. 1981).

[126]Rank v. Nimmo, 677 F.2d 692 (9th Cir.1982), *cert. denied*, 459 U.S. 907 (1982).

[127]*Rank* , 677 F.2d at 701-2.

[128]*Rank* , 677 F.2d at 695.

test that originated in the Supreme Court's Fourteenth Amendment jurisprudence involving private actors, that of Jackson v. Metropolitan Edison Co. (1974): in

> order to apply the proscriptions of the Fifth Amendment to private actors "there must exist 'a sufficiently close nexus between the (government) and the challenged action of the . . . (private) entity so that the action of the latter may be fairly treated as that of the (government) itself.'"[129]

The Ninth Circuit said in Rank that the loss of the home

> was the direct result of foreclosure by the private lender under a valid contract . . ., and cannot be attributed to the federal government. Although the private lender was subject to extensive federal regulation under the federal home loan guaranty program, this, alone, in our view, is insufficient to convert the actions of the private lender into governmental action. We thus conclude that foreclosure by a private lender of a mortgage in a federal mortgage guaranty program does not involve federal action sufficient to invoke the due process clause of the Fifth Amendment.[130]

Rank has been sharply criticized. Professor Frank Alexander has pointed out that Rank is inconsistent with the principle established by the Supreme Court in U.S. v. Shimer that "the VA guaranty program displaces state laws because the 'regulatory scheme [for VA related foreclosures], complete as it is in every detail, was intended to provide the whole and exclusive source of protection of the interests of the Veterans Administration," and "federal common law" must determine the VA's rights. [131] In Carter v. Derwinski, for example, a majority of the Ninth Circuit, en banc, overruled an earlier decision relieving veterans of deficiency judgments when the VA

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[129]*Rank*, 677 F.2d at 701 (quoting Warren v. Gov't Nat'l Mortg. Ass'n., 611 F.2d 1229, 1232 (8th Cir. 1980), *cert. denied*, 449 U.S. 847 (1980) and Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974). Warren is discussed *infra* at p.35.

[130]*See, e.g.*, Rank v. Nimmo, 677 F.2d 692, 702 (9th Cir. 1982), *cert. denied*, 459 U.S. 907 (1982)

[131]Alexander, *Federal Intervention*, *supra* note 5, at 368-9 (citing United States v. Shimer, 367 U.S. 374, 381 (1961)). This principle has been endorsed by Congress and the VA, *see, e.g.*, Whitehead v. Derwinski, 904 F.2d 1362, 1371 (9th Cir. 1990) (reporting that the "VA argues that the VA loan guaranty program is national in scope and provides uniform procedures . . ." and that with respect to the deficiency judgment issue presented in that case, "Congress apparently has decided that a uniform federal rule is necessary prospectively . . . ").

instructed foreclosing lenders not to follow state procedures for securing deficiency judgments. The Ninth Circuit wrote:

> The VA is not a private litigant, limited to the choices provided by state law; it's an arm of the federal government and cannot be deprived of the benefits of federal law, regardless of any election it may make under state law. Federal law is mandatory, and neither the State of Idaho through legislation, nor the VA through its litigation choices, can waive its applicability.[132]

As Professor Alexander writes, "it is difficult to see how there could be . . . a sufficient basis for federal common law preemption of state law" yet "an insufficient nexus for state action . . . ."[133]

Despite the criticism, Rank has been followed by other cases challenging the VA's refusal to take assignments of mortgages.[134] It has not been influential, however, with respect to the obligation of a private mortgagee to give adequate notice to a veteran when foreclosure is effected pursuant to VA instructions. In those situations, courts have continued to hold that the VA's involvement is sufficient to trigger due process requirements.

In 1985, two district courts found adequate government action in the VA's instructions to the foreclosing mortgagee. In U.S. v. Whitney, the court said:

> to the extent that the Veterans' Administration participated in the denial of defendant's rights to due process of law and adequate notice . . ., there is no question that the acts and omissions of this federal agency constitute "state action" sufficient to implicate the protections of the Due Process Clause of the Fifth Amendment.[135]

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[132]Carter v. Derwinski, 987 F.2d 611, 615 (9th Cir. 1993) (en banc), *cert. denied sub nom.* Carter v. Brown, 510 U.S. 821 (1993). *Carter* overruled Whitehead v. Derwinski, 904 F.2d 1362 (9th Cir. 1990), agreeing with the Seventh and Eighth Circuits in United States v. Davis, 961 F.2d 603 (7th Cir. 1992) and Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991).

[133]Alexander, *Federal Intervention*, *supra* note 5, at 368.

[134]Fitzgerald v. Cleland, 498 F.Supp. 341 (D. Me. 1980), *aff'd in part, rev'd in part*, 650 F.2d 360 (1st Cir. 1981); Nelson & Whitman, *supra* note 3, § 7.28 at 692. *See, e.g.,* Simpson v. Cleland, 640 F.2d 1354 (D.C. Cir. 1981); Gatter v. Nimmo, 672 F.2d 343 (3rd Cir. 1982); United States v. Harvey, 659 F.2d 61 (5th Cir. 1981); Bright v. Nimmo, 756 F.2d 1513 (11th Cir. 1985).

[135]United States v. Whitney, 602 F.Supp. 722, 733 n. 11 (W.D. N.Y. 1985).

This decision was followed in U.S. v. Murdock, where another district court denied summary judgment to the United States because the government had not shown that the veteran had received constitutionally adequate notice of the foreclosure.[136] The court said that there apparently had been "significant VA involvement with the property during the time of the foreclosure."[137]

Indeed, the VA and Congress have recognized this duty. In the wake of Whitney, the VA developed Form 26 251, "the so-called 'Whitney letter,'" "which notifies the veteran that the present owner of the mortgaged property is in default, and that foreclosure appears probable." [138] And in 1987, Congress amended the VA statute to require the agency "to provide notification to the veteran upon a showing of default".[139]

In 1991, in Vail v. Derwinski, the Eighth Circuit said that "state action is supplied by the VA's involvement in ordering foreclosure." [140] The court noted that "government participation in this type of [non-judicial] foreclosure procedure raises serious due process questions"[141] and "held that failure to give [reasonable personal notice] was a violation of the Due Process Clause of the

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[136]United States v. Murdock, 627 F.Supp. 272, 279 (N.D. Ind. 1985).

[137]*Id.*

[138]Vail v. Brown, 841 F.Supp. 909, 914 (D. Minn. 1994) (holding that this notice satisfies the due process requirement). **[CT - WHEN WAS THIS FORM DEVELOPED? BEFORE OR AFTER THE 1987 AMENDMENT OF THE STATUTE? -I can't find the exact date that it was developed, the earliest I see is in 1988.- BVA 92-24661 (1992) letter was sent in 1989]**

[139] 38 U.S.C. § 3732(a)(4)(A) (1991); see Vail v. Derwinski, 946 F.2d 589, 593 n. 9 (8th Cir. 1991), amended, 956 F.2d 812 (1992) (stating that after the earlier opinion had been filed, the government called to the court's attention a 1987 amendment of 38 U.S.C. 3732(a)(4)(A) to require the agency "to provide notification to the veteran upon a showing of default").

[140]Vail v. Derwinski, 946 F.2d 589, 593 n. 9 (8th Cir. 1991), *amended*, 956 F.2d 812 (1992) (stating that after the earlier opinion had been filed, the government called to the court's attention a 1987 amendment of 38 U.S.C. 3732(a)(4)(A) to require the agency "to provide notification to the veteran upon a showing of default").

[141]Vail v. Derwinski, 946 F.2d at 593.

Fifth Amendment."[142] It was only after the Eighth Circuit had filed this opinion that the government called to the court's attention the 1987 amendment of 38 U.S.C. 3732(a)(4)(A) that requires the agency "to provide notification to the veteran upon a showing of default").[143] In 1994, on remand from the Eighth Circuit, the district court held that the "Whitney Letter" notice satisfied the due process requirement. Meanwhile, in 1993, in Boley v. Brown, the Fourth Circuit held that the Due Process Clause controls in these situations because "the VA orchestrates the foreclosure proceedings."[144]

With respect to private mortgagees' foreclosures of HUD-insured mortgages, there has been much less litigation. In 1997, the Fifth Circuit, in "an ambiguous opinion" in Roberts v. Cameron-Brown Co., reversed a district court holding that private mortgagees foreclosing under HUD's Section 235 subsidy program were subject to the Fifth Amendment's Due Process Clause.[145] The court of appeals emphasized, as the district court had not, that the foreclosing party was Fannie Mae, which the court did not consider a federal instrumentality in this context.[146] On the other hand, in 1974, the Ninth Circuit held that even when foreclosure was not in issue, for private mortgagees with HUD-insured mortgages under some programs there was "sufficient government involvement . . . to subject the activities of the landlords to the Fifth Amendment" so that tenants are entitled to participate in decisions about rent increases.[147] And, also in 1974, the Second Circuit held that after

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[142]Vail v. Brown, 841 F.Supp. at 911 (implementing the Eighth Circuit's directive).

[143] Vail v. Derwinski, 946 F.2d at 593 n. 9.

[144]Boley v. Brown, 10 F.3d 218, 220 (4th Cir. 1993). The principal issue in Boley was whether the veteran mortgagor, who had sold the home to a purchaser who assumed the loan, had a constitutionally protected property interest in the foreclosure proceedings in light of his obligation to indemnify the VA for any loss it might suffer. The court held that he did have such a constitutionally protected interest. *Boley*, 10 F.3d at 222.

[145]Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977), *reh. denied*, 559 F.2d 1217 (1977); Nelson & Whitman, *supra* note 3, § 7.28 at 692; *but see* Brown v. Lynn, 385 F.Supp. 986, 992-5 (N.D. Ill. 1974) (holding that private mortgagees foreclosing under HUD's Section 235 program are subject to due process constraints, but that state court procedures "provide the prescribed due process minima").

[146]*Roberts*, 556 F.2d at 358; Nelson & Whitman, *supra* note 3, § 7.28 at 692. See the discussion of Fannie Mae's status *supra* at .

[147]Geneva Towers Tenants Org'n v. Federated Mortg. Investors, 504 F.2d 483, 487-8 (9th Cir. 1974) (distinguishing Langevin v. Chenango Court, 447 F.2d 296 (2nd Cir. 1971)); *but see*

private mortgagees had foreclosed HUD-insured mortgages but had not yet conveyed the properties to HUD, *tenants* in those properties had a due process right to be heard with respect to whether HUD would require that they be evicted before transfer of the properties to HUD.[148]

In some of the litigation involving foreclosures by private lenders, including Roberts v. Carmeron-Brown, an issue has been whether the foreclosing entity is a federal entity. This issue arose several times with respect to FNMA and FHLMC. They were subject to government regulation, but after 1968 (for Fannie) and 1969 (for Freddie) they had "completely private ownership" and predominantly private management, with most of each board elected by the private owners.[149]

After 1968 and 1969, but before the conservatorship, Fannie and Freddie claimed to be and were held to be federal entities for some purposes.[150] In Mendrala v. Crown Mortgage Co. (1992), for example, the Seventh Circuit held that FHLMC was not a "federal agency" for purposes of the Federal Tort Claims Act but was protected by the Merrill doctrine's prohibition of estoppel against

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Nelson & Whitman, *supra* note 3, § 7.28 at 692 (discussing Miller v. Hartwood Apartments Ltd., 689 F.2d 1239 (5th Cir. 1982)).

[148]Caramico v. Dep't Hous. & Urban Dev., 509 F.2d 694, 701 (2nd Cir. 1974).

[149]Nelson & Whitman, *supra* note 3, § 11.3 at 934 (stating also that FIRREA, 12 U.S.C. § 1452(a) (2008) "gave Freddie Mac a new board structure virtually identical to Fannie Mae's"); Northrip v. Fed. Nat'l Mortg. Ass'n., 527 F.2d 23, 30 (6th Cir. 1975)(stating that FNMA has had "completely private ownership" since 1968).

[150]*See, e.g.*, McCauley v. Thygerson, 732 F.2d 978, 981-2 (D.C. Cir. 1984) (per curiam) (noting "numerous indicia of FHLMC's status as a federal entity for many purposes, including employment relations," and holding that Freddie's status for purpose of employment relations "ultimately turns . . . on functional considerations of the effect that application of broad notions of promissory estoppel would have in light of the congressional intent expressed in FHLMC's enabling act"); Rocap v. Indiek, 539 F.2d 174, 176-7, 181 (D.C. Cir. 1976) (Freddie a "Government controlled corporation" under 5 U.S.C. § 552(e) and subject to the Freedom of Information Act, in part because Freddie "is subject to such substantial federal control over its day-to-day operations"); Fed. Nat'l Mortg. Ass'n v. Lefkowitz, 390 F.Supp. 1364 (S.D. N.Y. 1975) (3 judge district court) (holding FNMA "a federal instrumentality" in a Supremacy Clause challenge to a state's requirement that it pay interest on escrow funds).

federal instrumentalities. [151]

Nonetheless, pre-conservatorship, most (though not all) courts held that Fannie and Freddie were not federal entities for purposes of resolving due process challenges to the use of non-judicial foreclosure.[152] These courts treated Fannie and Freddie as private entities in that context. In Northrip v. FNMA (1975), for example, the Sixth Circuit first said that if a private entity exerts "functions or powers of a governmental nature," it is subject to constitutional constraints, but "[m]ortgage foreclosures through power of sale agreements are not powers of a governmental nature."[153] The court acknowledged "government involvement in and regulation of " FNMA, but said that even significant government involvement is not enough to satisfy the governing test, that of Jackson v. Metropolitan Edison: "whether there is a sufficiently close nexus between the State [federal government] and the challenged action of the regulated entity so that the action of the latter

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[151]Mendrala v. Crown Mortg. Co., 955 F.2d 1132, 1139 (7th Cir. 1992) (stating that "Because the FHLMC is privately owned, is structured to function independently of the federal government to a great extent, and receives no appropriations from Congress, we conclude that it is not a federal agency for purposes of the Federal Tort Claims Act" although it is entitled to the protection of FCIC v. Merrill, 332 U.S. 380 (1947)); *accord*, Dupuis v. Fed. Home Loan Mortg. Corp., 879 F.Supp. 139 (D. Maine 1995) (FHLMC entitled to protection of Merrill); *see also* Paslowski v. Standard Mortg. Corp. of Georgia, 129 F.Supp.2d 793 (W.D. Penn. 2000) (holding Freddie a federal instrumentality entitled to the estoppel protection of Merrill).

[152]*See, e.g.*, Roberts v. Cameron-Brown Co., 556 F.2d 356, 357-9 (5th Cir. 1977) (pre-conservatorship FNMA is not government agency; use of non-judicial foreclosure is not governmental action subject to the due process clause); Northrip v. Fed. Nat'l Mortg. Ass'n., 527 F.2d 23 (6th Cir. 1975) (same); Fed. Nat'l Mortg. Ass'n. v. Scott, 548 S.W.2d 545 (Mo. 1977) (en banc), *app. dis.* 436 U.S. 924 (1978); Alexander, *Federal Intervention*, *supra* note 5, at 368 (stating that for "mortgage foreclosures by secondary mortgage market entities, due process requirements have been found to be inapplicable on the basis of insufficient governmental involvement"); *but see* Samuel T. Isaac & Assoc. v. Fed. Nat'l Mortg. Ass'n., 647 S.W.2d 495 (Ky. Ct. App. 1982) (upholding trial court's findings that FNMA was a federal agency and that "FNMA's conduct of business is so entwined with government policies that it assumes the character of government action," thereby requiring due process for termination of a mortgage banker's contract).

[153]*Northrip*, 527 F.2d at 31; *id*. (stating that the "history of this corporation shows, it was transferred to private control in 1968 because its activities were not thought to be governmental in nature").

may be fairly treated as that of the State [federal government] itself." [154] That test, the Sixth Circuit held, was not satisfied by FNMA:

> It was the congressional intent to disassociate [sic] FNMA from its previous government ownership because it was not appropriate for the government to be involved in the operation of a secondary mortgage market.[155]

The court concluded "that FNMA is sufficiently analogous to the public utility described in Jackson so that its actions should not be considered those of the state [sic: federal government]."[156]

In Roberts v. Cameron Brown, the Fifth Circuit similarly said that

> FNMA is essentially a privately-owned mortgage banker providing secondary mortgage loans. In 1968, Congress specifically dissociated FNMA from its previous government ownership and transferred it to private ownership.[157]

The court concluded: "We stand with the Sixth Circuit position that . . . The federal government and FNMA have not become so interdependent as to make its actions the actions of the federal government."[158]

The standard for determining when a private but federally controlled entity is subject to

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[154]*Northrip,* 527 F.2d at 31-2 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

[155]*Northrip*, 527 F.2d at 31-32; *accord*, *Roberts*, 556 F.2d at 359 (stating that "We stand with the Sixth Circuit position . . . ").

[156]*Northrip*, 527 F.2d at 32.

[157]*Roberts*, 556 F.2d at 359.

[158]*Id.*There is a curious aspect to Roberts v. Cameron-Brown Co. The court there states there that "[i]n Hoffman v. HUD, 519 F.2d 1160 (5 Cir. 1975) . . . this Circuit rejected . . . the argument that foreclosure of property under FNMA by use of the private power of sale violates due process." *Id.* at 360. In fact, however, Hoffman involved GNMA, not FNMA, and the Fifth Circuit's holding in Hoffman was that 42 U.S.C. § 1983 did not reach GNMA. Hoffman v. Dep't Hous. Urban Dev., 519 F.2d 1160, 1165 (5th Cir. 1975) (stating that "A suit testing the foreclosure of a mortgage by GNMA (a federal agency) is therefore not a case where 42 U.S.C. § 1983 should be applied").

constitutional constraints was refined by the Supreme Court in 1995 in Lebron v. National Railroad Passenger Corp.[159] There, the Court held that Amtrak, identified by statute as "not . . . an agency or establishment of the United States Government," would be treated as the government for First Amendment purposes.[160] Specifically, Justice Scalia wrote for the Court that

> where, as here, the Government creates a corporation by special law, for the 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.[161]

Lebron is understood to establish a two prong test: government purpose and government control. There is consensus that Fannie and Freddie satisfy the first prong.[162] Even before Lebron, even courts that held Fannie and Freddie not government entities agreed that both had been created by the government to serve government purposes.[163] Post-Lebron, in American Bankers Mortgage Corp. v. FHLMC (1996), the Ninth Circuit, addressing a mortgage banker's due process claims, agreed.[164] In American Bankers, however, the court held that Lebron's second prong, government

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[159]Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995).

[160]*Lebron*, 513 U.S. at 391-2.

[161]*Id* at 399.

[162]Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 615 (quoting Daniel E. Blegen, *The Constitutionality of Power Sale Foreclosures by Federal Government Entities*, 62 Mo. L. Rev. 425, 445-6 (1997)). As Professor Nelson writes, they satisfy this prong "because they both were formed by the government to further governmental objectives."

[163]*Mendrala*, 955 F.2d at 1139-41(stating that Freddie's purposes are "'federal governmental objectives' for the purpose of analyzing whether or not Freddie Mac is a government entity" and that Freddie "certainly furthers an important federal mission, and does act as a federal agency or instrumentality in this sense," and "has a *public statutory mission*: to maintain the secondary mortgage market and assist in meeting low- and moderate-income housing goals . . . "). *See also* Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401 (9th Cir. 1996) (quoting Mendrala and adding the emphasis indicated).

[164]*Am. Bankers*, 75 F.3d at 1406-07 (stating that the "congressional purposes of Freddie Mac are clearly designed to serve the public interest by increasing the availability of mortgages on housing for low- and moderate-income families and by promoting nationwide access to mortgages").

control, was not satisfied by pre-conservatorship Freddie Mac.[165] The Ninth Circuit said that the federal government did not "control[] the operation of [Freddie Mac] through its appointees," for, pre-conservatorship, Freddie was privately owned, Freddie's common stock was publicly traded on the New York Stock Exchange, and "the U.S. government [was] entitled to appoint fewer than one-third of Freddie Mac's directors."[166] The bases for the decision would have applied equally to Fannie Mae. [167]

As we have seen, courts, scholars, Congress, and agencies expressed disparate views about the application of the Due Process Clause to foreclosures by private lenders under VA and HUD guarantee and insurance programs. When private entities foreclosed, at least some courts applied the Metropolitan Edison test and determined that there was not a sufficient nexus between the private action and the federal entity to hold the private actor subject to constitutional constraints. With respect to Fannie and Freddie pre-conservatorship, courts generally held them not to be federal agencies for purposes of resolving Due Process challenges. The decisions applied the Metropolitan Edison test and then the Lebron test.

Those cases did not, however, detract from the apparent agreement of scholars, courts, Congress, and the agencies that when the foreclosing mortgagee is a federal entity federal action is present and due process requirements must be satisfied.[168] That consensus was breached, however, in a 1980 decision of the Eighth Circuit, Warren v. Government National Mortgage Ass'n. (GNMA).[169]

As discussed above, GNMA was created in 1968 as a "body corporate . . .in the Department of Housing and Urban Development . . .[, to] have succession until dissolved by Act of

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[165]Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401 (9th Cir. 1996).

[166]*American Bankers*, 75 F.3d at 1407.

[167]*See* Herron v. Fannie Mae, 857 F. Supp. 2d 87, 93 (D. D.C. 2012) (comparing Fannie and Freddie pre-conservatorship with regard to these factors and concluding that "Fannie Mae was a private entity pre conservatorship").

[168]Nelson & Whitman, *supra* note 3, § 7.28 at 689; Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5 at 613; Alexander, Georgia Real Estate, *supra* note 14, § 13.2(a); see discussion *supra*, at .

[169]Warren v. Gov't Nat'l Mortg. Ass'n., 611 F.2d 1229 (8th Cir. 1980), *cert. denied*, 449 U.S. 847 (1980).

Congress."[170] It has no capital stock and describes itself and is described by others as "a government entity."[171] It is "in the Department of Housing and Urban Development" in the same way that the Farmers Home Administration (now the Rural Housing Service) is "in" the Department of Agriculture. The full faith and credit of the United States is pledged to the repayment of GNMA's securities.[172] As a government agency, it is represented in litigation by the U.S. Department of Justice.[173]

In Hoffman v. HUD (1975), the Fifth Circuit (per Judge Rives) dealt with foreclosure of a mortgage held by GNMA. The court said that the "mortgagee . . . is the Government National Mortgage Association (GNMA), a branch of the Department of Housing and Urban Development."[174] The case was captioned "Hoffman v. United States Department of Housing and Urban Development."[175] The defendants were represented by the U.S. Attorney, the U.S. Department of HUD, and the U.S. Department of Justice.[176] The court of appeals affirmed dismissal of a cause of action under 42 U.S.C. § 1983 on the ground that "a federal agency is . . . excluded from the scope of section 1983 liability."[177] It held that a "suit testing the foreclosure of a mortgage

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[170]Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Title VIII, 82 Stat. 476, (codified as amended at 12 U.S.C. § 1717(a)(2)(A) (2013)).

[171]Government National Mortgage Association, www.ginniemae.gov (Last visited July 18, 2013); Ingrid Gould Ellen, John Napier Tye, & Mark A. Willis, *The Secondary Market for Housing Finance in the United States: A Brief Overview*, in The American Mortgage System, *supra* note 22, at 8-9.

[172]Ingrid Gould Ellen, John Napier Tye, & Mark A. Willis, *The Secondary Market For Housing Finance in the United States: A Brief Overview*, in The American Mortgage System, *supra* note 22, at 8-9.

[173]*See, e.g.*, Hoffman v. U.S. Dep't of Hous. & Urban Dev., 519 F.2d 1160 (5th Cir. 1975).

[174]*Id*. at 1164.

[175]*Id*. at 1160.

[176]*Id.* at 1161.

[177]*Id*. at 1165.

by GNMA (a federal agency) is therefore not a case where 42 U.S.C. § 1983 should be applied."[178]

On the merits of the due process claim in Hoffman, the Fifth Circuit said that it assumed that before a foreclosure "by GNMA (a federal agency)" "due process would . . . require the federal government to give homeowners notice and opportunity to be heard." [179] The court held, however, that in the case presented the homeowners had waived that right.[180] Identifying the numerous notices that had been sent to the homeowners, the court concluded that GNMA had satisfied its due process obligations.[181]

Despite this decision, five years later, in 1980, the Eighth Circuit, without referring to Hoffman, held in Warren v. GNMA that GNMA was not subject to the Due Process Clause and therefore could use non-judicial foreclosure.[182] Vivian Warren and her husband had purchased a home from HUD and executed a note and deed of trust to FNMA; "[t]hereafter, by Congressional Act, FNMA was converted into GNMA . . . ."[183] When GNMA instituted non-judicial foreclosure, Mrs. Warren challenged both the Missouri non-judicial foreclosure statute and the use of non-judicial foreclosure by GNMA.[184]

The federal court abstained from deciding the constitutionality of the state statute; the state supreme court held that the state statute authorizing non-judicial foreclosure did not constitute state

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[178] *Id.*

[179] *Id.* See note 158, *supra*, re: the mis-use of Hoffman in Roberts.

[180] *Id.*

[181] *Id.* at 1166.

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Warren v. Gov't Nat'l Mortg. Ass'n., 611 F.2d 1229, 1233 (8th Cir. 1980), *cert. denied*, 449 U.S. 847 (1980); *id.* at 1232 (rejecting the due process claim "on the basis of no federal government action").

[183] *Id.* at 1231. In Missouri, deeds of trust "are commonly used as security agreements in lieu of mortgages." *Warren*, 611 F.2d at 1231 n.4.

[184] When the suit was filed, the Warrens had separated. Mrs. Warren was the plaintiff; Mr. Warren was made a party defendant and defaulted. *Warren*, 611 F.2d at 1231, n.2.

action sufficient to invoke the Fourteenth Amendment's Due Process Clause.[185]

The federal court then considered Ms. Warren's Fifth Amendment challenge to the non-judicial foreclosure. It was clear that the action had been taken by GNMA: a letter to the Warrens notified them "that GNMA deemed the payments on the note to be in default and that, as holder of the note GNMA had elected to declare the entire principal due."[186] "Thereafter, GNMA foreclosed . . .[; and] GNMA was the purchaser at this sale."[187] Mrs. Warren had had no notice of the sale before it was conducted; she learned of it when GNMA, having purchased the property at the foreclosure sale, demanded possession of the property.[188]

The Eighth Circuit described GNMA as "a private corporation wholly-owned by the federal government,"[189] "a corporate entity, wholly-owned by the federal government" which "also operates under federal government authority."[190] The court acknowledged that GNMA "is under the management and control of the Secretary of HUD" and "has no capital stock"; it recognized that the "economic benefits and burdens of its administration inure to the Secretary of the Treasury . . . ."[191]

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[185]*Id*. at 1232 n.6, discussing Warren v. Gov't Nat'l Mortg. Ass'n., 443 F.2d 624 (8th Cir. 1971) (affirming abstention decision but directing that the case remain on the federal court docket pending decision by the state supreme court) and Warren v. Gov't Nat'l Mortg. Ass'n., 521 S.W.2d 441 (Mo. 1975) (en banc) (holding that the state statute did not constitute state action sufficient to invoke the Fourteenth Amendment's Due Process Clause).

[186]*Warren*, 611 F.2d at 1231.

[187]*Id*. at 1231-2.

[188]*Id*. The letter regarding the default had been sent to Mr. and Mrs. Warren, first class, not registered nor certified. It had not mentioned foreclosure. The record indicated that Mrs. Warren "had only a fifth grade education and neither she nor her husband could read." In the state court proceedings, she testified that she did not remember receiving the letter. *Id*. at 1231, 1231 n.5.

[189]*Id*. at 1231; 12 U.S.C. § 1716 (2013).

[190]*Warren*, 611 F.2d at 1232-3; *but see, id*. at 1231 (noting that GNMA had employed private counsel to conduct the foreclosure. referring to "the successor trustee under the deed of trust[,] a private attorney retained by GNMA and not otherwise employed by the federal government . . .").

[191]*Id*. at 1233.

The court acknowledged that "if considered purely as a matter of statutory and organizational form the new GNMA could perhaps be viewed as more 'governmental' than its counterpart FNMA," but the court said it "read the legislative history to indicate Congress' intent" that GNMA should be treated as if it were as private as FNMA.[192] The court said its reading of the legislative history indicated Congress's intent "to dissociate as far as possible" both FNMA and GNMA, "however characterized as to form, from the federal government in regard to their respective secondary mortgage market functions."[193]

In addressing the due process claim, the court did not discuss Hoffman or other cases applying the bright line rule that a federal agency that forecloses a mortgage is subject to the Fifth Amendment. It said "the deciding issue in this regard is not simply whether GNMA is a government-owned or authorized corporation . . . "[194] Treating GNMA as courts had treated FNMA, the court applied not the standard for federal agencies but the standard for <u>private</u> entities. It said that "[t]he standard for finding federal government action under the fifth amendment is the same as that for finding state action under the fourteenth amendment": whether there exists "'a sufficiently close nexus between the (government) and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the (government) itself,"citing Jackson v. Metropolitan Edison Co.[195]

The court then went on to discuss what it considered "the deciding issue," whether GNMA's use of non-judicial foreclosure "was so closely linked to federal government regulation" that it should be regarded "more as the action of the federal government itself than that of GNMA." The court concluded that it was not.[196]

Warren "has been criticized heavily and has few adherents."[197] Professors Nelson and Whitman analyze the "unclear" reasoning of the opinion, and suggest that it could be read narrowly (though erroneously), "saying simply that GNMA, because of its unique role as a corporation

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[192]*Id*. at 1233 n.8.

[193]*Id*.

[194]*Id*. at 1233.

[195]*Id*. at 1232 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

[196]*Id*. at 1233.

[197]Randolph, *supra* note 119, at n.41; Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 613-14; Nelson & Whitman, *supra* note 3, § 7.28 at 690.

dealing on the secondary mortgage market, acts, for the most part, like a private corporation and therefore should not be treated as a direct federal instrumentality."[198] A broader reading of Warren, they agree with other commentators, is even more tenuous: "'to the extent that [*Warren*] purports to state that in some circumstances a government mortgagee acting as a private entity is not a state actor, [it] is wrong and contrary to the strong trend in the other circuits." [199]

In 1987, the Eighth Circuit characterized its decision in Warren as resting on the proposition that effecting foreclosures pursuant to power of sale agreements was not a governmental function, a point that had been emphasized by the concurring opinion in Warren.[200] In the 1987 case, Arcoren v. Peters, a majority of the Eighth Circuit, sitting en banc, took this reasoning even further, holding that FmHA officials who repossessed cattle without prior notice to the owner were entitled to qualified immunity because there was not a clearly established right to due process in that situation. Rather, the majority held, there had been at the time of repossession (and, the majority said, still was in 1987) "strong authority" for the proposition that "when the FmHA acted as a lender, it acted in a commercial rather than a sovereign capacity."[201] Discussing Warren, the Arcoren majority said:

> Despite this seemingly indisputable entanglement with the federal government, we concluded that "mortgage foreclosures through power of sale agreements * * * are not in and of themselves powers of a governmental nature."[202]

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[198]Nelson & Whitman, *supra* note 3, § 7.28 at 690; Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 613-14 (discussing the "unclear" reasoning of the decision).

[199]Nelson & Whitman, *supra* note 3, § 7.28 at 690 (quoting Jack Jones & J. Michael Ivens, *Power of Sale Foreclosure in Tennessee: A Section 1983 Trap*, 51 Tenn. L. Rev. 279, 302 (1984)).

[200]The 1987 decision is Arcoren v. Peters, 829 F.2d 671, 674 (8th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 987 (1988). In *Warren*, Judge Ross, concurring, had stated: "I concur in the determination that there was no federal government action for the reason that GNMA functions only in a traditionally nonsovereign capacity in providing secondary mortgages and enforcing them according to their terms," citing Northrip v. Fed. Nat'l Mortg. Ass'n., 527 F.2d 23 (6th Cir. 1975) and Roberts v. Cameron-Brown Co., 556 F.2d 356 (5th Cir. 1977). *Warren*, 611 F.2d at 1235.

[201]Arcoren v. Peters, 829 F.2d 671, 674 (8th Cir. 1987) (en banc), *cert. denied*, 485 U.S. 987 (1988).

[202]*Arcoren*, 829 F.2d at 675 (quoting Warren v. Gov't Nat'l Mortg. Ass'n., 611 F.2d 1229, 1234 (8th Cir. 1980)).

The Arcoren majority concluded:

> Arcoren has not demonstrated, nor has our study caused us to conclude, that there is a constitutional right to prior notice and a hearing when the government acts in the capacity of a commercial lender pursuant to a security agreement.[203]

On the other hand, as we have seen, in 1991, in Vail v. Derwinski, the Eighth Circuit, without ever referring to its decisions in Warren or Arcoren, said that "state action is supplied by the VA's involvement in ordering foreclosure." [204] The Vail court noted that "government participation in this type of [non-judicial] foreclosure procedure raises serious due process questions"[205] and "held that failure to give [reasonable personal notice] was a violation of the Due Process Clause of the Fifth Amendment."[206]

Aside from the Eighth Circuit, courts certainly have not treated Warren as contradicting the bright line rule that a federal entity as foreclosing mortgagee is subject to the Due Process Clause. Cases involving the Farmers Home Administration, the VA, and HUD continued to apply that bright line rule, without even referring to Warren or Arcoren.[207]

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[203]*Arcoren*, 829 F.2d at 676. The decision in Arcoren was subject to a strong dissent by Judge Heaney, joined by Chief Judge Lay; the dissent objected that the majority "affords the FmHA officials a chameleon-like quality, finding their actions sufficiently governmental to merit qualified immunity and sufficiently private to be exempt from constitutional requirements." *Arcoren*, 829 F.2d at 680 (Heaney, J., dissenting). The dissent insisted that "governmental officials are not exempt from the requirements of the Constitution because a state statute authorizes a private individual to utilize a course of conduct otherwise off-limits to them." *Id*. at 681.

[204]Vail v. Derwinski, 946 F.2d 589, 593 n.9 (8th Cir. 1991), *amended*, 956 F.2d 812 (1992) (stating that after the earlier opinion had been filed, the government called to the court's attention a 1987 amendment of 38 U.S.C. § 3732(a)(4)(A) to require the agency "to provide notification to the veteran upon a showing of default").

[205]*Vail v. Derwinski*, 946 F.2d at 593.

[206]Vail v. Brown, 841 F. Supp. 909, 911 (D. Minn. 1994) (implementing the Eighth Circuit's directive).

[207]*See,* in addition to Vail v. Derwinski, 946 F.2d 589 (8th Cir. 1991) and Vail v. Brown, 841 F. Supp. 909 (D. Minn. 1994), Boley v. Brown, 10 F.3d 218 (4th Cir. 1993), Mortg. Assoc. v. Cleland, 651 F.2d 476 (7th Cir. 1981), Lehner v. United States, 685 F.2d 1187 (9th Cir. 1982),

Warren also has not governed cases involving three government owned or controlled corporations that regulate or insure depository institutions: the FDIC, the RTC, and the FSLIC. The FDIC was created in 1933 to insure deposits in commercial banks; the Federal Savings and Loan Insurance Corporation (FSLIC) began insuring deposits in savings and loan associations in 1934.[208] The 1989 Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) abolished the FSLIC, transferred its deposit insurance responsibilities to the FDIC, and created the Resolution Trust Corporation (RTC) "as a temporary federal agency to clean up the savings and loan (S&L) crisis after the FSLIC fund became insolvent."[209] The RTC existed from August 1989 through December 1995 and then was replaced by the FDIC.[210] FDIC, FSLIC, and RTC all were authorized to serve as conservator or receiver of failed depository institutions.[211] The Supreme Court and lower courts consistently have recognized that due process and other constitutional claims can be made against these agencies even when they act as conservators or receivers for private depository

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Johnson v. U.S. Dep't Agric., 734 F.2d 774 (11th Cir. 1984), Matzke v. Block, 564 F. Supp. 1157 (D. Kan. 1983), United States v. Ford, 551 F. Supp. 1101 (N.D. Miss. 1982), United States v. Whitney, 602 F. Supp. 722 (W.D. N.Y. 1985), United States v. Murdock, 627 F. Supp 272 (N.D. Ind. 1985).

[208]James R. Barth, Susanne Trimbath, & Glenn Yago, *Introduction*, The Savings and Loan Crisis: Lessons from a Regulatory Failure xxv, xxix (Milken Institute 2004) (James R. Barth & Glenn Yago eds.); as to FSLIC, *see* Coit Independence Joint Venture v. Fed. Sav. Loan Ins. Corp, 489 U.S. 561, 569-70 (1989).

[209]Michael K. Slattery, FIRREA: Receivership and Conservatorship Law §§ 1-1, 1-2 (1992); Federal Deposit Insurance Corporation, Managing the Crisis: The FDIC and RTC Experience 1980-1994 6 (1998) [hereinafter FDIC, Managing the Crisis]; *id*. at 11 ("FIRREA dissolved the FSLIC, authorized use of taxpayer funds to resolve failed thrifts, and established the RTC [,] . . . with the FDIC named as the manager of the RTC"); Fischer v. Resolution Trust Corp., 59 F.3d 1344, 1345-6 (D.C. Cir. 1995) (stating that the RTC was created by FIRREA and "charged with the temporary task of liquidating the assets of the large number of depository institutions that failed in the 1980s"); Financial Institution Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, § 501 (codified as amended 12 U.S.C. § 1441a) [hereinafter FIRREA]; FIRREA § 211 (codified as amended at 12 U.S.C. § 1821a); FIRREA § 215 (codified as amended at 12 U.S.C. § 1281a).

[210]FDIC, Managing the Crisis, *supra* note 209, at 8; 12 U.S.C. § 1441a(m)(1) (1989); Lopez-Flores v. Resolution Trust Corp., 93 F.Supp.2d 834, 836 n.1 (E.D. Mich. 2000).

[211]12 U.S.C. § 1811, et seq. (2013); 12 U.S.C. § 1726 (1989) (repealed in 1989 by FIRREA); 12 U.S.C. § 1441a (2011) (repealed in 2011).

institutions.[212]

Some of these cases have involved challenges to the use of non-judicial foreclosure; declining to follow Warren, the courts acknowledged that these constitutional challenges against the conservators or receivers were justiciable. In 1983, for example, a district court held that the FDIC, acting as receiver for a failed depository institution, was subject to the Fifth Amendment's Due Process Clause and therefore could not use non-judicial foreclosure.[213] In this case, FDIC v. Morrison, the court used the bright line rule; it held that

> FDIC is a federal agency whose actions . . . are governed by the Due Process Clause of the Fifth Amendment . . .[;] FDIC and federal agencies whose actions are limited by the Fifth Amendment must, in order to effect a valid foreclosure, do more than to rely upon newspaper notice to those whose property rights are affected.[214]

When the FDIC appealed, it accepted this ruling. In the court of appeals, the FDIC renounced an argument it had made below, that foreclosure of a mortgage involved a proprietary, not a governmental function, and therefore was immune from constitutional constraints. On appeal, the FDIC

> pointedly decline[d] to urge that . . . it ha[d] performed only a proprietary function not subject to due process requirements. Indeed, the agency admit[ted] that in liquidating this asset of a failed bank it ha[d] performed a governmental function." [215]

"In fact, the FDIC obtained permission to amend its Brief on Appeal in order to withdraw its proprietary function argument. The amended brief frankly concede[d] that such liquidations are a

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[212]*See* discussion *infra* at -.

[213]Fed. Deposit Ins. Corp. v. Morrison, 568 F.Supp. 1240, 1246 (N.D. Ala. 1983), *order rev'd on other grounds*, 747 F.2d 610 (11th Cir. 1984), *reh'g denied*, 763 F.2d 419. For clarity I will refer to the District Court's decision as *Morrison I*, and the Eleventh Circuit's decision as *Morrison II*.

[214]*Morrison I*, 568 F.Supp. at 1246.

[215]*Morrison II*, 747 F.2d at 613; *see*, Alexander, Georgia Real Estate, *supra* note 14, § 13.2(a).

governmental function."[216]

On the appeal in Morrison, the Eleventh Circuit acknowledged but explicitly did not rely on the Eighth Circuit's decision in Warren.[217] Accepting the applicability of the Fifth Amendment to a foreclosure by the FDIC as receiver, the court of appeals reversed the district court on the ground that the FDIC had not effected a deprivation of a property interest.[218]

Consistently with the district court in Morrison, the D.C. Circuit has said that the FDIC as receiver may be subject to due process constraints when it forecloses a mortgage. In Freeman v. FDIC (1995), homeowners sued to prohibit the FDIC as receiver from foreclosing on their home.[219] The D.C. Circuit held that the district court lacked jurisdiction over the claim because the homeowners had failed to exhaust administrative remedies for their statutory claims.[220] The homeowners also made a due process claim. As to that, the court referenced earlier decisions of the D.C. Circuit and other courts which had left open the possibility of constitutional due process claims against the FDIC, but said the due process claim in this case was unavailing because the homeowners had been provided with predeprivation notice and an opportunity to be heard.[221]

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[216]*Morrison II*, 747 F.2d at 613, n.6.

[217] In *Morrison II*, the Eleventh Circuit uses a "Cf." signal in its citation of *Warren* and *Roberts v. Cameron-Brown Co.*, (discussed *supra* at n.156) in the footnote to the statement that the FDIC declines to argue that it is not subject to the due process clause. *Morrison II*, 747 F.2d at 613 n.5.

[218] *Morrison II*, 747 F.2d at 615-616; *see* the discussion of this point *supra* at n. 91.

[219]Freeman v. Fed. Deposit Ins. Corp., 56 F.3d 1394, 1396 (D.C. Cir. 1995).

[220]*Freeman*, 56 F.3d at 1402

[221]*Freeman*, 56 F.3d at 1403 (citing, *inter alia*, Nat'l Trust for Historic Pres. v. Fed. Deposit Ins. Corp., 21 F.3d 469, 473 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1065 (1994) (stating that "we do not decide today what might happen if the denial of an injunction in any particular situation itself violated constitutional due process")); Nat'l Trust for Historic Pres. v. Fed. Deposit Ins. Corp., 995 F.2d 238, 240 (D.C.Cir. 1993) (stating that statutory preclusion of judicial review is effective except against claims that the FDIC "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions"); Nat'l Union Fire Ins. Co. of Pittsburg, Pa. v. City Sav., F.S.B., 28 F.3d 376, 392 (3rd Cir. 1994);

These cases are especially significant because for FDIC and RTC as receivers, recovery is not for the United States but for the depositors and creditors of the failed institution. The Supreme Court has indicated that when the federal treasury is at risk, government controlled corporations are even more likely to be held to be the government.[222] For FDIC and RTC as receivers, however, recovery will generally inure "to the benefit of [the failed institution's] depositors and creditors rather than the government."[223] Nonetheless, constitutional constraints have been held to apply to the FDIC and RTC. The vulnerability of the RTC is especially significant because it was established as a temporary agency.

This recognition that due process claims lie against a federally owned or controlled corporation acting as receiver for a depository institution is grounded in a seminal Supreme Court decision involving the FSLIC, Coit Independence Joint Venture v. FSLIC (1989).[224] In Coit, the Supreme Court was interpreting a statutory prohibition of judicial action that would "restrain or

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Homeland Stores Inc., v. Resolution Trust Corp., 17 F3d. 1269, 1274 n.5 (10th Cir. 1994). *See also* Rosa v. Resolution Trust Corp., 938 F.2d 383, 396-7 (3rd Cir. 1991), *cert. denied*, 502 U.S. 981 (1991) (entertaining due process and other constitutional claims against RTC); Tillman v. Resolution Trust Corp., 37 F.3d 1032, 1036 (4th Cir. 1994) (indicating that due process claim might be viable but the facts showed that the plaintiff had received notice); Resolution Trust Corp. v. Walde, 18 F.3d 943, 948-9 (D.C. Cir.1994) (entertaining Fourth Amendment challenge to RTC administrative subpoenas and holding unreasonable RTC interpretation that would contravene Fourth Amendment standards); Am. Nat'l Ins. Co. v. Fed. Deposit Ins. Corp., 642 F.3d 1137, 1143 (D.C. Cir. 2011) (recognizing the possibility of constitutional problems with actions of FDIC as receiver).

[222]Inland Waterways Corp. V. Young, 309 U.S. 517 (1940); Cherry Cotton Mills v. United States, 327 U.S. 536 (1946).

[223]Resolution Trust Corp. v. Daddona, 9 F.3d 312, 321 (3rd Cir. 1993) (RTC); North Arkansas Medical Ctr. v. Barrett, 962 F.2d 780, 790 (8th Cir. 1992) (FDIC).

[224] Coit Independence Joint Venture v. Fed. Sav. Loan Ins. Corp., 489 U.S. 561 (1989); Nat'l Trust for Historic Pres. v. Fed. Deposit Ins. Corp., 995 F.2d 238, 240 (D.C. Cir. 1993), *judgment vacated*, 5 F.3d 567 (D.C. Cir. 1993), *reinstated in relevant part*, 21 F.3d 469 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1065 (1994) (citing and quoting *Coit*).

affect the exercise of powers or functions of a conservator or receiver."[225] The Court held that FSLIC was not authorized to adjudicate creditors' claims and that, for that reason, judicial consideration de novo of such claims was not barred by the prohibition of judicial action that would "restrain or affect" FSLIC's "powers or functions" as receiver.[226] Therefore, the Court said, it did not need to consider Coit's due process and other constitutional claims.[227] The Court noted that these claims "raise[d] serious constitutional difficulties" and the "statutes can and should be read to avoid these difficulties."[228]

One other aspect of Coit – the use of a metaphor – is significant with respect to the discussion, below, of constitutional claims against FHFA, Fannie, and Freddie. Describing the receivership process, the Court said that when "[o]nce FSLIC is appointed receiver of an insolvent savings and loan association, FSLIC steps into the shoes of the association and takes control of its assets"; later, the Court observed that in cases, like Coit, where suit is filed before the FSLIC becomes receiver, "FSLIC will receive notice of those claims when it steps into the shoes of the failed savings and loan and takes control of its assets."[229]

Consistently with Coit, the courts of appeals repeatedly maintained that even a statutory prohibition of judicial interference with a receiver's actions does not bar consideration of constitutional claims or of claims that the FDIC or RTC has exceeded its statutory powers.[230] In

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[225]*Coit*, 489 U.S. at 571; Financial Institutions Supervisory Act (FISA) of 1966, 80 Stat. 1033 (codified as amended at 12 U.S.C.§ 1464(d)(6)(C) (2011). A similar provision was included in FIRREA and then in HERA: the anti-injunction language of FISA, 12 U.S.C. § 1464(d)(6)(C), became FIRREA § 1821(j) and then HERA § 4617(f). See Florence Wagman Roisman, Securing Judicial Review of Denials of Mortgage Modifications under the Administrative Procedure Act (draft article on file with author).

[226] *Coit*, 489 U.S. at 574.

[227] *Id*. at 578.

[228] *Id*. at 579.

[229] *Id*. at 585.

[230]*See, e.g.*, Gross v. Bell Sav. Bank Pa SA, 974 F.2d 403, 407 (3rd Cir. 1991) (stating that "federal courts have the ability to restrain the RTC where the Corporation is acting clearly outside its statutory powers"); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B., 28

Freeman v. FDIC, the D.C. Circuit applied this to a due process challenge to a foreclosure.[231] While the Supreme Court and many courts of appeals have said that constitutional claims do lie against these federally owned or created corporations, there is one exception to this consensus: U.S. v. Beszborn, a Fifth Circuit decision rejecting a claim that a criminal prosecution was barred by the Double Jeopardy Clause because of an earlier suit brought by a savings and loan institution which subsequently was replaced by the RTC as "conservator/receiver."[232]

The foregoing reviews the state of the law prior to FHFA's imposition of the conservatorship on Fannie and Freddie. Part V addresses that situation.

V. APPLICATION OF THESE PRINCIPLES TO THE QUESTION WHETHER. POST-CONSERVATORSHIP, FORECLOSURES OF MORTGAGES HELD BY FANNIE AND FREDDIE ARE SUBJECT TO DUE PROCESS REQUIREMENTS.

As we have seen, while the Supreme Court has not ruled on the issue, lower courts, scholars, Congress, and agencies have taken varied approaches to the question whether different federally-related entities are subject to due process constraints when they foreclose mortgages.
When entities that are part of federal departments (e.g., the Department of Agriculture or HUD) are foreclosing mortgagees, courts and commentators generally agree that they are subject to the Due Process Clause.[233] In some situations, Congress and the agencies also have acknowledged that these entities should provide notice – and, sometimes, an opportunity for hearing – when they foreclose.[234] Warren v. GNMA is the striking exception to this bright line rule, holding that

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F.3d 376, 389-91 and n.16 (3rd Cir. 1994) (reversing a district court's dismissal for lack of jurisdiction of a claim for rescission because that interpretation would "result in an unconstitutional deprivation of due process"); Fischer v. Resolution Trust Corp., 59 F.3d 1344, 1349 (D.C. Cir. 1995); Sharpe v. Fed. Deposit Ins. Corp., 126 F.3d 1147, 1155 (9th Cir. 1997).

[231] Freeman v. Fed. Deposit Ins. Corp., 56 F.3d 1394 (D.C. Cir. 1995).

[232] United States v. Beszborn, 21 F.3d 62 (5th Cir. 1994).

[233] See discussion *supra* at p.22, n.109.

[234] See discussion *supra* at p.23, n.110.

GNMA, which is part of HUD, was not subject to the Fifth Amendment.[235] On the other hand, some courts have extended the bright line rule, holding that due process requirements apply when foreclosure is effected by a private actor that is following the instructions of a federal department.[236]

Before FHFA imposed the conservatorship, courts generally regarded Fannie and Freddie as private entities for constitutional purposes. The test used to determine whether constitutional constraints applied initially was that employed for private, regulated entities under the Fourteenth Amendment, Jackson v. Metropolitan Edison's "nexus" test.[237] In Lebron, the Supreme Court established the standard for deciding whether First Amendment claims lay against a corporation created by Congress and designated by Congress as *not* being an agency of the federal government: that standard was government purpose and control.[238]

A separate group of cases involved the FSLIC, FDIC, and RTC, government controlled corporations that generally were considered government actors. When any of these acted as conservator or receiver of a private depository institution, the courts sometimes asked whether the challenged action performed by the corporation were "sovereign," "corporate," or "proprietary" or whether the corporation had "stepped into the shoes" of the entity for which it is conservator or receiver. This inquiry usually was undertaken to decide whether federal or state law should control in particular situations; the leading Supreme Court decisions in that regard were D'Oench, Duhme and O'Melveny & Myers.[239] In those choice of law cases, however, the Supreme Court and numerous courts of appeals said that constitutional claims would lie against the FSLIC, FDIC, and RTC as conservator or receiver.[240] The Fifth Circuit strayed from this consensus in U.S. v. Beszborn, involving the Double Jeopardy Clause.[241]

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[235]See discussion *supra* at p.37, n.182.

[236]See discussion *supra* at p.26, n.124.

[237]See discussion *supra* at p.32, n.154.

[238]See discussion *supra* at p.33, n.159.

[239]See discussion *infra* at .

[240]See discussion *supra* at p.42, n.211.

[241]See discussion *supra* at pp.46-47, n.232.

This was the background to FHFA's imposition of the conservatorship on Fannie and Freddie. Post-conservatorship, several district courts have considered whether FHFA, Fannie, and Freddie are subject to constitutional constraints, sometimes in the context of due process challenges to non-judicial foreclosures. The leading case is a 2012 federal district court interlocutory opinion, Herron v. Fannie Mae, which said that termination of a contract by Fannie Mae was not federal action for purposes of the First Amendment.[242]

The plaintiff in Herron was a contractor with Fannie Mae who challenged Fannie's termination of her contract, in part on First Amendment grounds.[243] The court granted a motion to dismiss that claim, saying that "the imposition of conservatorship and the execution of the Financial Agency Agreement did not transform Fannie Mae into a government actor" for First Amendment purposes.[244]

The court's opinion had three bases. First, it stated that Lebron set the standard for determining "what type of entity constitutes a federal actor for the purpose of a constitutional claim."[245] It held that Lebron was not satisfied because FHFA's control over Fannie, while complete, is only temporary, and "[i]n order to be a government actor under the *Lebron* framework, permanent government control is required."[246]

Second, the court compared FHFA as conservator to the FDIC and Fannie to a failed private lending institution. Relying on O'Melveny & Myers, where the issue was whether federal or state law should be used, the Herron court wrote:

> like FDIC when it serves as a conservator or receiver of a private entity, FHFA when it serves as conservator "step[s] into the shoes" of the private corporation, Fannie Mae. In such circumstances, the federal agency in its guise as a conservator or receiver of a private

[242]Herron v. Fannie Mae, 857 F.Supp.2d 87 (D. D.C. 2012), 2012 WL 1476051.

[243]*Id*. at 89.

[244] *Id*. at 92.

[245] *Id*.

[246]*Id*. at 95.

corporation is not a government actor.[247]

Third, the Herron court cited Beszborn, where the Fifth Circuit said that when the RTC, as receiver, acts on behalf of "the creditors and stockholders of the failed institution which it represents," is represented by private counsel instead of the U.S. Attorney, and seeks recoveries not for the United State Treasury but for those creditors and stockholders, "the RTC stands as a private, non-governmental entity, and is not the Government for purpose of the Double Jeopardy Clause."[248]

Herron has been followed by several district courts, including some ruling on whether due process constraints apply when FHFA as conservator forecloses a mortgage held by Fannie or Freddie.[249] These courts have used the Herron analysis: applying the Lebron test and finding it not satisfied because the conservatorship is not permanent; analogizing FHFA to FDIC and saying that when FHFA "step[s] into the shoes" of Fannie or Freddie, it is not a private actor; and citing Beszborn.

On the other hand, some state courts have rejected the Herron analysis and have held that Fannie and Freddie are federal actors under Lebron. In FHLMC v. Kelley, for example, a Michigan Circuit Court concluded that "the Federal Government retains permanent control over" Freddie.[250] "In regard to permanence," the court wrote:

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[247]*Id*. at 94.

[248]*Beszborn*, 21 F.3d at 68.

[249]See, e.g., Bernard v. Fed. Nat'l Mortg. Ass'n, 2013 WL 1282016 (E.D. Mich. March 2013); Fannie Mae v. Mandry, 2013 WL 687056 (E.D. Mich. Feb. 2013); Lopez v. Bank of Am., N.A., 2013 WL 150460 (W.D. Mich. Jan. 2013); Kapla v. Fed. Nat'l Mortg. Ass'n, 2012 WL 6569739 (Bankr. E.D. Mich. Dec. 2012); In re Azhar Hermiz; Hermiz v. Fed. Home Loan Mortg. Corp., 2013 WL 3353928 (Bankr. E.D. Mich. July 2013) (following Kapla); Rubin v. Fannie Mae, 2012 WL 6000572 (E.D. Mich. Nov. 2012); Syriani v. Freddie Mac Multiclass Certificates, Series 3365, 2012 WL 6200251 (C.D. Cal. July 2012) (rejecting a claim under 42 U.S.C. § 1983, relying on Herron to establish that FHLMC is not a state [sic] actor, but noting that under California law plaintiff did receive notice of and an opportunity to be heard with regard to the foreclosure).

[250]Fed. Home Loan Mortg. Corp. v. Kelley, 30th Cir. Ct. for the Cnty. of Ingham (Feb. 12, 2013), sl. op. at 9.

there is no determined end date in which [Freddie] will become a private entity, nor is there an automatic provision that will revert [Freddie] to a private entity. The FHFA controls every aspect of [Freddie's] business and its Board of Directors is appointed by and answers to the Director of the FHFA.

Though conservatorship is described as a temporary status of a company, the procedures and provisions in place . . . make the conservatorship, in all practicality, permanent. Because [Freddie] is a government entity, foreclosure by advertisement is prohibited and constitutional due process procedure must be applied.[251]

[251] *Id.*; *Accord*, Fannie Mae v. Everingham, 55th Dist. Ct. For the Cnty. of Ingham, File No. 12-1286LT (April 9, 2013).

For reasons discussed below, Herron's analysis is inconsistent with governing precedent and sound reasoning. Herron and the courts that followed it used the wrong tests, but even under the tests they used they reached the wrong conclusion. Under all the tests, properly applied, when FHFA as conservator forecloses mortgages held by Fannie Mae and Freddie Mac, it is subject to the Fifth Amendment's Due Process Clause. Even recent decisions immunizing FHFA from judicial review of some conservatorship actions recognize that FHFA, even as conservator or receiver, always is subject to judicial review when it has "acted beyond, or contrary to, its . . . constitutionally permitted . . . powers or functions."[252] As the Eleventh Circuit has said, "'if the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, [HERA] would not bar judicial oversight or review of its actions.'"[253]

A. Applying the Correct Test, The Bright Line Rule: FHFA is a Federal Agency; Its Actions are Subject to the Fifth Amendment.

The most straightforward way of analyzing post-conservatorship foreclosures of mortgages held by Fannie and Freddie is to apply the bright line rule that if "a direct federal instrumentality" is the foreclosing mortgagee, then "the requisite 'federal action' exists, and a court will apply fifth amendment due process standards to test the constitutionality of the foreclosure."[254] FHFA is a federal agency; the foreclosures are effected by FHFA; therefore, the Fifth Amendment applies.

That FHFA is a federal agency is incontrovertible: 12 U.S.C. § 4511(a) provides: "There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government."[255] "FHFA is a federal agency even when acting as conservator or receiver";

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[252]Cnty. of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987, 992 (9th Cir. 2013) (quoting Sharpe v. Fed. Deposit Ins. Corp., 126 F.3d 1147, 1155 (9th Cir. 1997) (stating that a statutory bar of injunctive relief against the FDIC "does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions")). These cases are discussed *infra* at p.60, n.291.

[253]Leon Cnty., Fla. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1278 (11th Cir. 2012).

[254]Nelson & Whitman, *supra* note 3, § 7.28 at 689; Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 613; Alexander, Georgia Real Estate, *supra* note 14, § 13.2(a); *see* discussion *supra* at p.22 [beginning of Part IV].

[255] HERA, Pub.L. 102-550, Title XIII, § 1311, as added Pub.L. 110-289, Div. A, Title I, § 1101, 122 Stat. 2661 (2008); 12 U.S.C. § 4617(a)(7) (2013). Many cases acknowledge this. *See,*

FHFA is not 'subject to the direction or supervision of any other agency of the United States . . . ."[256]

Post-conservatorship, when mortgages held by Fannie or Freddie are foreclosed, the foreclosing entity is FHFA, not Fannie or Freddie. Under HERA, FHFA

succeed[ed] to all rights, titles, powers, and privileges of [Fannie Mae and Freddie

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e.g., Fed. Hous. Fin. Agency v. Royal Bank of Scot. Group PLC, 2012 U.S. Dist. LEXIS 116292, 7-8 (D. Conn. Aug. 17, 2012) (citing also, for this proposition, 'e.g., Nevada v. Countrywide Home Loans Serv., LP, 812 F.Supp.2d 1211 (D. Nev. 2011) ('[T]he Court finds that the Federal Housing Finance Agency ('FHFA') is an independent agency of the federal government who has authority over Fannie Mae.'); Leon Cnty., Fla. v. Fed. Hous. Fin. Agency, 816 F. Supp. 2d 1205, 1205 (N.D. Fla. 2011) (aff'd, 700 F.3d 1273 (11th Cir. 2012)) ('The Federal Housing Finance Agency ('FHFA') is a federal agency that has duties both as a regulator, and, since 2008, as the conservator of the Federal National Mortgage Association Corporation ('Fannie Mae ') and Federal Home Loan Mortgage Corporation ('Freddie Mac ')'); In re Fannie Mae 2008 Securities Litigation, Nos. 08 Civ. 7831(PAC), 09 Civ. 1352(PAC), 2009 U.S. Dist. LEXIS 109888, 2009 WL 4067266, at *1 (S.D. N.Y. Nov. 24, 2009) ('FHFA is an agency of the United States Government and acts as the conservator for Fannie Mae. '); Williams v. Timothy F. Geithner, Civil No. 09-1959 ADM/JJG, 2009 U.S. Dist. LEXIS 104096, 2009 WL 3757380, *3 (D. Minn. Nov. 9, 2009) ('FHFA is a federal agency that supervises and regulates housing finance and also serves as the Conservator for Fannie Mae and Freddie Mac.'); In re Fed. Home Loan Mortg. Corp. Derivative Litig., 643 F. Supp. 2d 790, 791 (E.D. Va. 2009) (describing FHFA as 'the federal agency acting as conservator of Freddie Mac pursuant to the Housing and Economic Recovery Act of 2008')."

[256]In re Countrywide Financial Corp. Mortgage-Backed Securities Litigation, 900 F.Supp.2d 1055, 1066 (C.D. Cal. 2012) (citing 12 U.S.C. § 4617(a)(7), which provides that "When acting as conservator or receiver, the Agency shall not be subject to the direction or supervision of any other agency of the United States or any State in the exercise of the rights, powers, and privileges of the Agency"); Conservatorship and Receivership, 76 Fed. Reg. 35724-01 (June 6, 2011); Establishment of a New Independent Agency, 73 Fed. Reg. 52356-01 (2008) (FHFA describing itself as "an independent agency of the Federal Government . . . with all of the authorities necessary to oversee vital components of our country's secondary mortgage markets – the regulated entities and the Office of Finance of the Federal Home Loan Bank System"). Compare 12 U.S.C. § 4617(i)(10)(A) (2008) (providing that a "limited-life regulated entity" authorized to be created by a receiver, "is not an agency, establishment, or instrumentality of the United States").

> Mac], and of any stockholder, officer, or director of [Fannie Mae and Freddie Mac] with respect to [Fannie Mae and Freddie Mac] and [their] assets." 12 U.S.C. § 4617(b)(2)(A)(i). "In other words, FHFA completely controls Fannie Mae and Freddie Mac." [257]

[257]Oakland Cnty. v. Fed. Nat'l Mortg. Ass'n, 276 F.R.D. 491, 494, 497 (E.D. Mich. 2011) (bracketed material in opinion) (agreeing with consistent rulings that FHFA is entitled to intervene in cases involving Fannie or Freddie); 12 U.S.C. § 4617(b)(2)(A)(i) (2008) (stating that "The Agency shall, as of the regulated entity, and of any stockholder, officer, or director of such regulated entity conservator or receiver, and by operation of law, immediately succeed to – (i) all rights, titles, powers, and privileges with respect to the regulated entity and the assets of the regulated entity . . ."; In re Countrywide Fin. Corp. MBS Litigation, 900 F.Supp.2d at 1058 (stating that "As conservator, FHFA has succeeded to all of the legal rights of Fannie Mae and Freddie Mac"; note that in this litigation, as elsewhere, the court uses FHFA, Fannie, and Freddie as interchangeable terms (e.g., "On September 2, 2011, FHFA sued the defendants . . .," "Fannie Mae and Freddie Mac sued the defendants on September 2, 2011 . . . "; "FHFA brings twelve causes of action . . ."; "FHFA also sues . . .")). *Id.* at 1058-60. "As conservator, FHFA has succeeded to all of the legal rights of Fannie Mae and Freddie Mac." *Id.* at 1058. Other decisions also that treat FHFA as the actor. *See, e.g.*, Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221 (2nd Cir. 2012); Kuriakose v. Fed. Home Loan Mortg. Corp., 674 F.Supp.2d 483 (S.D. N.Y. 2009), *see also* Kuriakose v. Fed. Home Loan Mortg. Corp., 2011 WL 11580258 (S.D. N.Y. 2011), Kuriakose v. Fed. Home Loan. Mortg. Corp., 897 F.Supp.2d 168 (S.D. N.Y. 2012).

HERA authorizes FHFA to "take over the assets of and operate the regulated entity with all the powers of the shareholders, the directors, and the officers of the regulate entity **and conduct all business of the regulated entity;"** as conservator FHFA is vested with the power to "take such action as may be . . . appropriate to carry on the business of the regulated entity . . ." and, inter alia, to "**perform all functions of the regulated entity in the name of the regulated entity** which are consistent with the appointment as conservator or receiver . . . ."[258] "Essentially, the powers of the directors, officers, and shareholders of the entity in conservatorship are transferred to the conservator . . . ."[259] As FHFA says, "FHFA as Conservator has been responsible for the conduct and administration of all aspects of the operations, business, and affairs of both Enterprises since September 6, 2008 . . . ."[260] Actions taken in the names of Fannie and Freddie are actions of FHFA, a federal agency.

In a variety of contexts, courts have recognized that in cases involving Fannie and Freddie post-conservatorship, "FHFA is . . . the true party at interest . . . ."[261] Courts agree that "Congress granted the Agency the power to operate Fannie Mae and Freddie Mac with 'all' the powers of those two GSEs' directors, officers, and shareholders. . . . . The Agency also succeeded to all rights, titles, powers, and privileges of Fannie Mae and Freddie Mac . . . ."[262] Congress has given the Agency "all-encompassing ability to control the operations and business decisions" of Fannie

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[258]12 U.S.C. § 4617(b)(2)(B)(i), (iii) (2008) (emphasis added); 12 U.S.C. § 4617(b)(2)(D) (2008).

[259]Leon Cnty., Fla. v. Fed. Hous. Fin. Agency, 700 F3d 1273, 1278-9 (11th Cir. 2012).

[260]Conservatorship and Receivership, 76 Fed. Reg. at 35725.

[261]*Oakland Cnty.*, 276 F.R.D. at 495 (citing also Fed. Home Loan Mortg. Corp. Derivative Litig., 643 F.Supp.2d 790, 797 (E.D. Va. 2009), aff'd sub nom. La. Mun. Police Emps. Ret. Sys. v. Fed. Hous. Fin. Agency, 434 F.App'x 188 (4th Cir. 2011) (per curiam) (holding that the language of 12 U.S.C. § 4617(b)(2)(A)(I) "clearly demonstrates Congressional intent to transfer as much control of Freddie Mac as possible to the FHFA, including any right to sue on behalf of the corporation") and Esther Sadowsky Testamentary Trust v. Syron, 639 F.Supp.2d 347, 350 (S.D. N.Y. 2009)).

[262]*Oakland Cnty.*, 276 F.R.D. at 496.

and Freddie.[263] HERA

> explicitly contemplates that the Agency will appear on behalf of Fannie Mae and Freddie Mac in litigation. It provides that 'In the event of any appealable judgment, the Agency as conservator . . . shall have all of the rights and remedies available to the regulated entity (before the appointment of such conservator or receiver) and the Agency, including removal to Federal court and all appellate rights.' 12 U.S.C. § 4617(b)(11)(B)(I); *see also* 12 U.S.C. § 4617(b)(12)(A) . . . ."[264]

Under the bright line rule, when FHFA, a federal agency, forecloses a mortgage, FHFA is subject to the Fifth Amendment. This is the standard recognized by numerous courts and uniformly applied to foreclosures conducted by the Department of Agriculture.[265] It also has been applied to foreclosures conducted by HUD and by GNMA, which is part of HUD.[266]

Warren is an exception to this. In Warren, the Eighth Circuit conceded that "as a matter of statutory and organizational form" GNMA could be viewed as more governmental than FNMA, but relied on the Fannie Mae cases, Northrip and Cameron-Brown, to conclude that Congress intended GNMA, like FNMA, to be a private entity.[267] No such claim can be made about FHFA. Both the express terms and the legislative history of HERA, the statute that created FHFA, make absolutely clear that FHFA is a federal agency. Since it is a federal agency, there should be no question about whether the Fifth Amendment applies. FHFA is the federal government; the Fifth Amendment applies to actions of FHFA.

B. Applying the Lebron Test: Fannie and Freddie Serve Government Purposes and Are Subject to Federal Control

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263 *Id.*

264 *Id.* at 495, n.2.

265 *See* discussion *supra* at p.23, n.113.

266 *See* discussion *supra* at p.35, n.170; , Hoffman v. U.S. Dep't of Hous. & Urban Dev., 519 F.2d 1160 (5th 1975;) Lehner v. United States, 685 F.2d 1187 (9th Cir. 1982).

267 *Warren*, 611 F.2d at 1233, n.8.

As discussed in section A, the Lebron test is not appropriate for FHFA, which is a federal agency, not a government created corporation. Lebron dealt, as the Supreme Court said, with "corporations created and participated in by the United States for the achievement of governmental objectives."[268] One of these corporations, discussed in Lebron, was the FDIC.[269] Other such corporations discussed in this article are the FSLIC, the RTC, and Fannie and Freddie before the conservatorship.

The Federal Housing Finance Agency, however, is not such a corporation. The FHFA is a federal agency, like the Farmers Home Administration or the VA or HUD. The Lebron standard is not for government agencies. For FHFA, as for Farmers Home or the VA or HUD, when it is the foreclosing mortgagee, its actions are federal actions because FHFA is a federal agency.

If, however, the Lebron standard were applied here, it was satisfied. Herron and the courts following it were wrong in holding otherwise.

As all courts have acknowledged, Lebron has two prongs: government purpose and government control. There is no doubt that the first prong is satisfied, that there is a government purpose to FHFA's conservatorship and to the activities that FHFA undertakes in the names of Fannie and Freddie. Indeed, Fannie and Freddie pre-conservatorship were held to have satisfied the government purpose prong of Lebron.[270]

The second prong, government control, also is satisfied. When the Federal Housing Finance Agency imposed the conservatorship on Fannie and Freddie on September 7, 2008, the federal government took total control of Fannie and Freddie. It appoints all the directors of Fannie and Freddie, provides the funding that keeps them functioning, bears their losses, and determines how they conduct their operations.[271]

FHFA's absolute and total control of Fannie and Freddie is detailed by FHFA in its 2012

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[268]*Lebron*, 513 U.S. at 386.

[269]*Id.* at 388.

[270]Northrip v. Fed. Nat'l Mortg. Ass'n, 527 F.2d 23 (6th Cir. 1975); Mendrala v. Crown Mortg. Co., 955 F.2d 1132 (7th Cir. 1992); Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp. 75 F.3d 1401 (9th Cir. 1996); see discussion *supra* at p.32, n.152.

[271]See *supra* at p.32, n.166.

Report to Congress. FHFA writes that it

> Appointed new chief executive officers (CEOs) for Fannie Mae and Freddie Mac . . .[272]
>
> changed the compensation executives at each Enterprise are eligible to earn. We designed the new plan to provide competitive compensation . . .[,] a retention feature and reductions for missed performance. The new plan also included a 10 percent reduction to most executives' total direct compensation and eliminated bonuses and incentive plans . . ."[273]
>
> Appointed an executive to lead the newly established Office of Strategic Initiatives to coordinate and oversee the activities associated with the 2012 *Strategic Plan for Enterprise Conservatorships* . . .[274]
>
> Directed the Enterprises to make further changes to the single-family guarantee fees they charge . . .[275]
>
> Directed the Enterprises to develop a mandatory Uniform Collateral Data Portal to ensure all lenders submit standard appraisal forms and data electronically . . .[276]
>
> Directed the Enterprises to consolidate four existing short sale programs into one

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[272]FHFA 2012 Report to Congress, *supra* note 54, at 70, 3.

[273]*Id.* at 3.

[274]*Id.* at 70.

[275]*Id.* at 70, 8 (stating that in "December 2011, Congress directed FHFA in the Temporary Payroll Tax Cut Continuation Act of 2011 to increase the guarantee fees the Enterprises charge lenders on single-family mortgages by at least an average of 10 basis points"; and in "August 2012, we directed the Enterprises to make more changes to the single-family guarantee fees they charge lenders"); *id*. at 14 (stating that "We also will continue increasing guarantee fees in 2012 and evaluating" the impact of those fees).

[276]*Id.* at 70.

Standard Short Sale Program.[277]

Launched initiative to sell in bulk properties owned by Fannie Mae, Freddie Mac, and the Federal Housing Administration, known as real estate owned, in neighborhoods and states hit especially hard by the housing crisis.[278]

set a target reduction in multifamily business volume from 2012 levels.[279]

Directed the Enterprises to focus on foreclosure prevention options . . . [280]

"At [FHFA's] direction, the Enterprises . . began working to develop plans to enhance their loan-level MBS [mortgage backed securities] disclosures, consistent with" a template developed as required by FHFA.[281] FHFA also published a proposed imposition of "an up-front fee on newly acquired single-family mortgages originated in specific states where the Enterprises are likely to incur default-related losses much higher than the national average because of the individual laws in those states."[282] FHFA is "evaluating the public input and determining how to proceed . . . ."[283] FHFA and the Enterprises examined ways to share credit risk with the private sector; "FHFA will continue developing risk transfer structures during 2013."[284] "FHFA announced that Fannie Mae and Freddie Mac would launch a new representations and warranties framework for conventional

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[277] *Id.* at 70, 8.

[278] *Id.* at 70, 9.

[279] *Id.* at 14.

[280] *Id.* at 70.

[281] *Id.* at 8.

[282] *Id.*

[283] *Id.*

[284] *Id.*

loans . . . ."[285]

FHFA also writes that Fannie and Freddie "were directed to work together and with FHFA on a series of goals focused on building a new infrastructure, contracting their existing footprint in the secondary mortgage market, and maintaining their operations to protect the taxpayers' investment."[286] FHFA says that it "worked with the Enterprises" on "design of a common securitization platform of hardware and software . . ." and "for an improved contractual and disclosure framework to support a more efficient and effective secondary mortgage market [,] . . . includ[ing] a complex set of rules, regulations, contractual agreements, and enforcement mechanisms that define the process of securitization."[287] FHFA "review[ed] servicing transfers considered to be outside of the normal course because of size and scale."[288] FHFA also controlled one of the most controversial decisions with respect to mortgages held by Fannie and Freddie: the refusal to allow principal forgiveness as a method of preventing foreclosures. "In January 2012 . . ., [FHFA] publicly disclosed the analysis that led FHFA to exclude principal forgiveness from its menu of loss mitigation tools.[289] FHFA published regulations that establish standards for "aspects of management and operations" of Fannie and Freddie and benchmark levels for single- and multifamily housing goals for mortgages they purchase.[290] FHFA also issued a "Directive" to Fannie and Freddie requiring that they "assure that pledge collateral is not adversely affected by

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[285]*Id.* at 9, 14 (discussing the goals of "our 2012 changes to the representation- and warranty framework").

[286]*Id.* at 3.

[287]*Id.* at 7; *see also id.* at 13 (stating that "FHFA will continue to pursue greater standardization in the contractual framework of securitizations for the mortgage market of the future. We will continue to develop common standards, align their contractual frameworks, and develop standards for the shortcomings observed in private-label contracts over the past several years").

[288]*Id.* at 11.

[289]*Id.* at 10.

[290]Prudential Management and Operations Standards, 77 Fed. Reg. 33950-01 (June 8, 2012) (codified as amended at 12 C.F.R. Part 1236); 2012-2014 Enterprise Housing Goals, 77 Fed. Reg. 67535-01, corrected at 77 Fed. Reg. 75361-01 (codified as amended at 12 C.F.R. Part 1282); FHFA 2012 Report to Congress, *supra* note 54, at 57-58.

energy retrofit programs that include first liens," and followed the Directive with a letter to Fannie and Freddie which "directed" them to "refrain from purchasing mortgage loans secured by properties" with such first-lien obligations.[291]

FHFA also conducted litigation on behalf of Fannie and Freddie. Some of these suits seek "to collect money due to the Enterprises because of investments in MBS that did not conform to representations made . . . ."[292] FHFA says that its "work led to settlement of two of the cases."[293] FHFA credits itself with other litigation successes on behalf of Fannie and Freddie, stating that "FHFA had several other legal successes in 2012, citing cases involving Property Assessed Clean Energy programs ("PACE") and actions seeking "damages for real estate transfer taxes allegedly owed by the Enterprises . . . ."[294] It writes that "the Sixth Circuit recently agreed with our position that the Enterprises are statutorily immune from such transfer taxes."[295] Indeed, FHFA acknowledges that it is the party asserting the immunity of Fannie and Freddie from the Fifth Amendment's Due Process Clause, stating that "We" – i.e., FHFA – "continue to defend against actions that claim non-judicial foreclosures involving the Enterprises violated due process."[296]

As this catalog indicates, virtually every aspect of Fannie and Freddie's operation is directed by FHFA. Moreover, the federal investment in Fannie and Freddie is enormous. [297] As FHFA

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[291]Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.2d 221, 225-6 (2nd Cir. 2011); Cnty. of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987 (9th Cir. 2013); and Leon Cnty., Fla. v. Fed. Hous. Fin. Agency, 700 F.3d 1273 (11th Cir. 2012).

[292]FHFA 2012 Report to Congress, *supra* note 54, at 11-12.

[293]*Id*. at 12.

[294]*Id.* The PACE cases are Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.2d 221 (2nd Cir. 2011); Cnty. of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987 (9th Cir. 2013); and Leon Cnty., Fla. v. Fed. Hous. Fin. Agency, 700 F.3d 1273 (11th Cir. 2012).

[295]FHFA 2012 Report to Congress, *supra* note 54, at 12.

[296] *Id.*

[297]*See* Catherine Rampell, *Herbert M. Allison Jr. Dies at 69; Led Bailout Efforts*, N.Y. Times, July 17, 2013, at A19 (stating that "The bailout of [Fannie and Freddie] . . ., engineered by the Treasury secretary, Henry M. Paulson Jr., was one of the most extraordinary and

reported, "[t]hrough year-end 2012, the Enterprises' cumulative draws [from the U.S. Treasury] . . . totaled $187.5 billion . . . ."[298] Fannie and Freddie "depleted all of their shareholders' equity"[299] and were "kept solvent through infusions of Treasury funds."[300] The "draws the companies have taken from the Treasury are so large they cannot be repaid under any foreseeable scenarios."[301] The federal financial investment alone goes far to show that Fannie and Freddie should be treated as the government. As the Supreme Court held in Inland Waterways Corp. and Cherry Cotton Mills, when "all of [the] money comes from the Government; . . . profits if any go to the Government; . . . losses the Government must bear," the entity should be treated as the government.[302] In this case, however, the enormous financial stake the United States has in Fannie and Freddie combines with the importance of the functions Fannie and Freddie perform and the total control FHFA exercises over them to leave no room for doubt that they should be treated as the federal government.

After the conservatorship had been imposed, scholars concluded that, under the Lebron test, Fannie and Freddie are government actors subject to the Due Process Clause of the Fifth Amendment. Professor Frank Alexander wrote that the conservatorship

> essentially plac[es] the Director of FHFA in absolute control of both Fannie Mae and Freddie Mac. Both entities were chartered by Congress and served significant public

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expensive federal interventions in American history, totaling about $180 billion. By taking over the companies and replacing their managements, the administration sought to calm Wall Street concerns that these 'too big to fail' institutions would go under and take the rest of the housing market – as well as the entire economy – with them").

[298]FHFA 2012 Report to Congress, *supra* note 54, at iii (stating also that "the Enterprises have paid $55.1 billion in cash dividends to Treasury. Under the Senior Preferred Stock Purchase Agreements, the payment of dividends does not offset or pay down prior Treasury draws") *id*. at 6 (stating that in 2012, neither Enterprise required financial support from the U.S. Treasury").

[299]FHFA 2011Report to Congress, *supra* note 3, at iii; 2012 FHFA Report, *supra* note 54, at iii.

[300]Conservatorship and Receivership, 76 Fed. Reg. at 35726.

[301] Next Chapter, *supra* note 3, at 9.

[302]Inland Waterways Corp. v. Young, 309 U.S. 517 (1940); Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946).

> purposes even prior to the conservatorship. With the conservatorship placing both entities under governmental control, both elements of the *Lebron* test for a federal instrumentality appear to be met for Fannie Mae and Freddie Mac . . . .[303]

Professors Nelson, Whitman, Burkhart, and Freyermuth agreed that "[i]t seems clear that . . . Fannie and Freddie satisfy the second prong of the *Lebron* test in that the federal government controls each entity for the foreseeable future."[304] As Professor Nelson wrote:

> The upshot is that when either [Fannie or Freddie] forecloses mortgages under state power of sale statutes, it is treated as a federal actor under the Fifth Amendment and therefore must satisfy the norms of procedural due process. Few state statutes satisfy constitutional criteria.[305]

Without referring to the analyses by Professors Alexander, Nelson, Whitman, Burkhart, and Freyermuth, the Herron court acknowledged that Fannie and Freddie satisfy the first prong of Lebron, but said that they did not satisfy the second prong because the conservatorship is not permanent. This was error. "Permanent" authority to appoint some directors is only one indication of government control in Lebron; "permanence" is not a requirement. Moreover, in any reasonable sense of "permanent," the conservatorship is permanent. Most importantly, even if the conservatorship were not considered permanent, federal government control over Fannie and Freddie is permanent, for – as FHFA admits – decisions about the future of Fannie and Freddie will be made by Congress and the Administration.

The Herron court focused on one phrase in Lebron: "permanent authority." These words were part of Lebron's definition of government control: one indication of government control over

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[303]Alexander, Georgia Real Estate, *supra* note 14, § 13.2(b).

[304]Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 692.

[305]Nelson, *Confronting the Mortgage Meltdown*, *supra* note 5, at 616. Note that Professor Nelson reaches this conclusion reluctantly. He considers that requiring Fannie and Freddie to use judicial foreclosure "would be a potential disaster." *Id*. at 616. Nonetheless, he considers that reliance on the Warren decision probably is precluded by Lebron. *Id*. at 617. His recommendation is that Congress provide a foreclosure process that includes reasonable notice and opportunity for hearing provisions in a power of sale foreclosure. *See also* Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 692, discussing various courses of action that Fannie and Freddie might take in light of this conclusion.

Amtrak was that the government had "permanent authority to appoint a majority of the directors of that corporation . . . ."[306]

Other than Herron and its cohort, no decision interpreting Lebron has focused on or even discussed permanence .[307] This is not surprising, since Lebron itself does not focus on or discuss "permanence." "Permanent" is simply an adjective describing one aspect of the far from complete government control over Amtrak. (In fact, the government had less control over Amtrak than it has over Fannie and Freddie. With the conservatorship, FHFA appoints all – not simply a majority – of the directors of the corporations. As detailed above, it controls every aspect of their operations.) The word should not be used as a shibboleth to immunize FHFA from responsibility for compliance with the Constitution.

"Permanence" is a relative concept. Nothing in life – and, certainly, nothing in the federal government – is permanent.[308] Congress always is free to change the status of federal agencies and federally controlled corporations. FmHA, which unquestionably was a federal agency, subject to

[306]*Lebron*, 513 U.S. at 400.

[307]Memorandum from Christopher Pottratz to Florence Roisman "re: Permanence cases" (October 1, 2012), on file with author.

[308] The composition of the "great" federal departments has changed: to the original three of 1789, Treasury, State, and War, a fourth, the Navy, was added in 1798, and these were reorganized in the Department of Defense in 1949. Ronald C. Moe, Cong. Research Serv., RL 30673, The President's Cabinet: Evolution, Alternatives, and Proposals for Change 4-5 (2000), also available at: http://congressionalresearch.com/RL30673/document.php?study=THE+PRESIDENTS+CABINET+EVOLUTION+ALTERNATIVES+AND+PROPOSALS+FOR+CHANGE (last visited July. 30, 2013).Other examples abound. The Post Office became an executive department in 1872 and lost that status in 1971. *Id*. at 4-5. The Department of Health, Education, and Welfare was established in 1953 and reconstituted as the Department of Health and Human Services in 1979, when the Department of Education was created. *Id*. at 4, n.18. The Department of Commerce and Labor was created in 1903 and then divided into two separate departments in 1913. *Id*. at 4, n.16, n.18.

constitutional constraints, was created in 1935 and ended in 1994.[309] In particular, federal financial agencies regularly change shape and appear and disappear.[310] "Permanent" with respect to federal agencies and corporations means "until Congress makes a change."

Even explicitly temporary federally controlled corporations are subject to constitutional constraints, as shown by the experience of the RTC, which was created as a temporary agency by FIRREA in 1989 and terminated in 1995.[311] Despite the fact that it was explicitly created as a temporary agency, RTC generally has been treated as a federal agency for constitutional purposes, both in its corporate or sovereign capacities and when it has been acting as receiver, with the Double Jeopardy case an exception to this general rule.[312] FHFA's conservatorship of Fannie and Freddie has lasted longer than the entire life of the RTC.

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[309] Exec. Order No. 7027 (1935) (order by President Franklin Roosevelt establishing the Resettlement Administration which was later renamed in 1946 the Farmers Home Administration, 7 U.S.C. § 1981 (2002)); Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354 (codified as amended at 7 U.S.C. §§ 6901 et seq. (2013)).

[310]Fannie was created as a federal agency in 1938; it lost that status (at least for some purposes) in 1954. *See supra* at p.6, n.18. The Federal Home Loan Banks, the Federal Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation were created in 1932-34. Arthur W. Leibold, Jr., Some Hope for the Future, After A Failed National Policy for Thrifts, in The Savings and Loan Crisis: Lessons from a Regulatory Failure 31,34 (James R. Barth, Susanne Trimbath, & Glenn Yago, eds. 2004) ("Barth"). The Federal Home Loan Bank Board and the FSLIC were abolished in 1989 by FIRREA, which created the Office of Thrift Supervision (OTS), the Resolution Trust Corporation, and the Federal Housing Finance Board. Michael P. Malloy, Banking Law and Regulation § 1.03[D] at 1-85-6 (2d ed. 2012); Lawrence J. White, The Savings and Loan Debacle: A Perspective from the Early Twenty-first Century, in Barth, supra, at 15, 24. The RTC, created by FIRREA, was terminated in 1995. Malloy, *supra*, § 1.03[D] at 1-90; White in Barth at 24. The Office of Federal Housing Enterprise Oversight (OFHEO), formerly a regulator of Fannie and Freddie, lost its life when FHFA was created. Malloy, *supra*, § 1.03[D] at 1-93. OTS is scheduled to be [has been?] abolished by the Dodd-Frank Act. Malloy, *supra*, § 1.03[D] at 1-85-6.

[311]Malloy, *supra* note 310, § 1.03[D] at 1-90; White in Barth et al. At 24; 12 U.S.C. § 1441a(m)(1) (2008) (repealed 2011) (provides that the "Corporation shall terminate not later than December 31, 1995").

[312]See discussion *supra* at pp.46-47, n.232.

It certainly is true that the conservatorship – already seven years old – is not intended to last forever. But no one anticipates that the conservatorship will end soon; rather, there is general agreement that it is likely to continue into the indefinite future. Indeed, FHFA itself has recognized "that the conservatorships would not be temporary . . . ."[313] FHFA reported to Congress in 2012 that it expects to continue to control Fannie and Freddie "*over the next few years*."[314] A 2013 report from FHFA explains that in 2012, "FHFA recognized that there was 'no near-term resolution in sight' for the enterprises and released a five-year strategic plan for the enterprises . . . ."[315]

Moreover, even if the conservatorship were not considered permanent, federal control over Fannie and Freddie *is* permanent. The functions that Fannie and Freddie perform are essential to the residential mortgage market in the United States and the global economy.[316] What follows the

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[313]Fed. Hous. Fin. Agency Office of Inspector General, Semiannual Report to the Congress: October 1, 2012 through March 31, 2013 50, 53 (2013) [Hereinafter FHFA OIG Semiannual Report].

[314]Next Chapter, *supra* note 3, at 6 (emphasis added), 9. In February of 2012, FHFA sent to Congress a strategic plan "for the next phase of the conservatorships of Fannie Mae and Freddie Mac . . . ." FHFA 2011 Report to Congress, *supra* note 3, at 8. The February 2012 Strategic Plan for Enterprise Conservatorships is reproduced in the June 13, 2012 Report as an Appendix, at 111-124. FHFA created its five year plan, through 2017, to "lay the groundwork for housing finance reform," recognizing that there is not consensus "from the Administration and Congress on ending the conservatorships . . . ." *See also* FHFA 2012 Report to Congress, *supra* note 54, at 13 (showing that FHFA's actions with respect to Fannie and Freddie prepare them for the future with, e.g., "[n]ew infrastructure," a "new business entity," "greater standardization in the contractual framework of securitizations," and "[d]eveloping standard terms, definitions, and industry standard data reporting protocols"). FHFA created its five year plan, through 2017, to "lay the groundwork for housing finance reform," recognizing that there is not consensus "from the Administration and Congress on ending the conservatorships . . . ."

[315]FHFA OIG Semiannual Report, *supra* note 313, at 57, citing Next Chapter, *supra* note 3.

[316] In 2012, Fannie and Freddie "guaranteed $1.3 trillion in new mortgage production, representing 77 percent of all mortgages originated." FHFA 2012 Report to Congress, *supra* note 54, at 6."Market confidence in the Enterprises' ongoing ability to provide this stable, liquid flow of mortgage-backed securities to investors is essential to stabilizing house prices and ensuring stability in the value of nearly $3.9 trillion in outstanding Enterprise mortgage-backed

conservatorship will be decided by the federal government – specifically, by the Congress and the Administration.[317] As FHFA states:

> [t]he future of the Enterprises and the housing finance system continues to be the subject of many questions and much debate. A new structure for housing finance requires congressional action . . . .[318]
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> [The] "final chapter . . . remains the province of law-makers."[319]

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securities." Next Chapter, *supra* note 3, at 17. "Major holders of GSE securities included the Chinese and Russian central banks, which, between them, owned more than half a trillion dollars of these securities . . . ." Fin. Crisis Inquiry Comm'n Report, *supra* note 27, at 321.

This is why the conservatorship was imposed originally. *See* Paulson, *supra* note 27, at 1 (stating that Secretary Paulson was concerned that "[i]f we did not act immediately, Fannie and Freddie would, I feared, take down the financial system, and the global economy, with them"); *id*. at 4 (stating that "the collapse of Fannie and Freddie would be catastrophic" and "[i]t is hard to exaggerate how central Fannie and Freddie were to U.S. markets"). *See also* FHFA 2011 Report to Congress, *supra* note 3, at 1 (stating that "By the time the conservatorships were established, the private mortgage securitization market had already practically vanished, and *there were no other effective secondary market mechanisms in place. Ensuring the Enterprises' continued operations was critical for most Americans to be able to obtain a mortgage or refinance their existing mortgage."*) (emphasis added). *Accord*, Next Chapter, *supra* note 3, at 8 (stating that the conservatorship was instituted because "the Enterprises' continued operations were necessary for most Americans to obtain a mortgage or refinance an existing mortgage"); *id*. at 12 (stating that since there are no "meaningful secondary mortgage market mechanisms beyond the Enterprises and Ginnie Mae," "new mortgages would have been largely unavailable if the Enterprises suddenly had been shut down").

[317] Next Chapter, *supra* note 3, at 6.

[318] *Id*. at 5. FHFA 2012 Report to Congress, *supra* note 54, at 8; Next Chapter, *supra* note 3, at 4.

[319] Next Chapter, *supra* note 3, at 4; FHFA OIG Semiannual Report, *supra* note 313, at 57, 62. FHFA created its five year plan, through 2017, to "lay the groundwork for housing finance reform," recognizing that there is not consensus "from the Administration and Congress on ending the conservatorships . . . ."

Under these circumstances, the second prong of Lebron is satisfied. Federal control over Fannie and Freddie is "permanent" in the sense that it will continue into the indefinite future and will end only when and if Congress creates a new mechanism to do the essential tasks that Fannie and Freddie perform. This is not likely to happen until after "the current financial and real estate crises have passed,"[320] and even then strong disagreements would have to be resolved within whatever Administration and Congress are in control at that time. Fannie and Freddie are "the traditional pivots of the nation's housing finance structure"[321]; they are not likely to be replaced easily or soon. As Professors Nelson, Whitman, Burkhart, and Freyermuth have noted:

> Some legislators and policy makers argue that [Fannie and Freddie] should be liquidated or broken up into smaller pieces and sold to private investors to avoid a repeat of a financial crisis of such tremendous magnitude. Others argue that they should become federal agencies, as Fannie Mae was for its first three decades, or public utilities or should have their mission limited to assisting affordable housing. Other legislators and commentators think that, although Fannie and Freddie currently are experiencing difficulties, they perform a valuable role and that the government should help them start functioning properly again but increase the safeguards on their operations. Stay tuned![322]

C. Applying the "Shoes" Metaphor: When Federal Actors "Step into the Shoes" of Even Private Depository Institutions, They Still are Responsible for Complying with the Constitution.

The case on which the Herron court relied for its "shoes" metaphor was O'Melveny &

[320]Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 928.

[321]Marvin M. Smith & Susan M. Wachter, *Introduction*, in The American Mortgage System: Crisis and Reform, *supra* note 22, at 1,2.

[322]Nelson, Whitman, Burkhart, & Freyermuth, *supra* note 14, at 928; *see also* Paulson, *supra* note 27, at 166 (stating that he told President Bush that Secretary Paulson "thought that when the crisis was over they [Fannie and Freddie] ought to be downsized, have their missions shrunk, and be recast as utilities, but felt we needed to defer that discussion until well after we had bolstered them financially and markets were stable").

Myers v. FDIC.[323] In O'Melveny, the FDIC, as receiver for an insolvent savings and loan (S&L) association, caused the S&L to make refunds to investors for certain fraudulent real estate syndications in which the S&L had been represented by the O'Melveny & Myers law firm.[324] The FDIC sued O'Melveny & Myers, alleging professional negligence and breach of fiduciary duty. The central issue was whether California law was preempted because the FDIC was suing as receiver. The Court noted that for some purposes the governing statute did "specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver."[325] Relying on the principle *inclusio unius, exclusio alterius*, the Court said that the statute "places the FDIC in the shoes of the insolvent S&L, to work out its claims under state law, except where some provision in the extensive framework of [the statute] provides otherwise."[326] The Court held that "this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted."[327]

O'Melveny 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.

In D'Oench, Duhme & Co. v. FDIC (1942), the issue was whether federal or state law applied and, if federal law applied, whether state law defenses could be adjudicated. The Supreme Court held that in light of the "federal policy to protect [the FDIC], and the public funds which it administers," federal law controls and determines whether a uniform federal rule should be imposed or the federal courts should apply various state laws; the Court concluded that federal common law

[323]O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79 (1994).

[324]The FSLIC had been conservator and then receiver; the FDIC was substituted as receiver pursuant to FIRREA. *Id.* at 82 n.1.

[325]*Id.* at 86.

[326]*Id.* at 86-87, citing for the metaphor *Coit*, 489 U.S. at 585.

[327]*O'Melveny*, 523 U.S. at 89.

governed and the state law defenses were not justiciable.[328] Agreeing with the majority that the FDIC had been created to serve important public purposes and therefore should not be restricted by state laws, Justice Jackson, concurring, noted that the FDIC "was created and financed in part by the United States to bolster the entire banking and credit system. The Corporation did not simply step into the private shoes of local banks." [329]

Perhaps most significantly, as discussed above, in Coit Independence Joint Venture v. FSLIC, the Supreme Court described the FSLIC as receiver as stepping into the shoes of the failed S&L.[330] Nonetheless, the Supreme Court said that due process and other constitutional claims would be cognizable against the FDIC as receiver.[331]

A case that seems inconsistent with this principle is U.S. v. Beszborn (1994), where the Fifth Circuit said that when a criminal prosecution had been preceded by a claim by the RTC as receiver, the RTC "is not the Government for purpose of the Double Jeopardy Clause."[332] Beszborn differs from our situation not only because it involves the Double Jeopardy Clause rather than the Due Process Clause but also because one of the important premises of Beszborn does not apply here. The Beszborn court emphasized that recoveries by the RTC as receiver do not go to the U.S. Treasury but "benefit the creditors and stockholders of the failed institution which [the RTC] represents"; to the contrary, any recoveries by FHFA go to the Treasury.[333] If the Fifth Circuit was correct in Beszborn, that is an exception to the governing law in this regard, which is the Supreme Court's statement in Coit that constitutional claims against FSLIC are cognizable. Furthermore, as we have seen above, the D.C. Circuit and other courts of appeals have said and held, before and

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[328]D'Oench, Duhme & Co., Inc. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 457 (1942). The doctrine of D'Oench, Duhme was codified by Congress in the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e) (2011). *See* Resolution Trust Corp. v. Daddona, 9 F.3d 312, 316 (3d Cir. 1993). The doctrine has been extended to the RTC as well. Adams v. Madison Realty & Dev., Inc., 937 F.2d 845, 852 (3d Cir. 1991).

[329] *D'Oench*, 315 U.S. at 472 (Jackson, J. concurring).

[330]*Coit*, 489 U.S. at 571, 585; *see* discussion *supra* at p.45, n.224.

[331]*Coit*, 489 U.S. at 578, 579; *see* discussion *supra* at p.45, n.224.

[332]*Beszborn*, 21 F.3d at 68.

[333]*Id.*

after Beszborn, that the FDIC and RTC as receiver may be subject to due process and other constitutional constraints. [334]

As we have seen, recent cases have applied this principle to FHFA, with the Ninth and Eleventh Circuits recognizing that FHFA, even as conservator or receiver, always is subject to judicial review when it has "acted beyond, or contrary to, its . . . constitutionally permitted . . . powers or functions."[335] As courts have acknowledged, the source for this principle is the Supreme

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[334]*See, e.g.*, Resolution Trust Corp. v. Daddona, 9 F.3d 312 (3d Cir. 1993) (adjudicating Takings and Due Process Clause claims against RTC); ; Nat'l Union Fire Ins. Co. v. City Sav., F.S.C., 28 F.3d 376, 392 (3d Cir. 1994); Nimon v. Resolution Trust Corp., 975 F.2d 140, 147 (5th Cir. 1992) (adjudicating due process claim against RTC with respect to federal deposit insurance); Resolution Trust Corp. v. Ford Motor Credit Corp., 30 F.3d 1384, 1388 (11th Cir. 1994) (adjudicating Fifth Amendment Takings Clause claim against the RTC); Homeland Stores, Inc. v. Resolution Trust Corp., 17 F3d. 1269, 1274 n.5 (10th Cir. 1994); Morrison v. Fed. Deposit Ins. Corp., 747 F.2d 610 (11th Cir. 1984); Resolution Trust Corp. v. Greif, 906 F.Supp. 1457, 1469 (D. Kan. 1995) (adjudicating claim of Fifth Amendment privilege in case brought by RTC); Freeman v. Fed. Deposit Ins. Corp., 56 F.3d 1394, 1403 (D.C. Cir. 1995) (citing, inter alia, Nat'l Trust for Historic Pres. v. Fed. Deposit Ins. Corp., 21 F.3d 469, 473 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1065 (1994) (stating that "we do not decide today what might happen if the denial of an injunction in any particular situation itself violated constitutional due process")); Nat'l Trust for Historic Pres. v. Fed. Deposit Ins. Corp., 995 F.2d 238, 240 (D.C. Cir. 1993) (stating that statutory preclusion of judicial review is effective except against claims that the FDIC "has acted or proposes to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted powers or functions"); Resolution Trust Corp. v. Moskowitz, 1994 WL 16190856 (D. N.J. 1994) (adjudicating due process claim). *See also* Tillman v. Resolution Trust Corp., 37 F.3d 1032, 1036 (4th Cir. 1994) (indicating that due process claim might be viable but the facts showed that the plaintiff had received notice). *See* discussion *supra* at p.44, n.221.

[335]Cnty. of Sonoma v. Fed. Hous. Fin. Agency, 710 F.3d 987, 992 (9th Cir. 2013) (quoting Sharpe v. Fed. Deposit Ins. Corp., 126 F.3d 1147, 1155 (9th Cir. 1997) (stating that a statutory bar of injunctive relief against the FDIC "does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions")); Leon Cnty., Fla. v. Fed. Hous. Fin. Agency, 700 F.3d 1273, 1278 (11th Cir. 2012). *See also* Natural Resources Defense Council, Inc. v. Fed. Hous. Fin. Agency, 815 F.Supp.2d 630, 642 (S.D. N.Y. 2011) (*aff'd sub nom.* Town of Babylon v. Fed. Hous. Fin. Agency, 699 F.3d 221

Court's decision in Coit.[336]

The most fundamental problem with applying O'Melveny to FHFA foreclosures is that the issue here is whether constitutional due process protections can be evaded when the federal entity takes control. In O'Melveny, the issue was whether the facts presented an extraordinary situation in which the federal courts should create a special rule of decision, as the Court had in D'Oench, Duhme. Here, the issue is whether, when it takes total control of another entity, a federal agency can evade due process requirements. As the Supreme Court and lower courts have recognized, when constitutional protections are at issue, not even explicit statutory language can immunize even government controlled corporations from constitutional requirements. As Justice Scalia wrote for the Court in Lebron:

> it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.[337]

A fortiori, it is not for an agency – FHFA – to decide that it may violate fundamental "constitutional rights of citizens affected by its actions."[338]

(2d Cir. 2012)) (stating that "[a]lthough courts have interpreted section 1821(j) broadly, relief is nonetheless available when an agency has acted beyond its statutorily prescribed powers or functions").

[336]*In re Fed. Home Loan Mortg. Corp. Derivative Litig.*, 643 F.Supp.2d at 799 ("agree[ing] . . . that, if the FHFA were to act beyond statutory or constitutional bounds in a manner that adversely impacted the rights of others, § 4617 would not bar judicial oversight or review of its actions. . ." and citing Coit Independence Joint Venture, *supra* n.224).

[337]*Lebron*, 513 U.S. at 392.

[338]Ironically, FHFA has recognized that it cannot be treated as a private entity, but has argued that this is true "for purposes of statutory interpretation . . . ." Brief for Plaintiff-Appellee at 41, n. 15, Fed. Hous. Fin. Agency v. UBS Am. Inc., 858 F.Supp.2d 306 (S.D. N.Y. 2012), (stating:

> for purposes of statutory interpretation, FHFA is not simply a "private" party, as two other courts overseeing actions by FHFA have found. See FHFA v. Royal Bank of Scot. Grp. PLC, 2012 WL 3580522, at *4 (D. Conn. Aug. 17, 2012) ("the fact that a federal agency

In Lebron, Congress had declared in the statute that Amtrak "will not be an agency or establishment of the United States Government," but the Supreme Court held that Amtrak was a government entity for purposes of constitutional protection.[339] Similarly, in cases involving the FHFA, FDIC, and other entities that have put depository institutions into conservatorship or receivership, the Supreme Court and the courts of appeals have indicated that constitutional requirements apply (excepting only the decision in Beszborn).[340]

As the Supreme Court has recognized, Congress may choose to carry out its purposes by using the corporate form rather than federal agencies.[341] When it does so, however, it cannot immunize the corporation from complying with constitutional mandates. This is one of the principal points of Lebron, where the Court rejected Congress's determination that Amtrak was not to be treated as a federal agency.[342] Indeed, as the Court said in Lebron:

> has stepped into the shoes of a person who would be a private plaintiff does not convert the federal agency into a private plaintiff"); Countrywide, Add.41 ("FHFA is a federal agency even when acting as conservator"); cf. SPA83-84 (giving deference to the views of FHFA, "a public agency charged by Congress," that a stay of proceedings pending appeal would not benefit the public).)

It is bizarre for FHFA to suggest that it is to be treated as a federal agency for the purpose of construing statutes but not the Constitution. FHFA wants courts to defer to its statutory interpretation under Chevron, but FHFA claims immunity from court enforcement of constitutional constraints!

339 *Lebron*, 513 U.S. at 391-2; *see id*. at 393-4 (The Court also distinguished two earlier opinions that had characterized Amtrak as a nongovernmental entity for other purposes: Nat'l RR Pass. Corp. v. Boston & Maine Corp., 503 U.S. 407 (1992) and Nat'l RR Pass. Corp. v. Atchison, T. & S.F.R. Co., 470 U.S. 451 (1985).)

340 *See* note 232, *supra*.

341 *See, e.g.*, *Lebron*, 513 U.S. at 386-391 discussing "the long history of corporations created and participated in by the United States for the achievement of governmental objectives" *id.* at 386.

342 *Id.* at 392.

> That Government-created and -controlled corporations are (for many purposes at least) part of the Government itself has a strong basis, not merely in past practice and understanding, but in reason itself. *It 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.*[343]

CONCLUSION

The Federal Housing Finance Agency, in the names of Fannie and Freddie, forecloses on the homes of millions of families in the United States. In the states that require judicial foreclosure, those families receive prior notice and an opportunity for a hearing. The question addressed by this article is whether, when the FHFA, a federal agency acting in the names of Fannie and Freddie, causes these foreclosures, homeowners in all states are entitled to minimal due process protections. The answer to this question is "yes."

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[343] *Lebron*, 513 U.S. at 397 (emphasis added).