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The State-Action Requirement of Due Process in Foreclosure Litigation

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The companion article to this one, Lassiter *Notwithstanding: The Right to Counsel in Foreclosure Actions*, argues that appointment of counsel is required in foreclosure-related judicial proceedings under the due process clause of the Fourteenth Amendment.[1] A threshold requirement to Fourteenth Amendment due process claims, however, is that the action complained of constitutes "state action." Here I discuss whether foreclosure-related judicial proceedings can meet that threshold requirement. I also discuss whether state constitutions provide more fertile ground for claims that foreclosure-related judicial proceedings violate due process.

The term "foreclosure-related judicial proceedings" is intended to cover foreclosures in judicial-foreclosure states and the court proceedings related to foreclosure in nonjudicial-foreclosure states. In judicial-foreclosure states, mortgage lenders or servicers (hereinafter collectively referred to as "lenders") must file a court action in order to foreclose on a mortgage. In nonjudicial-foreclosure states, lenders may foreclose through the mortgage or lending contract by exercising a power-of-sale clause. Judicial proceedings in nonjudicial-foreclosure states are initiated only when a debtor seeks an injunction against foreclosure, brings an affirmative case challenging the underlying loan or failure to comply with foreclosure statutes, or files for bankruptcy, the last triggering an automatic stay of the foreclosure.

I conclude here that strong state-action arguments support Fourteenth Amendment due process claims in judicial-foreclosure states, but the same is not necessarily true in nonjudicial-foreclosure states under ordinary circumstances. In both types of states, however, such claims may succeed under state constitutional law because state constitutions may have more liberal "state-action" requirements or alternatively might not require state action at all. Note that certain recent developments that I do not take up here may greatly strengthen the argument for state action. For instance,

[1]See my Lassiter *Notwithstanding: The Right to Counsel in Foreclosure Actions*, in this issue.

I do not discuss whether receiving federal bailout money might transform lenders into state actors. Nor do I examine whether federal entities such as the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Corporation (Freddie Mac), and the U.S. Department of Veterans Affairs might be considered state actors under the due process clause of the Fifth Amendment by virtue of their governmental status.

The Fourteenth Amendment State-Action Requirement and Foreclosure

The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."[2] To make a Fourteenth Amendment due process claim then, the debtor must prove as a threshold matter that the foreclosure process involves "state action." Because the state is not a party to any foreclosure-related judicial proceedings, the question is whether the lender's actions can be attributable to the state in any way. Answering this question requires a litigant to weave through doctrine that has, in the U.S. Supreme Court's own words, "not been a model of consistency."[3] The dividing line between private and public conduct is not easy to draw and the Supreme Court has declined to create a bright line because

> [i]f the Fourteenth Amendment is not to be displaced … its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed.[4]

In an attempt at some guidance, the Supreme Court has set out two elements that must be met if one is to establish state action under the Fourteenth Amendment: "First, the deprivation must be caused by the exercise of some right or privilege created by the State…. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor."[5]

The Deprivation Must Be Caused by the Exercise of a State-Created Right. In many contexts, the first prong of the Supreme Court's test is not difficult to meet. For instance, the Court held that a private insurer utilizing a statute to withhold workers' compensation payments was acting "'with the knowledge of and pursuant to' the state statute, thus satisfying the first [prong]."[6] The first prong is easily proved for judicial foreclosures: the lender utilizes a mandatory judicial forum that unconstitutionally deprives the debtor of due process by not providing appointed counsel.

When a nonjudicial-foreclosure process is used, however, showing that the debtor has been deprived of a state-created right may be difficult. The lender exercises a right to self-help foreclosure that is certainly codified by the state in its nonjudicial-foreclosure statute. But the self-help foreclosure statute does not require the use of the courts and thus by itself does not trigger the judicial proceeding that deprives the debtor of due process. In fact, nonjudicial-foreclosure statutes create no judicial forum for which counsel may be even theoretically provided. The only way a debtor's due process rights in this context may be violated is if the debtor initiates a separate court process related to the foreclosure (an injunction, challenge to the underlying loan, or bankruptcy filing) and the state does not require the appointment of counsel for indigent litigants in such proceedings. That there can be a depri-

[2]*Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

[3]*Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378 (1995) (quoting *Edmonson v. Leesville Concrete Company*, 500 U.S. 614, 632 (1991)).

[4]*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001).

[5]*Lugar v. Edmondson Oil Company*, 457 U.S. 922, 937 (1982).

[6]*American Manufacturers Mutual Insurance Company v. Sullivan*, 526 U.S. 40, 50 (1999) (citations omitted) (quoting *Flagg Brothers Incorporated v. Brooks*, 436 U.S. 149, 156 (1978)).

vation of a state-created right in these instances is doubtful, however, because the alleged state actor (the lender) did not initiate the judicial proceedings; rather the lender is in court as a defendant, not a plaintiff.

While showing state action for purposes of Fourteenth Amendment due process rights may be a difficult hurdle to surmount in nonjudicial-foreclosure states, state constitutions may provide another avenue for relief. A state constitution's due process clause may have different requirements from those of the federal constitution allowing a state's nonjudicial-foreclosure process to satisfy the state constitution's requirements for state action. I discuss this below.

The Conduct Must Be Attributable to the State. The second prong of the due process test requires that the debtor show that the lender's action in a foreclosure-related judicial proceeding is attributable to the state. Since foreclosures undertaken in nonjudicial-foreclosure states are unlikely to meet the first prong of the Fourteenth Amendment due process test, that is, a state-created deprivation, I do not discuss whether such proceedings can meet the second prong of the Fourteenth Amendment test.

Although a case search will turn up many failed due process challenges to foreclosure statutes on matters not related to the right to counsel, many of those challenges foundered on the second prong of the state-action test. They did so because the plaintiff attacked a lender's failure to follow a statute that had been found to be constitutional. For example, when the debtor alleges that the lender violated due process by failing to follow the notice or other requirements specified in a valid state law, the courts typically hold that the lender's failure to follow a *constitutional* statute is not behavior that can be attributed to the state. As the Eighth Circuit put it, "[t]o the contrary, the state, by enacting the statute, has expressly condemned a deprivation by such means."[7] In other words, absent constitutional infirmity of the law, "the fact that a state permits the use of foreclosure procedures and subsequent sheriff sales as the execution of a judgment is not sufficient to constitute state action."[8]

This problem is avoided if the plaintiff alleges that the governing statute itself is unconstitutional. For instance, a claim that a foreclosure statute violated due process because it did not require notice was found to satisfy the state-action requirement. In that case, the Fifth Circuit found that there was sufficient state action where the statute "allow[ed] foreclosure and the execution of a judgment pursuant to foreclosure without providing constitutionally adequate notice to other parties whose interests in the property will be extinguished…."[9] In a due process challenge to a judicial-foreclosure statute on the basis of the right to counsel, the allegation is not that the lender violated valid state law but that the foreclosure statute itself is constitutionally deficient by failing to provide a right to appointed counsel.

Notwithstanding that the claim for counsel relates to the unconstitutionality of the foreclosure statute, one cannot argue that the legislature's action in passing the foreclosure statute constitutes the necessary state action; the litigant must still show that the lender, acting pursuant to the statute, is a state actor.[10] In order to prove that the lender's actions are "attributable to the state," the litigant must

[7] *Roudybush v. Zabel*, 813 F.2d 173, 177 (8th Cir. 1987).

[8] *Harper v. Federal Land Bank of Spokane*, 878 F.2d 1172, 1178 (9th Cir. 1989).

[9] *Davis Oil Company v. Mills*, 873 F.2d 774, 780 (5th Cir. 1989).

[10] See *Sullivan*, 526 U.S. U.S. 40, 50 (1999) (quoting *Lugar*, 457 U.S. at 937), in which the U.S. Supreme Court rejected the argument that a challenge to "the utilization review procedures contained" in Pennsylvania's Workers' Compensation Act was actually a "facial" challenge to the statute itself—a challenge that did not require examination of the nature of the defendant. "[S]tate action requires *both* an alleged constitutional deprivation 'caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible,' *and* that 'the party charged with the deprivation must be a person who may fairly be said to be a state actor,'" the Court stated (*id.* at 50).

examine whether there is "such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[11]

Plaintiffs may demonstrate this nexus by using one of the five approaches. As noted, in analyzing these approaches I do not discuss whether the receipt of federal bailout money could transform lenders into state actors, particularly if acceptance of the bailout money requires the recipients to carry out foreclosures in a certain way. Nor do I examine whether federal entities such as Fannie Mae, Freddie Mac, and the Department of Veterans Affairs might be considered state actors under the due process clause of the Fifth Amendment by virtue of their governmental status. Either of these developments (receiving bailout money or the participation of federal entities) might allow for persuasive arguments under the "coercive power," "entwinement," or "public function" approaches discussed below.[12]

The first approach to proving a nexus between the state and the challenged action is to demonstrate that the private actions result from the state's "coercive power" or, put slightly differently, that the private entity is "controlled by 'an agency of the State.'"[13] This approach is unlikely to be applicable to the types of judicial foreclosures discussed here.[14] Another approach, which is a variant of the first, is to show that the private actor is "'entwined with governmental policies'" or that the government is "'entwined in [the actor's] management or control.'"[15] This approach is also unlikely to work in the judicial foreclosures discussed here.[16] The third approach is to show that the private actor has been delegated a "public function."[17] This approach is unlikely to be applicable to the types of judicial foreclosure discussed here.[18] The fourth approach is to show that the state gives "'significant encouragement, either overt or covert,'" to engage in the actions.[19] But the "'[m]ere approval of or acquiescence in the initiatives of a private party is not

[11]*Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351 (1974)).

[12]See Stephen Labaton & Edmund L. Andrews, *In Rescue to Stabilize Lending, U.S. Takes Over Mortgage Finance Titans*, New York Times, Sept. 7, 2008, (http://bit.ly/3Jxlg6) (government takeover of Federal National Mortgage Association and Federal Home Loan Corporation); A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 University of Illinois Law Review 543 (1995) (http://bit.ly/4oLFoa) (state-action issue for federal government corporations). See also First Amended Class Action Complaint, *Williams v. Geithner*, No. 09-1959 (D. Minn. Nov. 9, 2009) (asserting that loan servicers are state actors by virtue of their participation in Home Affordable Modification Program); First Amended Class Action Complaint, *Edwards v. Aurora Loan Services*, No. 09-2100 (D.D.C. Aug. 17, 2009).

[13]*Brentwood Academy*, 531 U.S. at 296 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) and *Pennsylvania v. Board of Directors*, 353 U.S. 230, 231 (1957) (per curium)).

[14]In an oft-cited opinion the Ninth Circuit illustrates why the "coercive power" approach is not likely to apply to foreclosure actions. Even if the mortgagee does not possess the power of sale in the contract and gains it only through the statute, such a fact still does not establish state action because the "statute creates only the right to act; it does not require that such action be taken," the Ninth Circuit, citing an earlier case, noted (*Charmicor v. Deaner*, 572 F.2d 694, 695 (9th Cir. 1978), quoting *Melara v. Kennedy*, 541 F.2d 802, 806 (9th Cir. 1976)). The Supreme Court held that the warehouseman's statute at issue was not state action because "the State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale" (*Flagg Brothers*, 436 U.S. at 166).

[15]*Brentwood Academy*, 531 U.S. at 296 (quoting *Evans v. Newton*, 382 U. S. 296, 299, 301 (1966)).

[16]Entwinement is not a likely viable approach because while there are statutes governing the foreclosure procedures, "[t]he mere fact that a business is subject to state regulation does not, by itself, convert its action into that of the State for purposes of the Fourteenth Amendment" (*Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 350 (1974) (utility company not state actor despite extensive regulation)).

[17]*Brentwood Academy*, 531 U.S. at 296.

[18]As the Ninth Circuit put it, "legislative approval of a private self-help remedy [is] not the delegation of a public function" (*Apao v. Bank of New York*, 324 F.3d 1091, 1094 (9th Cir. 2003) (Clearinghouse No. 55,230)). The Supreme Court held that a warehouseman's sale of an evicted tenant's goods pursuant to a state statute did not invoke sufficient state action, and the Court commented that that "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function" (*Flagg Brothers*, 436 U.S. at 161).

[19]*Brentwood Academy*, 531 U.S. at 296 (quoting *Blum*, 457 U.S. 991, 1004 (1982)).

sufficient to justify holding the State responsible for those initiatives,'" making it difficult to apply this approach successfully in the judicial-foreclosure context.[20] The fifth and final approach is to show that the "private actor operate[d] as a 'willful participant in joint activity with the State or its agents.'"[21] This means essentially that the private actor must have had "significant aid from state officials."[22] Or, put another way, the private actor must have received the "significant assistance of state officials."[23] This is the approach most likely to succeed in judicial-foreclosure cases.

Since the "coercive power," "entwinement," "public function," and "encouragement" approaches are unlikely to be applicable to most judicial-foreclosure cases, I do not discuss those approaches but instead concentrate on the fifth approach: showing that the actor and state were willful participants and that the private actor received significant assistance from the state.

Demonstrating the Involvement of State Officials to Show that the Conduct Is Attributable to the State Under the Fourteenth Amendment

In judicial-foreclosure states the approach that is most likely to be successful in showing state action is to demonstrate that the foreclosure process occurs with the "overt, significant assistance of state officials."[24] This requires, at the least, that state officials participate in the foreclosure process. In *Flagg Brothers Incorporated v. Brooks* the Supreme Court found that there was no state action, at least in part, because the warehouseman's lien statute at issue did not utilize any state officials. The statute instead contained a self-help remedy in the form of an extrajudicial process.[25] The Court contrasted its conclusion with some of its previous cases in which it had found state action where "a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred."[26]

In judicial-foreclosure states, of course, the use of the state's courts (and the use of all the state officials who work for those courts) to pursue the foreclosure is mandatory; the foreclosing entity does not possess the right of self-help. In the landmark case *Shelley v. Kraemer* the Supreme Court held that the use of a court to enforce a restrictive covenant could be state action because the court was essentially participating in the discrimination by enforcing the facially discriminatory covenant.[27] The Court subsequently referred to this kind of situation as one where "the injury caused is aggravated in a unique way by the incidents of govern-

[20] *Id.* at 309 (quoting *Blum*, 457 U.S. at 1004–5 (1982)). For cases discussing why this approach is unlikely to be successful, see *Northrip v. Federal National Mortgage Association*, 527 F.2d 23, 27–28 (6th Cir. 1975) (quoting *Turner v. Impala Motors*, 503 F.2d. 607, 611 (6th Cir. 1974)), where the Sixth Circuit reversed the district court decision that the Michigan nonjudicial-foreclosure statute "encouraged" foreclosures. The Sixth Circuit found that the statute "acted [only] to regulate and standardize a recognized practice" and that "[w]hile mere existence of the statute might seem to suggest encouragement, we conclude that the effect of the statute is only to reduce a creditor's risk in making repossessions." And see *American Manufacturers Mutual Insurance Company*, 526 U.S. at 53 (While enacting a statute that provides creditors with certain options might be encouraging them to use such options, "this kind of subtle encouragement is no more significant than that which inheres in the State's creation or modification of any legal remedy. We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it."); *Apao*, 324 F.3d at 1094 (The state's "statutory authorization of self-help provisions" did not create state action because "[t]he statute neither encourages nor compels the procedure, but merely recognizes its legal effect.").

[21] *Brentwood Academy*, 531 U.S. at 296 (quoting *Lugar*, 457 U.S. at 941).

[22] *Lugar*, 457 U.S. at 937.

[23] *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478, 486 (1988).

[24] *Id.* at 486.

[25] *Flagg Brothers*, 436 U.S. at 160 n.10.

[26] *Id.*

[27] *Shelley*, 334 U.S. at 1.

mental authority."[28] For a time, *Shelley v. Kraemer* appeared to stand for the proposition that the use of the courts itself sufficiently "aggravated" injuries so as to constitute state action.

Although the mandatory use of the courts in foreclosure proceedings is an important factor in showing state action, it would be unwise to rely on that factor alone. Some courts have limited *Shelley*'s reach to cases involving racial discrimination or restrictive covenants.[29] Many federal appellate courts (and the Supreme Court itself, in dicta) have questioned whether the mere use of the courts to foreclose is enough to constitute state action.[30] By contrast, at least one court found that the use of the judicial process sufficed to trigger state action.[31]

One route to showing state action that has met with particular success is one in which the state statute not only mandates the use of the courts but also does so in a way that (1) unconstitutionally deprives a litigant of notice or an opportunity to be heard *before* a loss or attachment of property (in other words, the proceeding is ex parte) and (2) enlists the use of state officials to carry out the deprivation. Although the rationale for this rule has never been clearly explained, the thinking likely is that, by providing such an ex parte process, the state is a collaborator in the deprivation. As *Shelley* noted, "[t]he action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment."[32] Conversely, where the party *does* receive notice and the opportunity to be heard, the process is not ex parte and state action will not be found.[33] This is because "mere recourse to state court procedures does not by itself constitute 'joint activity' with the state[;] … the state's authorization of foreclosure procedures and sheriff sales in the execution of a judgment is not sufficient to constitute state action…."[34]

One example of the role of ex parte proceedings in state action is seen in *Lugar v. Edmondson Oil Company*. In *Lugar*, the Supreme Court narrowly held, "when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute," a private entity seeking such attachment is a state actor under the "joint participation" theory.[35] The Court limited its holding to prejudgment ex parte pro-

[28] *Edmonson*, 500 U.S. at 622.

[29] See, e.g., *Loren v. Sasser*, 309 F.3d 1296, 1303 (11th Cir. 2002) ("*Shelley* has not been extended beyond race discrimination"); Sharon Kolbet, *Signs of the Times: How the Recent Texas Legislation Regarding Homeowners' Associations Deprives Homeowners of Their Fundamental Free Speech Rights*, 15 Texas Wesleyan Law Review 85, 96 (2008) ("Many lower courts have concluded that the *Shelley* ruling should be applied only to racially restrictive covenants. However, there are a number of cases where courts have applied *Shelley* to other types of restrictive covenants.").

[30] See, e.g., *Hollis v. Itawamba County Loans*, 657 F.2d 746, 749 (5th Cir. 1981) ("[N]o 'state action' is involved when the state merely opens its tribunals to private litigants."); *American Manufacturers Mutual Insurance Company*, 526 U.S. at 54 (quoting *Tulsa Professional Collection Services*, 485 U.S. at 486) ("[A] private party's mere use of the State's dispute resolution machinery" is not state action unless there is "overt, significant assistance of state officials."); *Fallis v. Dunbar*, 386 F. Supp. 1117, 1120 (N.D. Ohio 1974) (The court found that there was no state action for eviction filing and limited *Shelley* to race cases where the court would be made a party to discrimination: "As a general principle, the filing of a suit between private parties in state court is not state action."), aff'd, 532 F.2d 1060 (6th Cir. 1976).

[31] *United States v. Whitney*, 602 F. Supp. 722, 733 n.11 (W.D.N.Y. 1985). The district court distinguished nonjudicial-foreclosure case law and found that there was no state action because "the mortgage held by Community Savings Bank was foreclosed through judicial proceedings in the courts of New York State. That factor, which was not present in *Rank v. Nimmo*, 677 F.2d 692, 702 (9th Cir. 1982), presents an element of state action sufficient to trigger the protections of the Due Process Clause of the Fourteenth Amendment." The court might also have been influenced by the loan in question having been guaranteed by what is now called the U.S. Department of Veterans Affairs and consequently subject to federal regulation (*id*. at 732).

[32] *Shelley*, 334 U.S. at 16.

[33] See, e.g., *Earnest v. Lowentritt*, 690 F.2d 1198, 1201–2 (5th Cir. 1982).

[34] *Nelson v. Smith*, No. C06-00432RSM, 2006 WL 2690981, at *2 (W.D. Wash. Sept. 19, 2006) (unpublished).

[35] *Lugar*, 457 U.S. at 942.

cedures.[36] Some courts have extended the holding to include postjudgment ex parte statutes, but only where the statute does not require notice of the proceedings to all parties with an interest in the property and utilizes state officials to execute the judgment.[37] In one case where a state statute allowed a creditor to increase unilaterally the judgment amount listed on a sheriff's writ, the court found that there was state action based on the principle that the statute unconstitutionally deprived the debtor of an opportunity to be heard while also utilizing the "compulsive power of the local Sheriff."[38]

These cases can be analogized to support an argument that indigent litigants have the right to counsel in judicial-foreclosure proceedings. A statute requiring judicial foreclosure, but not providing appointed counsel for indigent debtors, essentially deprives such debtors of a full opportunity to be heard in a way similar to ex parte hearings. And at the conclusion of such proceedings the debtor will be deprived of property because of the actions of the sheriff and other officials. The concern in *Shelley* was, in essence, that the singular power of the courts was being enlisted to perpetuate unfairness. Similarly the injury caused by the absence of appointed counsel is one particular to the judicial process itself: the judge is presiding over a state-created court process that is fair only in theory.

Where the proceedings are not ex parte, another approach to proving state action is to show that the powers and responsibilities of state officials in the judicial-foreclosure process rise to the level of "overt, significant assistance." While there is some negative case law regarding the sufficiency of the involvement of certain officials such as a county recorder, those cases relied upon the strictly "ministerial" role of the official in question.[39] The greater the powers of the state officials, the likelier that state action will be found. For instance, the Second Circuit found that the use of Vermont's strict foreclosure statute, which required the mortgagee to go to court to obtain a foreclosure, granted the court discretionary power to change the statutory period of redemption, obligated the creditor to obtain a writ of possession after the redemption period expired, and generally "directly engage[d] the state's judicial power in effectuating foreclosure," was enough to show that there was state action in the foreclosure process.[40] The court's reliance on the judge's powers is key in that foreclosure proceedings are typically equitable proceedings that provide judges with broad discretionary powers.

Because of the particular involvement of state officials, a few cases have found sufficient state action even when nonjudicial-foreclosure statutes are used. These cases may be instructive when examining state officials' involvement in a judicial-foreclosure process. For instance, a district court reviewed North Carolina's nonjudicial-foreclosure statute, which

[36]*Id*. at 939 n.21.

[37]See, e.g., *Davis Oil Company*, 873 F.2d at 780–81 n.12 (5th Cir. 1989); *Scott v. O'Grady*, 760 F. Supp. 1288, 1295 (N.D. Ill. 1991) (Finding state action in a challenge to postforeclosure eviction of tenants who were not given notice of foreclosure, the court noted, "The *Davis Oil* case also supports the Scotts' claim that a private person's use of state postjudgment procedures to seize property may be considered state action.").

[38]*Grillo v. BA Mortgage LLC*, No. 2:04-cv-02897, 2004 WL 2250974, at *6 (E.D. Pa. Oct. 4, 2004) (unpublished).

[39]See, e.g., *Ramsey v. Neindorff*, 177 F.3d 977 (5th Cir. 1999) (per curiam) (The requirements that the foreclosure notice be posted on courthouse door and filed with county clerk and that the clerk keep the file conveniently located for public access is insufficient to find state action because "the clerk remains but a ministerial agent, insufficiently involved with the foreclosure."); *Lawson v. Smith*, 402 F. Supp. 851, 855 (N.D. Cal. 1975) (The functions of the county recorder were insufficient to trigger state action because the recorder only "ascertain[s] that a document relating to real property contains the information required by law. Furthermore, no independent verification of the accuracy of the information is required by the recorder since [the statute] provides that 'the recorder may rely upon the information contained in or appended to the document being offered for record.'"); *Fitzgerald v. Cleland*, 498 F. Supp. 341, 348 (D. Me. 1980) (Under the Maine nonjudicial-foreclosure statute, the official serves only a "ministerial role" as a "messenger" and does not have "significant supervisory and discretionary powers."), aff'd on different grounds, 650 F.2d 360 (1st Cir. 1981); *Garfinkle v. Superior Court,* 578 P.2d 925, 933 (Cal. 1978) (involvement of county recorder performing "ministerial acts" does not implicate state action).

[40]*Dieffenbach v. Attorney General*, 604 F.2d 187, 194 (2d Cir. 1979).

required that the mortgagee file a sales report with the clerk after the sale of the property and file a final report after the period for redemption and upset bids expired.[41] The lender argued that there was insufficient state action since the lender pursued the foreclosure voluntarily and the clerk's receiving the sales report was a "passive," after-the-fact routine matter that did not include approval of the sale.[42] The district court replied that the clerk's review of the sales report was not an "empty ritual" and that the clerk's validation of the report was a prerequisite to finalization of the sale.[43] Moreover, the court stated, the statute empowered the clerk to approve or reject any upset bids, and this had the effect of "extend[ing] to private foreclosure sales an effective equivalent of an equity court's power to decree a resale upon the filing of a substantial raised bid."[44] The court concluded that this statutory scheme was, "in effect, a streamlined version of a judicial sale, with the clerk exercising by detailed *statutory* authority many of the supervisory powers inherent in a court of equity."[45]

A few nonforeclosure cases also provide useful guidance in evaluating the involvement of state officials in a judicial-foreclosure process. In one case the Supreme Court found that the peremptory challenge system implicated state action due to the "overt, significant assistance" of the court in the system.[46] The Court took into account the peremptory challenge system in which the judge designs the jury pool process, determines initial eligibility criteria, controls the *voir dire* process, and ultimately informs the juror that the juror has been struck. The Court rejected the dissent's argument that the judge's "approval" of the strike of the juror was de minimis state action. In another case the Court found state action in a law cutting off a creditor's claims after a certain amount of time had passed since the filing of a probate action.[47] The Court noted that the "nonclaim statute becomes operative only after probate proceedings have been commenced in state court," the court appointed the executor or executrix prior to the notice being issued and ordered the notice to be issued, and "copies of the notice and an affidavit of publication must be filed with the court."[48] The Court concluded that "[i]t is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved."[49] Therefore the statute at issue was not a self-executing statute of limitations but a limitations period that began to run only after the court's actions were completed.

Because state statutory structures change over time and states may add to state officials' involvement or responsibilities, a court's prior holding that a foreclosure statute does not implicate state action may not be determinative.[50] Advocates must examine exactly what state officials do, how much discretion and involve-

[41] *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975).

[42] *Id*. at 1255.

[43] *Id*. at 1256.

[44] *Id*.

[45] *Id*. at 1258. See also *Garner v. Tri-State Development Company*, 382 F. Supp. 377, 379 (E.D. Mich. 1974) (Regarding the nonjudicial-foreclosure statute, the court stated that "two state officials participate directly in the proceedings: The sheriff and the registrar of deeds. Though they are largely ministerial, their actions comprise state action."). Note that *Garner* relied on *Northrip v. Federal National Mortgage Association,* 372 F. Supp. 594 (E.D. Mich. 1974), which was subsequently reversed by the Sixth Circuit, 527 F.2d at 23.

[46] *Edmonson*, 500 U.S. at 624.

[47] *Tulsa Professional Collection Services*, 485 U.S. at 478.

[48] *Id*. at 487.

[49] *Id*.

[50] Kenneth Krock, *The Constitutionality of Texas Nonjudicial Foreclosure: Protecting Subordinate Property Interests from Deprivation Without Notice*, 32 Houston Law Review 815, 838–39 (1995) (how Texas nonjudicial-foreclosure statute was amended after court rulings that foreclosure statute did not involve state action).

ment they have, and how many different kinds of officials are involved.

Examining "State Action" Under State Constitutions

Since Justice William Brennan's landmark article arguing that state constitutions can be more protective of individual rights than the federal constitution, there has been much written about whether state due process clauses require a right to counsel in civil cases.[51] State constitutions are indeed fertile territory because some states have declared that their state due process clauses are not to be interpreted in lockstep with the federal constitution.[52] One may be able to argue that a state constitution's "state-action" standard is broader than that established for the Fourteenth Amendment.

That an action was not state action under the federal constitution, a New York appellate court noted in one case, *Sharrock v. Dell Buick-Cadillac Incorporated*, "does not perforce necessitate that the same conclusion be reached when that conduct is claimed to be violative of the State Constitution," and "the absence of any express State action language simply provides a basis to apply a more flexible State involvement requirement than is currently being imposed by the Supreme Court with respect to the Federal provision."[53] The appellate court then held that, because the state garageman's lien was entirely a creature of statute, the state, by enacting the statute, had "done more than simply furnish its statutory imprimatur to purely private action. Rather, it has entwined itself into the debtor-creditor relationship arising out of otherwise regular consumer transactions."[54] The court held that this legislative authorization to bypass the courts "encourage[d] him to adopt this procedure rather than to rely on more cumbersome methods which might comport with constitutional due process guarantees."[55] Even though *Sharrock* was "essentially using the same two state-action theories rejected in *Flagg Brothers*," it trod safely by basing its ruling on the state constitution's due process clause.[56]

Similarly a California appellate court found that an aircraft lien statute "constitute[d] a delegation by the State of California of the traditional and exclusively sovereign power of nonconsensual enforcement of a possessory lien by an involuntary sale by the private lienholder, namely, the aircraft keeper. At common law a possessory lienholder possessed no power of sale to enforce his lien."[57] The court conceded that this holding was "inconsistent with … *Flagg Brothers*."[58] But, the court pointed out, the statute had to "meet the requirements of the procedural due process provision of the California Constitution."[59]

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[51]William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harvard Law Review 489, 502–4 (1977). For additional articles on the subject, see, e.g., Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 Temple Political and Civil Rights Law Review 733 (2006); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 Touro Law Review 187 (2009).

[52]See, e.g., *In re Kimber Petroleum*, 539 A.2d 1181, 1187 (N.J. 1988) ("[T]he doctrine of fundamental fairness, which has roots in the New Jersey Constitution and in New Jersey common law, has been applied to grant persons procedural protections that may exceed those offered by the due process clause of the federal constitution."); *In re K.L.J.*, 813 P.2d 276, 282 n.6 (Alaska 1991) (In this private involuntary adoption case, the court found a right to counsel under Alaska Constitution's due process clause and stated that it "rejected the case-by-case approach set out by the Supreme Court in *Lassiter* [*v. Department of Social Services*, 452 U.S. 18 (1981)]. Rather, our view comports more with the dissent.").

[53]*Sharrock v. Dell Buick-Cadillac Incorporated*, 379 N.E.2d 1169, 1173 (N.Y. 1978).

[54]*Id.* at 1174.

[55]*Id.* at 1175.

[56]*Price v. U-Haul Company of Louisiana*, 745 So. 2d 593, 598 (La. 1999) (discussing *Sharrock* and referring to the "traditional sovereign function" and "entwinement" theories that *Sharrock* had applied more liberally than was indicated by Supreme Court precedent (*id.* at 598–99)).

[57]*Martin v. Heady*, 103 Cal. App. 3d 580, 587 (1980).

[58]*Id.* at 587.

[59]*Id.* at 589.

Going further, one could argue that the due process clause of a particular state constitution had no state-action requirement whatsoever. Some state courts find that there are some state constitutional protections (such as voting, free speech, or searches) that lack a state-action requirement; due process protections could possibly be another.[60] In one case the Iowa supreme court noted that the state-action requirement in the Fourteenth Amendment originated from the need to protect "the rights of the sovereign states in the federal system of government" and that the concept of federalism had "little or no concern in a state constitutional interpretation."[61] This, the court conceded, might cause one to "wonder why a state-action requirement should be imposed on the sweeping language of article I section 9 [of the Iowa constitution]," although the Iowa supreme court opted to impose the state-action requirement for other reasons.[62] While a number of courts have extended the state-action requirement to the due process clauses of their state constitutions, some of these decisions have not explained why, thereby creating the possibility that the litigants did not raise the appropriateness of doing so.[63]

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Since state action is a threshold requirement to asserting a violation of the due process clause of the Fourteenth Amendment, advocates must understand this very complicated and ever-evolving doctrine. The winning argument looks at the foreclosure process from start to finish, creatively explores the powers and responsibilities of all involved, examines whether there is an ex parte nature to the proceeding, and checks whether the foreclosure statute has changed since the date of the relevant case law. Advocates also must examine the state constitution's due process jurisprudence. If the state is anything but a "lockstep" jurisdiction, advocates can argue that the state should ignore the Supreme Court's confusing (and at times illogical) holdings in order to pursue a more doctrinally sound approach.[64]

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[60]See, e.g., *Batchelder v. Allied Stores International*, 445 N.E.2d 590, 593–94 (Mass. 1983); *Southcenter Joint Venture v. National Democratic Policy Committee*, 780 P.2d 1282, 1300–1301 (Wash. 1989) (Utter, J., concurring).

[61]*Putensen v. Hawkeye Bank of Clay County*, 564 N.W.2d 404, 408 (Iowa 1997).

[62]*Id*.

[63]See, e.g., *Dimond v. Samaritan Health Service*, 558 P.2d 710 (Ariz. Ct. App. 1976) ("Article 2, Sec[tion] 4 of the Arizona Constitution applies only to state action." (no rationale given)); *Nichols v. Eckert*, 504 P.2d 1359, 1362 (Alaska 1973) (stating that there must be state action under state due process clause but not explaining why); *State v. Mellett*, 642 N.W.2d 779 (Minn. Ct. App. 2002) (same).

[64]The Second Circuit has criticized the Supreme Court's pattern of finding state action in some cases but not others as a "somewhat arbitrary method of differentiation" (*Dieffenbach*, 604 F.2d at 194).

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