
EMINENT DOMAIN: A SOLUTION TO THE MORTGAGE CRISIS?*

I. INTRODUCTION

As a result of the subprime mortgage crisis,¹ 20% of America's homeowners have mortgages that are "underwater," meaning they owe more than their homes are worth.² San Bernardino County, California, has experienced especially devastating effects due to the subprime mortgage crisis.³ After six consecutive years of home value appreciation, the subsequent plunge in the market has left San Bernardino County with 57% of its mortgages underwater.⁴ The state of California in general was strongly affected by the crisis, boasting the fifth-highest foreclosure rate nationally in 2012.⁵ Thus, in order to preserve its community, San Bernardino County was the first municipal government to express interest in a solution proposed by Mortgage Resolution Partners (MRP),⁶ which hopes to use eminent domain proceedings to take over mortgages with values greater than the homes securing them and underwrite principals so that the borrowers can afford their mortgage payments.⁷ After consideration of MRP's proposed solution or plan (the Plan), San Bernardino County ultimately decided to drop the idea due to lack of public support.⁸ However, this was not the end for MRP's Plan. Recently, the city of Richmond, California, facing a depleted middle class and abandoned neighborhoods, became the first city to affirm that it will implement the MRP Plan.⁹ MRP alleges that the Plan, if implemented, will do what federal government programs have consistently failed to do—prevent hundreds of thousands of foreclosures across the United States and allow homeowners to remain

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1. See *infra* Part II.A for an overview of the subprime mortgage crisis.

2. Tad Friend, *Home Economics: Can an Entrepreneur's Audacious Plan Fix the Mortgage Mess?*, THE NEW YORKER, Feb. 4, 2013, at 26.

3. *Id.* at 29.

4. *Id.*

5. RealtyTrac Staff, *1.8 Million U.S. Properties with Foreclosure Filings in 2012*, REALTYTRAC (Jan. 14, 2013), <http://www.realtytrac.com/content/foreclosure-market-report/2012-year-end-foreclosure-market-report-7547>.

6. Mortgage Resolution Partners is a private firm that is working to combat the foreclosure crisis. The firm has come up with the solution discussed in this Comment. Overview of MRP, MORTG. RESOLUTION PARTNERS, <http://mortgageresolution.com/> (last visited Nov. 27, 2013).

7. See *infra* Part II.C for an explanation of how MRP's solution would work.

8. Alejandro Lazo, *San Bernardino County Abandons Mortgage Plan*, L.A. TIMES (Jan. 31, 2013), <http://articles.latimes.com/2013/jan/25/business/la-fi-eminent-domain-20130125>.

9. Shaila Dewan, *A City Invokes Seizure Laws to Save Homes*, N.Y. TIMES, July 30, 2013, at A1.

in their homes.¹⁰

The power of eminent domain has never been used under these particular circumstances. However, with the continued failure of government programs enacted to address the subprime mortgage crisis, an unconventional solution may be just what the United States needs to rehabilitate the mortgage market. This Comment proposes that what MRP intends to do is constitutional under the Takings Clause of the United States Constitution and, if implemented, could be the solution the United States has been waiting for since the collapse of the housing bubble.

Part II.A of this Comment covers subprime lending practices and details how the United States found itself in the midst of the subprime mortgage crisis. Part II.B gives an overview of government programs that were enacted in response to the crisis. Part II.C explains the Plan, and Part II.D gives a brief history of eminent domain law. Section III then explains why the Plan is constitutional under current eminent domain law. Section III also explores reasons for the underwhelming success of all previous government programs enacted to tackle this problem and explains why MRP's Plan will succeed.

II. OVERVIEW

This Section begins by detailing how irresponsible lending practices and home value fluctuations resulted in the subprime mortgage crisis the United States is experiencing today. Government programs have been implemented to remedy the subprime mortgage crisis, but none of them have produced the results desperately needed by the United States. MRP's Plan would use eminent domain to take over underwater mortgages and lower principals on loans. This Plan is detailed further in this Section, along with a brief history of eminent domain law.

A. *The Subprime Mortgage Crisis*

Homeownership has forever been considered the American dream, but that dream may no longer be as attainable as it used to be.¹¹ Homeownership took flight during the post-World War II era when the government decided to subsidize homeownership for the middle class with programs and departments such as the Federal Housing Administration (FHA) and the United States Department of Veterans Affairs.¹² These federal programs, which guaranteed 90% of the value of a home as collateral for private loans, allowed for much lower down payments on home loans (10%, as opposed to 33–50%), longer repayment periods, and lower monthly payments.¹³ From 1945 to 1975, homeownership rates increased by 50% and about two-thirds of

10. See *infra* Part II.B for a discussion of the various federal programs initiated to combat mortgage foreclosures that have been largely unsuccessful.

11. See Jill Simmons, *Home Values Flat in Third Quarter on Slow Road to Housing Market Bottom*, ZILLOW BLOG (Nov. 7, 2011), <http://www.zillowblog.com/2011-11-07/home-values-flat-in-third-quarter-on-slow-road-to-housing-market-bottom/> (reporting that 28.6% of mortgaged homes were underwater during the third quarter of 2011 and predicting that home values would bottom out in 2012).

12. Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 *FORDHAM L. REV.* 949, 956–57 (2008).

13. *Id.* at 957.

Americans owned their own homes.¹⁴ During the last quarter of the twentieth century, homeownership rates continued to increase, although at a much slower rate, to 67%.¹⁵ New accessibility and lower standards to obtain home loans were just a start to the subprime mortgage lending that snowballed out of control during the housing bubble of the twenty-first century.¹⁶

There are differing opinions as to what exactly led to the mortgage crisis.¹⁷ Many believe that it was the increase in lenders issuing nonconforming, or subprime, mortgages during the housing bubble when home prices skyrocketed.¹⁸ These theorists blame the rise of unregulated commercial lenders and lax lending procedures for the crisis.¹⁹ Another theory is that historically low interest rates and a drastic increase in the prices of residential real estate are to blame for the housing bubble, which eventually caused the crisis that the United States is now facing.²⁰ On the other hand, Alan Greenspan, the former Chairman of the Federal Reserve, believes that the increase in subprime lending was due to borrowers who borrowed after home prices had already increased and were thus unable to build enough equity in their homes before interest rates increased.²¹ Regardless of why subprime lending became so popular, subprime mortgages totaled \$600 billion in 2006.²² They accounted for slightly more than one-fifth of the United States' home loan market, increasing from 9.5% of all mortgage originations in 1996 to 23.5% in 2006.²³ The number of subprime loans rose with the

14. Peter W. Salsich, Jr., *Homeownership—Dream or Disaster?*, 21 J. AFFORDABLE HOUS. 17, 25 (2012).

15. *Id.*

16. Major Coleman IV et al., *Subprime Lending and the Housing Bubble: Tail Wags Dog?*, 17 J. HOUSING ECON. 272, 272–73 (2008). The term housing bubble refers to the time period from the late 1990s to 2006 when home values increased at an exponential rate due to high demand, high credit availability, and speculation in the market. See Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1180–81, 1206 (2012) (noting that scholars differ on when the housing bubble began, but some date its origins to as early as 1997).

17. Compare FRANK J. FABOZZI ET AL., MORTGAGE-BACKED SECURITIES: PRODUCTS, STRUCTURING, AND ANALYTICAL TECHNIQUES 23–24 (2011) (explaining how the securitized-mortgage market contributed to the subprime mortgage crisis), with STAFF OF S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, 112TH CONG., REP. ON WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 11 (2011) [hereinafter ANATOMY OF A FINANCIAL COLLAPSE] (placing blame on the investment banks for underwriting high-risk, poor-quality mortgages), and John Kiff & Paul Mills, *Money for Nothing and Checks for Free: Recent Developments in U.S. Subprime Mortgage Markets* 3 (Int'l Monetary Fund, Working Paper No. 188, 2007) (tracing the origins of the crisis to lenders who issued subprime, high-risk mortgages).

18. See, e.g., ANATOMY OF A FINANCIAL COLLAPSE, *supra* note 17, at 18–21 (describing how an increase in lending to subprime borrowers contributed to the financial crisis); Christopher L. Foote et al., *Just the Facts: An Initial Analysis of Subprime's Role in the Housing Crisis*, 17 J. HOUSING ECON. 291, 291–92 (2008) (arguing that subprime mortgages “lie at the center of recent turmoil in [the] housing and credit markets”).

19. KATALINA M. BIANCO, THE SUBPRIME LENDING CRISIS: CAUSES AND EFFECTS OF THE MORTGAGE MELTDOWN 7–8 (2008).

20. Robert T. Miller, *Morals in a Market Bubble*, 35 U. DAYTON L. REV. 113, 120 (2009).

21. BIANCO, *supra* note 19, at 4.

22. David D. Chait, *Small Business Financing and the Post-2008 Credit Paradigm: The U.S. Small Business Administration and Key Factors to Support Traditional Credit Markets*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 411, 415 (2011).

23. *Id.*

value of real estate as lenders continued to issue riskier loans.²⁴

Subprime mortgages have a low expectation for repayment because they fail to conform to the requirements for prime mortgages.²⁵ Subprime mortgage loans are made to borrowers who usually possess one or more of the following characteristics: a low credit score, a debt-to-income (DTI) ratio over 55%, and a loan-to-value (LTV) ratio over 85%.²⁶ It is estimated that 29% of all home loans in 2007 were originated with no down payment, and the median down payment on home purchases was 9%, down 20% from 1989.²⁷ Because subprime loans were riskier to lenders, they were often negotiated with higher interest rates.²⁸

Lenders also issued loans in innovative structures such as the adjustable-rate mortgage or the interest-only mortgage.²⁹ Adjustable-rate mortgages have variable interest rates and monthly payments that fluctuate in conjunction with the market interest rate, and they typically start out with a very low, or “teaser,” interest rate that allows for low monthly payments at the outset of the loan.³⁰ Interest-only loans begin with the borrower making only interest (not principal) payments on the loan, allowing for low monthly payments at first.³¹ Interest-only loans typically require a balloon

24. Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 16–17 (2009).

25. Kiff & Mills, *supra* note 17, at 3. A conforming mortgage is a home loan that meets the underwriting standards of the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Tim Plaehn, *Define Conforming Mortgage*, SFGATE, <http://homeguides.sfgate.com/define-conforming-mortgage-8917.html> (last visited Nov. 27, 2013). The mortgage loan limit is \$417,000 for a single-family home, \$533,850 for a duplex, and \$801,950 for a four-unit duplex. *Loan Limits*, FANNIEMAE, <https://www.fanniemae.com/singlefamily/loan-limits> (last visited Nov. 27, 2013). Housing expenses cannot be more than 28% of monthly income, the down payment must be at least 5–20%, and the borrower’s FICO credit score must be at least 620. *Conventional Loans*, JNC MORTGAGE, <http://www.jncmortgage.com/conventional-loans.htm> (last visited Nov. 27, 2013).

26. Kiff & Mills, *supra* note 17, at 3. A DTI ratio helps the lender determine a borrower’s ability to pay back a loan. See Solomon Maman, *New Tools for Combating Unfair, Deceptive and Abusive Mortgage Practices: New Amendments to Regulation Z*, 21 LOY. CONSUMER L. REV. 194, 202 (2008) (explaining that a borrower’s payment capacity is reduced if his or her DTI ratio is high). The ratio is calculated by dividing a borrower’s fixed monthly expenses by gross monthly income. *Id.* at 202 n.50. The higher the ratio, the less likely it is that a borrower will be able to pay back the loan. *Id.* at 202. A loan-to-value (LTV) ratio is the ratio “between the amount of a mortgage loan and the value of the property pledged as security for the mortgage.” BLACK’S LAW DICTIONARY 1022 (9th ed. 2009). As with the DTI ratio, the higher the LTV ratio, the more trouble a borrower will have paying back the loan. See Anne Balcer Norton, *Reaching the Glass Usury Ceiling: Why State Ceilings and Federal Preemption Force Low-Income Borrowers into Subprime Mortgage Loans*, 35 U. BALT. L. REV. 215, 227 (2005) (stating that the possibility of foreclosure increases as a borrower’s LTV ratio increases).

27. John Leland, *Facing Default, Some Abandon Homes to Banks*, N.Y. TIMES, Feb. 29, 2008, at A1. The median down payment for first-time buyers was even lower, estimated at 2%. *Id.*

28. Godsil & Simunovich, *supra* note 12, at 961.

29. *Id.*

30. Rayth T. Myers, Comment, *Foreclosing on the Subprime Loan Crisis: Why Current Regulations Are Flawed and What Is Needed to Stop Another Crisis from Occurring*, 87 OR. L. REV. 311, 314 (2008). “Teaser” interest rates have the possibility of increasing very quickly with the market interest rate. Carolyn E. Waldrep, *North Carolina’s Emergency Measures to Reduce Home Foreclosures*, 13 N.C. BANKING INST. 453, 454–55 (2009). Throughout the life of the loan, the rate increases or decreases in conjunction with the market, thereby increasing or decreasing the monthly payment. *Id.*

31. Dustin Fisher, Comment, *Selling the Payments: Predatory Lending Goes Primetime*, 41 J.

payment at the end of the term, which accounts for the unamortized principal on the loan.³² These loan structures posed another way for lenders to decrease the risk in lending to subprime borrowers.³³ They also allowed subprime borrowers to better afford monthly payments.³⁴

There are several reasons why nonconforming mortgage lending became popular during the housing bubble. As the housing bubble continued, and the price of homes rose rapidly, many loans fell outside the conforming limit, which was \$417,000 for single-family homes.³⁵ Also, Government Sponsored Enterprises (GSEs) were forced to decrease their purchasing of mortgages due to accounting and governance issues.³⁶ Thus, many private lenders welcomed innovative securitization techniques, such as mortgage-backed securities, that allowed them to sell off their outstanding mortgages.³⁷ Lenders sold off mortgages to be converted into mortgage-backed securities to provide liquidity in the mortgage market and to use the sale proceeds to issue more mortgages.³⁸

The impact of the growth of this innovative and new securitized mortgage market has not been all positive.³⁹ The securitized mortgage market helped contribute to the subprime mortgage crisis when credit rating agencies and lenders failed to ensure the

MARSHALL L. REV. 587, 599 (2008).

32. Thomas E. Plank, *Toward A More Efficient Bankruptcy Law: Mortgage Financing Under the 2005 Bankruptcy Amendments*, 31 S. ILL. U. L.J. 641, 643 (2007). As opposed to traditional mortgage payments, which consist of part principal and part interest, interest-only loan payments consist of just the interest owed each month without amortizing the principal. Jonathan Macey et al., *Helping Law Catch Up to Markets: Applying Broker-Dealer Law to Subprime Mortgages*, 34 J. CORP. L. 789, 794 (2009).

33. Gary J. Madich et al., *Non-Agency Mortgage-Backed Securities: Managing Opportunities and Risks*, INSIGHTS, Feb. 2006, at 2.

34. BD. OF GOVERNORS OF THE FED. RESERVE SYS., INTEREST-ONLY MORTGAGE PAYMENTS AND PAYMENT-OPTION ARMS—ARE THEY FOR YOU? 10 (2006).

35. Kiff & Mills, *supra* note 17, at 6.

36. *Id.* Congress established GSEs to create liquidity in selected markets (including the mortgage market) and improve the capital markets. KEVIN R. KOSAR, CONG. RESEARCH SERV., RS21663, GOVERNMENT SPONSORED ENTERPRISES (GSEs): AN INSTITUTIONAL OVERVIEW 2–3 (2007). GSEs essentially act as insurers of the mortgage industry, purchasing loans and holding them in their own portfolios. *Id.* at 3; Jonathan Miner, Note, *The Mortgage Crisis in Historic Perspective: Is There Hope?*, 36 J. LEGIS. 173, 184 (2010). They also issue capital stock and debt instruments and guarantee mortgage-backed securities. *Id.* Fannie Mae and Freddie Mac are considered GSEs, which are characterized by: “(1) private sector ownership, (2) limited competition, (3) activities limited by congressional charter, and (4) chartered privileges that create an inferred federal guarantee of obligations.” *Id.* at 2–3.

37. Kiff & Mills, *supra* note 17, at 6–7. Fundamentally, a mortgage-backed security is a large pool of mortgage loans that have similar, but not identical, characteristics. FABOZZI ET AL., *supra* note 17, at 24. Factors that are considered in putting together mortgage pools are the interest rate, term to maturity, credit quality, loan balance, and product type. *Id.* Individual loans are pooled and transformed into homogeneous securities that are traded in the market. *Id.* Pools are then sold off to investors, and monthly payments of principal and interest are paid to the investors based on their pro rata share of the pool. *Id.* at 25. These securities can be further broken up to attract different types of investors. *Id.* “Tranching,” or dividing the mortgages’ cash flows into varying securities that have different average lives, degrees of prepayment risk, and credit can create securities on different risk and return levels. *Id.*

38. FABOZZI ET AL., *supra* note 17, at 23.

39. *Id.*

creditworthiness of the loans underlying newly issued mortgage-backed securities.⁴⁰ Moody's Investor Services and Standard and Poor's knowingly used inadequate credit rating models to predict how high-risk, subprime residential mortgages would perform in mortgage-backed securities.⁴¹ The premise behind securitization of mortgages was the assumption that when loans are pooled together, the overall risk decreases because it is spread over a larger number of investors.⁴² However, rating agencies and lenders failed to factor in considerations of increased credit risk due to mortgage fraud, lax underwriting standards, and unsustainable housing price appreciation, causing investors to falsely believe they were investing in a relatively low-risk, reliable securities.⁴³

Combined with skyrocketing home prices and subprime lending techniques, the mortgage crisis took off.⁴⁴ Since the advent of securitization, about 38% of outstanding mortgages were held by GSE securitization pools (plus the 3% held directly by the GSEs themselves), 18% by non-GSE (private label) securitization pools, 5% by finance companies, and most of the remainder by real estate investment trusts and households.⁴⁵ After years of home value appreciation and irresponsible lending procedures, home values peaked in 2006 and thus had nowhere to go but down.⁴⁶ When the housing bubble burst in 2006, it had devastating effects on homeowners, as well as banks and lending institutions.⁴⁷ Home values decreased at an alarming rate, and foreclosures and mortgage defaults became the norm.⁴⁸ Between 2007 and 2009, between five and six million foreclosure actions were initiated by lenders.⁴⁹ By the end of 2012, over 3.5% of outstanding home loans were in foreclosure.⁵⁰ As a result, banks put a screeching halt on offering credit, and investment firms faced major losses.⁵¹ Mortgage-related investments, such as mortgage-backed securities, lost billions of dollars, and the investment banks that once formed the foundation of our financial system experienced shocking effects.⁵²

40. *Id.*

41. ANATOMY OF A FINANCIAL COLLAPSE, *supra* note 17, at 245–46. Moody's Investor Services, Standard and Poor's, and Fitch are credit rating agencies that rate investments (including debt instruments) and companies for a fee. Caitlin M. Mulligan, *From AAA to F: How the Credit Rating Agencies Failed America and What Can Be Done to Protect Investors*, 50 B.C. L. REV. 1275, 1278–79 (2009). These ratings are important because many investors rely solely on them when making investment decisions, and many entities, including government investment groups, are permitted to invest only in products rated favorably by the ratings agencies. *Id.*

42. Kathryn E. Johnson & Carolyn E. Waldrep, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Overview*, 14 N.C. BANKING INST. 191, 193 (2010).

43. ANATOMY OF A FINANCIAL COLLAPSE, *supra* note 17, at 246.

44. FABOZZI ET AL., *supra* note 17, at 23–24.

45. Kiff & Mills, *supra* note 17, at 7.

46. Moran, *supra* note 24, at 7–8.

47. *Id.*

48. *Id.*

49. Johnson & Waldrep, *supra* note 42, at 198–99.

50. Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, 391 (2013).

51. Johnson & Waldrep, *supra* note 42, at 198.

52. *See id.* at 198 (pointing out the major losses suffered by large financial institutions as a result of the mortgage crisis); Moran, *supra* note 24, at 9 (noting that Citigroup, Merrill Lynch, and Wachovia all reported

The effect of home value depreciation is even worse on subprime mortgage holders.⁵³ Because subprime borrowers have likely paid little to no down payment and minimal principal in the early years of the loan, they are more likely to have negative equity in a down market.⁵⁴ The current negative equity rate for United States homeowners is 14.5%.⁵⁵ In several metropolitan areas in the United States, upwards of 24% of mortgages are underwater.⁵⁶ These areas include Miami-Miami Beach-Kendall, Florida (36.5%), Tampa-St. Pete-Clearwater, Florida (33.8%), Phoenix-Mesa-Glendale, Arizona (25.6%), Riverside-San Bernardino-Ontario, California (24.8%), and Warren-Troy-Farmington Hills, Michigan (24.3%).⁵⁷

Homeowners with negative equity are at a higher risk for future foreclosure.⁵⁸ Because of negative equity, owners will likely have trouble refinancing their loans or selling their homes, which may lead them to strategically default.⁵⁹ Home values declined approximately 30% from their peak in 2006 through mid-2011.⁶⁰ Depressed home values lead to homeowners' equity values becoming negative.⁶¹ When the value of a mortgage exceeds the value of the underlying property, homeowners become increasingly susceptible to defaulting on their loans.⁶² As home prices continue to decline, selling the property is often not a viable option for homeowners who cannot afford their monthly payments because selling the home will not pay off the mortgage in full.⁶³ This problem led to a peak in foreclosure filings in 2010.⁶⁴

The housing bubble and the advent of subprime, predatory lending, followed by the financial crisis and severe decrease in home values, left many borrowers no choice but to default on their loans.⁶⁵ At the peak of the crisis in 2010, others merely held on

multibillion dollar losses in the fall of 2008).

53. Godsil & Simunovich, *supra* note 12, at 961.

54. *Id.* Homeowners have negative equity when their mortgage balances are greater than the value of their homes. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-146R, LOAN PERFORMANCE AND NEGATIVE HOME EQUITY IN THE NONPRIME MORTGAGE MARKET 1 (2009).

55. CORELOGIC, CORELOGIC EQUITY REPORT: SECOND QUARTER 2013 2 (2013), available at <http://www.corelogic.com/research/negative-equity/corelogic-q2-2013-equity-report.pdf>.

56. *Id.* at 13.

57. *Id.*

58. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 54, at 1.

59. A strategic default on a mortgage occurs when a borrower simply walks away and stops paying the mortgage, allowing the bank to foreclose on the home. Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547, 1559–60 (2011). A strategic default can be an attractive option for the borrower when foreclosure on the home would be cheaper than actually making monthly payments. *Id.*

60. William Alden, *Home Prices Fall Again in Biggest Drop Since 2008*, HUFFINGTON POST (July 9, 2011, 10:29 AM), http://www.huffingtonpost.com/2011/05/09/home-prices-first-quarter-2011_n_859299.html. As of January 2013, however, home values appeared to be finally on the path to recovery after six years of deflating prices. Pat Mertz Esswein, *Housing Outlook 2013: Home Prices Get a Lift*, KIPLINGER (Jan., 2013), <http://www.kiplinger.com/article/real-estate/T010-C000-S002-housing-outlook-2013-home-prices-get-a-lift.html>.

61. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 54, at 1.

62. *Id.*

63. Godsil & Simunovich, *supra* note 12, at 963.

64. RealtyTrac Staff, *supra* note 5.

65. Lauren Hassouni, *The Nuts, Bolts, Carrots, and Sticks of the Mortgage and Foreclosure Crisis and a*

by a thread, barely making their monthly payments.⁶⁶ The government has attempted to remedy the problems with the housing market, but it has not seen the results hoped for.⁶⁷ The following sections of this Comment detail steps the government has taken, as well as a new, innovative idea that may yet be the solution for which millions of Americans have hoped.

B. Federal Government Solutions

Both the Bush and Obama administrations created programs that had goals of reversing or remedying the subprime mortgage crisis.⁶⁸ Unfortunately, however, neither administration's attempt has been as successful or effective as hoped, and the subprime mortgage crisis is still going strong.⁶⁹

1. Housing and Economic Recovery Act

The Housing and Economic Recovery Act (HERA)⁷⁰ was Congress's first attempt at addressing the mortgage crisis and was signed into law by President Bush in 2008.⁷¹ HERA had five main goals: (1) assisting and providing relief to GSEs, (2) providing relief to lenders and borrowers, (3) stabilizing the housing market, (4) remedying the consequences of foreclosures, and (5) preventing future foreclosures.⁷² HERA established the Federal Housing and Finance Agency and provided new regulations meant to improve GSEs.⁷³ Most importantly, it provided authority for the Secretary of Treasury to directly purchase obligations and securities issued by GSEs, including Fannie Mae or Freddie Mac, and other banks.⁷⁴ Using this authority, the Secretary purchased \$200 billion worth of GSE preferred stock to keep Fannie Mae and Freddie Mac solvent.⁷⁵

HOPE for Homeowners (HOPE) was one of the programs enacted under HERA.⁷⁶ It was a temporary program that sought to induce lenders to refinance at-risk loans by offering to insure them against future loss.⁷⁷ HOPE sought to prevent future

Suggested Solution, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 591, 596–97 (2010).

66. *Id.*

67. See *infra* Part II.B for a discussion of government programs enacted to resolve the subprime mortgage crisis.

68. Miner, *supra* note 36, at 174.

69. See *id.* (suggesting that while this legislation does contain some important provisions, its overall impact has not been large enough to remedy the crisis).

70. Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654 (codified in scattered sections of the U.S.C.).

71. Miner, *supra* note 36, at 174, 181.

72. Bruce Arthur, Note, *Housing and Economic Recovery Act of 2008*, 46 HARV. J. ON LEGIS. 585, 586 (2009).

73. 12 U.S.C. § 4511 (2012); see also KOSAR, *supra* note 36, at 1–2 (providing an explanation of GSEs); Miner, *supra* note 36, at 182 (explaining that HERA provided new regulatory guidelines for capitalization levels, mortgage-interest rates, corporate structures, and executive compensation).

74. 12 U.S.C. § 1719(g); Miner, *supra* note 36, at 182.

75. Miner, *supra* note 36, at 183.

76. 12 U.S.C. § 1715z–23.

77. *Id.* § 1715z–23(b)(1), (d).

foreclosures by creating a temporary, voluntary FHA program that would reduce principal and interest rates for borrowers at risk of foreclosure.⁷⁸

HOPE allows eligible homeowners to replace their mortgages with thirty-year fixed-rate mortgages insured by the FHA.⁷⁹ HOPE writes down the mortgage to 90% of the value of the home.⁸⁰ Lenders must agree to eliminate prepayment penalties, default fees, delinquency fees, and subordinate liens.⁸¹

There are several problems associated with HOPE that have contributed to its limited success. HOPE's extensive requirements,⁸² its voluntary nature, and a lack of education about the program have led to minimal activity under the program.⁸³ Furthermore, under HOPE, homeowners are required to share with the FHA any increase in equity in their property that results from the refinance.⁸⁴ The amount of equity that the borrower must share is the equity created from the time of refinance to the time of a future sale.⁸⁵ Homeowners may also share any appreciation in the property upon sale or disposition.⁸⁶ These provisions take away one of the biggest incentives for homeownership and may be the ultimate reason for HOPE's failure.⁸⁷

Not long after its launch, HOPE underwent a number of remedial revisions, which the FHA hoped would increase participation.⁸⁸ After a year of being in force, however, only twenty-two loans had been closed under the program.⁸⁹ Despite the government's wishes, borrowers and lenders were still skeptical of the program, and it is considered a failure.⁹⁰

2. Making Home Affordable

Making Home Affordable (MHA) was enacted early on in the Obama administration and drew on support from several pieces of legislation.⁹¹ MHA is an executive branch effort that addresses the housing crisis and has enjoyed vastly more

78. *Id.* § 1715z-23(b).

79. *Id.* § 1715z-23(e)(5).

80. *Id.* § 1715z-23(e)(2).

81. *Id.* § 1715z-23(e)(3), (4).

82. To be eligible for HOPE, borrowers must have a DTI ratio greater than 31%. *Id.* § 1715z-23(e)(1)(C). The new, refinanced mortgage must have a fixed interest rate. *Id.* § 1715z-23(e)(5)(A). Its LTV ratio must not exceed 90%. *Id.* § 1715z-23(e)(2)(B). It must have a maturity date of at least thirty years. *Id.* § 1715z-23(e)(5)(B). A maximum value cap is also placed on the loan. *Id.* § 1715z-23(e)(6).

83. Miner, *supra* note 36, at 188-89.

84. 12 U.S.C. § 1715z-23(k)(1).

85. *Id.*

86. *Id.* § 1715z-23(k)(2).

87. Miner, *supra* note 36, at 191.

88. Hassouni, *supra* note 65, at 602-03; Miner, *supra* note 36, at 188-89. Revisions to HOPE in November 2008 included increasing the LTV ratio to 96.5%, allowing lenders to extend the mortgage terms from thirty to forty years, and simplifying the process of removing subordinate liens. Hassouni, *supra* note 65, at 603; Miner, *supra* note 36, at 188-89.

89. Miner, *supra* note 36, at 188.

90. Hassouni, *supra* note 65, at 604.

91. *Id.*

91. Miner, *supra* note 36, at 181.

success than HOPE.⁹² The main programs enacted under MHA are the Home Affordable Refinance Program and the Home Affordable Mortgage Plan, which both had hopes of helping up to nine million homeowners.⁹³ MHA hoped to mitigate the crisis by helping up to five million homeowners refinance their loans, providing \$75 billion to incentivize lenders to modify loans for four million homeowners, and financially backing Fannie Mae and Freddie Mac to encourage lower interest rates.⁹⁴

a. Home Affordable Refinance Program

The Home Affordable Refinance Program (HARP) was established in 2009 and has been extended to December 2015.⁹⁵ It is designed to help people with underwater mortgages refinance their loans to lower interest rates.⁹⁶ Under HARP, homeowners with mortgages owned by Fannie Mae and Freddie Mac can refinance their loans to a lower interest rate, even if they own less than 20% equity in their homes (the typical requirement for refinancing).⁹⁷ HARP initially capped LTV ratios at 105% for eligibility under the program, but due to drastic declines in home values in California, Nevada, and Florida, HARP increased its LTV requirement to 125%.⁹⁸ Requirements to participate in HARP are a bit less stringent than HOPE,⁹⁹ and it is thought that these more relaxed requirements contributed to HARP's significantly higher success rate.¹⁰⁰ Since its origination, HARP has refinanced over one million mortgages through Fannie Mae and Freddie Mac, vastly outperforming its predecessor, HOPE.¹⁰¹ However, this still does not take care of the majority of homeowners facing foreclosure today.

b. Home Affordable Mortgage Program

The Home Affordable Mortgage Plan (HAMP), on the other hand, is designed to help homeowners who will not benefit from a simple refinance but need a reduction in principal, interest rate, and monthly payment.¹⁰² Like HARP, HAMP has experienced a

92. *Id.* at 195.

93. *Id.*

94. Hassouni, *supra* note 65, at 606. The \$75 billion is comprised of a \$50 billion contribution from TARP (Troubled Asset Relief Program) and a \$25 billion contribution from the GSEs. Miner, *supra* note 36, at 195–96.

95. HARP MORTGAGE, <http://harp-mortgage.com> (last visited Nov. 27, 2013).

96. Miner, *supra* note 36, at 196.

97. Hassouni, *supra* note 65, at 606.

98. Johnson & Waldrep, *supra* note 42, at 206.

99. To be eligible for HARP, the mortgage must be owned or guaranteed by Freddie Mac or Fannie May; the mortgage must have been sold to Freddie Mac or Fannie May on or before May 31, 2009; the mortgage cannot have been refinanced previously under HARP (with one exception); the current LTV ratio must be larger than 80%; and the borrower must be current on mortgage payments and have a timely payment history over the last year. *Home Affordable Refinance Program Eligibility*, MAKINGHOMEAFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/programs/lower-rates/Pages/harp.aspx> (last visited Nov. 27, 2013).

100. Miner, *supra* note 36, at 196.

101. FED. HOUS. FIN. AGENCY, 2011 REPORT TO CONGRESS 5 (2012), *available at* <http://www.goodwinprocter.com/~media/E0D1EB0AA09748ADBA8F9CB0D9565B4E.pdf>.

102. Miner, *supra* note 36, at 196.

higher success rate than HOPE due to its less stringent requirements.¹⁰³ In order for a homeowner to participate in HAMP, the homeowner must meet the requirements set out by HAMP, and the mortgage servicer must agree to participate in the program.¹⁰⁴ One fundamental difference from HOPE is that HAMP offers incentive payments to servicers to get them to participate in the program.¹⁰⁵ Incentives offered include an up-front payment for each modification made under the program and subsidies to lenders that reduce a borrower's monthly payment to 38% of gross monthly income.¹⁰⁶ In the years since its enactment, HAMP has helped only 1.9 million borrowers, roughly one-third of the amount it promised.¹⁰⁷

Although all three of these programs—HOPE, HARP, and HAMP—have made commendable attempts at attacking the mortgage crisis, none has been able to make a real, meaningful difference.¹⁰⁸ Progress has been slow and weak, which could be due to the back-end approach to refinancing, when what at-risk homeowners really need is a direct principal reduction.¹⁰⁹ Since the crisis began, it is estimated that only 1% of underwater mortgage holders were offered principal reductions.¹¹⁰ One scholar even contends that it seems as if these programs were more concerned with loss mitigation for lenders than with making homeowners' mortgages affordable again.¹¹¹

C. A New Solution

With the mortgage crisis still in full force and federal government programs failing to bring the relief hoped for, a solution is still being sought.¹¹² MRP has proposed an intriguing idea, which is in the process of being implemented by the city of Richmond, California.¹¹³ In response to unsuccessful federal government programs, MRP and its founder came up with the Plan, which proposes to have the government use its eminent domain power to seize underwater mortgages at the market price, allow

103. *Id.* To be eligible for HAMP, the owner must occupy the home as his or her primary residence; the home must be a single-family, one- to four-unit property; and the home must have an unpaid balance on the mortgage that is below \$729,750. *Id.* at 196–97. Eligibility for HAMP has also been recently expanded to include homeowners seeking modifications on a property that they rent or intend to rent, those whose DTI ratio is 31% or lower, and those who defaulted on their payments in a previous HAMP plan. *Home Affordable Mortgage Program Eligibility*, MAKINGHOMEAFFORDABLE.GOV, <http://www.makinghomeaffordable.gov/programs/lower-payments/Pages/hamp.aspx> (last visited Nov. 27, 2013).

104. Miner, *supra* note 36, at 197.

105. Hassouni, *supra* note 65, at 607.

106. *Id.* at 607–08.

107. Friend, *supra* note 2, at 28–29.

108. See Johnson & Waldrep, *supra* note 42, at 191 (explaining that despite the government's quick responses to the mortgage crisis, these responses have not resulted in an abatement of the mortgage crisis).

109. Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 784–85 (2010).

110. Friend, *supra* note 2, at 29.

111. See Braucher, *supra* note 109, at 785–86 (explaining that the underlying goal of loss mitigation led to mortgage companies attempting to distribute more of their losses on borrowers).

112. Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121, 136–37 (2012).

113. Dewan, *supra* note 9.

homeowners to refinance at the new price, and thereby lower their mortgage payments in an attempt to prevent default or foreclosure.¹¹⁴ While the Plan has not yet been implemented, it has recently been approved for implementation in Richmond, California, and is being considered by Newark, New Jersey; Seattle, Washington; and a few other cities in California.¹¹⁵ The goal of the Plan is to prevent homeowners with underwater mortgages from defaulting on their loans, an occurrence which has been proven to be highly likely.¹¹⁶

1. The Plan to Use Eminent Domain to Take Over Underwater Mortgages

The city of Richmond, California, like many other struggling areas in the United States, needed a way to prevent blight resulting from the extensive mortgage foreclosures that have been plaguing the United States as of late.¹¹⁷ MRP's Plan has the government of Richmond, California, committed to implementing a novel application of this country's eminent domain law.¹¹⁸ The Plan proposes that local governments use their power of eminent domain to take over underwater mortgages and reduce principal amounts and loan payments for homeowners who are on the brink of foreclosure.¹¹⁹ While MRP did not propose the Plan solely for one municipality, this Part will use Richmond's commitment to implement the Plan as an example for illustrative purposes.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."¹²⁰ The government's ability to take private property for public use, if it provides just compensation, is commonly referred to as its "eminent domain" power.¹²¹ This right is imputed to the states through the Fourteenth Amendment to the United States Constitution.¹²² California, along with every other state, has a virtually identical constitutional provision giving it this power of eminent domain.¹²³

As proposed by the Plan, Richmond would utilize its eminent domain power to

114. Ben Hallman, *San Bernardino Eminent Domain Proposal Arousing Concern from Mortgage Industry*, HUFFINGTON POST (Aug. 16, 2012, 8:32 PM), http://www.huffingtonpost.com/2012/08/16/san-bernardino-eminent-domain_n_1791773.html.

115. Dewan, *supra* note 9.

116. *See* Hallman, *supra* note 114 (noting that the purpose of the Plan is to make homeowners' monthly payments more manageable). It logically follows that if a homeowner's monthly mortgage payment is lowered, he or she is less likely to default.

117. Dewan, *supra* note 9.

118. *Id.* Other cities considering implementation of the Plan include Newark, Seattle, and several other cities in California. *Id.* Note that San Bernardino County, California, the first municipal government to consider implementing the Plan, has since rejected it due to lack of public support. Lazo, *supra* note 8.

119. Yuki Noguchi, *County Considers Eminent Domain As Foreclosure Fix*, NPR.ORG (July 13, 2012, 3:19 AM), <http://www.npr.org/2012/07/13/156683302/county-considers-eminent-domain-as-foreclosure-fix>.

120. U.S. CONST. amend. V.

121. David Schultz, *Economic Development and Eminent Domain After Kelo: Property Rights and "Public Use" Under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41, 45 (2006).

122. *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 233–35 (1897).

123. *E.g.*, ARIZ. CONST. art. II, § 17; CAL. CONST. art. I, § 19; FLA. CONST. art. X, § 6; NEV. CONST. art. I, § 22; N.J. CONST. art. I, ¶ 20; N.Y. CONST. art. I, § 7.

take over mortgages that it identifies as underwater and at risk of foreclosure.¹²⁴ Under federal and California state law, eminent domain requires that the government pay just compensation to each mortgage holder from whom it acquires a mortgage.¹²⁵ The measure of just compensation in California is fair market value.¹²⁶ Thus, Richmond will pay fair market value to the lenders who hold the mortgages.¹²⁷ Once Richmond takes possession of the loans, it will refinance and renegotiate a deal that the homeowner can afford.¹²⁸ It will do this by reducing the principal amount to reflect the actual value of the home in its current, depreciated state.¹²⁹

Richmond will receive funding to purchase the mortgages from private-sector investing institutions.¹³⁰ MRP, the private investing institution that devised the Plan, relies on private investors willing to pool money in order to fund the just compensation required by eminent domain.¹³¹ The Plan dictates that MRP will collect a flat fee of \$4,500 in exchange for helping Richmond find eligible homeowners that can benefit from it.¹³² In order to make the Plan financially feasible, MRP would have to acquire the mortgages at a 20–25% discount off the face value of the mortgages.¹³³ This discount is justified as the potential savings of transaction costs by the lender because, under the Plan, the lender does not have to go through foreclosure proceedings.¹³⁴

To be eligible for the Plan, a mortgage must (1) be secured by single-family, owner-occupied residences within each municipality's jurisdiction; (2) have a LTV ratio greater than 100%; (3) have a fair market value totaled at 85% or less of the value of the home; and (4) have an underlying home value of less than 105.3% of FHA-approved loan amounts (permitting a 95% new LTV ratio).¹³⁵ The Plan also allows flexibility for each county or state to tailor the Plan to its areas of need.¹³⁶

The Plan is about to be implemented by Richmond, California, and is being seriously considered by other cities around the country that are in the same predicament.¹³⁷ It may be an attractive option to other county and city governments throughout the country that are facing blight or bankruptcy. Cities with high foreclosure rates and low incentive for commercial development are facing the problem

124. Hockett, *supra* note 112, at 150–51.

125. U.S. CONST. amend. V; CAL. CONST. art. I, § 19.

126. CAL. CIV. PROC. CODE § 1263.310 (West 2013). What constitutes just compensation may vary from state to state.

127. Richard E. Gottlieb & Vivian I. Kim, *Eminent Domain: Will Local Governments Attempt to Use This Extraordinary Power to Purchase Troubled Residential Mortgages?*, BANKING & FIN. SERVICES POL'Y REP., Nov. 2012, at 1, 4.

128. Hockett, *supra* note 112, at 154.

129. Gottlieb & Kim, *supra* note 127, at 4.

130. *Id.* at 151–52.

131. Andrew Edwards, *Mortgage Resolution Partners Executive Defends Eminent Domain Proposal*, SAN BERNARDINO SUN (June 16, 2012, 9:00 PM), http://www.sbsun.com/ci_21168357.

132. Gottlieb & Kim, *supra* note 127, at 4.

133. *Id.*

134. *Id.*

135. Hockett, *supra* note 112, at 154–55.

136. *Id.* at 155.

137. Dewan, *supra* note 9.

of an ever-shrinking tax base.¹³⁸ Lower home values result in lower property tax revenue, which can be exceptionally devastating to local governments in cities with the highest foreclosure rates.¹³⁹ This depleted tax base can force local governments to decrease funding for parks, police and fire departments, and other government-funded programs.¹⁴⁰ Thus, preventing foreclosures and keeping homeowners in their homes may prevent many cities across the United States from resorting to bankruptcy. At face value, the Plan sounds like a win-win for everyone, but it already has its critics.¹⁴¹

2. Banks and Lending Institutions Oppose the Plan

Although the Plan has yet to be implemented, it has already met strong opposition from major players in the financial industry.¹⁴² In response to a request for input by the Federal Housing Finance Agency, the Mortgage Bankers Association (MBA)¹⁴³ alleged that the Plan could have a negative effect on the extension of credit to prospective homeowners.¹⁴⁴ The MBA reasoned that investors will be wary of investing in mortgages for fear of devaluation.¹⁴⁵ Creditors will be unwilling to lend for the same reason, thus lowering the number of buyers who would be able to purchase homes.¹⁴⁶ The MBA concluded that the Plan will ultimately result in further depreciation of home values because demand for homes in the market will decrease with the decreased willingness to issue credit.¹⁴⁷

Another response to the Federal Housing and Finance Agency's request came from a coalition of twenty-two financial organizations (the Coalition) in which it detailed its reasons for opposing the Plan.¹⁴⁸ The Coalition asserted that the Plan is likely to be found unconstitutional and in violation of federal and state laws.¹⁴⁹ The

138. See, e.g., Peter S. Goodman, *Eminent Domain as Underwater Mortgage Fix: Why Some Cities Are Considering Unorthodox Measure*, HUFFINGTON POST (Oct. 1, 2012, 12:52 PM), http://www.huffingtonpost.com/2012/10/01/eminent-domain-mortgages_n_1917391.html (describing Sacramento's shrinking tax base due to its high foreclosure rate and abandoned plans for new construction).

139. CORINNE WILSON, CENTER ON POLICY INITIATIVES, FORECLOSURE: THE COSTS COMMUNITIES PAY (2011), http://onlinecpi.org/wp-content/uploads/2011/10/Foreclosure_4page_eng_web.pdf.

140. Goodman, *supra* note 138.

141. E.g., Letter from Am. Bankers Ass'n et al., to Alfred Pollard, Esquire, Gen. Counsel, Fed. Hous. Fin. Agency (Sept. 7, 2012) [hereinafter Coalition Letter]; Memorandum from Walter Dellinger et al., O'Melveny & Myers LLP, to Sec. Indus. and Fin. Mkts. Ass'n (July 16, 2012) [hereinafter Dellinger Memo]; Memorandum from David H. Stevens, President and Chief Exec. Officer, Mortg. Bankers Ass'n, to Alfred Pollard, Esquire, Gen. Counsel, Fed. Hous. Fin. Agency (Sept. 7, 2012) [hereinafter MBA Memo].

142. Coalition Letter, *supra* note 141, at 1–2.

143. The Mortgage Bankers Association is the national association representing the real estate finance industry. MBA Memo, *supra* note 141, at 1 n.1.

144. *Id.* at 1.

145. *Id.*

146. *Id.*

147. *Id.*

148. Coalition Letter, *supra* note 141, at 1–2. The Coalition included MBA and other financial organizations such as the Securities Industry and Financial Markets Association, American Bankers Association, American Insurance Association, California Land Title Association, and Consumer Bankers Association. *Id.* at 6.

149. *Id.* at 2.

Coalition alleged that the Plan would pose valuation issues for the complex contractual securities that are traded in national and international markets, negatively impact current security holders, and, again, have a “chilling effect” on credit extension.¹⁵⁰ The Coalition also alleged that lenders will either refrain from issuing mortgages in jurisdictions that implement the Plan for fear of government takings or seek a significant risk premium to make up for that possibility.¹⁵¹ The Coalition further argued that the Plan will diminish retirement funds and savings that hold mortgage-backed securities and will cause investors to flee from the mortgage market, greatly diminishing liquidity.¹⁵²

The Coalition argued that the unconstitutionality of the Plan lies in the just compensation requirement due to the securitized nature of most mortgages.¹⁵³ The Coalition urged that the compensation given would not take into account the actual value of the cash flow from the performing loans in the pools.¹⁵⁴ The Coalition further argued that the Plan does not account for the diminution in value of the underlying pool of securities the loan was taken from and the reinvestment risk faced by holders of the securities, and therefore the compensation provided by the Plan reflects only a fraction of the true loss suffered by holders of these securities.¹⁵⁵

While critics have challenged the constitutionality of the Plan, this Comment argues that the Plan does not conflict with existing eminent domain law. Contrary to critics’ beliefs, if implemented, the Plan can help the majority of homeowners around the United States who are at severe risk of foreclosure due to their underwater mortgages.

D. *A Brief History of Eminent Domain Law*

The Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”¹⁵⁶ Two major requirements are imposed on the government in this amendment, which gives it the power to take possession of private property. First, the property must be taken for some public use.¹⁵⁷ Second, just compensation must be given to the owner in return for his property being unwillingly taken through eminent domain.¹⁵⁸ State governments also possess this authority, as an “inherent attribute of sovereignty.”¹⁵⁹

150. *Id.*

151. *Id.*

152. *Id.* at 3.

153. *Id.* at 4.

154. *Id.*

155. *Id.*

156. U.S. CONST. amend. V.

157. *Id.*

158. *Id.*

159. See Schultz, *supra* note 121, at 45 (explaining that this right is subject to the restrictions and limitations unique to each state’s constitution).

1. Public Use

Under the Takings Clause, property must be taken for public, rather than private, use.¹⁶⁰ The meaning of the public use requirement has been debated for many years.¹⁶¹ The Supreme Court has rejected any literal requirement that the condemned property be used by the general public.¹⁶² The broad view of this requirement regards public use as use that provides a public benefit, rather than a requirement of literal use by all of the public.¹⁶³ The liberalization of this clause has paved the way for governments to alleviate urban development, including remedying economic distress, as a public use.¹⁶⁴

Since as early as 1870, courts have been comparing eminent domain with states' police power. In *People ex rel. Detroit & Howell Railroad Co. v. Township Board of Salem*,¹⁶⁵ the Supreme Court of Michigan found that "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and . . . the law does not so much regard the means as the need."¹⁶⁶ Equating the eminent domain power with states' police power limits the court's role in evaluating actions taken under the Takings Clause and subjects the public use requirement to a very low level of scrutiny.¹⁶⁷ Courts will likely hold that the use meets the definition if it serves a public purpose, confers a public benefit, is within a state's police power, or is within a state's legitimate governmental authority.¹⁶⁸ Illustrated in the following cases, this view "encompasses the creation of jobs, promotion of . . . land sales and industrial activity, and the development of natural resources within the state."¹⁶⁹

In *Berman v. Parker*,¹⁷⁰ the Supreme Court "expanded the definition of public use and limited the scope of judicial review."¹⁷¹ In *Berman*, Congress determined that certain living conditions in the District of Columbia were so blighted and substandard that they were "injurious to the public health, safety, morals, and welfare."¹⁷² In order to eliminate these conditions, Congress enacted the District of Columbia Redevelopment Act of 1945, which proposed to acquire the property necessary to eliminate these housing conditions through eminent domain.¹⁷³ Under this Act, the redevelopment agency authorized to acquire the property would transfer the land to public agencies (for public purposes such as streets, utilities, recreational facilities, and

160. U.S. CONST. amend. V.

161. Jonathan Neal Portner, *The Continued Expansion of the Public Use Requirement in Eminent Domain*, 17 U. BALT. L. REV. 542, 542-43 (1988).

162. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

163. Portner, *supra* note 161, at 543.

164. *Id.* at 545.

165. 20 Mich. 452 (1870).

166. *Howell Railroad*, 20 Mich. at 480-81.

167. Portner, *supra* note 161, at 547-48.

168. Schultz, *supra* note 121, at 46.

169. Portner, *supra* note 161, at 543.

170. 348 U.S. 26 (1954).

171. Portner, *supra* note 161, at 544.

172. *Berman*, 348 U.S. at 28.

173. *Id.* at 28-30.

schools) and lease or sell the rest to redevelopment companies.¹⁷⁴ Appellants, owners of a department store that was not blighted, challenged the Act, alleging that the properties were being taken for private use.¹⁷⁵ In finding the Act constitutional, the Court reasoned that Congress, acting within its police power, has the power to determine what is best for the public.¹⁷⁶ The Court reasoned that the judiciary has a very narrow role in appraising Congress's determination of a public purpose, and that determining the means of executing a project proposed to benefit the public is a decision for Congress alone.¹⁷⁷

Thirty years later, the Supreme Court continued its trend of using a broad definition of public use when it decided *Hawaii Housing Authority v. Midkiff*.¹⁷⁸ In *Midkiff*, the Supreme Court held that the Hawaii Land Reform Act of 1967 did not violate the public use requirement of the Fifth Amendment.¹⁷⁹ This decision authorized the use of eminent domain to "redistribute private resources within society to accomplish certain widely drawn public purposes."¹⁸⁰ The challenged Act created a land condemnation scheme that took title in real property from lessors and transferred it to lessees in attempts to reduce the concentration of land ownership in Hawaii.¹⁸¹ Under the Act, lessees were to file an application with the newly created Hawaii Housing Authority, after which a public hearing would be held to determine whether the acquisition would effectuate the public purposes of the Act.¹⁸²

Again, the Court deferred to the judgment of the legislature, stating that "[the Court] will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"¹⁸³ The Court stated that the mere fact that property taken by eminent domain is first transferred to a private party does not mean that the taking has only a private purpose.¹⁸⁴ Again, the Court compared the public use requirement with the scope of a sovereign's police powers.¹⁸⁵ The Court pointed out that where the exercise of the eminent domain power is rationally related to any public purpose, the Court has never held the compensated taking to be unconstitutional.¹⁸⁶ "[I]t is only the taking's purpose, and not its mechanics," that matters in determining public use.¹⁸⁷

The Court has continued to embrace a broader definition of public purpose, as

174. *Id.* at 30.

175. *Id.* at 31.

176. *Id.* at 32. Notably, while the police power is typically understood as solely a *state* (not federal) power, "[t]he power of Congress over the District of Columbia includes all the legislative powers that a state may exercise over its affairs." *Id.* at 31.

177. *Id.* at 32–33.

178. 467 U.S. 229 (1984).

179. *Midkiff*, 467 U.S. at 243.

180. Schultz, *supra* note 121, at 50.

181. *Midkiff*, 467 U.S. at 231–32.

182. *Id.* at 233.

183. *Id.* at 241 (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

184. *Id.*

185. *Id.* at 240.

186. *Id.* at 241.

187. *Id.* at 244.

evidenced in *Kelo v. City of New London*.¹⁸⁸ *Kelo* considered the question of whether the city of New London's proposed development plan, which was projected to create jobs, increase tax revenues, and revitalize the economy in a distressed city, was considered a public use for purposes of the Takings Clause.¹⁸⁹ The plan proposed to use eminent domain to acquire property from unwilling owners and transfer it to a private nonprofit development corporation to revitalize the area surrounding New London.¹⁹⁰ In 1998, New London's unemployment rate was twice as high as the unemployment rate in Connecticut, and its population was at its lowest since 1920.¹⁹¹ The plan intended to capitalize on the arrival of a Pfizer facility in New London and the new commerce it was projected to attract.¹⁹² Petitioners alleged that the taking of their property would violate the public use requirement of the Takings Clause because the condemned property was being transferred to private, rather than public, entities.¹⁹³ The properties were condemned because they were located in the development area; however, there was no evidence of blight or poor conditions.¹⁹⁴ The Court acknowledged that it is clear that the government cannot take property from private party A for the sole purpose of transferring it to private party B—even if just compensation is paid.¹⁹⁵ However, the Court identified that a state may transfer property to a private party if it will be used by the public in the future.¹⁹⁶

Finding that the takings satisfied the public use requirement of the Fifth Amendment, the Court reasoned that “the City’s development plan was not adopted ‘to benefit a particular class of identifiable individuals.’”¹⁹⁷ The Court went on to find that there was no rational basis for exempting economic development from the traditionally broad understanding of public use.¹⁹⁸ Just because a taking may benefit individual private parties does not mean that it does not have an underlying public purpose.¹⁹⁹ In his concurrence, Justice Kennedy added his observation that, when applying this rational basis review, courts should strike down takings that are intended to favor particular private parties and have only incidental public benefits.²⁰⁰

Over the years, the definition of public use under the Takings Clause has been expanded so much that almost any acquisition can meet the test.²⁰¹ As long as a court can find that the public use confers some benefit on the public or furthers the state’s

188. 545 U.S. 469 (2005).

189. *Kelo*, 545 U.S. at 472.

190. *Id.* at 472–73.

191. *Id.* at 473.

192. *Id.* at 473–74.

193. *Id.* at 485.

194. *Id.* at 475.

195. *Id.* at 477.

196. *Id.*

197. *Id.* at 478 (quoting *Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

198. *Id.* at 485.

199. *Id.*

200. *Id.* at 491 (Kennedy, J., concurring).

201. See Schultz, *supra* note 121, at 46 (explaining that the definition of public use has been expanded to allow for public use that serves a public purpose, that confers a benefit to the public, and that furthers a state’s police powers).

police powers, the use will likely meet the definition.²⁰² Once a court determines that the public use requirement is satisfied, it must next inquire whether the just compensation requirement is satisfied.

2. Just Compensation

The just compensation requirement was included in the Fifth Amendment with the policy justification of preventing one person from bearing the costs that society should bear as a whole.²⁰³ Just compensation requires “a full and perfect equivalent for the property taken.”²⁰⁴ Determining whether compensation is full and just is a judicial function.²⁰⁵ Property owners are to be put in the same pecuniary position they would have been in had their property not been taken.²⁰⁶

In an effort to maintain some uniform, practical standard, some courts use the concept of fair market value to determine just compensation.²⁰⁷ Fair market value is the amount that a purchaser in the market would pay for the property at the time that it is taken.²⁰⁸ However, it must be noted that just compensation fails to account for the subjective value of a person’s property, which encompasses sentimental value, social status, personal dignity, and personal attachment to a piece of property.²⁰⁹ The Supreme Court has stated that “just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner.”²¹⁰

Determination of what constitutes just compensation varies among the states.²¹¹ In the state of California, where the MRP Plan is being considered, the measure of just compensation is fair market value.²¹² California defines fair market value as:

[T]he highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is

202. *Id.*

203. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

204. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

205. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 150 (1978).

206. *United States v. Miller*, 317 U.S. 369, 373 (1943).

207. *Id.* at 374; *see also* *United States v. New River Collieries Co.*, 262 U.S. 341, 343–45 (1923) (explaining that fair market value determines what constitutes just compensation).

208. *Miller*, 317 U.S. at 374.

209. *See* Lucas J. Asper, *The Fair Market Value Method of Property Valuation in Eminent Domain: “Just Compensation” or Just Barely Compensating?*, 58 S.C. L. REV. 489, 491, 501–02 (2007) (noting factors that may affect the subjective valuation of one’s property); Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 599–600 (2013) (explaining that there might be a difference between the value that a condemnee places on his property and the fair market value of that same property).

210. *United States v. 50 Acres of Land*, 469 U.S. 24, 35 (1984).

211. *Compare, e.g.*, FLA. STAT. ANN. § 73.071 (West 2013) (stating that just compensation can include more than fair market value), *with, e.g.*, NEV. REV. STAT. ANN. § 37.110 (West 2013) (requiring that just compensation be determined by the property’s market value at its highest and best use).

212. CAL. CIV. PROC. CODE. § 1263.310 (West 2013).

reasonably adaptable and available.²¹³

Generally, the requirement is fair market value, or enough to put the owner in the same position he would have been in had the taking not occurred.²¹⁴

3. Private Property, Including Intangible Property

In addition to the just compensation requirement, the Fifth Amendment also requires that the property taken is private property.²¹⁵ The word “property” denotes the group of rights that includes the right to possess, use, and dispose of property.²¹⁶ The constitutional provision is addressed to every sort of interest the citizen may possess.²¹⁷

Intangible property has been held by the courts to be property for purposes of the Takings Clause on many occasions.²¹⁸ In *Ruckelshaus v. Monsanto Co.*,²¹⁹ the Court found that a property interest exists in trade secrets.²²⁰ The appellee brought suit alleging that the data-disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act constituted a taking of its property without just compensation and therefore violated the Fifth Amendment of the United States Constitution.²²¹ The challenged provision of this Act authorizes the Environmental Protection Agency to use and publicly disclose data previously submitted by an applicant for registration of a pesticide in evaluating that applicant in subsequent applications.²²² Monsanto is one of a few companies that invents, develops, and researches new active ingredients for pesticides.²²³ In determining whether Monsanto had a property interest in its trade secrets, the Court noted that the fact “[t]hat intangible property rights protected by state law are deserving of the protection of the Takings Clause has long been implicit in the thinking of this Court.”²²⁴ Furthermore, although the Court has never considered whether a mortgage note is susceptible to the Takings Clause, the Supreme Court has found that many other types of intangible property do fit under the Takings Clause.²²⁵

213. *Id.* § 1263.320(a); *see also* *City of San Diego v. Rancho Penasquitos P’ship*, 130 Cal. Rptr. 2d 108, 119 (Cal. Ct. App. 2003) (explaining the fair market valuation process).

214. *See supra* note 213 and accompanying text for a definition of the fair market value standard.

215. U.S. CONST. amend. V.

216. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

217. *See id.* (noting that the constitutional provision addresses various interests, ranging from fee simple interests to tenancy for years interests).

218. *See, e.g.,* *Armstrong v. United States*, 364 U.S. 40, 46 (1960) (finding that materialmen’s liens were compensable property interests under the Takings Clause of the Constitution); *Lynch v. United States*, 292 U.S. 571, 579 (1934) (finding that “[v]alid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States”).

219. 467 U.S. 986 (1984).

220. *Ruckelshaus*, 467 U.S. at 1003–04.

221. *Id.* at 998–99.

222. *Id.* at 990.

223. *Id.* at 997.

224. *Id.* at 1003.

225. *See supra* note 218 for examples of such cases.

4. Taking of Property for Purposes of Mortgage-Backed Securities

The inquiry into whether a taking has occurred is essentially an “ad hoc, factual” inquiry.²²⁶ However, the Supreme Court has identified several factors to look at when determining whether a taking has in fact occurred.²²⁷ In determining whether a taking has effectually occurred, the Court should look to (1) the economic impact of the regulation on the person asserting the claim, (2) the extent to which the regulation has interfered with investment-backed expectations, and (3) the character of the governmental action.²²⁸ Diminution in property value alone cannot establish a taking.²²⁹ It is the character of the taking, rather than the amount of damage resulting from it, that determines whether there was a taking.²³⁰

Whether the Plan proposed by MRP fits into traditional eminent domain law has yet to be analyzed by the courts, and it has been met with some strong opposition in the financial field.²³¹ However, this Comment argues that application of current eminent domain law to the Plan reveals that the Plan cannot be struck down by the courts as unconstitutional.²³²

III. DISCUSSION

Whether the Plan is a permissible use of the states’ eminent domain power has yet to be considered by the courts. If MRP’s Plan does what it is intended to do, it could mean the difference between ending the subprime mortgage crisis and having it continue for years to come because programs like HOPE, HARP, and HAMP were originated with the same goals but have not seen the results hoped for.²³³ This Section explores the constitutionality of the Plan and emphasizes the effect the Plan will have on homeowners, the surrounding communities, governments, and investors in the securitized mortgage market. This Comment argues that under current eminent domain law, the Plan is constitutional and, if implemented, could be the answer to the subprime mortgage crisis.

A. Eminent Domain Law Does Not Bar the Plan

The concept of eminent domain has existed in the United States since colonial times.²³⁴ It was finally set in stone with the addition of the Fifth Amendment to the

226. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

227. *Id.*

228. *Id.*

229. *Id.* at 131.

230. United States v. Cress, 243 U.S. 316, 328 (1917).

231. See *supra* Part II.C.2 for a discussion of banks’ and other financial institutions’ opposition to the Plan.

232. See *infra* Part III.A for a discussion of why the Plan is constitutional.

233. See *supra* Part II.B for a discussion of these programs.

234. Elisabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 MCGEORGE L. REV. 405, 407 (2007).

United States Constitution, written by James Madison.²³⁵ Since the addition of the Fifth Amendment, eminent domain has been used in a number of innovative ways that deviated from its original intention.²³⁶ Although eminent domain law has evolved over the years, it has yet to be used in the way that is proposed by the Plan. The remainder of this Comment discusses what exactly constitutes qualification for an eminent domain taking and whether the Plan meets those requirements.

1. The Plan Meets the Public Use Requirement

In *Kelo*, the Supreme Court expressed the view that the United States Constitution is the minimum requirement for takings under eminent domain, and it encouraged states to adopt more rigorous eminent domain standards in their own constitutions if they were dissatisfied with the constitutional requirements.²³⁷ Thus, if states choose not to revise their own eminent domain standards, they are bound by those of the United States Constitution.

The public purpose of the Plan is to prevent future foreclosures in high-risk communities, which will lead to blight and other disparities that come along with high foreclosure rates.²³⁸ When this particular public purpose is analyzed using the deferential and lenient requirements set forth by the Supreme Court, the Plan will most likely satisfy the Supreme Court standards.²³⁹ If local governments determine that the Plan is what is best for their community, the courts are very limited in their review of the issue.²⁴⁰

In the case of the Plan, local governments are in the best position to determine what is best for their communities. Government officials are present in their communities, witnessing the struggles that their citizens and neighborhoods are experiencing.²⁴¹ If local governments that adopt the Plan find that it will benefit their communities, and the courts can find some rational basis for this determination, then it is likely that the Plan cannot be struck down under the public use requirement.²⁴² Taking over underwater mortgages and renegotiating them so that they reflect the actual value of the underlying homes will allow homeowners to afford their mortgage

235. Daniel Dalton, *A History of Eminent Domain Law*, ST. B. MICH. PUB. CORP. L. Q., Fall 2006, at 4.

236. Madison's intention in writing the clause was to prevent the uncompensated taking of chattel and real property by the government and to "impress on the people the sanctity of property." *Id.* (quoting William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 712 (1985)). The Court, however, has deviated from this original intention by applying it to intangible items such as materialmen's liens and contracts. See *supra* note 218 for a discussion of these cases.

237. *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

238. Hockett, *supra* note 112, at 150.

239. See *supra* Part II.D.1 for a discussion of the Court's expansion and liberalization of the Fifth Amendment's public use requirement.

240. See *supra* note 176 and accompanying text for a discussion of the limited role of the judiciary in evaluating Congress's determination of a public purpose.

241. See Hockett, *supra* note 112, at 150 ("It is cities that must watch their residents being evicted, their homes being emptied, their houses deteriorating, their property values plummeting, their tax bases dwindling, their services retrenching, their crime levels spiking, and so on.")

242. See *supra* note 176 and accompanying text for a discussion of the limited role of the judiciary in evaluating Congress's determination of a public purpose.

payments.²⁴³ It will also give homeowners the option to sell their homes to pay off their underlying mortgages, since the mortgage values will no longer be substantially higher than the underlying home values.²⁴⁴ Giving homeowners more affordable payments and refinanced mortgages that actually reflect the value of their homes and allow them to build equity will help to prevent future mortgage defaults and foreclosures.²⁴⁵ Preventing future mortgage defaults and foreclosures in cities with high foreclosure rates is a valid public purpose because it will prevent blight as well as provide for a healthier tax base.²⁴⁶ Thus, the Plan satisfies the public use requirement.

Although the Plan benefits lenders, homeowners, and municipalities, its critics denounce it as benefitting only private individuals and not the public at large. One critic alleges that the Plan is being implemented for the sole purpose of benefitting private individuals, such as the private investors, the selected homeowners, and new lenders that will receive only the renegotiated, performing loans.²⁴⁷ That critic further alleges that the Plan will only incidentally benefit the public by avoiding future blight in communities with mortgages that may not even result in default or foreclosure.²⁴⁸

As the Supreme Court has stated in *Kelo*, however, as long as the Plan has some underlying public purpose, the fact that it transfers property from private party A to private party B in the process does not immediately disqualify it from eminent domain proceedings.²⁴⁹ The Plan was created to battle the subprime mortgage crisis and prevent future deterioration of communities due to impending foreclosures and mortgage defaults.²⁵⁰ Just because the Plan at some point transfers the mortgages to a private investor, like the private development company in *Kelo*,²⁵¹ its entire underlying purpose is not solely to transfer property between private parties—rather, it is to provide the public with a much-needed remedy to the subprime mortgage crisis.²⁵² The Plan was not proposed with the intention of benefitting those private parties; they are incidentally benefitted and simply a means to a particular end that will benefit the public.

While it looks like the Plan may satisfy the public use requirement of the United States Constitution, it may have a more difficult time satisfying the requirements of

243. See Hockett, *supra* note 112, at 156–57 (explaining how the Plan will enable residents to alleviate their debt burden).

244. *Id.* at 169.

245. *Id.* at 157–57.

246. See *supra* footnotes 137–141 and accompanying text for a discussion of the benefits cities stand to gain from implementing the Plan.

247. Dellinger Memo, *supra* note 141, at 4.

248. *Id.* at 4–5.

249. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005).

250. See *supra* Part II.C for a discussion of the Plan's goal of remedying the negative effects of the subprime mortgage crisis.

251. See *supra* notes 188–200 and accompanying text for a discussion of how the Supreme Court in *Kelo* addressed a city's transfer of private land to a private company for economic development under the public use justification.

252. See *supra* Part II.C for a discussion of the Plan's goal of remedying the negative effects of the subprime mortgage crisis.

state constitutions such as California's.²⁵³ California courts have interpreted California's public use requirement a bit more strictly than the Supreme Court has interpreted the public use requirement of the United States Constitution. In *99 Cents Only Stores v. Lancaster Redevelopment Agency*,²⁵⁴ the court found that, under California law, "prevention of 'future blight'" was not a valid public purpose.²⁵⁵ In disallowing the use of eminent domain, the court pointed out that the 99 Cents Only store was extremely profitable and that the evidence showed that the city of Lancaster, California, both the city itself and its Redevelopment Agency, was only condemning 99 Cents Only to appease Costco, the anchor tenant of one of the city's redevelopment project areas.²⁵⁶

However, it must be noted that the particular circumstances of this case are much different than the current situation presented in Richmond, California, and other California cities. In *99 Cents Only*, the city of Lancaster, California, wished to condemn a store for the sole reason that Costco, the anchor tenant for one of the city's redevelopment areas, wished to expand and take over that area.²⁵⁷ The court would not allow condemnation of an extremely profitable business merely because the city was afraid of losing an anchor tenant in one of its redevelopment areas, which it alleged would cause the area to become blighted.²⁵⁸ The situation currently facing California, including the city of Richmond, along with many other struggling areas of the country, is quite different. The property that would be condemned by the Plan includes mortgages on the brink of default.²⁵⁹ With nearly a quarter of all mortgages in certain areas of the country underwater and at risk of default, something must be done to remedy this situation.²⁶⁰ Thus, it is likely that *99 Cents Only* would be limited to the facts presented in that case, and California courts would look to Supreme Court precedent for instruction on the economic development theory.

The fact that the Supreme Court has allowed many eminent domain takings to prevail on grounds of the economic development theory bodes well for the Plan.²⁶¹ The Court would likely apply the same reasoning to the Plan that it applied in cases like *Berman*, *Midkiff*, and *Kelo*, its most recent economic-development case.²⁶² These cases allowed condemnation proceedings, even though they involved property being transferred to private parties, under the theory that the transfer to private parties was merely a means to achieving the ultimate public purpose of each particular plan.²⁶³ Like the above cases, transfer to private lenders under MRP's Plan is merely an

253. CAL. CONST. art. I, §19.

254. 237 F. Supp. 2d 1123 (C.D. Cal. 2001).

255. *99 Cents Only Stores*, 237 F. Supp. at 1130–31.

256. *Id.* at 1129.

257. *Id.* at 1126, 1129.

258. *Id.* at 1129.

259. Hockett, *supra* note 112, at 150–51.

260. See *supra* notes 53–64 and accompanying text for a discussion of the high number of underwater mortgages in the United States and the risks associated with them.

261. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

262. See *supra* Part II.D.1 for a discussion of the Court's reasoning in these cases.

263. *Kelo*, 545 U.S. at 482; *Midkiff*, 467 U.S. at 244; *Berman*, 348 U.S. at 33.

incidental requirement to achieving the public purpose of lowering principals on underwater mortgages as a means to preventing future mortgage foreclosures and default, which can cause community blight.²⁶⁴ Thus, the public purpose of preventing blight in the community will likely prevail under current Supreme Court precedent, regardless of whether a private party is involved.

2. The Plan Also Satisfies the Just Compensation Requirement

Specifically in California, just compensation is defined as fair market value, or the price that would be reached by parties bargaining at arm's length under current market conditions.²⁶⁵ The Plan calls for the participating municipalities, financed by private investors, to use their eminent domain power to give just compensation for the qualifying underwater mortgages in their jurisdictions.²⁶⁶ Value of the loans will be determined up front by municipality appraisals.²⁶⁷ Once the loans are acquired, they will be refinanced, and the municipality will accept discounted monthly payments that reflect the actual values of the homes.²⁶⁸ The new, refinanced loans will ultimately be bundled together into bonds, with the institutions that financed the initial purchases holding the bonds and receiving the payments.²⁶⁹

The Coalition believes that the just compensation required by the United States Constitution will not be satisfied by the Plan, alleging that securities holders will not be put in the same place they would be in had the taking never occurred.²⁷⁰ According to the Coalition, the securities made up of pooled mortgages will be devalued due to performing mortgages being removed by the eminent domain proceedings.²⁷¹ This removal would increase the concentration of nonperforming mortgages in the pool, thus decreasing the value of the securities.²⁷² In sum, the Coalition argues that because the Plan fails to account for secondary costs, such as the actual value of cash flows from the performing loans in the securities, diminution in value of the mortgage pool the loans were taken from, and the reinvestment risk faced by holders of the affected securities, investors in mortgage-backed securities will not be justly compensated by the takings.²⁷³

The Coalition, however, fails to recognize that the performing (yet underwater) mortgages being taken out of the pools by eminent domain proceedings have a very

264. In 2008, five million homeowners were delinquent on their mortgages or in foreclosure. Moran, *supra* note 24, at 23. During the housing bubble, it is estimated that banks issued fifteen million subprime mortgages and more than ten million of these will default. *Id.*

265. CAL. CIV. PROC. CODE § 1263.310, 1263.320(a) (West 2013).

266. Hockett, *supra* note 112, at 151. Municipalities acting under the Plan will pay for the acquired mortgages through willing private investors, which may include pension funds, insurance companies, and mutual funds. *Id.* at 152. Investors attracted to this Plan may include those who wish to replace default-prone mortgages in their portfolios with safer, higher-guarantee assets. *Id.* at 153.

267. *Id.* at 154.

268. *Id.*

269. *Id.* at 156.

270. Coalition Letter, *supra* note 141, at 4.

271. *Id.*

272. *Id.*

273. *Id.*

high risk of becoming nonperforming in the near future.²⁷⁴ Leaving the underwater mortgages in the pool can prove to be more damaging to investors in the future once homeowners default because they can no longer afford their mortgage payments.²⁷⁵ Securities holders may be better off receiving the fair market values for these currently performing loans before mortgagors default and cash flows become significantly decreased.²⁷⁶ Those opposed to the Plan must consider the consequences of not providing relief to underwater mortgagors. Statistics show that such mortgagors will likely default in the near future.²⁷⁷ Once the underwater mortgages are defaulted or foreclosed on, owners of mortgage-backed securities will be in a worse position than they would have been had they accepted the fair market value proposed by the Plan. Although home prices have recently been back on the rise, they are still not back to their 2006 peak levels, and homeowners as well as mortgage-backed securities holders can still benefit greatly by implementation of the Plan.²⁷⁸

From a constitutional standpoint, the Plan complies with the just compensation requirement. The Plan proposes to pay mortgage holders the fair market value of a loan, as determined by an appraiser.²⁷⁹ The Supreme Court has explicitly stated that just compensation is an objective value, which cannot include a subjective amount that provides value only to the individual owner.²⁸⁰ Because of this objective rule, just compensation should include only the fair market value of the mortgage determined by the appraiser and should not account for individual reinvestment risks, the value of uncertain cash flows, and diminution in value of the pool. These are all subjective or secondary values that the Supreme Court likely would not include in its determination of fair market value.²⁸¹

Paying fair market value for the seized loans under the Plan explicitly satisfies the just compensation requirement of the Takings Clause of the United States Constitution. If the city of Richmond, California, follows through with the Plan, the financial players that challenge it cannot prevail under the theory that just compensation is not being paid.

3. Private Property

The Plan proposes to use eminent domain to take over mortgage notes, rather than

274. See *supra* notes 53–65 and accompanying text for a discussion of negative equity and why it leads homeowners to a higher risk of default.

275. See Friend, *supra* note 2, at 26 (noting that underwater mortgage holders who can afford to make their mortgage payments could nevertheless choose to default if they remain underwater for many years).

276. *Id.* at 28 (stating that bondholders will receive a better return via payoff than via foreclosure).

277. See *supra* notes 63–65 for a discussion of why underwater mortgages are at high risk of default or foreclosure.

278. Ruth Mantell, *Why There's No Housing Bubble . . . Yet*, WALL ST. J. (July 22, 2013, 7:15 PM), <http://www.marketwatch.com/story/why-theres-no-housing-bubbleyet-2013-07-22>.

279. Hockett, *supra* note 112, at 150–51, 154.

280. *United States v. 50 Acres of Land*, 469 U.S. 24, 35–36 (1984).

281. See *supra* Part II.D.2 for a discussion of just compensation and how its value is determined by an objective fair market value of certain property and not by the subjective significance of that property to its owner.

the tangible property secured by those notes.²⁸² The fact that the mortgages are considered intangible property should not pose a problem for the Plan, because intangible property such as contracts and trade secrets have been previously condemned by eminent domain proceedings.²⁸³ This issue also does not seem to be contested by the Coalition.²⁸⁴ However, the Plan may run into problems if the owners of the mortgage-backed securities feel they have not been justly compensated for a taking of their property.

4. Taking of Property for Purposes of Mortgage-Backed Securities

If the financial industry can successfully assert that each individual owner of the mortgage-backed securities, which consist of the condemned mortgages, has experienced a taking that has not been justly compensated, the Plan may fail. The Coalition alleges that the securities made up of pooled mortgages will be devalued when the performing mortgages are removed by the eminent domain proceedings.²⁸⁵ However, as explicitly stated by the majority in *Penn Central Transportation Co. v. City of New York*,²⁸⁶ diminution in property value cannot alone establish a taking.²⁸⁷ Although the remainder of the securities may decrease in value due to the underwater mortgages being taken, using the reasoning of *Penn Central*, this diminution in value alone does not mean that every owner of every individual mortgage-backed security can allege that the government has taken its property.²⁸⁸

In *Penn Central*, the Supreme Court recognized three factors to determine whether there has been a taking of property: (1) the economic impact on the person asserting the claim, (2) the extent to which the regulation has interfered with investment-backed expectations, and (3) the character of the governmental action.²⁸⁹ In considering the factors set forth in *Penn Central*, it is clear that a big area of concern with critics of the plan lies in the economic impact on the person asserting the claim of a taking.²⁹⁰ The Coalition claims that once the underwater mortgages are taken out of the mortgage-backed security pools, the value of the securities will decrease due to the removal of performing loans from security pools.²⁹¹ However, the Coalition fails to consider the fact that while the underwater loans are *currently* performing, they will not stay that way for long.²⁹² By removing the underwater mortgages from the pools before they are foreclosed upon, the mortgage pools and securities are spared from having to

282. Hockett, *supra* note 112, at 151.

283. See *supra* Part II.D.3 for a discussion of intangible property being taken via eminent domain proceedings.

284. The Coalition does not mention in its letter that the mortgages are not private property; thus, the assumption is being made that they probably are not contesting this issue. Coalition Letter, *supra* note 141.

285. *Id.* at 4.

286. 438 U.S. 104 (1978).

287. *Penn Central*, 438 U.S. at 131.

288. *Id.*

289. *Id.* at 124.

290. Dellinger Memo, *supra* note 141, at 7–8.

291. Coalition Letter, *supra* note 141, at 4.

292. See Friend, *supra* note 2, at 26 (discussing how homeowners with underwater mortgages may decide to strategically default even if they are currently capable of making their mortgage payments).

pay the transactional costs of foreclosure, which can result in an even greater loss than having the loans taken out of the pools. Thus, removal by the eminent domain proceedings is beneficial, rather than harmful, to holders of mortgage-backed securities.

A recent Washington Supreme Court case could put a damper on the arguments made by the Coalition if it gains momentum with other state courts.²⁹³ *Bain v. Metropolitan Mortgage Group, Inc.*²⁹⁴ involved Mortgage Electronic Registration System (MERS), an electronic registration system that tracks ownership of mortgage-related debt.²⁹⁵ MERS was established by Fannie Mae, Freddie Mac, the MBA, and Ginnie Mae, among others.²⁹⁶ It facilitates the market for mortgage-backed securities and helps keep track of ownership of mortgages in this new, liquidized-mortgage market.²⁹⁷ Aside from tracking ownership, MERS is often listed as the beneficiary of the deeds of trust securing the mortgages, a role traditionally reserved for the actual lender.²⁹⁸ The Washington Deed of Trust Act²⁹⁹ recognizes that the beneficiary of a deed of trust at any given time may not be the original lender because of the relatively new practice of lenders selling off mortgages.³⁰⁰ Deeds of trust protect lenders by giving them the power to nominate a trustee who can sell the home in foreclosure if the debt is not paid.³⁰¹

The issue in *Bain* was whether MERS was a lawful beneficiary with the power to appoint trustees to initiate foreclosure proceedings if it does not actually hold the promissory notes secured by the deeds of trust.³⁰² The court concluded that only the actual holder of the promissory note can be a beneficiary with the power to appoint a trustee and proceed with a nonjudicial foreclosure on the property.³⁰³ Thus, if MERS does not hold the underlying note, it cannot be a lawful beneficiary, and it cannot

293. *Bain v. Metro. Mortg. Grp.*, 285 P.3d 34 (Wash. 2012); see also Ellen Brown, *Fixing the Mortgage Mess: The Game-Changing Implications of Bain v. MERS*, HUFFINGTON POST (Aug. 23, 2012, 9:40 AM), http://www.huffingtonpost.com/2012/08/23/ellen-brown-gamechange-bain-vs-mers_b_1820591.html (describing how *Bain* will benefit cities and countries that want to use eminent domain to address the mortgage crisis).

294. 285 P.3d 34 (Wash. 2012).

295. *Bain*, 285 P.3d at 36.

296. *Id.* at 39.

297. *Id.* at 36.

298. *Id.* The beneficiary to a deed of trust is “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” WASH. REV. CODE ANN. § 61.24.005(2) (West 2013).

299. The Washington Deed of Trust Act, codified in WASH. REV. CODE ANN. § 61.24, is the statutory act that governs nonjudicial foreclosures in Washington. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 276 P.3d 1277, 1281 (Wash. 2012). It creates a three-party mortgage system that allows lenders to implement foreclosure proceedings upon default without the assistance of the courts through a trustee’s sale. *Id.* The goals of the Act are to have an efficient and inexpensive nonjudicial foreclosure process in which interested parties have an adequate opportunity to prevent wrongful foreclosure. *Id.*

300. *Bain*, 285 P.3d at 36.

301. *Id.*

302. *Id.*

303. *Id.*

appoint a trustee to initiate foreclosure proceedings.³⁰⁴

A general requirement of mortgage law is that the one who has the ability to foreclose is the one to whom payment is due.³⁰⁵ However, after bundling so many loans together into complex securities, it is difficult to determine the holder of a particular loan at any moment in time.³⁰⁶ Determining who has authority to negotiate loan modifications is extraordinarily difficult in today's liquidized-mortgage-securities market.³⁰⁷ Guided by the Uniform Commercial Code definition of "holder,"³⁰⁸ the court concluded that a beneficiary must either actually possess the promissory note or be the payee to be considered a "holder."³⁰⁹ Under the plain language of the statute, the court found that MERS was not a holder, and furthermore, MERS was not a beneficiary.³¹⁰

It may not be immediately apparent what effect this case has on MRP's Plan, but the reality is that this case could silence the complaints of many mortgage-backed securities investors. As a result of this holding by the Washington Supreme Court, MERS is not considered a beneficiary entitled to foreclose on a particular home and is thus not entitled to assign that right or title.³¹¹ Now, title remains with the original note holder who issued the loan.³¹² This poses its own problems because the original note holder likely will be difficult to locate due to the countless amounts of times the mortgage has been transferred throughout its life.³¹³ The original note holder may even no longer exist. This gives governments thinking of imposing the Plan the ability to acquire some mortgages without having to deal with the financial institutions and holders of the complex securities that the mortgages are a part of.³¹⁴ If the original titleholder cannot be found, the government will simply need to provide notice of the eminent domain taking in the local newspaper, and the burden would then be on the note holder (who cannot be found) to establish title.³¹⁵ If title were even challenged, it could not be proven if courts follow the holding in *Bain*.³¹⁶

Although this decision is only binding in the state of Washington, MERS is present in every state, and other state courts may choose to follow the decision of the Washington Supreme Court and find that MERS cannot foreclose on properties in their own states. The advent of securitizing mortgages made it extremely difficult to track down the current holder of one particular loan, and MERS made it even more difficult

304. *Id.* at 36–37.

305. *Id.* at 40.

306. *Id.* at 41.

307. *Id.*

308. *See id.* at 44 (noting that with respect to both negotiable instruments and title documents, "holder" refers to the person in possession of the instrument or goods).

309. *Id.*

310. *Id.* at 36–37, 44.

311. Brown, *supra* note 293.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

by dispensing with recording requirements.³¹⁷ Thus, it is likely that other states will follow the *Bain* decision and make it easier for MRP's Plan to jump over these constitutional hurdles. Specifically, if MERS is no longer considered a beneficiary, and the note holder cannot be found, there will be no one to contest the "just compensation" being given for the taking.³¹⁸ Since just compensation has to be slightly less than fair market value for the Plan to work, the *Bain* decision eliminates MERS as a potential claimant from asserting lack of just compensation.³¹⁹

The Plan satisfies all requirements of the Takings Clause. Mortgages being taken using the eminent domain power would be taken for a public use, and the holders of the mortgages would receive just compensation as required by both the United States Constitution and the California constitution. Furthermore, holders of mortgage-backed securities are getting more of a benefit out of this Plan than a burden. Thus, this Comment next considers whether the Plan will actually help communities that are plagued by excessive percentages of underwater mortgages.

B. MRP's Plan Will Address the Negative Effects of Foreclosure on Families and Communities

The current housing crisis has taken a sledgehammer to the largest source of wealth for most American families.³²⁰ In 2011, home equity had dropped to its lowest percentage since the 1920s, falling to 38.6% of the value of homeowner-held real estate.³²¹ Foreclosure can have negative social (as well as economic) consequences, and its consequences can extend beyond the individual family who has experienced the foreclosure.³²² Foreclosures negatively impact individual families by uprooting them from their homes and causing them to need another suitable form of housing.³²³ In addition, foreclosures can have negative external consequences on neighborhoods by lowering property values and leading to blight and crime.³²⁴ Foreclosures can hurt even those who are diligently making their mortgage payments.³²⁵ Studies show that each foreclosure in a neighborhood causes surrounding home values to drop approximately 1%.³²⁶ An example of foreclosures increasing the presence of crime or blight in a particularly committed occurred in San Bernardino County, California, where, after the onslaught of foreclosures during the mortgage crisis, the homicide rate rose more than 50% in one year, and entire neighborhoods became dislocated.³²⁷

317. *Bain*, 285 P.3d at 36. MERS made it possible for mortgages to change hands electronically without the old requirements of manually recording the new holder of the mortgage. *Id.*

318. Brown, *supra* note 293.

319. *Id.*

320. Matt Stoller, *The Housing Crash and the End of American Citizenship*, 39 *FORDHAM URB. L. J.* 1183, 1209–10 (2012).

321. *Id.* at 1210.

322. Arthur, *supra* note 72, at 589.

323. *Id.*

324. *Id.*

325. See Johnson & Waldrep, *supra* note 42, at 199–200 (describing the impact home foreclosures can have on an entire community).

326. *Id.* at 199.

327. Friend, *supra* note 2, at 29.

Effects of foreclosure can be even more attenuated. Foreclosures decrease tax revenue, reduce fixed-residential investment, reduce auto sales, increase unemployment, and cause political problems in the community.³²⁸ Thus, it is clear that the rapid rate of foreclosures in the United States today poses a real and serious problem that needs to be stopped before more communities are completely destroyed and transformed. MRP's Plan, if implemented properly, could be the end to this devastation plaguing the United States today.

Implementation of the Plan can be particularly helpful in the Sunbelt states—California, Florida, Nevada, and Arizona—which were hit especially hard by the foreclosure crisis.³²⁹ These states were also subjected to the steepest increases in home values during the bubble, which is why they were affected much more significantly when the bubble burst.³³⁰ As a result of home values being extremely inflated, borrowers in these states lost significant portions of their investments and were left with mortgages worth much more than the current value of their homes once the bubble burst. With the exponential number of foreclosures occurring in these areas of the country, neighborhoods are becoming empty and blighted. Homes that are left empty as a result of foreclosure proceedings bring down the value of neighborhoods and increase the likelihood of squatters and criminal activity.³³¹

If the Plan can actually prevent the number of foreclosures that are impending due to underwater mortgages, cities and towns around the country can be preserved from the blight and crime that results from high foreclosure rates. Furthermore, innocent homeowners will be spared from their home values decreasing as a result of foreclosures in their neighborhoods.

C. *Will the Plan Work?*

The largest problem with HOPE, HARP, and HAMP is that they are merely optional alternatives to both lenders and homeowners that come with many confusing stipulations.³³² In contrast, the Plan is not optional for lenders. If the local government selects a mortgage that qualifies for the Plan, holders of that mortgage will be barred from refusing a refinance due to the government seizing the mortgage with its power of eminent domain.³³³

Other than their optional nature, HOPE, HARP, and HAMP took roundabout ways to help homeowners, rather than directly reducing principal, which is what the

328. Stoller, *supra* note 320, at 1209–10.

329. Daniel Carty, *Foreclosure Wave Spreading, Group Says*, CBSNEWS.COM (Jan. 28, 2010, 11:03 AM), http://www.cbsnews.com/8301-503983_162-6150748-503983.html.

330. Edward L. Glaeser, *Housing Hangover in the Sun Belt*, N.Y. TIMES (Jan. 12, 2010, 9:14 AM), http://economix.blogs.nytimes.com/2010/01/12/build-it-and-they-will-come-housing-hangover-in-the-sun-belt/?_r=0.

331. G. THOMAS KINGSLEY ET AL., THE IMPACTS OF FORECLOSURES ON FAMILIES AND COMMUNITIES 13–18 (2009), available at http://www.urban.org/UploadedPDF/411909_impact_of_foreclosures.pdf.

332. See *supra* notes 82, 99, and 103 for an explanation of the extensive requirements for HOPE, HARP, and HAMP participation.

333. See *supra* notes 124–134 and accompanying text for a discussion of the Plan's use of eminent domain to take over underwater loans from the lenders.

Plan would do.³³⁴ Principal reduction is what these homeowners need because while home values are on the rise, they are still not back to their 2006 peak level.³³⁵ Yes, interest-rate reductions are helpful in the interim, but meanwhile, the homeowner is still paying on a mortgage that is barely amortizing, making it nearly impossible for homeowners to generate equity in their homes.³³⁶

Homeowners are in desperate need of straight principal reduction, which will be given to them if the Plan is implemented.³³⁷ If lenders and borrowers come together to renegotiate a mortgage, they can both benefit.³³⁸ Homeowners get to stay in their homes, and lenders receive more than they would get from a resulting foreclosure.³³⁹ However, lenders have been consistently reluctant to refinance, due in part to (1) mortgage pooling agreements that do not allow it, (2) a lack of personnel to accommodate modifications, and (3) the existence of second mortgages.³⁴⁰ Half of all mortgage holders have second mortgages, and, upon refinance, second mortgage holders receive little to no repayment.³⁴¹ Thus, implementation of the Plan, which takes the at-risk mortgages away from lenders and requires them to refinance, seems to be the most effective option for principal reduction.

Another way the Plan is superior to previous government programs is that it has no equity-sharing provisions.³⁴² Under the Plan, whatever equity homeowners build in their homes due to the refinance is theirs to keep.³⁴³ There is no requirement for sharing of equity with the government or with any private investor who participates in the Plan.³⁴⁴ Building equity is the entire crux of owning a home.³⁴⁵ Without the ability to build equity in their homes, borrowers would be better off going into foreclosure and finding a place to rent. The optional nature of these previously enacted government programs, and the fact that HOPE contains an equity-sharing provision, are just more indications that these programs were founded with a focus on mitigating the lenders' loss rather than with a genuine goal of helping the homeowner.³⁴⁶

334. Overview of MRP, *supra* note 6.

335. Ruth, *supra* note 278.

336. Amortization is the paying off of debt with regular payments over a period of time. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 34, at 12. Generally, mortgage payments consist of part principal and part interest, thus decreasing (or amortizing) the principal balance on the loan with every payment. *Id.*

337. See *supra* notes 124–129 and accompanying text for an explanation of how the Plan will reduce principal.

338. Johnson & Waldrep, *supra* note 42, at 200.

339. *Id.*

340. *Id.* at 201–02.

341. *Id.* at 202.

342. See *supra* notes 84–86 and accompanying text for an explanation of the equity-sharing provisions in HOPE for Homeowners.

343. See Hockett, *supra* note 112, at 149–157 (lacking an equity sharing provision in its explanation of the Plan).

344. *Id.*

345. See Stoller, *supra* note 320, at 1210 (referring to equity and homeownership as “the largest store of broad-based wealth held by American families”).

346. See *supra* notes 84–86 and accompanying text for an explanation of the equity-sharing provisions in HOPE for Homeowners.

Finally, the Plan is superior to the previous government programs for one of the reasons that the Coalition is opposed to it.³⁴⁷ The Plan proposes to use private investors' money to purchase the mortgages rather than money on loan from the government.³⁴⁸ This is beneficial to the success of the Plan because the possibility of making a profit incentivizes investors to provide the funds to carry out the Plan. If private investors can somehow help mitigate the foreclosure crisis, while making a profit for themselves, everyone wins. This method is more effective than using government funds, which are usually scarce and come with many provisions and stipulations.³⁴⁹

Critics of the Plan have said that underwater mortgages will continue to perform and will not result in foreclosure.³⁵⁰ Thus, the discounted price that the Plan proposes to pay for the mortgages will not constitute just compensation.³⁵¹ However, statistics indicate that at the peak of the crisis 15.2 million borrowers owed considerably more than their homes were worth.³⁵² Borrowers in this position are essentially stuck in their homes because they cannot sell to pay off the loan, and lenders will not allow them to refinance.³⁵³ Thus, foreclosure is the only viable option for borrowers who cannot afford their mortgage payment due to having an underwater mortgage. This problem is also exaggerated by the record-high unemployment rates the United States has been experiencing.³⁵⁴ Contrary to what the Coalition has to say, under the present circumstances of the economy, foreclosure is highly likely for a borrower with an underwater mortgage.³⁵⁵ It is like a ticking time bomb ready to go off, and once these mortgages eventually default, mortgage-backed securities holders will experience devastating effects, much worse than any devaluing effects as a result of the Plan.³⁵⁶

III. CONCLUSION

MRP's Plan to use eminent domain to take over underwater mortgages could be just what the United States needs to combat the subprime mortgage crisis. The Plan certainly has its advantages over previously implemented government programs, such as HOPE, HAMP, and HARP. The Plan is mandatory, has less stringent requirements for participation, uses private rather than government funds, and does not impose equity-sharing requirements. Most importantly, the Plan focuses on helping

347. MBA Memo, *supra* note 141; Coalition Letter, *supra* note 141.

348. Hockett, *supra* note 112, at 151.

349. See *supra* Part II.B for an overview of the extensive requirements of HOPE, HAMP, and HARP.

350. Coalition Letter, *supra* note 141, at 4.

351. *Id.*

352. Steve Christ, *Underwater Mortgages Drive the Next Foreclosure Wave: No Bottom in Sight*, WEALTH DAILY (Aug. 17, 2009), <http://www.wealthdaily.com/articles/underwater-mortgages-drive-the-next-foreclosure-wave/1945>.

353. Johnson & Waldrep, *supra* note 42, at 198, 201–02.

354. *United States Unemployment Rate*, TRADING ECONOMICS, <http://www.tradingeconomics.com/united-states/unemployment-rate> (last visited Nov. 27, 2013) (showing that unemployment rates have been between 7 and 9% over the last few years when historically they have averaged 5%).

355. See *supra* notes 58–65 and accompanying text for an explanation of why underwater homeowners are at a higher risk for foreclosure.

356. See *supra* Part III.A.4 for a discussion of the effects on mortgage-backed securities holders.

homeowners reduce their principals, rather than mitigating loss to those lenders and banks that put the United States into this situation in the first place. Without this Plan, tens of thousands of homeowners will go into foreclosure, banks will lose money, cities and neighborhoods will lose value, and there will be no end in sight to the subprime mortgage crisis.