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Jacob R. Shelton

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Abstract

Beginning in 2007, the U.S. economy was hit with a series of damaging financial blows, the negative repercussions of which still affect Americans today. In years prior thereto, various economic and political factors worked in unison to artificially inflate the selling price of residential homes within many U.S. markets.1 When the market could stand no more inflation, the metaphorical bubble burst, sending the banking, investment, and mortgage industries into a downward tailspin.

Keywords

Cornell, real estate, mortgage, underwater mortgage, negative equity, eminent domain, loan servicer, bank, lending, banking, supreme court, law, takings law, berman midkiff, olson, kelo, securitization, estate, legal, loan, mortgage-backed, value

Constitutional Constraints on Using Eminent Domain to Write-Down Underwater Mortgages

By: Jacob R. Shelton*

Introduction

Beginning in 2007, the U.S. economy was hit with a series of damaging financial blows, the negative repercussions of which still affect Americans today. In years prior thereto, various economic and political factors worked in unison to artificially inflate the selling price of residential homes within many U.S. markets.[1] When the market could stand no more inflation, the metaphorical bubble burst, sending the banking, investment, and mortgage industries into a downward tailspin.

Economists assert that the artificial inflation issue is an ongoing one whose damaging implications have not yet come to fruition in some areas. This assertion is based on data showing that many homeowners that bought in the pre-2007 free-spirited loan market are still significantly underwater[2] on their home mortgage loans.[3] Due to a much higher likelihood of default, underwater loans are considered economically burdensome and unstable.

Government entities and private analysts alike have proposed various solutions to reduce the current number of underwater mortgages, thus avoiding further instability via foreclosures. One commentator advocates for a particularly unique approach. Professor Robert Hockett of the Cornell University Law School prescribes the use of sovereign eminent domain authority to achieve the benefits that many perceive mass write-downs could afford.[4]

In very general terms, Hockett's plan ("the Plan") suggests that local municipalities utilize their eminent domain power to "take" underwater mortgages from pooled units of securitized investor-trusts that would not otherwise be able to write-down such loans, and then restructure them in a way that reduces the risk of default, thus benefitting both national and local economies.[5]

This article will objectively address several major legal challenges such a program faces under Constitutional jurisprudence. Section II below sets out a brief explanation of how the need for collective-action solutions such as the Plan arose, and then provides a summary of Hockett's Plan. Section III then analyzes the Plan under the U.S. Supreme Court's current repertoire of Taking's law, and explains why the Plan meets the Constitutional requirements thereof. Sections IV and V highlight the legal hurdles the Plan faces under the U.S Constitution's Contracts and Commerce Clauses, respectively. Finally, Section V provides a conclusion and a summary of the impediments faced by Plan proponents moving forward, particularly the city of Richmond, California.

Author

Jacob R. Shelton is a May 2015 graduate of the Texas A & M University School of Law in Fort Worth, Texas. During his legal education, Jacob was an award-winning Moot Court brief writer, and interned with the U.S. Department of Housing and Urban Development and several private law firms in the Fort Worth area. After taking the bar exam, Jacob intends to enter the private sector and practice real estate, estate planning, and transactional contract law. Jacob also holds a B.A. from the University of Texas at Arlington.

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* By Jacob R. Shelton, Candidate for Juris Doctor May 2015, *Texas A & M University School of Law*.

1 *See generally* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359 (2010); Benjamin S. Bernanke, Chairman, Bd. of Governors of Fed. Res. Sys., *Monetary Policy and the Housing Bubble*, Address at the Annual Meeting of the American Economic Association (Jan. 3, 2010).

2 "Underwater" as used herein means that a homeowner owes more on their residential mortgage than what their house is actually worth on the market. This premise is also known as "negative equity."

3 *See* Core Logic 2014 First Quarter Negative Equity Report, *available at* http://www.corelogic.com/research/negative-equity/corelogic-q1-2014-equity-report.pdf (Illustrating that as of the first fiscal quarter of 2014, 12.7% of all U.S. mortgages were underwater) (last visited March 21, 2015).

4 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 (2012) (hereinafter, "Hockett, *It Takes a Village"*).

5 *Id.*

Collective-Action Problems and the Plan

Consider first what a mortgage is. At its core, it is a financial instrument used to secure the repayment of a loan over a fixed term of years, generally in exchange for a lien on real property.[6] Many lenders now specialize solely in this practice.

In an effort to originate more loans (and thus make more money), lenders need to create cash flow. To do this, they sell all or a part of their interest in newly created mortgages into the secondary mortgage market.[7] The secondary market in turn benefits from purchasing the loans through *securitization*.

Securitization refers to the process of *pooling* contractual debt obligations (here mortgages), into *securitized units* with other mortgages of similar credit-worthiness.[8] Once created, these securitized units are referred to as *collateralized mortgage obligations* or *mortgage-backed securities* ("MBS").[9] These MBS are then put into trust accounts and sold to various groups of investors as part of their investment portfolios.

The securitization process itself can occur in a variety of ways depending on the parties involved. If the loan originator was a large commercial bank, for example, they may choose to handle the securitization/pooling process themselves, thereby saving some expense. Alternatively, the loan originator may engage in a complex series of legal conveyances through which it sells its loans to specialized *loan servicers*,[10] who thereafter securitize and pool loans from various sources before selling an interest in them in the secondary market.[11] Due to the varied (and previously unregulated) nature of the securitization process, many ownership structures are possible.[12]

The securitization process offers many economic benefits. Because many specialized loan originators are so efficient at what they do, they prefer to focus entirely on creating profitable investments, rather than maintaining them. By creating and selling mortgages at a discount into the investment market, lenders are able to generate more cash flow, thus facilitating the lending process by having more money to lend.[13]

Relatedly, the process also benefits homebuyers. Securitization (1), creates an attractive niche in the market for lenders to operate, so more financing options are available to borrowers, and (2), creates natural competition among lenders, incentivizing them to offer better rates to homebuyers. Holistically then, the secondary mortgage market expands consumer access to credit.[14]

MBS are however, not without drawbacks. In the traditional mortgage lending model where the original lender retains title to a loan, the lender has the option of reducing the likelihood of borrower default by writing-down (or essentially off) a portion of the loan made, thus (arguably) incentivizing and increasing the likelihood of repayment.[15] Modernly however, most underwater mortgages are held in the previously described private-label

6 *See generally* 54A Am. Jur. 2d Mortgages § 1.

7 This general concept, known as *structured finance*, encompasses "financial arrangements that serve to efficiently refinance and hedge … profitable economic activity beyond the scope of conventional forms of on-balance sheet securities (debt, bonds, equity) …" often at much lower transaction costs. Andreas A. Jobst, *Tranche Pricing in Subordinated Loan Securitization*, 11-2 J. Structured Fin. 64 (Summer 2005).

8 *Id.*

9 *Id.*

10 The term "loan servicer" may refer to one of several players in the secondary mortgage market. A true loan servicer simply contracts to handle the transaction between the originator, the securities broker, and the investor, acting in effect as a trustee; and then functions as an intermediary by distributing funds to investors as homeowners make their payments. In this instance, the loan servicer does not own any part of the securitized unit, but instead simply profits via a fee for handling the transaction. Alternatively, some use the term "loan servicer" to refer to an entity that purchases, securitizes, *and* in the traditional sense "services" the pooled loans after selling a portion to end investors. Because this latter type of servicer retains a portion of each MBS as its own investment, it is more appropriately referred to as an "aggregator." *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 24 (2011) (Discussing the various types of "servicers.").

11 *See* Kathryn E. Johnson, Carolyn E. Waldrep, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Overview*, 14 N.C. Banking Inst. 191, 193-94 (2010).

12 For purposes of this article, it is not necessary to delve too deeply into the various ways in which securitization can occur. More important in this analysis is a basic understanding of the system's structure, and the resulting limitations.

13 Jobst, *supra* note 7.

14 *See* Alan Greenspan, Chairman of the Federal Reserve Board, At the Economic Development Conference of the Greenlining Institute, San Francisco (Oct. 11, 1997) *available at* http://www.federalreserve.gov/boarddocs/speeches/1997/19971011.htm (Discussing the effects of the creation of securitized secondary mortgage market investments) (last visited March 23, 2015).

15 Letivin & Twomey, s*upra* note 10.

securitized pooled units as MBS. These securitized units are managed by loan servicers whose authority is governed by a pooling and servicing agreement ("PSA").[16] Nearly all PSAs restrict the loan servicer's ability to modify the terms of the loan itself.[17] This restriction is necessary to maintain the particular pass-through type of limited tax liability that makes mortgage-backed securities so attractive to investors, so there is no readily available work-around for this arrangement.[18]

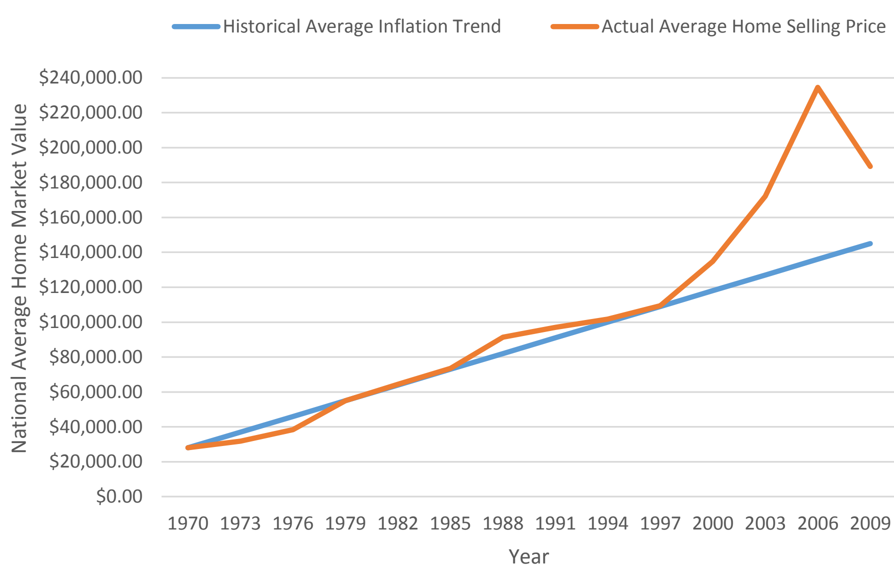
Add into the mix the cause of, and thus the need to restructure many of these securitized loans. From the early 1990's until 2006, U.S. residential home prices rose at unprecedented rates. Causes of price inflation included: an increase in the home buying population,[19] conflicts of interest that promoted unscrupulous appraisals,[20] government-sponsored mortgage deductions that made home ownership an attractive option for both investment, and residential purposes,[21] and ease of consumer access to credit because of the secondary mortgage market, among others.

The following chart illustrates the inflation bubble by showing both the historical trend of home price increases, and the artificially inflated rates that homes were selling at before the mortgage bubble burst.[22]

From the 1990s through 2006, private label securitization through the secondary market was just one of several facilitators that allowed borrowers to take out loans on homes at

Figure 1

Median Single Family Home Price



artificially high prices. Those price-inflated loans were then sold into securitized/pooled units as mortgage-backed securities. Then the metaphorical inflation bubble burst, causing market home values to plummet. Suddenly, borrower/homeowners find themselves upside down or "underwater" on their mortgages, owing investors much more than their homes are now worth in the market, and the PSAs that govern private-label loans do not allow them to be restructured. As a result, many underwater loans are unmodifiable, and

16 *Id.*

17 *Id.*

18 *Id.*

19 Commercial Real Estate Workouts § 1:5 (3d ed.).

20 J. Kevin Murray, *Issues in Appraisal Regulation: The Cracks in the Foundation of the Mortgage Lending Process*, 43 Loy. L.A. L. Rev. 1301, 1312 (2010).

21 Robert Hardaway (FNaa1), *The Great American Housing Bubble: Re-Examining Cause and Effect*, 35 U. Dayton L. Rev. 33, 51 (2009).

22 Information derived from the S&P/Case-Shiller national HPI, available at http://www.jparsons.net/housingbubble/ (last visited March 26, 2015).

as such, bear a significantly higher likelihood of default.

To remedy this economy-wide problem, Hockett's Plan[23] suggests a "collective-action" solution.[24] He proposes that municipalities use their eminent domain authority to *take* the underwater mortgages themselves from their investor-owned securitized trusts (thus circumventing the restrictive PSAs), refinance them so that they more closely reflect the (current) actual value of the underlying home, and then sell them to new investors thereby decreasing the likelihood of default.

Under the plan, local municipalities will begin by collaborating with privately owned enterprises to raise the large amounts of capital necessary to pay for the condemnations. Mortgage Resolution Partners, LLC ("MRP") is one such privately owned venture capitalist firm seemingly created for the purpose.[25] MRP initially raises the necessary funding by seeking out interested third-party investors interested in buying into trust accounts that will later be collateralized by re-securitized mortgages.[26] MRP then fronts the raised capital to local municipalities to facilitate the Plan.[27]

Second, the local municipality and MRP will work together to establish a set of criteria to use when actually selecting which underwater loans they wish to take.[28] At the outset, "it was MRP's intent that municipalities purchase all underwater mortgages…[,]" but it was later conceded that municipalities should retain the flexibility to establish their own criteria for selecting the loans they wish to condemn.[29] Also, initially MRP only intended to take performing loans, but preliminary loan selections in one area have included both performing and nonperforming loans.[30]

Third, after selecting which loans to take, the municipality will use its eminent domain power under the applicable state[31] and U.S. Constitutions[32] to effectively condemn the privately held securitized mortgages themselves, and pay the required "just compensation" to the investor/owners.[33]

Finally, once it has *purchased* a mortgage through condemnation, the municipality will negotiate with the homeowner an entirely new mortgage loan based on the previously determined fair market value, at terms equal to those that the homeowner could currently obtain on the open market.[34] The municipality will then convey the new mortgage to MRP for re-securitization, and placement as a mortgage-backed security into one of its various investor-financed trusts.[35] MRP's financial interest in facilitating this process is limited to a $4,500 transaction fee for each loan taken and processed through the Plan.[36]

23 As this has been an ongoing proposal over the last few years, several changes and revisions have been made to the structure and mechanics of the Plan. This summary attempts to integrate those updates as much as possible to provide the most accurate analysis of Hockett's proposal.

24 Hockett, *It takes a Village, supra* note 4.

25 *See* http://mortgageresolutionpartners.com (last visited March 23, 2015).

26 *Id.*

27 Michael S. Moskowitz, *Treading Water: Can Municipal Efforts to Condemn Underwater Mortgages Prevail?* 41 Pepp. L. Rev. 633, 639 (2013).

28 Jacob J. Lantry, *Municipal Lifeguards: The Constitutionality of Condemning and Refinancing Underwater Mortgages*, 62 Drake L. Rev. 243, 246 (2013).

29 *Id.* Citing Interview with John Vlahoplus, Founder and Chief Strategy Officer, Mortgage Resolution Partners, in Des Moines, Iowa (Sept. 28, 2012).

30 Panel review with Robert Hockett, John Vlahoplus, et. Al., *The Forum: Mortgage Relief or Bank Robbery? An Eminent Domain Showdown,* NYU School of Law (Feb. 10, 2014) *available at* https://www.youtube.com/watch?v=0q-kAzZuLwU (last visited, Dec. 10, 2014).

31 *See e.g.* Cal. Const. art. I, § 19.

32 U.S. Const. amend. V.

33 Hockett, *It Takes a Village*, *supra* note 4.

34 *Id.*

35 *Id.*

36 Ben Hallman, *San Bernardino Eminent Domain Proposal Arousing Concern from Mortgage Industry*, HUFFINGTON POST (Aug. 16, 2012), *available at* http://www.huffingtonpost.com/2012/08/16/sanbernardino-eminent-domain_n_1791773.html (last visited Dec. 10, 2014).

Takings Law and the Plan

An Overview of Takings Jurisprudence

Claims of improper eminent domain use underlie almost all objections to the Plan. Commonly referred to as the "Takings Clause," the last line of the Fifth Amendment to the U.S. Constitution reads: "nor shall private property be taken for public use, without just compensation."[37] Scholars disagree about whether the Takings Clause is an express grant of eminent domain authority, or merely a limitation upon the implicit sovereign authority held as a matter of right.[38] At any rate, such authority is accepted, so the Fifth Amendment *does* serve to limit sovereign eminent domain authority, irrespective of whether it does so inclusively or exclusively.

In its early applications, the Fifth Amendment (as part of the Bill of Rights) was only read to apply to the federal government,[39] but has subsequently been *incorporated* through the Fourteenth Amendment's Due Process Clause[40] so as to apply to state (and therefore local) governments as well.[41]

When parsed, the Takings Clause requires analysis of several considerations, including: what kind of action amounts to a "taking," what constitutes "public use," and how "just compensation" should be calculated.

Defining a Taking

Broadly stated, "[a] taking occurs when the government encroaches upon or occupies private land for its own proposed use."[42] In the simplest example, a taking occurs when a sovereign approaches a private landowner and demands the overturning of title to, or deprivative use of, all or a portion of the landowner's property for some type of public use.[43]

Initially, "takings" only occurred with respect to real property,[44] but the doctrine has since been significantly relaxed in scope,[45] thus conforming its application to the evolving definition of "property."[46] For example, instead of strictly using the term to define interests in real estate, "property" more appropriately describes a bundle of rights or interests, which can vary in form depending on the circumstances.[47]

The modern definition of property now encompasses intangible assets as well, including

37 U.S. Const. amend. V.

38 *See* 26 Am. Jur. 2d Eminent Domain § 3 ("The power of eminent domain does not depend for its existence on a specific grant in the United States Constitution or statutes as it is inherent in sovereignty and exists in a sovereign state without any specific recognition.").

39 *See Barron v. City of Baltimore*, 32 U.S. 243, 250-51, (1833).

40 U.S. Const. amend XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law ….").

41 *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897). ("Due process of law, as applied to judicial proceedings instituted for the taking of private property for public use means. therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.").

42 10 A.L.R. Fed. 2d 231 (Originally published in 2006).

43 The classic example would involve a local government's need to take privately owned land to construct a school, hospital, or roadway.

44 *See W. River Bridge Co. v. Dix*, 47 U.S. 507, 516 (1848) ("The original idea of the eminent domain was the right of sovereignty, or residuum of power over the land which remained in the sovereign or lord paramount after the fee granted to the feudatory, and was therefore confined to the realty.").

45 "In the progress of arts and commerce, when personal property became worthy of legal consideration, this power of sovereignty was extended over that, and even included debts." *Id.*

46 For example, the state of California now broadly defines "property" as "real and personal property and any interest therein." Cal. Civ. Proc. Code § 1235.170 (West).

47 "The term is generally used in this sense in the federal and state constitutional guarantees against deprivation of property without due process of law, and as so used, the word signifies the sum of all the rights and powers incident to ownership" 63C Am. Jur. 2d Property § 1 (Referring to "property" as a "bundle of rights.").

"contract rights,[48] insurance policies,[49] corporate equities,[50] businesses as going concerns,[51] hunting rights,[52] rights of way,[53] and sports franchises,[54] among others."[55]

While many cases note the expansive definition of property for purposes of eminent domain, few courts have specifically dealt with the Taking Clause's applicability to financial instruments, and almost none have explicitly applied it to mortgages.[56]

Defining Public Use

Defining a "public use" is an oft-challenged aspect of takings jurisprudence. In *Berman v. Parker*[57] the Supreme Court began expanding the formerly strict public use requirement, thereby setting the stage for broadened future applications. In response to large concentrations of substandard housing and "blighted" areas, in 1945 Congress enacted the District of Columbia Redevelopment Act ("the Red. Act").[58] Under the Red. Act, the District of Columbia would use its eminent domain authority to condemn large areas within a certain community, and then turn them over to a private developer for new construction.[59] The principle opponent of the Red. Act owned a department store that came within the purview of the area to be condemned, but was not itself in a blighted condition.[60] Ultimately, the court rejected the argument that the public would not benefit from the taking of this particular owner's property due to (an isolated) lack of blight.[61]

In effect, the *Berman* Court began to expand the taking clause's "public use" requirement by giving near-absolute deference to legislative authority that dictates what a public use is, and in so doing, rejected a judicially scrutinous limitation on governmental eminent domain authority.[62]

Relatedly, the *Berman* Court also rejected the opponent's arguments that the taking could not constitute a legitimate public use because the Red. Act would result in another private owner ultimately having title to the condemned property. In referencing its new deferential approach to legislative determinations of public use, the Court simply noted that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude."[63] It is therefore reasoned that *post facto* private ownership does not automatically nullify the public use requirement.

The Supreme Court's next major opportunity to define the Taking Clause's public

48 *See, e.g., U.S. Trust Co. of N.Y. v. New Jersey,* 431 U.S. 1, 21-26 (1977).

49 *See, e.g., Lynch v. United States,* 292 U.S. 571, 577-79 (1934).

50 *See, e.g., Offield v. N.Y., New Haven & Hartford R.R.,* 203 U.S. 372 (1906).

51 *See, e.g., Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).

52 *See, e.g., Swan Lake Hunting Club v. United States,* 381 F.2d 238 (5th Cir. 1967).

53 *See, e.g., City of Cincinnati v. Louisville & Nashville R.R.,* 223 U.S. 390, 404-07 (1912).

54 *See, e.g., City of Oakland v. Oakland Raiders,* 646 P.2d 835 (Cal. 1982).

55 Robert Hockett & John Vlahoplus, *A Federalist Blessing in Disguise: From National Inaction to Local Action on Underwater Mortgages,* 7 Harvard Law & Policy Review 253, 270 (2013) (internal citations original).

56 In *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 602 (1935), the Supreme Court mentioned in dicta that "[i]f the public interest requires, and permits, the taking of [the] property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain …." While the *Radford* language is clear, two important considerations may curb its application to modern cases. First, *Radford* was a bankruptcy case dealing with creditor rights, not intentional applications of eminent domain authority. Second, the *Radford* language was proffered over twenty years before the Supreme Court began to expand its definition of "public use" in 1954 for eminent domain purposes (discussed infra). Although subsequent state court decisions have applied eminent domain to mortgages, *W. Fertilizer & Cordage Co. v. City of Alliance,* 504 N.W.2d 808, 816 (Neb. 1993), the U.S. Supreme Court may yet impose additional limitations in light of these contextual considerations.

57 348 U.S. 26 (1954).

58 *Id.* at 28.

59 *Id.*

60 *Id.*

61 *Id.* at 34.

62 *Id.* at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress [or a state legislature].").

63 *Id.* at 34.

use vernacular came in *Hawaii Hous. Auth. v. Midkiff*.[64] In that case, the Court measured the constitutionality of Hawaii's Land Reform Act of 1967 ("Land Act").[65] Hawaii's state legislature created the Land Act in an effort to correct what it viewed as the residual market failures caused by past feudal land ownership structures on the Hawaiian islands.[66]

The Land Act's condemnation structure operates by allowing individual tenants[67] "living on single-family residential lots within developmental tracts at least five acres in size … to ask the Hawaii Housing Authority ("HHA") to condemn the property on which they live."[68] When twenty-five eligible tenants within a given area make such a request, a hearing is held to determine whether they are allowed to move forward with condemnation.[69] If so, the Land Act allows the HHA to condemn the property, thus taking it from the current owner and allowing the possessor/lessee of the property to take title and pay the required just compensation.

When considered in light of the Takings Clause, the Supreme Court unanimously found the Land Act constitutional. In reaffirming its deferential approach founded under *Berman*, the *Midkiff* Court explained that the judiciary would not substitute its judgment for that of the legislature "as to what constitutes a public use."[70] In so doing however, the Court added much to the already expansive public use limitation by implying that the word "use" was too restrictive, and should instead be read to merely require that the taking justify a "public purpose."[71]

This interpretation again circumvents arguments that suggest an action cannot be a public use because the taken property returns to some other form of private ownership. This rationale allowed the *Midkiff* Court to dismiss arguments by the aggrieved condemnee-landowners who objected based on the fact that the property ended up in the private hands of the lessee/possessors, and no other members of the public. A public purpose was served because the taking alleviated the negative effects the land oligopoly had on "the normal functioning of the State's residential land market [which had] forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes."[72]

Finally, one of the Supreme Court's most recent applications of the public use requirement is displayed in *Kelo v. City of New London, Conn*.[73] In that case, the city of New London was experiencing economic downturn and flight due in large part to escalating local unemployment rates.[74] Poor economic conditions caused state and local officials to target the area for "economic revitalization" programs.[75] Enter Pfizer, a large pharmaceutical company in search of a home for its new 90-acre, $300 million dollar research facility.[76] The match would have seemed ideal to the city of New London. The city was able to purchase most of the land needed, but had to use forced condemnation to acquire property held by a few holdout homeowners.[77] The U.S. Supreme Court affirmed the State Court's determination that the New London revitalization project was within due bounds of the

64 467 U.S. 229 (1984).

65 Haw.Rev.Stat., ch. 516.

66 *Midkiff*, at 232 ("[A]fter extensive hearings, the Hawaii Legislature discovered that, while the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. … The legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.") (Internal citations omitted).

67 The term "tenants" appropriately describes the disadvantaged residents the Land Act meant to help; these "tenants" owned the house in which they lived, but because of the feudal land ownership scheme (see note 66, supra), most were forced to lease or rent the real estate upon which their home had been built.

68 *Id.* at 233.

69 *Id.*

70 *Id.* at 241.

71 *Id.* ("[W]here the exercise of the eminent domain power is rationally related to a conceivable *public purpose*, the Court has never held a compensated taking to be proscribed by the Public Use Clause.") (emphasis added).

72 *Id.* at 242.

73 545 U.S. 469 (2005).

74 *Id.*

75 *Id.* at 473.

76 *Id.*

77 *Id* at 475.

public use requirement.[78]

The Supreme Court's decisions in *Berman*, *Midkiff*, and *Kelo* are instrumental under the public use requirement in at least two key respects: (1) the Supreme Court acknowledges its retreat from the formerly conservative definition of "public use," by clearly affirming that the language now merely necessitates a "public purpose;"[79] and (2) in determining what a public purpose is, the condemning authority is given much deference.[80]

But even the Court's seemingly unrestrained application of the new public purpose doctrine is still arguably limited by the repeated affirmation that a sovereign "would no doubt be forbidden from taking … land *for the purpose of* conferring a private benefit on a particular private party."[81] Though the limitation seems commanding, rare is the case in which the judiciary is willing to identify a purely private taking. As long as some public purpose is articulable, much deference is given to the sovereign's motives.

Just Compensation

The final resistance from condemnees is usually based on challenges to the valuation of "just compensation."[82] Unlike the deference given when identifying a public purpose, the just compensation inquiry is contextually fact-based, and is left entirely to the judicial process.[83]

By way of interpretation, the phrase "just compensation" is a mandatory remedy that equates to the fair market value of taken property,[84] at the time of the taking.[85] Based on this standard, the property owner must be paid what a willing buyer would pay a willing seller at the time the taking occurs.[86] Further, it is the condemnee's loss, and not the takers gain that is the proper valuation of the taken property.[87] Deviation from this measure is appropriate only when market value is too difficult to determine, or its measure would work as an injustice on the owner, or the public.[88]

Takings Law as Applied to the Plan

The most forward and prominent objections to the Plan are based on assertions of improper eminent domain use.[89] But as explained above, expansive applications of sovereign condemnation authority are alive and widely recognized by the legal community, and are applicable to intangible property such as mortgages. Primarily then, these objections come not from legal experts, but from (a) economic and political theorists fundamentally opposed to redistributive social policies, and (b) parties heavily involved in secondary market finance who would actually be affected by the Plan. When viewed in this light, most of these objections are properly addressed through the holistic policies behind the Plan itself, but have no place in a pure legal authority analysis.

78 *Id.* at 489-90.

79 *Id.* at 479. "[T]his 'Court long ago rejected any literal requirement that condemned property be put into use for the general public.'" *Id.* "[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as "public purpose." *Id.* at 480.

80 *Id.* at 483-84.

81 *Id.* (emphasis added); *See also Midkiff,* 467 U.S., at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void[.]").

82 U.S. Const. amend. V.

83 *Monongahela Nav. Co. v. U.S.,* 148 U.S. at 327 ("The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial.").

84 Marisa Fegan, *Just Compensation Standards and Eminent Domain Injustices: An Underexamined Connection and Opportunity for Reform*, 6 Conn. Pub. Int. L.J. 269, 272 (2007) ("Thirty years [after *Monongahela*], in Olson v. United States, the Supreme Court articulated the 'equivalency' discussed in Monongahela as fair market value.").

85 *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984); *Olson v. United States,* 292 U.S. 246, 255 (1934).

86 *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9 (1984).

87 *United States v. Causby*, 328 U.S. 256, 261 (1946).

88 *50 Acres of Land*, 469 U.S. at 25.

89 *See* Lawrence Kudlow, *The Kudlow Repot:* Interview with Robert Hockett (Aug. 8, 2013) *available at* http://video.cnbc.com/gallery/?video=3000189052 (last visited Dec. 10, 2014).

Because the Plan itself affirmatively advocates for the use of eminent domain, a taking is definitively occurring.[90] This leaves only three issues for consideration: (1) whether a sufficient pubic use is effectuated, (2) whether a purely private taking would occur, and (3) how to properly valuate just compensation.

Public Use

As the Supreme Court has consistently reaffirmed since its *Berman* decision, legislatures are given almost complete deference when defining public use.[91] Moreover, public use does not necessarily even mean "use" in the literal sense, but instead merely requires a proffered public purpose. Two of the most commonly relied on purposes are those discussed in connection with *Berman,* and *Kelo*: reversing and/or preventing blight, and economic development.

The Plan likely meets both purposes. Reversing and preventing blight is largely beneficial for the local public, while economic development serves both local and national economies. As Professor Hockett himself explains, "each municipality will preserve neighborhood integrity, property values, and the revenue base from which it funds services. [The Plan] keeps residents in their own homes—still owning and paying on them rather than falling into default and foreclosure …."[92]

To meet the public use requirement, it is not even necessary that the Plan's stated goals be met if the exercising authority could have rationally believed that they would be at the outset.[93] The Plan therefore meets the low burden, merely by virtue of its asserted purpose.

Purely Private Taking

Though the judiciary consistently affirms that takings of a purely private nature would be an unconstitutional exercise of eminent domain authority, a case with facts as individualist-based as those in *Midkiff* suggest that a purely private taking would rarely, if ever be identified. In that case, even giving fee simple title of each lot to a single person was not a purely private taking because the scheme therein was utilized by more than just one person, and necessarily provided communal economic benefits. When viewed this way, the Court implies that a purely private taking could *only* occur when the deferential public use requirement is not itself satisfied.[94]

Because by their very terms MBS require multiple interest owners in a given asset, it is rarely, if ever possible to assert that the taken mortgages are conveyed to a single private owner if they are thereafter securitized according to secondary market norms as the Plan asserts they will be. This distributive ownership structure is far less offensive to the purely private taking analysis as applied to the facts of *Midkiff*, where fee simple title ended up in the hands of individual private owners.

Moreover, where the economic benefits in cases like *Berman*, *Midkiff,* and *Kelo* were largely isolated to a given geographic area, Hockett's Plan touts both local and nationwide economic relief through reduced foreclosures. In sum, though it may seem like a purely private taking to a layperson, legal precedent dictates otherwise.

90 *See generally* Hockett, *It Takes a Village, supra* note 4, at 151.

91 In this context, the local municipality is the equivalent of a "legislature" because they have the ability to invoke condemnation authority.

92 *Id.* at 156-57.

93 *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671–672 (1981) ("Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if ... [the state] Legislature rationally could have believed that the [Act] would promote its objective.").

94 *Midkiff*, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

Just Compensation

Most problematic for the Plan is the valuation of just compensation. To be viable, Hockett's Plan requires the taking authority to purchase the loans for something much less than 100% of the actual market value of the underlying home (likely around 80%). This way, after factoring in transaction costs and MRP's fees, when the new mortgage arrangement is worked out between MRP, the local condemning authority, and the homeowner, the new mortgage loan amount will be closer to 100-110% of the home's actual market value; which is still substantially less than the underwater mortgage was when taken (the underwater loan could have been as high as 300% of the home's value).[95]

Consider a hypothetical[96] based on a single home:

- Home X has a current market value of $200,000;
- Due to a variety of factors, the mortgage on home X is currently underwater, with its mortgagor owing a total of $300,000. This can also be stated as saying the investors who own the mortgage have a $300,000 expectation interest based on the face value of the loan;
- For Hockett's Plan to work, MRP would need to be able to initially *take* the loan from the investors for approximately $160,000;
- When re-mortgaged and re-securitized, the new loan on the home X will have a face value of approximately $200-210,000.

Examples like this one illustrate the concerns of many critics. Facially, it seems improbable that the Plan can both pay a constitutionally fair amount of just compensation, and create the growth and stability that it posits. Assuming (as discussed supra) that this is an appropriate exercise of eminent domain authority, can MRP and the local condemning authority show that the $300,000 face-valued mortgage is actually only worth $160,000 in its current state?

Speaking in practical terms, a mortgagee will always have the right to foreclose upon default and receive the value of the collateral. In our hypothetical, this would yield the securitized investors $200,000., less the costs of foreclosure.[97]

Because just compensation is based on the value of an asset when taken (as opposed to its potential future value), the relevant question is "whether the loans' expected value can be raised sufficiently to offset the write-downs and associated transaction costs."[98] Hockett himself proposes two avenues to calculate the appropriate amount of compensation.[99]

Avenue A equates mortgage-backed securities with market-traded bonds, and suggests that since bonds are traded at a discount from their face value, mortgage-backed securities should be as well.[100] In some cases, "[w]here mortgage-backed securities associated with a particular loan pool or analogous pools trade at a discount,"[101] the fair market valuation method would be the same as it is for real property. One would need to look to similarly situated securities to see what they are trading at when the taking occurs.[102] But it is unlikely

95 *See* Panel Review with Hockett & Vlahoplus, *supra* note 30.

96 Hypothetical and criticisms are derived from Matt Levine, *Mortgage Investors Don't Want Richmond to Take Away Their Mortgages* (Aug. 8, 2013) *available at* http://dealbreaker.com/2013/08/mortgage-investors-dont-want-richmond-to-take-away-their-mortgages/ (last visited Dec. 11, 2014).

97 This is somewhat of a crude example; when a foreclosure on a MBS loan occurs, the distribution of funds is far more complicated, and would need to take into account the variously owned interests in the loan, and the contracted management fees of the loan servicer.

98 Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 Current Issues in Econ. & Fin., no. 5, 2013, at 1 (Hereinafter "Hockett, Paying Paul").

99 *Id.*

100 *Id.*

101 *Id.*

102 It is worth noting that because the trading prices for securities can fluctuate greatly from one day to the next (unlike real estate), there exists the potential for valuation manipulation (*aka foul play*) depending on *when* the taking occurs.

that this method could prove consistently effective because the loans at issue will vary drastically in their terms, unlike market-traded bonds.

Alternatively, when the data necessary for avenue A is unavailable, avenue B suggests a work-back method.[103] Though not specifically formulated, it purports to rely on annual Fannie Mae and Freddie Mac publications containing anticipated default rates for PLS underwater mortgages, costs of foreclosure and associated recovery rates, and other "discount rates."[104]

Of his two valuation methods, Hockett's first approach would forgo the result-oriented valuation analysis inherent in the above hypothetical and simply look to see what similarly situated mortgage-backed securities are trading at, and letting the numbers naturally fall where they do. Such an approach makes one wonder if mortgage-backed securities investors make cost-benefit decisions based on likelihood of borrower default and resulting remedies when they select investments, or if they simply look to see which type of loans are performing and which are not. The fluidity of the securities market suggests the latter.

Hockett's second model takes into consideration a variety of externalities such as: (a) the likelihood of default based on Fannie Mae and Freddie Mac projections, which presumably consider various aspects of the underlying loan including: borrower debt-to-income ratios, the percentage of loan-to-value (our underwater percentage), and borrower payment history just to name a few; and (b) the likely remedy for the investor after said default, taking into account the various fees, and associated transaction and legal costs associated with foreclosure.

In an explicit opinion the Fair Housing Finance Agency (FHFA) rejects both approaches; the former because it looks to general pool data instead of taking into account individual loans on a case-by-case assessment, and the latter because a calculation of the likelihood of default would be largely fallible in a rising market. [105]

By way of a summary, Hockett's Plan is legally sound under Supreme Court takings jurisprudence, but practical hurdles may yet limit its effectiveness. The associated costs with litigating just compensation values alone may prove crippling for the Plan's feasibility. Moreover, facial legality will not necessarily dissuade investors with fundamental objections to this type of condemnation action from raising costly legal setbacks for MRP and local municipalities.[106]

Contract Clause Concerns

Notwithstanding what appears to be a valid exercise of eminent domain authority, Hockett's Plan may also have to overcome challenges based on a violation of the Constitution's Contracts Clause.[107] It provides that "[n]o State shall … pass any … Law impairing the Obligation of Contracts …."[108] Oddly enough, the Contracts Clause was included in the Constitution primarily to promote economic stability by preventing further state-enacted debtor relief legislation after the Revolutionary War.[109] Opponents of MRP and Hockett's Plan are therefore not out of line to assert that the Plan is the very kind of action that drove the Constitution's framers to include the Contract Clause in the first place.[110]

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103 *Id.*

104 *Id.*

105 152-599 *FHFA Takes a Strong Position Against Eminent Domain Plans,* (Aug. 8, 2013).

106 *See* Complaint for Declaratory and Injunctive Relief, CV 13 3663, U.S. District Ct. for the Northern District of California (Aug. 7, 20a13).

107 While the Supreme Court has noted that "the Contract Clause has never been thought to *protect against* the exercise of the power of eminent domain" *Midkiff,* 467 U.S. at 243 n. 6 (emphasis added), it is a non-sequitur that such an action would be immune from attack as a violation of the Contracts Clause.

108 U.S. Const. art. I. § 10, cl, 1.

109 Richard A. Epstein, *Toward a Revitalization of the Contract Clause,* 51 U. Chi. L. Rev. 703, 706 (1984).

110 "The goal and effect of the MRP proposal is precisely the danger contemplated by the Contracts Clause: the abrogation of valid debts because a local jurisdiction desires to reduce the debt born by local residents."

Although it was one of the strongest constitutional limitations on state legislation in our country's youth,[111] the Contract Clause has had limited reach in the last century. When it began to regress on the issue, the Supreme Court opined that "literalism in the construction of the contract clause … would make it destructive of the public interest by depriving the State of its prerogative of self-protection."[112] In short, the Court ultimately concluded that giving true literal effect to the clause's language could hamper or destroy economic growth and necessary regulation.

At any rate, a modern Contract Clause analysis first requires a determination of whether and to what degree the challenged action imposes a "substantial impairment [on] a contractual relationship."[113] The impairment's severity correspondingly increases the level of judicial scrutiny.[114]

Several of the Plan's finer points potentially heighten the level of contractual impairment. Consider the following: (a) The Plan seeks not to limit or alter the terms of the various underlying contracts; it seeks to invalidate them entirely. (b) MBS investors bought into the various securitized units expecting that they would perform according to market standards and the terms of their contracts over a period of years, or that they would fail and give them a legal remedy, not with the expectation of receiving a grossly discounted lump sum at some indeterminable point in the future. So not only are the terms of the investors' contracts themselves invalidated, the effects on the investors are much different than the risks and benefits that they initially bargained for. And (c), the level of impairment is particularly heightened when considering the structure of the secondary mortgage market itself. On this point, not only would the Plan invalidate the investors' contracts, it would also invalidate homeowners' contracts, loan servicers' contracts, insurers' policy contracts, loan originators' contracts with secondary market brokers, and the contracts of any other related parties that may have a vested interest in a mortgage. The complicated secondary market's structure that calls for a "collective action solution" as Professor Hockett says, also creates an extremely high level of contractual impairment under the Contract Clause analysis.[115]

Second, if (or when) the challenged action is deemed a substantial impairment, the analysis looks to the invalidating cause (here the condemnation), to determine whether it proposes a "significant and legitimate public purpose."[116] As discussed *supra* in connection with takings jurisprudence, the Plan meets this requirement.

Finally, once a legitimate public purpose is identified, the judiciary will determine whether the reallocation of "the rights and responsibilities of contracting parties is based upon reasonable conditions" and is of a character responsively appropriate to the underlying public goal.[117]

This last prong is the most problematic for the Plan. While it is similar to the Supreme Court's commonly articulated Rational Basis Test, the "significant impairment" considerations listed above provides the third prong with a certain amount of contextual flexibility. Coupling this necessary flexibility with the fact that the Supreme Court has not squarely applied the third prong since 1983 leaves future litigation in this area somewhat uncertain. The result would likely hinge on a judicially imposed policy question about the appropriateness of using the Plan to invalidate all of the contractual obligations involved in the underlying transactions.

Walter Dellinger, Jonathan Hacker, Matthew Close, *San Bernardino Eminent Domain Proposal*, 67 Consumer Fin. L.Q. Rep. 164, 169 (2013).

111 *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

112 *Id. Quoting W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934). *But see* James Madison, *The Federalist No. 44* ("[L]aws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation.").

113 *Allied Structural Steel*, 438 U.S. at 244.

114 *Energy Reserves Grp. Inc. v. Kansas Power & Light Co*., 459 U.S. 400, 411 (1983).

115 *See generally,* Hockett, *It Takes a Village, supra* note 4.

116 *Energy Reserves*, 459 U.S. at 411.

117 *Id. Quoting U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977).

Dormant Commerce Clause Concerns

Facially the Commerce Clause is simply an affirmative grant of power to Congress, allowing it to "regulate Commerce with foreign Nations, and among the several States …."[118] However, as arguably intended, [119] and now formally recognized,[120] the Dormant or Negative Commerce Clause provides an offsetting reciprocal limitation on a state's ability to regulate commerce.

Though the mechanics of the clause can invalidate state actions in a variety of ways, the Dormant Commerce Clause Doctrine as it applies to the Plan is articulable as follows: where the state action or law "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate [commerce] are only incidental, it will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[121] If a "legitimate public purpose" is acknowledged, then resort is had to a balancing test; the burden that will be permitted is dependent upon (a) the nature of the local interest, and (b) whether or not it could be alternatively implemented with a less intrusive impact on interstate commerce.[122]

As the Plan's creation centered on remedying both nationwide and local market defects, its local public benefits are largely self-explanatory. The less-clear, and thus more likely litigated issue will be an application of the so-called balancing test.

Though somewhat circular, for purposes of the balancing test the nature of the local interest should be considered aside from the Plan's national benefits because foundationally, the Commerce Clause itself deals with *interstate* regulations. Local benefits include economic stability through reduced quantities of foreclosures within a given area, reduced strain on the local authorities who facilitate the foreclosure process, consistent revenue through local property taxes, and *potentially* keeping a fair number of people in their homes (assuming the Plan works as intended).

Alternatively, whether or not there are other less restrictive means available that could achieve the same results necessarily incorporates considerations of the negative effects the Plan would have on interstate commerce. These include: litigation costs borne by affected parties domiciled in other jurisdictions; instability in both domestic (nationwide) and foreign investment markets; responsive mortgage industry cost increases to compensate for uncertainty; chilled nationwide lending; and the concernedly potential overlap between federal regulation of the primary and secondary mortgage markets, and state efforts to circumvent such federal regulation.

Though balancing these considerations is left to the judiciary, another governmental authority—the FHFA—has weighed in.

> Where a federal interest exists and is established, that interest would preempt a conflicting state interest. Here, the interest of the Conservator to preserve and conserve assets and to operate the Enterprises in conservatorships would be superior to the interest of a locality to alter the terms of a contract held by the Enterprises either through their ownership of a mortgage-backed security, their guarantee of a pool of mortgages or their ownership of a mortgage held in portfolio. As regulator for the Home Loan Banks, entrusted with safety and soundness responsibilities by federal law, concern would exist for any de-stabilization of investments held by the Banks as well as for values for collateral pledged to secure advances. [123]

118 U.S. Const. Art. I, § 8, cl. 3.

119 "Mr. Madison. Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but they seem to exclude this power of the States— They may certainly be restrained by Treaty." 2 The Records of the Federal Convention of 1787 (Max Farrand ed., 1911).

120 *See generally* 41 A.L.R. Fed. 2d 1 (Originally published in 2009).

121 *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).

122 *Id.*

123 *See* FHFA Opinion, *supra,* note 105.

While not dispositive, strong opposition by federal agencies who regulate housing and finance would certainly have a persuasive effect on judicial opinion. Also beneficial for the Plan's opponents is the quantitatively limited, but qualitatively strong precedent.

Only one case, *City of Oakland v Oakland Raiders,*[124] has analyzed the issues raised when local eminent domain use affects interstate commerce. In that case, the City of Oakland attempted to use its condemnation power to take intangible property—the Oakland Raiders Football franchise. In applying the balancing test discussed above, the Court agreed that because professional football is "such a nationwide business, and so completely involved in interstate commerce that acquisition of a franchise by an individual state through eminent domain would impermissibly burden interstate commerce."[125]

Like national football, but far more complex, the MBS market is so inexplicably intertwined with interstate commerce that the burdens it imposes likely outweigh the local putative benefits. Unlike the moderate interpretive hurdles that the Plan faces when addressing Contract Clause challenges, the Dormant Commerce Clause may be more probative and influential because it allows a court to consider the Plan's practical marketplace ramifications.

Conclusion

The legal hurdles caused by the secondary mortgage market's structure, including the securitization process and the resulting modification limitations of PSAs make a collective-action solution like the one Robert Hockett proposes an attractive option to those who fear the negative consequences associated with further underwater loan default and foreclosure.

Leading the Plan's implementation charge is the small community of Richmond, California.[126] Richmond has collaborated with the San Francisco-based MRP to create the Richmond CARES (Community Action to Restore Equity and Stability) program through which it will facilitate the Plan's goals.[127] Though other municipalities have expressed interest in the Plan (including Irvington, N.J. and El Monte, C.A.), all seem to be waiting on Richmond, making it a nationwide test case.[128]

At this point in time, Richmond has preliminarily selected 624 loans, and has tried to negotiate with the servicers/trustees of the loans to attempt buying them outside of Court first (presumably at a steep discount). Richmond has not yet actually begun condemnation proceedings.[129]

Citing the foregoing constitutional provisions, several major secondary mortgage market players have filed suit against Richmond in response to its preliminary actions.[130] Wells Fargo, the Bank of New York Mellon, and several others filed an action for Declaratory Relief to declare the Plan unconstitutional, coupled with a Request for an Injunction to prevent the City of Richmond from moving ahead with condemnation proceedings.[131] The filed-in Court declined to decide the issues presented however, and instead granted Richmond's Motion to Dismiss because the Plaintiff's Complaint was not yet "ripe" for suit.[132]

124 174 Cal. App. 3d 414, 419 (1985). ("[P]laintiff contends exercise of eminent domain power can never violate the commerce clause and notes that no previous case has precluded an eminent domain taking under that constitutional provision. The lack of such case law, however, is unremarkable; it serves merely to point out that eminent domain cases have traditionally concerned real property, rarely implicating commerce clause considerations which deal primarily with products in the flow of interstate commerce. Whether the commerce clause precludes taking by eminent domain of intangible property, however, is a novel question posed, it seems, for the first time in this case.")

125 *Id* at 420.

126 *See* Shaila Dewan, *Eminent Domain: A Long Shot Against Blight,* New York Times' Business Day (Jan. 11, 2014), available at http://www.nytimes.com/2014/01/12/business/in-richmond-california-a-long-shot-against-blight.html?_r=2 (last visited March 25, 2015) (hereinafter Dewan, *A long shot*).

127 Save Richmond Homes, http://www.saverichmondhomes.org/learn_more (last visited March 25, 2015);

128 Dewan, A long Shot, *supra* note 126.

129 *See* Panel Review with Hockett & Vlahoplus, *supra* note 30; *Wells Fargo Bank, National Association et al. v. City of Richmond et al.*, No. CV-13-03663-CRB (N.D. Cal., filed Aug. 7, 2013).

130 *Id.*

131 *Id.*

132 *Id.*; "A claim is not ripe if it is based on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"

While Professor Hockett is not dissuaded, calling the Banks' suit a "bluff and intimidate" tactic,[133] Richmond has nonetheless temporarily put the Plan on hold while it explores other options.

Although the Plan is legally sound under current takings jurisprudence, hurdles including costly challenges based on valuation, and facial legal challenges based on arguable Contracts and Commerce Clause violations may absolve the Plan's viability—especially given the comparative resources of big bank-opponents. Moreover, such an aggressive solution may have seemed necessary in the height of the foreclosure crisis, but may no longer be agreeable in what most analysts deem, a recovering market.

Aluminum Extrusions Fair Trade Comm. v. United States, 968 F. Supp. 2d 1244, 1254 (Ct. Int'l Trade 2014).

133 Robert Hockett, *Sham Suits and Securitizers: Why the lawsuits by several major banks against the City of Richmond seeking declaratory and injunctive relief have no merit* (Sep. 12, 2013), available at http://mortgageresolution.com/mrp-blog-0 (last visited March 25, 2015).