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Faced with a severe economic contraction, the federal government implemented a nationwide bailout of the banking system to prevent the Great Recession from trumping the Great Depression as the worst economic downturn in the history of the United States.[8]

A. Status of the Housing Market in 2012

By 2012, home prices were no longer plummeting, but the housing market had by no means regained its pre-2007 level.[9] The price of houses in the country as a whole remained at 33 percent below their 2006 values.[10] More than $7 trillion in home equity was lost, an amount that represented more than half of the aggregate home equity that existed in 2006.[11]

As a consequence of the losses in home values, millions of homeowners who had purchased their homes near the peak of the housing "bubble" were "underwater"—they owed more than their homes were worth.[12] In early 2012, about 12 million homeowners nationwide were underwater on their mortgages, representing about 20 percent of all homes subject to a mortgage.[13] In some states, nearly half of all mortgages were underwater.[14] Middle-income families suffered particularly dramatic declines in the value of their home equity relative to their income.[15] Those homeowners who lost their jobs or took wage cuts during the Great Recession, and were unable to stay current on their mortgages, were also unable to sell their homes for the full value of the mortgage.[16] Foreclosure and short-sale rates dramatically increased as a result.[17]

It is against this backdrop that state and local governments in 2012 began to consider using the power of eminent domain to

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8. *See generally* Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 437 (2011) (describing the banking system bailout).

9. *See* FEDERAL RESERVE WHITE PAPER, *supra* note 1, at 1.

10. *Id.* at 3.

11. *Id.* "Home equity" is the difference between the value of the home itself and the amount of mortgage debt owed on the property. *Id.* Home equity can be either positive, where the home is worth more than the mortgage debt owed on it, or negative, where the debt owed under one or more mortgage contracts exceeds the value of the property that secures the contract(s) (commonly known as an "underwater mortgage"). *Id.* at 3–4.

12. *Id.* at 4.

13. *Id.*

14. *Id.*

15. *Id.*

16. *See id.* at 5.

17. *See id.* at 8.

C. FHFA Response to the Program

The JPA Entities' plan and their collaboration with MRP became the focus of national attention. On August 9, 2012, the Federal Housing Finance Agency (FHFA) submitted a request for comments on the use of eminent domain to revise existing financial contracts.[42] The request noted that "FHFA has significant concerns with programs that could have a chilling effect on the extension of credit to borrowers."[43]

FHFA's concerns stem in part from its oversight of Fannie Mae and Freddie Mac (the Enterprises).[44] The Enterprises operate in FHFA conservatorships to support the national housing market.[45] The MRP program could affect Enterprise holdings directly, as well as indirectly, through the market in which they operate, because "[t]he Enterprises purchase a large portion of the mortgages originated in the United States and they hold private label mortgage backed securities containing pools of non-Enterprise loans."[46] The FHFA also oversees the Federal Home Loan Banks (Banks).[47] According to the request for comment, "FHFA has significant concerns about the use s

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owner.[54]

Because securitized mortgages, the very ones targeted by the Program, are traded regularly in interstate commerce, the Commerce Clause[55]

> authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end has the result of modifying or abrogating contracts already in effect.[69]

Importantly, "the r

The United States Supreme Court has explained the necessity of the power of eminent domain:

> The power of eminent domain is essential to a sovereign government. If the [Government] has determined its need for certain land for a public use that is within its . . . sovereign powers, it must have the right to appropriate that land. Otherwise, the owner of the land, by refusing to sell it or by consenting to do so only at an unreasonably high price, is enabled to subordinate the constitutional powers of [that government] to his personal will. The Fifth Amendment, in turn, provides him with important protection against abuse of the power of eminent domain by the . . . Government.[85]

Here the Court set out the two policy reasons that require that sovereign governments retain the power of eminent domain: (1) the power to force a sale to occur at all, and (2) the power to prevent the seller from demanding an unreasonably high price. The Fifth Amendment limits that inherent power:

> The provision found in the fifth amendment to the federal constitution, and in the constitutions of the several sta

Fifth Amendment. A use does not "fail to be public upon the ground that the immediate enjoyment of it is limited to a small group or even

to be put in as good position pecuniarily as he would have occupied if his property had not been taken."[124] Although there are common measures employed to determine just compensation, each measure should be evaluated against the particulars of the case in order to ensure that the compensation is "full" and "perfect."

Just compensation normally is measured by fair market value.[125] To arrive at fair market value, the Supreme Court "has repeatedly held that just compensation normally is to be measured by the market value of the property at the time of the taking contemporaneously paid in money."[126] This means that "the valuation of property which has been taken must be calculated as of the time of the taking."[127] The rationale for using market value as the measure of just compensation is that market value "achieves a fair 'balance between the public's need and the claimant's loss.'"[128]

The fair market value requirement does not guarantee the property owner will recover all of the money that he has spent on his property; the fair market value "may be more or less than the owner's investment. [The owner] may have acquired the property for less than its worth or . . . may have paid a speculative and exorbitant price. Its value may have changed substantially while held by [the owner]."[129] The underlying principle of the market value rule is that "[the owner] must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and Federal Constitutions."[130]

The U.S. Constitution guarantees to the owners of property the right to a fair *process* with respect to the determination of just compensation. The process established by the States

> is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just

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

125. *See, e.g.*, United States v. 50 Acres of Land, 469 U.S. 24, 25–26 (1984).

126. *Id.* at 29 (internal quotation marks omitted).

127. *First English*, 482 U.S. at 320.

128. *50 Acres of Land*, 469 U.S. at 33 (citing United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402 (1949)).

129. Olson v. United States, 292 U.S. 246, 255 (1934).

130. *Id.*

> manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon.[131]

This standard defers to a state's determination of just compensation. The United States Supreme Court, then, will not necessarily engage in the fact-bound inquiry of determining whether the compensation paid to the owners of mortgages is "just," but instead will look merely to see if the property owner was afforded notice and an opportunity to offer evidence of value. Although the amount of compensation is a question of fact, the method by which value is determined is a question of law,[132] and because of the potential national economic ramifications of multiple jurisdictions condemning mortgages, the Supreme Court could take up the question of which valuation methods are permissible. At least in the context of regulatory takings, the Supreme Court has recognized that "investment-backed expectations" are protected by the Fifth Amendment differently than other interests.[133]

Deviation from the market value measure of just compensation "has been required only when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public."[134] The "manifest injustice" standard is a stringent one: the fact that, for example, the cost to acquire or build a substitute facility would greatly exceed the market value of the condemned facility does not inflict the kind of "manifest injustice" that justifies departure from the market value method.[135] To determine the appropriate valuation method for the property at issue, "the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"[136]

Where a government entity seeks to condemn contracts that

131. United States v. Jones, 109 U.S. 513, 519 (1883).

132. *Cf.* United States v. Miller, 317 U.S. 369, 380 (1943) ("questions of substantive right—

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MRP must rely on the requirement that property must be valued at the time of condemnation if, as it promises, the mortgages can be rewritten for a lower value than their original face value, permit MRP to collect a fee, and result in a return for the investors who finance the project, all without the use of tax payer funds.[144] If the condemning authority must pay face value for condemned contracts, then tax payer funds will be necessary to reduce the principal amount of the loan and to pay MRP's fee.

the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken."[152] To determine whether the Dormant Commerce Clause prohibits a state from acting, the "first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce."[153] In the context of the Dormant Commerce Clause, "'discrimination' simply means differential treatment of in- and out-of-state economic interests that benefits the former and burdens the latter."[154]

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certainly qualify as a public purpose; it is the means (use of eminent domain to pay fair market value for the mortgage contracts) that the courts are more likely to prevent.

Finally, valuing underwater mortgage contracts at "current market value" arguably would not result in the payment of "just compensation" as the Fifth Amendment requires. Payment of "market value" would not only result in an inequitable windfall for the condemning authority, but it would also constitute a private burden on the investment institutions that would be forced to realize their losses and forgo the benefit they otherwise would obtain when the market recovers. Theoretically, "just compensation" would accurately reflect the likelihood that a particular mortgage will be paid in full under the terms of the contract. To arrive at "current market value" for each property, courts may have to delve into the likelihood that a particular homeowner will be able to make payments under the contract terms as well as the probability that a particular property will recover its value and when that might happen. Such considerations would no doubt consume considerable judicial or

American people.

The just compensation prong of the Fifth Amendment Takings Clause provides the strongest argument against the Program. States are sovereigns in our federal system, and the courts are generally

considerable uncertainty into the national mortgage market, and would allow states to receive an inequitable windfall at the expense of one (often out-of-state) class of parties to those contracts. To permit states to condemn mortgage contracts without also condemning the underlying property only if the state pays at or near face value of the contract would reserve to the states their sovereign power to control property within their jurisdiction, secure to the affected parties "just compensation" as required by the Constitution, and ensure that the public pays for public benefits, rather than disfavored private parties.