Condemning Fair Market Value: An Appraisal of Eminent Domain's Just Compensation

Paige Boldt

Follow this and additional works at: https://scholarship.law.tamu.edu/txwes-jrpl

Recommended Citation

This Comment is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas Wesleyan Journal of Real Property Law by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.
CONDEMNING FAIR MARKET VALUE:
AN APPRAISAL OF EMINENT DOMAIN’S
“JUST COMPENSATION”

Paige Boldt

I. INTRODUCTION .............................................. 131
II. BACKGROUND ON EMINENT DOMAIN AND JUST
COMPENSATION ........................................... 134
   A. Origins of Eminent Domain in the American Federal
      System .............................................. 136
   B. Eminent Domain Origins in the Texas System ........ 137
   C. Modern Changes in Understanding of Public Use .... 139
   D. Requirements of Just Compensation ................ 142
   E. Texas’ Adequate Compensation ...................... 148
   F. Recent Texas Eminent Domain Reform ............ 150
   G. The Texas Condemnation Process .................. 153
   H. States Legislating a More “Just Compensation” ..... 155
I. Current Status of Intangible Values in the
   Calculation of Just Compensation .................... 157
III. ANALYSIS .................................................... 160
   A. Legislating Compensating Relocation and
      Comparable Housing ............................... 160
   B. Legislating Rolling Property Tax Exemption ....... 162
   C. Legislating Condemnation Premiums for Private
      Entities .............................................. 164
IV. CONCLUSION ............................................... 168

I. INTRODUCTION

In recent years, state legislatures have taken steps to reform eminent domain law, including changes to the requirements of “just compensation.” However, no state has enacted legislation where the subjective value of an individual’s home would be considered part of landowners’ just compensation or solving problems related to private entities wielding eminent domain authority without oversight. This Comment examines whether Texas legislators should consider factors in addition to the fair market value of the property, such as subjective value, tax exemptions, or damages for relocation, when determining

† I am grateful for the hard work and the opportunity provided by the Texas Wesleyan Real Property Journal’s inaugural board and staff as well as Professor Mulvaney for his assistance and insight in writing this comment. I would also like to thank the main men in my life for their sacrifices over the past three years: my husband for his encouragement and perspective; my son for his ceaseless joy and welcomed distractions; and my father, Chelton Ammons, for his constant support, clever commentary, and without whom none of this would have been possible.

Author Bio: J.D., Texas Wesleyan School of Law; B.A., Southwestern University.

DOI: https://doi.org/10.37419/TWJRPL.V1.I1.6
what constitutes just compensation. It also recommends that Texas legislators implement a premium for private entities that have been granted eminent domain authority; this premium would either be given to the landowners or set aside to provide legal counsel to condemnees.

Property owners develop a special attachment to the land they own and improve. More than having sentimental value, which is especially prevalent in situations when property has been in a family for generations, landowners frequently associate personal dignity and social status with homeownership. This type of loss is not addressed when fair market value dictates “just compensation,” which is the situation in the state of Texas and in most states across the country. It has become a self-evident truth that landowners are not completely compensated and “the most striking feature of American compensation law... is that just compensation means incomplete compensation,” however state legislatures are not without an ability to meet subjective needs of citizens who are displaced.1 The other half of the constitutional restraint of eminent domain, the public use doctrine, has been expanded over the past half-century, giving the legislature the power of eminent domain on a broader scale,2 thus providing an increase in the number and ability of eminent domain authorities with no balancing increase to the landowner’s ability to fight back.

The Fifth Amendment’s Takings Clause attempts to balance the goals of private ownership and the government’s power to regulate. “Although a familiar battleground, valuing just compensation turns out to be largely under-studied, but essential for defining the extent of constitutional protection for private property.”3 Despite courts’ persistent warning that “just compensation” should place owners in the same pecuniary position they would have occupied but-for the governmental action, current compensation rules exclude whole categories of damages caused by government takings of private property.4 Just compensation, measured by the fair market value of the property taken, excludes, for example, consequential damages and compensation for any of the real but subjective harms suffered by the property

4. Olson v. United States, 292 U.S. 246, 255 (1934) ("[T]he property owner] is entitled to be put in as good a position peculiarly as if his property had not been taken.")
owner. Part II of this Comment discusses the origins and development of eminent domain in the United States and Texas as well as briefly exploring the judicial developments in the interpretation of public use in the United States and Texas. As discussed below, case law has articulated the breadth of the public use definition to include utility and development plans that are for public purposes. This breadth and delegation of authority encompasses a wider range of property that may be taken than originally conceived without any sort of balancing growth in protection for landowners. Part II also discusses the origins, modern development and process of compensating landowners for their condemned property.

Part III analyzes the fair market value calculation of just compensation and its failure to adequately compensate landowners. It then suggests methods that Texas could employ to establish an improved balance between the power of the state to condemn land and the financial well-being of targeted property owners. This comment recommends legislation to include relocation costs to a comparable dwelling as part of a displaced homeowners “adequate compensation” to put them in the same pecuniary position they were in before the condemnation proceedings. This comment also suggests Texas tax legislation to roll the effective date of a residence property tax exemption designed to freeze elderly or disabled landowner’s property taxes to the landowner’s new residence after eminent domain displacement. This would not only provide calculable, subjective compensation not available by fair market value but also maintain stable economic circumstances for a particularly susceptible group of citizens. This Comment then also recommends harkening back to the early American Mill Acts, which granted private entities the ability to use another’s land for a public purpose but required the landowners to be compensated an additional fifty percent of their damages. This extra (or debatably equal) compensation is a way to restrain private eminent domain authorities since they do not have public oversight of their actions and work as a tax on the coercive ability to take the land of another.


quiring private entities to pay more for land they take will reduce the number of private entity takings, while still allowing for productive development. Additionally, providing more than fair market value to condemnees would more accurately compensate for the true costs of a forced relocation and thus reduce the incentives of the property owner to litigate or otherwise oppose the taking.

All three recommendations focus on the just compensation needed to place landowners in the same pecuniary position they would have been prior to condemnation and serve as a meaningful safeguard to rebalance the equity of eminent domain to its origins.

II. BACKGROUND ON EMINENT DOMAIN AND JUST COMPENSATION

The history of eminent domain dates back to Roman law (eminens dominium), but the development most relevant to current issues began during the downfall of feudalism, when property rights were developing in Europe. The protection of property rights is clearly recognizable in the Magna Carta, which stated, “No Freeman shall be . . . de-seized of his freehold . . . but by lawful judgment of his peers or by the Law of the Land.” It was in the seventeenth century that Grotius, a legal scholar and writer, originated the term “eminent domain” alongside the perquisites of public use and compensation. Under the common law, the English government possessed the power to obtain private land for its own use. Upon winning independence from England, each original American state was vested with powers similar to those held by the English government, including the power of eminent domain.

8. Id. (citing Magna Carta § XXXIX (1215)).
9. Dale Orthner, Toward A More “Just” Compensation in Eminent Domain, 38 McGeorge L. Rev. 429, 431 (2007) (citing Martin J. King, Rex Non Prosect Pecare???: The Decline and Fall of the Public Use Limitation on Eminent Domain, 76 Dick. L. Rev. 266, 268 n.11 (1972) (“Grotius also first indicated that public use and compensation are requisite to eminent domain.” (citing Hugo Grotius, De Jure Belli ac Pacis, Lib. III, Cap. xx, Lib. II, Cap. xv, § vii (1631))); See also Christopher A. Bauer, Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation, 2003 BYU L. Rev. 265, 269 (2003) (citing Hugo Grotius, The Law of War and Peace 402 (Louise R. Loomis trans., Walter J. Black, Inc. 1949) (1625) “the property of subjects under the law of eminent domain belongs to the state, so that the state, or the person who represents the state, can make use of that property, can even destroy or alienate it . . . whenever it is to the public advantage.”).
11. Id.
The power of eminent domain is necessary to enable the government to provide public goods. Economic theory maintains that without eminent domain, governments would not be able to procure the assets necessary to provide public goods on account of information asymmetries and strategic holdouts.12

Information asymmetries is the concept that potential condemnees are aware of the government’s strong need for their property well in advance of negotiations and take advantage of the government’s inability to mask the property’s necessity. As such, the landowner has an extra bargaining chip due to the government’s slow-moving and very public decision making process. When projects are publicly funded plans, they are not likely to be kept secret until after the land is obtained because of the need to appropriate the funds, as well as many other requirements associated with government projects, such as mandated public hearings, environmental review, and so on, that preclude secrecy. In the absence of eminent domain, such entities would also confront the holdout problem in cases involving the assembly of multiple properties for a single project. Potential sellers, knowing that their individual properties are each necessary for the entire project, could “hold out” in order to obtain an inflated price. This strategic behavior could expand the cost of the transaction to a point which bars the sale of the property and frustrates the entire project.13

Eminent domain allows the government to sidestep these strategic difficulties by temporarily altering the nature of the owner’s protection to that of a liability rule, thereby empowering the eminent domain authority to force a sale.14

The justifications behind private parties benefiting from the power of eminent domain are the same as those for government: “if property has to be purchased, this power may be needed to overcome the “holdout” problem caused by strategic sellers.”15 According to conventional wisdom, private parties seeking to assemble multiple


properties are just as afflicted by holdouts as the government. As such, they are in just as much need of eminent domain power to overcome the problem and are granted that ability when legislators believe the general public could benefit from projects whose profitability is in jeopardy by holdouts.

Sections A. and B. discuss the development of eminent domain in the American federal law and Texas state law respectively. Section C. emphasizes some of the changes in modern understanding of the public use requirement; while section D. lays out the constitutional requirements of “just compensation,” which requires the payment of compensation for the full loss occasioned on property owners, but in practice, current law settles for the payment of the market value of the property taken—a benchmark that often falls far short of the deserved price of the aggrieved owner. Section E. describes Texas’s specific constitutional compensation requirements. Section F. points out some of the state of Texas’s eminent domain reforms, including changes to the condemnation process that are outlined in further detail in section G. Section H. compares Texas’s reform with others across the country while Section I. summarizes the current status of intangible valuation in compensating for condemned property in the legal system as well as legal commentary.

A. Origins of Eminent Domain in the American Federal System

The Fifth Amendment states that “[n]o person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”16 The Supreme Court has noted that eminent domain is a right belonging to every independent government and is “incident of sovereignty” which “requires no constitutional recognition.”17 Because governments have the eminent domain right by virtue of being the government, a constitution cannot technically grant this power, though it can limit the power’s use. As such, the Fifth Amendment simply acts as a limitation upon the exercise of that power. The United States Constitution and almost all state constitutions include provisions that regulate this strong, innate governmental power.18

The Takings Clause of the Fifth Amendment is “a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power.”19 The Fifth Amendment’s language—

16. U.S. Const. amend. V.
“nor shall private property be taken for public use, without just compensation” — outlines two limitations on exercising eminent domain powers. “First, the “public use” limitation prohibits the federal government from taking land for merely private advantage. It is a term that courts today interpret very broadly, permitting an array of government objectives under the “public use” definition of eminent domain authority. The second limitation outlined in the Takings Clause is “just compensation” which is the requirement that the government pay a fair amount to the landowner for any taking.

As previously mentioned, this right of eminent domain is inherent in a sovereign’s power, so the lack of a grant of eminent domain authority in the original articles of the United States Constitution or any of the Constitution’s amendments is not an omission. Actually, the federal government’s eminent domain right was not expressly recognized by a branch of the government until 1875, when the Supreme Court decided Kohl v. United States. Although implied in the Constitution’s Fifth Amendment, the Constitution does not grant the power of eminent domain, rather the Fifth Amendment is a protection of individual liberty against it. The source of the eminent domain right itself is sovereignty. Although the Fifth Amendment’s private property protections have applied to all the states via the Fourteenth Amendment, as incorporated by Supreme Court case law, almost all state constitutions include provisions that administrate this potent governmental power.

B. Eminent Domain Origins in the Texas System

Eminent domain is one of the inalienable rights of sovereignty. Eminent domain is the right of the state, or of those to whom the power has been delegated, to condemn private property for public

20. U.S. Const. amend. V.
22. Kohl v. United States, 91 U.S. 367, 371 (1875) (“It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. . . . The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. . . . this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence.”).
24. Jones, 109 U.S. 513, 518 (1883) (“The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and. . . requires no constitutional recognition.”).
use, and to appropriate the ownership and possession of the property upon paying due compensation. Article 17 of the Texas Constitution also makes a point of limiting the exercise of eminent domain:

a. No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and only if the taking, damage, or destruction is for:
   1. the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:
      A. the State, a political subdivision of the State, or the public at large; or
      B. an entity granted the power of eminent domain under law; or
   2. the elimination of urban blight on a particular parcel of property.

b. In this section, “public use” does not include the taking of property for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

The delegated power of eminent domain can only be conferred by express statute or by legislative implication, and all such acts are strictly construed in favor of the property owner. Some private corporations that are regulated by the state government, such as commercial utility companies, can also bring eminent domain proceedings.

The discussion of urban blight found in Article 17 of the Texas Constitution was added in 2009 as a response to outcry from what the public considered a judicial growth of the definition of “public use.” Although this growth in the understanding of “public use” was well founded precedent, the modern changes in its application forced courts to define the extent of the ‘public use’ definition in order to consider local governments’ innovative eminent domain use.

30. See Zucht, Ill v. City of San Antonio, 698 S.W.2d 168, 169, 170 (Tex. App.—San Antonio 1984, no writ) (“Prior to the enactment of the present statute, Pearson v. State, 159 Tex. 66, 315 S.W.2d 935, 937 (1958), held that the county court did not have general jurisdiction in condemnation proceedings, but only special jurisdiction in accordance with the provisions of former article 3266 . . . ” (now codified in Tex. Prop. Code Ann. §§ 21.011 et seq.).
31. See e.g. Roadrunner Invs., Inc. v. Tex. Utils. Fuel Co., 578 S.W.2d 151 (Tex. Civ. App.—Fort Worth 1979, writ ref’d n.r.e.).
C. Modern Changes in Understanding of Public Use

The Supreme Court interpreted the public use doctrine in Hawaii Housing Authority v. Midkiff.32 The Court held that so long as the taking of property under eminent domain is rationally related to a legislatively determined public purpose, courts should not challenge the taking under the public use doctrine.33 At the time, almost all of Hawaii’s private land was owned by a small group of landowners.34 In order to reduce the concentration of ownership in the state, the Hawaii Legislature passed the Land Reform Act, which gave the state the authority to condemn tracts of land and transfer ownership of land to the existing lessees of property without large tax consequences for the landowners.35 The Court held that the determination by the Hawaii Legislature to eliminate land oligopoly was a valid public purpose.36

In Kelo v. City of New London,37 the Supreme Court affirmed the government’s use of takings for economic redevelopment purposes to effectively transfer land from one private owner to another.38 This 2005 case arose from Connecticut’s approval of an economic development plan for the city of New London that was projected to add jobs, increase tax revenue, and revitalize the local economy.39 Despite the fact that many of the properties acquired were neither substandard nor deemed “blighted,” the properties were condemned because they were located in the planned development area.40 Unlike historical projects that sought to condemn “blighted” urban areas, the New London project was designed to achieve economic redevelopment of a depressed part of the City, promising new jobs and higher local tax revenues.41

The Court declined to address the challenges of “individual owners” on a “piecemeal basis,” and instead assessed the entire plan and concluded that the “public use” requirement of the Fifth Amendment was met, even though private interests would benefit.42 The Court had previously established that the state may transfer property from one private party to another if the taking is reasonably related to public use.43 The Supreme Court in Kelo, consistent with Berman v.

33. Id. at 241.
34. Id. at 232.
36. Midkiff, 467 U.S. at 241.
38. Id. at 469–70.
39. Id. at 472–73.
40. Id. at 475.
41. Id. at 483.
42. Id. at 484.
43. Id. at 482 (discussing Midkiff, 467 U.S. 229 (1984)).
Parker, Midkiff, and other precedents, found promoting economic development is a function of the government and “unquestionably” provides a legitimate public purpose for taking private property. The Court gave deference to the City’s judgment and declined to second-guess the usefulness of its development plan as well as the necessity of the specific land taken. The Court emphasized, however, that state legislatures have the power to enact “further restrictions on [the State] exercise of the takings power” in order to limit the constitutional baseline affirmed in Kelo.

Although the Supreme Court’s ruling in Kelo “was substantially consistent with precedent”, indignation over the Court’s decision swept the nation along with an equally alarming rise in condemnation proceedings. Within a year of the Kelo decision, local governments condemned, or threatened to condemn, more than 5,783 properties, nearly three times the annual rate of threatened or condemned properties in the previous five years. Interestingly, the incidences of condemnations that were actually appealed dropped dramatically, since owners largely conceded rather than face insurmountable litigation challenges. “Therefore, while the incentive of property owners to litigate a taking decreased, the risk of seizures increased significantly in the immediate aftermath of Kelo.”

Recently, a different variation of private entity eminent domain abuse was called out by the Texas Supreme Court in Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC. Denbury Green applied with the Railroad Commission to operate a CO₂ pipeline in Texas as a “common carrier.” The one-page permit application had two boxes for the applicant to indicate whether the pipeline would be operated as “a common carrier” or “a private line.”

44. Berman v. Parker, 348 U.S. 26, 32, 34–35 (1954) (holding that police power encompasses the alleviation of blight and the provision of, inter alia, light and open space, and noting that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive”).
45. Kelo, 348 U.S. at 484.
46. Id.
47. Id. at 489.
49. Id. at 438 (citing Dana Berliner, Opening the Floodgates, Eminent Domain Abuse in the Post-Kelo World 1, 2 (2006), available at http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (providing a comprehensive compilation of published accounts and court papers regarding eminent domain actions in many states since the Kelo decision).
53. Id.
54. Id.
Denbury checked the common carrier box and within the week the Railroad Commission rubberstamped the permit, granting it without any sort of investigation or oversight. The Texas Natural Resources Code requires so-called common carrier pipeline companies to transport carbon dioxide “to or for the public for hire.” 55 Section 111.019 of that same code also grants common carriers “the right and power of eminent domain.” 56

Denbury Green used that power to condemn land and connect pipelines from its Jackson, Mississippi CO₂ reserve to inject into its existing oil wells in Galveston County. 57 It was only when one of the condemnees refused to allow Denbury Green surveyors onto their property that Denbury filed suit and the condemnor, in turn, questioned the “common carrier” status. 58 The Texas Supreme Court held that “A private enterprise cannot acquire unchallengeable condemnation power . . . merely by checking boxes on a one-page form and self-declaring its common-carrier status.” 59 Denbury Green’s representations suggested that it “(1) owned most or all of the naturally occurring CO₂ in the region, (2) intended to purchase all the man-made CO₂ that might be produced under current and future agreements, (3) saw its access to CO₂ as giving it a significant advantage over its competitors, and (4) intended to fully utilize the pipeline for its own purposes.” The Court held that these representations are all inconsistent with private use of the pipeline, that Denbury Green did not establish common carrier status as a matter of law, and was not entitled to summary judgment. 60

The Denbury Green pipeline was granted, by all appearances, eminent domain power via a permit, which simply required the company to check a box saying it was a common carrier. Any potential landowner could have called the Railroad Commission to verify that it did have common carrier status (as the Railroad Commission’s website recommends landowners do61) and would likely do no further investigation. Unlike federal, state, or local governments which have accountability through the electoral process and are under the watchful eye of their constituents to act in accord with the public good; private

55. TEX. NAT. RES. CODE § 111.002(6) (West 2011).
56. 58 TEX. NAT. RES. CODE § 111.019(a) – (b) “(a) Common carriers have the right and power of eminent domain, (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.”
58. Id. at 196.
59. Id. at 204.
60. Id.
entities that are granted eminent domain power through a non-investigative permitting process, are more accountable to their financial interests than public well-being, and not held accountable until brought into court.

Seven years after the Supreme Court affirmed the right of cities to use eminent domain to secure land for proposed private commercial development, and after more than forty States have reassessed their own state laws in response, a bipartisan group of federal lawmakers is still seeking to legislatively overturn Kelo. On February 28, 2012, the House of Representatives approved H.R. 1433, the Private Property Rights Protection Act of 2011.62

The bill prohibits federal, state, and local governments that receive federal economic development funds from using eminent domain to acquire land for economic development purposes.63 Economic development is defined in the bill as “taking private property . . . and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health.” 64 The definition does not include conveying private property to public ownership for roads, hospitals, and airports, but also includes wide exceptions for common carriers, such as pipelines and railroads, and private transportation entities, including toll roads.65 The bill imposes punitive measures on governments for violating the ban and creates a cause of action for landowners who have property wrongfully taken by a state or local government.66

D. Requirements of Just Compensation

While the sovereign right of eminent domain is of ancient origin, the just compensation requirement is a more recent historical development.67 As late as 1835, certain state governments were exercising


65. § 9(1)(A)(i) – (iii).

66. Id.

67. J.D. Eaton, REAL ESTATE VALUATION IN LITIGATION 13, 14 (2d ed. 1995) ("Many early definitions of eminent domain, including those applied in the United States, did not include a provision for just compensation."); The idea of just compensation appeared in the writings of Grotius in connection with his expression of the eminent domain right. See Bauer, supra note 10, at 272 (citing HUGO GROTIUS, THE LAW OF WAR AND PEACE 402, 403 (Louise R. Loomis trans., Walter J. Black, Inc. ed., 1949) (1625) ("[T]he state is bound to make good out of the public funds the damage
their eminent domain rights without paying compensation. The Fifth Amendment’s private property protections, which include the just compensation requirement, only applied to all the states via Supreme Court case law incorporating the portions of the Bill of Rights to state and local governments by virtue of the Due Process Clause of the Fourteenth Amendment. However, each state has its own constitutional (or in the case of North Carolina, statutory) eminent domain laws which dictate state and local government’s exercise of the eminent domain right in a similar fashion to the Federal Government. Thus, all governments must compensate landowners when taking land.

The United States Supreme Court has noted on multiple occasions that the requirement for just compensation found in the Fifth Amendment serves the purpose of preventing the government from forcing a small group of citizens to incur a cost that, in fairness, should be absorbed by society. The role of just compensation is to put the landowner in the same pecuniary position as he or she would be had the taking not occurred. The Supreme Court has also stated that “[t]he constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law.” The Supreme Court has held that just compensation means “the full and perfect equivalent in money of the property taken”, and that the landowner is to be placed “in as good position pecuniarily as he would have occupied if


69. See Dolan v. City of Tigard, 512 U.S. 374, 405 (1994); Chi. B. & Q.R. Co. v. City of Chi., 166 U.S. 226, 241 (1897) (“In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.”).

70. Bauer, supra note 10, at 272; Searles, supra note 68, at 335–336.


his property had not been taken.”75 Although the Court acknowledges that, conceivably, “an owner’s indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose.”76 In an effort to find some practical standard, the courts adopted the concept of market value and have retained it since 1897.77 Courts have said that this practical standard of “fair market value” does not generally account for the value an individual owner may place on property, but it is nevertheless an administratively necessary standard:

We have acknowledged that, in some cases, this standard fails fully to indemnify the owner for his loss. Particularly when property has some special value to its owner because of its adaptability to his particular use, the fair-market-value measure does not make the owner whole. We are willing to tolerate such occasional inequity because of the difficulty of assessing the value an individual places upon a particular piece of property and because of the need for a clear, easily administrable rule governing the measure of “just compensation.”78

Although the Supreme Court recognizes the need to pay for the property’s full value, it does not interpret the Constitution as requiring payment for any associated damages inevitably linked to the loss of property.79 Because the market value of the property does not change with the needs of the government, nor with the needs of the individual property owner, compensation for loss of “profits, damage to good will, the expense of relocation and other such consequential losses” is not required by the Constitution.80

Notably, the U.S. and many state constitutions include the words “just” or “due” with the term “compensation.”81 Courts have indi-

76. Id. at 373–74 (emphasis added).
77. Id. at 374 (citing Bauman v. Ross, 167 U.S. 548, 574 (1897)).
78. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 n.15 (1984) (citation omitted).
80. Orthner, supra note 49, at 453 n.197; but see 42 U.S.C. § 4622 (2006) (providing that, as part of the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs, whenever a federal program or project displaces a person, that person is to be provided payment for actual reasonable moving expenses, actual direct losses of tangible personal property, and certain business related expenses, but not for the many other real yet subjective expenses, such as an individual’s time or sentimental value).
81. Bauer, supra note 10, at 272 (citing Carman F. Randolph, The Law of Eminent Domain in the United States §223 at 205–06 (photo. reprint 1991) (1894) (“The word [sic] ‘just,’ ‘full,’ ‘adequate,’ ‘due,’ or ‘reasonable,’ prefixed to ‘compensation’ in constitution or statute, does not carry any definite weight. None of these prefixes can enlarge or restrict the definition of property, nor affect the measure of compensation.”)).
cated that the term “just compensation” shows that reparation must ultimately be fair “not merely to the individual whose property is taken, but to the public which is to pay for it.”82 “Just compensation” may be defined as paying the property owner the value—normally the fair market value on the date of valuation—of the taken property. The “fair market value” of a property is “what a willing buyer would pay in cash to a willing seller” at the time of valuation.83 Such compensation must: be paid in money,84 and includes interest for delay in making payment.85

When the particular property has no market, the Supreme Court has held that “other data” can be used to ascertain the property’s value because “even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety.”86 The court went on to say that when the land taken or nearby comparable property has not been recently sold, the application of fair market value involves “at best, a guess by informed persons.”87

As early as 1943, the Supreme Court recognized that a property’s potential uses are another valuable factor to consider in determining fair compensation.88 Property should not be considered worthless because an owner has not, either by choice or by inability, invested resources to put the property to another, more objectively valuable use.89 However, in order to receive compensation for the theoretical uses of the property, “there must be a ‘reasonable possibility’ that the owner could, with sufficient resources, actually put the property to a higher use and claim the alternative use as a basis for compensation”.90 This concept is often referred to as valuing a property at the “highest and best use” to which it may be reasonably put.

Requiring payment of only fair market value to a condemnee, devoid of any moving expenses or incidental costs, would appear to make for an administratively clean and relatively straightforward process. However, appraising property to determine its value involves the assessment and balancing of many factors, including valuing the effect of hypothetical property uses. The condemnor, of course, pre-

85. See id. (citing Jacobs v. United States, 290 U.S. 13 (1933)).
87. Id. at 374–75.
88. Orthner, supra note 49, at 450.
89. Id.
fers to focus on factors that point to a diminished value of the property, while the owner contests for the highest conceivable value.

Three different approaches are typically used in arriving at fair market value, depending on the nature of the property. The most common method for valuing residential property is the sales comparison approach. “Under this method, the recent sales of comparable homes near the subject property aid in determining the price that the parcel might have received on the open market.” The comparable homes, once adjusted for the differences in various features between them and the subject property, show at what price a willing seller might sell the property to a ready, willing, and able buyer.

The second method, referred to as the cost approach, begins by valuing the land as though it were vacant, adding the cost to build all of the existing improvements on the land, and then deducting for the accrued depreciation of the improvements. The cost approach is not often used in eminent domain proceedings, but is typically applied when the property is so unique that comparable properties are not available or are not a reliable source for valuation. As such, the appraiser has to believe and convince the fact finder that the valuation of the hypothetical construction and depreciation of the unique property is a more accurate assessment than comparables.

The third method, referred to as the income or capitalization approach, “values the property based on the amount of income the property generates for the owner.” This approach requires an appraiser to convert “the income from the property, plus the projected value at the end of a particular time period, into a present value using a given rate of return”. Based on that value the appraiser would then produce an estimate of what an investor would likely pay for the property.

Considering the various methods for determining the value of a property and the wide assortment of factors to be considered within each method, appraisals involve some degree of subjective opinion as

93. United Techs. Corp. v. Town of E. Windsor, 807 A.2d 955, 960 (Conn. 2002) (Citing J. Eaton, Real Estate Valuation in Litigation (2d Ed.1995) (“Under the cost approach to valuation, the appraiser estimates the current cost of replacing the subject property, with adjustments for depreciation, the value of the underlying land, and entrepreneurial profit.”)).
95. Id.
96. Id.
97. Id.
to true value.\textsuperscript{98} Even though the Supreme Court has determined and adopted fair market value as the fulfillment of the need for a clear, easily administrable rule,\textsuperscript{99} the methodology required to reach an appropriate valuation for the property in question is always going to be an educated guess. This “administratively clean” rule becomes muddled in hearings and court proceedings where the condemning authority’s and, if present, the landowner’s advocates and experts use every possible measurement to throw the property valuation in their favor. Since current takings jurisprudence centers on “a determination of ‘the fair market value of the property’” as the “ultimate issue” in each case,\textsuperscript{100} legislative proposals that modify the current understanding of fair market value as a starting point for eminent domain reform, are not transforming a solid, consistent algorithm which produces the same consistent answer regardless of the mathematician doing the calculations. Rather, this type of reform is adapting the already uncertain and subjective nature of property valuations to reflect the concerns of condemnors in order to place them in “as good a position pecuniarily as if his property had not been taken.”\textsuperscript{101}

One example of such legislation is the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (frequently referred to as the “Uniform Relocation Act” or “URA”). Although state and local projects not employing any form of federal assistance are exempt from the Act’s provisions, it requires payment for moving expenses, business reestablishment, and other relocation costs.

The URA was designed to provide uniform, fair, and equitable treatment of people who are displaced in connection with federally funded projects so that displaced persons do not “suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole.”\textsuperscript{102} It attempts to encourage and expedite acquisition by agreement and without coercion and ensure that no individual or family is displaced unless decent, safe, and sanitary (“DSS”) hous-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{98} Id. (citing Paula K. Konikoff, CFO’s Guide to Real Estate Appraisals, 534 Prac. Law Inst. 843, 845 (2006); Andrew W. Schwartz, Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings, 22 UCLA J. Envtl. L. & Pol’y 1, 68 (2004) (stating that “[a]n appraisal is an opinion of value, rather than a scientific measuring process” and that appraisals that are biased are difficult to avoid).  
\item \textsuperscript{99} Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 n.15 (1984).  
\item \textsuperscript{100} Orthner, supra note 49, at 452 (citing Andrew W. Schwartz, Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings, 22 UCLA J. Envtl. L. & Pol’y 1, 68 (2004) (stating that “[a]n appraisal is an opinion of value, rather than a scientific measuring process” and that appraisals that are biased are difficult to avoid)).  
\item \textsuperscript{101} Olson, 292 U.S. 246, 255.  
\item \textsuperscript{102} 42 U.S.C. § 4621(b) (2000); see also http://www.hud.gov/offices/cpd/affordablehousing/training/web/relocation/overview.cfm
\end{itemize}
\end{footnotesize}
E. Texas’ Adequate Compensation

Today, every state provides a guarantee of just compensation to landowners whose property is taken by an eminent domain power. While states may formulate and adopt their own procedures for condemnation actions— and all do—the constitutional mandate that just compensation be provided must be obtained in every case.106

The Texas Constitution, specifically Article 1, section 17, provides that “no person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . .”107 “Adequate compensation” includes the fair market value of the property taken, plus damages.108 Chapter 21 of the Property Code requires that the property owner be compensated for the injury resulting from the condemnation.109 The statutes specifically exclude from recovery any “injury or benefit that the property owner experiences in common with the general community.”110 Further, “adequate compensation” does not include an award of attorney’s fees unless a condemnation proceeding is dismissed by the court or a condemnor.111 The rarity of recovering attorney’s fees makes it very difficult for landowners to effectively challenge takings.112

Texas courts have long utilized the market value of property as the basis for determining recovery in eminent domain cases. Market value has been further defined in case law as “the price the property will bring when offered for sale by the one who desires to sell, but is not obligated to sell and is bought by one who desires to buy, but is under no necessity of buying.”113 In other words, the measure of damages for property taken in condemnation is the difference in the market value of the property immediately before and immediately after

103. Id.
106. Bauer, supra note 10, at 274.
111. TEX. PROP. CODE ANN. § 21.019(b) (West 2004).
113. See State v. Carpenter, 89 S.W.2d 194, 202 (Tex. 1936).
the date of taking.\textsuperscript{114} The seminal case in determining compensation in Texas is \textit{State v. Carpenter},\textsuperscript{115} decided by the Texas Supreme Court in 1936. In \textit{Carpenter}, the court established market price, not subjective worth, as the proper measure for quantifying property values: “[The question] is one of proof as to market value and depreciation in market value, rather than abstract questions as to what may or may not be considered by the jury in assessing damages.”\textsuperscript{116} The court explained that normally market value is determined by hearing evidence on the price that a willing seller and a willing buyer would reach in a voluntary transaction.\textsuperscript{117} The court envisioned the use of a broad variety of evidence to establish value under this “willing seller-willing buyer” test:\textsuperscript{118}

Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value. Evidence should be excluded relating to remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property.\textsuperscript{119}

The Texas Supreme Court has repeatedly upheld the validity of this test in eminent domain cases.\textsuperscript{120}

Since the broad establishment of the “willing seller-willing buyer” test, Texas courts have focused upon enumerating the narrow categories of damage that should be excluded from evidence under the market-value test.\textsuperscript{121} It is well established that speculative injuries are not able to be compensated, an exception derived directly from the language in \textit{Carpenter}. For example, the \textit{Carpenter} Court’s ban on evidence concerning speculative uses of the property was applied in \textit{State v. Walker}\textsuperscript{122} to include only evidence about the actual use or probable future use, thus prohibiting evidence of its more valuable theoretical use.\textsuperscript{123} The Texas Supreme Court has also held that lost business profits are not compensable per se under the condemnation statutes, and

\textsuperscript{114} Callejo, 755 S.W.2d at 76.
\textsuperscript{115} Carpenter, 89 S.W.2d 194.
\textsuperscript{116} Id. at 199.
\textsuperscript{117} Id. at 201–02.
\textsuperscript{119} Id. at 525–26
\textsuperscript{120} See, e.g., State v. Schaefer, 530 S.W.2d 813, 816 (Tex. 1975); City of Pearland v. Alexander, 483 S.W.2d 244, 246 (Tex. 1972); City of Austin v. Cannizzo, 267 S.W.2d 808, 812 (Tex. 1954); Sample v. Tenn. Gas Transmission Co., 251 S.W.2d 221, 222 (Tex. 1952).
\textsuperscript{121} Singley, supra note 119, at 526.
\textsuperscript{122} Texas v. Walker, 441 S.W.2d 169 (Tex. 1969).
\textsuperscript{123} Id.
that evidence of lost profits is relevant only as it might affect the market value of the property.\textsuperscript{124}

Another element of compensation not directly related to the value of the condemned land is relocation expense administered under the Relocation Assistance Program.\textsuperscript{125} The program is patterned after the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Program. The claim is normally handled as an administrative matter apart from the eminent domain proceeding, and allows for reasonable moving expenses of personal property being transferred from a place of residence or business to another if the landowner is physically and permanently displaced from a dwelling or place of business.\textsuperscript{126} However, the maximum distance for compensation of a move is 50 miles, and the amount cannot be greater than the market value of the personal property being relocated.\textsuperscript{127} As such, market value determines whether the displaced landowner’s personal property is valuable enough to move and once again ignores emotional or sentimental value that a person might attach to objects which are a part of their home prior to condemnation.

F. Recent Texas Eminent Domain Reform

Within the past five years, Texas has taken several steps not only to inform landowners of their property rights but also to preserve them. In order to keep landowners aware of their rights, the state is creating a database of condemning authorities in the state and provides a phone number for landowners to verify a power utility’s eminent domain authority and has provided a Texas Landowner’s Bill of Rights which summarizes a landowner’s rights during the condemnation process. The Texas legislature has also reformed the eminent domain process after years of debate on the floor of the legislature and outcry from Kelo and the Trans-Texas Corridor (a discontinued and hotly debated transportation network involving private entities and eminent domain powers).

One step to inform landowners came from the Texas Attorney General’s Office, which created a Texas Landowner’s Bill of Rights. Effective February 1, 2008, any condemning authority is required to present this Bill of Rights to landowners before or at the same time as initiating condemnation proceedings.\textsuperscript{128} The Texas Landowner’s Bill

\textsuperscript{124} State v. Travis, 722 S.W.2d 698, 699 (Tex. 1987).
of Rights explains the condemnation process and outlines the rights that property owners have when faced with a taking.\textsuperscript{129}

Property owners are frequently discouraged by the lack of power they have once a condemning authority becomes interested in their property.\textsuperscript{130} For example, a private condemning authority who wishes to create a pipeline through a Texas landowner's property, may lawfully conduct surveys even before filing a petition in condemnation.\textsuperscript{131} Texas courts have expressly held that the right of a pipeline to enter your property to conduct surveys is "ancillary to the power of eminent domain."\textsuperscript{132} Property owners who challenge the entry rights of condemning authorities often are immediately faced with a court-ordered injunction allowing the condemnor entry to survey. Additionally, Texas condemnors have "broad discretion" in the exercise of their eminent domain powers.\textsuperscript{133} Truly, the condemnor's determination of what and how much land to take "is nearly absolute."\textsuperscript{134}

Further, as a reaction to Texas Supreme Court cases like \textit{Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC},\textsuperscript{135} where an educated landowner saw past a Railroad Commission's permit granting eminent domain power and successfully questioned the utility company's right to condemn,\textsuperscript{136} the state is currently working to create a list of authentic eminent domain authorities and is trying to reign in some of the power discrepancies by creating new eminent domain procedures for all condemning authorities.

Since 1885, Texas legislators have suggested 108 pieces of legislation relating to reforming condemnation.\textsuperscript{137} This number includes a tidal wave of bills recommended in 2009 after Justice Stevens told the states in the \textit{Kelo} decision that they were free to provide additional eminent domain restrictions through state law.\textsuperscript{138} There were few measures to come through the three (biennial) legislative sessions, but nothing too


\textsuperscript{131} Id.

\textsuperscript{132} HP Farms v. Exxon Pipeline Co., 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ).

\textsuperscript{133} Webb v. Dameron, 219 S.W.2d 581, 584 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.).


\textsuperscript{135} Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC, 363 S.W.3d 192 (Tex. 2012).

\textsuperscript{136} See id.


\textsuperscript{138} \textit{Kelo}, 348 U.S. at 489.
152 TEXAS WESLEYAN J. OF REAL PROPERTY LAW [Vol. 1

substantive. Governor Rick Perry even vetoed an eminent domain reform bill in 2007. He then “refused to place eminent domain reform on the agenda for the special session in 2009.” Those two actions brought him the wrath of the Farm Bureau and a nonendorsement in the governor’s race, which was unusual. The Farm Bureau and other strong political allies had demanded Perry do something about Texas eminent domain laws following controversy over the Trans-Texas Corridor. However, it was not until 2011, after an “emergency” session, that post-Kelo reform came into effect in Texas via Senate Bill 18 (“SB18”).

The new law amends provisions in the Texas Property Code to require private entities with eminent domain authority to follow limitations that already applied to local governments. It also requires those entities to provide certain appraisal reports to property owners whose land the eminent domain authority proposes to purchase. Further, these provisions apply to offers to lease land, not just purchase offers and they can no longer include standard confidentiality provisions that prohibit the landowner from discussing the offer with others.

With SB 18, Texas legislators attempted to address the disadvantage often felt by landowners in negotiations with intimidating powerful governmental purchasers by requiring more demanding procedural requirements, including public notice and hearing requirements and explicit voting mandates by authorizing official bodies. These procedures are now a pre-condition to the use of eminent domain power by governmental entities, ensuring that potentially affected property owners have an opportunity to be advised of the impending use of eminent domain authority to acquire their property.

Part of the new law’s requirements include a bona fide acquisition offer that must now precede the use of eminent domain power by public or private entities claims to be unable to come to a mutually acceptable purchase agreement with the property owner. A key element of the new bona fide offer requirement is the inclusion of a written initial offer for the property, which must be made thirty days

141. Id.
142. See Kelo, supra note 140.
143. Id.
144. See id.
148. See, e.g., § 21.0113.
149. Id.
before a final offer is made. SB 18 also requires that the final offer be accompanied by a certified appraisal and be equal to or greater than the amount of the written appraisal. Landowners are now given fourteen days to respond to the final offer. The new law also empowers targeted landowners to demand relevant and available information from prospective purchasing entities in an eminent domain acquisition.

SB 18 also sets up possible further revision of Texas eminent domain law in 2013 by requiring any public or private entity claiming authorization to exercise the power of eminent domain in Texas to submit a letter to the state comptroller, by no later than December 31, 2012, explaining the legal basis for its assertion of such authority. Failure of an entity to submit such a letter will result in a loss of its eminent domain power as of September 1, 2013, and the state of Texas is expected to compile an approved list of eminent domain authorities, both private and public.

Recent Texas reforms have done little to address the entities that are allowed to wield eminent domain authority or the compensation involved, however they have brought about substantial change in the procedures and process required for condemnation.

G. The Texas Condemnation Process

An eminent domain suit under Texas law typically begins when state or local government officials bring a condemnation proceeding via the statutes in the Property Code. Chapter 21 of the Texas Property Code governs the exercise of eminent domain authority and outlines the procedural requirements that must be followed in condemnation proceedings. The Texas land condemnation scheme is a two-part procedure involving an administrative proceeding before three special commissioners appointed by the trial court and, if the condemnee is unsatisfied with the commissioners’ award and files an objection, a judicial proceeding. The general steps in the Texas condemnation process are:

150. § 21.0113(b)(3).
151. § 21.0113(b)(5).
152. § 21.0113(b)(7).
155. Id.
(i) the condemnor must negotiate and make a bona fide offer to purchase the landowner’s property;
(ii) the condemnor must provide the landowner with the Landowner’s Bill of Rights Statement prior to instituting condemnation proceedings;
(iii) the condemnor begins condemnation proceedings by filing a Petition for Condemnation in the designated court in the county where the property is located;
(iv) the court has limited administrative authority to appoint three disinterested freeholders who reside in the county as special commissioners;
(v) the commissioners’ hearing is held to determine fair market value of the property and damages with ten days prior notice of the hearing to the landowner;
(vi) the commissioners render an award and assess costs;
(vii) the condemnor deposits the amount of the commissioners’ award into the registry of the court and may take immediate possession of the property pending litigation;
(viii) the landowner may accept commissioners’ award or file objections to the award and proceed to trial as in any other civil case;
(ix) landowner’s withdrawal of funds waives the landowner’s right to contest the condemnor’s “right to take the property.”158

The vast majority of litigation in eminent domain law deals with challenges to the amount of compensation due to the land owner.159 Texas courts have developed a large body of case law dealing with the permissible types of damages and their quantifications. For example, the owner of condemned land is entitled to have the fact finder consider, in determining its fair market value,160 the highest and best use to which the land is adaptable.161

Only certain individuals are competent to testify to market value: “(1) the landowner; (2) a qualified expert (such as a certified appraiser or licensed real estate broker); and (3) a lay witness who is acquainted with subject property, owns contiguous land of the same kind or character, or shows peculiar knowledge of its qualities.”162

---

158. See State v. Jackson, 388 S.W.2d 924, 925 (Tex. 1965).
160. See City of Dallas v. Rash, 375 S.W.2d 502 (Tex. Civ. App.—Dallas 1964, writ ref’d n.r.e.).
162. See Tennasago Gas Gathering Co. v. Fischer, 624 S.W.2d 301, 302-03 (Tex. App.— Corpus Christi 1981, writ ref’d n.r.e); Fort Worth & D. S. P. Ry. v. Judd, 4 S.W.2d 1032, 1036 (Tex. Civ. App.—Amarillo 1928, writ dism’d w.o.j); City of Dallas
The owner of property is permitted to give his opinion as to the value of the property, but only when the testimony refers to the owner’s knowledge of the market value, and is not merely his or her opinion as to intrinsic or some other value.\(^\text{163}\) “Expert witness testimony regarding property value is subject to Texas Evidence Rule 702, which requires that the expert must be qualified and that the expert’s opinion must be both relevant and reliable.”\(^\text{164}\)

Although considerable change has been made in the Texas condemnation process, the procedural negotiation steps were not what sparked outrage after *Kelo* and the Trans-Texas Corridor. As other states responded to their citizens’ concerns following the Supreme Court’s examination of “public domain,” many of them focused on reforming the fairness of their compensation.

H. *States Legislating a More “Just Compensation”*

After the outcry from *Kelo*, several states require enhanced compensation, typically expressed as an additional percentage of fair market value. This legislation responded to the awareness that “fair market value” is not always “fair” to the seller,” by privileging certain types of property.\(^\text{165}\)

In 2006, Missouri passed new legislation adopting a more expansive definition of “fair market value”\(^\text{166}\) and required “just compensation” for condemned property to be determined by factors beyond market value, such as heritage value.\(^\text{167}\) In addition to condemning authorities being required to pay relocation costs to displaced individuals, the new legislation called for additional payments depending on length of ownership or whether the property is the owner’s primary residence. “Heritage value” is additional value (beyond fair market value) assigned property that has been in “the same family for fifty or more

---

\(^{163}\) v. Priolo, 242 S.W.2d 176, 177 (Tex. 1951) (illustrates the distinction between admissible evidence of market value and other inadmissible evidence of property value. Here, the court held that an expert’s testimony, which would have been admissible on the issue of market value, was properly excluded because the question was phrased in terms of impact on the business, as opposed to market value of the property.)


166. Mo. ANN. STAT. § 523.001(1) (West Supp. 2012) (“Fair market value” shall mean “the value of the property taken after considering comparable sales in the area, capitalization of income, and replacement cost less depreciation, singularly or in combination [with]... its highest and best use, using generally accepted appraisal practices.”)

167. Governor Matt Blunt, Missouri Governor’s Message: Preventing Eminent Domain Abuse (July 14, 2006).
years," including business property where the small business employs "fewer than one hundred employees." The added value is a fixed "fifty percent of fair market value."

Just compensation in Missouri is determined by the highest result from one of three methods: (1) the fair market value of such property; (2) 125% of fair market value for a homestead taking, which involves taking and displacing the owner of their "primary place of residence;" or (3) 150% of fair market value for a "heritage value" taking. "Heritage value" is reserved for property that has been in "the same family for fifty or more years," including small businesses. The availability of both the heritage value component and the homestead taking compensation is also limited by the requirement that the taking of the property "prevents the owner from utilizing property in substantially the same manner as it was currently being utilized on the day of the taking." This prevents the additional use of homestead or heritage value in partial takings.

Other states’ responses to Kelo included legislating fixed percentages of added value (premiums) into compensation. Indiana requires condemning authorities to not only compensate for relocation costs but also pay 150% of market value when an owner occupied residence is taken, and 125% of market value for agricultural land. Similarly, Michigan law requires condemning authorities taking an individual’s home to pay the owner no less than 125% of the fair market value.

Maryland now allows a $45,000 additional payment (raised from $22,500) to displaced homeowners for additional expenses such as recording titles, increased interest and debt servicing as a result of financing a new dwelling, and the difference between the purchase price and the price needed to purchase a comparable dwelling. Renters may receive up to $10,500 (up from $5,250) to rent a comparable dwelling for up to forty-two months or to put the money towards the down payment on a comparable dwelling. Maryland farmers, small business owners, and nonprofit organizations may recover up to $60,000 of reasonable costs to reestablish their businesses.

168. See §§ 523.001(2), 523.039(3), RSMo 2006. Governor Matt Blunt, Missouri Governor’s Message: Blunt Signs Bill to Protect Missouri Farm Families; Property Owners (July 13, 2006).
170. See § 523.001(2), 523.039(3).
176. Id. § 12-204.
177. Id. § 12-205(4).
I. Current Status of Intangible Values in the Calculation of Just Compensation

In spite of all these state reforms, which are focused on compensating the condemnee, a brief overview of federal case law regarding eminent domain quickly reveals the status of subjective values in the federal system. The United States Supreme Court stated that “just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner.”

In Coniston Corp. v. Village of Hoffman Estates, Judge Richard A. Posner concisely described the meaning of just compensation and the values gained and lost:

Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to his property. Many owners . . . because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs . . . value their property at more than its market value . . . . Such owners are hurt when the government takes their property and gives them just its market value in return. The taking in effect confiscates the additional (call it “personal”) value that they obtain from the property, but this limited confiscation is permitted provided the taking is for a public use.

As established previously, within the federal test for just compensation there is no place for any special value that the landowner may place on the property.

Turning now to state policies regarding just compensation in eminent domain, it is apparent that states, including Texas, have been as equally opposed to subjective values as the federal system. The Mississippi Supreme Court has held that sentimental value cannot impact the determination of fair market value. Similarly, the Alabama Supreme Court held that the sentimental value an individual attaches to a homestead is not applicable in the determination of compensation. The court explains that “[g]reat caution should be observed not to build up an imaginary or speculative value as a basis for awarding damages. Neither should the value be reduced for imaginary or speculative reasons.” These cases demonstrate that courts confronting this issue, including the Supreme Court, have explicitly denied consideration of the subjective values of property when calculating just compensation. In summary, the current judicial methods of determining compensation in the United States are based on the principle of just compensation, which is defined as the market value of the property taken.
just compensation specifically eliminate any subjective value an owner attaches to property.

Although nowhere in eminent domain case law, commentators have discussed inclusion of a landowner’s subjective value either through legislation or judicial methods.

To appropriately understand the subjective value that an individual attaches to a home, Professor Eduardo M. Peñaalver revisited the age-old metaphor of “the home as a man’s castle” positing that there are actually two versions of the castle metaphor. The first metaphor focuses on the “castle as dominion,” which exemplified the owner’s right to exclude and the second focuses on the “castle as dignity.” Under the castle as dignity metaphor, the focus is on the “inherent dignity of homeownership,” which results from the subjective importance and social standing that goes hand-in-hand with owning a home. Peñaalver argues that governmental takings intrude upon the “castle as dominion” metaphor by both taking the exclusive control of the property, implicit in the concept of the castle as dominion, and further by rejecting subjective value that a homeowner attaches to a home, eminent domain violates that concept of the “modest home” as a castle.

This discussion of metaphors argues that subjective values that can and should be monetized must be part of any compensation that is just. This theory insists upon the state exercising its eminent domain power “in a manner that gives due regard to the importance of the property in question to the lives of the people being displaced.”

Professor Christopher Serkin has discussed a similar argument, relying on what is termed the “personality theory” of property. Serkin contends that government should employ takings law that is “responsive to a contextual inquiry into the personhood of the property taken.” Under this view, “[f]air market value . . . is inherently inadequate to vindicate the personal connection people may have with [deeply personal] property.” Serkin quotes that “[e]xactly what has been taken, and from whom, matters.”

184. Id. at 2973.
185. Id. at 2973–74.
186. Id. at 2975.
187. Id.
189. Id. at 722.
190. Id.
191. Id. at 722 n.202.
Keeping these theories in mind, Jason Asper suggests that “courts should utilize a hybrid rule that makes use of the characteristics of both property rules and liability rules,” allowing landowners’ subjective evaluation of their property to be considered in determining “just compensation” in eminent domain cases. However, this “hybrid rule” requires courts to balance “all of the factors affecting the property value, including subjective values such as sentimental attachment,” rather than have the owners themselves set the value of their entitlement.193

However, Asper suggests that some courts have already taken a step in this subjective valuation direction by departing, ever so slightly, from the standard comparable sales analysis in determining the market value of a piece of property.194 By allowing the appraiser to conduct a different type of valuation in determining market value to account for the property’s unique character or special purpose, Asper claims that courts “have opened the door to allowing the consideration of the subjective value attached to one’s home in the determination of market value.”195 Although in each case Asper analyzes the courts are still evaluating objective, tangible aspects of the property itself, not compensation for the subjective, intangible, Asper asserts that these cases leave the door open for subjective valuation to be easily argued into compensation proceedings.

For example, Asper cites a Georgia Court of Appeals decision from 1992 where Judge Beasley stated that a “property owner may recover compensation for the value of his property where the property has a unique value to him such that fair market value does not represent just and adequate compensation.”196 But the opinion went on to note that pecuniary value, rather than sentimental value, is all that the court should consider in determining the value to the owner.197 “Unique value is based on the characteristics of the land, and the use of the land by the owner, but not the characteristics of the owner.”198 Thus, a court would allow for additional compensation when condemning property with an additional vast supply of potable ground water in a drought-prone area or compensating for the valuable minerals beneath the surface. Both examples would require an estimation of the fair market value but their value is objective and unique to the property, not the landowner of the property. Asper asserts that

193. Id.
194. Id. at 500.
195. Id.
196. TAYLOR v. JONES Cnty, 422 S.E.2d 890, 892 (Ga. Ct. App. 1992) (citing CHARLES N. PURSLEY, JR., GEORGIA EMINENT DOMAIN §§ 5-12, 6-3 (1982)).
197. Id. at 892-93.
198. Taylor, 422 S.E.2d at 893.
based on the Georgia court’s legal reasoning and similar others, a person wishing to “include various items of subjective value in the determination of the property’s value can now make an argument for such inclusions, assuming that individual is able to attach a comprehensible monetary value to the various items.”

However, this judicial principle of placing the landowner in the same pecuniary position they would have occupied but for the governmental action is throughout eminent domain case law and, as the Georgia court articulated, looks to the tangible values of the property involved not the specific damages to the landowner. A better solution for implementing subjective valuations is going to involve legislation. State legislation, which contains a specific itemized list of damages permissible in eminent domain proceedings could very easily include Asper’s “hybrid rule” or be as simple as requiring relocation compensation. Both options would ensure some administrative consistency rather than have the owners themselves set the value of their entitlement but still compensates the landowner, who as of yet had their property taken without consideration for the harm done to them personally.

III. ANALYSIS

When looking for a solution to the expansion of eminent domain authority, some commentators have changed their focus from the Public Use Clause of the Fifth Amendment, and given more attention to the “Just Compensation” Clause. Increasing the amount of compensation given to landowners will provide a meaningfully improved compromise between the state’s need to use eminent domain and an individual’s need not to be excessively burdened by the taking of his or her property.

A. Legislating Compensating Relocation and Comparable Housing

A state legislature considering compensation for relocation is not farfetched, in fact the Texas legislature considered such an amendment to its constitution in 2009. House Joint Resolution Number 65 (Yvonne Davis-Dallas) proposed to amend Article 1, section 17 of the Texas Constitution to define “adequate compensation” when the property taken is a homestead or farm. “In eminent domain takings where relocation of a farm or homestead is necessary, “adequate

199. Asper, supra note 193, at 501.
201. Id.
compensation” would include the cost to relocate the property owner to another property that affords the owner the same standard of living as he or she enjoyed immediately before the taking.202

House Joint Resolution (“HJR”) 65 was left pending in the Land and Resource Committee after a public hearing and testimony on March 25, 2009.203 The committee met for seven hours, the majority of that time consisted of testimony centering on eminent domain reform. Two other bills, HJR 14 and HJR 31, discussed the definition of public use and received the majority of the committee and witness attention.204 At that time, the Texas Legislature had still not successfully responded to public outcry from Kelo, and as such the committee was primarily focused on the several proposed definitions of public use, rather than compensation aspects of eminent domain.

In addition to Representative Davis who sponsored the resolution, the Committee heard from Ted Gorski, Senior Assistant City Attorney for the City of Fort Worth, and Robert Soard, Chief of Staff at Harris County Attorney’s Office regarding HJR 65.205 Mr. Gorski explained his concern with the resolution’s vague language, which requires the return of the condemnee to a comparable standard of living.206 Mr. Soard explained that Harris County already compensates for relocation costs on its own.207 He recommended modeling HJR 65 after the Federal Uniform Relocation Act to access relocation costs and make such language applicable to all condemning authorities within the State.208 He explained that the federal act provided broader protection and allowed recovery for relocation costs up to a year after the actual move.209 This prevented speculation about moving expenses at the commissioner’s hearing and allowed the condemnee to have full evidence of the move.210 Representative Davis responded to Mr. Soard’s recommendation and explained that the bill was modeled after the federal act, but pointed out that the federal act gave capped compensation: $10,000 for families and $20,000 for business who are forced to relocate.211 Representative Davis reiterated

202. Id.
203. LEGISLATIVE REFERENCE LIBRARY OF TEX. (Oct. 1, 2012), http://www.lrl.state.tx.us/legis/billSearch/actions.cfm?legSession=81-0&billTypeDetail=HJR&billNumberDetail=65&billSuffix=&startRow=1&IDlist=&unClicklist=&number=100
205. Id.
207. Id. at 15:15.
208. Id.
209. Id.
210. Id.
211. Id. at 1:52:00.
that the aim of the resolution was to make the condemnee “whole and harmless” by placing the property owner in same standard of living they were before condemnation.212

This compensation assists displaced homeowners in purchasing replacement housing which is (1) decent, safe, and sanitary, and (2) comparable to the house previously owned by the displaced person. Support for not having a cap to this compensation rests primarily on the proposition that a displaced homeowner should not be required by the government to move into a substandard home, no matter what the condition of the landowner’s original home. If one accepts this proposition, it is somewhat inconsistent to put a limit on a replacement housing payment because such a limit effectively modifies that policy. In effect, the Federal Government is saying, “Our policy is to provide decent, safe, and sanitary housing, as long as it doesn’t cost too much to do so.” A payment limit can also reduce the probability that the displaced person will be provided a home, which has comparable features to the home from which he is displaced. Without a limit, the replacement housing payment would be computed solely on the criteria of the Act that the replacement dwelling be (1) decent, safe, and sanitary, and (2) comparable to the displaced person’s previous dwelling.

Although the definition of a “comparable dwelling” is somewhat vague, in the context of real estate, comparable homes are frequently quantified in a list of factors. Fair market value goes too far in this quantification by reducing homes to one number. If instead, appraisers weighed these factors and found comparable homes in the area available for purchase with these same qualities that the homeowner has deemed important, the government would be the facilitator from one home to the next rather than potentially undercompensating and leaving the homeowner on their own to find a new residence. Further by mimicking the several decades old federal provisions in URA, condemnation in the state of Texas would be uniform and more consistent with condemnations across the country.

B. Legislating Rolling Property Tax Exemption

Another aspect of condemnee focused compensation, which has not been addressed in Texas legislation, would be rolling the effective date of a residence property tax exemption to the new residence of a displaced landowner. Texas eminent domain authorities when considering condemnation of the homestead of a disabled landowner or one that is over sixty-five years old might meet added resistance. These landowners could be taking advantage of a residence tax exemption,
which freezes the value of the property from taxation and lowers their property taxes at the age of sixty-five or upon establishing the disability.\textsuperscript{213} This legislation was created to prevent landowners on retirement or social security from being pushed out of homeownership by continually rising property taxes. This year-to-year consistency is easier to budget for those with limited income but would be reset upon relocation. Thus, the disabled or over sixty-five homeowner who is displaced by government takings is not put in a similar pecuniary position as they were before the entity initiated condemnation.

In California, such a rollover of a homeowner’s tax exemption already exists as a one-time application to all eligible citizens (those over the age of fifty-five or severely disabled\textsuperscript{214} or owners of contaminated property)\textsuperscript{215} who voluntarily decide to move. In a series of voter-enacted initiatives, California citizens approved a constitutional amendment authorizing the transfer of a property’s base year value to a replacement dwelling under certain circumstances.\textsuperscript{216}

Sections 69.4-5 of the California Tax Code provide the implementing language for the constitutional provision and allow the specified group of citizens to transfer the base year value of their original property to any replacement dwelling in the same county of equal or lesser value.\textsuperscript{217} Eight California counties have passed ordinances implementing inter-county base year value transfers.\textsuperscript{218} As such, if the replacement property is in a different county than the original property, only the replacement property (not the original property) must be located in one of these eight counties.\textsuperscript{219} If a county has an ordinance, it will accept a base year value transfer from any other county in California as long as all the requirements are met.\textsuperscript{220} Regardless of the new property’s county, the rollover of a homeowner’s tax exemption only applies to properties purchased or newly constructed by the homeowner as their principal residence within two years (before or after) the sale of the original property.\textsuperscript{221}

\footnotesize
\begin{itemize}
  \item \textsuperscript{213} \textit{Tex. Tax Code Ann.} § 11.13 (West 2008).
  \item \textsuperscript{214} \textit{See Cal. Rev. & Tax. Code} § 69.5 (West 2011).
  \item \textsuperscript{215} \textit{See Cal. Rev. & Tax. Code} § 69.4 (West 2011).
  \item \textsuperscript{216} Wunderlich v. Cnty. of Santa Cruz, 178 Cal. App. 4th 680, 690–91, 100 Cal. Rptr. 3d 598, 603 (Cal. Ct. App. 2009) (discussing Cal. Const., art. XIII A, § 2, subd. (a)).
  \item \textsuperscript{217} \textit{Cal. Rev. & Tax. Code} §§ 69.4–5(a)(1) (West 2011).
  \item \textsuperscript{218} \textit{Frequently Asked Questions-Exclusions from Reappraisal, Propositions 60/90, Cal. State Bd. of Equalization, available at} http://www.boe.ca.gov/propptaxes/faqs/propositions%2090.htm (Alameda, Orange, San Mateo, Ventura, Los Angeles, San Diego, Santa Clara, and El Dorado Counties).
  \item \textsuperscript{219} \textit{Id.}
  \item \textsuperscript{220} \textit{Id.}
  \item \textsuperscript{221} \textit{Cal. Rev. & Tax. Code} § 69.5(a)(1)(West 2011).
\end{itemize}
In application, the date of valuation and the “equal or lesser value” requirement of the rollover provision are the frequently litigated issues. The date of valuation for the new property is measured at the purchase date of the residence or the date construction of the new residence is completed, whichever is later. In general, “equal or lesser value” means the fair market value of the replacement property does not exceed one of the following:

- 100 percent of the market value of the original property, if the replacement property is purchased or newly constructed before the original property is sold;
- 105 percent of the market value of the original property, if the replacement property is purchased or newly constructed within the first year after the original property is sold; or
- 110 percent of the market value of the original property, if the replacement property is purchased or newly constructed within the second year after the original property is sold.

Although California’s tax exemption applies to voluntary moves of a specific group of citizens, Texas legislators could create a similar rollover provision for Texas property owners qualifying for the residence property tax exemption who are displaced by an eminent domain taking. Allowing governments within the state of Texas to remedy a financial devastation for elderly and disabled landowners by tolling the property taxes on the relocated homestead to the date the condemned land’s tax exemption began could potentially take a bit of the sting out of governmental takings.

C. Legislating Condemnation Premiums for Private Entities

Some commentators, who have shifted eminent domain reform focus from “fair use” to “just compensation,” have suggested that states should redefine “just compensation” for particular eminent domain authorities to include a substantial premium over and above the fair market value of the property. This suggestion attempts to balance the incentives of the condemnor to take property against the incentives of a property owner to litigate the taking.

222. See e.g., Wunderlich, 178 Cal. App. 4th 680, 100 Cal. Rptr. 3d 598 (Cal. Ct. App. 2009).
223. CAL. REV. & TAX. CODE § 69.5(g)(5) (West 2011); see Wunderlich, 178 Cal. App. 4th 680, 100 Cal. Rptr. 3d 598 (Cal. Ct. App. 2009) (stating that taxpayer could not transfer former home’s base-year value to replacement property (land and house) because its combined value, measured as of construction completion date, exceeded former residence’s sale price).
226. Id.
Dale Orthner, for example, reexamined the Mill Acts as a compensation solution for eminent domain authorities. Early in American history, many states had statutes known as the Mill Acts, which authorized grist mill owners to dam a river to provide more water power to run their mills. However, the government required the mill to offer services to the community, in addition to its own business. The Mill Acts also provided that owners of any land upstream that were flooded as a result of the dam would be awarded compensation. The Mill Act of New Hampshire provided that if the grist mill owner and the flooded land owner could not agree on the level of damages, a court would appoint a committee. “Upon a determination that the mill benefited the public and was necessary to the operation of the mill, the committee would determine the damages caused by the flooding and make a report to the court.” The Mill Act then required the court to award those damages plus an additional 50% to the landowner. As such, the New Hampshire Mill Act provided a property owner who had land taken by eminent domain compensation at a level significantly above the measure of actual damages.

Orthner argues that a provision harkening back to the Grist Mill Acts of adding 50% to the assessed damages accomplished two objectives in limiting private entity eminent domain power abuse. Such a provision made private entities reluctant to use the granted eminent domain power to take land, “because the flooded property cost more to the grist mill owner than its fair market value.” It also “reduced the owner’s incentive to obstruct the development of a valuable service to the community, since the owner would recoup his reasonable loss of property value, plus pocket a 50% profit.” Orthner then recommends state legislatures apply a similar penalty to all entities, private and public, exercising eminent domain authority simply stat-

227. Orthner, supra note 49, at 453–54 (citing Kelo, 545 U.S. at 512 (Thomas, J., dissenting); see also Head v. Amoskeag Mfg. Co., 113 U.S. 9, 16–17 (1885) (listing Virginia, Maryland, Delaware, North Carolina, Massachusetts, New Hampshire, and Rhode Island as having Mill Acts before the Declaration of Independence, and Tennessee, Maine, Kentucky, Missouri, Arkansas, Pennsylvania, Connecticut, Vermont, Kansas, Oregon, West Virginia, and Georgia as passing mill acts at varying times after 1776, and Indiana, Illinois, Michigan, Wisconsin, Iowa, Nebraska, Minnesota, Mississippi, Alabama, and Florida as passing Mills Acts while they were still territories and re-enacting them after they became states).
230. Id. (listing the above provisions in sections 2 to 3 of the Mill Act of New Hampshire).
231. Id. at 454.
232. Id.
234. Id.
235. Id.
ing, “the more the government will have to pay to seize property, the less likely it is to seize it.”

From a practical standpoint, the fixed percentage of added value may minimize the need for, or opportunity to prove, contrary value for the property. Inclusion of a fixed additional value will make this aspect of condemnation proceedings more straightforward and in states like Missouri and Indiana, where these fixed percentages are based off of “heritage or homestead value,” motions in limine could be used to exclude often emotional testimony by stipulating that the land qualifies for the statutory enhancement based on the length of time the landowner has owned the home or its use as a primary residence.

Orthner attempts to apply the grist mill statutes to all eminent domain authorities, when the origins and applications of such statutes are limited to private entities. As such, a better modern-day application should also be limited to private entities. For example, private utility companies, which apply for “common carrier” status by merely checking a box on the Railroad Commission’s permit application and receive eminent domain authority, should have some disincentive to condemn property, especially if there is no future government interference, community oversight, or observation.

Given that an individual’s home often represents the vast majority of their personal worth, news that the value of that home has just increased due to an eminent domain proceeding is likely to be met with great joy instead of fears of loss and uncertainty. As Orthner points out, since the vast majority of people have substantial mortgages on their home, and thus have far less equity than the fair market value, the premium can represent an increase in their net worth.

A compensation premium as a solution does satisfy the need for a simple, constant administrative solution in eminent domain proceedings. However, a solution based on government paying additional money for a necessity, such as condemning property to widen a ravine and protect the neighborhood from flooding is not ideal, nor would it provide any more accountability than citizens keeping a watchful eye on political officials in a state. While the government is accountable to the general public to meet the community’s demands, private enterprises are usually more accountable to financial interests. “A private

236. Id.
237. Id. at 456. (“For example, a $200,000 house bought with ten percent down carries a mortgage of $180,000 and $20,000 in equity. If the law required compensation at 150% of value, the owner would receive $300,000 for the home and have $120,000 cash in hand after paying off the mortgage. This money could be used to pay moving and other expenses and for a solid down payment on another home, likely one with improved amenities. A substantial portion of the property owner’s net worth would expand from $20,000 to $120,000 on completion of the eminent domain proceeding. That represents a six-fold increase in the property owner’s equity and would provide a powerful disincentive to obstruct the project with litigation.”)
development that was only marginally profitable at 100% of fair market value for the condemned properties would likely be left uninitiated if the acquisition cost of those properties was set at 150% of value." 238 The extra cost, whether borne by a developer or private utility, would be justified by the substantial effectiveness of those private entities’ plans.

This premium would not substantially harm profitable development plans in a truly blighted area. The urban blight exemption is still present in the Texas Constitution and is a vague term that could lead to situations similar to Kelo where homes that are not specifically deemed blighted, potentially the yard of the month winner for thirty-seven consecutive months, but are in a “blighted” area will be condemned for a redevelopment project. This premium would not substantially harm profitable development plans in a truly blighted area because the initial home values would be rather inexpensive and easily digestible if the redevelopment is truly a profitable venture, but those redevelopment plans which are on the edge of profitability and would be unable to swallow the premium, then would be weeded out and leave the community intact.

Orthner describes the 50% figure as “just a rough estimate of what will provide meaningful relief to condemnees, yet still allow productive takings to occur.” 239 However a 50% premium, in a state that has outlawed certain types of economic redevelopment, is likely a bit excessive. The proposed compensation premium should serve as an attached string to a grant of eminent domain power to private entities, but if the legislative grant of eminent domain power is legitimately helpful to the private entity and public welfare then a better balance between actual public need and private harm would be 15-20%. Potentially, legislators could raise, lower, or waive this premium for specific types of projects such as hospitals and schools. However, care should be taken to avoid complex schemes of varying compensation levels, which have the potential to increase the already arduous level of eminent domain litigation and create even more uncertainties in the mind of landowners. With the cautious addition of a compensation premium to the law of eminent domain, the amount of litigation and public unease could be substantially reduced.

Such legislation could be too inclusive of private entities who would, if they had the option, allow public oversight rather than pay the additional premium for eminent domain authority. Other state legislatures have begun including such oversight into private entities with eminent domain authority. In Missouri, for example, board members of non-governmental authorities or redevelopment corporations must be elected or appointed by one or more elected officials. 240

---

238. Id. at 454–55.
239. Orthner, supra note 49 at 457.
Before these authorities can exercise eminent domain to acquire real estate, a local ordinance is required in addition to the approval by a governmental authority to condemn lands “in the name of the state of Missouri.”

Another variation of revising the Mill Acts, would be to set aside a certain percentage, say 30%, of the appraised values of the condemned properties at the outset of the condemnation process to provide landowners with legal counsel to defend the condemnee from private entities wielding eminent domain authority. Although after SB18, Texas condemning entities are required to provide the condemnee copies of all appraisals related to their land, the average landowner might not be able to decipher these documents or be able to represent themselves against a highly specialized and experienced condemnation attorney for a private company. Rather than have the landowner pocket the premium, in what might be argued as a windfall, these funds could be used to give landowners the appropriate tools to negotiate fair, just, and adequate compensation.

IV. Conclusion

The Texas legislative response to the public outcry over Kelo has provided a step in the right direction by creating a more stringent process for condemnation proceedings and attempting to limit the types of public uses allowed in government takings. However, the Texas legislature needs to continue reform and should focus on what entails adequate compensation and needs to fully address problems related to private entities wielding eminent domain authority without oversight.

The public use doctrine has been broadly defined as giving the legislature the power of eminent domain on a broader scale, providing an increase in the number and ability of eminent domain authorities with no balancing increase to the landowner’s ability to fight back. This Comment recommends harkening back to the early American Mill Acts, which granted private entities the ability to use another’s land for a public purpose but required the landowner to be compensated an additional 50% of their damages. This extra (or debatably equal) compensation is a way to restrain private eminent domain authorities since they do not have public oversight of their actions and work as a tax on the coercive ability to take the land of another. Re-


requiring private entities to pay more for land they take will reduce the number of private entity takings, while still allowing for productive development. Additionally, providing more than fair market value to condemnees would more accurately compensate for the true costs of a forced relocation and thus reduce the incentives of the property owner to litigate or otherwise oppose the taking.

This Comment also recommends looking past the “fair market value” as the means of returning landowners to their same pecuniary position before the taking and legislating compensation to include relocation costs to a comparable dwelling as part of a displaced homeowners “adequate compensation” to put them in the same pecuniary position they were before the condemnation proceedings and rolling the effective date of a residence property tax exemption designed to freeze elderly or disabled landowner’s property taxes to the landowner’s new residence after eminent domain displacement. These methods would not only provide calculable, subjective compensation not available by fair market value, but would also maintain stable economic circumstances for a particularly susceptible group of citizens.

Legislators should establish an improved balance between the power of the state to condemn land and the financial well-being of targeted property owners. Requiring private entities to pay more for land it takes will reduce the number of takings, while still allowing for productive development. Additionally, providing more than fair market value to condemnees will more accurately compensate for the true costs of a forced relocation and thus reduce the incentives of the property owner to litigate or otherwise oppose the taking. Therefore, to make productive reforms in the states’ power of eminent domain, legislators should focus more on providing “just compensation” as a meaningful safeguard to rebalance the equity of eminent domain than attempting to restrict the definition of “public use.”