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FULL SPEED AHEAD? Reexamining Texas's Approach to Eminent Domain

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**FULL SPEED AHEAD? REEXAMINING TEXAS’S APPROACH TO
EMINENT DOMAIN**

Emma Blackmon[†]

Abstract

Property rights are traditionally held sacred in Texas. But through eminent domain, landowners lose their property rights, purportedly in service of the broader public. Sometimes, the legislature confers eminent domain power on for-profit companies. Landowners are then forced to surrender their property while the companies benefit economically. The result is that landowners are stripped of the right to fully use and enjoy their property.

The recent Texas Supreme Court case, Miles v. Texas Central Railroad & Infrastructure, Inc., demonstrates the tension between property rights and economic development created by eminent domain. Facially, Miles concerns whether a for-profit company’s high-speed rail qualifies as an interurban rail or railroad for purposes of eminent domain authority. But like many cases involving eminent domain, Miles is really about power: who has it, where it comes from, and what happens to those who do not have it. This Article functions as a starting point for reexamining how the Texas Legislature can better balance the scales between a landowner’s property rights and the economic benefits of eminent domain.

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I. INTRODUCTION

Merriam-Webster defines power as the “possession of control, authority, or influence over others.”¹ Power is fundamental to acquisition. If power is not curbed, disaster may result. Unchecked power can be so detrimental, that embedded within the fabric of American society is the idea that the levers of power be balanced amongst the branches of government so that one branch cannot acquire too much power at the expense of the others, and, most importantly, at the expense of the people. Though the separation of powers is meant to protect the people from governmental overreach, eminent domain allows the government to wield power at the expense of landowners to benefit the broader public.

Eminent domain grants governments the power to take private property for public use in exchange for just compensation.² Governments use eminent domain for a variety of purposes, often to improve transportation and infrastructure.³ Because eminent domain requires the government to flex its muscles to acquire property, eminent domain jurisprudence is lengthy.

Interestingly, the federal government did not always consider itself to have eminent domain power.⁴ Eminent domain was initially not

1. *Power*, MERRIAM-WEBSTER (2023), <https://www.merriam-webster.com/dictionary/power> [<https://perma.cc/8G4Y-427X>].

2. *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2251 (2021).

3. *History of the Federal Use of Eminent Domain*, DEP’T OF JUST., <https://www.justice.gov/enrd/history-federal-use-eminant-domain> [<https://perma.cc/MU5R-RZHA>].

4. William Baude, *Rethinking Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1742 (2013).

considered an implied federal power because it was too expansive.⁵ But by 1879, the Supreme Court recognized that eminent domain may be a power inherent to any sovereignty.⁶ Writing for the majority in *Boom Co. v. Patterson*, Justice Field wrote, “the right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.”⁷ Despite such a definitive statement by Justice Field, eminent domain is controversial.⁸

One controversial aspect of eminent domain is that the government sometimes confers eminent domain power on for-profit companies.⁹ These companies must still satisfy the public use requirement and provide property owners with just compensation.¹⁰ But no matter who is condemning the property, the landowner is losing something. Despite the fact that eminent domain takes property away from landowners, people in many states, including Texas, view private property rights with reverence. Texas has gone so far as to codify the importance of private property rights.¹¹ In 1995, the Texas Legislature enacted the Private Real Property Rights Preservation Act.¹² The Act’s purpose was to ensure that any government actions that impacted private property rights, such as an exercise of eminent domain, did not trample on those rights.¹³ For example, the Act mandates that certain government actions receive a Takings Impact Assessment (“Assessment”).¹⁴ An Assessment is meant to ensure that the government considers all the implications of taking private property.¹⁵ As important as private property rights may be in Texas,

5. *Id.*

6. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

7. *Id.*

8. See *The Civil Rights Implications of Eminent Domain Abuse*, U.S. COMM’N ON C.R. (2009), https://www.usccr.gov/files/pubs/docs/FINAL_FY14_Eminent-Domain-Report.pdf [<https://perma.cc/VP93-A9V4>].

9. TEX. DEP’T OF TRANSP., 2023-2024 EDUCATIONAL SERIES – EMINENT DOMAIN 6 (2023).

10. *Id.*

11. TEX. GOV’T CODE ANN. § 2007 (West, Westlaw through 2021 Reg. & Called Sess. 87th Leg.).

12. *Id.*

13. *Id.*

14. TEX. GOV’T CODE ANN. § 2007.043 (West, Westlaw through 2021 Reg. & Called Sess. 87th Leg.).

15. *Id.*

they are often in tension with economic growth, something with which Texas is intimately familiar.

According to the U.S. Census Bureau, though Florida may be the fastest-gaining state since 2021, it is Texas that has made the largest population gains.¹⁶ Texas is now home to over 30 million people, a feat previously accomplished only by California.¹⁷ But the population growth has brought predictable problems, including growing transportation concerns.¹⁸ With more people moving to Texas, the need for more roads and methods of transportation grows.¹⁹ The desire to improve transportation has already attracted innovative projects. But attracting new projects raises questions about how developers can complete those projects. In some cases, the only answer is through the use of eminent domain.

In *Miles v. Texas Central Railroad & Infrastructure, Inc.*, the Texas Supreme Court found that a for-profit company seeking to build a high-speed rail connecting Dallas and Houston had eminent domain power.²⁰ Relying on an early 20th-century statute concerning the use of trolley cars within various Texas cities, the court used statutory interpretation tools and court precedent to determine that Texas Central Railroad, with its desire to build a high-speed rail, had the authority to condemn private property that stood in the rail's path.²¹ The court's decision underscored an imbalance between private property rights and eminent domain power given to for-profit companies.

This Article highlights the importance of protecting landowners and their rights. To that end, this Article first discusses the road *Miles* took through the court system. Second, this Article comments on the court's analysis of whether the high-speed rail company had eminent domain authority. Third, this Article advocates for adopting a new test to determine whether a for-profit company has eminent domain

16. Predictably, everything is bigger in Texas. *See Growth in U.S. Population Shows Early Indication of Recovery Amid COVID-19 Pandemic*, U.S. CENSUS BUREAU (Dec. 22, 2022), <https://www.census.gov/newsroom/press-releases/2022/2022-population-estimates.html> [<https://perma.cc/ZUE9-LKYW>].

17. Glorie G. Martinez, *What Does a Population Boom Mean for Texas Housing and Infrastructure?*, KERA NEWS (Jan. 11, 2023, 9:41 AM), <https://www.keranews.org/business-economy/2023-01-11/what-does-a-population-boom-mean-for-texas-housing-and-infrastructure> [<https://perma.cc/GTG2-E335>].

18. *Id.*

19. *Id.*

20. *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613, 617 (Tex. 2022).

21. *Id.*

authority. Fourth, this Article explores the Texas Legislature's recent revisions to its eminent domain laws and proposes a future change to the repurchasing requirements in the Texas Property Code.

II. BACKGROUND OF *MILES V. TEXAS CENTRAL INFRASTRUCTURE, INC.*

In *Miles v. Texas Central Railroad & Infrastructure, Inc.*, the court considered whether Texas Central Railroad, a for-profit company seeking to build a high-speed rail connecting Houston and Dallas, had eminent domain power.²² In *Miles*, private property owners brought suit against Texas Central Entities ("Texas Central") and argued that the railways did not have the authority to condemn the owners' property.²³ This Section first explains Texas Central's high-speed rail and then summarizes *Miles*'s journey to the Texas Supreme Court.

A. *Texas Central's High-Speed Rail*

Texas Central's high-speed rail was an attempt to assist "supercommuters" who frequently travel between Dallas and Houston.²⁴ Texas Central's high-speed rail would stop at three stations: a North Texas station in Dallas, a Brazos Valley station near College Station and Huntsville, and a Houston station in northwest Houston.²⁵ Across 240 miles of tracks, travelers could take the approximately 90-minute trip.²⁶ The high-speed rail's stations would house retail stores and food spots.²⁷ The high-speed rail itself would contain Wi-Fi and other features that would allow travelers to take the train for work or recreation.²⁸ Developers planned to incorporate Japanese technology in the rail.²⁹

To complete the plan, Texas Central needed the cooperation of landowners along the proposed route.³⁰ The company claimed it

22. *Id.* at 616.

23. *Id.*

24. *The Project*, TEX. CENT., <https://www.texascentral.com/project/> [<https://perma.cc/V5JR-XZYQ>].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Landowner Resources*, TEX. CENT., <https://www.texascentral.com/landowners/> [<https://perma.cc/4Y93-8H2Y>].

wanted to minimize any harm or disruption to landowners.³¹ But Texas Central had a problem. What if landowners did not want to allow the company to access and use their land? In the event that landowners did not comply with Texas Central's request, Texas Central banked on using the power of eminent domain.³²

B. Miles's Journey to the Supreme Court

In late 2015, when Texas Central was beginning to survey properties along the path of its planned route, Texas Central sought to survey James Miles's land.³³ Miles owned about 600 acres, and Texas Central's preferred route cut across Miles's property.³⁴ Texas Central would require 100 feet of Miles's property to be used as a right of way for the rail.³⁵ But Miles did not allow Texas Central to survey his property and instead sued Texas Central for a declaratory judgment.³⁶ Miles argued that Texas Central could not qualify as a railroad simply because it stated it was a railroad in its company charter.³⁷ According to Miles, Texas Central was merely checking a box, doing the bare minimum to qualify as a railroad company.³⁸ Miles further argued that Texas Central was relying on outdated statutes when it claimed that its high-speed rail qualified as an interurban electric railway.³⁹ Texas Central counterclaimed, stating it was a railroad company and that it was also an interurban electric railway company.⁴⁰ Because it was a railroad and an interurban electric railway, Texas Central argued Texas law authorized its use of eminent domain.

Thus began *Miles's* winding road through the Texas court system. First, the trial court granted Miles's motion for summary judgment.⁴¹ Not only did the trial court grant Miles summary judgment, but the trial court also dismissed Texas Central's claims against Miles with

31. *Id.*

32. Barclay R. Nicholson & Erica C. Gibbons, *Texas Central wins authority to Take Land for High-Speed Rail System*, NAT'L L. REV. (Sept. 27, 2022), <https://www.natlawreview.com/article/texas-central-wins-authority-to-take-land-high-speed-rail-system> [<https://perma.cc/L5ES-N5QX>].

33. *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613, 617 (Tex. 2022).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 618-19.

39. *Id.*

40. *Id.* at 617.

41. *Id.* at 619.

prejudice.⁴² Texas Central appealed the decision and won.⁴³ But the battle did not end there. The Texas Supreme Court granted Miles's petition for review.⁴⁴

Because the Legislature must expressly grant eminent domain power, Texas Central's authority needed to be rooted in a statute.⁴⁵ Texas Central asserted it was a railroad company under Chapter 81 of the Texas Transportation Code and an interurban electric railway under Chapter 131 of the Code.⁴⁶ If Texas Central qualified either as a railroad company or as an interurban electric railway, Texas Central had eminent domain power.⁴⁷ The Court first addressed Chapter 131 and whether the high-speed rail fell into the statutory definition of an interurban electric rail.⁴⁸ The Court found that it did.⁴⁹ First, though the Legislature enacted statutes pertaining to the interurban railway in the early 20th century, the statutory language was broad.⁵⁰ The statute granted eminent domain power to "corporations chartered for the purpose of constructing, acquiring, maintaining or operating lines of electric railway between municipalities in this state for the transportation of freight, passengers, or both freight and passengers."⁵¹ The court reasoned that the broad, plain language of the statute encompassed Texas Central's high-speed rail.⁵² Because the court considered the high-speed rail an interurban electric railway under Chapter 131, the court did not address whether Texas Central was also a railroad company.⁵³ According to the court, Chapter 131 unambiguously extended eminent domain power to Texas Central.⁵⁴ *Miles* was a win for for-profit companies at the expense of Miles and other property owners standing in the high-speed rail's path.

42. *Id.*

43. *Tex. Cent. R.R. & Infrastructure v. Miles*, 635 S.W.3d 684, 697 (Tex. App.—Corpus Christi-Edinburg, 2020).

44. *Miles*, 647 S.W.3d at 619.

45. *Id.* at 620.

46. *Id.* at 618.; *see* TEX. TRANSP. CODE ANN. § 131.011 (West, Westlaw through 2021 Reg. Called Sess. 87th Leg.); *see also* TEX. TRANSP. CODE ANN. § 81.002 (West, Westlaw through 2021 Reg. Called Sess. 87th Leg.).

47. *Miles*, 647 S.W.3d at 621.

48. *Id.*

49. *Id.* at 626.

50. *Id.* at 621-23.

51. TEX. TRANSP. CODE ANN. § 131.012 (West, Westlaw through 2021 Reg. Called Sess. 87th Leg.).

52. *Miles*, 647 S.W.3d at 623.

53. *Id.* at 630.

54. *Id.* at 626.

III. REDEFINING HOW COURTS AND THE LEGISLATURE ASSESS GRANTS OF EMINENT DOMAIN AUTHORITY

Though *Miles* was primarily concerned with interpreting whether a high-speed rail fit into the statutory definition of an interurban rail, another component of the case was whether Texas Central's eminent domain authority was supported by its activities. Put another way, the court assessed whether Texas Central was a railroad company within the meaning of the statute or if Texas Central was only masking itself as a railroad company to benefit from eminent domain. Miles claimed that Texas Central was engaging in "box-checking" and was not acting like a railroad company.⁵⁵ Miles argued that Texas Central should be required to demonstrate a reasonable probability that it could actually complete the high-speed rail.⁵⁶ The Court disagreed and found Texas Central to be more than checking a box because it was actually chartered for the purpose of being a railroad and had engaged in activities in furtherance of that purpose.⁵⁷

First, this Section explains the origins of "box-checking" to obtain eminent domain power. Second, this Section defines Miles's proposed reasonable probability of completion test. Third, this Section explores the court's rejection of Miles's test. Fourth, this Section advocates for a reasonable probability of completion test that requires a for-profit company to present objective evidence demonstrating it can and will complete the project.

A. *Origins of the Box-Checking Test*

The court in *Miles* discussed two prior eminent domain cases: *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, decided in 2012, and *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, decided in 2017.⁵⁸ These two cases are often referred to as *Denbury I* and *Denbury II* (sometimes *Texas Rice I* and *II*)⁵⁹ in subsequent cases and articles.⁶⁰ In *Denbury I*, the court defined box-checking and introduced a test for how companies can be labeled

55. *Id.* at 618.

56. *Id.* at 627.

57. *Id.* at 627-28.

58. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 196-97 (Tex. 2012).

59. This article refers to the cases as *Denbury I* and *Denbury II*.

60. *Tex. Rice Land Partners, Ltd.*, 363 S.W.3d at 192.; *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909 (Tex. 2017).

common carriers for purposes of eminent domain.⁶¹ In *Denbury II*, the court clarified that test.⁶²

In *Denbury I*, Denbury attempted to survey land owned by Texas Rice in connection with Denbury's plan to build a pipeline.⁶³ Texas Rice denied Denbury access to its land.⁶⁴ Denbury filed a permit with the Texas Railroad Commission to gain status as a common carrier so it could utilize eminent domain.⁶⁵ Denbury sought an injunction against Texas Rice and proceeded to survey the land.⁶⁶ Texas Rice challenged Denbury's eminent domain power.⁶⁷ The court determined that neither a grant from the Railroad Commission nor a common-carrier permit was enough to give a pipeline company eminent domain power.⁶⁸ According to the court, registering for a common carrier permit, absent further actions in service of the pipeline, was akin to checking a box.⁶⁹ The court stated, "holding oneself out [as a common carrier] is insufficient under Texas law to thwart judicial review."⁷⁰ The entity seeking to benefit from eminent domain must do more than self-identify as a common carrier on a form and provide reasonable proof that the pipeline will actually serve the public as a common carrier ("Reasonable Probability Test").⁷¹

The court defined reasonable probability as something that is "more likely than not."⁷² Though Denbury's pipeline would have greatly benefitted Texas in its push to increase energy production, the desire to increase production did not supersede landowners' property rights.⁷³ At the time Denbury sought access to Texas Rice's land, Denbury had only demonstrated that it intended for its pipeline to serve the public.⁷⁴ Mere intent, without more, was not enough to grant Denbury eminent domain power.⁷⁵ Further, the court noted the

61. *Tex. Rice Land Partners, Ltd.*, 363 S.W.3d at 192.

62. *See generally Denbury Green Pipeline-Texas, LLC*, 510 S.W.3d 909, 909.

63. *Tex. Rice Land Partners, Ltd.*, 363 S.W.3d at 196.

64. *Id.*

65. *Id.* at 195-96.

66. *Id.* at 196; under Tex. Prop. Code § 21.021(a), a condemner can take the land and begin the project even if the property owner is currently challenging eminent domain authority.

67. *Tex. Rice Land Partners, Ltd.*, 363 S.W.3d at 195-97.

68. *Id.* at 198.

69. *Id.* at 204.

70. *Id.*

71. *Id.*

72. *Id.* at 202.

73. *Id.* at 204.

74. *Id.* at 203.

75. *Id.* at 203-04.

testimony indicated that the pipeline was more operationally necessary for Denbury rather than beneficial to the public.⁷⁶ The court remanded the case for further proceedings but did not offer concrete guidance as to how to administer this new Reasonable Probability Test.⁷⁷

In *Denbury II*, the court revisited the Reasonable Probability Test.⁷⁸ Denbury offered evidence that it had entered into construction contracts after it completed the pipeline.⁷⁹ These contracts served as evidence that Denbury's pipeline would serve the public.⁸⁰ For example, Denbury offered a contract between itself and Airgas Carbonic.⁸¹ Under the contract, Denbury would use its pipeline to transport gas owned by Airgas to one of Airgas's plants.⁸² Airgas's plants would then sell the gas to its customers.⁸³

In *Denbury II*, the court clarified the Reasonable Probability Test by distinguishing between merely proving intent and offering evidence that the project would serve the public. Proving intent before construction was not necessary.⁸⁴ The kind of contract Denbury offered was relevant to the reasonable probability analysis because the contract could, among other things, demonstrate that the pipeline's route ran through areas where potential customers were concentrated.⁸⁵ The court identified other evidence that, when considered with the post-construction contracts, would further support a reasonable probability of public use.⁸⁶ That evidence included that Denbury's pipeline was already benefitting unaffiliated third parties.⁸⁷ By benefitting more than just Denbury and those it contracted with, the pipeline was serving a public use.⁸⁸ By showing that the public was already benefitting from the pipeline, Denbury established not only an intent to serve the public at some unknowable point in the

76. *Id.* at 203.

77. *Id.* at 204.

78. *Denbury Green Pipeline-Texas, LLC v. Tex. Rice Land Partners, Ltd.*, 510 S.W.3d 909, 915-16 (Tex. 2017).

79. *Id.* at 916.

80. *Id.*

81. *Id.* at 915.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 916.

86. *See id.* at 916-17.

87. *Id.*

88. *Id.*

future but that its pipeline would, more likely than not, serve a public use after construction.⁸⁹

Coupled together, *Denbury I* and *II* established that a common carrier must do more than check a box on a permit application to obtain eminent domain power. The cases established that companies who want to benefit from eminent domain cannot just demonstrate an intent that the project will come to fruition and serve the public. The companies must show that it is more likely than not that the company will complete the project and serve the public.

B. The Court's Rejection of a Reasonable Probability of Completion Test in Texas Central

In *Miles*, Miles argued for a reasonable probability of completion test, citing *Denbury I* and *II*'s Reasonable Probability Test.⁹⁰ Miles claimed that Texas Central could not have eminent domain power simply because Texas Central self-identified as a railway company in its charter.⁹¹ Under Miles's proposal, Texas Central needed to show that it was more likely than not that Texas Central could complete the project and "produce the public good" that Texas Central's project was aimed at achieving.⁹² In Miles's view, Texas Central could not make this showing.⁹³ Accordingly, clinging to its charter, without more, was the very box-checking that the court rejected in *Denbury*.⁹⁴ The court agreed with Miles that Texas Central needed to do more than check a box, but the court found that Texas Central went beyond box-checking.⁹⁵ From the court's perspective, Texas Central was (1) actually chartered as a railway company and (2) engaged in activities in furtherance of its purpose of being a railway company.⁹⁶ The court further commented that a reasonable probability of completion test was not supported by either *Denbury* or the Texas Constitution and that implementing a reasonable probability of completion test would constitute a substantial change to Texas's eminent domain law.⁹⁷

89. *Id.* at 917-18.

90. *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613, 626 (Tex. 2022).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 626-27.

95. *Id.* at 627.

96. *Id.*

97. *Id.* at 626.

Despite finding that the test was supported neither by case law nor the Constitution, the court agreed that Miles's concerns about Texas Central's authority were legitimate.⁹⁸ But an attempt by the court to address Miles's policy concerns would have been an "unprecedented and improper judicial intrusion into the legislative sphere."⁹⁹

C. Problems with the Court's Approach

Though the court appeared sympathetic to Miles's policy concerns, the court declined to adopt Miles's proposed test because Texas Central went beyond box-checking.¹⁰⁰ Further, the court saw adopting Miles's test as a legislative activity.¹⁰¹ But given the context surrounding Texas Central's activities, it is difficult to see how Texas Central was not merely checking a box, a finding the court had the power to make.

Texas Central's charter as a railway company was a persuasive factor to the court.¹⁰² But claiming to be a railway company in one's charter is no different from what occurred in *Denbury I*. In *Denbury I*, the company filled out a form, marked that it was a common carrier, and could suddenly wield eminent domain power. In *Texas Central*, Texas Central wrote its charter, identified as a railway company, and could suddenly wield eminent domain power. The court likely recognized the similarities between *Denbury* and *Texas Central* because the court pivoted and stated that Texas Central was engaged in activities supporting its purpose in being a railway.¹⁰³ The court likely obtained that information from Texas Central's brief filed in connection with its appearance in front of the court. In its brief, Texas Central listed several activities it was engaged in that supported its position that it was acting in furtherance of being a railway company.¹⁰⁴ Those activities included the following: (1) spending over \$125 million; (2) engaging around 300 technical experts and employees for the project; (3) completing more than 2,000 land

98. *Id.* at 627-28.

99. *Id.* at 629.

100. *Id.* at 627.

101. *Id.* at 628-29.

102. *Id.* at 627.

103. *Id.*

104. Respondent's Brief on the Merits at 6-9, *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613 (Tex. 2022) (No. 20-0393), <https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=3da75e84-bb29-4b47-89b0-308a5e916c78&coa=cossup&DT=BRIEFS&MediaID=a8f680b1-6797-47df-b24e-8b36ddcf1155> [https://perma.cc/MZ48-HMB6].

surveys; (4) signing an agreement with Amtrak to connect the high-speed rail to Amtrak's existing system; (5) retaining a project manager; and (6) retaining the company that built and operates Japan's high-speed rail.¹⁰⁵ This evidence of Texas Central's activities, coupled with its self-identifying as a railway company, satisfied the court that Texas Central fell within the meaning of Chapter 131.¹⁰⁶ The problem with taking Texas Central at its word is that the activities Texas Central offered in support of being a railway company did not tell the full story. Though Texas Central may have engaged in those activities at some point, the activities no longer accurately reflected Texas Central's present ability to complete the high-speed rail.

At one point, Texas Central may have been acting in furtherance of its purpose of being a railway. But those with knowledge of the project had doubt as to whether Texas Central was presently acting in furtherance of its purpose. The court itself referenced this doubt when it pointed to the dispute over whether Texas Central was equipped to complete the project.¹⁰⁷ The court punted and instead cited pre-existing statutory protections for landowners should Texas Central's project ultimately fail.¹⁰⁸ While the court saw implementing a new test as a legislative function,¹⁰⁹ the reality of Texas Central's high-speed rail undercuts the idea that the provisions currently in place were enough to protect Miles and the other landowners along Texas Central's proposed route.

D. Whether Texas Central Was Acting in Furtherance of Its Purpose Was in Doubt

In 2012, Texas Central announced that it was planning to build a high-speed rail.¹¹⁰ At that time, Texas Central was confident that it would not need any public funding,¹¹¹ despite projections that the

105. *Id.*

106. *Miles*, 647 S.W.3d at 627.

107. *Id.* at 628.

108. *Id.*

109. *Id.* at 628-29.

110. Aman Batheja, *Private Firm Aims for Bullet Trains from Dallas to Houston* by 2020, TEX. TRIB. (Aug. 15, 2012) <https://www.texastribune.org/2012/08/15/private-firm-planning-bullet-trains-texas-2020/> [<https://perma.cc/9CUL-YQGF>].

111. *Id.*

project would cost anywhere from \$10 billion¹¹² to \$12 billion.¹¹³ Then, just three years later in 2015, then-Vice President Joe Biden attended an event in Dallas celebrating the project.¹¹⁴ The Vice President's statements identifying Texas Central's high-speed rail as an industry leader coincided with the realization that Texas Central would likely need a federal loan to finance the project.¹¹⁵ By 2020, the idea that Texas Central would not use a bit of public funding was all but abandoned.¹¹⁶ The project was then projected to cost approximately \$30 billion.¹¹⁷ In a letter to a Texas state senator, Texas Central's then-chairman, Drayton McLane, Jr., said Texas Central was seeking more than just private funding.¹¹⁸ Texas Central was also hoping to receive some federal stimulus money through the Department of Transportation.¹¹⁹

In 2016, Texas Central began acquiring land from landowners but was met with opposition.¹²⁰ Despite attempting to acquire land for its project, Texas Central was not applying for all the required permits.¹²¹ Texas Central had initially penciled in 2017 as the project's completion date, but 2017 came and went without breaking ground.¹²²

112. Juan Pablo Garnham, *More Than Eight Years In, Texas High-Speed Rail Company Still Lacks Permits to Build Dallas-to-Houston Route*, TEX. TRIB. (Nov. 17, 2020), <https://www.texastribune.org/2022/08/30/texas-high-speed-rail-dallas-houston> [<https://perma.cc/TDE5-QZWB>]; Wendell Cox, *Texas High Speed Rail: The End or Not?*, NEWGEOGRAPHY (Oct. 4, 2022), <https://www.newgeography.com/content/007597-texas-high-speed-rail-the-end-or-not> [<https://perma.cc/YM6Q-84YP>].

113. William Melhado, *After a Decade of Hype, Dallas-Houston Bullet Train Developer Faces a Leadership Exodus as Acquisition Slows*, TEX. TRIB. (Aug. 30, 2022), <https://www.texastribune.org/2022/08/30/texas-high-speed-rail-dallas-houston/> [<https://perma.cc/Q92W-FHE2>].

114. Brandon Formby, *Biden Calls Dallas-Houston Bullet Train Beginning of New Transportation Era in America*, THE DALL. MORNING NEWS (Nov. 18, 2015), <https://www.dallasnews.com/news/transportation/2015/11/18/biden-calls-dallas-houston-bullet-train-beginning-of-new-transportation-era-in-america/> [<https://perma.cc/J89U-EC4H>].

115. *Id.*

116. Sofia Krusmark, *Will Stimulus Money Help Put Texas Central High-Speed Rail Back on Track?*, D MAG. (June 10, 2020), <https://www.dmagazine.com/business-economy/2020/06/will-stimulus-money-help-put-texas-centrals-high-speed-rail-back-on-track/> [<https://perma.cc/5482-484Z>].

117. *Id.*

118. *Id.*

119. *Id.*

120. Melhado, *supra* note 113.

121. Garnham, *supra* note 112.

122. Melhado, *supra* note 113.

Then, in September 2020, Texas Central received approval from the Federal Railroad Commission after the Commission completed a regulatory and environmental review of the project.¹²³ But to begin construction, Texas Central still needed a permit from the federal Surface Transportation Board and permits from the Texas General Land Office and Texas Commission on Environmental Quality.¹²⁴ Two months after receiving the greenlight from the Federal Railroad Commission, Texas Central had yet to apply for the other permits.¹²⁵ Texas Central needed these permits in particular because they authorized Texas Central's route proposal, construction, and operation of a rail line.¹²⁶

That Texas Central did not apply for the necessary permits is perhaps best explained by its organizational chaos. Reports swirled that Texas Central was not paying property taxes, that Texas Central had stopped answering its phones, and that Texas Central's website listed its Dallas office at the same address as the Dallas Police Department.¹²⁷ To top off Texas Central's organizational woes, its CEO, Carlos F. Aguilar, announced he was stepping down in the summer of 2022, shortly before the court rendered its *Miles* decision.¹²⁸ Texas Central had failed to secure adequate funding, failed to apply for the requisite permits, and was facing organizational and structural chaos. At the exact same time, Texas Central sought the power to take private property for its flailing project.

Texas Central's activities convinced the court that it was doing more than box-checking.¹²⁹ Therefore, Texas Central could brandish eminent domain power as an interurban electric rail.¹³⁰ But Texas Central provided an incomplete list of its activities. It failed to account for all that had yet to go its way. It did not reveal that real questions existed about whether completing the project was even possible, let alone reasonably likely to succeed. The "acting in furtherance"

123. Garnham, *supra* note 112.

124. *Id.*

125. *Id.*

126. *Id.*

127. Cox, *supra* note 112.

128. Donnie Tuggle & Hope Merritt, *Carlos Aguilar Steps Down as CEO of Texas Central Railway*, KBTX (Jun. 13, 2022, 5:53 PM), <https://www.kbtx.com/2022/06/13/carlos-aguilar-steps-down-ceo-texas-central-railway/> [<https://perma.cc/ZA8J-LCFR>].

129. *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613, 626-28 (Tex. 2022).

130. *Id.* at 630.

requirement permitted Texas Central to exercise eminent domain power even though Texas Central was failing to make adequate progress on the high-speed rail. By the time *Miles* made its way to the court, the record before the court was old. The court decided that Texas Central was doing more than checking a box based on history and not the current, rocky landscape. Certainly, a court is constrained to the record before it. But in *Miles*, the record was faulty and incomplete. The “chartered for the purpose of” and “actual furtherance” factors disguised the reality of the situation. The court needed a better test.

E. Reexamining a Reasonable Probability of Completion Test

The court declined to adopt *Miles*’s proposed reasonable probability of completion test because the test would change eminent domain law in the state, and changing policy was squarely a job for the legislature.¹³¹ Putting aside which branch is best suited to make this decision, this subsection discusses implementing a reasonable probability of completion test (“Completion Test”), one that would force private companies to offer objective evidence that it is more likely than not that their project will reach completion.

The central purpose of introducing a Completion Test is to infuse the eminent domain process with more certainty. As demonstrated above, the high-speed rail envisioned by Texas Central in 2012 will likely never come to fruition. In September 2022, attorneys representing 93 property owners along Texas Central’s proposed route sent a letter to Texas Central.¹³² The letter included general questions from the landowners about Texas Central’s progress.¹³³ Those questions ranged from seeking information about who was running the company to wanting clarity about Texas Central’s financial status.¹³⁴ The landowners wanted answers and, in lieu of answers, wanted Texas Central to publicly state that it had no intention of completing the high-speed rail.¹³⁵ The letter also put Texas Central on notice.¹³⁶ If Texas

131. *Id.* at 629.

132. Donnie Tuggle, *Central Texas Landowners Want Answers from Texas Central About Future of Train Route*, KBTX (Oct. 2, 2022), <https://www.kbtx.com/2022/10/03/central-texas-landowners-want-answers-texas-central-about-future-train-route/> [<https://perma.cc/7WYC-WL9S>].

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

Central neither answered the landowners' questions nor stated it was abandoning the project, the landowners would seek a pre-suit deposition from Texas Central.¹³⁷ And as of February 1, 2023, that prognosis has not changed, and some landowners whom Texas Central held in limbo are moving toward litigation to hold Texas Central accountable for the chaos surrounding the high-speed rail.¹³⁸

In her article "Checking the Box Is Not Enough: The Impact of *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC* and Texas's Eminent Domain Reforms on the Common Carrier Application Process," Megan James analyzed the impact that *Denbury* had on the energy industry in Texas.¹³⁹ James advocated for a test that would demonstrate a reasonable probability that the common carrier pipeline would serve the public.¹⁴⁰ James's proposed new standard is an evidentiary one.¹⁴¹ She argued that the legislature should set a baseline for what kind of evidence the Texas Railroad Commission should consider when determining whether to grant common carrier status.¹⁴² Though James published her article before *Denbury II*, the article advocated for the legislature to establish a framework for analyzing what evidence would best demonstrate that a pipeline is more likely than not to serve a public use.¹⁴³ James suggested that drafted contracts between the pipeline company and an unaffiliated third party to transport products were enough to demonstrate that the pipeline would serve a public use.¹⁴⁴

Similarly, the Texas Legislature should adopt a Completion Test for for-profit companies seeking to build transportation like the high-speed rail. The Completion Test should set forth that, unless the company can offer objective evidence that it can and will complete the project, the company cannot condemn property. Determining what constitutes "sufficient objective evidence" is difficult, but one piece of

137. *Id.*

138. Donnie Tuggle, *Back to Court: Landowner Files Pre-suit Deposition Against Texas Central Railroad*, KBTX (Feb. 1, 2023), <https://www.kbtx.com/2023/02/02/back-court-landowner-files-pre-suit-deposition-against-texas-central-railroad/> [https://perma.cc/RTM9-VSVC].

139. Megan James, Comment, *Checking the Box Is Not Enough: The Impact of Texas Rice Land Partners, Ltd. v. Denbury-Green Pipeline Texas, LLC and Texas' Eminent Domain Reforms on the Common-Carrier Application Process*, 45 TEX. TECH L. REV. 959, 1000-01 (2013).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

persuasive evidence is *secured* funding. A plan to obtain funds is not enough. The company should at least be able to demonstrate that it has the means to complete its project before it tries to condemn property. If a company can show that it has the financial means to complete its project, it is more likely than not able to finish the project. One roadblock to Texas Central's project was difficulty in securing funding.¹⁴⁵ But that roadblock did not stop Texas Central from trying to condemn property.¹⁴⁶ Demonstrating that a private company has the necessary means to complete the project is similar to the *Denbury* requirement of demonstrating that a pipeline will serve the public. In *Denbury I*, it was not enough that Denbury intended to make the pipeline available to the public.¹⁴⁷ Denbury had to offer proof that the public would actually get to use the pipeline.¹⁴⁸ Similarly, a for-profit rail company should have to do more than show that it intends to act like a railway to condemn property. It should have to demonstrate that it can complete the railway. Such a standard is consistent with the rule that eminent domain statutes are construed in favor of landowners,¹⁴⁹ not the company seeking to condemn.

Transportation projects like the high-speed rail involve large areas of land and substantial funding. As it stands, if a for-profit company wants to build a rail like Texas Central, all it has to do is charter itself as a railway company and start engaging in activities like filing some permits or performing land surveys to obtain eminent domain power. That company can begin condemnation proceedings, whether it has secured funding to complete the project or not. Under a Completion Test, without demonstrating objective evidence like secured funding, it would be difficult for a for-profit company to obtain eminent domain power.

A Completion Test would also force companies to more strategically choose when to begin a project and increase accountability. First, the test would dissuade for-profit companies from prematurely trying to condemn property. If a for-profit company has to produce objective evidence that it will complete the project, the

145. Krusmark, *supra* note 116.

146. Evan Hoopfer, *After Court Ruling, Can Texas Central Start Condemning Land for High-Speed Rail Project?*, DALLAS BUS. J. (May 21, 2020), <https://www.bizjournals.com/dallas/news/2020/05/21/texas-central-eminent-domain-high-speed-rail.html> [<https://perma.cc/9FML-S67R>].

147. *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192, 202 (Tex. 2012).

148. *Id.*

149. *Id.* at 198.

company may be more selective in choosing which property to condemn and when it will try to condemn that property. For example, Texas Central's high-speed rail was initially going to cost around \$12 billion.¹⁵⁰ If Texas Central had been required to produce objective evidence that it had already secured a commitment for all or a substantial portion of the \$12 billion, Texas Central would likely not have begun condemning property in 2016, years before the Supreme Court rendered its *Texas Central* decision.

Second, implementing a Completion Test would further constrain the broad eminent domain power statutorily granted to for-profit companies. A Completion Test applying to for-profit companies would force those companies to be accountable for their projects just as public entities are held accountable. Public entities are constrained by the people. The democratic process limits how far the government can go when condemning property. If the public is unsatisfied, the voters get the final word. But for-profits are not beholden to the public. That is not to say that for-profit companies should always be met with suspicion. But when a landowner's property is threatened to be taken away by a for-profit company via eminent domain, then that for-profit company should be held to a high standard. When a public entity abuses its power, the people have the power to vote out the individuals controlling those entities. But what power do landowners have to protect themselves when for-profit companies wield eminent domain power? The answer is: too little under the current landscape. A Completion Test forces for-profit companies to do more legwork on projects before trying to condemn property from landowners.

No one can peer into the future to see if a project will reach completion. But had Texas Central been required to show objective evidence that it could and would complete the project, the court may have classified Texas Central's conduct as mere box-checking and therefore insufficient to establish eminent domain authority.

IV. REVISING TEXAS'S EMINENT DOMAIN STATUTES TO PROTECT LANDOWNERS

Miles was not a unanimous decision. Several justices dissented, underscoring the controversy that is eminent domain. Justice Devine dissented, zeroing in on how Texas views eminent domain.¹⁵¹ Justice

150. Melhado, *supra* note 113.

151. *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613, 636 (Tex. 2022) (Devine, J., dissenting).

Devine noted that Texas amended the state constitution after the Supreme Court expanded the reach of eminent domain authority.¹⁵² Importantly, Justice Devine noted that the court ignored that Texas Central seemed to state that the purpose of the high-speed rail was to improve Texas's economic prospects.¹⁵³ Justice Devine focused on a highly-controversial part of eminent domain discourse: what satisfies the public use requirement?¹⁵⁴ In 2005, the U.S. Supreme Court rendered a decision regarding public use in *Kelo v. City of New London*.¹⁵⁵ That decision spurred changes across the nation. This Section discusses the Supreme Court's decision regarding public use. Then, this Section discusses changes to Texas's eminent domain laws in light of that decision. Finally, this Section proposes a further revision to Texas statutes pertaining to a landowner's right to repurchase property after condemnation.

A. *Kelo's Impact on Texas's Eminent Domain Laws*

In *Kelo v. City of New London*, the City of New London, Connecticut, approved a private development project and used its eminent domain authority to take private property to sell to private developers.¹⁵⁶ The stated purpose for the development was that the City wanted to increase job growth and tax revenue.¹⁵⁷ Susette Kelo and others brought suit, claiming the taking violated the public use requirement of the Fifth Amendment.¹⁵⁸ The Court's decision rested on two considerations.¹⁵⁹ The Court had to consider (1) whether the City satisfied the public use requirements in the Takings Clause and (2) whether the Court should automatically defer to the City's assessment that the taking complied with the Fifth Amendment.¹⁶⁰ The Court noted that the term "public use" did not require "any literal requirement that condemned property be put into use for the general public."¹⁶¹ The Court determined that the City did not violate the

152. *Id.*

153. *Id.*

154. Gregory J. Robson, Note, *Kelo v. City of New London: Its Ironic Impact on Takings Authority*, 44 URB. LAW. 865 (2012).

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

156. *Id.* at 472.

157. *Id.*

158. *Id.* at 475.

159. Robson, *supra* note 154.

160. *Kelo*, 545 U.S. at 483-84, 488-89.

161. *Id.* at 479 (2005) (quoting *Haw. House Auth. v. Midkiff*, 467 U.S. 229, 244 (1984)).

public use requirement because the City condemned the land as part of a broader plan to promote the welfare of the entire community.¹⁶²

The public response to *Kelo* was largely a belief that the decision afforded the government too much power to determine what constitutes a public use.¹⁶³ Discussion ensued as to how governments could now abuse eminent domain.¹⁶⁴ In response to *Kelo*, Texas revised its eminent domain laws to clarify that the public use requirement did not include private economic development projects. In 2005, the Texas Legislature engaged in efforts to identify projects that would not satisfy the public use element.¹⁶⁵ After the change, private entities and for-profits could not use eminent domain if the taking benefitted a “particular private party,” if the public use was a guise to “confer a private benefit on a particular private party,” or if the taking was for “economic development purposes,” unless the economic development purposes were secondary to community development or repairing blighted areas.¹⁶⁶ However, the Legislature did not apply these new changes to a variety of activities, including transportation, sports, and community venue projects.¹⁶⁷

After clarifying which projects could not satisfy the public use requirement, the Legislature placed Proposition 7 on the ballot.¹⁶⁸ Proposition 7 permitted private landowners to repurchase condemned property if any of the following occurred: (1) the public use is canceled; (2) no “actual progress is made toward the public use”; and (3) when the landowner’s property is no longer needed for the public use project.¹⁶⁹ Texans approved Proposition 7, amending the Texas Constitution.¹⁷⁰

But Texas was not done tinkering with its eminent domain laws. In 2011, Texas made several changes to its Government and Property codes. The new laws limited how oil and gas pipelines can utilize

162. *Id.* at 483-84.

163. Robson, *supra* note 154.

164. William Woodyard & Glenn Boggs, *PUBLIC OUTCRY: KELO V. CITY OF NEW LONDON—A PROPOSED SOLUTION*, 39 ENV’T L. 431, 440-42 (2009).

165. Tex. Gov’t Code § 2206.001 (West, Westlaw through 2021 Reg. Sess. 87th Leg.).

166. *Id.* at § 2206.001(b) (Westlaw).

167. *Id.* at § 2206.001(c) (Westlaw).

168. 1 NICHOLS ON EMINENT DOMAIN § SA.01 (Matthew Bender, 3d ed.) (2023).

169. *Proposition 7—Eminent Domain Amendment*, KVIA (Oct. 29, 2007), <https://kvia.com/news/2007/10/29/proposition-7-eminent-domain-amendment-2/> [<https://perma.cc/3CX2-DRMX>].

170. TEX. CONST. Art. III, § 52j (West, Westlaw through 2021 Reg. Sess. 87th Leg.).

easements,¹⁷¹ strengthened eminent domain procedures,¹⁷² and required entities seeking to condemn property to first “make a bona fide offer” to the landowner before the entity attempts to condemn the property.¹⁷³

B. Texas’s 87th Legislature: A Time for Revision

Perhaps sensing that new technology like Texas Central’s high-speed rail would further disadvantage private landowners, the Texas Legislature again revisited Texas’s eminent domain laws. Despite a lengthy fight between legislators, the Legislature further revised Texas’s eminent domain laws. In 2021, the Texas Legislature passed five bills addressing eminent domain and the rights belonging to a landowner when their property is condemned.¹⁷⁴

First, the Legislature passed SB 726, which redefined the requirements for an entity with eminent domain power trying to establish that the entity made actual progress on its project.¹⁷⁵ To demonstrate actual progress prior to SB 726, an entity had to show only two of the following: (1) the entity completed a substantial amount of work on the condemned property or another property connected to the project; (2) the entity provided a significant amount of materials for use on the project; (3) the entity hired an architect, engineer, or surveyor to prepare a plan or plat that utilized the condemned property or another property connected to the same project; (4) the entity applied state or federal funds to develop the condemned property or another property connected to the project; or (5) the entity applied for a state or federal permit to develop the condemned property or other property connected to the project.¹⁷⁶ With the passage of SB 726, if an entity wants to stave off repurchase by the original landowner, the entity must demonstrate actual progress by demonstrating three of the above actions.¹⁷⁷

171. TEX. GOV’T CODE ANN. § 2206.002 (West, Westlaw through 2021 Reg. Sess. 87th Leg.).

172. TEX. GOV’T CODE ANN. § 2206.051-.053 (West, Westlaw through 2021 Reg. Sess. 87th Leg.).

173. TEX. PROP. CODE ANN. § 21.0113 (West, Westlaw through 2021 Reg. Sess. 87th Leg.).

174. Kerri Lewis, *Come and Take It? Not So Fast*, TEX. A&M UNIV.: TEX. REAL ESTATE RSCH. CTR. (June 6, 2022), <https://www.recenter.tamu.edu/articles/tierra-grande/Come-and-Take-It-2350> [<https://perma.cc/23RR-483W>].

175. *Id.*

176. *Id.*

177. *Id.*

Forcing the entity to demonstrate that it has taken concrete actions to complete its project does two things. First, it demonstrates that the entity is working towards completing the project and that the public use that was promised will come to fruition. Second, it supports fundamental principles of property law.¹⁷⁸ Namely, an actual showing of progress underscores the societal preference that land is not only possessed but that it is used productively.¹⁷⁹

Second, the Legislature passed SB 725.¹⁸⁰ SB 725 ensured that a property that previously had an agricultural tax exemption would not lose the exemption as a result of the condemnation of a right-of-way with a width of less than 200 feet.¹⁸¹ Additionally, the entity, and not the landowner, is responsible for any additional taxes resulting from the change of the land from agricultural to nonagricultural use.¹⁸² This bill shifted tax liability from the original landowner to the entity condemning the property.

Third, the Legislature passed SB 721.¹⁸³ SB 721 provides that if a special commissioner's hearing takes place on the valuation of property, the entity with eminent domain power must provide the landowner with copies of all appraisal reports.¹⁸⁴ The entity must provide the appraisal reports at least three business days before the special commissioner's hearing.¹⁸⁵

Fourth, the Legislature passed HB 4107.¹⁸⁶ HB 4107 requires common carrier pipelines to provide the landowner with written notice if, under the carrier's eminent domain power, the carrier intends to conduct a survey on the landowner's property.¹⁸⁷ The carriers are required to include an indemnification provision in the landowner's favor if any damages result from the survey.¹⁸⁸ The notice must also include a contact number for the carrier.¹⁸⁹

178. LOUIS KAPLOW & STEVEN SHAVELL, HANDBOOK OF PUBLIC ECONOMICS 1683 (A.J. Auerbach & M. Feldstein eds., 3d ed. 2002).

179. *Id.*

180. Lewis, *supra* note 174.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

Fifth, the Legislature passed HB 2730.¹⁹⁰ HB 2730 constituted the most comprehensive changes made by the Legislature to the eminent domain process. The changes involved not only the Property Code but also the Texas Government Code and the Occupations Code.¹⁹¹ One of the most notable changes centers around the Landowner's Bill of Rights. The Office of the Attorney General provides the Landowner's Bill of Rights to landowners involved in condemnation proceedings.¹⁹² After the passage of HB 2730, the Landowner's Bill of Rights must include notice to the landowner of their right to file a complaint to the Texas Real Estate Commission about any allegations of misconduct by representatives of an entity utilizing eminent domain power.¹⁹³ Another noteworthy addition is that the Landowner's Bill of Rights must be reviewed every two years following the public's feedback.¹⁹⁴ These changes to the Landowner's Bill of Rights demonstrate that the Texas Legislature not only recognized some defects within the previous eminent domain landscape but was also willing to remedy those defects.

In addition to revising the Landowner's Bill of Rights, HB 2730 permits landowners and the entity exercising eminent domain to change any contract terms in the Landowner's Bill of Rights provided to the landowner.¹⁹⁵ The entity must also include with their initial offer to the landowner: (1) a copy of the Landowner's Bill of Rights; (2) a conspicuous statement indicating if the compensation offered by the entity to the landowner includes damages to the remainder of the property or a certified appraisal of the property that includes damages; (3) the conveyance document, barring some exceptions; and (4) the entity's contact information.¹⁹⁶

These recent legislative actions increase protections for landowners. And while these actions are positive steps toward providing further protections for landowners, the Legislature can do more to protect landowners from a private entity's eminent domain power.

190. *Id.*

191. *Id.*

192. OFF. OF THE ATT'Y GEN., THE STATE OF TEXAS LANDOWNER'S BILL OF RIGHTS (2022), <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/landowners-bill-of-rights-2022.pdf> [<https://perma.cc/3DMA-5E82>].

193. Lewis, *supra* note 174.

194. *Id.*

195. *Id.*

196. *Id.*

C. More Protections Needed: The Landowner's Right to Repurchase Property

The recent passage of SB 726, SB 725, SB 721, HB 4107, and HB 2730 demonstrate the Texas Legislature's efforts to return some power to landowners. Given that the 88th Legislative Session is looming, perhaps landowners should feel hopeful that greater protections are coming their way. Perhaps the Legislature intends to recommit to the idea that landowners' property rights are more important than allowing a for-profit company to condemn property without demonstrating that the project will be completed. Even in *Miles*, despite finding that the railways did have statutorily conferred eminent domain power, the Court acknowledged that the landowners raised a salient point about the balance between property rights and eminent domain power.¹⁹⁷ The landowners expressed concern that if the railway decided to abandon the high-speed rail project, Texas Central could not appropriately compensate the landowners for damage caused to their land.¹⁹⁸ But the court left this policy issue to the Legislature.¹⁹⁹ The Texas Legislature should take that cue from the Court and re-examine the process for landowners who want to repurchase their land after a company has condemned the land.

If the Legislature is interested in protecting landowners from the further erosion of property rights, the Legislature should reevaluate the landowner's right to repurchase property under the Texas Property Code. The Texas Property Code permits a landowner to repurchase their property if the public use for which their property was acquired is canceled before the property was used for that public purpose, no actual progress toward accomplishing the project occurred between the date the condemning entity acquired the land and the 10th anniversary of that date, or the landowner's property is no longer needed for the public use for which it was originally acquired.²⁰⁰ If the entity cancels the public use, has not made actual progress within ten years, or no longer needs the landowner's property, the entity has six months to notify the landowner that the window for repurchasing the property opened.²⁰¹ The notice must (1) identify the property, (2)

197. *Miles v. Tex. Cent. R.R. & Infrastructure*, 647 S.W.3d 613, 626-29 (Tex. 2022).

198. *Id.* at 628.

199. *Id.*

200. TEX. PROP. CODE ANN. § 21.101(a) (West, Westlaw through Reg. Sess. 87th Leg.).

201. TEX. PROP. CODE ANN. § 21.102 (West, Westlaw through Reg. Sess. 87th

identify the public use the property was acquired for and a statement that the public use was canceled, no actual progress was made towards that public use, and ten years have passed, or the entity no longer needs the property for the public use previously identified; and (3) inform the landowner of the owner's right to repurchase the land.²⁰²

The Texas Property Code also permits the landowner to inquire about the property and whether the landowner can repurchase it. A landowner may request information ten years after the entity acquired the property.²⁰³ The request must detail the specific plot of land, and the entity has 90 days to respond to the landowner's request.²⁰⁴ After either the entity provides notice of the landowner's right to repurchase or the entity responds to the landowner's request for information about the right to repurchase, and the land is eligible for repurchase, the landowner has only six months to notify the entity that they intend to repurchase the property.²⁰⁵ The entity must offer to resell the property to the landowner for the same amount the entity paid when it acquired the property.²⁰⁶

However, the landowner's right to repurchase does not exist in perpetuity. The right to repurchase expires one year after the entity was required to provide the landowner with notice of the right to repurchase, provided the entity made a good faith effort to find and notify the landowner, and the landowner did not respond to the notice.²⁰⁷ Additionally, once the entity offers to resell the property to the landowner, the landowner has only 90 days to repurchase the property.²⁰⁸

Generally, the repurchase requirements demonstrate a fair back-and-forth. The entity has time to make progress on the project, and the landowner has the opportunity to inquire about the status of the project. However, once the entity makes an offer, the landowner has a mere 90 days before their right to repurchase is extinguished.

Leg.).

202. *Id.*

203. *Id.* at § 21.1021(a).

204. TEX. PROP. CODE ANN. §§ 21.1021(b)-(c) (West, Westlaw through Reg. Sess. 87th Leg.).

205. TEX. PROP. CODE ANN. §§ 21.103(a) (West, Westlaw through Reg. Sess. 87th Leg.).

206. TEX. PROP. CODE ANN. §§ 21.103(b) (West, Westlaw through Reg. Sess. 87th Leg.).

207. TEX. PROP. CODE ANN. §§ 21.1022 (West, Westlaw through Reg. Sess. 87th Leg.).

208. TEX. PROP. CODE ANN. §§ 21.103(b) (West, Westlaw through Reg. Sess. 87th Leg.).

Conversely, the entity has ten years to demonstrate actual progress on the project. And as the previous Section indicates, the entity has five ways of demonstrating actual progress. To better reflect a balance between the entity's right to advance the project once it has condemned property with the landowner's right to repurchase their property, the timeframe the landowner has to repurchase their property once the entity offers to resell should be expanded from 90 days to one year.

Increasing the time for a landowner to repurchase the property directly relates to the importance of private property rights under both the U.S. and Texas Constitutions.²⁰⁹ Landowners enjoy certain rights, including the right to use their property and the right to exclude others from their property.²¹⁰ Eminent domain strips landowners of the right to use and exclude. In exchange for losing this right, landowners receive just compensation for their property. But when a condemning entity cancels a project or the project otherwise no longer requires use of the condemned property, landowners can reinstate their rights to that piece of land. Under the scenario that ten years have passed since the entity condemned the property, and the landowner is now able to repurchase the property, the landowner gets only 90 days once the entity offers to resell. A blanket 90-day period is an inadequate amount of time.

If an entity condemned a small area for an easement and did not pay much, perhaps the landowner can put together enough money to repurchase the property. But if the entity condemned a larger piece of land, 90 days may not be enough time for the landowner to acquire enough money to repurchase the property. But the current construction of the Texas Property Code makes no distinction between the size of the property or the amount paid for the property. Giving the landowner more time to repurchase the property they lost simply because their property was conveniently located protects the landowner and better balances the landowner's interest in owning and maintaining their property with the entity's interest in having enough time to make progress on its project.

The Texas Supreme Court recognized that the right to protect an individual's property is "fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even

209. *Severance v. Patterson*, 370 S.W.3d 705, 709 (Tex. 2012).

210. *Id.*

constitutions.”²¹¹ After eminent domain strips away a landowner’s property, Texas law permits the landowner to repurchase it. And because the landowner has already lost their property once through no fault of their own, the process to repurchase should be fair. And a fair process means extending the window for the right to repurchase once the entity offers to sell from 90 days to one year.

V. CONCLUSION

Eminent domain is a controversial power belonging to the government. The controversy grows when a government delegates eminent domain power to for-profit companies, as with Texas Central and its high-speed rail. While a high-speed rail connecting some of Texas’s most populous cities would certainly add to the state’s attractiveness, Texas Central could only complete its project by exercising eminent domain power. Although the court recognized that Texas Central had eminent domain power as an interurban rail, the facts are clear. It is unlikely Texas Central will ever complete the high-speed rail. And while Miles and Texas Central battled in court over whether Texas Central qualified as an interurban electric rail or railroad company, the reality is that Texas Central failed to organize and fund its project in a manner that would have led to the its completion. Landowners in Texas Central’s proposed pathway found themselves stuck while Texas Central was permitted to condemn property.

To prevent landowners from the future whims of for-profits with an apparent lack of resources, the Texas Legislature should adopt a reasonable probability of completion test and continue to revise the statute granting landowners the right to repurchase their land. While improvements to the state’s infrastructure are enticing, Texas landowners should come first.

211. *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).