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## Take It or Leave It: Eminent Domain for Economic Development- Statutes, Ordinances, & Politics, Oh My!

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## NOTES AND COMMENTS

### TAKE IT OR LEAVE IT: EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT—STATUTES, ORDINANCES, & POLITICS, OH MY!†

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#### I. INTRODUCTION

The Fifth Amendment to the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”<sup>1</sup> The definition of what constitutes a “public use,” as opposed to a private use, has endured a number of permutations since

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† The Author dedicates this Comment to her husband, Mark Folden  
1. U.S. CONST. amend. V.

its inception, and is synonymous today with “public purpose,”<sup>2</sup> which may include economic development.<sup>3</sup>

When it comes to economic development as a public use, the public has generally left to the legislature the decision of whether, with regard to property rights, the “needs of the many outweigh the needs of the few,” or the one. But until recently, the public tended to rely on the courts to stop takings once the legislature made a decision.<sup>4</sup> When “public purpose” can be met by almost any definition and courts defer to the legislature, the only remaining solutions, based on the separation of powers, are constitutional or legislative change. But such change must be considered in context, because the assertion by private property rights activists, that no property owner’s rights are safe if economic development can be used as a justification for eminent domain,<sup>5</sup> is not entirely accurate either.

To evaluate the true risk to property owners, as well as the likelihood that an economic development-based taking would occur *at all* in a geospatial context,<sup>6</sup> the judicial and legislative pronouncements on “public use” must be considered. Factors inherent in corporate site selection already exist to restrain takings decisions,<sup>7</sup> because of the economic, social, and political costs involved, in addition to the procedural constraints and expense associated with condemnation proceedings.<sup>8</sup> The evaluation issue is critically important, not only to property owners, but also to communities, in terms of finding the appropriate balance between jobs and private property, and in drawing, or re-

2. See *infra* Part II.C.

3. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005); *Infra* Part II.C.2.

4. See *infra* Part II.D.3.

5. Institute for Justice, U.S. Supreme Court Accepts Review of New London Eminent Domain Abuse Case, Sept. 28, 2004, [http://www.ij.org/private\\_property/connecticut/9\\_28\\_04pr.html](http://www.ij.org/private_property/connecticut/9_28_04pr.html). Dana Berliner, Institute for Justice senior attorney, states that, “If jobs and taxes can be a justification for taking someone’s home or business, then no property in America is safe because anyone’s home can create more jobs if it is replaced by a business and any small business can generate greater taxes if replaced by a bigger one.” *Id.* See also *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 464 (Mich. 1981) (per curiam) (Fitzgerald, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (“The decision that the prospect of increased employment, tax revenue, and general economic stimulation makes a taking of private property for transfer to another private party sufficiently ‘public’ to authorize the use of the power of eminent domain means that there is virtually no limit to the use of condemnation to aid private businesses.”). Authorizing local legislative bodies to determine that a different use will produce greater public benefit means that “no homeowner’s, merchant’s, or manufacturer’s property, however productive or valuable to its owner, is immune from condemnation for the benefit of other private interests that will put it to a ‘higher’ use.” *Id.*

6. For example, planners, corporate site selectors, and economic developers use tools for economic analysis like location theory. See *infra* Part II.D.2.

7. While the weight allocated to each factor in a site selection decision will be different (much like each case turning on its own facts), there are some common denominators. See *infra* Part II.A.1, D.2.

8. See *infra* Part II.D.1.

drawing, the line between the rights of the community and the individual property owner. So while the use of eminent domain for economic development's siren song could potentially destroy inattentive property owners on the rocks of legislative overreaching and judicial deference, these other factors must be examined in making a true assessment of the risk. The "risk" itself often appears in the form illustrated by the hypothetical below.

Big Corporation engages in a discussion with a North Texas city about possibly relocating to the area with an as-yet undetermined, but presumably large, number of new, well-paying jobs. The unemployment rate has been rising, and many of the city's older companies have down-sized or relocated, while the tax base has continued to decline. Big Corporation claims that it needs a particular piece of real estate, which a group of homeowners and local businesses has refused to sell to it. The property owners also refuse to sell to the city. In Texas, prior to the latest legislative actions, the city could probably have taken the property upon payment of "adequate compensation," using the eminent domain power, under the justification that economic development was a "public use," and then leased or resold the property to the business.

The idea of using eminent domain for economic development is not new, but urbanization and industrialization trends foster an acceleration in property redevelopment through eminent domain, sometimes in the name of economic development.<sup>9</sup> Economic development, based on the idea of progress and jobs, is politically attractive to most people, even if only a few still take the time to go to the polls.<sup>10</sup> Voter apathy and the nullification of judicial activism through U.S. Supreme Court precedents<sup>11</sup> reduce citizens to the mercy of state legislatures and local city councils when it comes to the use of eminent domain for economic development, a precarious position in some circumstances.<sup>12</sup> The Court's precedents "appear to sanction increased legislative power over individuals and have rendered property rights, once traditionally thought of as an individual protection against the state, as mercurial limits upon political power."<sup>13</sup>

In light of earlier changes to the Texas constitution,<sup>14</sup> Texans could not rely on the judiciary to defend their property against takings for purely economic development purposes. And now, instead of Texas voters themselves taking action through the electoral process to retain

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9. See *infra* Part II.B.

10. See *infra* Part II.B.1., B.2.b.

11. See *infra* Part II.C.1.

12. See *Wilkinson v. Leland*, 27 U.S. 238, 241 (1829) (according to Justice Story, "government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint").

13. DAVID A. SCHULTZ, *PROPERTY, POWER, & AMERICAN DEMOCRACY* 2-3 (1992).

14. See *infra* Part II.C.2.

their private property rights, through careful tailoring of local ability to use the eminent domain power as it pertains to economic development,<sup>15</sup> the state legislature has preemptively passed a statute to limit such use.<sup>16</sup> Texans, individually or through interest groups, must make their voices heard to their local and state elected officials, in order to both protect property rights and still obtain the benefit of economic development opportunities.

North Texas is the focus of this Comment because it is a microcosm of the interaction between competing economic and social forces, both external, in the form of global competition, and internal, as an area of the state with one of the country's fastest growing and most diverse populations.<sup>17</sup> Section II of this article will examine this context, as well as federal and Texas judicial actions, to assess the economic development takings environment prior to the most recent federal case and acts of the Texas Legislature. Section III will explain the effect this combination has had in producing a constitutional imbalance. Section IV will conduct an examination of proposed solutions at the constitutional, judicial, and legislative levels from the literature and case law on the subject. Section V will conclude with predictions about the likely success of recent legislative enactments developing a "brighter" line between individual property rights and community economic development.

The focus of this article is on the "public purpose" aspect of eminent domain use and strictly pertains to the taking of real property in fee simple absolute as perceived today, not on the myriad other purposes to which the eminent domain power can and has been applied,<sup>18</sup> nor the various conceptions of "property" over time.<sup>19</sup>

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15. Like most Americans, Texans can always rely on legislators' political incentives to respond to High Court decisions. See, e.g., Tresa Baldas, *States Ride Post-'Kelo' Wave of Legislation: Eminent Domain Curbs in 28 States*, NAT'L L.J., Aug. 1, 2005, at 1; see Abe Levy, *Perry Signs Law Limiting Eminent Domain*, FORT WORTH STAR-TELEGRAM, Sept. 1, 2005, at 4B.

16. See *infra* Part IV.C.

17. See North Central Texas Council of Governments, Center of Development Excellence, <http://www.developmentexcellence.com/about.asp> (last visited Jan. 23, 2006) ("The number of people living in North Central Texas has grown by more than 30 percent in the last 10 years and experts predict that this trend will continue. This means that today's population of about 5.6 million people in the Dallas/Fort Worth region is expected to grow to more than 9 million by 2030."). See also U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Jan. 23, 2006). Texas and the United States have the same average number of persons per square mile: 79.6. *Id.*

18. For example, regulatory takings restricting use of property but not physical possession, takings of personal property, or takings of a leasehold.

19. See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 6 (2d ed. 1998) (reference to property as "a dynamic concept": the transformation of wealth from land in the eighteenth century to intangible personal property like stock in the late twentieth century, and the possibility of intellectual property as the most significant wealth of the twenty-first; he

## II. THE CONTEXT OF THE THREAT

Before beginning the analysis, it is advisable to develop a working familiarity with the core concepts of economic development and eminent domain.

### A. Terminology

#### 1. Economic Development

“Economic Development” refers to the process of site selection and community marketing used to attract and retain businesses and jobs,<sup>20</sup> and ideally prevent, but at least impede, the cycle of economic decline and urban decay.<sup>21</sup> It is an attempt to influence the location decisions of private corporations for the benefit of some particular geographic area, either local,<sup>22</sup> regional,<sup>23</sup> state,<sup>24</sup> or national.<sup>25</sup> An economic development organization attempts to strengthen an area’s economic base through several key strategies: retention and expansion of existing businesses in the area, facilitating the start-up of new businesses, and recruitment of additional businesses from outside the geographic area.<sup>26</sup> These strategies are implemented to mitigate the area’s decline in competitive capacity because “[p]laces, just like corporate giants and entire industries, may rise and fall with new technologies, new competitors, and shifting consumer preferences.”<sup>27</sup>

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also notes the changes over time in the legal recognition of property rights, citing slavery as an example.)

20. See Rachel Weber, *Why Local Economic Development Incentives Don’t Create Jobs: The Role of Corporate Governance*, 32 *URB. LAW.* 97, 97 (2000).

21. See PHILIP KOTLER ET AL., *MARKETING PLACES: ATTRACTING INVESTMENT, INDUSTRY, AND TOURISM TO CITIES, STATES, AND NATIONS* 6–7 (1993).

22. See Arlington Chamber of Commerce, Economic Development Council, <http://www.arlingtontx.com/3dde3faa4d3b4fe0b4f2ff0418c3d74c/default.html> (last visited Nov. 20, 2004) (Mission: “To stimulate job growth in Arlington through Target Industry Cluster Recruitment, Business Retention and Expansion, building Arlington’s image and brand recognition, and enhancing the economic climate to establish Arlington’s competitive position.”).

23. North Texas Commission, <http://www.ntc-dfw.org/> (last visited Feb. 1, 2006) (“The North Texas Commission is a regional non-profit consortium of businesses, cities, counties, chambers of commerce, economic development entities and higher education institutions in the North Texas Region. The Commission is the one and only public-private regional organization committed to enhancing the overall economic vitality and quality of life of North Texas.”).

24. See Texas Economic Development & Tourism, <http://www.governor.state.tx.us/ecodevo> (last visited Feb. 6, 2006).

25. See Economic Development Administration, <http://www.eda.gov/AboutEDA/AbtEDA.xml> (last visited Feb. 1, 2006).

26. See Kotler, *supra* note 21, at 27–31; see also RONALD J. HUSTEDDE ET AL., *COMMUNITY ECONOMIC ANALYSIS: A HOW TO MANUAL* 9–10 (rev. ed. 2005) (listing five general strategies: attract new base employers, capture existing markets, encourage start-ups, help existing firms increase efficiency, and use aid from broader levels of government).

27. KOTLER, *supra* note 21, at 230.

Site selection involves an “amalgam of economic theories, demographic and industrial trend forecasts, and political understanding, case examples, and practical experience,”<sup>28</sup> generally following the policy of “highest and best use”<sup>29</sup> as it pertains to a specific industrial classification. Particularly, businesses

rate places as potential sites in terms of their business climates and regulatory environments; the caliber of the labor force; the availability of infrastructural benefits such as access to airports, good roads, and mass transportation; the quality of the school system and other types of training institutions; and the quality of life. Business firms also respond to relocation inducements and incentives such as tax concessions and tax deferrals, inexpensive land and infrastructure subsidies, and subsidized training facilities.<sup>30</sup>

These site selection factors receive varying weight in corporate location decision-making,<sup>31</sup> and should properly be considered in evaluating the actual risk that any city will try to use eminent domain for economic development purposes.

## 2. Eminent Domain

The definition of eminent domain “involves the deprivation of the right of the property owner to keep his property when it is needed for public use.”<sup>32</sup> The eminent domain power is a sovereign right.<sup>33</sup> The Fifth Amendment to the United States Constitution limits use of the eminent domain power, both in the “takings” clause and in the due process clause.<sup>34</sup> These apply to the States via the Fourteenth Amendment.<sup>35</sup> The Texas Constitution provides a very similar public use requirement:

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, when taken, except for the use of the State, such compensation shall be first made, or se-

28. *Id.* at 20.

29. APPRAISAL INSTITUTE, *THE APPRAISAL OF REAL ESTATE* 6 (11th ed. 1996) (Land utility and its highest and best use are affected by location and other geographical characteristics, in addition to “trends in economics, population, technology, and culture.”).

30. KOTLER, *supra* note 21, at 27.

31. *See id.*

32. *Porter v. Sw. Pub. Serv. Co.*, 489 S.W.2d 361, 363 (Tex. Civ. App.—Amarillo 1972, writ ref’d n.r.e.).

33. *Kohl v. United States*, 91 U.S. 367, 373–74 (1875); *United States v. 12.84 Acres of Land*, 994 F.2d 696, 698 (9th Cir. 1993).

34. “[N]or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

35. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 231 (1984); *John Corp. v. City of Houston*, 214 F.3d 573, 577 (5th Cir. 2000) (explaining that “principles embodied in the Takings Clause of the Fifth Amendment have been incorporated into the Fourteenth Amendment”).

cured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.<sup>36</sup>

Eminent domain power is delegated to municipalities in the Texas Local Government Code.<sup>37</sup> Cities tend to view eminent domain as “an indispensable tool in urban redevelopment . . . ,” particularly when “property owners are unwilling to sell or are demanding exorbitant prices, figuring to cash in on a major redevelopment plan . . . .”<sup>38</sup>

To take private property by condemnation in Texas, after being unable to agree with the property owner as to damages, the condemning entity must file a petition with the proper court, which (1) describes the property to be condemned; (2) states the purpose of intended use; (3) states the name of the property owner; and (4) states that the entity and owner are unable to agree to the amount of damages.<sup>39</sup>

### B. *Trends Affecting the “Public Use” Interpretation: Innovation Drives Obsolescence*

“Public use” has traditionally been subject to two interpretations.<sup>40</sup> The narrow interpretation requires that property taken must be subject to actual “use by the public.”<sup>41</sup> The broad interpretation considers eminent domain to be “coterminous with the scope of a sovereign’s police powers,” such that practically any acquisition meets the public use test as long as the court finds a rational basis.<sup>42</sup>

The evolution of the “public use” concept has been greatly affected by trends that include growing urban concentration<sup>43</sup> and population growth,<sup>44</sup> industrialization, and the demand for jobs, arising from both

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36. TEX. CONST. art. I, § 17; *see also* Coastal Indus. Water Auth. v. Celanese Corp. of Am., 592 S.W.2d 597 (Tex. 1979); *Marrs v. R.R. Comm’n*, 177 S.W.2d 941, 948 (Tex. 1944) (Article I, sections 3 and 19 also protect property rights in Texas. Section 3 provides for equal rights and section 19 provides for due process and equal protection under the law.).

37. *See* TEX. LOC. GOV’T CODE ANN. § 251.001(a) (Vernon 2004).

38. Jonathan Walters, *For the Greater Good*, 66 PLAN. 10, 12 (2000).

39. TEX. PROP. CODE ANN. § 21.012 (Vernon 2004); *See also* Edwin M. Snyder, *A Condemnation Case from the Condemner’s Perspective*, 31 URB. LAW. 649 (1999) (stating the requirements of the petition).

40. *See* *Davis v. City of Lubbock*, 326 S.W.2d 699, 705–06 (Tex. 1959).

41. *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960, 965 (5th Cir. 1994).

42. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240–41 (1984).

43. *See* TEXAS STATE DATA CENTER, OFFICE OF THE STATE DEMOGRAPHER, ESTIMATES OF THE TOTAL POPULATIONS OF COUNTIES AND PLACES IN TEXAS FOR JULY 1, 2003 AND JANUARY 1, 2004, TABLE 3, OCT. 2004, [http://txsdc.utsa.edu/download/pdf/estimates/2003\\_txpopest\\_msa.pdf](http://txsdc.utsa.edu/download/pdf/estimates/2003_txpopest_msa.pdf) (last visited Feb. 1, 2006).

44. *See* U.S. CENSUS BUREAU, TABLE 2, POPULATION, HOUSING UNITS, AREA MEASUREMENTS, AND DENSITY: 1790 to 1990, <http://www.census.gov/population/censusdata/table-2.pdf> (last visited Feb. 1, 2006) [hereinafter TABLE 2].



domestic and international market forces.<sup>45</sup> While property has been actively redeveloped in the United States since at least the nineteenth century,<sup>46</sup> new technology has a way of “rendering obsolete older forms of property and wealth,”<sup>47</sup> as does policy response: “[d]uring the last several decades, all levels of government have become increasingly active, through planning, regulation, spending, and taxation, in influencing the use of land, and activities on land.”<sup>48</sup>

### 1. Federal Context

In 1750, most of the people living in what would become the United States made their living from agriculture.<sup>49</sup> As of the first U.S. Census in 1790, there were over 3 million people living in the approximate 864,746 square miles of U.S. land area.<sup>50</sup> Population density existed at 4.5 persons per square mile.<sup>51</sup> There were only twenty-four places classified as “urban,” containing approximately five percent of the total population.<sup>52</sup>

Colonial policies favored industrial development, as did the post-colonial United States.<sup>53</sup> For example, the Mills Acts of the nineteenth century allowed land to be taken from a private owner, usually by flooding, and essentially given to the private mill owner, for the public’s benefit.<sup>54</sup> But as early as the 1780s, public leaders “were bothered by this gap between the philosophical commitment to private property as a fundamental value in a free society and the infringement of these rights by state legislatures [ ]” in their use of eminent domain.<sup>55</sup>

In the nineteenth century, an “overabundance of publicly owned lands” generated little need to definitively limit eminent domain’s

45. N.A. Phelps & N. Parson, *Edge Urban Geographies: Notes from the Margins of Europe’s Capital Cities*, 40 URBAN STUDIES 1725, 1726 (2003) (“Glocalization” as defining the “interconnections between processes at various spatial scales.”).

46. See ELY, *supra* note 19, at 6 (“Economic development was a primary objective of Americans in the nineteenth century . . .”).

47. *Id.* at 6–7 (stating as example the transportation-based transition in the United States: canals, which were replaced by railroads, which were replaced by airplanes).

48. Ann Louise Strong & Daniel R. Madelker, *Property Rights and Takings*, 62 J. AM. PLAN. ASS’N 5, 5–6 (1996).

49. See ELY, *supra* note 19, at 16 (“Most of the colonists owned land, and eighty percent of the population derived their living from agriculture.”).

50. See TABLE 2, *supra* note 44.

51. See *id.*

52. See U.S. CENSUS BUREAU, TABLE 4, POPULATION: 1790-1990, <http://www.census.gov/population/censusdata/table-4.pdf> (last visited Feb. 1, 2006) [hereinafter TABLE 4]. For current official definitions of the terms “urban” and “rural,” visit the U.S. Census Bureau website, <http://www.census.gov> (search “FAQs” for “urban”; then follow “Definition: urban and rural” hyperlink) (last visited Feb. 9, 2006).

53. J.W. HARRINGTON & BARNEY WARF, *INDUSTRIAL LOCATION: PRINCIPLES, PRACTICE, & POLICY* 123 (1995) (recognizing capitalism as one of the drivers for initiating mass urbanization in industrialized societies).

54. SCHULTZ, *supra* note 13, at 26.

55. ELY, *supra* note 19, at 26.

“public use.”<sup>56</sup> But rapid industrialization in the late nineteenth century led to correspondingly rapid urbanization,<sup>57</sup> a catalyst, combined with poor housing conditions, which led eventually to the blight removal programs popular in the 1950s.<sup>58</sup> Industrialization and urbanization led to the need for greater governmental administration: the rise of the national bureaucratic state,<sup>59</sup> a “newer, stronger” government, which “required the courts to give deference to the legislatures in struggling to manage ever more complex relations among competing actors.”<sup>60</sup> Post-World War II, population movement to the suburbs “became a dramatic, extraordinarily consistent, four-decade process characterized by a massive shift in the location and design of housing, shopping, work places and jobs . . . .”<sup>61</sup> International competition also had a significant effect: “[a] manufacturing jobs were lost to global competition and technological trends increased the relative mobility of capital, cities came under increased pressure to attract and hold onto large employers.”<sup>62</sup>

Today, the United States is home to over 290,809,777 people.<sup>63</sup> It holds over 8,000 “urban” places, containing approximately 75% of the population.<sup>64</sup> The physical territory of the United States is made up of over three million square miles, with over 70.3 persons per square mile,<sup>65</sup> and the gross domestic product is around \$12,485.7 billion.<sup>66</sup>

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56. Daniel B. Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499–500 (1966).

57. See Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 706 (1993).

58. See *id.* at 711. “From the perspective of the 1990s, one has difficulty appreciating the squalor of the nineteenth century slum.” *Id.*

59. See Maureen Straub Kordesh, “*I Will Build My House With Sticks*”: *The Splintering of Property Interests Under the Fifth Amendment may be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 417 (1996).

60. *Id.*

61. Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 329 (1993). For example, “[b]etween 1947 and 1967, America’s sixteen largest and oldest central cities lost an average of 34,000 manufacturing jobs each, while their suburbs gained an average of 87,000 jobs. This trend continued through the 1970s as America’s industrialized cities lost from 25% (Minneapolis) to 40% (Philadelphia) of the manufacturing jobs that remained.” *Id.* at 333.

62. Weber, *supra* note 20, at 100.

63. U.S. CENSUS BUREAU, TABLE 1, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND THE STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2003, <http://www.census.gov/popest/states/tables/NST-EST2003-01.pdf> (last visited Feb. 9, 2006) [hereinafter TABLE 1].

64. See TABLE 4, *supra* note 52.

65. See TABLE 2, *supra* note 44.

66. ECONOMIC STATISTICS ADMINISTRATION, TABLE 3, GROSS DOMESTIC PRODUCT AND RELATED MEASURES: LEVEL AND CHANGE FROM PRECEDING PERIOD, <http://www.economicindicators.gov/> (follow “Gross Domestic Product” hyperlink; then follow “Tables: XLS” hyperlink, then follow “Table 3”) (last visited Feb. 9, 2006). From 1995 to 2000, durable goods manufacturing, specifically computer and electronic products, was the fastest-growing industry. BUREAU OF ECONOMIC ANALYSIS, NEWS

“Public purpose” is now construed pursuant to the trends affecting land redevelopment and their underlying “money and public policy trails.”<sup>67</sup> One significant trend is the “inner ring” phenomenon: small towns surrounded by the interstate ring system, or neighboring cities, with no place left to grow.<sup>68</sup> This is a situation that tends to foster redevelopment of property through eminent domain, due to an inability to continue the process of “urban sprawl.”<sup>69</sup>

While industrialization and urbanization have had a significant impact on land use,<sup>70</sup> consider the recent statistics with regard to takings and threats of takings for economic development purposes in the United States: from January 1, 1998 through December 31, 2002, approximately 10,282 properties were threatened, and 3,722 actually taken.<sup>71</sup> Based on these statistics, as well as the number of people and potential properties in the United States,<sup>72</sup> one may rationally conclude that takings for economic development have not yet reached the level of an epidemic. Particularly in light of the prior history of redevelopment in the United States, displacement is not a new occurrence;<sup>73</sup> it is just more highly-publicized today.<sup>74</sup>

One other trend may have significant bearing: even as population has increased, voter participation has seen a significant decline until

RELEASE: GROSS DOMESTIC PRODUCT BY INDUSTRY, <http://www.bea.gov/bea/newsreleases/2004/naics.htm> (last visited Feb. 9, 2006).

67. See Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL’Y REV. 345, 353 (1997). Epstein cites as incentives for suburbanization and sprawl “support for home mortgages; single family mortgages insurable in a government-backed securities market; accelerated depreciation; five-year amortization; and deductibility of ‘passive’ real estate losses, [which] represent federal tax policies that have served as a subsidy to sprawl. Even the definitive selection of automobile infrastructure as that which would receive overwhelming public financial support, has helped promote the current national profile of urbanization.” *Id.* at 355.

68. See Aoki, *supra* note 57, at 743 (“Road construction wreaked a fundamental change on the form and appearance of American cities and towns.”).

69. See Epstein, *supra* note 67, at 347. Epstein describes “sprawl” as “large expanses of low-density, single-use development, married with strip and auto-oriented commercial land uses, at the very edges or beyond the fringes of existing urbanization.” *Id.*

70. See Amnon Frenkel, *A Land-Consumption Model: Its Application to Israel’s Future Spatial Development*, J. AM. PLAN. ASS’N, Autumn 2004, at 455. Impact of the acceleration of urban sprawl in North America after rapid population growth post-WWII, “expressed by the mass movement of urban populations from the cities to the suburbs,” and the “negative impact of market forces on the spatial distribution of population and on the supply of land . . . .” *Id.*

71. Dana Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain*, SJ051 A.L.I.-A.B.A. 189, 197 (2003).

72. See *supra* sources cited and text accompanying notes 64–67.

73. Aoki, *supra* note 57, at 768 (“From 1949 to 1961, urban renewal displaced 85,000 families in 200 American cities, while federally funded renewal and highway programs displaced about 100,000 families and 15,000 businesses per year.”).

74. See *infra* Part II.D.3.

the most recent presidential election.<sup>75</sup> According to Federal Election Commission statistics, in Presidential election years, percent turnout of voting age population declined from 63.06% in 1960 to 49.08% in 1996, while in mid-term election years, percent turnout of voting age population declined from 47.27% in 1962 to 38.78% in 1994.<sup>76</sup> This decline in voter participation may have had a corresponding negative effect on keeping the legislature in check.

## 2. Texas Context

### a. Geography: Growth in People and Places

Texas had an estimated 22,490,022 residents as of July 1, 2004,<sup>77</sup> and is composed of approximately 261,797 square miles of territory.<sup>78</sup> North Texas has been a recipient of tremendous population growth; for example, Plano, a North Texas city, is ranked at number eight in the category of “Cities with 100,000 or more in population,” for highest percent growth in the nation between the 1990 and 2000 census.<sup>79</sup>

North Texas, like other areas of the United States, suffers from the development of the “inner ring” phenomenon.<sup>80</sup> Faced with population growth, the expansion of suburbs, and a corresponding decline in the tax base,<sup>81</sup> “inner ring” cities are forced to consider property redevelopment to shore up their financial losses. One of the most recent examples in North Texas is the City of Hurst’s condemnation and redevelopment of neighborhood property to expand a shopping mall,<sup>82</sup> discussed in greater detail below.

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75. See The Brookings Institution, Event Summary: The 2004 Election Results, Nov. 5, 2004, <http://www.brookings.edu/comm/op-ed/20041105results.htm> (referencing volume of voters, the article states that “[o]ne of the highlights of the election was the near-historic number of voters who arrived at the polls, motivated by the belief that this election would decide the direction of the United States and energized by massive get-out-the-vote efforts.”).

76. Federal Election Commission, National Voter Turnout in Federal Elections: 1960–1996, <http://www.fec.gov/pages/htmlto5.htm> (last visited Feb. 9, 2006).

77. U.S. Census Bureau, State and County QuickFacts, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Feb. 9, 2006).

78. *Id.*

79. U.S. CENSUS BUREAU, CITIES WITH 100,000 OR MORE POPULATION IN 2000 RANKED BY POPULATION: PERCENT CHANGE, 1990–2000 IN RANK ORDER, <http://www.census.gov/statab/ccdb/cit1100r.txt> (last visited Feb. 9, 2006).

80. See *supra* text accompanying note 68.

81. See Richmond, *supra* note 61, at 331 (“[M]ajor cities are surrounded by seas of low density residential development, highlighted by ‘agglomerations’ of development, often referred to as ‘Edge Cities’ or ‘suburban megacenters,’ where commercial, retail, office, and entertainment development has occurred.”).

82. See Kendall Anderson, *Judge Rules Hurst Can Take Properties: Landowners have Sued to Stop Seizure for Mall Expansion*, DALLAS MORNING NEWS, May 23, 1997, at 6N.

### b. Voter Participation in Texas

Texas has followed the national trend in decline in voter participation.<sup>83</sup> Participation in national issues (*i.e.*, presidential election years) is almost always higher, while voting on Texas constitutional issues tends to fluctuate.<sup>84</sup> For example, in the presidential election years, from 1972–2000, an average of 69% of the voting age population (VAP)<sup>85</sup> was registered to vote, with an average of 67% of registered voters turning out to vote.<sup>86</sup> This is in contrast to non-presidential election years, from 1970–2002, in which an average of 66% of the VAP was registered to vote, while an average of 43.7% of registered voters turned out.<sup>87</sup>

Texas constitutional issues, from 1977–2001, drew an average of 13% of registered voters, while over that same time period, an average of 68% of the VAP was registered.<sup>88</sup> Interestingly, 1987 was the peak year for voter turnout, at 30.56%.<sup>89</sup> This was the year that Texans voted on an amendment to the Texas Constitution, discussed in greater detail below, to include economic development as a public purpose for public fund expenditure purposes.<sup>90</sup>

### C. Current “Public Use” Interpretations

While taking private property for a private purpose has generally been accepted as unconstitutional,<sup>91</sup> the concept of “public use” has expanded such that today, “[p]ractically any acquisition meets the public use test if it serves a public purpose, confers a benefit on the public, or furthers the state’s police powers.”<sup>92</sup> The ambiguity of “public use” allows for an interpretive spectrum, with extremes on either side. As one court has noted,

[A]ny attempt at a concise and comprehensive definition of “public use” would be unsuccessful. Only by the gradual process of judicial

83. See *supra* sources cited and text accompanying notes 75–76.

84. TEXAS SECRETARY OF STATE, TURNOUT AND VOTER REGISTRATION FIGURES (1970–CURRENT), <http://www.sos.state.tx.us/elections/historical/70-92.shtml> (last visited Feb. 9, 2006).

85. See Federal Election Commission, A Few Words About Voting Age Population (VAP), <http://www.fec.gov/pages/vapwords.htm> (last visited Feb. 12, 2006). “The term Voting Age Population (VAP), refers to the total number of persons in the United States who are 18 years of age or older regardless of citizenship, military status, felony conviction, or mental state. The standard source of VAP figures is the Bureau of the Census, as reported in their Current Population Reports, Series P-25.” *Id.*

86. See TEXAS SECRETARY OF STATE, *supra* note 84.

87. See *id.*

88. See *id.*

89. See *id.*

90. See *infra* Part II.C.2.

91. 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.01[1] (3d ed. 2005).

92. *Id.* § 7.01[1].

exclusion and inclusion, and by a study of the influences which have affected the development of the law in the area under consideration, can any authoritative delimitation of “public use” be attained. Among these influences, one of the most significant is the historical development of public use and the forces—economic, social, and political—which have affected it.<sup>93</sup>

### 1. Federal Interpretation of “Public Use”

The U.S. Supreme Court has tended to take the “broad” view in interpretation of “public use,”<sup>94</sup> illustrated most recently in its *Kelo* decision.<sup>95</sup> “Blight” as a reason for taking property for redevelopment falls under this broad categorization.<sup>96</sup> In *Berman v. Parker*,<sup>97</sup> the Court upheld the District of Columbia Redevelopment Act of 1945, which allowed the use of eminent domain to redevelop slum areas, as promoting a “public use.”<sup>98</sup> The Court interpreted the use of eminent domain as turning on a rule of reason, stating that the use of the eminent domain power is “essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition,”<sup>99</sup> even if this meant, as part of the “comprehensive” redevelopment to eliminate blight, that non-blighted property could also be taken, and resold to private interests.<sup>100</sup>

In *Hawaii Housing Authority v. Midkiff*,<sup>101</sup> in which the Hawaiian legislature passed a statute allowing the property to be taken from the landlord-owners and resold to the tenants in fee simple, the Court stated that the “mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”<sup>102</sup> This echoed the much-earlier *Rindge Co. v. Los Angeles*<sup>103</sup> decision, in which the Court stated that “[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or par-

93. *County of Essex v. Hindenlang*, 114 A.2d 461, 467 (N.J. Super. Ct. App. Div. 1955).

94. See cases cited *infra* Part II.C.1.

95. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). The Court examined “over a century” of its precedents regarding the Fifth Amendment “public use” provision in the development of the *Kelo* opinion. See *id.* at 2668.

96. See Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 *FORDHAM URB. L.J.* 305, 306–07 (2004) (renaming an area “blighted” gives a freedom to redevelop an area in the image it believes “it should be”).

97. *Berman v. Parker*, 348 U.S. 26 (1954).

98. See *id.* at 31.

99. *Id.* at 32.

100. See *id.* at 34–35.

101. *Haw. Hous. Auth.*, 467 U.S. at 229.

102. *Id.* at 243–44.

103. *Rindge Co. v. County of Los Angeles*, 262 U.S. 700 (1923).

ticipate in any improvement in order [for it] to constitute a public use.”<sup>104</sup>

Most recently, the Court granted certiorari in *Kelo v. City of New London*,<sup>105</sup> to address this specific issue of economic development and eminent domain: What protection does the Fifth Amendment’s public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of “economic development” that will perhaps increase tax revenues and improve the local economy?<sup>106</sup> Based on the facts and circumstances of that case, the Court concluded that New London’s use of eminent domain for economic development was constitutional.<sup>107</sup>

*Kelo* originated as a mammoth opinion by the Connecticut Supreme Court, upholding the constitutionality of using economic development as a public purpose.<sup>108</sup> The justification for this holding was primarily based upon the facts that the plan at issue, paralleling *Poletown Neighborhood Council v. City of Detroit*,<sup>109</sup> discussed below, was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city . . . .”<sup>110</sup> Connecticut historically took the broad approach to “public use,”<sup>111</sup> and its high court reasoned in *Kelo* that the creation of “public economic benefits” satisfied the state and federal constitutions’ “public use” clauses.<sup>112</sup> One of the key facts upon which the U.S. Supreme Court’s subsequent ruling turned was that Connecticut had a statute “express[ing] a legislative determination that the taking of land, even developed land, as part of an economic development project is a ‘public use’ . . . .”<sup>113</sup> The U.S. Supreme Court stated:

Given the comprehensive character of the [economic rejuvenation] plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in

104. *Id.* at 707.

105. *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

106. *Kelo v. City of New London*, Question Presented, <http://www.supremecourtus.gov/qp/04-00108qp.pdf> (last visited Feb. 22, 2006).

107. *See Kelo*, 125 S. Ct. at 2668.

108. *See Kelo v. City of New London*, 843 A.2d 500, 507–08 (Conn.), *cert. granted*, 542 U.S. 965 (2004).

109. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

110. *Kelo*, 843 A.2d at 507.

111. *See id.* at 522 (citing *Olmstead v. Camp*, 33 Conn. 532, 546 (1866), which held that mill improvements that would result in flooding neighboring land were permitted as generally useful to the public who relied on the mill’s production). The *Olmstead* court construed “public use” as “synonymous with public benefit or advantage,” and held that “any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use.” *Id.* at 522 n.31.

112. *See id.* at 520.

113. *Kelo v. City of New London*, 125 S. Ct. 2655, 2660 (2005).

*Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestioningly serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.<sup>114</sup>

Underlying all of these decisions is the idea that courts should defer to federal or state legislative determinations of public interest,<sup>115</sup> under a rational basis-type review.<sup>116</sup> The eminent domain power has been treated as a means to an end,<sup>117</sup> and success in achieving the intended goal of the legislation is not required.<sup>118</sup>

Of significance to the overall body of jurisprudence dealing with economic development and eminent domain is another state court case dealing with similar facts, but which did not reach the U.S. Supreme Court. In *Poletown Neighborhood Council v. City of Detroit*,<sup>119</sup> the Michigan Supreme Court approved Detroit's use of eminent domain for economic development, to condemn private property on behalf of General Motors Corp. for construction of a new automobile assembly plant.<sup>120</sup> Under the philosophy that when there is a public need, "[t]he abstract right [of an individual] to make use of his own property in his own way is compelled to yield to the general comfort and protection of the community, and to a proper regard to relative rights in others[ ]," the majority held the public benefit sufficient "to satisfy this Court that such a project was an intended and a legitimate object of the Legislature when it allowed municipalities to exercise, condemnation powers even though a private party will also, ultimately, receive a benefit as an incident thereto."<sup>121</sup> One of the dissenting justices pointed out that in exchange for the estimated 6,150

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114. *Id.* at 2665.

115. *See Berman*, 348 U.S. at 32 (explaining ". . . when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . ."). *See also* *United States v. 2,606.84 Acres of Land*, 432 F.2d 1286, 1289 (5th Cir. 1970) ("It is perfectly clear that the judicial role in examining condemnation cases does not extend to determining whether the land sought is actually necessary for the operation of the project.").

116. *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (Regulation as a "comprehensive and rational approach to identifying and correcting market failure."). "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241.

117. *Berman*, 348 U.S. at 33 (stating that "the power of eminent domain is merely the means to the end").

118. *See Midkiff*, 467 U.S. at 242 (quoting *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)).

119. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (per curiam), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

120. *See id.* at 458-60.

121. *Id.* at 459.



jobs to be created at the GM plant, 3,438 people would be displaced, and 1,176 structures destroyed.<sup>122</sup>

*Poletown* was recently reversed in *County of Wayne v. Hathcock*,<sup>123</sup> wherein the Michigan Supreme Court recanted its earlier justification of economic development as a public purpose, stating that “a vague economic benefit stemming from a private profit-maximizing enterprise,” is not a public use after all, citing to the *Poletown* dissent by Justice Ryan.<sup>124</sup>

## 2. Texas Interpretation of “Public Use”

Texas’s interpretation of “public use” as it pertains to economic development must be examined chronologically because of an amendment to the Texas Constitution in 1987 that pertained specifically to economic development.<sup>125</sup> The Texas Constitution prohibited public fund expenditures for promotion of private business activity<sup>126</sup> until November 1987, when Texas voters passed an amendment to the Texas Constitution that provided expenditures for economic development serve a public purpose.<sup>127</sup> The Texas Constitution, Article III, section 52-a now states that:

Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, *for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state.* Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and that are payable from ad valorem taxes *must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue.* . . .<sup>128</sup>

This change made possible subsequent legislation dealing with municipal economic development.<sup>129</sup> Although the amendment provides a

122. See *id.* at 464 n.15 (Fitzgerald, J., dissenting).

123. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

124. *Id.* at 786. “[W]e conclude that the transfer of condemned property is a ‘public use’ when it possess[es] one of the three characteristics in our pre-1963 case law identified by Justice Ryan.” *Id.* at 781.

125. See TEX. CONST. art. III, § 52-a.

126. See TEX. CONST. art. III, § 52.

127. See TEX. CONST. art. III, § 52-a.

128. *Id.* (emphasis added).

129. See, e.g., TEX. LOC. GOV’T CODE ANN. § 380.001 (Vernon 2005) (defining miscellaneous provisions relating to municipal planning and development of economic

requirement for voter approval, as discussed above, voter participation in Texas has declined significantly over the past three decades.<sup>130</sup> Voter participation on this issue, however, was the high point for Texas voter turnout on constitutional issues, with 30.56% of registered voters participating.<sup>131</sup>

*a. Texas Judicial Interpretation, pre-1987*

In 1940, the Texas Supreme Court held in *Housing Authority of City of Dallas v. Higginbotham*<sup>132</sup> that a taking for public use depends on the character of the public use, not its extent, and just because “the advantage of the use inures to a particular individual or enterprise, or group thereof, will not deprive [the use] of its public character.”<sup>133</sup> *Higginbotham* involved slum clearance, and followed the majority of states and the federal government in holding that the eradication of blight was a public purpose sufficient for the use of eminent domain,<sup>134</sup> even though officially, Texas courts purported to follow the “narrow” interpretation of “public use.”<sup>135</sup>

A subsequent case, *Davis v. City of Lubbock*,<sup>136</sup> involved a similar issue, holding constitutional the Texas Urban Renewal Law, which provided that blight clearance and resale of condemned property served a “public use” when “subject to such covenants, restrictions and zoning restrictions as will insure that the redevelopment plan will be carried out and that the property will not again become a slum or blight area within the foreseeable future . . . .”<sup>137</sup> The court approved the condemnation as for a public purpose.<sup>138</sup> Of particular note in *Davis* is the additional protection provided by the Texas legislature in passing the Texas Urban Renewal Law, which the court noted contained “more limitations upon the powers of cities and renewal agencies than are contained in the laws of other states.”<sup>139</sup> The court cited as an example the requirement that to exercise the powers, the city

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development programs). Section 380.001(a) provides that the municipality may provide for program administration, including “programs for *making loans and grants of public money* . . . to promote state or local economic development and to stimulate business and commercial activity in the municipality.” *Id.* (emphasis added).

130. See *supra* Part II.B.2.b.

131. TEXAS SECRETARY OF STATE, *supra* note 84.

132. *Hous. Auth. of Dallas v. Higginbotham*, 143 S.W.2d 79 (Tex. 1940).

133. *Id.* at 84.

134. See *id.* at 85.

135. See Benbow, *supra* note 56, at 1500 (stating “courts’ struggles to reconcile the state’s expanding role in fostering public welfare with the narrow traditional construction of [public use]”).

136. *Davis v. City of Lubbock*, 326 S.W.2d 699 (Tex. 1959).

137. *Id.* at 707. “The general purpose of the Urban Renewal Law is to provide for the clearance of slum and blighted areas in cities and the redevelopment of the areas by private enterprise under restrictions designed to carry out the plan of renewal and to prevent recurrence of the slum conditions.” *Id.* at 701.

138. See *id.* at 707.

139. *Id.*

council must first hold “an election by the people of the city as to whether (1) one or more slum or blighted areas exist in such cities, and (2) slum clearance and rehabilitation of such area is necessary in the interest of public health, safety, morals or welfare.”<sup>140</sup>

Other, fairly typical, public purposes included condemnation for “public roads, parks, schools, railways, sanitation, drainage, flood control, telephone and telegraph facilities, light and power facilities, irrigation, port facilities, urban renewal, and public housing.”<sup>141</sup> However, the Texas courts continued to adhere, in theory, to a narrow view of “public use.” As one commentator noted,

[t]he administrative necessity of delegating the power of eminent domain to both public and private corporate entities to facilitate regional development soon gave rise to anomalous situations wherein the exercise of the delegated power appeared to vest in the general public little more than a fictional right of use, while “incidental” private gain to the condemning authority was substantial.<sup>142</sup>

In *Maher v. Lasater*,<sup>143</sup> the Texas Supreme Court held that while legislative declarations of public use “will be given great weight by the courts, the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts.”<sup>144</sup> *Maher* and similar private-access cases belie the tacit approval of projects involving the broad construction of “public use,” because *Maher*’s sole issue was restricted to a “private landowner’s right to an easement of necessity over adjacent private property . . . .”<sup>145</sup>

The trend, even before the modification of the Texas Constitution, had been to permit eminent domain use for industrial development, so long as it related to other recognized public uses,<sup>146</sup> in addition to the assertion that a legislative declaration of public use “is binding on the court unless it is manifestly wrong or unreasonable,” or its purpose is clearly private.<sup>147</sup> In *Atwood v. Willacy County Navigation District*,<sup>148</sup>

140. *Id.* at 701.

141. Benbow, *supra* note 56, at 1510–11.

142. *Id.* at 1500 n.10. He also noted, in reference to early 1900s cases, that “[a]fter initially adopting a comparatively restrictive definition of public use, the Texas courts, in order to stay apace of the rapidly changing social and economic climate, soon found themselves in the unenviable position of honoring the inflexible ‘use by the public’ concept more in the breach than in the application.” *Id.* at 1504.

143. *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962).

144. *Id.* at 925. The court held that landlocked property owner was not entitled to what amounted to an easement across neighboring property by eminent domain, and that the legislative act at issue was void. *See id.* at 926. Of particular relevance to the court was the fact that no one lived on this land and it was used for pasture. *See id.* at 924.

145. Benbow, *supra* note 56, at 1509 (citing *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962)).

146. *See Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137, 141 (Tex. Civ. App.—San Antonio 1954, writ ref’d n.r.e.).

147. *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 475 (Tex. App.—Corpus Christie 1983, writ ref’d n.r.e.).

landowners protested the condemnation of 1,760 acres of their land by the district for the purpose of port and industrial facility construction, statutorily authorized as a “public purpose and a matter of public necessity.”<sup>149</sup> The court considered this direct legislative declaration, as well as the circumstances, and concluded that, “a matter of common knowledge,” because industrial development and successful port operation “go hand in hand” as essential to one another, that the public use requirement was satisfied.<sup>150</sup>

*b. Texas Judicial Interpretation, post-1987*

Since the modification of the Texas Constitution, the specific issue of economic development as a public purpose has not yet been addressed by the Texas Supreme Court. In *City of Arlington v. Golddust Twins Realty Corp.*,<sup>151</sup> the Fifth Circuit noted that although Texas still counted itself as adopting the narrow view of “public purpose,” this interpretation has continued to be honored more in breach than in practice.<sup>152</sup> Deference to the legislature remains strong in Texas courts:

In light of more recent opinions articulating the role of legislatures and the judiciary in determining whether the power of eminent domain is being exercised for public purposes, we believe the proper view is to defer to the legislature’s declaration of a public purpose, unless the purpose is clearly private in nature.<sup>153</sup>

The Texas Office of the Attorney General also examined the issue of taking private property for the economic development as a public purpose, and stated that while “[e]conomic development itself is not one of the listed purposes” under Chapter 273 of the Texas Local Government Code’s list of purposes under which a city may purchase land,<sup>154</sup> Chapter 251 of the same code “appears to provide independent authority for a city to use its powers of eminent domain.”<sup>155</sup> One of the purposes under that chapter allows a city to use eminent domain when it “considers it necessary . . . for any . . . municipal purpose the governing body considers advisable.”<sup>156</sup> The Attorney General stated:

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148. *Atwood*, 271 S.W.2d at 137.

149. *Id.* at 139–40 (internal citations removed).

150. *Id.* at 142. “We hold that the acquisition of lands for industrial development by a navigation district is for a public use, and that the amendment of 1947, Article 8263h, § 50, Vernon’s Ann. Tex. Stats., is constitutional.” *Id.* at 143.

151. *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1994).

152. *See id.* at 965–66.

153. *Tex. Fruit Palace, Inc. v. City of Palestine*, 842 S.W.2d 319, 322 (Tex. App.—Tyler 1992, writ denied).

154. ECONOMIC DEVELOPMENT HANDBOOK 150, available at [http://www.oag.state.tx.us/AG\\_Publications/pdfs/2004econdevhb.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/2004econdevhb.pdf) (last visited Feb. 12, 2006) [hereinafter HANDBOOK].

155. *Id.* at 151.

156. TEX. LOC. GOV’T CODE ANN. § 251.001(a)(5) (Vernon 2005).

A strong argument can be made that the use of land for economic development would constitute a municipal purpose since both the Texas Constitution and state statutory law have been amended to make economic development a permissible public purpose. Additionally, Texas Civil Statutes Article 5190.6, Sections 4A(g) and 4B(j) provide economic development corporations organized under Sections 4A or 4B with the power of eminent domain if approved by the involved city. Since the overriding purpose of Section 4A and Section 4B corporations is to promote economic development, it appears that the Legislature interpreted a city's power of eminent domain to include the authority to condemn land for purposes of economic development.<sup>157</sup>

One counter-argument cited by the Attorney General to assist cities in risk assessment is that because "eminent domain laws predate the constitutional amendment on economic development," they could not be considered "implementing legislation for the use of eminent domain to acquire property for economic development purposes."<sup>158</sup> Also, if a city were to use eminent domain for economic development by condemnation on behalf of a private entity, then it "would arguably need to receive from that entity some sort of legally enforceable promise to accomplish a permissible economic development purpose."<sup>159</sup> With the idea of this power in mind, one should then consider potential limitations on the use of that power. Most recently, Texas legislative enactments now place limits on such use.<sup>160</sup>

#### D. *Non-Legislative Limitations on Takings for Economic Development*

##### 1. Administrative "Due Process" Factors

"Administrative" costs associated with the use of eminent domain include obtaining legislative authorization or persuading officials to exercise such authorization,<sup>161</sup> procedural requirements imposed by the federal constitution's Fifth and Fourteenth Amendments' due process clauses, as well as state constitutional and statutory requirements, professional appraisal of the property to be condemned, and court costs,<sup>162</sup> in addition to the actual required amount of "just," or "adequate," compensation.<sup>163</sup> Merrill states that "[t]he possibility of trial

157. HANDBOOK, *supra* note 154, at 151.

158. *Id.*

159. *Id.* See also Attorney General's Municipal Advisory Committee, *2004 Eminent Domain Made Easy: Answers to the Most Frequently Asked Questions About Eminent Domain*, [http://www.oag.state.tx.us/AG\\_Publications/pdfs/2004eminentdomain\\_easy.pdf](http://www.oag.state.tx.us/AG_Publications/pdfs/2004eminentdomain_easy.pdf) (last visited Feb. 17, 2006).

160. See *infra* Part IV.C.

161. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 77 (1986).

162. See *id.*

163. See *Berman v. Parker*, 348 U.S. 26, 36 (1954) ("The rights of these property owners are satisfied when they receive that just compensation which the Fifth

clearly increases the expected administrative costs of condemnation” and, with the other costs associated with due process, make eminent domain a more expensive way of acquiring resources in what he refers to as a “thick market.”<sup>164</sup> Another commentator, testing Merrill’s economics-based eminent domain theory, also concludes that “[f]or the most part, municipalities avoid condemning private property unless market conditions require them to do so.”<sup>165</sup> Another factor that may have an impact is the “public relations” factor: a city that institutes a condemnation case “must face at the outset a trier of fact who will generally perceive [it] in a negative light.”<sup>166</sup>

## 2. Site Selection

Generally, neighborhoods are unlikely to be taken for economic development unless there is a severe shortage of available land for development. In addition to the various factors listed in business relocation and expansion decisions above, the first stage in the land development (or redevelopment) process involves site inspection, preliminary market study, and preliminary cost estimates.<sup>167</sup> Even if the site is a greenfield (*i.e.*, has not had prior development), this initial evaluation may still derail the project if the area itself is not suitable for the particular development envisioned.<sup>168</sup> If the site has been previously developed, or even worse, has acquired the designation “brownfield,”<sup>169</sup> this may further complicate any chances of redevelopment.

Considering these factors, as well as the statistics discussed above, one may conclude that in an urbanized area, the risk of a taking for economic development purposes is *increased*, but not epidemic. As a

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Amendment exacts as the price of the taking.”); U.S. CONST. amend. V; see TEX. CONST. art. 1, § 17.

164. See Merrill, *supra* note 161, at 76–77 (characterizing “any situation where market conditions do not allow a seller to extract economic rents from a buyer [as] a ‘thick market’”).

165. Corey J. Wilk, *The Struggle Over the Public Use Clause: Survey of Holdings and Trends, 1986–2003*, 39 REAL PROP. PROB. & TR. J. 251, 274 (2004).

166. Snyder, *supra* note 39, at 649.

167. See WILLIAM B. BRUEGGEMAN & JEFFREY D. FISHER, REAL ESTATE FINANCE AND INVESTMENTS 529 (10th ed. 1997). For example, with a greenfield site, before any development can take place, it must be studied “to establish how much of the surface area needs excavating and grading, and at what cost. These decisions are a function of the topography, drainage characteristics, soil condition, and subsurface characteristics.” *Id.*

168. See *id.*

169. See U.S. Environmental Protection Agency, Brownfields Cleanup & Redevelopment, <http://www.epa.gov/swerosps/bf/index.html> (last visited Feb. 17, 2006). A brownfield is “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. Cleaning up and reinvesting in these properties takes development pressures off of undeveloped, open land, and both improves and protects the environment.” *Id.*

witness from the real estate planning and economic development consulting firm explained to the trial court in *Kelo*, the “common redevelopment approach” is to give the private sector developer “raw land with the necessary infrastructure, and the developer makes an investment.”<sup>170</sup> However, the risk is higher for the private developer if the site has hazardous waste, geographic constraint, “a lot of regulations dealing with it, and it’s in an urban setting . . . [t]hat’s not the most attractive for investment.”<sup>171</sup> In spite of that, the fact that it can occur is still cause for concern when considered in the context of the constitutional imbalance created when the courts give excessive deference to the legislature, and voters fail to supervise their legislators.<sup>172</sup>

### 3. North Texas Examples

Hurst, Texas, is a classic example of an inner-ring city, geographically encircled by highways 121, 183, and 10.<sup>173</sup> In 1997, the North East Mall, Hurst’s biggest taxpayer, and employment site of over 2,600 workers, discussed the possibility of a \$220 million expansion, predicted to result in an additional \$8 million in sales taxes and 2,000 more jobs.<sup>174</sup> The hitch was that plan implementation would require a buyout of 127 homeowners, to facilitate road and parking lot expansion.<sup>175</sup> Only ten homeowners refused to accept the buyout offered by the mall’s owner.<sup>176</sup> In 2000, the City of Hurst settled with the ten hold-outs for \$3 million.<sup>177</sup> North East Mall remains Hurst’s largest employment site, with 3,460 workers employed in its various retail establishments.<sup>178</sup>

Eminent domain for economic development is not a recent phenomenon in North Texas—in the 1960s, over 200 Dallasites lost their homes to an expansion of Fair Park, “to provide more parking spaces for the Dallas Cowboys . . . .”<sup>179</sup> Other examples have included condemnation by the City of Arlington for The Ballpark in Arlington

170. *Kelo v. City of New London*, 843 A.2d 500, 554 n.82 (Conn. 2004), cert. granted, 542 U.S. 965 (U.S. Sept. 28, 2004) (No. 04-108).

171. *Id.*

172. See *infra* Parts III, IV.

173. For a visual description of Hurst’s geographical layout see North Central Texas Council of Governments, <http://www.dfwmaps.com> (last visited Feb. 17, 2006).

174. *Growing Pains: Mall’s Expansion Claims Neighborhood*, DALLAS MORNING NEWS, Feb. 1, 1998, at 9A.

175. See *id.*

176. See *id.* The buyout package amounted to an average of 180% of the properties’ values. See *id.*

177. See Scott Stafford, *Private Sector Sites Eyed: Planned DART Stations Have City Rethinking Eminent Domain Rules*, DALLAS MORNING NEWS, Dec. 5, 2003, at 10.

178. See North Central Texas Council of Governments, 2004 Major Employer Publication, <http://www.nctcog.org/ris/majemp/majempbycity04.pdf> (last visited Nov. 28, 2004).

179. Frank Trejo, *Bitter Legacy at Fair Park: 1960s Controversy Recalled as Talk Grows of Possible Cowboys’ Return*, DALLAS MORNING NEWS, Apr. 4, 2004, at 1B.

(now Ameritrust Field in Arlington), and by the City of Fort Worth for the Texas Motor Speedway.<sup>180</sup> Most recently, debate has centered over the new \$650 million Dallas Cowboys stadium,<sup>181</sup> which recently passed a vote in Arlington: 55.27% for and 44.73% against.<sup>182</sup> However, there appears to be less concern about home loss and more concern that the “adequate compensation” price, required by the Texas Constitution, be sufficient.<sup>183</sup>

### III. FACTOR INTERPLAY LEADING TO CONSTITUTIONAL IMBALANCE

The ambiguity inherent in “public use” allows for the interpretive spectrum addressed above. Today, it can be construed to mean almost anything and courts tend not only to defer to the legislature, but also follow the U.S. Supreme Court’s lead in doing so.

The Founders of the Constitution envisioned an institutional framework of limited government to secure private property rights,<sup>184</sup> but anticipated that an active public would keep legislative officials in check not an apathetic civic body.<sup>185</sup> Until the 2004 presidential election,<sup>186</sup> voter registration and participation had been on a decline,<sup>187</sup> with a corresponding negative effect on keeping the legislature in check.<sup>188</sup> Candidates for all levels of political office promote the plat-

180. See Kendall Anderson, *Bedford to Vote on Eminent Domain: Plan Would Bar Takeover of Property for Private Use*, DALLAS MORNING NEWS, Sept. 4, 1997, at 1G.

181. See Jim Getz, *Arlington Council to Vote on Stadium: City, Cowboys Reach Tentative Deal*, DALLAS MORNING NEWS, Aug. 17, 2004, at 1B.

182. City of Arlington, *City Election*, Nov. 2, 2004, Dallas Cowboys Complex Project Election Results, [http://www.ci.arlington.tx.us/citysecretary/110204\\_election\\_results.html](http://www.ci.arlington.tx.us/citysecretary/110204_election_results.html) (last visited Feb. 17, 2006).

183. See Jim Getz, *“Right Price” Would Clear Way for Stadium*, DALLAS MORNING NEWS, Oct. 22, 2004, at 1A. One resident stated, “We could be out in seven days. But if they don’t offer the right price, we’ll hold it up all the way.” *Id.* The stadium project has not been derailed despite recent changes in Texas law, and “despite homeowner objections that they are being displaced for economic benefit, not public use.” Levy, *supra* note 15, at 4B.

184. See ELY, *supra* note 19, at 4 (“The bicameral legislative body, an independent judiciary, and the other checks and balances established by the Constitution were expected to create a political climate in which property interests would be safe.”).

185. See generally THE FEDERALIST NO. 10 (James Madison) (stating the idea that factions were a part of American political life); The Constitution Society, *Chronology of the Pro- and Anti-Federalist Papers and how they related to one another and to key events*, <http://www.constitution.org/afp/afpchron.htm> (last visited Feb. 18, 2006) (providing a detailed timeline of events related to the drafting of the Federalist Papers).

186. See The Brookings Institution, *supra* note 75.

187. See FEDERAL ELECTION COMMISSION, *supra* note 76.

188. SCHULTZ, *supra* note 13, at 3 (“The state of property rights and legislative power in America . . . may stand at a conceptual crossroads, in need of reexamination.”).



form of “economic development,”<sup>189</sup> or at least receive funding for it.<sup>190</sup> And an increasingly urban population has abdicated its responsibility not to “sleep on its [private property] rights,”<sup>191</sup> in decreased voter registration and participation in the political process.<sup>192</sup> This, in turn, has resulted in a constitutional imbalance at both federal and state levels, because without the public or judiciary to keep legislative power in check, lawmakers have free rein.

With regard to the hypothetical situation in the introduction, Big Corporation might bypass the North Texas City, denying it an opportunity to increase the tax base and develop those jobs. This is because, in addition to the cost of using eminent domain and the specific site selection factors involved in a corporate location decision, Texas has redrawn a line regarding “public use,” in response to the political backlash following *Kelo*.<sup>193</sup>

The previous line existed because of the importance of jobs, taxes, and geography, in addition to the constitutional asymmetry caused by judicial deference and voter abdication. But until recently, the “public use” determination of economic development remained a rule of reason to be determined locally. Determining where an individual’s right to private property should end in the face of socioeconomic expansion, when the cost is potential home loss to citizens and a litigation black-eye to city councils, is essentially a local decision. However, Texas legislators responded to *Kelo* by enacting a law that, while protecting private property rights to a certain extent, may hamper local communities’ flexibility in responding to some economic development opportunities, because of its emphasis on denying a taking that “confers a private benefit on a *particular* private party,”<sup>194</sup> which

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189. See Weber, *supra* note 20, at 101 (“Deals that attract or retain large companies . . . are announced with great fanfare as politicians rush to take credit for reviving the local economy.”).

190. See, e.g., Texas Economic Development Council, The TEDC PAC: Your Voice at the Texas Capitol, [http://www.texasedc.org/docs/116\\_2005tedc\\_brochure\\_v2.pdf](http://www.texasedc.org/docs/116_2005tedc_brochure_v2.pdf) (last visited Feb. 17, 2006). TEDC PAC was organized in 1997 to “represent[ ] the interests of more than 900 economic developers from across Texas.” *Id.*

191. See generally 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01[4] (Michael Allan Wolf ed., 2000) (supporting the idea that one of the policies behind adverse possession is to punish owners who fail to defend their property rights within the statutory period); see also *Kelo v. City of New London*, 843 A.2d 500, 589 (Zarella, J., concurring in part and dissenting in part) (explaining that “[t]akings for private economic development resemble takings by adverse possession because property owners in both situations lose title to their land”).

192. See *supra* Part II.B.1, B.2.b.

193. See Levy, *supra* note 15, at 4B.

194. See TEX. GOVT. CODE ANN. § 2206.001 (Vernon Supp. 2005) (emphasis added). Specifically, the legislature indicated that its reason for proposing this statute was to redefine the scope of public use in light of *Kelo*. Sen. Comm. on Land and Resource Management, Bill Analysis, Tex. S.B. 7, 79th Leg., 2d C.S. (2005).

would include Big Corporation, in spite of any public benefits bestowed by the proposed economic development.<sup>195</sup>

#### IV. ANALYSIS

Current safety measures for individual landowners include the site selection factors, geographic layout of the area in question, the administrative “due process” costs of using eminent domain,<sup>196</sup> the statutory requirements that must be met to condemn property for public use involved, and the requirement of payment of “just” or “adequate” compensation.<sup>197</sup> These measures combine to make it an unusual situation when someone’s home is actually taken for economic development purposes. However, the problem remains that in certain circumstances, someone’s private property *could* be taken for economic development purposes, despite new statutory provisions. The risk may be minimal in many circumstances, but that does not give the homeowner an excuse to “sleep on his rights” and fail to make his or her voice heard at city hall. The various alternatives discussed below have been proposed by a number of commentators and include constitutional, judicial, and legislative changes, to increase individual protection.

##### A. Constitutional Change

Some commentators have suggested that a change in state constitutions to make use of eminent domain more difficult is the solution to the problem of takings for economic development purposes.<sup>198</sup> Specifically, by raising the “information and transaction costs” to interest groups of using eminent domain to take private property for private purposes, “economically rational special interest will find rent-seeking

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195. However, the statute itself is riddled with exceptions, including one that prohibits a taking for economic development purposes, “unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas” under the existing Local Government and Tax Codes. § 2206.001(b)(3). The “slum and blight” clearance theories for enacting a taking have been used to justify a taking for what amounts to economic development purposes since at least *Berman v. Parker*. See *supra* Part II.C.1.

196. See Merrill, *supra* note 161, at 77.

197. See *supra* Part II.

198. See Donald J. Kochan, “Public Use” and the Independent Judiciary: *Condemnation in an Interest Group Perspective*, 3 TEX. REV. L. & POL. 49, 92 (1998) (stating that the “[g]ame theory and the classic prisoner’s dilemma illustrate that no one faction will find it in their best interest to unilaterally withdraw from the political game of rent-seeking”); see also ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 263 (2d ed. 1988) (suggesting that “[i]f judges remain fixed in their ways, then perhaps some constitutional revisions might be in order”). Recent passage of the Texas statute to prevent takings for economic development dissatisfied some critics, who “wanted a constitutional amendment instead of a law, to avoid any loopholes.” Levy, *supra* note 15, at 4B.

too expensive.”<sup>199</sup> However, eminent domain itself is not the root problem, and states and cities still need that power in order to facilitate its traditional uses, such as road expansion.<sup>200</sup> Also, in Texas at least, constitutional change is a possibility, but appears unlikely, because the majority (or at least those who vote) have demonstrated a preference for flexibility when it comes to economic development.<sup>201</sup>

### B. Judicial Change

Other commentators suggest that it is the courts’ responsibility to protect private property rights.<sup>202</sup> Specifically, because courts have performed the guardianship role in terms of civil rights, they should also exercise this activism to protect property rights, standing as “the final bulwark against government’s propensity to seek the public good at the expense of trenching upon property rights[.]”<sup>203</sup> A subissue is the concern that allowing private property to be taken for economic development may also reduce other rights, if private property ownership has historically been considered a buffer from government coercion.<sup>204</sup>

Based on the current “ends justify the means” analysis, reconfirmed by the U.S. Supreme Court in *Kelo*,<sup>205</sup> legislative discretion is the key to resolution of a condemnation for economic development as a public purpose.<sup>206</sup> This means that just about anything goes—unless the taking is clearly arbitrary or capricious—and as long as it has been thoroughly covered by a statute, it will probably pass federal constitutional muster. To be found arbitrary or capricious today, “[t]here must be basic to the project pervasive deception, unreasoned decision, or will-of-the-wisp determination before these words of pejoration are brought into play.”<sup>207</sup> And as more than one commentator has noted, courts do not have the same access to experts, or need to assess, when a particular property is required for public use.<sup>208</sup> One commentator has stated that:

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199. Kochan, *supra* note 198, at 92.

200. See generally Attorney General’s Municipal Advisory Committee, *supra* note 159 (providing background information on eminent domain).

201. See *supra* Part II.C.2. That is, as long as it’s not their house being taken.

202. See Paul, *supra* note 198, at 266.

203. *Id.* (stating “[i]n recent times we have seen activist judges in effect usurp legislative or executive functions by themselves managing schools, mental hospitals, and prisons”).

204. See ELY, *supra* note 19, at 43.

205. See *Kelo v. City of New London*, 125 S. Ct. 2655, 2668 (2005).

206. See *United States v. 2,606.84 Acres of Land*, 432 F.2d 1286, 1289 (5th Cir. 1970) (“Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.”).

207. *Id.* at 1290.

208. See Jennifer Maude Klemetsrud, Note, *The Use of Eminent Domain for Economic Development*, 75 N.D. L. REV. 783, 800 (1999) (“It is both difficult and costly for courts to complete an independent analysis of a societal or public benefit. It is

[i]n light of the multitudinous variables inherent in public planning which are peculiarly within the realm of administrative expertise, the courts are simply not the proper bodies, in the absence of extreme arbitrariness or fraud, to make a satisfactory determination of the expediency of a specific use, the necessity of a particular taking, or the extent of the interest to be acquired.<sup>209</sup>

Courts are also not immune to socioeconomic factors that may promote infringement on private property rights. Cases like *Poletown* demonstrate “how easily government, in all of its branches, caught up in the frenzy of perceived economic crisis, can disregard the rights of the few in allegiance to the always disastrous philosophy that the end justifies the means.”<sup>210</sup> This is why some commentators suggest that judicial review should be of the means used, and not the “public purpose” ends.<sup>211</sup> In light of decisions like *Poletown*, and now *Kelo*, judicial redevelopment of the takings framework has been urged.<sup>212</sup> Recommendations have included strict scrutiny and demonstration of compelling state need where certain conditions are present, including where “the land is transferred to another private party rather than held by the public; [ ] the individual interest of those whose land is taken is particularly strong and monetary compensation cannot significantly compensate for the loss; and [ ] the party whose land is taken is relatively powerless politically.”<sup>213</sup>

Courts have made difficult land rights determinations before, with acknowledgment as early as Blackstone that “in short, one’s absolute rights to property are tempered by the rights of others or by the public

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difficult because determining the societal costs and benefits of any taking is at best uncertain and speculative. It is costly because it requires courts to review all of the evidence presented and determine if, in fact, the taking is in the interests of the public.”).

209. Benbow, *supra* note 56, at 1503.

210. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 465 (Mich. 1981) (per curiam) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

211. See Merrill, *supra* note 161, at 71 (stating that “the American judiciary is unlikely soon to assume the task of closely scrutinizing legislative judgments about the legitimate ends of government”). “Given the choice of means question is an analytically distinct and important inquiry, it is worth asking whether the public use limitation can be reformulated as a choice of means doctrine, and if so, whether the judiciary should have a role in reviewing the exercise of eminent domain from this perspective.” *Id.*

212. See Peter J. Kulick, Comment, *Rolling the Dice: Determining Public Use in Order to Effectuate a “Public-Private Taking” –a Proposal to Redefine “Public Use,”* 2000 MICH. ST. L. REV. 639, 660–61 (2000) (Five reasons why *Poletown* is bad law: loss of individual liberty and less private property protection, imposition of significant costs on society through economic inefficiency, encourages interest group capture, too much deference to legislative determination of public use, and “creates new constitutional rules beyond the traditional scope of the eminent domain limitation in the Constitution.”).

213. Ralph Nader & Alan Hirsch, *Making Eminent Domain Humane*, 49 VILL. L. REV. 207, 224 (2004).

good,”<sup>214</sup> and that there is an interaction between property’s legal nature and “how the law could alter property relations.”<sup>215</sup> Specifically, common law creations in property law like trespass, nuisance, and water law, traditionally allowed courts “to bend the law to keep up with shifting communal values.”<sup>216</sup> The policy that “[p]roperty rights serve human values” and “are recognized to that end and are limited by it,”<sup>217</sup> has been used in various courts over the years to justify entry onto another’s land because of necessity,<sup>218</sup> civil rights legislation forbidding various forms of discrimination on the right to exclude,<sup>219</sup> limitations on landlords with regard to tenants’ rights,<sup>220</sup> and other restrictions on the absolute right of the private property owner. In redrawing the line, courts must reflect that while today’s society is willing to protect private property to a certain extent,

an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion.<sup>221</sup>

At this time, however, in the shadows of *Kelo*, *Berman*, and *Midkiff*, judicial change appears unlikely.

### C. Legislative Change

For Texas, legislative change appears to be the most reasonable solution to minimize the risks associated with taking private property for economic development purposes, but the critical factor is at which level: state or local?

The most recent statutory enactment, *Limitation on Eminent Domain for Private Parties or Economic Development Purposes*,<sup>222</sup>

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214. SCHULTZ, *supra* note 13, at 20 (citing 2 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 2).

215. *Id.*

216. Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 UCLA L. REV. 77, 103 (1995).

217. *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

218. *See id.* at 372–75 (establishing a public policy limitation on right to exclude when landowner kept migrant farm workers from receiving government information).

219. *See, e.g., Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (discussing whether the public accommodations provision of the Civil Rights Act of 1964 is valid under the Commerce Clause).

220. *See, e.g., Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984).

221. 10 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 69.01 (Michael Allan Wolf ed., 2000).

222. TEX. GOVT. CODE ANN. § 2206.001 (Vernon Supp. 2005).

grandfathers Arlington's new Dallas Cowboys stadium project,<sup>223</sup> and leaves open takings for transportation projects, port authorities, and other special groups<sup>224</sup> that, per Texas jurisprudential history, have traditionally been allowed to use eminent domain for purposes that tend to result in economic development.<sup>225</sup> It also leaves open takings to redevelop blighted areas.<sup>226</sup>

At the local level, some North Texas cities took action before the *Kelo* decision. For example, in 1997, as a reaction to the Hurst-mall scenario described above, the neighboring City of Bedford held a referendum to amend the city ordinances to include that while the city followed the state law as it pertained to municipal eminent domain power:

[n]othing included . . . anywhere within this charter shall authorize the city, or any corporation, agency or entity created by the city, or pursuant to the city's approval and authorization, to institute and exercise the power of eminent domain to acquire private or public property if the purpose of the acquisition is the promotion of economic development for a private business enterprise which business enterprise would own any right, title, or interest in the property so acquired.<sup>227</sup>

Another neighboring city, Carrollton, added a substantially similar provision in 1998.<sup>228</sup> This local action adds a "brighter" line, directly accountable to the homeowners within the community, and unlike a statute, is easier to amend if the community's citizens change their minds.

Other recommendations based on case law and commentators, to modify either state or local requirements for a taking for economic development purposes include incorporating three key elements: extreme public necessity, continuing public accountability, and selection of land according to facts of independent significance.<sup>229</sup> Or, categorizing property as "political" and "non-political," to determine what

223. See *id.* § 2206.001(c)(6).

224. See *id.* § 2206.001(c)(1)–(11).

225. See *supra* Part II.C.

226. See § 2206.001(b)(3).

227. BEDFORD, TEX., ORDINANCES ART. 1, § 1.08(b), available at <http://www.municode.com/resources/gateway.asp?pid=11924&sid=43> (last visited Feb. 19, 2006).

228. CARROLLTON, TEX., CODE art. I, § 1.04 (2005) ("Provided, however, nothing included above or anywhere in this charter shall authorize the City of Carrollton, or any corporations, agency or entity created by the City, or pursuant to the City's approval and authorization, to institute and exercise the power of eminent domain to acquire private or public property if the purpose of the acquisition is the promotion of economic development for a private business enterprise which business enterprise would own any right, title, or interest in the property so acquired."), available at [http://www.ci.carrollton.tx.us/government/code\\_of\\_ordinances.shtml](http://www.ci.carrollton.tx.us/government/code_of_ordinances.shtml) and <http://www.municode.com>.

229. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 478 (Mich. 1981) (per curiam) (Ryan, J., dissenting), *overruled by* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

type is available for a taking, along with an additional requirement for stricter judicial scrutiny, “to mitigate some of the abuses of the expanded public use doctrine,”<sup>230</sup> and placing the burden of proving “public use” on the government, with no judicial deference to legislative judgments nor presumption of constitutionality.<sup>231</sup> Promoting this sort of change is the recent trend of “courts’ willingness to embrace new ways to limit private use takings, such as focusing on statutory requirements.”<sup>232</sup>

One commentator has argued that it is not cost-efficient for “a taxpayer to fight a particular piece of special-interest legislation[ ],” and that the information costs of the effect of any one particular issue on an individual taxpayer are too high, “thereby deterring him from identifying his interests in the first place.”<sup>233</sup> The answer is to use Madison’s “factions” to defend private property: there are a number of interest groups already that exist to defend private property rights.<sup>234</sup> These ideas follow the underpinnings of our institutions: John Locke’s publication of his thesis on “the rights to life, liberty, and property under limited government, as a social contract,” in 1690;<sup>235</sup> the Declaration of Independence, reaffirming the concept of limited government, stating that governments derive “their just powers from the consent of the governed,”<sup>236</sup> on July 4, 1776, and in our federal and state constitutions.<sup>237</sup>

## V. CONCLUSION

In the reconciliation of competing interests, private property versus jobs, state and local elected officials get to strike the balance—but it is

230. SCHULTZ, *supra* note 13, at 183.

231. See Paul, *supra* note 198, at 261 (arguing that eminent domain, as “the power of the state to seize property against the will of its rightful owner” is wholly unjustifiable).

232. Wilk, *supra* note 165, at 274.

233. Kochan, *supra* note 198, at 81. “Additionally, individual citizen opposition, such as from the landowner, is unlikely to influence a politician’s decision or his electoral chances, for ‘the probability that a typical voter will change the outcome of the election is vanishingly small.’” *Id.* at 82–83.

234. See, e.g., Owners’ Council of America, <http://www.ownerscounsel.com/> (last visited Feb. 19, 2006) (“Owners’ Counsel of America is a voluntary network of experienced eminent domain trial lawyers from every state of the nation in coalitions with environmental and land use lawyers to assist its members in better serving property owners in the exercise of their constitutional guarantees of private ownership.”); Castle Coalition: Citizens Fighting Eminent Domain Abuse, <http://www.castlecoalition.org/> (last visited Feb. 19, 2006).

235. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 350 (Peter Laslett ed., Cambridge Univ. Press 1988) (1960).

236. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

237. See Republican Party of Texas v. Dietz, 940 S.W.2d 86, 91 n.6 (Tex. 1997) (stating that “[t]he framers of the Texas Constitution apparently shared the belief that a constitution was a compact between the government and its citizens[ ],” and then citing to TEX. CONST. art I, § 2 (“All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.”)).

up to the public to demand accountability. Because of voter and court abdication, per the analysis above, it would appear that interest groups must bear the burden of public participation revitalization. The likely success of developing a “brighter” line between individual property rights and community economic development depends on the activities of these groups in waking up private property owners to the potential threat they face from the use of eminent domain for economic development. The system depends on itself to function:

[R]esource allocation is a function of market demand and supply, which is in turn a function of power, which is a function of property rights (understood as a mode of participation in decision making, or power), which are a function of law, which is a function of government, which is a function of the results of the contest over the control of government to use it to protect certain interests rather than others.

Government and property, therefore, are interdependent variables; each is both dependent and independent relative to the other; each is formed and influenced by the other. The ineluctable problems are always: which, or whose, interests are to count; through which institutional or power structure are they to be defined so as to count; and with what legal change of law are legal rights to be revised.<sup>238</sup>

As one commentator has pointed out, “[a]s lawyers, we are trained to work within the system, but the system itself is broken; the longer we merely fiddle, the hotter Rome burns.”<sup>239</sup>

The administrative costs of using eminent domain, and the variables involved in site selection, make it an unusual situation when someone’s home is taken for such a purpose. The degree of risk is a function of geographic location, as well as all of the socioeconomic and political variables that go into the site selection process and the willingness of a municipality to use the power of eminent domain. But however great or small the risk, this does not give the homeowner an excuse to “sleep on his rights.” Part of the problem now faced stems from voter abdication, and a good part of the solution is to reinvigorate voters locally to defend their private property rights if they want to keep them: “property rights and public use deliberations are political policy questions and should be made by the people because representative decision making is the essence of democracy.”<sup>240</sup>

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238. *Introduction to THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY* 6 (Nicholas Mercuro & Warren J. Samuels eds., 1999).

239. Epstein, *supra* note 67, at 362–63 (commenting on “reliance upon certain government models and public policies invented to address the problems of a different era.”).

240. SCHULTZ, *supra* note 13, at 184.