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Restricting Kelo: Will Redefining Blight in Senate Bill 7 Be the Light at the End of the Tunnel.

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COMMENTS

RESTRICTING *KELO*: WILL REDEFINING "BLIGHT" IN SENATE BILL 7 BE THE LIGHT AT THE END OF THE TUNNEL?

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"Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not."[1]

I. INTRODUCTION

Susette Kelo had made significant improvements to her home, a 100-year-old cottage,[2] which she prized for its waterfront view of the Long Island Sound.[3] Mrs. Kelo had comfortably lived in the Fort Trumbull area of the city of New London for eight years,[4] until the day before Thanksgiving, when she came home to find a condemnation notice affixed to her front door.[5]

On June 23, 2005, in *Kelo v. City of New London*,[6] the United States Supreme Court extended the public use limitation to its most expansive definition yet.[7] The *Kelo* decision enhanced the Fifth Amendment[8] takings power by allowing the city of New London, Connecticut, to exercise eminent domain power in furtherance of an economic development plan.[9] The city of New London implemented a plan in the Fort Trumbull area for economic revitalization, which included using the city's power of eminent domain to acquire private property of homeowners, such as the home of Susette Kelo.[10] Notably, there was no claim that the area was blighted.[11] In essence, the Court ruled that fifteen homes in the Fort Trumbull area of New London could be condemned because the homes

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1. Kelo v. City of New London, 125 S. Ct. 2655, 2685 (2005) (Thomas, J., dissenting). Justice Thomas felt the Court erroneously upheld a costly urban renewal project with an ambiguous promise to create jobs and increase tax revenue, but which ultimately benefits Pfizer as a private corporation. *Id.* at 2677-78. Justice Thomas argued that this is not a "public use." *Id.*

2. *CBS Sunday Morning: This Land Is Your Land – Maybe* (CBS News television broadcast Mar. 6, 2005), http://www.cbsnews.com/stories/2005/03/07/sunday/printable678427.shtml (transcript on file with the *St. Mary's Law Journal*).

3. *Kelo*, 125 S. Ct. at 2660.

4. *Id.*

5. *See* Laura Mansnerus, *Ties to a Neighborhood at Root of Court Fight*, N.Y. TIMES, July 24, 2001, at B5 (describing Susette Kelo's testimony).

6. 125 S. Ct. 2655 (2005).

7. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005) (upholding the city of New London's exercise of eminent domain).

8. *See* U.S. CONST. amend. V (stating, in relevant part: "[N]or shall private property be taken for public use, without just compensation"); *see Kelo*, 125 S. Ct. at 2666 (referring to the Takings Clause of the Fifth Amendment).

9. *See Kelo*, 125 S. Ct. at 2659-60 (discussing the proposed benefits the economic development plan would have on the city of New London).

10. *Id.* at 2660.

11. *Id.*

happened to be located in the development area, which envisioned upscale restaurants, shopping, luxury hotels, a new urban neighborhood, and a $300 million research facility for the pharmaceutical giant, Pfizer, Inc.[12]

Yet, the Court was far from unanimous in its decision. As Justice O'Connor wrote in her dissent, quoting her predecessors from over two centuries before:

> An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. . . . [A] law that takes property from A[ ] and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.[13]

But the consequence of *Kelo* is that, today, such private use takings *are* permitted.

The Fifth Amendment provides that governments may wield the power of eminent domain and take private property for public use with just compensation.[14] The power of eminent domain, established in the Con-

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12. *See id.* at 2559-60 (examining various reasons why fifteen properties were condemned, even though the city of New London acknowledged these properties were not blighted). Commenting on the type of development visualized by the New London Development Corporation, Mrs. Kelo said, "We weren't the right type of people. . . . They said they wanted to create a hip little city. And to us hip—or to me—hip meant higher income people . . . . Not me." *CBS Sunday Morning: This Land Is Your Land – Maybe* (CBS News television broadcast Mar. 6, 2005), http://www.cbsnews.com/stories/2005/03/07/sunday/printable678427.shtml (transcript on file with the *St. Mary's Law Journal*).

13. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis omitted)). The quotation from *Calder* was cited by Justice O'Connor in her strong dissent in *Kelo*, arguing the Court abandoned "this long-held, basic limitation on government power." *Id.*

14. U.S. CONST. amend. V; *accord* U.S. CONST. amend. XIV, § 1 (providing that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"). Eminent domain is "[t]he power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character." BLACK'S LAW DICTIONARY 470 (5th ed. 1979). It is evident today that a taking does not have to be a physical taking to require just compensation. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 443 (5th ed. 1995). A taking can be a regulation of property if the regulation goes too far, or if the governmental activity produces a significant amount of property damage which impairs the use of the property. *Id.* at 443-44; *see, e.g.*, Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 306 (2002) (holding that a temporary moratoria on development did not constitute a per se taking); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (concluding the Beachfront Management Act stripped the property owner of all economically beneficial uses and that the property owner suffered a taking); Penn Cent. Transp. Co. v. New

stitution, is a fundamental and necessary power of government.[15] Nonetheless, the taking of private property solely for private use does not withstand constitutional scrutiny, despite just compensation being awarded.[16] Generally, private property can be condemned in only extremely limited circumstances and these condemnations must be for the public benefit.[17] However, after the watershed decision of *Kelo*, the Court's ruling invited future abuse and provided an avenue for governments to use the power of eminent domain to acquire property to put it toward a more economically beneficial use, which now appears to be properly classified as public use. *Kelo* held that the potential for increased tax revenue and general economic revitalization is classified as "public use" under the Takings Clause, effectively placing no limit on the power of eminent domain to aid private entities.[18] After the Supreme Court handed down the *Kelo* decision, the Court placed a rubber stamp on virtually any taking and gravely eroded the bedrock principle of the right to "life, liberty, or property."[19]

York City, 438 U.S. 104, 124 (1978) (upholding the New York City Landmark Preservation Law as constitutional, thereby limiting the building rights in the vicinity of historic Grand Central Station); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that just compensation must be awarded if a coal company's rights were limited by a prohibition on mining causing subsidence). Additionally, if the government physically takes possession of an interest in any property, real or personal, for a public purpose, it has a categorical duty of just compensation. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 233 (2003) (holding that the state's use of interest on lawyers' trust accounts (IOLTA) to pay for legal services for the needy qualified as a public use); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984) (protecting registration of pesticides as a trade secret, which are protected by the Takings Clause of the Fifth Amendment, therefore, requiring just compensation).

15. *See* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (expressing that eminent domain is a "despotic power," but is vital and essential to the government). *But see* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 286-87 (2000) (recommending that the power of eminent domain, though fundamental to the sovereign, has been expanded to no longer serve as a viable safeguard of private property).

16. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) (stating that a purely private taking "would serve no legitimate purpose of government and would thus be void").

17. 26 AM. JUR. 2D *Eminent Domain* § 43 (2005) (listing the traditional public uses as takings for public roads, parks, utilities, and schools).

18. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005) (upholding a development plan that was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city").

19. U.S. CONST. amend. XIV, § 1.

In response to *Kelo*, the Texas Legislature passed, and Governor Rick Perry signed into law, Senate Bill 7 (S.B. 7)[20] to limit the government's ability to seize land for a purely private benefit. Although S.B. 7, from the outset, seems to limit the power to take private property for economic development, it contains a community development exemption that is likely to have adverse consequences on private property rights in the future.[21] S.B. 7 is now codified and the law now provides that a government may wield the power of eminent domain, if "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."[22]

This Comment provides a critical analysis of the *Kelo* decision regarding the Public Use Clause of the Fifth Amendment. Specifically, this Comment focuses on the response in Texas to the *Kelo* decision and the adoption of S.B. 7. Additionally, the discussion illustrates the need to limit the government's power to take property under the guise of "public use," and carefully scrutinizes whether there is a legitimate benefit to the public for economic development takings. Because public use takings, as occurred in *Kelo*, have eroded the protection afforded to private property owners by the United States Constitution, there is a need to return to a more narrow reading of the Public Use Clause to prevent public takings for a private benefit.

Part II surveys the history of eminent domain and the theory of just compensation. It explores the nebulous interpretation of the Public Use Clause and its apparent demise after *Kelo*. Part II further examines the *Kelo* case and provides a critical analysis of the decision. Additionally, discussion is devoted to the backlash on the federal and state level in light of the recent decision. This discourse reviews the recent legislation and laws passed by other states attempting to limit economic development takings that are purportedly for the public's benefit.

Part III examines the current status of eminent domain law in Texas and discusses the legislative intent of S.B. 7. Further analysis is devoted to studying S.B. 7 and the possible implications of the community development exemption provision. The provision endorses the use of eminent domain in slum and blighted areas only if the economic development is a secondary purpose resulting from the taking.

In Part IV, discussion is devoted to the impact of S.B. 7 on several proposed projects in Texas, namely the Dallas Cowboys Stadium in Arlington, the potential Texas A&M campus in San Antonio, and lastly, the

20. Tex. S.B. 7, 79th Leg., 2d C.S. (2005).
21. TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon Supp. 2005).
22. *Id.*

Trans-Texas Corridor. This part outlines three scenarios to demonstrate the potential for abuse in takings for economic development under the new S.B. 7, including a sports stadium, college campus, and shopping mall. These scenarios will analyze the steps an entity must take in order to bypass S.B. 7's new limitations on eminent domain and will highlight the areas where further private property protections are needed in S.B. 7.

Finally, Part IV succinctly summarizes the issues and provides evidence of the importance of a finding of public use to justify a taking through eminent domain. This part provides several proposals to remedy the ambiguities of S.B. 7 and suggests solutions to curb the government's ability to flex its eminent domain muscles in the name of economic development. These proposals specifically address the areas where S.B. 7 failed to provide the utmost protection for property rights and attempt to sew up any loopholes where takings for a "private purpose" occur under the pretext of economic development. In concluding, this Comment proffers a judicial interpretation of the Public Use Clause which is in greater accord with its original intent in the Constitution.

II. BACKGROUND

A. *History of Eminent Domain*

Respect for private property is fundamental to the essential needs of society and is recognized as a principle of natural justice, with the roots of eminent domain founded in the natural law movement.[23] With regard to property, Blackstone urged: "So great moreover is the regard of the law for private property that it will not authorise [sic] the least violation of it; no, not even for the general good of the whole community."[24] John Locke described property as "an individual's life, liberty, and estate,"

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23. *See* THE FEDERALIST NO. 10, at 54-55 (James Madison) (E.H. Scott ed., 1898) (examining the fundamental right of protection of private property).

> The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: And from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

Id.; *see also* Steven E. Buckingham, Comment, *The* Kelo *Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1293-94 (2005) (proposing that without the structure of private property, too much liberty or an excess of power would pose a grave danger to society).

24. ERNST FREUND, THE POLICE POWER § 505, at 541 (1904) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *139).

which are inherent in the establishment of a culture.[25] Thus, the natural social order is premised upon the ability to possess private property.

Historically, the power of eminent domain and public use dates back to the ancient Romans.[26] The term eminent domain seems to have originated with Grotius, a seventeenth century legal scholar, who described eminent domain as a universal power as old as political society.[27] The privilege of eminent domain originated prior to the United States Constitution and needs no constitutional acknowledgement; it is only limited "as the people have limited it" in their respective state constitutions.[28] Medieval jurists recognized the power of the state to take property for just cause, and generally, public necessity sufficed as a just cause.[29] However, when private property yielded to the public interest, principles of natural justice imposed an obligation of compensation.[30] In England, the principle of just compensation originated early in time with regard to "the king's right of purveyance for the royal household which was in analogy to the taking for public use."[31]

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25. *See* Steven E. Buckingham, Comment, *The* Kelo *Threshold: Private Property and Public Use Reconsidered*, 39 U. RICH. L. REV. 1279, 1294 (2005) (describing Locke's belief that the right to property is the foundation of society).

26. *See* JOHN BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 945 (1895) (analyzing the lengthy history of eminent domain); *see also* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204 (1977) (discussing the legal development of eminent domain and its origination in ancient Rome).

27. *See* JOHN BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 945 (1895) (providing that Grotius recognized the right of the sovereign to take or destroy private property for the gain of the social unit, but believed the sovereign was obligated to compensate the injured party). Grotius described the law of nature in regard to eminent domain as follows:

> But to do this by the force of eminent domain, there is required in the first place, public utility; and next, that if possible, compensation be made to him who has lost what was his, at the common expense; and as this holds with regard to other matters, so does it with regard to rights which are acquired by promise or contract.

ERNST FREUND, THE POLICE POWER § 504, at 540 (1904).

28. EUGENE MCQUILLIN, 11 THE LAW OF MUNICIPAL CORPORATIONS § 32.02 (West Group, 3d ed. 2000) (1904); *accord* JOHN BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 945 (1895) (explaining the origin of eminent domain).

29. *See* ERNST FREUND, THE POLICE POWER § 504, at 540 (1904) (noting that principles of public law attributed to the medieval jurist's judgment on private property, specifically, that private property can be taken when it is necessary for the public welfare).

30. *Id.*

31. *Id.* § 505; *see also* Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 204 (1977) (examining the English precedent that first, the king could make use of private land, and second, that Parliament had the power of eminent domain). In England, every time the power of eminent domain was used it warranted "the sanction of an act of Parliament," which regularly provided just compensation. ERNST FREUND, THE POLICE POWER § 505, at 540-41 (1904).

Conversely, the origin of the Takings Clause in the United States is more elusive and has never been specifically defined.[32] At the Constitutional Convention of 1789, James Madison added the Takings Clause to the amendments he proposed, and as a result, the Eminent Domain Clause was written into the Fifth Amendment.[33] During the adoption of the Constitution, state ratifying conventions sought amendments to every provision in the Bill of Rights *except* the Takings Clause.[34] The state ratifying conventions most likely sought no amendments to the Takings Clause because the use of eminent domain was already a well-established principle from colonial times and was widely accepted as a procedure of natural law.[35]

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32. *See, e.g.*, Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1977) (acknowledging that in the years following the adoption of the Constitution, there were two kinds of activities where condemnation was most frequently used: road building and the building of milldams); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785 (1995) (expressing that there were few precedents for the Takings Clause in the United States, and that the precedents that did exist were narrow in application).

33. *See* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 290 (2000) (evidencing James Madison's intent to protect private property in proposing the Eminent Domain Clause); Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 412-13 (1983) ("Government is instituted no less for the protection of the property, than of the persons of individuals." (quoting THE FEDERALIST NO. 54, at 370 (James Madison) (J. Cooke ed., 1961)).

34. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 791 (1995) (noting that James Madison's comments on the Takings Clause provide great depth into the framers' original intent and, specifically, why Madison felt this particular clause was necessary). St. George Tucker was the first legal scholar to interpret the Takings Clause and offered that the clause was most likely adopted to aid the Army's practice of obtaining supplies during the Revolutionary War. *Id.* at 791-92 (citing 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA 305-06 (1803)).

35. *See, e.g.*, 2A JULIUS SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 7.01[3] (3d ed. 2005) (illustrating that eminent domain was used long before it was given the constitutional nod in the United States Constitution); JOHN BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW 945 (1895) (examining the historic origin of eminent domain in the United States). Due to the fact that eminent domain was a concept of natural law, it is not surprising that the original draft of the Constitution did not include protection for private property. *See* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 289-90 (2000) (expressing that the framers of the Constitution were cognizant of the new powers of the government and ipso facto excluded the government from the ability to act in a private capacity); Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 60-61 (1998) (contending that an express prohibition on private takings would

It is clear that the Supreme Court's original intent was to utilize the power of eminent domain in situations of dire public need and necessity.[36] In the early Supreme Court decision of *Vanhorne's Lessee v. Dorrance*,[37] the power of eminent domain was viewed in an extremely narrow light and "[it would not be] exercise[d] except in urgent cases, or cases of the first necessity."[38] Although the Court in *Vanhorne's Lessee* referred to eminent domain as "[t]he despotic power," it also recognized that "such power is necessary [and the] government could not subsist without it."[39] Since the eighteenth century, public use has meant exactly that—public use.[40] Today, however, the scope of public use has been stretched

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have been gratuitous because the framers did not acknowledge a non-public authority in the government).

36. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (expressing the longstanding principle that it is inappropriate for the government to take property from one private citizen to transfer to another); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (upholding the power of eminent domain only in situations of dire public necessity). *But see* Kelo v. City of New London, 125 S. Ct. 2655, 2659-60 (2005) (expanding the Fifth Amendment takings power to use eminent domain to put private property toward a more beneficial use).

37. 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

38. Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795). In *Vanhorne's Lessee*, two deeds, one from Native Americans, and the other from William Penn, were passed to subsequent purchasers. *Id.* at 306. A law passed by the Pennsylvania Legislature declared that land purchased from Native Americans would be considered void. *Id.* The plaintiff's deed ascended from the Native Americans. *Id.* The State of Pennsylvania attempted to divest the plaintiffs of their land and vest the same property in the hands of the defendants. *Id.* The Court ultimately held "[t]he legislature . . . had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without just compensation." *Id.* at 310.

39. *Id.*

40. *See, e.g.*, Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (claiming that for "the railroad corporation to surrender a part of its land to the petitioners . . . [for] building and maintaining their elevator . . . [was] a taking of private property of the railroad corporation for the private use of the petitioners"); Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 164 (1896) (announcing that "we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use"); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 26 (1885) (holding that a taking for riparian use "is clearly valid as a just and reasonable exercise of [eminent domain] having regard to the public good, in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water-power of running streams"); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (expressing that "a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers"); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (proclaiming that "[i]t is, however, difficult to form a case, in which the necessity of a state . . . [would] excuse the seizing of landed property belonging to one citizen, and giving it to another citizen").

beyond its constitutional limits to encompass "the goal of developing a better balanced, more attractive community."[41]

B. *The Public Use Requirement*

1. Public Use in General

The Public Use Clause comes from the Fifth Amendment, which provides: "nor shall private property be taken for public use, without just compensation."[42] Public use limits the scope of police powers.[43] If the police power is not exercised in furtherance of the recognized exceptions of public health, safety, morals, or general welfare, there can be no public use, and subsequently, no Fifth Amendment taking.[44] At present, takings must be "rationally related to a conceivable public purpose."[45] Nonetheless, "if the ostensible public use [is simply] a cloak for an ulterior private use," the taking will not pass constitutional muster.[46] Prior to *Kelo*, public use was generally limited to traditional uses such as public utilities, roads, and other objectives geared toward the greater public interest.[47]

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41. Berman v. Parker, 348 U.S. 26, 31 (1954) (quoting the owners of a department store whose land was unblighted, but was condemned because it was in the project area for an urban redevelopment plan); *accord* Kelo v. City of New London, 125 S. Ct. 2655, 2659-60 (2005) (upholding the public use doctrine for a taking to build a more attractive community).

42. U.S. CONST. amend. V.

43. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) (explaining the Public Use Clause in relation to the state's power).

44. *See id.* (discussing the state's police power to wield the power of eminent domain); 26 AM. JUR. 2D *Eminent Domain* § 43 (2005) (delineating the instances where constitutions of various states authorize the use of eminent domain for "ways of necessity, irrigation, drainage, sanitary purposes, or urban redevelopment").

45. *Midkiff*, 467 U.S. at 241; *see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 442 (1985) (emphasizing that legislation will be sustained if it is rationally related to a legitimate state interest). Once the sovereign determines there is a substantial basis for a taking, it is presumed that the taking will serve a public use. *Midkiff*, 467 U.S. at 244 (1984); *see also* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 288-89 (2000) (arguing for a strict scrutiny analysis of eminent domain takings). Jones argues that moving public use scrutiny from rational basis review to a strict scrutiny test could remedy the abuse of "private use" takings, because it would require the state to demonstrate a compelling need in taking land and transferring it to another private individual. *Id.* If the taking is rationally related to a public use, the courts will customarily defer to the legislative intent, which forms a presumption that the property will be put toward public use. *Id.* at 301.

46. 2A JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 7.01[9] (3d ed. 2005).

47. *See* 26 AM. JUR. 2D *Eminent Domain* § 43 (2005) (discussing the traditional uses of eminent domain, namely for public roads, parks, utilities, and schools); *see also* Clark v. Nash, 198 U.S. 361, 369-70 (1905) (upholding a taking as a public use to enable a land-

The definition of public use has been referred to as a "nebulous" term,[48] and pinning down a definition is often considered an impossible task. Two opposing schools of thought have emerged in their interpretation of the Public Use Clause.[49] The proponents of the first school insist public use "means that the property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the property."[50] The opposing school of thought involves a more expansive concept of public use, equating public use with public advantage.[51]

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owner to condemn a right of way over his neighbor's land for an irrigation ditch); Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (viewing public use in a narrow context by denying farmers the ability to use eminent domain to take a railroad company's land for the private purpose of storing their grain); Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 164 (1896) (supporting the theory that the "water used for irrigation purposes upon lands which are actually arid is used for a public purpose, and the tax to pay for it is collected for a public use"); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 26 (1885) (upholding "the validity of general mill acts as taking private property for public use"); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (explaining that public use takings should be used only in "cases of the first necessity").

48. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 480 (Mich. 1981) (Ryan, J., dissenting) (expressing that "[t]he concept of public benefit is indeed protean. It is also nebulous."); *see also* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 72 (1998) (quoting Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 480 (Mich. 1981) (Ryan, J., dissenting)) (referring to Justice Ryan's description of public use as "nebulous").

49. *See* 2A JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 7.02[2] (3d ed. 2005) (discussing that each school of thought "has its ardent supporters among legal scholars and courts"); *see also* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 291-92 (2000) (naming the two schools of thought the "narrow view" and the "broad view"); Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 413 (1983) (recognizing that a narrow reading necessitates a guarantee of public use, while the broader view only requires a tangible public benefit).

50. *See* 2A JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 7.02[2] (3d ed. 2005) (footnotes omitted) (describing the school of thought that adheres to a strict interpretation of the Public Use Clause); *see, e.g.*, County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004) (applying a narrow definition of public use, as it was understood in the language of the Michigan Constitution at the time it was ratified); Stephen J. Jones, Note Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 292 (2000) (explaining that a court would not uphold the taking unless the public had a possessory interest in the property after the taking).

51. *See* 2A JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 7.02[3] (3d ed. 2005) (describing the school of thought that views the Public Use Clause in a broad context); *see, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2659-60 (2005) (expanding the scope of public use beyond the generally held broad view); Haw. Hous. Auth. v.

Generally, three criteria are important in evaluating whether there is a valid public use:

> (1) That the taking affect a community as distinguished from a single individual; (2) That the use to which the taken property is applied is authorized by law; [and] (3) That the title taken not be invested in a person or corporation as private property . . . and controlled as private property unless the public receives some public benefit as a result of the private possession.[52]

2. Initial Public Use Jurisprudence

Historically, the Public Use Clause was subject to narrow construction.[53] Many courts worried that eminent domain was being exploited and began to require actual use by the public.[54] Though, as time progressed, there was a gradual liberalization of the term as courts approved the exercise of eminent domain for a multitude of uses by private parties, such as railroads, milldams, and for the irrigation of farmland, to

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Midkiff, 467 U.S. 229, 240-42 (1984) (stating that the scope of eminent domain is coterminous with a government's police powers and its taxing authority); Berman v. Parker, 348 U.S. 26, 32-33 (1954) (delineating the public need to eliminate urban blight and slums, which is achieved through economic development); Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 292 (2000) (illuminating that this broad construction led to the view today, which is that it is proper to transfer blighted property to another private party).

52. 2A JULIUS L. SACKMAN ET AL., NICHOLS ON EMINENT DOMAIN § 7.02[4] (3d ed. 2005).

53. *See, e.g.*, Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (holding that the exercise of eminent domain by a state for a private use violated the Due Process Clause and the Fourteenth Amendment); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (explaining that it is improper for a law to take property from *A* to give to *B*); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (referring to eminent domain as "[t]he despotic power, as it is aptly called by some writers, of taking private property"). *But see* Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 33 (1916) (embracing the broad constructionist view of the Public Use Clause, as opposed to the two decades prior *Missouri Pacific Railway* case in which the strict constructionist view governed).

54. *See* OSBOURNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 498-99 (2d ed. 2001) (explaining that courts began reverting to the narrow constructionist view of public use in light of takings that occurred simply under the guise of public use); *see also, e.g.*, Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (striking down the use of eminent domain "to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property"); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (expressing that taking property from *A* to give to *B* "is against all reason and justice"); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 311 (C.C.D. Pa. 1795) (describing that "[t]he presumption is, that [the government] will not call [eminent domain] into exercise except in urgent cases, or cases of the first necessity").

name a few.[55] The enhancement of the Public Use Clause manifested the courts' positive attitude towards industry in the *Lochner* era—when industry solicited the government as an ally, as opposed to resisting it as an adversary.[56] The Mill Acts of the late nineteenth century presented the issue of public use and construed its meaning in an exceptionally broad context, providing that a benefit to private individuals would not invalidate the taking.[57] Riparian owners were allowed to erect mills in exchange for a promise that when flooding due to the operation of the mill occurred, upstream landowners would be compensated.[58] *Fallbrook Irrigation Distribution v. Bradley*[59] broadened the scope of public use. The Court held an irrigation scheme was a public use "because all persons

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55. *See* OSBOURNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 498-99 (2d ed. 2001) (stating that "there has been a gradual liberalization of the term once again, leading to some suggestion that the public-use requirement poses little obstacle to most programs that any government would be likely to undertake"); *see also* Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30, 33 (1916) (construing public use liberally, in that "[c]ertain exceptions from the powers conferred . . . subject to the taking of the excess of water . . . are too plainly reasonable so far as they come in question here to need justification"); Clark v. Nash, 198 U.S. 361, 369-70 (1905) (enabling a landowner to condemn a right of way over his neighbor's land for an irrigation ditch); Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 163 (1896) (viewing the Public Use Clause in an expansive light in regard to public irrigation schemes that only benefited the surrounding owners); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 26 (1885) (upholding in a broad context the public use of eminent domain in the Mill Acts).

56. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (stating that a maximum hour law for bakery employees was an arbitrary interference with the freedom to contract and could not be sustained as a valid exercise of the police power); *see also* Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897) (finding that a state statute, which prohibited a citizen of the state from contracting an insurance policy outside the state, deprived such citizen of his liberty without due process of law). Interestingly, while fostering industrial growth, instrumentalities of commerce exceptions eventually arose in regard to the public use requirement. *See* Phillip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?*, 35 ENVTL. L. 311, 319 (2005) (representing that the scope of eminent domain powers increased in relation to the attitude of the government toward industry); Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 291 (2000) (contending that the industrial revolution manifested the gradual decline of property rights in the late-nineteenth century).

57. *See* Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 605 (1949) (discussing how the Mill Acts defined the Public Use Clause in a broad context and extended the clause to encompass a benefit for the private individual). The Mill Acts "authorized riparian owners to erect and maintain mills on the condition that upstream landowners would be compensated for any flooding caused by the mills." *Id.*

58. *See id.* (suggesting that the Mill Acts serve as a clear example of eminent domain for the benefit of private individuals).

59. 164 U.S. 112 (1896).

have the right to use the water under the same circumstances."[60] The Court explained that without the power of eminent domain, an attempt to acquire the land in question would be futile and the cost of purchasing the land would increase once landowners realized that the land would have to be purchased.[61] Hence, the Court in *Fallbrook Irrigation* upheld the irrigation scheme as a constitutional public use taking because anyone touching the land would benefit from the water.[62] As modern economic and societal factors were introduced, the Public Use Clause continued to broaden in scope.

3. The Modern Definition of Public Use

The leading modern case delineating the scope of the Public Use Clause is the unanimous decision of *Berman v. Parker*.[63] The decision was important because it solidified the public use limitation by reaffirming that once the legislature declared condemnation a public use, the declaration was given great deference—thereby significantly limiting the scope of judicial review.[64] In *Berman*, the constitutionality of the District of Columbia Redevelopment Act of 1945 was at issue.[65] Under the Act, Congress made a legislative determination that the policy was "to protect and promote the welfare of the inhabitants . . . by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose."[66] The Act created the District of Columbia Redevelopment Land Agency and granted it eminent domain power to acquire and

60. Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 163 (1896).

61. *Id.* at 161.

62. *Id.* at 164.

63. 348 U.S. 26 (1954); *see* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 415-16 (1983) (explaining the importance of *Berman*). *Berman* had a notable effect on urban renewal; namely, "it expanded the general substantive definition of public use by establishing that reconveyance to private parties for redevelopment is acceptable, and it contracted the scope of judicial review." *Id.*

64. Berman v. Parker, 348 U.S. 26, 33 (1954); *see also* Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (stating that the decisions of Congress are "entitled to deference until it is shown to involve an impossibility"); United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896) (providing, "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation"); Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 294 (2000) (suggesting that "the holding in *Berman* opened a Pandora's Box of state interference with individual property rights").

65. *Berman*, 348 U.S. at 28.

66. *Id.* The purpose of the Act was to eliminate all substandard housing in Washington D.C. because it was "injurious to the public health, safety, morals and welfare." *Id.*

assemble "real property for the redevelopment of blighted territory."[67] Once the real estate had been assembled, the Agency was authorized to transfer the land to public agencies to be used for public streets, public utilities, and public schools, with the remaining land to be leased or sold to a redevelopment company.[68]

In *Berman*, the petitioners urged two points.[69] First, their property was not slum housing, because it was commercial property.[70] Second, a taking of private property for private redevelopment violates the constitutional mandate that takings are to be for public purposes only.[71] Further, petitioners disagreed with the blight designation and argued that their building did not endanger health or safety or add to the slum or blighted area; thus, it should not be encompassed in the redevelopment plan.[72] The Court disagreed and held Congress has the police power to legislate as necessary for the public's health, safety, and welfare, and it is within that power "to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."[73] Subsequently, after *Berman*, the public use requirement is

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67. *Id.* at 29. The Act, however, did not define "slums" or "blighted areas." *Id.*

68. *Id.* at 30. Notably, none of the briefs on behalf of the parties mentioned that the redevelopment project would uproot thousands of underprivileged African Americans and reshape Washington D.C.'s racial geography. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 44 (2003). "*Berman* was argued just four months after the Supreme Court's monumental declaration on American race relations in *Brown v. Board of Education*." *Id.* The redevelopment project at issue in *Berman* allowed the district to redistribute its population and increase racial segregation, thus making scholastic integration more challenging. *Id.* Accordingly, "of the 5,900 units of housing that were constructed on the site, only 310 could be classified as affordable to the former residents of the area." *Id.* at 46-47.

69. *Id.* at 31.

70. *Berman*, 348 U.S. at 31.

71. *See id.* (setting out the petitioners' challenges to the constitutionality of the taking—that the property was not slum housing, because it was not even residential, and that government cannot take private property for private use). Petitioners claimed their property was being taken contrary to two constitutional mandates: "No person shall . . . be deprived of . . . property, without due process of law," and "nor shall private property be taken for public use, without just compensation." *Id.* Ultimately, the Court endorsed Congress's approach to "attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis." *Id.* at 34-35.

72. *Id.* at 34. Max Morris and Goldie Schneider were the two business owners affected by the District of Columbia Redevelopment Land Agency. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 1 (2003). "Schneider operated a successful hardware store that had been in the family for decades; Morris owned a department store." *Id.*

73. *Berman*, 348 U.S. at 32-33. The Court, without a second thought, approved Congress's intent to condemn decaying slums that "may despoil a community as an open sewer may ruin a river." *Id.* at 33.

now met whenever the power of eminent domain is exerted by federal or state government as a means of fulfilling any power within its authority.[74]

The Court followed the broad public use takings test established in *Berman* by upholding the Hawaii Land Reform Act of 1967 in *Hawaii Housing Authority v. Midkiff*.[75] The Hawaii Legislature created a procedure for acquiring title to residential property from the lessors for just compensation, and transferring title to the lessees in an effort to reduce the concentration of land ownership in the state.[76] The Land Reform Act was adopted in response to the concentrated land ownership by the chiefs of the Hawaiian Islands, which resulted in a distorted residential fee simple market, escalated land prices, and injured the public harmony of the state.[77] The Court upheld this use of eminent domain as rationally related to the public purpose of rectifying the "perceived social and economic evils of a land oligopoly."[78] The fact that the property was transferred to private individuals did not invalidate the taking; the Court reasoned that "the taking's purpose, and not its mechanics," must meet the scrutiny of the Public Use Clause.[79] The Court held the transfer of property was not solely for the private benefit of the lessees, but was rationally related to the problems caused by the land oligopoly, and therefore, was upheld as constitutional because it served a public purpose.[80]

4. *Kelo v. City of New London*

The Fort Trumbull area in the city of New London is located "on a peninsula that juts into the Thames River," is comprised of nearly 115

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74. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 465 (5th ed. 1995) (reiterating the rule of legislative deference derived from *Berman*). The Court recognized that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear." *Berman*, 348 U.S. at 33.

75. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231-32, 240 (1984) (upholding the taking of title from lessors, for just compensation and giving it to lessees, justified by the *Berman* "police powers" argument). Justice O'Connor delivered an opinion for a unanimous court, of which Justice Marshall did not participate. *Id.* at 231, 245. It is interesting to note that Justice O'Connor wrote a strong dissenting opinion in *Kelo*. Kelo v. City of New London, 125 S. Ct. 2655, 2671 (2005) (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

76. *Midkiff*, 467 US. at 232-33.

77. *Id.* at 232.

78. *Id.* at 241-43.

79. *Id.* at 243-44. "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void. But no purely private taking is involved in these cases." *Id.* at 245.

80. *Id.* at 243, 245 (holding that the proposed development plan was rationally related to a public purpose and was thus unconstitutional).

privately owned properties, and encompasses thirty-two acres of "land formerly occupied by the naval facility."[81] In 2000, New London initiated a development plan to create over 1000 new jobs, increase tax revenues, and "revitalize an economically distressed city, including its downtown and waterfront areas."[82] The city needed land for the development program, and the New London Development Corporation purchased property from willing sellers, but used eminent domain to acquire the remaining properties.[83]

Petitioner Susette Kelo had made significant improvements to her home, which she prized for its waterfront view.[84] Petitioner Wilhelmina Dery was born in 1918 in Fort Trumbull, and lived in the same home for her entire life; her husband, Charles, lived there since they married sixty years ago.[85] These were three of the nine petitioners who owned fifteen properties in the condemned area.[86] There was no claim that these properties were blighted or in poor condition; in fact, these properties were condemned solely "because they happen[ed] to be located in the development area."[87]

The petitioners brought their action in the New London Superior Court in December 2000, claiming that the takings violated "the 'public

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81. Kelo v. City of New London, 125 S. Ct. 2655, 2658-59 (2005).

82. *Id.* at 2658 (citing Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004)). After decades of economic decline, the city was designated as a "distressed municipality" by a state agency in 1990. *Id.* In 1998, a pharmaceutical manufacturer, Pfizer, Inc., announced it would build a research facility near the Fort Trumbull neighborhood, which sparked the New London Development Corporation to make the plans that were the issue in the case. *Id.* at 2671 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

83. *Id.* at 2658. The development plan included seven parcels. *Id.* at 2659. Parcel one was "designated for a waterfront conference hotel" surrounded by a "small urban village" with shops and restaurants. *Id.* Parcel two included the site of eighty potential new residences, linked by a public walkway to the rest of the development. *Id.* Parcel three contained 90,000 square feet for a research and development office park. *Id.* The fourth parcel was split between a site used "to support the adjacent state park" and a renovated marina, including "the final stretch of the riverwalk." *Id.* at 2658. Parcels five, six, and seven would supply "land for office and retail space, parking," and commercial uses dependent on water. *Id.*

84. *Id.* at 2660.

85. *Id.*; *see CBS Sunday Morning: This Land Is Your Land – Maybe* (CBS News television broadcast Mar. 6, 2005), http://www.cbsnews.com/stories/2005/03/07/sunday/printable678427.shtml (providing personal information on Matt and Sue Dery) (transcript on file with the *St. Mary's Law Journal*). "Since 1901, five generations of [Matt and Sue Dery's] family have lived in four homes on the block," just down the block from Mrs. Kelo. *Id.* "'The whole process,' says Matt Dery, 'has been emasculating to the degree that any man wants to be able to protect his family—keep 'em safe—keep a roof over their head.'" *Id.*

86. *See Kelo*, 125 S. Ct. at 2660 (listing the petitioners and their respective properties).

87. *Id.*

use' restriction of the Fifth Amendment."[88] Here, the court awarded a restraining order in favor of the property owners that prohibited the taking in parcel 4A for park and marina support,[89] but the court denied relief to the property owners located in parcel 3, which was to be used for office space.[90] Both sides appealed to the Supreme Court of Connecticut, and "that court held, over a dissent,[91] that all . . . [the] takings were valid."[92] The United States Supreme Court granted certiorari "to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[93]

The Supreme Court reasoned that "economic development is a traditional and long accepted function of government. . . . [and there is] no principled way of distinguishing economic development from the other public purposes [it has] recognized."[94] The Court admitted that "the gov-

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88. *Id.*

89. *Id.* In Justice O'Connor's dissent, she refers to parcel 4A as being "slated, mysteriously, for 'park support.'" *Id.* at 2672 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

90. *Id.* at 2660.

91. *Kelo*, 125 S. Ct. at 2660. The three dissenting justices in the Connecticut Supreme Court recommended "a 'heightened' standard of judicial review for takings" in furtherance of economic development. *Id.* at 2661 (citing Kelo v. City of New London, 843 A.2d 500, 587 (Conn. 2004) (Zarella, J., joined by Sullivan, C.J. & Katz, J., concurring in part and dissenting in part)); *see also* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 311 (2000) (arguing that strict scrutiny should be employed so that the condemning authority must demonstrate a compelling public necessity); Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 444 (1983) (proposing a "true rational basis" test in reviewing eminent domain takings). The dissenting justices would have held the taking was unconstitutional because the city failed to provide "clear and convincing evidence" of the economic benefits that would come to fruition from the development plan. *Kelo*, 125 S. Ct. at 2661 (citing Kelo v. City of New London, 843 A.2d 500, 587 (Conn. 2004) (Zarella, J., joined by Sullivan, C.J. & Katz, J., concurring in part and dissenting in part)).

92. Kelo v. City of New London, 125 S. Ct. 2655, 2660 (2005). The majority in the Connecticut Supreme Court relied on cases such as *Hawaii Housing Authority v. Midkiff* and *Berman v. Parker*. *Id.* (citing Kelo v. City of New London, 843 A.2d 500, 527 (Conn. 2004)). The majority analogized the situation in New London to these two cases, holding that the economic development qualified as a valid public use under the federal and state constitutions. *Id.* at 2660 (citing Kelo v. City of New London, 843 A.2d 500, 527 (Conn. 2004)).

93. *Id.* at 2661.

94. *Id.* at 2665. The petitioners urged the court to adopt a "bright-line rule that economic development does not qualify as a public use." *Id.* Further, the petitioners argued that "[the government] cannot take their property for the private use of other owners simply because the new owners may make more productive use of the property." *Id.* at 2672 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

ernment's pursuit of a public purpose will often benefit [only] individual private parties."[95] Ultimately, the Court held that New London's proposed condemnations were for a public use within the meaning of the Fifth Amendment.[96]

In her dissent,[97] Justice Sandra Day O'Connor defined the scope of prior eminent domain decisions into three categories: (1) "transfer [of] private property to public ownership";[98] (2) "transfer [of] private property to private parties," such as common carriers or a similar public infrastructure;[99] and (3) transfer of private property to remedy an identifiable public harm.[100] Justice O'Connor pointed out that "economic development" does not fit into any of these categories.[101] In Justice Clarence Thomas's dissent, he expressed that "[t]oday's decision is simply the latest

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95. *Id.* at 2666.

96. *Id.* at 2668. The majority's holding was made pursuant to a Connecticut statute, which established that economic redevelopment may generally be considered a public use and in the public interest. *Id.* at 2660.

97. *Kelo*, 125 S. Ct. at 2671 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting). The dissenting opinion viewed the majority's holding very dimly:

> It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicated to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.

Id. at 2675. Under the majority's interpretation, "the words 'for public use' do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power." *Id.*

98. *Id.* at 2673. *See generally* Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (exemplifying a taking that transfers private property to public ownership). In *Old Dominion Land Co.*, the United States used eminent domain to take private property for military purposes and to erect structures on the property. *Id.* at 63.

99. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting). *See generally* Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 422 (1992) (referring to a taking that transferred property from a private party to a common carrier). In *National Railroad Passenger Corp.*, the condemnation resulted in the transfer of ownership from a private party to Amtrak, a common carrier, who then transferred the track to another railroad. *Id.* The taking was upheld as rationally related to a public purpose. *Id.*

100. *Kelo*, 125 S. Ct. at 2673 (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting). *See generally* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241-42 (1984) (upholding land reform to transfer ownership to another private party to eliminate a land oligopoly); Berman v. Parker, 348 U.S. 26, 32-34 (1954) (permitting land condemnations to resell land to developers to restore the slums of the District of Columbia).

101. *See Kelo*, 125 S. Ct. at 2673 (explaining that takings for economic development are unconstitutional) (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning."[102]

Throughout the years, the Court's general statements about public use have remained constant.[103] It is a long-accepted principle that a sovereign cannot take the property of *A* for the singular purpose of transferring it to another private party *B*, even if *A* is paid just compensation.[104] Alternatively, it is clear that the sovereign may take property and transfer it to another private party if the purpose of the taking is future public use.[105] In *Berman*, the Court held that it will give great deference to government decisions regarding what constitutes public use.[106] *Berman* also held that the government has the ability to promote public health and welfare by eliminating areas of slum and urban blight, and may transfer the property to private agencies and developers.[107] In essence, *Kelo*

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102. *Id.* at 2678 (Thomas, J., dissenting). Justice Thomas felt that extending the concept of public purpose to encircle any economically beneficial goal will fall disproportionately on the poor. *Id.* at 2686-87; *cf.* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003) (expressing that "urban renewal came to be known as 'Negro removal'"). Pritchett suggests that urban renewal has amplified racial segregation and hampered the mobility of African-Americans. *Id.* at 4.

103. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2661 (2005) (quoting the overarching principle from Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), that has applied to every eminent domain taking since 1798). However, several commentators have critiqued the present interpretation of the Public Use Clause. *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 110-11 (1998) (contending that "political filters" should be created to increase the cost for private parties to acquire property through eminent domain); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 1-2 (2003) (providing a brief discussion of urban renewal programs' impact on eminent domain); Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 306 (2000) (arguing that courts should use strict scrutiny analysis in relation to eminent domain); Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 444 (1983) (proposing a "true rational basis" test for the judiciary in reviewing eminent domain takings).

104. *See Kelo*, 125 S. Ct. at 2661 (explaining the proposition set forth in *Calder v. Bull*); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasizing that any law giving property from one private individual to another is unfair).

105. *Kelo*, 125 S. Ct. at 2661.

106. *See* Berman v. Parker, 348 U.S. 26, 33 (1954) (urging that once the legislature defines a use as public, there is a strong presumption in favor of deference to the legislature); *see also* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 293 (2000) (contending that the deference given to the legislature's definition of public use significantly restricts the scope of judicial review).

107. *Berman*, 348 U.S. at 28-29.

has gone beyond the constitutional boundaries and set a precedent that allows the government to take property and transfer it to a private developer for a more economically beneficial purpose, regardless of whether the area is blighted.

C. *The Federal and State Level Responses to* Kelo

Since the June 23, 2005, *Kelo* ruling, much legislation has been introduced—on the national as well as the state level—to hinder potential abuse.[108] Conversely, as states have moved to limit the effects of *Kelo*, others have moved just as quickly to take advantage of the ruling.[109] City officials in Freeport, Texas, only hours after the *Kelo* decision, began taking steps to seize two waterfront seafood businesses in an attempt to make way for a proposed $8 million private boat marina.[110]

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108. *See* Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong. § 3(b) (2005), *available at* http://www.govtrack.us/congress/bill.xpd?bill=S109-1313 (last visited Mar. 24, 2006) (prohibiting government from using eminent domain to take private property); Ala. S.B. 68, 2005 Leg., 1st Spec. Sess., 2005 Ala. Laws 643 (codified as amended at ALA. CODE §§ 11-47-170, -80-1 (2005)) (limiting the use of eminent domain); Mich. H.R.J. Res. 16, 93d Leg., R.S. (2005) (narrowing the use of eminent domain when it would benefit private entities); CALIFORNIA STATE REPUBLICAN CAUCUS: BRIEFING REPORT ON PROPERTY RIGHTS, http://republican.sen.ca.gov.opeds/99/poed2887.asp (last visited Feb. 21, 2006) (discussing California's constitutional proposals in response to *Kelo*) (on file with the *St. Mary's Law Journal*).

109. *See* W. Seafood Co. v. City of Freeport, 346 F. Supp. 2d 892, 893 (S.D. Tex. 2004) (describing the immediate effects of *Kelo*, where city officials in this case acted hours after the *Kelo* decision to begin condemnation proceedings).

110. *See* Press Release, Cornyn, Susette Kelo Discuss Property Rights (Sept. 20, 2005), http://www.cornyn.senate.gov/index.asp?f=record&lid=1&oid=4&rid=237016&gid=4&pg=1&lid=1 (providing Sen. John Cornyn's testimony at the Senate Judiciary Committee hearing) (on file with the *St. Mary's Law Journal*). Senator Cornyn provided the Freeport, Texas, example of one local government's quick response after the *Kelo* ruling. *Id.*; *see* W. Seafood Co. v. City of Freeport, 346 F. Supp. 2d 892, 893 (S.D. Tex. 2004) (proceeding against Freeport Economic Development Corporation to stop the taking of plaintiff's property to make way for a private marina). The Freeport Economic Development Corporation attempted to take property owned by plaintiff Western Seafood Company to develop a major marina. *Id.* at 893. The plaintiff's disputed parcel of land "contain[ed] a number of unloading docks and a state-of-the-art shrimp processing and freezing plant." *Id.* at 894. Under the Texas Development Corporation Act, the term "project" includes: "land, buildings, equipment, facilities, and improvements found by the board of directors to . . . be required or suitable for use for professional and amateur (including children's) sports, athletic, entertainment, tourist, convention, and public park purposes and events." *Id.* at 898 (quoting TEX. REV. CIV. STAT. ANN. art. 5190.6, § 4B(2)(A) (Vernon Supp. 2005)). The court found "project" encompassed the defendant's proposed marina development. *Id.* As such, it upheld the taking because when read in the context of Texas courts' deference to legislative findings of public interest, the provisions of the Texas Development Corporation Act resolved the Texas constitutional issue. *Id.*; *see also* Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 704 (1959) (upholding an urban renewal project

At the federal level, Senator John Cornyn, a member of the Senate Judiciary Committee, introduced The Protection of Homes, Small Businesses, and Private Property Act of 2005.[111] The ultimate intent of the Act is to limit the power of eminent domain and to restore private property rights to owners because each is a "fundamental principle and core commitment of our nation's Founders."[112] Public use is redefined in the Act so as not to include economic development.[113] The Act urges that it is proper for Congress to take action to reestablish the fundamental protections of the Fifth Amendment consistent with its limited powers under the Constitution.[114] Additionally, the Act recommends that it would be proper for the states to take affirmative action to limit the power of eminent domain in their state.[115] The Senate Judiciary Committee held a hearing on Cornyn's legislation, entitled "The *Kelo* Decision: Investigating Takings of Homes and Other Private Property."[116] Notably, Susette Kelo testified at the hearing on the Protection of Homes, Small Businesses, and Private Property Act.[117]

Kelo also prompted several states to pass legislation and state constitutional amendments in an effort to protect their citizens' private prop-

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providing for redevelopment of blighted areas on the basis of legislative determination); Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 83 (1940) (indicating Texas courts' deference to legislative determinations of the public interest); Atwood v. Willacy County Navigation Dist., 271 S.W.2d 137, 142 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) (upholding a scheme whereby property was acquired for industrial development by a navigation district as a use for the public).

111. Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong.§ 1 (2005), *available at* http://www.govtrack.us/congress/bill.xpd?bill=S109-1313 (last visited Mar. 24, 2006).

112. *See* Press Release, Cornyn, Susette Kelo Discuss Property Rights (Sept. 20, 2005), http://www.cornyn.senate.gov/index.asp?f=record&lid=1&oid=4&rid=237016&gid=4&pg=1&lid=1 (quoting Senator John Cornyn's reasoning for introducing The Protection of Homes, Small Businesses, and Private Property Act of 2005) (on file with the *St. Mary's Law Journal*).

113. Protection of Homes, Small Businesses, and Private Property Act of 2005, S. 1313, 109th Cong.§ 3(b) (2005), *available at* http://www.govtrack.us/congress/bill.xpd?bill=S109-1313 (last visited Mar. 24, 2006). The Act repeatedly cites to Justice O'Connor's dissenting opinion in *Kelo*. *Id.* § 2(8), (9), (10).

114. *Id.* § 2(12), (13).

115. *Id.* § 2(13).

116. *See* Press Release, Cornyn, Susette Kelo Discuss Property Rights (Sept. 20, 2005), http://www.cornyn.senate.gov/index.asp?f=record&lid=1&oid=4&rid=237016&gid=4&pg=1&lid=1 (Sept. 20, 2005) (identifying Senator Cornyn's testimony at the Senate Judiciary Committee hearing concerning his legislation to safeguard property rights) (on file with the *St. Mary's Law Journal*).

117. *See id.* (noting Ms. Kelo's testimony at the Senate Judiciary Committee hearing that discussed Senator Cornyn's legislation).

erty.[118] Alabama was the first state to enact such protections.[119] Alabama's governor signed the bill, which the Alabama Legislature passed unanimously, into law on August 3, 2005.[120] The bill prohibits governments from using eminent domain to take private property "for the purposes of private retail, office, commercial, industrial, or residential development."[121] However, the bill includes an exception that permits

118. *See e.g.*, Ala. S.B. 68, 2005 Leg., 1st Spec. Sess., 2005 Ala. Laws 643 (codified as amended at ALA. CODE §§ 11-47-170, -80-1 (2005)) (amending the Alabama Code to provide that the government "may not condemn property for the purposes of private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue; or for transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity"); Del. S.B. 217, 143d Leg., R.S., 2005 Del. Laws Ch. 88 (codified as amended at DEL CODE ANN. tit. 29, § 9505 (2005)) (amending the Delaware Code to limit eminent domain power "only for the purposes of a recognized public use as described at least [six] months in advance of the institution of condemnation proceedings"); Mich. H.R.J. Res. 16, 93d Leg., R.S. (2005) (proposing an amendment to the Michigan Constitution to ensure the public use does not include transferring private property "to a private entity or entities for the primary benefit of the private entity or entities"); Ohio S.B. 167, 126th Leg., R.S., 2005 Ohio Laws File 44 (establishing a moratorium on the use of eminent domain in Ohio "to take . . . private property that is in an unblighted area when the primary purpose for the taking is economic development that will ultimately result in ownership of the property being vested in another private person" and establishing a task force to study the issue); S.D. H.B. 1080, 81st Leg., R.S., 2006 S.D. Laws Ch. 66 (requiring in South Dakota that "[n]o county, municipality, or housing and redevelopment commission . . . may acquire private property by use of eminent domain: (1) For transfer to any private person, nongovernmental entity, or other public-private business entity; or (2) Primarily for enhancement of tax revenue"); Tex. S.B. 7, 79th Leg., 2d C.S. (2005) (amending the Texas Government Code to state that eminent domain may not be used "if the taking: (1) confers a private benefit on a particular private party through the use of the property; (2) is for a public use that is merely a pretext to confer a private benefit on a particular private party"); *see also* Castle Coalition, Citizens Fighting Eminent Domain Abuse, Passed Legislation, http://www.castlecoalition.org/legislation/passed/index.html (referencing the legislation passed by various states regarding eminent domain reform) (last visited Mar. 24, 2006) (on file with the *St. Mary's Law Journal*).

119. *See* Donald Lambro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A1, *available at* http://www.washingtontimes.com/national/20050804-120711-4571r.htm (reporting on Alabama's new legislation that further protects property owners from a local government's use of eminent domain).

120. *See id.* (noting that "Alabama yesterday became the first state to enact new protections against local-government seizure of property").

121. Ala. S.B. 68, 2005 Leg., 1st Spec. Sess., 2005 Ala. Laws 643 (codified as amended at ALA. CODE §§ 11-47-170, -80-1 (2005)); *see also* Donald Lambro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A1, *available at* http://www.washingtontimes.com/national/20050804-120711-4571r.htm (addressing the effects of the newly passed Alabama legislation on the government's eminent domain power).

takings of blighted areas that the government can transfer to private interests.[122]

In California, using eminent domain for economic development is limited to economic redevelopment of blighted areas, which suffices as a public use.[123] Currently, however, California is proposing a constitutional amendment that would bar "the use of eminent domain for private use under any circumstances."[124] If the use is strictly public, the amendment requires the government to: (1) convince a judge there is no reasonable alternative, (2) assert the public purpose for which the property will be used, and (3) own and occupy the property for that specific public use.[125] If the land is not used for the stated public use, the government's ownership ceases and the property is given back to the rightful owner.[126]

In Michigan, a proposed constitutional amendment restricts the power of the state to use "eminent domain for the primary benefit of private entities."[127] This amendment provides that "[a] taking of private property is not considered to be for public use if the property is transferred to a private entity or entities for the primary benefit of the private entity or

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122. *See* Ala. S.B. 68, 2005 Leg., 1st Spec. Sess., 2005 Ala. Laws 643 (codified as amended at ALA. CODE §§ 11-47-170, -80-1 (2005)) (allowing an exception to the governments restricted eminent domain power); Donald Lambro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A1, *available at* http://www.washingtontimes.com/national/20050804-120711-4571r.htm (reporting on the passage of Alabama's legislation restricting local governments' eminent domain power).

123. *See* CAL. HEALTH & SAFETY CODE § 33030 (West 1999) (describing what constitutes a blighted area). A blighted area is:

> An area that is predominantly urbanized . . . and [in which conditions are] so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment.

Id. § 33030(b)(1).

124. CALIFORNIA STATE REPUBLICAN CAUCUS: BRIEFING REPORT ON PROPERTY RIGHTS, http://republican.sen.ca.gov.opeds/99/poed2887.asp (last visited Feb. 21, 2006) (on file with the *St. Mary's Law Journal*). The proposed amendment precludes public entities from taking property through eminent domain for any private use. *Id.*

125. *Id.*

126. *Id.*

127. Mich. H.R.J. Res. 16, 93d Leg., R.S. (2005). The case, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), overruled *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), and held the Michigan Constitution prevents the state from using economic development to justify condemnation of non-blighted private property. *See generally* 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 L. REV. M.S.U.-D.C.L. 639, 654 (2000) (proffering a solution to redefine public use, specifically in regard to the *Poletown* decision, which was later overruled).

entities."[128] These states' constitutional amendments and legislation evince the indignation in response to the *Kelo* ruling. Similarly, after the *Kelo* decision, Texas legislators began drafting legislation to further protect the private property rights of Texans.

III. THE RESPONSE TO *KELO* IN TEXAS

A. *Eminent Domain in Texas*

1. Construction of the Eminent Domain Clause in Texas

Article I, section 17 of the Texas Constitution mandates that:

> 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 secured by a deposit of money . . . .[129]

The Texas Constitution does not confer the takings power to the state; instead, it provides a restraint on the power by allowing the exercise of eminent domain only when the state takes the property for public use and pays adequate compensation.[130] Additionally, the public use limitation "is also found in the Legislature's delegation to municipalities of the power of eminent domain."[131] Section 251.001(a) of the Texas Local Government Code provides that "the municipality may exercise the right

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128. Mich. H.R.J. Res. 16, 93d Leg., R.S. (2005).

129. TEX. CONST. art. I, § 17. There are three distinct claims that arise under article 1, section 17: "taking," "damaging," and "destruction." City of Dallas v. Jennings, 142 S.W.3d 310, 313 n.2 (Tex. 2004). "[T]he term 'taking' has become used as a shorthand to refer to all three types of claims." *Id.* Furthermore, eminent domain is an inherent characteristic of sovereignty in the state. Tex. Highway Dep't v. Weber, 147 Tex. 628, 219 S.W.2d 70, 72 (1949); *see also* Fort Worth & Denver City Ry. Co. v. Ammons, 215 S.W.2d 407, 409 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.) (stating that eminent domain is the right of a state to both condemn private property for use by the public and delegate possession upon payment of due compensation).

130. *See* McInnis v. Brown County Water Imprvmt. Dist. No. 1, 41 S.W.2d 741, 744 (Tex. Civ. App.—Austin 1931, writ ref'd) (explaining that eminent domain is an inherent right of the sovereign, and that constitutional provisions touching legislative provisions are commonly seen as limitations upon the legislative power); *see also* Daniel B. Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499, 1500-01 (1965) (reiterating that the Texas constitutional provision is not a grant of power, but a limitation).

131. *See* City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960, 963 (5th Cir. 1994) (stating that the city of Arlington's condemnation for use as a parking lot was public use as required under Texas law); *see also* TEX. LOC. GOV'T CODE ANN. § 251.001(a) (Vernon 1999) (reiterating the need for the condemnor to prove the necessity of the taking).

of eminent domain for a public purpose to acquire public or private property."[132]

In order to prevail on a condemnation claim, the condemnor must prove three essential elements.[133] First, there are formal prerequisites required to move forward in the trial court.[134] "The prerequisites include proof that a petition was filed . . . an offer to purchase was made . . . and objections were filed [by the party opposing the taking]."[135] Second, the condemnor must prove "the condemnation was for a 'public use,'" in accordance with article I, section 17 of the Texas Constitution and section 251.001(a) of the Texas Local Government Code.[136] Concerning the public use requirement, the condemnor must intend the property for a public use under Texas law, and the condemnation must be necessary to advance the apparent public use.[137] Third, the condemnor must prove by affirmative pleading that the condemnation is necessary.[138] "Once the presumption of necessity arises," the opponent of the taking can rebut the

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132. TEX. LOC. GOV'T CODE ANN. § 251.001(a) (Vernon 1999).

133. *See* TEX. PROP. CODE ANN. §§ 21.011-.016 (Vernon 2004 & Supp. 2005) (delineating the claims a litigant must bring in a condemnation suit); Whittington v. City of Austin, 174 S.W.3d 889, 896 (Tex. App.—Austin 2005, pet. denied) (describing the essentials a condemnor must prove in an eminent domain action).

134. *Whittington*, 174 S.W.3d at 896; *see also* Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172, 183-84 (Tex. 2004) (explaining that although these requirements have been characterized as jurisdictional, the court held at least some of the requirements are not).

135. *Whittington*, 174 S.W.3d at 896; *see also* TEX. PROP. CODE ANN. § 21.012 (Vernon 2004 & Supp. 2005) (enumerating what a condemnor must do in order to file a valid petition for condemnation).

136. *Whittington*, 174 S.W.3d at 896; *see also* McInnis v. Brown Co. Water Imprvmt. Dist. No. 1, 41 S.W.2d 741, 744 (Tex. Civ. App.—Austin 1931, writ ref'd) (expressing that the Texas Constitution is not a grant of powers, but a limitation, and that the state can take property only for public use and must pay adequate compensation). The state has delegated to municipalities "the right of eminent domain for a public purpose to acquire public or private property" for the listed purposes or any other municipal purpose the governing body considers advisable. TEX. LOC. GOV'T CODE ANN. § 251.001(a) (Vernon 1999).

137. *Whittington*, 174 S.W.3d at 898; *see also* Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 88 (1940) (reiterating the need to prove the necessity of a taking); Bevly v. Tenngasco Gas Gathering Co., 638 S.W.2d 118, 120 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (stating the condemnor bears the initial burden of proving the necessity of the condemnation). *See generally* City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960, 964-65 (5th Cir. 1994) (clarifying that the condemnor must intend to use the property for a public use).

138. *See Whittington*, 174 S.W.3d at 898 (expressing that the condemnor must first prove necessity, and second, that the use is public). This pleading includes "a determination by the condemnor of the necessity for acquiring certain property." *Higginbotham*, 143 S.W.2d at 88; *see also McInnis*, 41 S.W.2d at 745 (explaining that the amount of property reasonably necessary for public use is committed to the sound discretion of the condemnor).

presumption "only by establishing affirmative defense such as . . . fraud, bad faith, or arbitrariness."[139]

Whether a taking constitutes "a [p]ublic use presents a judicial question," and Texas courts have generally given great deference to "a legislative declaration of public use."[140] Because a Texas municipality's use of eminent domain is a legislative act,[141] if a municipality has legislatively classified a particular use of eminent domain as "public," this classification is given great deference and judicial interpretation is significantly limited.[142] Although the legislature is given the power to define public use, whether a taking constitutes a public use is ultimately a question for the judiciary because the legislature cannot determine its own authority.[143] As the Texas Supreme Court declared, "a mere declaration by the [l]egislature cannot change a private use or private purpose into a public use or public purpose."[144] The central issue is not "whether the use is public, but rather whether the legislature could have reasonably considered it to be public."[145]

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139. *Whittington*, 174 S.W.3d at 898; *see also* Coastal Indus. Water Auth. v. Celanese Corp. of Am., 592 S.W.2d 597, 600 (Tex. 1979) (stating that "[i]n the absence of allegations that the condemnor acted arbitrarily or unjustly, the legislature's declaration that a specific exercise of eminent domain is for public use is conclusive"); Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565-66 (Tex. App.—San Antonio 1998, pet. denied) (explaining that "once a company establishe[d] . . . that its board of directors determined that the taking was necessary, a court should approve the taking unless the landowner demonstrates fraud, bad faith, abuse of discretion, or arbitrary and capricious action"); *Bevly*, 638 S.W.2d at 121 (asserting that "a determination by the condemnor of the necessity for acquiring certain property is conclusive in the absence of fraud, bad faith or abuse").

140. *Golddust Twins Realty Corp.*, 41 F.3d at 963; Maher v. Lasater, 163 Tex. 356, 354 S.W.2d 923, 925 (1962); Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 704 (1959); *Higginbotham*, 143 S.W.2d at 84.

141. *Golddust Twins Realty Corp.*, 41 F.3d at 964.

142. *See* Berman v. Parker, 348 U.S. 26, 33 (1954) (opining that great deference will be given to legislative intent); Old Dominion Land Co. v. United States, 269 U.S. 55, 66 (1925) (explaining that deference will be given to the legislatively declared public use until such use is proven impossible); United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896) (highlighting that if the legislature declares a use to be public, that choice will be respected unless the specific use is shown to be unfeasible).

143. *Maher*, 354 S.W.2d at 925; *see also* Daniel B. Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499, 1502 (1965) (representing that the legislature is imputed with power by the Texas Constitution and therefore has the power to define public use; however, because the term public use is found in the constitution, its determination is an issue for the judiciary).

144. *Maher*, 354 S.W.2d at 925.

145. Daniel B. Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499, 1502 (1965).

2. The Development of Public Use in Texas

Texas initially employed a conservative analysis of public use, but to harmonize the use of eminent domain with the changing social and economic climate, the courts began to adopt the public use concept "more in the breach than in the application."[146] The Texas Supreme Court affirmed the conservative public use analysis in *Borden v. Trespalacios Rice & Irrigation Co.*[147] In that case, a landowner challenged an irrigation company's use of eminent domain for a right of way for a canal to supply water to the neighboring lands.[148] The landowner argued that the legislature did not have the ability to authorize private companies to take private property with no benefit to the general public.[149] The court upheld the irrigation company's power of eminent domain because the public use applied to those who owned or held a possessory right to land adjacent or contiguous to the canal.[150] Thus, public use was broadly construed as only a general public use.[151]

Furthermore, in 1911, the Galveston Court of Civil Appeals adopted an exceedingly broad public use definition. In *Chapman v. Trinity Valley & Northern Railway Co.*,[152] the court ruled that a railway company has the power to condemn a right of way because its power to condemn for public use was measured by the public's "right to use it, and not by the

146. *Id.* at 1504. There is no concrete rule to determine whether a use is a public use, and each case is determined on its facts and the surrounding circumstances. *Maher*, 354 S.W.2d at 925; Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 704 (1959). Some Texas courts have adopted a liberal view concerning public use. *See* Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 84 (1940) (holding that a general benefit to the public at large is sufficient). However, other Texas courts have rejected the liberal definition of public use. *See* Borden v. Trespalacios Rice & Irrig. Co., 98 Tex. 494, 86 S.W. 11, 14 (1905), *aff'd*, 204 U.S. 667 (1907) (striking down the liberal interpretation because anything that promotes prosperity would be aided by eminent domain).

147. 98 Tex. 494, 86 S.W. 11 (1905), *aff'd*, 204 U.S. 667 (1907).

148. Borden v. Trespalacios Rice & Irrig. Co., 98 Tex. 494, 86 S.W. 11, 12 (1905), *aff'd*, 204 U.S. 667 (1907).

149. *Id.* at 14.

150. *Id.* at 15. The court declined to adopt the liberal definition of the phrase public use, which had been adopted by other authorities. *Id.* at 14. In *Borden*, the public use arose out of the general benefit to the state through irrigation of arid lands. *Id.* The court was concerned with this liberal definition because it meant that almost any kind of business that "promotes the prosperity and comfort of the country might be aided by the power of eminent domain." *Id.*

151. *See id.* at 15 (recognizing that "[t]he right to condemn private property is only given to [entities] formed to carry on . . . business . . . for public benefit," and therefore uses by these legislatively recognized entities is inherently a public use, unless proof is introduced to the contrary).

152. 138 S.W. 440 (Tex. Civ. App.—Galveston 1911, writ dism'd w.o.j.).

extent to which that right [was] exercised."[153] The taking was upheld in *Chapman* because the privilege of eminent domain is bestowed on common carriers, and the court judged the railway company as such—even though ninety percent of the cargo hauled was owned by the railway and ninety percent of its passengers were mill employees.[154] Although only ten percent of the passengers and cargo were "public," the court concluded the carrier existed for the public use.[155]

Texas courts recognized early on the impracticability of necessitating that general public access be a component of the definition of public use and therefore upheld most takings as a public use, irrespective of their public benefit.[156] As the economic and social background continued to progress, the public use interpretation in Texas expanded to include the taking of private property in the name of economic redevelopment.[157]

3. Takings for Economic Redevelopment in Texas

The most significant relaxation of the public use limitation came with the arrival of urban renewal efforts, which subsequently led to the orderly deterioration of private property rights.[158] As urban redevelopment projects began to increase, private property rights were reshaped because redevelopment required the condemnation of property and subsequent transfer to private developers.[159] Contrary to the traditional notions of

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153. Chapman v. Trinity Valley & N. Ry. Co., 138 S.W. 440, 442 (Tex. Civ. App.—Galveston 1911, writ dism'd w.o.j.).

154. *Id.* at 441.

155. *Id.* at 442.

156. *See, e.g.*, McInnis v. Brown County Water Imprvmt. Dist. No. 1, 41 S.W.2d 741, 745 (Tex. Civ. App.—Austin 1931, writ ref'd) (upholding a condemnation proceeding by a water district as a public use); West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref'd) (stating that the question of whether the use is public depends on the character of the right that the public has to use the property, to the extent that the public may not exercise that right). *See generally* 17 WILLIAM V. DORSANEO III ET AL., TEXAS LITIGATION GUIDE § 261.01[3][b]-[d] (2005) (delineating condemnation case law, specifically, in regard to public use).

157. *See* Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 703 (1959) (classifying economic development by way of slum clearance as a public use); Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 84-85 (1940) (approving the exercise of eminent domain in the case of slum elimination).

158. *See* Berman v. Parker, 348 U.S. 26, 32-33 (1954) (introducing the arguments in the leading case wherein the Supreme Court addressed the issue of urban redevelopment); *see also* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 415 (1983) (expressing that when the states were faced with deciding the constitutionality of urban redevelopment, contrary to the traditional view, states upheld a taking from *A* to give to *B*, for the benefit of *B*).

159. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3 (2003) (highlighting the

public use, land was now being taken from *A* and given to *B* in the name of urban redevelopment.[160] Courts began consistently upholding that, no matter what the ultimate use of the property might be, the elimination of slums and blight served a public purpose.[161] Nevertheless, the ends of urban redevelopment have run the gamut and now occupy a spot on the opposite end of the spectrum, as evidenced in *Kelo*. Urban redevelopment now includes industrial parks, sports stadiums, and other endeavors that, at best, tenuously further a "public purpose."[162]

The Texas government, in the late 1930s, began to initiate public housing and slum clearance programs.[163] These projects directly contravened the "use by the public" concept because the redevelopment projects were not available to the public generally, but were directed to clearing slums and creating clean living areas for low income persons.[164] As a result, the

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role of urban redevelopment). In regard to urban redevelopment, growth coalitions comprised of business and political leaders arose to promote urban renewal. *Id.* at 4.

160. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2661 n.5 (2005) (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)) (recognizing the long-standing principle that taking private property from one private party and transferring it to another private property is unconstitutional).

161. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3 (2003) (describing blight as being "elevat[ed] into a disease that would destroy the city").

162. *See, e.g.*, *Kelo*, 125 S. Ct. at 2659-60 (utilizing eminent domain to take land needed to build an industrial park); City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960, 962 (5th Cir. 1994) (using eminent domain to acquire land to build a parking lot for the Texas Rangers' baseball stadium, now known as Ameriquest Field in Arlington).

163. *See* Daniel B. Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499, 1507 (1965) (delineating the history behind public housing and urban renewal); *cf.* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-89 (1926) (comparing urban redevelopment to the urban planning and zoning schemes established in the mid-twentieth century). In *Euclid*, the appellee, Ambler Realty, owned a sixty-eight acre tract of land. *Id.* The Village of Euclid later enacted a comprehensive zoning ordinance, which excluded industry from much of Ambler Realty's land, and as a result, the land's value was diminished by seventy-five percent. *Id.* at 384. The Court upheld this zoning ordinance on the grounds that it passed rational basis review and was a valid exercise of state authority. *Id.* at 397.

164. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (expressing the schism between public benefit and a use clearly not intended to be made available to the general public); *see also* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 409 (1983) (indicating that governments may take private property for private use under the guise of public benefit). Cities in search of economic reprieve have used their power of eminent domain in exchange for private developers' promise of tax revenues, jobs, or other benefits. *Id.* The governmental entity must eventually transfer ownership to the private developer, leading to the possibility the government will utilize the taking solely to favor private interests. Christopher L. Harris & Daniel J. Lowenberg, Recent Development, Kelo v. City of New London, Tulare Lake Basin Water Storage District v. United States, *and* Washoe County v. United States:

Texas government harmonized the doctrine of eminent domain with the theory of progress.[165] In *Housing Authority of Dallas v. Higginbotham*,[166] the Texas Supreme Court rationalized that the legislative intent behind public use should be given due weight, and that designation of only limited income classes as recipients was a rational public use.[167] In *Davis v. City of Lubbock*,[168] the Texas Supreme Court once again faced the reconciliation of the narrow public use doctrine and the Texas Urban Renewal Law of 1957.[169] Once again, the court upheld its traditional position, adhering to the doctrine that public use represents nothing more than public benefit or general public welfare.[170] From these precedents, it is equally clear that the sale to a private developer pursuant to the purpose of slum clearance does not invalidate the taking.[171] It is now

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A Fifth Amendment Takings Primer, 36 ST. MARY'S L.J. 669, 681 (2005) (citing Kelo v. City of New London, 843 A.2d 500, 578-79 (Conn. 2004) (Zarella, J., dissenting)).

165. *See* Daniel B. Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499, 1507 (1965) (summarizing how the Texas Supreme Court has rationalized public housing under the public use requirement of the Texas Constitution).

166. 135 Tex. 158, 143 S.W.2d 79 (1940).

167. Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 84-85 (1940). The court held that no broad rule had been settled in forming a definition for public use, but rather each previous case had been determined on its own facts and the surrounding situation. *Id.* at 84. Further, the court expressed that it was immaterial that the use of the public housing at issue was limited to the citizens of a local neighborhood, "so long as it is open to all who choose to avail themselves of it." *Id.* (quoting West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref'd)).

168. 160 Tex. 38, 326 S.W.2d 699 (1959).

169. Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 703 (1959). The Texas Urban Renewal Act specifically prohibited using acquired property for public housing, requiring instead that cities sell or lease the property to private developers. *Id.* at 702-11. One petitioner in *Davis* owned property in the area which was clearly not substandard, but was encompassed in the taking nonetheless. *Id.* at 702.

170. *Id.* at 703. The court additionally concluded that de novo review of urban renewal projects was an inappropriate violation of the separation of powers. *Id.* at 713. The court indicated that because the designation of "slum areas" was a legislative function, a "de novo judicial review . . . would clearly involve the exercise by the courts of nonjudicial powers." *Id.* at 714. Thus, the trial court's finding that the taking was supported by substantial evidence was upheld. *Id.* at 715.

171. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33-34 (1954) (upholding a slum clearance and subsequent transfer to private developers); City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960, 966 (5th Cir. 1994) (using eminent domain to acquire land and transfer it to the private developers of the Texas Rangers' baseball stadium); *Davis*, 326 S.W.2d at 703 (maintaining the constitutionality of transferring land to a private developer after the land was condemned); *Higginbotham*, 143 S.W.2d at 84-85 (following the rule of *Berman*, and holding it constitutional to condemn land and transfer to a private developer in the name of economic development); Hardwicke v. City of Lubbock, 150 S.W.3d 708, 714 (Tex. App.—Amarillo 2004, no pet.) (maintaining the holding of *Davis v. City of Lubbock*, that

inarguable that Texas courts have abandoned the narrow public use concept and adopted a broader definition thereof.[172]

Under S.B. 7, eminent domain can be used for economic development purposes if they result "from municipal community development or municipal urban renewal activities" under Chapter 373 or 374 of the Local Government Code.[173] Chapter 373 is the Texas Community Development Act of 1975, which was adopted to assist the development of viable urban communities by creating housing and economic opportunities.[174] Chapter 374 pertains to the Texas Urban Renewal Law, implemented to clear slums and blight and promote redevelopment through private enterprise to prevent slum conditions.[175]

Urban renewal laws are vital to Texas because they necessitate the clearing of pernicious environments and diseased slums, actions which are clearly within the purview of the police power.[176] Furthermore, urban redevelopment is vital to prevent additional urban decline.[177] The first step in redevelopment is "slum clearance for the improvement of

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although the condemned property will be sold to private developers, public use is still sustained).

172. *See* Daniel B. Benbow, *Public Use As a Limitation on the Power of Eminent Domain in Texas*, 44 TEX. L. REV. 1499, 1499-1500 (1965) (explaining that the public use concept represents little more than a historical theory that arose in an atmosphere of limited social and economic welfare); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3-4 (2003) (putting forward that blighted properties were regarded as "less worthy of the full bundles of rights recognized by American law").

173. TEX. GOV'T CODE ANN. § 2206.001(b)(3)(A) (Vernon Supp. 2005). Additionally, property can be taken under the section pertaining to designation of an area as a reinvestment zone. *Id.* § 2206.001(b)(3)(B); TEX. TAX CODE ANN. § 311.005(a)(1)(I) (Vernon 2002 & Supp. 2005).

174. TEX. LOC. GOV'T CODE ANN. § 373.001 (Vernon 2005). Section 373.002(b)(5) of the Urban Renewal Act is specifically excepted from section 2206.001 under S.B. 7. TEX. GOV'T CODE ANN. § 2206.001(b)(3)(A) (Vernon Supp. 2005). More importantly, the section provides that activities performed under this chapter are directed toward the purpose of utilizing a "more rational use of land and other natural resources." TEX. LOC. GOV'T CODE ANN. § 373.002(b)(5) (Vernon 2005). The exception to the application of Chapter 373 of the Texas Local Government Code is a prudent exception to eminent domain law, namely because land will not be taken to be put toward a more profitable use, as it was in *Kelo*. *See id.* (stating the exemption that eminent domain may not be used for a "more rational use of land"); Kelo v. City of New London, 125 S. Ct. 2655, 2659 (2005) (upholding a taking for economic development to generate a more rational use of the land).

175. TEX. LOC. GOV'T CODE ANN. § 374.001 (Vernon 2005); *see* Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 701 (1959) (upholding eminent domain proceedings against a property owner under the Texas Urban Renewal Law).

176. *See* TEX. LOC. GOV'T CODE ANN. §§ 373.001, 374.001 (Vernon 2005) (citing to the Texas Community Development Act and the Texas Urban Renewal Law).

177. *See* Berman v. Parker 348 U.S. 26, 32-33 (1955) (using eminent domain to eliminate urban blight).

housing";[178] second, "slum clearance with the ancillary purpose of commercial or industrial development";[179] and third, slum clearance with the intent to institute more attractive private development.[180] The first two measures indisputably serve a benefit for the general public; conversely, the third measure arguably extends public use beyond constitutional limitations.[181] Thus, it is precisely this third measure that warrants both the redefining of public use and correspondingly, the strict enforcement of the Public Use Clause.

In the abstract, the objective and the finished products of redevelopment plans are widely praised.[182] However, the courts, with increasing

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178. Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 423 (1983); *see also* Berman v. Parker, 348 U.S. 26, 32-33 (1955) (sustaining the use of eminent domain for the ultimate goal of slum clearance).

179. Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 423 (1983).

180. *Id.*; *see also* Kelo v. City of New London, 125 S. Ct. 2655, 2659-60 (2005) (approving the taking of property so it may be put toward a more economically beneficial use and increase the aesthetic pleasure of the property); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459 (Mich. 1981) (upholding the public use of the taking of a neighborhood so the property could be used for a more industrious use), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004). In Michigan, the state supreme court upheld the use of the takings power to condemn an entire neighborhood in Detroit in order to make way for a General Motors automobile plant. *Id.* The court stated that the transfer to a private entity is merely incidental to the public benefit received by the public at large. *Id.* In Atlantic City, Donald Trump convinced the local casino development agency "to use their eminent domain power to condemn land adjacent to his casino so that he could build a limousine waiting station." Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 51 (1998). However, ultimately, the Superior Court of Atlantic City denied the taking because Mr. Trump failed to place limitations on his use of the land; that said, had he placed the limitations on the use of the land, the court indicated it would have upheld the taking. *Id.* at 78. In discussing the Trump development, there is some evidence which suggests that the beneficiaries of a relaxed public use standard are generally the influential and wealthy special interests. *Id.* at 52.

181. *See Kelo*, 125 S. Ct. at 2659-60 (extending the scope of public use).

182. *See generally* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 354-55 (1990) (explaining the public choice theory). The public choice theory maintains that special interest groups exchange votes and financial donations quid pro quo to legislators for the promise of eminent domain actions. *Id.*; Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49, 110-11 (1998) (reiterating the need to place limitations on the power of interest groups to utilize eminent domain power); Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 302, 304-05 (2000) (expressing the need to deter unconstitutional takings by placing restrictions on public interest groups that would make private to private transfers more costly). Most politicians and legislators support economic development and would vote in favor of a redevelopment project because those displaced are only a small percentage of voters. *Cf.* RICHARD A. POSNER, THE PROBLEMS

frequency, have ignored that urban redevelopment centers around private redevelopment, rather than slum clearance.[183] S.B. 7 addresses the public transfer of property for a private benefit, as occurred in *Kelo*, and has barred any such taking.[184] Yet, it is not beyond the realm of possibility that such redevelopment abuse will continue to occur, unless S.B. 7 is supplemented with more extensive protections for private property owners.

B. *Senate Bill 7*

Following the *Kelo* decision, Texas Governor Rick Perry called a special legislative session to address, among other issues, eminent domain in Texas.[185] Consequently, Senator Kyle Janek (Houston) authored and Senator Jane Nelson (Lewisville) co-authored S.B. 7, a bill which seeks to limit both governmental and other condemning entities from using eminent domain in the way it was used in *Kelo*.[186] The Bill was amended several times by both the Senate and the House.[187] Governor Perry said,

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OF JURISPRUDENCE 354-55 (1990) (observing that politicians' ultimate goal is to be reelected).

183. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 33-34 (1954) (upholding a slum clearance and its subsequent transfer to private developers); City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960, 966 (5th Cir. 1994) (using eminent domain to take property and transfer it to the private developers of the Texas Rangers' baseball stadium); Davis v. City of Lubbock, 160 Tex. 38, 326 S.W.2d 699, 703 (1959) (maintaining the constitutionality of transferring land to a private developer after the land was condemned); Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 84-85 (1940) (following the rule of *Berman*, and holding it constitutional to condemn land and transfer to a private developer in the name of economic development); Hardwicke v. City of Lubbock, 150 S.W.3d 708, 714 (Tex. App.—Amarillo 2004, no pet.) (concluding that although the condemned property will be sold to private developers, the use is nevertheless classified as being one for the public).

184. Tex. S.B. 7, 79th Leg., 2d C.S. (2005).

185. Press Release, Tex. Gov. Rick Perry, Gov. Rick Perry Signs New Law Protecting Property Rights: Senate Bill 7 Prohibits Seizure of Property for Private Ventures (Aug. 31, 2005), *available at* http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-08-31.3313 (on file with the *St. Mary's Law Journal*).

186. *See* S.J. OF TEX., 79th Leg., 2d C.S. 117 (2005) (indicating that, in Texas, eminent domain uses for economic development should be limited). At one point, Senator Janek stated, "[i]t is my intent that we adopt the more conservative approach to what constitutes public use under the Constitution." *Id.* Senator Janek also responded affirmatively to the question of whether a litigant claiming one of the exceptions in S.B. 7 still must prove public use. *Id.*

187. Tex. S.B. 7, 79th Leg., 2d C.S. (2005). Senator Mario Gallegos attempted to kill S.B. 7 with a two-and-a-half hour filibuster. Polly Ross Hughes, *Filibuster Fails to Stop Eminent Domain Limit*, HOUS. CHRON., Aug. 17, 2005, at B4. Senator Gallegos's attempted filibuster was specifically aimed at an amendment proposed by Representative Rene Oliveira. *Id.* The amendment barred universities from using eminent domain to

"I draw the line when government begins to pick winners and losers among competing private interests, and the loser is the poor Texan who owns the land to begin with."[188] On September 1, Governor Perry signed S.B. 7 into law, stating: "These projects, often in the name of economic development, should not come at the expense of people's private property rights."[189] As such, S.B. 7 became effective on November 18, 2005.[190]

The Interim Committee on the Power of Eminent Domain[191] was established by statute under S.B. 7 because Governor Perry felt the subject would come under much analysis and discussion during the legislative interim.[192] The committee consists of ten members: five senators appointed by the Lieutenant Governor and five House members appointed by the Speaker of the House of Representatives.[193] The committee's purpose is to analyze the use of eminent domain for economic development purposes, to determine what constitutes just compensation for property

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acquire property for a lodging facility or accompanying parking garage. *Id.* It should be noted that Representative Oliviera's cousin is the owner of Player's restaurant, which was the site the University of Texas wanted to take for a parking garage for their planned conference center and hotel. *Id.* Senator Janek, author of S.B. 7, stated that the legislative intent of the amendment was to "restrict the use of eminent domain only for facilities that can be shown to be in direct competition with private enterprises." S.J. OF TEX., 79th Leg., 2d C.S. 101 (2005). However, Senator Gallegos thought the amendment was prejudicial to the University of Houston-Downtown, in anticipation of the Hilton Hotel possibly building a downtown hotel, similar to the hotel on the university's main campus. Polly Ross Hughes, *Filibuster Fails to Stop Eminent Domain Limit*, HOUS. CHRON., Aug. 17, 2005, at B4. Notably, the University of Houston's spokesman, Eric Gerber, stated the school was not concerned about S.B. 7's affect on future downtown development. *Id.* The amendment was subsequently enrolled and added to the Texas Education Code. *See* TEX. EDUC. CODE ANN. § 51.9045 (Vernon Supp. 2005).

188. Press Release, Tex. Gov. Rick Perry, Gov. Perry Signs New Law Protecting Property Rights: Senate Bill 7 Prohibits Seizure of Property for Private Ventures (Aug. 31, 2005), *available at* http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-08-31.3313 (on file with the *St. Mary's Law Journal*).

189. *Id.*

190. Tex. S.B. 7, 79th Leg., 2d C.S. (2005).

191. *Id.*

192. Press Release, Tex. Gov. Rick Perry, Gov. Perry Signs New Law Protecting Property Rights: Senate Bill 7 Prohibits Seizure of Property for Private Ventures (Aug. 31, 2005), *available at* http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-08-31.3313 (on file with the *St. Mary's Law Journal*).

193. Tex. S.B. 7, 79th Leg., 2d C.S. (2005). Representative Beverly Woolley (Houston) will serve as co-chair and the other named appointees are Representative Frank Corte (San Antonio), Representative Aaron Pena (Edinburg), Representative Marc Veasey (Fort Worth), and Representative Phil King (Weatherford). Press Release, Speaker Announces House Appointments to the Interim Committee on the Power of Eminent Domain, (Oct. 17, 2005), *available at* http://www.house.state.tx.us/news/release.php?id=1481 (on file with the *St. Mary's Law Journal*).

taken in furtherance of economic development, and then to prepare a corresponding "report for the Lieutenant Governor and the Speaker by December 1, 2006."[194]

The limitations on the use of eminent domain after the adoption of S.B. 7 are primarily focused on takings that take from one private entity and transfer to another private entity. Thus, the intent of S.B. 7 is clearly an effort to prevent a taking under the pretext of public use. However, it is foreseen that cities and developers can sidestep this regulation by pinpointing areas which are considered urban blight. Under S.B. 7, there is a community development exemption that allows takings for economic development if the property is blighted or a slum and the development is secondary to remedying the existing harm to society. This particular exemption is discussed further in this Comment in Part III(B)(1).

1. The Implications of Senate Bill 7

Although S.B. 7 was signed into law with the intent of protecting private property interests, the community development exemption may prove to cause problems in the future. Section 1 of S.B. 7 provides an amendment to the Texas Government Code:

> A governmental or private entity may not take private property through the use of eminent domain if the taking:
>
> (1) confers a private benefit on a particular private party through the use of the property;
>
> (2) is for a public use that is merely a pretext to confer a private benefit on a particular private property; or
>
> (3) is 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* . . . .[195]

The community development exemption codifies the government's ability to take property for economic development if it is a derivative

194. Press Release, Speaker Announces House Appointments to the Interim Committee on the Power of Eminent Domain, (Oct. 17, 2005), *available at* http://www.house.state.tx.us/news/release.php?id=1481 (on file with the *St. Mary's Law Journal*). Speaker Craddick stated, "It is my hope this committee will come up with the recommendations that will help the legislature more fully understand this issue." *Id.*

195. TEX. GOV'T CODE ANN. § 2206.001(b)(1)-(3) (Vernon Supp. 2005) (emphasis added).

consequence of eliminating slums and blighted areas.[196] Correspondingly, blight is defined as:

> [A]n area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.[197]

Under the current definition of blight, practically any defect on the property, no matter how small, could qualify as blighted and then be taken through eminent domain.[198] It is foreseen that government and private developers could potentially seek out blighted areas and pinpoint those areas for a taking.[199] Thus, a *Kelo*-type situation could still occur if a city were to exercise its eminent domain powers by taking a middle-

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196. *See* H.J. OF TEX., 79th Leg., 2d C.S. 184 (2005) (debating community development exemptions). Representative Menendez expressed concern about the community development exemption being "open-ended and subject to broad interpretation." *Id.* Additionally, Representative Menendez raised the question of "who determines a more rational use of land" and expressed his concern with low income property owners being put at considerable risk. *Id.* Representative Menendez also expressed direct concern regarding the business and development park Kelly USA in San Antonio (formerly Kelly Air Force Base) and the surrounding neighborhood, and how the proposed Kelly Parkway will drive right through the middle of the forty-year-old neighborhood. *Id.* Representative Corte, a member of the Interim Committee, stated that "[w]e don't want to diminish the abilities to [sic] our cities to continue to use that section [regarding the removal of blight]." *Id.* Representative Corte acknowledged that this "is a very fine line because in the *Kelo* case that was some of what the city of New London argued." *Id.*

197. TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005). Before designating an area as blighted, a municipality must first adopt a resolution that designates an area as blighted or a slum, and then "a majority of the municipality's voters" must favor adoption of the resolution. *Id.* § 374.011. "If a majority of the voters are against the resolution, the governing body may not adopt [the resolution] and may not propose the resolution for a one-year period." *Id.*

198. *See id.* § 374.003(3) (detailing what constitutes blight). Representative Woolley, a member of the Interim Committee, said that the Mercantile Bank complex in Dallas, which has been vacant for over twelve years, meets the legislative intent and fits within the definition of "blighted area." H.J. OF TEX., 79th Leg., 2d C.S. 181 (2005).

199. *See* Jay Root, *Critics: Eminent Domain Bill Is Lacking*, FORT WORTH STAR-TELEGRAM, Aug. 22, 2005, at B1 (quoting Dana Berliner, a senior attorney at the Institute for Justice, a nonprofit public-interest firm specializing in eminent domain cases). Dana Berliner said of the community development exemption in S.B. 7: "There is a decent possibility that the community-development exemptions will let in all the economic development condemnation they were saying they were trying to keep out." *Id.* Dana Berliner was counsel for Susette Kelo and the other petitioners in *Kelo*. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).

class neighborhood for economic revitalization under the guise of a public benefit to the city. It would merely take the governmental entity's labeling the property as blighted for the property to be taken through the community development exemption under S.B. 7.

2. Current and Proposed Takings in Relation to Senate Bill 7

Senate Bill 7 does not affect the authority to use eminent domain to take private property for traditional public uses. Some of these uses include transportation projects, port authorities, public utilities, public buildings, hospitals, parks, common carriers, libraries, and museums.[200] However, one particularly troubling provision provides that the power of eminent domain is not affected in regard to "a sports and community venue project approved by voters at an election held on or before December 1, 2005."[201] This provision was added to grandfather in the new Dallas Cowboys stadium to be built in Arlington, Texas.[202] The City of Arlington has approved the condemnation of about 200 properties in order to build parking lots for the new $650 million Dallas Cowboys stadium.[203] In 2004, Arlington voters approved the public and privately financed project, and in 2005, the city filed condemnation suits against the

200. TEX. GOV'T CODE ANN. § 2206.001(c) (Vernon Supp. 2005).

201. *Id.* § 2206.001(c)(6); TEX. LOC. GOV'T CODE ANN. §§ 334.001-.410 (Vernon 1999) (outlining regulations concerning sports and community venue projects). Chapter 334 of the Texas Local Government Code was written largely, in part, to enable the city of Arlington to use eminent domain to build the Ameriquest Field for the Texas Rangers. John Council, *Taking the Field: Stadium Suits May Reveal Distance Between Texas and New London*, TEX. LAW., July 18, 2005, at 1, *available at* 7/18/2005 Tex. Law. 1 (Westlaw); *see* City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960, 966 (5th Cir. 1994) (upholding eminent domain power in furtherance of a valid public use in Arlington's acquisition of property for the Texas Rangers' baseball stadium).

202. *See* John Council, *Taking the Field: Stadium Suits May Reveal Distance Between Texas and New London*, TEX. LAW., July 18, 2005, at 1, *available at* 7/18/2005 Tex. Law. 1 (Westlaw) (explaining that "lawmakers are usually unwilling to write a retroactive law that would alter a project that voters already have approved or that is the subject of a pending suit"); *see also* TEX. GOV'T CODE ANN. § 2206.001(c)(6) (Vernon Supp. 2005) (stating that sports stadium projects approved by voters before December 1, 2005, are specifically exempt).

203. *See* John Council, *Taking the Field: Stadium Suits May Reveal Distance Between Texas and New London*, TEX. LAW., July 18, 2005, at 1, *available at* 7/18/2005 Tex. Law. 1 (Westlaw) (comparing the results in New London, Connecticut, with private economic development in Arlington, Texas. "The city of Arlington is attempting to take about 200 properties from landowners" for the stadium project. *Id.*

private landowners.[204] The land designated for the proposed stadium qualifies as blighted.[205] The city has offered private landowners:

> fair market value for their property in addition to a lump sum payment of $22,500 per dwelling . . . . Resident-tenants with temporary use and all occupants of property owned by another will receive a lump sum payment in the amount of $5,250 per dwelling . . . . Businesses in the core project area will receive a lump sum payment . . . of $10,000 or reimbursement for reasonable actual moving expenses . . . limited to relocation within [fifty] miles of the acquired property.[206]

Additionally, there is a proposal to build a Texas A&M campus in San Antonio in the impoverished neighborhood of Alameda Homesites, which sits on "400 acres in the southwest quadrant of Loop 410 South and U.S. [Highway] 281."[207] This proposal could involve using the power of eminent domain for the proposed $15 million buyout of homes and businesses for the land donation to the Texas A&M University System.[208] There still stands the issue of whether the land will qualify as blighted. Under S.B. 7, if the land is found to be blighted, the city is given the power to take the land to eliminate the existing harm to society.[209]

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204. *Id.* Many of the homeowners who own property near the proposed Dallas Cowboys stadium are represented by Glenn Sodd, the attorney who represented the landowners in the Texas Rangers ballpark condemnation case in Arlington. *See* Mark Agee, *Owners Sue to Block Land Seizure*, FORT WORTH STAR-TELEGRAM, July 27, 2005, at B1 (discussing the landowners' lawsuit concerning Arlington's condemnation of property for the stadium). Glenn Sodd lost on the legality of Arlington's use of eminent domain, but received a large offer from the city for the residential lots in question in the Texas Rangers ballpark condemnation case. *See id.* (explaining that "Sodd turned a $1.1 million offer . . . into $5.1 million"). Still, Sodd argues that "Arlington should have to prove that the Cowboys stadium will benefit the city before forcing the residents from their homes." *Id.*

205. *See* TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005) (defining what constitutes a blighted area); *see also* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3 (2003) (criticizing the term blight as "[a] vague, amorphous term . . . that enabled renewal advocates to reorganize property ownership by declaring certain real estate dangerous to the future of the city").

206. Press Release, City of Arlington, City Extends Core Project Area for Cowboys Stadium (July 5, 2005), *available at* http://www.ci.arlington.tx.us/news/2005/archive_0705_05.html (on file with the *St. Mary's Law Journal*).

207. Greg Jefferson, *A&M Hasn't Passed Mayor's Test*, SAN ANTONIO EXPRESS-NEWS, Oct. 12, 2005, at 1A.

208. *See id.* (noting that the proposal to build a Texas A&M campus could require the use of eminent domain).

209. *See* TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon Supp. 2005) (allowing the use of eminent domain when dealing with a blighted area).

Texas property owners have also expressed concern about the building of the Trans-Texas Corridor.[210] "The Trans-Texas Corridor . . . is a proposed . . . statewide network of transportation routes . . . incorporate[ing] existing and new highways, railways[,] and utility right-of-ways."[211] This proposed project by the Texas Department of Transportation would require massive land acquisition.[212] The proposed project would reach the expanse from Oklahoma to Mexico.[213] Initial environmental studies are being conducted on a ten-mile-wide study area.[214] Importantly, while the Trans-Texas Corridor is specifically mentioned in S.B. 7,[215] the project will not be affected by the new law.[216] Transportation projects, such as railways, airports, public roads, and highways are not affected by the limitations on the use of eminent domain.[217] Another troubling provision in S.B. 7 states that property can be taken along the Trans-Texas Corridor for gas stations, convenience stores, or ancillary facilities.[218] The ability to take property for "ancillary facilities" along the corridor is ambiguous, and the provision will likely be susceptible to abuse simply because no limits were placed on the provision.[219]

IV. Three Scenarios Whereby Texas Government Can Still Take for the Benefit of Private Parties

This section proposes three scenarios which delineate the ways in which the power of eminent domain can be utilized and potentially

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210. *See* CorridorWatch.org, http://www.corridorwatch.org/ttc/index.htm (last visited Mar. 24, 2006) (expressing concern over the plans for the Trans-Texas Corridor project) (on file with the *St. Mary's Law Journal*).

211. Trans-Texas Corridor: About TTC, http://www.keeptexasmoving.com/about/ (last visited Mar. 24, 2006) (on file with the *St. Mary's Law Journal*).

212. *See id.* (discussing the multiple lanes and tracks that the routes of the Trans-Texas Corridor will occupy throughout the state).

213. Trans-Texas Corridor: TTC Projects, http://www.keeptexasmoving.com/projects/ttc35 (last visited Mar. 24, 2006) (on file with the *St. Mary's Law Journal*).

214. *Id.*

215. *See* Tex. S.B. 7 § 4, 79th Leg., 2d C.S. (2005) (discussing eminent domain issues in regards to the Trans-Texas Corridor).

216. *See* Tex. Transp. Code Ann. § 227.041 (Vernon Supp. 2005) (addressing powers and procedures for land acquisition for the Trans-Texas Corridor project).

217. Tex. Gov't Code Ann. § 2206.001(c) (Vernon Supp. 2005).

218. *See* Tex. Transp. Code Ann. § 227.041(b)(5), (b-1) (Vernon Supp. 2005) (defining primary purposes of the Trans-Texas Corridor); Anna M. Tinsley, *Limits on Property Seizures Debated*, Fort Worth Star-Telegram, July 17, 2005, at B1 (explaining that private companies will develop along the corridor, "[b]ut the land [will be] owned by the state and considered public property").

219. *See* Tex. Transp. Code Ann. § 227.041(b)(5), (b-1) (Vernon Supp. 2005) (allowing for ancillary facilities to be placed along the corridor, but not defining the term "ancillary").

abused. These scenarios provide a critical analysis of S.B. 7 and address the implication in the Bill that allows takings to occur under the community development exemption.[220] The hypothetical situations construct circumstances where the condemnor must take the proper steps to acquire the land through eminent domain and illustrate the ways an entity can bypass S.B. 7's new restrictions.

A. *Football Stadium*

In the first scenario, a city has the intent of constructing a football stadium using eminent domain to acquire property on which to build the stadium.[221] There are several avenues the city could follow in their attempt to wield the power of eminent domain, such as creating a development corporation and using the power of condemnation, or taking blighted property under the community development exemption in S.B. 7.

The Texas Development Corporation Act (TDCA), adopted in 1979, authorizes a municipality to create a development corporation.[222] Projects falling under the TDCA include "recycling facilities, and land, buildings, equipment, facilities, and improvements found by the board of directors to: be required or suitable for use for professional and amateur (including children's) sports."[223] Thus, the city can create a development corporation to develop the sports stadium, which is properly classified as a project under the TDCA. However, the development corporation must comply with the TDCA.[224] The TDCA gives the development corporation the power to use eminent domain, but the corporation must nonetheless meet the constitutional requirements thereof.[225]

The city, as the condemnor, must prove three essential elements: (1) that it formally filed a petition and an offer to pay, appointed special

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220. *See* TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon Supp. 2005) (creating an exception for community development activities).

221. *See generally* Phillip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?*, 35 ENVTL. L. 311, 312-13 (2005) (addressing New York City's proposal to build a stadium for the National Football League's New York Jets, at an estimated cost of $1.4 billion).

222. *See* TEX. REV. CIV. STAT. ANN. art. 5190.6, § 4(a)-(b) (Vernon Supp. 2005) (addressing the creation of development corporations).

223. TEX. REV. CIV. STAT. ANN. art. 5190.6, § 4B(a)(2)(A) (Vernon Supp. 2005).

224. *See generally* TEX. REV. CIV. STAT. ANN. art. 5190.6 (Vernon 1987 & Supp. 2005) (articulating the Texas Development Corporation Act and its requirements).

225. *See* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 297 (2000) (explaining that after casinos were legalized in Atlantic City, New Jersey, the state established the Casino Redevelopment Authority and delegated to it the power of eminent domain).

commissioners, and allowed objections to be filed; (2) that the condemnation is for a public use; and (3) that the condemnation is necessary to advance such public use.[226] The city can argue that "legislative declarations of public use are entitled to deference."[227] Thus, the city needs to rely upon municipal codes and city resolutions that allocate to the city the power of eminent domain.[228] Additionally, the city will need to point to statutes that appear to view sports stadiums as public uses, or at least leave room for that interpretation.[229]

S.B. 7 forbids a public taking to confer a private benefit, therefore, the sports stadium must be classified as a public use to acquire the land through eminent domain.[230] Those in opposition to the taking will most likely claim the stadium "confers a private benefit on a particular private party," or that the stadium is merely "a pretext to confer a private benefit."[231] Thus, the municipality must prove the stadium benefit falls on the general public.[232] Nonetheless, as long as evidence establishes the taking is for public use, misstatement of the true purpose of the use does not

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226. *See* Whittington v. City of Austin, 174 S.W.3d 889, 896 (Tex. App.—Austin 2005, pet. denied) (proposing three elements that must be met by the condemnor in order to prevail on a condemnation claim).

227. *Id.* at 899-900 (discussing the city's attempt to classify a city block as public use in order to utilize the city's power of eminent domain, and explaining the city's reliance on "the principle that legislative declarations of public use are entitled to deference"); *see also* Maher v. Lasater, 163 Tex. 356, 354 S.W.2d 923, 925 (1962) (explaining the deference given to a legislative declaration of public use); Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 85 (1940) (pointing to the five sets of legislative enactments).

228. *See* TEX. LOC. GOV'T CODE ANN. § 251.001(a) (Vernon 1999) (providing municipalities with the power of eminent domain); *see also* Burch v. City of San Antonio, 518 S.W.2d 540, 545 (Tex. 1975) (delineating that it is within the authority of the municipality to exercise eminent domain, but the municipality must officially express its intent and the necessity to condemn the land in question).

229. *See* City of Arlington v. Golddust Twins Realty Corp., 41 F.3d 960, 966 (5th Cir. 1994) (pointing out that the parties in *Golddust* did not dispute that stadium parking was a public use). In *Whittington*, the city of Austin argued that their use of eminent domain was proper in attempting to condemn a city public block for the potential use of a parking facility and a chilling plant, because the property would benefit the public. Whittington v. City of Austin, 174 S.W.3d 889, 899-900 (Tex. App.—Austin 2005, pet. denied). The city pointed to other statutes that view parking facilities and chilling plants as public uses, and also to the voters' approval of statutory authorization for projects, including parking facilities. *Id.*

230. *See* TEX. LOC. GOV'T CODE ANN. § 334.044(a) (Vernon 1999) (stating, in effect, that a sports venue project serves a public purpose). "The legislature finds for all constitutional and statutory purposes that an approved venue project is owned, used, and held for public purposes by the municipality or county." *Id.*

231. TEX. GOV'T CODE ANN. § 2206.001(b)(1) (Vernon Supp. 2005) (limiting the ways eminent domain can be used to facilitate a private-to-public taking). Under S.B. 7, this type of taking is forbidden. *See id.* (codifying the language of S.B. 7).

232. *See id.* (limiting takings to those providing a public benefit).

invalidate the condemnation.[233] Next, it needs to be determined whether the stadium will be built with public or private funding, or a combination of both.[234]

If the taking is upheld as a transfer for a private benefit, the city must bypass the limitations of S.B. 7. This could be accomplished by classifying the area in question as blighted, because economic development will be upheld so long as it is a secondary purpose resulting from urban renewal activities.[235] Accordingly, if the city classifies the property as blighted, the city can circumvent S.B. 7 by merely proving the economic development is secondary to the public benefit resulting from the community development of the removal of the blight.[236] Thus, the city would potentially be authorized in taking private property to build a privately (or partially public) owned stadium, providing an excessive benefit to a private party, simply by classifying the land as blighted.

B. *Shopping Mall*

In the second scenario, a private developer aims to obtain land for construction of a shopping mall.[237] The developer may attempt to circum-

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233. *See Golddust Twins Realty Corp.*, 41 F.3d at 966 (discussing how "the district court overlooked the fact that the very evidence offered to prove that the stated purpose was false itself offered a valid public purpose"). The trial court found that Arlington had not been honest in its declaration that the taking was for use as a parking lot. *Id.* at 963.

234. *See* Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173, 174 (2002) (pointing out that by the end "of the twentieth century, Americans had spent more than $20 billion . . . on major league ballparks, stadiums, and arenas" including "$14.7 billion in government subsidies"). Sports stadiums, such as Yankee Stadium, Fenway Park, and Wrigley Field "were built with private funds by the teams themselves." Philip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?*, 35 ENVTL. L. 311, 314 (2005). "Since then, most new major-league stadiums have been municipally financed." *Id.* at 315. The Internal Revenue Code provides municipal bonds to finance stadiums through a tax exemption by enabling stadiums to bypass the requirement that municipal bonds benefit the public. *Id.* (citing 26 U.S.C. §§ 103(a), 141 (2000)). Sports stadiums are subsidized "when public schools, mass transit, and public health" and welfare are in dire need of municipal funds. *See id.* at 320 (suggesting that studies consistently show stadiums are a poor investment for cities).

235. *See* William J. Appel, Annotation, *Eminent Domain: Industrial Park or Similar Development As Public Use Justifying Condemnation of Private Property*, 62 A.L.R.4TH 1183, § 2[b] (2004) (expressing that reports and testimony by experts are effective in determining whether an area is blighted); Phillip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?*, 35 ENVTL. L. 311, 320 (2005) (emphasizing that finding a public use for a privately owned sports stadium would enlarge the *Berman* and *Midkiff* holdings beyond the Constitution's original intent).

236. TEX. GOV'T CODE ANN. § 2206.001 (Vernon Supp. 2005).

237. *See* Stephen J. Jones, Note, Trum*ping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 302 (2000) (suggesting that interest groups are motivated by "rent

vent the purchase on the open market if the old land is condemned through eminent domain. The private developer intends to increase the property value and the city has a vested interest in creating a larger tax base for the city. This scenario raises the pivotal question of whether such a taking is for public use.[238]

The city may utilize several methods in order to obtain the land on which to build the shopping mall.[239] As evidenced in the previous scenario, the most steadfast way to achieve the taking is by designating the desired area as blighted. The developer must simply pick the choicest spot that contains a defective street layout,[240] and the property qualifies as blighted. Once the blight designation is cast, the city can immediately condemn the land, even without a particular owner in mind.[241] In most industrial park cases, the city has initiated the plan before assigning it to a particular owner.[242] Thus, as soon as the land is classified as blighted, the

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seeking" behavior). An example of rent seeking behavior would include the use of eminent domain to build a shopping mall. *Id.* at 302-03 (outlining recent examples of rent seeking behavior). "This is especially true in 'thin market' contexts, when a seller holds out for a price higher than the fair market value of the parcel." *Id* at 302.

238. William J. Appel, Annotation, *Eminent Domain: Industrial Park or Similar Development as Public Use Justifying Condemnation of Private Property*, 62 A.L.R.4TH 1183, § 2[a] (2004). In general, courts have used two approaches in dealing with opposition to a taking:

> [First,] [s]ome courts have focused on the proposed industrial development itself and have considered whether it alone supplies a sufficient public purpose to satisfy constitutional strictures against the taking of private property for private purposes. [Second,] [o]ther courts have looked to the initial stages of industrial development plans and have considered whether a public purpose can be found in the elimination of slums or blight sufficient to justify the subsequent development of the property in question for industrial purposes and even its resale to private properties.

Id.

239. *See* DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 194-95 (2003), *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (discussing the use of eminent domain to construct strip malls and other projects not considered traditional public uses) (on file with the *St. Mary's Law Journal*). In Hurst, Texas, the city condemned 127 homes in an effort "to let its largest taxpayer, a real estate company, expand its North East Mall." *Id.* at 194. During the condemnation proceedings, the trial court judge refused to issue the injunctions and, as a result, the residents lost their homes. *Id.* (citing *Texas Judge Clears Way for Expansion of Mall*, N.Y. TIMES, May 24, 1997, at A9).

240. TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005).

241. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32-33 (1954) (delineating the public need to eliminate urban blight and slums, which is achieved through economic development of such property and without giving any reference to naming a particular individual property owner).

242. *See* Laura Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 450 (1983) (expressing that although the city has not designated an owner, the court reviewing the constitutionality of the taking must still establish an objective and valid goal for the taking).

proposed shopping mall can qualify as a public use because the mall will increase tax revenue, employment, and remedy the affects on "public health, safety, morals, or welfare of the municipality and its residents."[243]

Once the property is taken, the city can designate the land as a tax increment reinvestment zone to fund a project.[244] A city is afforded the power to designate a geographic area as "a reinvestment zone to promote development or redevelopment of the area if the governing body determines that development or redevelopment would not occur solely through private investment in the reasonably foreseeable future."[245] However, recent data has debunked the myth that tax increment financing works as intended.[246] Instead of benefiting the community at large, research shows that the financing actually benefits the reinvestment agency instead of the city—the intended beneficiary.[247]

C. *College Campus*

In the third and final scenario, a city has the objective of building a college campus, but will need a large amount of acreage on which to build the campus.[248] Both the city and developer stand to benefit from the additional revenue and tax benefits generated by a college and its surrounding property. This is yet another scenario that raises the question of

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243. TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005).

244. TEX. TAX CODE ANN. § 311.003(a) (Vernon 2002 & Vernon Supp. 2005).

245. *Id.* §§ 311.003(a), 311.005; *see also* Hardwicke v. City of Lubbock, 150 S.W.3d 708, 711 (Tex. App.—Amarillo 2004, no pet.) (designating a reinvestment zone on petitioner's property). This method is employed to finance public works through the designation of the reinvestment zone. *Id.* at n.4. The taxes collected on any increase in value resulting from the development are credited to the tax increment fund and used to finance public project costs. *Id. See generally* City of El Paso v. El Paso Cmty. Coll. Dist., 729 S.W.2d 296, 299 (Tex. 1986) (upholding the Tax Increment Financing Act as constitutional and finding that school districts qualify as "political units" under the Act).

246. DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 26 (2003), *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (on file with the *St. Mary's Law Journal*).

247. *Id.* at 27. The Public Policy Institute of California has published "the most comprehensive study to date," concluding that tax increment financing is not advantageous in achieving sound redevelopment. *Id.* at 26. The finance scheme produces only minimal benefits at a large cost to the general public. *Id.* at 27. The Institute summed up its review of tax increment financing with the statement: "redevelopment agency budgets, not cities, are the main beneficiaries of the [tax increment financing] projects." *Id.*

248. *See* Greg Jefferson, *A&M Hasn't Passed Mayor's Test*, SAN ANTONIO EXPRESS-NEWS, Oct. 12, 2005, at 1A (writing about the possible use of eminent domain to acquire land on which to build an A&M campus in San Antonio). The Texas A&M University System has proposed to build a campus in San Antonio at the site of the impoverished neighborhood of Alameda Homesites. *Id.*

whether the use of eminent domain will satisfy a public purpose, because the campus benefits only the students and not the public at large.[249]

School districts can acquire property for constructing school buildings or "any other purpose necessary for the district" through eminent domain.[250] Conversely, higher education institutions do not have authority to exercise the power of eminent domain themselves.[251] However, the governing bodies of higher education institutions possess the power of eminent domain.[252] The governing board is "the body charged with policy direction" of a Texas institute of higher education.[253] In this particular scenario, if the higher education institution delegates the power of eminent domain to the governing body of the university, then the governing body may use eminent domain "to carry out its powers and duties."[254]

As illustrated by the sports stadium and strip mall scenarios, the most straightforward way to acquire the needed property is through eminent domain. Particularly, the city and developer could use eminent domain with ease by selecting an area that easily conforms to the provision defining blight.[255] Once the land is classified as blighted, the taking will qualify as a public use because the benefit achieved by constructing the

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249. *Cf.* Hous. Auth. of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 84 (1940) (upholding the public use and noting that "[i]t is immaterial if the use [of the public housing] is limited to the citizens of a local neighborhood, . . . so long as it is open to all who choose to avail themselves of it").

250. TEX. EDUC. CODE ANN. § 11.155(a) (Vernon 1996 & Supp. 2005).

251. TEX. EDUC. CODE ANN. § 53.32 (Vernon 1996). Higher education entities are defined as "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section." TEX. EDUC. CODE ANN. § 61.003(8) (Vernon 1996).

252. *See id* § 85.32(a) (delegating eminent domain authority to the Texas A&M Board of Regents). The Texas A&M Board of Regents has the authority to use eminent domain to acquire property necessary "to carry out its powers and duties." *Id.* However, the Board of Regents must use its authority in accordance with Chapter 21 of the Texas Property Code. *Id.* § 85.32(b).

253. *Id.* § 61.003(9). A governing board of a higher education institution includes the "boards of directors, boards of regents, boards of trustees, and independent school district boards insofar as they are charged with policy direction of a public junior college." *Id.*

254. *Id.* § 85.32(a).

255. TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005) (defining a "blighted area"). A blighted area means:

> [A]n area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.

Id.

college is secondary to removal of the blight.[256] Thus, once the land is distinguished as blighted, it can be taken for economic development—to construct a college campus.

Although S.B. 7 was signed into law with the intent to circumscribe such takings,[257] it is still possible under the Bill to take private property to develop a more economically beneficial use.[258] The city has a vested interest in bringing in development and will likely use the easiest method to acquire the property—by casting a blight designation and taking the property through the community development exemption. Under this scenario, rather than purchase property voluntarily sold by its owner, the developer can simply pick and choose the desired property in an attempt to mold the ambiguous definition of blight. Consequently, the chosen property will subsequently be condemned.[259]

V. CONCLUSION

A. *Summary of the Current Takings Landscape in Texas*

The Public Use Clause of the Fifth Amendment has become a toothless limitation on the takings power.[260] Given the significance of private property rights, any infringement upon these rights has a direct effect on individual liberties. Yet, property rights clearly deserve sound protections. Thus, any taking must be rationally related to a true public purpose to pass constitutional muster.[261]

Traditional notions of public use, such as parks, schools, common carriers, and public utilities, are understood as proper public use takings under eminent domain.[262] However, these traditional notions have given way to an eminent domain scheme which consists mainly of land reconvey-

256. TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon Supp. 2005).

257. *See id.* § 2206.001(b) (limiting the use of eminent domain to narrow circumstances).

258. *Id.* § 2206.001(b)(3).

259. *See, e.g.*, DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 82-83 (2003), *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (expressing that developers love eminent domain simply because they do not have to negotiate the purchase price of the property; developers can pick any property they want, rather than purchasing it for a higher price on the open market) (on file with the *St. Mary's Law Journal*).

260. *See* Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 61 (1986) (entitling the public use limitation as a "dead letter").

261. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (holding that a taking must be rationally related to a public purpose); *cf.* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding that legislation will be sustained if it is rationally related to a legitimate government interest).

262. *See* 26 AM. JUR. 2D *Eminent Domain* § 43 (2005) (delineating the traditional uses of eminent domain, namely for public roads, parks, utilities, and schools).

ance to private parties for redevelopment.[263] As recognized in *Berman*, slum clearance is an appropriate use of the power of eminent domain.[264] *Berman* also granted deference to a legislative determination of public use.[265] This deferential attitude of the judiciary has contributed to the increase in "rubber stamped" takings. Thus, a taking under the guise of eliminating a potential harm on society needs to be carefully scrutinized by the judiciary to ensure a true public benefit.

In *Kelo*, the Supreme Court set a precedent for takings for economic development with the mere objective of an increased, more economically beneficial use.[266] Although the United States Supreme Court affirmed such a taking, it is urged that Texas courts abstain from such decisions. In Texas, the *Kelo* decision prompted the Texas Legislature to sign S.B. 7 into law, which attempts to restrict the eminent domain powers of the state and public entities.[267] The Bill provides statutory authority to steer the judiciary away from upholding takings that provide an excessive benefit to private parties.[268] However, S.B. 7 left a large avenue open for eminent domain application—takings to eliminate slums or blighted areas.[269] The Texas Legislature failed to tailor the definition of "blight," which although is defined in the Texas Local Government Code,[270] still remains a nebulous term, as does "public use."[271] Throughout America, blight classifications have been cast upon many properties in order to carry out economic development projects; namely when the properties are far from being blighted.[272] For instance, this was the case in Lake-

263. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2659-60 (2005) (allowing the city of New London to exercise its eminent domain power for the purpose of revitalizing its downtown area by adding hotels, shopping malls, restaurants, and marinas). In Justice Clarence Thomas's dissent, he expressed that "[t]oday's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning." *Id.* at 2678 (Thomas, J., dissenting).

264. Berman v. Parker, 348 U.S. 26, 32-33 (1954).

265. *Id.* at 33.

266. *See* Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005) (declining to judge the efficacy of a city's development plan). Rather, the courts should determine if the proposed takings are constitutional. *Id.*

267. *See* TEX. GOV'T CODE ANN. § 2206.001(b) (Vernon Supp. 2005) (limiting the use of eminent domain).

268. *Id.*

269. *Id.*

270. TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005).

271. Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 3 (2003) (criticizing the vague definition of blight).

272. *See, e.g.*, Kelo v. City of New London, 125 S. Ct. 2655, 2660 (2005) (condemning properties that were not classified as blighted); Berman v. Parker, 348 U.S. 26, 34 (1954) (holding that although the property at issue may not be blighted or considered a slum, it

wood, Ohio, where an average American home was classified as blighted because it had only one bathroom, a small side yard, and a one-car garage.[273] Notably, the properties taken in *Kelo* were not classified as blighted, yet they were still condemned.[274]

As evidenced in the three scenarios laid out in Part IV, takings that excessively benefit a private party are still attainable. Although the constructs of S.B. 7 appear to circumscribe "private use" takings, it is evident these types of takings may still occur. Such a taking can be achieved simply by classifying the land as blighted.[275] Next, the condemnor must make an affirmative pleading that the taking is necessary.[276] "Once the presumption of necessity arises," unless the opponent of the taking is able to establish an affirmative defense that the condemnor is using bad faith, fraud, or arbitrariness to effectuate the taking, eminent domain is presumed to be necessary.[277] Given consideration of the scenarios laid out, some of which are currently taking place in Texas, and the ease of overcoming the constraints of S.B. 7, further protections are vital to prevent *Kelo* from negatively impacting Texas property owners.

B. *A Suggested Approach to Restricting Takings for Economic Development: Redefining Blight*

The moral of the story is the same—all an entity must do to effectuate a taking is to classify an area as blighted. When proposing a new standard for economic redevelopment under the Public Use Clause, it is important to balance the original intent of the Constitution with the modern complexities of society. The inquiry for public use in an economic development context should center around whether the taking will truly remedy an existing harm on society through the clearance of slums or blight. S.B. 7 attempts to address takings for a purely private benefit or a public use that is merely a pretext to granting a private benefit.[278] Despite the Bill's attempt to circumscribe such public takings, it still remains possible

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was included in the condemned area). In *Berman*, the Court condemned all properties in the area selected for redevelopment because: "It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative. The entire area needed redesigning . . . ." *Id.*

273. DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 82-83 (2003), *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (on file with the *St. Mary's Law Journal*).

274. *Kelo*, 125 S. Ct. at 2660.

275. TEX. GOV'T CODE ANN. § 2206.001(b)(3) (Vernon Supp. 2005).

276. Whittington v. City of Austin, 174 S.W.3d 889, 898 (Tex. App.—Austin 2005, pet. denied).

277. *Id.*

278. *See* TEX. GOV'T CODE ANN. § 2206.001(b) (Vernon Supp. 2005) (narrowing the use of eminent domain).

to take property for economic development under the community development exemption.[279] The sad truth is that once property is labeled "blighted," the outcome is predetermined.[280] Any action on behalf of the municipality is presumed to be legally justified.[281]

In order to remedy the limited protections in S.B. 7 regarding areas of slum and blight, there are several limitations that should be included in future amendments to chapter 2206 of the Texas Government Code. The Bill laid out a complete exemption for property taken in furtherance of eliminating slum and blight, but the legislature "fail[ed] to change the definition of blight."[282] The present definition of blight allows interpretational latitude which causes concern about prospective eminent domain misuse. It is important for the definition of blight to be comprehensive, yet circumscribed, because some blight designations have been for homes that had the mere defect of having a one-car garage, one bathroom, or a side yard that was too small.[283] Since blighted areas are an exception in S.B. 7, the current definition of blight needs to be revised to include justification for eminent domain.[284]

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279. *Id.* § 2206.001(b)(3).

280. DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 82-83 (2003), *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (on file with the *St. Mary's Law Journal*).

281. Id. The broad definition of blight can encompass any area. *Id.* at 83. To exemplify this proposition, an existing neighborhood in Newport City, Kentucky, was designated as blighted, despite many of the homes being in the $200,000 range and the area being the second largest tax base in the city. *Id.* at 82-84 (citing Dave Ninemets & Susan Vela, *City Starts Buying Land for Project*, CINCINNATI ENQUIRER, Dec. 15, 2002, at B1).

282. *See* INST. FOR JUSTICE, KELO V. CITY OF NEW LONDON: What It Means and the Need for Real Eminent Domain Reform 7 (2005), *available at* http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf (expressing the most common pitfalls in proposed eminent domain reform legislation) (on file with the *St. Mary's Law Journal*). The Institute for Justice, a civil liberties law firm, has comprehensively researched the misuse of eminent domain and drafted a recommendation for drafting effective statutory protection against eminent domain abuse. Institute for Justice, Institute Profile: Who We Are, http://www.ij.org/profile/index.html (last visited Feb. 21, 2006) (on file with the *St. Mary's Law Journal*).

283. DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 82-83 (2003), *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (on file with the *St. Mary's Law Journal*). In Lakewood, Ohio, the land in question was classified as blighted in order to make way for private redevelopment, including condominiums, restaurants, retail stores, and theaters. *Id.* at 165.

284. *See* TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005) (defining blight); *see also* INST. FOR JUSTICE, KELO V. CITY OF NEW LONDON: What It Means and the Need for Real Eminent Domain Reform 7 (2005), *available at* http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf (arguing that giving a complete exemption for property taken in blighted areas without changing the definition for blight is a common pitfall in reform legislation) (on file with the *St. Mary's Law Journal*).

The definition of blight has not changed in over fifteen years.[285] Therefore, a revised blight designation is needed, and it should mandate that the property has a grave, objective, and identifiable problem before it can be taken for redevelopment.[286] This would ameliorate an unwarranted classification of blight simply to justify taking private property in furtherance of economic redevelopment.

Due to the presumption of necessity the opponent must overcome, this Comment urges the burden of proof be reevaluated. The state should bear the burden of showing public use or blight, instead of having the private property owner prove fraud, arbitrariness, or abuse of discretion as an affirmative defense.[287] Public policy—the protection of private property rights—dictates that the burden of proof should be placed on the condemning party, rather than the state's finding of public use or blight simply being a rebuttable presumption.[288] In other words, the tables should be turned to favor the party opposing the taking instead of the condemning party.[289] By leveling the playing field, the classification of blight will not automatically prove a lofty presumption for the opponent of the taking to overcome.

Additionally, if condemnation of the blighted property occurs, the unblighted property within the area should not automatically be included in the taking.[290] This will effectively eliminate an intentionally overbroad

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285. TEX. LOC. GOV'T CODE ANN. § 374.003(3) (Vernon 2005).

286. *See* DANA BERLINER, INST. FOR JUSTICE, PUBLIC POWER, PRIVATE GAIN 82-83 (2003), *available at* http://castlecoalition.org/pdf/report/ED_report.pdf (suggesting that once blight is determined, any action on behalf of the municipality is predetermined as proper) (on file with the *St. Mary's Law Journal*).

287. *See* Coastal Indus. Water Auth. v. Celanese Corp. of Am., 592 S.W.2d 597, 600 (Tex. 1979) (expressing that unless the condemnor acted arbitrarily or unjustly, deference must be given to a legislative determination of public use for that specific exercise of eminent domain); Whittington v. City of Austin, 174 S.W.3d 889, 898 (Tex. App.—Austin 2005, pet. denied) (stating that once a presumption of necessity arises, the opponent can only contest by establishing an affirmative defense of fraud, arbitrariness or bad faith of the condemnor); Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565-66 (Tex. App.—San Antonio 1998, pet. denied) (explaining that once it is determined that a taking is necessary, a court should uphold the taking "unless the landowner demonstrates fraud, bad faith, abuse of discretion, or arbitrary and capricious action"); Bevly v. Tenngasco Gas Gathering Co., 638 S.W.2d 118, 121 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (asserting that a finding of necessity is irrefutable in the absence of fraud, bad faith, or abuse of discretion).

288. *See Whittington*, 174 S.W.3d at 898 (explaining that a presumption of necessity must be rebutted by the opponent of a taking).

289. *See id.* (reiterating that once the necessity of the taking is proven, a presumption arises that must be rebutted by the opponent of the taking).

290. *See* Berman v. Parker, 348 U.S. 26, 31 (1954) (condemning the petitioners' property solely because it was included in the blighted area, when in actuality, the petitioners' property was not classified as blighted).

designation of blight to encompass a large scope of property. Furthermore, if a certain area of land is designated as blighted, this property should be reevaluated after a certain number of years.[291] Because a blight designation gives the government the power to condemn the land in question, the land should be reassessed to ensure the attached blight designation is not permanent. A reevaluation would remedy the problem that the property could once again be condemned in the near future; namely, if the blight has been removed and the property conforms to the state's standards.

Further, the property owners in a blighted area should be allowed ample time "to rehabilitate [the] property before it can be condemned."[292] If the goal of urban redevelopment is to eliminate the harm of slum and blight on communities, then the property owners should be afforded the opportunity to remedy.

If future eminent domain limitations on S.B. 7 include similar provisions, public takings for an exclusively private benefit can be prevented. Eminent domain must be used judiciously and only as a last resort. Although eminent domain aided great movements for economic development in communities, the takings power is only appropriate when used correctly. The government's ability to take property that poses an affirmative harm to society, such as slums, is recognized as a long-standing necessity that is vital to the municipality.[293] Today, however, slum clearance has become intertwined with the taking of private property to facilitate

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291. *See* INST. FOR JUSTICE, KELO V. CITY OF NEW LONDON: What It Means and the Need for Real Eminent Domain Reform 7 (2005), *available at* http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf (suggesting that to genuinely protect citizens from losing their land, blight designations should expire after a set number of years) (on file with the *St. Mary's Law Journal*). For a blight designation to be cast, "a majority of the municipality's voters" must adopt the resolution to designate an area as blighted. TEX. LOC. GOV'T CODE ANN. § 374.011(a)(2) (Vernon 2005). If the voters do not adopt the resolution, the resolution may not be proposed for another one year period. *Id.* § 374.011(c).

292. *See* INST. FOR JUSTICE, KELO V. CITY OF NEW LONDON: What It Means and the Need for Real Eminent Domain Reform 7 (2005), *available at* http://www.castlecoalition.org/pdf/Kelo-White_Paper.pdf (arguing that property owners should be allowed to repair property before condemnation occurs) (on file with the *St. Mary's Law Journal*).

293. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984) (remedying an affirmative harm on society through the oligopoly of land ownership resulting from extreme wealth); Berman v. Parker, 348 U.S. 26, 28-29 (1954) (eliminating an existing harm on society by condemning blighted property resulting from extreme poverty). In both *Midkiff* and *Berman*, the corresponding legislative bodies found that remedying an affirmative harm on society could be attained through eminent domain. Kelo v. City of New London, 125 S. Ct. 2655, 2673-74 (2005) (O'Connor, J., joined by Rehnquist, C.J., Scalia & Thomas, JJ., dissenting). When the harm on society was eliminated, a public purpose was realized directly through each taking. *Id.* In contrast, Susette Kelo and Wilhelmina Dery's homes were "well-maintained [and were not] the source of any social harm." *Id.* at 2675. There-

more attractive private development, and has subsequently been upheld as constitutional.[294] The now toothless definition of public use needs to be redefined by the courts, because in the current judicial landscape it is now defined as "private benefit, for private profit."[295] In sum, S.B. 7 will assist in curbing eminent domain abuse in Texas, but there is room for improvement. During the legislative interim, it should be given careful scrutiny and further protections for private property should be added to prevent *Kelo* from occurring in Texas.

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fore, the taking of their property could not possibly have remedied an existing harm to society. *Id.*

294. *See Kelo*, 125 S. Ct. at 2673-74 (approving the taking of property so it may be put toward a more economically beneficial use and to increase the aesthetic pleasure of the property, which is not the traditional type of taking).

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