St. Mary's Law Journal

Volume 54 | Number 3 Article 5

6-6-2023

A Perpetual Cycle of "Give-and-Take": The Case for Texas Eminent Domain Reform

Kathryn Faulk

ARTICLE

A PERPETUAL CYCLE OF "GIVE-AND-TAKE": THE CASE FOR TEXAS EMINENT DOMAIN REFORM

KATHRYN FAULK*

*Candidate for Juris Doctor, May 2023, Southern Methodist University Dedman School of Law. The author would like to thank John S. Lowe, SMU Professor Emeritus of Law, for his helpful feedback, comments, and persistence in encouraging me to seek publication. The author also thanks her parents for their support throughout her law school career, which led to this—her first published work.

I. INTRODUCTION

The method a state uses in determining the value of condemned property is of enormous concern because "just compensation" is both a federal and state constitutional right for property owners with land taken by eminent domain authority.[1] "Eminent domain" takings are not negotiated between a willing buyer and seller.[2] Thus, to the extent possible, any valuation approach should not overwhelmingly disadvantage the unwitting property owner. While the baseline for just compensation in the eminent domain context "is the fair market value of the property," states establish the baseline in various ways.[3]

This Article argues both the Texas legislature and judiciary engage in an abusive cycle of "give-and-take" with landowner property rights in the eminent domain context. Those with change-making ability—Texas's legislators—sit idly by or, even worse, actively enable condemning entities to take advantage of unsuspecting landowners. Although recent legislative reforms have "given" landowners a fairer "condemnation" process, the state's valuation method still severely lacks fairness, perpetuating a "take" requiring immediate legislative attention. Specifically, this Article argues Texas's use of a "Broad Instruction Approach"[4] gives too much latitude to courts in determining the fair market value for a parcel of land, leading to inconsistent valuations across the state. Instead, Texas should adopt a "Factor-Based

1. *See* Almota Farmers Elevator & Warehouse Co. v. U.S., 409 U.S. 470, 473–74 (1973) (discussing the Takings Clause of the Fifth Amendment as a method used for determining just compensation for property owners).

2. *See generally id.* (noting while some sort of compensation is involved, eminent domain still involves a taking of property where "sellers" are not always willing).

3. *See* CAITLYN ASHLEY ET AL., LAW AND POLICY GUIDE: A SURVEY OF EMINENT DOMAIN LAW IN TEXAS AND THE NATION 14 (2017) (describing the standard used for just compensation and other methods used by different states).

4. *See id.* at 15 (stating the Broad Instruction Approach offers little guidance as to compensation for condemned land).

Approach"[5] to limit judicial discretion and allow for considerations to guide both condemnors in making fair offers upfront and judges in reigning in condemnation abuses. In effect, a Factor-Based Approach would end the cycle of give-and-take plaguing property owners in Texas.

Part II of this Article explains the nuances of federal and constitutional eminent domain law. Next, Part III dives into the contours of eminent domain in Texas and then considers where the law currently stands in the Lone Star State. Part III is concluded by posing a question appealing to the crux of the Article: is eminent domain law advantageous to owners of property in Texas, or does this power represents a perpetual give-and-take of rights and limitations by the Texas legislature and judiciary? In Part IV, this Article explores the impact of *Hlavinka v. HSC Pipeline Partnership, LLC*[6] on property owners in Texas, focusing specifically on compensation. Next, in Part V, this Article surveys two dominant valuation approaches, addressing the opportunities and obstacles of each, as well as highlighting the valuation approaches used in various states other than Texas. Finally, in Part VI, this Article proposes an alternative valuation approach for Texas, factoring in considerations from the *Hlavinka* holding and its implications for property owners in Texas.

II. THE LAW OF EMINENT DOMAIN

Eminent domain refers to the power of the state to take private property, subject to two requirements—the taking must be (1) compensated and (2) for public use.[7] This power's tumultuous history did not begin with the drafting of the United States Constitution, in which James Madison and Thomas Jefferson disagreed on whether the government should have any authority to take private property.[8] Neither did eminent domain begin with

5. *See id.* at 16 (highlighting the mix of guidance and flexibility provided by the Factor Based Approach).

6. Hlavinka v. HSC Pipeline P'ship, LLC, 650 S.W.3d 483 (Tex. 2022).

7. Almota Farmers Elevator & Warehouse Co., 409 U.S. 470, 473 (1973).

8. *See* Bruce L. Benson, *The Evolution of Eminent Domain: A Remedy for Market Failure or an Effort to Limit Governmental Power and Government Failure?*, 12 INDEP. REV. 423, 429–30 (2008) (discussing the origins of eminent domain in American history). Thomas Jefferson argued for absolute dominion over property, "with no feudal obligations to the state," whereas James Madison, although hopeful "to make individual property rights more secure" than they had been in the colonies under British rule, chose to compromise, requiring compensation explicitly but still allowing for government takings. *Id.* at 429–30.

adopting the Takings Clause in the Fifth Amendment.[9] Rather, "eminent domain reflects the feudal underpinnings of English property law," finding its beginnings in 1066 when William the Conqueror seized all the lands of England.[10] Years later, in 1215, the Magna Carta recognized eminent domain authority in curbing the raw power of the king to dispossess a "Freeman . . . of his Freehold."[11] Subsequently, the power again arose within the British colonies in North America for purposes such as obtaining highway rights-of-way, lowland drainage, and private mill erection.[12] By the time of the American Revolution, the "government[] [clearly established its] power to take property . . . a remnant of feudalism in England."[13]

Eminent domain and condemnation, although often used interchangeably, are not synonyms and require distinction: "[e]minent domain is defined as the power of the sovereign (or government) to take private property for a public use. Condemnation is the procedure by which the taking or appropriation occurs. Thus, the former is the power, the latter is the process," and only where there is conferral of power, may the condemnation procedure begin.[14] Eminent domain authority in the United States, unlike many other governmental powers, is inherent and implied. Rather than explicitly granting the power, "the law assumes or implies that the power exists in the government."[15] In effect, there is neither a rulebook nor a procedure dictated by the federal or Texas Constitutions to guide the exact contours of condemnation procedure, leading to both variations among the states and occasional reforms in the Texas statute.

Although neither the United States Constitution nor Texas Constitution sets forth the exact procedure for condemnation, each enumerates limitations on the process. The United States Constitution guarantees the landowner due process and just compensation.[16] The Texas Constitution provides landowners must receive "adequate compensation."[17] The

9. U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation.").

10. Benson, *supra* note 8, at 424.

11. *Id.* at 425–26 (emphasis omitted).

12. *Id.* at 428–29.

13. *Id.* at 429.

14. JUDON FAMBROUGH, TEX. A&M UNIV., REAL EST. CTR., UNDERSTANDING THE CONDEMNATION PROCESS IN TEXAS: TECHNICAL REPORT 394 at 1 (2015), https://assets.recenter.tamu.edu/Documents/Articles/394.pdf [https://perma.cc/ME9U-87Q5].

15. *Id.*

16. U.S. CONST. amend. V.

17. TEX. CONST. art. I, § 17(a).

Fourteenth Amendment of the United States Constitution extends due process to all the states in the form of reasonable notice and opportunity to be heard.[18] Considering the well-developed nature of due process and its requirements, the key questions become (1) what constitutes "public use" and (2) what constitutes "just compensation" for a landowner?

A. *Public Use*

The public use limitation, originating in the Takings Clause of the Fifth Amendment, is subject to both legislative discretion and judicial interpretation.[19] After the adoption of the Takings Clause, courts adhered to the plain language and intent of the federal and state public use clauses for some time.[20] While the federal government has an inherent power to take property, Article I, Section VIII, of the federal Constitution grants state legislatures the power to define by statute what constitutes a public use.[21] Further, because states have the power to condemn, they may statutorily delegate that power out to counties, cities, special districts, and public-utility corporations.[22] Despite humble beginnings, drafted to limit the government's power to seize private property, federal courts have broadened the definition of public use to an unrecognizable extent.[23]

This broadening began in 1954 when the Supreme Court in *Berman v. Parker*[24] eliminated the distinction between "public interest," "public welfare,"

---

18. U.S. CONST. amend. XIV; *see also* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 156, 158 (1896) (detailing the components of Fourteenth Amendment).

19. U.S. CONST. amend. V ("[N]. . .or shall private property be taken for public use . . ."). *See also* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 683 (1896) (holding "[n]o narrow view of the character of this proposed use should be taken"); Berman v. Parker, 348 U.S. 26, 102–03 (1954) (holding it is "within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled").

20. *See* Kelo v. City of New London, 545 U.S. 469, 480 (2005) ("[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'") (citing Fallbrook Irrigation Dist., 164 U.S. at 158–64). *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUMBIA L. REV. 782 (1995) (discussing the history of the Takings Clause).

21. *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power To . . . collect [and] . . . provide for the common Defense and General Welfare of the United States . . . .").

22. *See State Laws on Eminent Domain*, USLEGAL, https://eminentdomain.uslegal.com/state-laws-on-eminent-domain/ [https://perma.cc/8N7A-UGQM] (describing how states delegate eminent domain power).

23. *See, e.g.*, *Kelo*, 545 U.S. at 483 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

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

and "public purpose" in defining public use.[25] This decision established satisfaction of the public use requirement if the "use of property would further some public purpose or generally promote welfare . . . ."[26] Later in 1984, the Supreme Court expanded the public use definition in *Hawaii Housing Authority v. Midkiff*[27] by holding the government itself is not required to use the condemned property to justify the taking.[28] In *Midkiff*, the Hawaii Legislature asserted eminent domain authority by taking title in real property from lessors and transferring it to lessees to reduce the concentration of land ownership in the state.[29] In the Court's words, "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose."[30] *Midkiff* forced the reality that condemnors could rightfully take property even if the government itself did not intend to use it, as long as the taking served generally some public purpose. In *Midkiff*, for instance, attacking the perceived evils of concentrated property ownership in Hawaii served a "legitimate public purpose."[31] Collectively, *Berman* and *Midkiff* show judicial willingness to interpret public use broadly, readily taken far beyond the plain language within the Takings Clause.

Finally, in 2005, the Supreme Court's decision in *Kelo v. City of New London*[32] largely expanded the public use definition.[33] Relying heavily on the reasoning from *Berman* and *Midkiff* in its analysis, the Supreme Court included the government's purpose of increasing economic development as part of the public use definition.[34] In *Kelo*, a city planned for an economic development project, anticipated to create over 1,000 jobs in order to "increase tax and other revenues, and to revitalize an economically distressed

25. *Id.* at 32–33.

26. Taylor Haines, *"Public Use" or Public Abuse? A New Test for Public Use in Light of* Kelo, 44 SEATTLE U. L. REV. 149, 156 (2020).

27. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

28. *See id.* at 244 ("[The] government does not itself have to use property to justify the taking; it's only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.").

29. *See id.* at 233–34 ("[T]he Hawaii legislature . . . created a mechanism for condemning residential tracts and for transferring ownership of the condemned fees simple to existing lessees.").

30. *Id.* at 243–44.

31. *Id.* at 245.

32. Kelo v. City of New London, 545 U.S. 469 (2005).

33. *See id.* at 484 (holding a public purpose satisfies "the public use requirement of the Fifth Amendment").

34. *See id.* at 483–84 ("Because [the economic] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

city . . . ."[35] In doing so, the city asserted its eminent domain authority to acquire fifteen residences and properties from property owners that refused to sell to the project.[36] Ultimately, the Court held the city's economic development plan satisfied the public use requirement.[37] Under the *Kelo* decision, local governments have the authority to condemn private property where the new owners will produce greater profits or "appreciable benefits" to the community using the land than the old owners did. The *Kelo* court measured appreciable benefits in terms of new jobs created, increased tax revenue, and the creation of commercial, residential, and recreational use of the land.[38] The *Kelo* decision shocked the nation—an accepted purpose of increased purely economic development expanded the public use definition to an enormous extent, opening the door even wider for condemnors to step in and flex eminent domain authority.

Despite the vast expansion in accepted public use purpose in *Kelo*, the Court acknowledged each state's freedom "to place further restrictions on exercising [its] takings power."[39] Lawmakers responded to *Kelo* by engaging in a mad dash to create new legislation limiting the potentially dangerous implications of its holding.[40] In the ten years after *Kelo*, forty-five states enacted eminent domain reform laws limiting the scope of public use in some way, most of which were passed in the first three years after the ruling.[41] Texas was one of them.[42] As this Article will show in Part III, for example, Texas's Constitution—amended in response to *Kelo*—states "'public use' does not include the taking of property . . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues."[43]

35. *Id.* at 472.

36. *Id.* at 475.

37. *Id.* at 484, 488–89.

38. *Id.* at 483.

39. Haines, *supra* note 26, at 158. This is arguably the only thing the Court got right in the *Kelo* decision.

40. *Id.* at 159; *see also supra* Part II (discussing *Kelo*).

41. Ilya Somin, *The Political and Judicial Reaction to* Kelo, WASH. POST : VOLOKH CONSPIRACY (June 4, 2015, 1:12 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/ [https://perma.cc/ER2A-9NJY].

42. *See* TEX. CONST. art. I, § 17 (amended 2009) (placing limitations on the definition of public use).

43. *Id.* § 17(b) (amended in 2009).

B. *Just Compensation*

The Fifth Amendment to the United States Constitution states, "[P]rivate property [shall not] be taken for public use, *without just compensation*."[44] While the sovereign right of eminent domain dates back to feudal England,[45] the just compensation requirement is "a more recent historical development."[46] The Fifth Amendment's just compensation requirement applies "to all the states via the Fourteenth Amendment, as incorporated by Supreme Court case law."[47] All fifty states follow their "own constitutional or statutory eminent domain laws that similarly limit state and local government exercise of the eminent domain right."[48] One such limitation is governments must compensate landowners when taking their land pursuant to eminent domain authority.[49] Effectively, "the "landowner-friendly compensation principle tempers the otherwise harsh power of the government to take an individual's private property."[50]

The United States Constitution and many state constitutions preface "compensation" with terms such as "just" or "due," indicating the amount "must ultimately be fair for both the landowner and the government."[51] For example, the Texas Constitution requires "adequate compensation."[52] The policy rationale behind these modifications stems from the reality that condemnation is a legally forced sale, not an arm's length transaction between a willing buyer and a willing seller.[53] Thus, the role of just compensation is to put the landowner in the same pecuniary position as he or she would be,

44. U.S. CONST. amend. V (emphasis added).

45. *See* Benson, *supra* note 8, at 424–30.

46. Christopher A. Bauer, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, 2003 B.Y.U. L. REV. 265, 272 (2003) ("[A]s late as the Civil War years, some state governments were exercising their eminent domain right without paying compensation.").

47. *Id.*; U.S. CONST. amend. XIV.

48. Bauer, *supra* note 46, at 272.

49. *Id.*

50. *Id.*

51. *Id.* at 272–73; *see also*, U.S. CONST. amend. V; ILL. CONST. art. 1, § 15 (stating the compensation required is "just compensation"); IOWA CONST. art. 1, § 18 (calling for "just compensation"); KAN. CONST. art. 12, § 4 (requiring "full compensation"); VT. CONST. ch. I, art. 2d (necessitating "equivalent in money").

52. TEX. CONST. art. I, § 17(a) (amended 2009).

53. *See* Jackson R. Willingham, *Fairness, Transparency, and Accountability: Where Are They in the Texas Oil and Gas Condemnation Process?*, 72 BAYLOR L. REV. 212, 213 (2020) (describing the reality of eminent domain versus a typical sale).

had the taking not occurred.[54] To achieve this, the condemnor pays the property owner the fair market value of the taken property on the date of valuation, or "'what a willing buyer would pay in cash to a willing seller'" at the time of valuation.[55] As this Article will discuss below, pertaining to the issue that is the crux of this Article, there are nuances among valuation approaches throughout the United States, and some, more than others, lead to consistency and fairness in the valuation process.

III. A LOOK AT TEXAS EMINENT DOMAIN LAW, PAST AND PRESENT PUBLIC USE

A. *Public Use*

As defined by the Texas Constitution, "public use" is the "ownership, use, and enjoyment of the property" by the government or another entity granted eminent domain power.[56] Article I, Section 17(a) of the Texas Constitution allows for the takings of property (1) for public use by the State, its political subdivision, the public at large, or an entity granted eminent domain authority by the State; and (2) to eliminate "urban blight on a particular parcel of property."[57] Similar to most states, the Texas legislature did not codify the entities possessing eminent domain authority.[58] Instead, the Texas Comptroller's office maintains a list of the entities that applied for and currently possess eminent domain authority.[59] In the context of oil and gas, "the Texas legislature has provided three different classifications where oil

54. *See* Almota Farmers Elevator & Warehouse Co. v. United States., 409 U.S. 470, 473–74 (1973) (discussing how just compensation attempts to place property owners in similar financial situation had the taking not occurred).

55. *See* Kirby Forest Indus. Inc., v. U.S., 467 U.S. 1, 10 (1984) (internal quotation marks omitted) (quoting United States v. 564.54 Acres of Land, 441 U.S. 506, 511–13 (1979)) (providing insight into how property owners are compensated during the takings process).

56. TEX. CONST. art. I, § 17(a); ASHLEY, ET AL., *supra* note 3, at 8.

57. TEX. CONST. art. I, § 17(a).; *see also* Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L. J. 1119, 1121 (2011) (stating the removal of "blight" goes to the "notion that certain physical, social, and economic conditions . . . on the way to likely becoming a slum, present[] a danger for cities and a threat to public health, safety and general welfare.").

58. ASHLEY, ET AL., *supra* note 3, at 8.

59. *Id.*; *see also Comptroller's Online Eminent Domain Database (COEDD)*, TEX. COMPTROLLER OF PUB. ACCTS., https://coedd.comptroller.texas.gov/ [https://perma.cc/SA5L-WWQS] (noting the Texas Comptroller's office has an online searchable list of "entities that have reported their eminent domain information").

and gas companies may acquire eminent domain authority: common carriers, public utilities, and gas corporations."[60]

The Texas Natural Resources Code defines what constitutes a common carrier, including:

> owning, operating, or managing a pipeline or the transportation of (1) crude petroleum to or for the public [for hire], or engaging in such business [of transporting crude petroleum by pipeline]; (2) crude petroleum to or for the public [for hire] when the pipeline is constructed on, over, or under a public road or highway; (3) crude petroleum to or for the public, which is or may be constructed, operated, or maintained across a right-of-way of a railroad, corporation, or other common carrier; (4) crude petroleum from an oil field or place of production to any distributing, refining, or marketing center or reshipping point under agreement; (5) coal; (6) carbon dioxide or hydrogen; or (7) feedstock for carbon gasification.[61]

Although the seven common carrier designations listed appear straightforward enough, Texas courts inconsistently interpret Section 111.002 , representing a give-and-take by courts in the application of Texas property owner rights.

B. *Just Compensation*

Article I, Section 17 of the Texas Constitution promises "[n]o person's property shall be taken . . . without adequate compensation being made . . . ."[62] Texas statutes assess compensation in terms of "local market value"[63]—a definition expanded upon by case law as "the price the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one [who desires to buy, but] is under no necessity of buying."[64] Importantly, "adequate compensation" in Texas excludes an award of attorney's fees, causing financial burden to landowners

60. Willingham, *supra* note 53, at 213; TEX. NAT. RES. CODE ANN. § 111.019; TEX. UTIL. CODE ANN. §§ 121.001, 181.004.

61. Willingham, *supra* note 53, at 216.

62. TEX. CONST. art. I, § 17(a).

63. *See* TEX. PROP. CODE ANN. § 21.042(b) ("If an entire tract or parcel of real property is condemned, the damage to the property owner is the local market value of the property at the time of the special commissioner's hearing."). *See also Landowner's Bill of Rights*, Tex. ATT'Y GEN. (Jan. 2022), https://texasattorneygeneral.gov/sites/default/files/files/divisions/general-oag/landowners-bill-of-rights-2022.pdf [https://perma.cc/8V6K-CTSR] (providing for one's entitlement to appropriate compensation if their property is taken).

64. State v. Carpenter, 89 S.W.2d 194, 202 (Tex. 1936).

wishing to challenge government takings.[65] To determine adequate compensation, Texas assesses "the measure of damages for property taken in condemnation [as] the difference in the market value of the property immediately before and immediately after the date of taking."[66]

The Texas Property Code also requires the property owner receive compensation "for the injury resulting from the condemnation."[67] In *State v. Carpenter*,[68] the seminal Texas Supreme Court case in determining compensation, the court disregarded subjective worth of the property in favor of market price and depreciation in market value, "rather than to abstract questions as to what [the jury] may or may not consider . . . in assessing damages."[69] This assessment accounts for normal discussions between a willing buyer and willing seller in a voluntary transaction, excluding "remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property."[70] Rather, relevant matters include "suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value."[71] Considering the *Carpenter* standard, adequate compensation lives up to its name—surely adequate but not purporting to go any further to ensure fairness in the Texas eminent domain compensation analysis.

C. *The "Give-and-Take" of Texas Eminent Domain Law*

Texas firmly protects certain individual rights, as if they are fundamental to calling oneself a Texan—specifically, rights pertaining to guns and

65. Paige Boldt, *Condemning Fair Market Value: An Appraisal of Eminent Domain's "Just Compensation,"* 1 TEX. A&M J. PROP. L. 131, 148 (2012).

66. *Id.* at 148–49.

67. *Id.* at 148; TEX. PROP. CODE ANN. § 21.042(c).

68. *Carpenter*, 89 S.W.2d at 194.

69. *Id.* at 199. In *Carpenter,* the State condemned 8.03 of the Carpenters' 240 total acres. *Id.* at 196. The Texas Supreme Court found issue with the trial court's jury instruction to consider the value of a part taken from the whole tract as well as the consequential damages to the remainder of the land. *Id.* This instruction, argued the court, allowed the opportunity for double damages. *Id.* at 196–97. To eliminate this opportunity, the court developed the "severed land" doctrine: juries are to value damages by calculating "the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after . . . consider[ing] the nature of the improvement, and the use" of the land. *Id.* at 197.

70. Michael C. Singley, *The Road to Nowhere: The Texas Supreme Court Departs from the Majority Rule by Limiting Highway Condemnation Damages in State v. Schmidt*, 14 REV. LITIG. 519, 525–26 (1995).

71. *Id.* at 525.

property.[72] Texas is notorious for enacting some of the most permissive gun laws in the country, continuously receiving an "F" from the Giffords Law Center to Prevent Gun Violence.[73] Further, Texan culture is adamant about property rights, clear in the state's "Castle Doctrine," which gives property owners the right to use deadly force to defend themselves while on their own property, without first requiring property owners to attempt to retreat.[74] Considering the preceding points, the Texas judiciary and legislature perceive Texan property rights as worth fighting—or even killing—for. Where then, if anywhere, does that same gusto preside in the law of eminent domain? As this Article will show, Texas eminent domain law falls short of adequately protecting owners of land in Texas, placing them in a cycle that simultaneously gives and takes individual rights.

One example of such a give occurred in 2012 when the Texas Supreme Court established the "Reasonable Probability Test" in *Texas Rice Land Partners v. Denbury Green Pipeline–Texas*, also known as *Texas Rice I*.[75] Prior to this decision, "a Texas pipeline owner could argue that it was a common carrier . . . simply because it had declared itself a common carrier on [the proper] form."[76] In *Texas Rice I*, the court held that to constitute a common carrier with eminent domain authority, the Texas Constitution requires evidence that the "pipeline will probably serve the public, rather than the

72. *See* Jamie Hancock, *What Are the Gun Laws in Texas?*, DALLAS MORNING NEWS (May 24, 2022, 11:06 PM), https://www.dallasnews.com/news/politics/2022/05/24/what-are-the-gun-laws-in-texas/ [https://perma.cc/5URA-HKY9] (quoting Texas Governor Greg Abbott, who proclaimed, "Surely . . . no state in America" has "ever done as much [t]o protect[] gun rights").

73. *See Gun Laws By State,* GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/ [https://perma.cc/83SR-HQJ9] (noting that Texas gun laws have become even more permissive in recent years, despite multiple high-profile mass shooting incidents); *see also* Hancock, *supra* note 72 (ascribing the lackluster rating from Giffords to a lack of universal background checks on gun purchases in Texas).

74. *See* TEX. PENAL CODE ANN. § 9.41 (instructing force against another is justified as long as there is reasonable belief by the property owner that the force was immediately necessary to protect their property).

75. *See* Tex. Rice Land Partners v. Denbury Green Pipeline–Tex. (Tex. Rice I), 363 S.W.3d 192, 202 (Tex. 2012) (establishing a reasonable probability of public use must exist to qualify as a common carrier).

76. Austin Brister, *Denbury v. Texas Rice: Clarifying the Test for Common Carrier Status, Power of Eminent Domain*, OIL & GAS L. DIG. (Jan. 18, 2017), https://oilandgaslawdigest.com/primers-insights/denbury-v-texas-rice-clarifying-test-common-carrier-status-power-eminent-domain/#:~:text=The%20Texas%20Supreme%20Court%20reversed,forth%20in%20Texas%20Rice%20I [https://perma.cc/7FVZ-Z3AZ].

builder's exclusive use."[77] The Texas Supreme Court found the pipeline's intent to negotiate with unaffiliated parties established merely a "possibility," and not a "reasonable probability," that it would eventually serve the public.[78] In effect, the court disallowed the designation of a common carrier with eminent domain authority.[79] The court then remanded the case to the trial court for further proceedings.[80]

When *Texas Rice II* made its way back up in 2017, the Texas Supreme Court exercised a take when it found the "Reasonable Probability Test" to require objectivity, eliminating subjective considerations altogether.[81] This did away with any requirement of proof that the pipeline's requisite intent to serve the public existed before construction.[82] Further, the court held that public use did not need to be "direct, tangible, or substantial."[83] Instead, "evidence establishing a reasonable probability that the pipeline will, at some point after construction, serve even one customer unaffiliated with the pipeline owner is substantial enough to satisfy public use" under *Texas Rice I*.[84] Reactions to *Texas Rice I* and *II* vary because, some believe post-2017, it is "far easier to condemn property and represent a windfall for pipeline companies at the expense of private property rights," whereas others argue "it is still significantly more difficult for a pipeline to condemn property" than in pre-*Texas Rice I* Texas.[85]

Texas has further given to landowners by keeping them informed of their property rights.[86] A tangible example of this is Texas providing landowners with information to verify the eminent domain authority seeking to

77. Brister, *supra* note 76; *see also Tex. Rice I*., 363 S.W.3d at 201–02 (holding there needs to be a probability of public use for the pipeline to be considered public use).

78. *Tex. Rice I*., 363 S.W.3d at 203 (stating a possibility with no evidence to back it up is not the same as a reasonable possibility).

79. *Id.* at 204 ("If a landowner challenges an entity's common carrier designation, the company must present reasonable proof . . . that the pipeline will indeed transport 'to or for the public for hire.'").

80. *Id.*

81. *See* Denbury Green Pipeline–Tex., L.L.C. v. Texas Rice Land Partners (Tex. Rice II), 510 S.W.3d 909, 915 (Tex. 2017) (stating outright the test established by *Texas Rice I* is objective).

82. *See id.* at 916 (agreeing it is the "evidence of post-construction contracts [that] is relevant to the common-carrier analysis").

83. *Id.* at 917.

84. *Id.*

85. Brister, *supra* note 76.

86. *See* Boldt, *supra* note 65, at 150–51 (discussing the state's creation of a database of condemning authorities to help keep landowners aware and appraised of their rights from the Landowner's Bill of Rights).

condemn their land through a database of condemning authorities.[87] Further, in 2008, the Texas Attorney General's Office effectuated the Texas Landowner's Bill of Rights to explain the condemnation process and outline property owners' rights when faced with a taking.[88] Texas even codified this particular "give"—statute requires presentation of this Bill of Rights to landowners by the condemning authority either before or at the same time of the initiation of condemnation proceedings.[89]

Another example of a "give" by the Texas legislature occurred in the aftermath of *Kelo*, where Justice Stevens informed the states they could create "additional eminent domain restrictions through state law."[90] In 2009, Texas amended its constitution to state "'public use' does not include the taking of property . . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues."[91] Post-*Kelo* reform also improved the procedure and process required for condemnation, creating more stringent public notice and hearing requirements.[92] This reform also recognized explicit voting mandates, authorizing official bodies as a pre-condition of "the use of eminent-domain power by governmental entities."[93]

While the legislature's procedural "gives" level out the playing field for landowners once the condemnation process begins, the flip side of the coin is that recent Texas reform "do[es] little to address the entities that are allowed to wield eminent domain authority or the compensation involved."[94] Thus, a disconnect lies within the fact that Texas, while strong in its protection of private property rights, falls short in its protection of property owners in common carrier and compensation determinations.

The rest of this Article will show the Texas Supreme Court's recent *Hlavinka v. HSC Pipeline Partnership, LLC* decision continues Texas's

87. *See* COEDD, *supra* note 59 (demonstrating the searchable database available to Texans for eminent domain authority).

88. *See* Boldt, *supra* note 65, at 150–51 (placing in context the creation of the Texas Landowner's Bill of Rights); *Landowner's Bill of Rights*, *supra* note 63 (listing the rights property owners in Texas must be informed of before a taking can be completed).

89. *See* TEX. GOV'T CODE ANN. § 402.031 (explaining how the Landowner's Bill of Rights Statement is to be properly prepared by the state); TEX. PROP. CODE ANN. § 21.0112 (explaining how the physical copy is to be disseminated to a property owner subject to a taking).

90. Boldt, *supra* note 65, at 151; Kelo v. City of New London, 545 U.S. 469, 489 (2005).

91. TEX. CONST. art. I, § 17(b).

92. *See* Boldt, *supra* note 65, at 152 (discussing Senate Bill 18 and the goals of the Texas legislature).

93. *Id.*

94. *Id.* at 153.

reputation of giving-and-taking of rights in the eminent domain sphere but finally shows a step in the right direction in terms of adequate compensation, introducing an emphasis toward greater fairness in the valuation process. Despite the give from *Hlavinka*, this Article argues it is imperative to consider alternatives to the valuation techniques currently governing compensation in eminent domain proceedings. It is an undeniable reality that Texas's "population is growing at a rapid pace," and accompanying this reality is an increasing need for more land and resources "such as fossil fuels and highways."[95] It is also undeniable that "private property rights are equally important" in Texas and therefore warrant protection.[96] Specifically, Texas landowners deserve adequate and fair compensation when forced to relinquish their land.

IV. THE IMPACT OF *HLAVINKA V. HSC PIPELINE PARTNERSHIP* ON THE EMINENT DOMAIN "GIVE-AND-TAKE" IN TEXAS

At the beginning of 2022, the Texas Supreme Court decided *Hlavinka v. HSC Pipeline Partnership, LLC*[97] answering two main questions: (1) whether a pipeline transporting polymer-grade propylene constitutes a common carrier when the pipeline possesses an ownership interest and (2) "whether a landowner may testify to recent, arms' length sales of pipeline easements as evidence of the market value for such an easement across his [or her] property."[98]

First, the Hlavinkas argued the court should not consider the pipeline a common carrier because polymer-grade propylene is not an "oil product" as specified in the Texas Business Organizations Code Section 2.105, which grants condemnation authority for common carrier pipelines that transport the products it identifies.[99] Derived "from propane and natural gas liquids, which are components of crude petroleum," polymer-grade propylene is

95. Willingham, *supra* note 53, at 213. Consider, for example, the Texas Central Railway's high speed rail project quickly approaching in Texas, which intends to provide a safe, efficient, and quick link between Houston and Dallas. *See generally* Aaron Mitchell, *High-Speed Rail: An Opportunity for Texas Eminent Domain Reform*, 5 TEX. A&M J. PROP. L. 901 (2019) (targeting areas for eminent domain reform within the high-speed rail industry).

96. Willingham, *supra* note 53, at 213.

97. Hlavinka v. HSC Pipeline P'ship, LLC, 650 S.W.3d 483 (Tex. 2022).

98. *Id.* at 487.

99. *Id.* at 493; *see also* TEX. BUS. ORG. CODE § 2.105 ("[E]ntities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions ha[ve] all the rights and powers conferred on a common carrier by Sections 111.019–111.022, Natural Resources Code.").

made "by further distilling refinery-grade propylene into streams of propane and propylene using a catalytic process."[100] The Hlavinkas argued because polymer-grade propylene is not naturally occurring, it could not fall under the category of "oil product."[101] The court, however, agreed with the lower courts finding "because the Natural Resources Code defines oil as 'crude petroleum oil,' and polymer-grade propylene is a product derived from crude oil's refinement and distillation . . . it qualifies as an 'oil product' under" Section 2.105.[102]

Second, the Hlavinkas argued the court should not consider the pipeline a common carrier because it only served one customer.[103] Specifically, the Hlavinkas asked the court to expand the conditions imposed by *Texas Rice I* by limiting "pipelines for public use to those that carry products for which a pipeline or its affiliate never possess an ownership interest."[104] This expansion would impose an additional requirement to *Texas Rice I*: "the manufacturer of the transported product must also have no affiliation with the pipeline owner."[105] Ultimately, the court refused to give, rejecting the Hlavinkas' proposed expansion and upholding the *Texas Rice I* and *II* decisions in finding because HSC's pipeline served "even one customer unaffiliated with the pipeline owner," it satisfied public use.[106]

Third, in arguing for a higher valuation of his land, Mr. Hlavinka wished to offer evidence regarding two prior pipeline easements he negotiated with other pipelines in arms' length transactions.[107] The trial court did not allow this testimony, instead admitting only evidence relevant to the agricultural value of the property taken.[108] It ultimately awarded the Hlavinkas $132,293.36 in compensation, only $23,326 of which reflected the perceived fair market value of the easement.[109] On appeal, HSC argued the highest and best use of the Hlavinka easement was agricultural, therefore that use alone should determine market value.[110] Instead, the court found it relevant

100. *Hlavinka*, 650 S.W.3d at 493.
101. *Id.*
102. *Id.* at 493 (quoting TEX. NAT. RES. CODE § 115.001(5)); TEX. BUS. ORG. CODE § 2.105.
103. *Hlavinka*, 650 S.W.3d at 494–95.
104. *Id.* at 495.
105. *Id.* at 494.
106. *Id.* at 495.
107. *Id.* at 488. One prior pipeline easement eventually sold at $3.45 million, and the other at $2 million. *Id.*
108. *Id.* at 490.
109. *Id.*
110. *Id.* at 497.

that Mr. Hlavinka purchased the tract of land back in 2001 for the purpose of selling pipeline easements—its location near the Texas Gulf Coast made this a particularly lucrative endeavor.[111] The court opined, "[a]rms' length sales to []. . . other pipeline companies that were voluntary, contemporary, local, and involve land with similar characteristics are some evidence demonstrating that the highest and best use of the property was as a pipeline easement."[112] In effect, the judiciary found Mr. Hlavinka's testimony—that he could have sold the easement to a different pipeline at a far higher price than its agricultural value—incredibly relevant to a fair market value analysis.[113]

The *Hlavinka* decision reinforces the perpetual give-and-take by the Texas judiciary in eminent domain rights. As discussed, the court answered both presented questions in the affirmative. The court "took" by interpreting Section 2.105's oil product to include an unnatural, refined petroleum by-product, effectively expanding the definition of products that qualify for transportation by common carriers exercising eminent domain authority.[114] On the flip side, the court "gave" by allowing a landowner to testify outside of the agricultural value of the property taken, in effect giving the landowner the chance to offer evidence of sales of other pipeline easements on the same property.[115] The consideration of comparable sales to support the landowner's opinions regarding fair market value reflects a willingness by the judiciary to expand upon the fair market value analysis, opening the door for fairness considerations to enter.

V. VALUATION APPROACHES ACROSS THE UNITED STATES

States have adopted one of two dominant approaches regarding valuation of condemned land.[116] Twenty-nine states, including Texas, use a "Broad Instruction Approach," providing minimal guidance on what to base just compensation on, outside some version of "fair market value."[117] Under

111. *Id.*
112. *Id.*
113. *Id.* at 497–99.
114. *Id.* at 493–95.
115. *Id.* at 497–99.
116. *See* ASHLEY, ET AL, *supra* note 3 at 5 (laying out the number of states following the "Broad Instruction Approach" versus the "Factor Based Approach"). There is a third approach called the "Specific Rates Approach," which "only applies to certain types of property" and is only used by six percent of states. *Id.* at 14–15. Further, two states' statutes, Delaware and Georgia, remain silent regarding land valuation. *Id.* at 14.
117. *Id.* at 15.

the Broad Instruction Approach, the state Special Commissioners hold "considerable discretion in determining the land valuation without any specific factors that they must follow."[118] Alternatively, seventeen states opt for the "Factor Based Approach," which "specifically lays out what considerations [or factors] . . . the court [should follow] in determining the fair market value of the land."[119] With this approach, discussions go further than the current use of the land, facilitating consideration of relevant information in every condemnation case.[120] Because differing amounts of judicial discretion are involved, the Broad Instruction Approach may lead to inconsistencies, whereas the Factor Based Approach likely promotes reliability and consistency in application.

Texas, in its application of the Broad Instruction Approach, refers to "'local market value' at the time of the taking as the value of [adequate] compensation."[121] Although not specifically defined, local market value includes "any injuries or benefits from the condemnation and its effects on the use or enjoyment of the parcel."[122] In interpreting local market value, the Texas Supreme Court repeatedly upholds the "willing seller-willing buyer" test from *State v. Carpenter*.[123] In *State v. Schaefer*, the court directed "[t]he entire focus in determining market value . . . on the property taken and the property remaining."[124] Thus, the construction cost of rebuilding a new structure at a different location to replace the one condemned bore "doubtful relevance to the market value of the condemned structure."[125] Further, in *State v. Walker*, the Court only allowed evidence about the property's actual or probable future use, omitting evidence of its more valuable theoretical use.[126] Similarly, in *State v. Travis*, the court held "lost business profits are not compensable per se under the condemnation statutes, and [] evidence of lost profits is relevant only as it might affect the market value of the

118. *Id.* at 5.

119. *Id.*

120. *Id.*

121. *Id.* at 15; TEX. PROP. CODE § 21.042(b).

122. *See also* ASHLEY, ET AL., *supra* note 3, at 15 (suggesting a practical definition of local market value as used in the Texas statute).

123. *See* State v. Carpenter, 89 S.W.2d 194, 201–02 (Tex. 1936) (providing a list of special questions to consider); State v. Schaefer, 530 S.W.2d 813, 816 (Tex. 1975) (using the "willing seller-willing buyer test of market value"); State v. Walker, 441 S.W.2d 168, 173 (Tex. 1969) (applying the willing seller-willing buyer test).

124. *Schaefer*, 530 S.W.2d at 817.

125. *Id.*

126. *See* Boldt, *supra* note 65, at 149 (explaining how *Walker* evinces a sustained dedication to the *Carpenter* test by the Texas Supreme Court); *Walker*, 441 S.W.2d at 175.

property."[127] It is indeed evident in Texas case law that while the "fair market value" principle guides compensation determinations, courts exercise flexibility and great latitude in its interpretation, basing their overall conclusions in alignment with the *Carpenter* rationale—what any particular judge believes a willing buyer and willing seller would consider in negotiations regarding market value.[128]

In contrast, the Factor Based Approach comprises statutes providing explicit considerations for use in determining compensation.[129] This approach allows courts to exercise flexibility in considering characteristics of property affecting value, including improvements, growth of crops, and goodwill of a business.[130] Eleven of the seventeen Factor-Based states allow for consideration of a variety of improvements on the property.[131] Four states' statutes—California, Kansas, Nebraska and Wyoming—explicitly compensate landowners for growing crops not yet harvested on the condemned property.[132] Other statutes include location-unique factors for courts to consider in valuation determinations, i.e., Alaskan and Arizonian statutes include the cost to build fences and cattle guards if the condemned property is for a railroad.[133] Kansas provides an extensive list of factors, including "access to the property, aesthetics, and use of the property."[134] These factors go further than what a willing buyer and willing seller would consider in determining market value explicitly. Instead, outside (fairness) considerations permeate the analysis. In effect, the Factor Based Approach

127. Boldt, *supra* note 65, at 149–50 (citation omitted); State v. Travis, 722 S.W.2d 698, 699 (Tex. 1987).

128. *Carpenter*, 89 S.W.2d at 201–02; *Walker*, 441 S.W.2d at 173 (citing City of Austin v. Cannizzo, 153 Tex. 324 (1954)).

129. ASHLEY, ET AL, *supra* note 3, at 16.

130. *See id.* (defining goodwill of a business "as the value of a business because of its location and reputation").

131. *Id.*

132. *Id.*; *see also* CAL. CODE CIV. PROC. § 1263.250(a) ("The acquisition of property by eminent domain shall not prevent the defendant from harvesting and marketing crops planted before or after the service of summons."); KAN. STAT. ANN. § 26-513(d)(12) (considering "[l]oss of or damage to growing crops" in determining total compensation); NEB. REV. STAT. § 76-710 (permitting damages for destroyed crops on condemned property); WY. STAT. ANN. § 1-26-709 (allowing "[c]ompensation for growing crops and improvements").

133. ASHLEY, ET AL, *supra* note 3, at 16–17. *See also* ARIZ. REV. STAT. ANN. § 12-1122 (assessing "the cost of . . . fences along the line of the railroad, and the cost of cattle guards where fences may cross the line of the railroad" in determining damages); ALASKA STAT. § 09.55.350 ("If the use is for railroad purposes, the plaintiff may, at the time of or before the payment, elect to build the fences and cattle guards.").

134. ASHLEY, ET AL, *supra* note 3, at 17; KAN. STAT. ANN. § 26-513.

humanizes the eminent domain process, giving landowners an idea and a say into the valuation process affecting their property.

The right of private companies to come in and take land the landowner does not desire to sell is an extremely high prerogative protected by statute.[135] Statute should, at the very least, allow for predictability in outcome and compensation to the disadvantaged landowner. Thus, the Factor Based Approach, which truly allows for consistent outcomes, is the better valuation approach, because it adds an element of fairness to the adequate compensation analysis—an element the Broad Instruction Approach severely lacks.

VI. THE ULTIMATE "GIVE": A FACTOR BASED VALUATION PROPOSAL FOR TEXAS

A. *The Bar is on the Floor: What Texas Considers "Adequate" Hardly Achieves the Bare Minimum of Fairness*

Owners of property in Texas deserve a fair market valuation calculation that reflects and adheres to the high cultural value Texans place on their property and land ownership rights. As discussed above, the Texas legislature has, in recent years, taken steps to reform eminent domain law procedurally, allowing landowners better opportunity to stay informed with the process and attain more leverage in the case of companies wanting to seize private land.[136] In fact, Texas enacted multiple bills in 2021 that greatly affect eminent domain issues in Texas, including: (1) HB 2730, creating Landowner's Bill of Rights, outlining all condemnation processes; (2) HB 4107, providing notice and indemnification rules for common carrier pipeline entities; (3) SB 721, requiring entities to disclose to the landowner any and all current and existing appraisal reports produced or acquired by the entity, used in determining value; and (4) SB 726, requiring entities to complete actions to show "actual progress" on a condemned property.[137] While these

135. *See* TEX. NAT. RES. CODE §§ 111.019 (a)–(b) (detailing the breadth of eminent domain rights and powers).

136. *See supra* Part III(C) (analyzing how Texan lawmakers have moved to align the premium placed in the state's culture on individual rights with eminent domain law).

137. *See* Katharine D. David et al., *New Eminent Domain Laws From the 2021 Texas Legislative Session*, HUSCH BLACKWELL (July 7, 2021), https://www.huschblackwell.com/newsandinsights/new-eminent-domain-laws-from-the-2021-texas-legislative-session [https://perma.cc/534R-RL5E] (giving capsule summaries of the laws pertaining to eminent domain that were passed during this session);

statutory reforms take considerable strides toward procedural fairness, substantive—monetary—fairness is of equal importance.

The Lone Star State is special because Texan pride rings throughout. Texans boast that here, everything is bigger and better. The adjective adequate, however, does not, on its face, scream bigger and better. While the Texas Constitution calls for adequate compensation for condemned property, what exactly constitutes adequate is subject to interpretation.[138] Is adequate compensation merely an arbitrary amount to calculate with blinders on, neglecting factors the landowner might highly consider when dealing with an arms' length transaction? In other words, does adequate simply mean arriving at the bare minimum valuation, leaving a landowner with far less than they could have bargained for in a willing buyer and willing seller transaction? Or is adequate compensation instead the value arrived at after taking off those blinders, considering, in part, subjective factors—for example, the value of comparable sales and that the landowner could have adapted the property to a more profitable use? Currently, statute adheres to the bare minimum view.[139] To truly live up to the Texas reputation of respect and protection of private, individual rights and to achieve a truly fair calculation of adequate compensation, valuation reform is of paramount importance.

As it currently stands, the Texas Property Code provision governing eminent domain compensation states, "[T]he damage to the property owner is the *local market value* of the property at the time of the special commissioners' hearing."[140] As discussed above, state case law expands upon this "local market value" mandate with the *Carpenter* willing buyer-willing seller test, allowing for consideration of what any particular judge believes a willing buyer and willing seller would factor into their negotiations regarding the calculation of market value.[141] This test excludes "remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present

---

TEX. GOV'T CODE §§ 402.031(b), (c-1), (e), and (f); TEX. PROP. CODE § 21.0113(b); TEX. NAT. RES. CODE §§ 111.019(d)–(g); TEX. PROP. CODE §§ 21.0111(a-1), 21.101(b), (b-1).

138. *See* TEX. CONST. art. 1, § 17(a) (calling for adequate compensation without defining adequate).

139. TEX. PROP. CODE § 21.0113 (b)(B)(i)–(ii), (b)(4)–(b)(5); *see* Boldt, *supra* note 65, at 148 (describing Texas's adequate compensation for eminent domain as "the fair market value of the property taken, plus damages").

140. TEX. PROP. CODE § 21.042(b) (emphasis added).

141. *See* State v. Carpenter, 89 S.W.2d 194, 201–02 (Tex. 1936) (providing a list of questions that provide flexibility).

market value of the property."[142] Also discussed above, the *Hlavinka* court arguably tread beyond the parameters of *Carpenter* by allowing a landowner to testify outside of the agricultural value of the property taken, giving Mr. Hlavinka the chance to offer evidence of sales of other pipeline easements on the same property.[143] This Texas Supreme Court elaboration and adaptation is helpful and ultimately represents a give to Texas landowners.

Despite this give, a question still begs to be asked: Wouldn't it be easier and fairer if the Texas legislature adopted a Factor Based Approach already including considerations such as the one adopted in *Hlavinka*? Wouldn't it save Texas landowners and condemning entities alike time and money in the long run—especially in terms of litigation expenses—by statutorily setting forth a nonexclusive list of factors courts should consider in valuing condemned property? The following subsection sets forth an approach such as the one described.

B. *The Proposal*

Of the states using the Factor Based Approach, Kansas most clearly and distinctly sets forth factors for consideration in ascertaining compensation.[144] Because of the Kansas statute's clarity and for reasons to follow, this Article argues for the Texas adoption of the Factor Based valuation approach, to be modeled after Kansas's statute.

Section 26-513 of the Kansas Statute asserts a nonexclusive list of factors for consideration if such factors are shown to exist.[145] Right from the jump, the "nonexclusive" language is crucial. A nonexclusive list of factors signals to the judiciary that although the following factors are considerations the legislature found important and are reflective of landowners' priorities, the considerations do not have to stop there. The nonexclusive language opens the door for fairness considerations to step in. A likely counterargument is nonexclusive language also unwittingly opens the door for unrestrained judicial discretion, and in turn, inconsistent results—the main problem with Texas's current Broad Instruction Approach. This Article argues while nonexclusive opens the door to both fairness considerations and judicial discretion, one will naturally apply a check on the other, as seen in *Hlavinka* where the Texas Supreme Court used its discretion to allow a consideration that

142. Singley, *supra* note 70, at 525–26.

143. Hlavinka v. HSC Pipeline P'ship, LLC, 650 S.W.3d 483, 490 (Tex. 2022).

144. KAN. STAT. ANN. § 26-513.

145. *Id.*

led to a far fairer outcome for the landowner. In practice, the nonexclusive language, paired with a comprehensive list of factors, does not impair fairness through judicial discretion but rather increases fairness.

Texas should also adopt the following factor, taken from the Kansas statute: "The most advantageous use to which the property is reasonably adaptable."[146] This factor directly contradicts the "highest and best use" standard currently used by Texas courts, whereby "[a] factfinder should consider the highest and best use of the land in determining the market value of the property taken."[147] Under this standard, "[t]he existing use of the land is presumed [] its highest and best use, but the landowner can rebut this presumption."[148] Adoption of this Kansas factor creates favor for the landowner, because the presumption that *existing use* is the land's highest and best use would no longer serve as a valuation constraint. For example, *Hlavinka* would have turned out differently if Texas statute included this factor. Mr. Hlavinka, throughout multiple appeals, rebutted the presumption that the land's current agricultural use was "highest and best," finally prevailing on the point at the state's highest court, which opined "[a]rms' length sales to . . . other pipeline companies that were voluntary, contemporary, local, and involve land with similar characteristics are some evidence demonstrating that the highest and best use of the property was as a pipeline easement."[149] A Texas statute allowing for consideration of "the most advantageous use," rather than the judiciary using its discretion to adopt the "highest and best [(current)] use,"[150] would potentially spare landowners such as Mr. Hlavinka time, money, and energy in negotiating valuation with condemning entities.

Another prudent factor for Texas to adopt is Section 26-513(d)(13): "That the property could be or had been adapted to a use which was profitably carried on."[151] The most notable portion of this factor—the most important portion to replicate—is the verbiage "could be or had been." Like the Kansas factor discussed above, this language accounts for future

146. KAN. STAT. ANN. § 26-513(d)(1).

147. *Hlavinka*, 650 S.W.3d at 496 (quoting Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC, 386 S.W.3d 256, 262 (Tex. 2012)).

148. *Id.* (quoting Exxon Pipeline Co v. Zwahr, 88 S.W.3d 623, 628 (Tex. 2002)).

149. *Id.* at 497.

150. *See id.* (reiterating the current Texas standard).

151. KAN. STAT. ANN. § 26-513(d)(13).

profitable prospects—something current Texas law does not do.[152] Under such a factor, courts could rightfully consider, within reason, uses for the land beyond what the average person or condemning authority may find relevant. From a policy standpoint, this is crucial because landowners who find themselves subject to condemnation proceedings are unlikely to be in a position where they are ready to part with their land. In fact, it is likely the landowner often, besides grasping the idea of having their land taken away, is also struggling to grasp the condemnor stripping them of their plans, goals, and dreams for their land or property. This factor promotes fairness by giving the landowner the ability to incorporate into the valuation sum the potential profits from an endeavor not yet begun.[153]

Additional notable factors contained within the Kansas statute include access to and appearance of the property remaining; productivity, convenience, "use to be made of the property taken, or use of the property remaining,"[154] "[s]everance or division of a tract";[155] "[l]oss of trees and shrubbery to the extent [] they affect the value of the land taken";[156] "[d]estruction of a legal nonconforming use";[157] "[l]oss of or damage to growing crops"[158] and drains; and "[c]ost of new private roads or passageways or loss" thereof or cost of replacing them.[159] While this Article does not argue for inclusion of every single one of these factors in a Texas factor based valuation statute, inclusion of some, all, or similar factors will go a long way in attaining a fairer measure of adequate compensation.

Although it is unnecessary to codify state supreme court decisions because they are binding upon all lower courts in the state,[160] if the legislature reforms the Texas valuation statute, it should pay attention to the *Hlavinka* factor. As discussed above, the *Hlavinka* decision allows for consideration of landowner testimony regarding prior valuations of other pipelines previously negotiated for and sold by the landowner on the same property in

152. *Id.*; *cf.* TEX. PROP. CODE § 21.042(b) (depicting the language the Texas statute utilized for condemnation, which is unlike the Kansas language).

153. *See* KAN. STAT. ANN. § 26-513(d)(13) (showcasing important language to be included in Texas statutes for condemnation).

154. *Id.* § (d)(4).

155. *Id.* § (d)(6).

156. *Id.* § (d)(7).

157. *Id.* § (d)(9).

158. *Id.* § (d)(12).

159. *Id.* § (d)(15).

160. *See generally* TEX. CONST. art. 5, § I ("The judicial power of this State shall be vested in one Supreme Court.").

third-party, non-condemnation cases. As the court in *Hlavinka* noted, in the typical condemnation case, there is ordinarily no credible evidence to suggest that, if not for condemnation, the landowner could sell a pipeline easement to another.[161] In a case like *Hlavinka*, however, "[s]ales of easements on [the] property to other pipeline companies, combined with the existence of pipelines running parallel and adjacent to [condemnor]'s pipeline, provide some evidence . . . that the [landowner] could have sold to another the easement that they instead were compelled to sell to [condemnor]."[162] Especially critical in oil and gas pipeline condemnation cases, codification of this factor would go a long way to level the playing field for property owners in Texas because it is unfair to force a property owner to sell at a lower sum when private companies will pay far more for similar land.

The current Texas valuation approach and Texas Supreme Court precedent enable—and arguably encourage—condemnors to lowball property owners, knowing that the law, as it stands, is unlikely to shield landowners from abysmal valuation outcomes. Once again, *Hlavinka* offers an apt illustration as the pipeline company valued the easement at $23,000, while the property owner used two recent arms' length easement sales on the same property to arrive at the value of $3.3 million.[163] This huge discrepancy in valuation calculations between private companies and condemning entities indicates the current system enables condemning entities to take advantage of landowners in condemnation proceedings. Inclusion of the *Hlavinka* factor would minimize further litigation on the subject and allow for statutory guidance upfront in negotiations, rather than in the courtroom.

In sum, Texas valuation law requires adoption of a Factor Based Approach that already includes considerations such as the one adopted in *Hlavinka*. Such an approach would save Texas landowners and condemning entities alike time and money in the long run. In addition, it is past time owners of land in Texas receive a fair market valuation calculation reflecting and adhering to the high cultural value Texans place on their individual property and land ownership rights.

161. Hlavinka v. HSC Pipeline P'ship, 650 S.W.3d 483, 498 (Tex. 2022).
162. *Id.*
163. *Id.* at 490.

C. *To Escape the Perpetual "Give-and-Take," Texas Must Limit Judicial Discretion*

Through application of the Broad Instruction Approach, the Texas judiciary is the Texas legislature's accomplice in the game of give-and-take played for years now in the Lone Star State. As hinted at above, the pinnacle of the "Broad Instruction" versus "Factor Based" approach debate lies in the amount of discretion given to the judiciary in determining valuation.[164] Where a state uses a Broad Instruction Approach, statute says to apply some measure of fair market value, with little to no other guidance.[165] Where a state follows a Factor Based Approach, judges receive statutory guidance in the form of factors.[166] These factors effectively allow flexibility but still limit discretion to a great degree.[167] Texas is a state where landowners depend upon individual property rights but also likely see the importance of, or are financially connected to, expansion of the Texas oil and gas trade. In effect, property owners do not argue for an elimination of condemnation authority by any means. Rather, landowners ultimately desire a condemnation system that promotes fairness, transparency, and accountability.

To rally against the phenomenon of "eminent domain abuse," Texas landowners share their stories to the Texas Farm Bureau, an online forum for property owners to address public policy concerns related to private property rights.[168] Stories on the site include that of Harold Pullins, an eighty-one-year-old man from Huntsville, Texas.[169] Mr. Pullins received an extremely low offer for a pipeline easement across his property and subsequently went to court to argue against condemnation.[170] Mr. Pullins ended his story with a gutting conclusion: "I think they're trying to take advantage

164. ASHLEY, ET AL., *supra* note 3, at 5.

165. *Id.*

166. *Id.*

167. *Id.* at 16 (noting the Factor Based Approach "provides some guidance, but still leaves the courts flexibility in determining just compensation").

168. *See Being an Informed Landowner*, TEXAS FARM BUREAU, https://texasfarmbureau.org/eminentdomain/ [https://perma.cc/BKC6-R775] ("Texas Farm Bureau aims to empower landowners through education and informational resources.").

169. Jennifer Dorsett, *Texas Landowners Face Uncertainty with Eminent Domain*, TEXAS FARM BUREAU, https://texasfarmbureau.org/texas-landowners-face-uncertainty-eminent-domain/ [https://perma.cc/2LHS-YRT3].

170. *See generally* Texas Farm Bureau, *Piping Mad | Eminent Domain*, YOUTUBE (Apr. 17, 2019), https://www.youtube.com/watch?v=7EGiB2tqeQ0 [https://perma.cc/48LR-B92W] (giving those interested about eminent domain law a view of the anger takings, which often engender affected citizens).

of me."[171] Another testimony on the site comes from Lynne and Bill Keys of the Abilene area, who now have four pipelines running through their family farm of ninety-five years.[172] Similar to the testimony of Mr. Pullins, Mr. Keys concluded by asserting "they do have the right to take your land, but they don't have the right to take advantage of you."[173] The thread connecting these two landowners, spanning from East to West Texas, is the feeling of helplessness and desperation as the state takes advantage of them in condemning their property for pipeline production. The lowball amounts offered to these property owners only add insult to injury after condemnors disrupt their lives and force them to pay legal fees, while simultaneously watching their land become ripped up and unrecognizable.[174]

As discussed above, Texas recently reformed eminent domain procedure. This procedural reform, implemented after the experiences of the Pullins and Keys families, provides some redress to landowners in similar situations, but the issue of valuation still stands. What these property owners deserve, and what Texas should implement, is a new valuation system that would level the playing field and produce more consistently fair results for owners of property in Texas. A Factor Based Approach would achieve this result by giving the judiciary explicit standards to follow in making value determinations. In summation, the abusive cycle of give-and-take would lose prevalence if the legislature removed some discretion from judicial hands.

VII. CONCLUSION

In the Lone Star State, few ideals sit on as high a pedestal as the individual property right. Texans notoriously feel protective of their land—from commercial farmers and ranchers to those like Mr. and Mrs. Keys who hold farms for decades as a place for their families to grow, expand and create

171. *Id.*

172. *See generally* Texas Farm Bureau, *The Keys for Eminent Domain Reform*, YOUTUBE (Feb. 20, 2019), https://www.youtube.com/watch?v=1ALIDE3Lneo [https://perma.cc/54PX-XAFJ] (providing a visual element to the sensory perception of eminent domain as actually practiced). *See also* Jennifer Dorsett, *Eminent Domain Takes More Than Just Land*, TEXAS FARM BUREAU (Mar. 21, 2019), https://texasfarmbureau.org/eminent-domain-takes-just-land/ [https://perma.cc/88H8-XUXX] (explaining the Keys' land lies in the "heart of the Jim Ned Valley, just outside Abilene").

173. Texas Farm Bureau, *The Keys for Eminent Domain Reform*, YOUTUBE (Feb. 20, 2019), at 00:15–00:20, https://www.youtube.com/watch?v=1ALIDE3Lneo [https://perma.cc/54PX-XAFJ].

174. *See* Dorsett, *Texas Landowners Face Uncertainty with Eminent Domain*, *supra* note 165 (illustrating how Mr. Pullins was forced to hire an attorney to negotiate but still had to watch his taken land be destroyed).

memories. Texans place a similar cultural emphasis on gun ownership, apparent in lenient gun laws and the Castle Doctrine. Dissimilar to Texas gun laws, however, the state's eminent domain laws do not reflect the emphasis put on individual rights.[175] Rather, Texas eminent domain legislation perpetuates a vicious cycle of give-and-take at the expense of property owners in the state. Despite (1) post-*Kelo* landowner-friendly statutory reform, (2) the procedural changes that followed, (3) the Texas judiciary giving and taking in its *Texas Rice I* and *II* decisions, and (4) the Texas Supreme Court's two-in-one give-and-take in the recent *Hlavinka* decision, Texas still has a long way to go in its fight for fair compensation in the eminent domain context.

Despite the pride Texans take in the booming oil and gas market of the state, the system should not enable condemnors to take advantage of the broad Texas valuation statutes to hand out lowball offers to unsuspecting landowners. According to Texas Farm Bureau, 77% of respondents who took their condemnation to court received at least 20% more compensation than the final written offer from the condemnor.[176] Further, only 2% of respondents perceived the initial offer they received as fair, and only 13% believed the final offer was fair.[177] These statistics speak volumes in support of reform. Texas's current use of a Broad Instruction Approach gives far too great a degree of latitude to courts in determining what constitutes fair market value for parcels of land.[178] This approach leads to inconsistent and unfair valuations across the state, as reflected in the statistics.[179] Instead, Texas should adopt a Factor Based Approach, which would limit judicial discretion, allowing for considerations of factors to guide both condemnors in making fair offers upfront, and judges in reigning in condemnation abuses.

175. *See* TEX. CONST. art. I, § 17 (providing an overview of Texas's eminent domain law).

176. TEXAS FARM BUREAU, https://texasfarmbureau.org/eminentdomain/ [https://perma.cc/BKC6-R775].

177. *Id.*

178. ASHLEY, ET AL., *supra* note 3, at 5.

179. *Id.*; TEXAS FARM BUREAU, https://texasfarmbureau.org/eminentdomain/ [https://perma.cc/BKC6-R775].