
COMMENT

IN PURSUIT OF JUST COMPENSATION IN TEXAS: ASSESSING DAMAGES IN TAKINGS CASES USING THE PROPERTY'S TAX-APPRAISED VALUE

ALEXANDER B. LUTZKY*

I. Introduction	106
II. Eminent Domain Law and Texas	107
A. Highest and Best Use Doctrine	109
B. Property Tax Valuation in Texas in Brief	111
III. Analysis	114
A. The Current Trend: Curtail Use of Eminent Domain and Protect Landowners	114
B. The Identical Aims of the Condemnation and Property Tax Valuation Process	116
C. Benefiting from Competing Government Priorities in the Condemnation and Tax Valuation Context	117
D. Reducing Costs in Condemnation Disputes by Limiting Experts	119
E. Limiting the Subjectivity of Land Valuation in Condemnation Suits	120
F. Challenges to the Use of the Property Tax Valuation	123

* The author would like to gratefully thank his wife Julie for her love, patience, and sacrifice. Her support was instrumental in the successful completion of this Comment and the author's legal studies.

1. Weaknesses in the Property Tax Valuation Process	123
2. Application of the Highest and Best Use Doctrine	125
3. Assessing Damages in a Partial Taking	126
4. Addressing the Challenges to Application of the Tax Assessed Value	129
IV. Conclusion	131

I. INTRODUCTION

Eminent domain and the condemnation of private property are controversial issues that fundamentally challenge our belief in the balance of power between the citizen and the state.¹ Even before the foundation of the American and Texas Republics, the ability of the sovereign to seize private property, and the corresponding duty to compensate the citizen, were well established.² Whether the compensation provided is adequate or just is often the key question when the state chooses to exercise its power of eminent domain,³ and the often blurred line between the state's power and the citizen's right to be secure in the possession of their property continues to produce volumes of litigation and scholarly comment.⁴

1. See *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893) (expounding upon the requirement for just compensation as a question of utmost importance because "the ful[l]ness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government").

2. See TEX. CONST. art. I, § 17 interp. commentary (West 2007) (asserting a compensation requirement under the eminent domain power dates all the way back to the Magna Carta).

3. See *State ex rel. W. Va. Dep't of Transp. v. Cookman*, 639 S.E.2d 693, 700 (W. Va. 2006) (Starcher, J., dissenting) ("In condemnation cases, the government is the proverbial 800-pound gorilla. It can take your property, period; and the only issue is how much the property is worth."); Gideon Kanner, "[Un]equal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1126 (2007) ("In *County of Los Angeles v. Ortiz* . . . the California Supreme Court expressed sympathy for 'small landowner[s]' who are put to a Hobson's Choice of either accepting the condemnor's inadequate, below-market offer, or absorbing the expense of [litigation] that in such small cases is likely to erode or consume the small equity in the homes that are being taken.").

4. See *Koontz v. Saint Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2588–89 (2013) (holding an environmental permitting process subject to Fifth Amendment takings analysis under the United States Constitution); Nicolas Parke, Comment, *How Much Is Fair?: Will Senate Bill 18 Ensure Condemnors Pay Just Compensation for Land Taken Due to the CREZ Transmission Lines?*, 44 TEX. TECH L. REV. 1121, 1124 (2012) (analyzing Texas legislation to determine its impact on landowners in the condemnation process); Jim Christie & Dan Levine, *Judge Says Premature to Rule on Calif. Eminent Domain Lawsuit*, REUTERS (Sept. 12, 2013, 4:34 PM), <http://www.reuters.com/article/2013/09/12/us-usa-mortgages-richmond-idUSBRE98B14T20130912> (reporting on a case filed in federal court in the Northern District of California involving seizure of "underwater" mortgages from private lenders).

This Comment advocates for the use of local property tax valuations of real property as the mandatory floor in assessing damages in any condemnation proceeding in Texas. Use of the annual property tax valuation will improve judicial economy by reducing the number of lawsuits that are heard before special commissioners and state courts,⁵ and take advantage of the existing property valuation process outlined in the Texas Tax Code.⁶ Using the property tax valuation as the starting point for the damage assessment will reduce cost for litigants by limiting the need for expert testimony and instill further equity in the process by requiring condemning entities to use neutral, third-party appraisals of the condemned property.⁷

II. EMINENT DOMAIN LAW AND TEXAS

The United States Constitution prevents the seizure of “private property . . . for public use, without just compensation.”⁸ The Texas Constitution similarly requires that “[n]o person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made.”⁹

Though those constitutional protections have long been established, eminent domain law is in a state of flux in Texas.¹⁰ Like many other

using eminent domain); Glen Morgan, *Seattle Uses Eminent Domain to Turn a Parking Lot into a Parking Lot*, WATCHDOG.ORG (Oct. 24, 2013, 8:10 AM), <http://watchdog.org/112499/seattle-uses-eminent-domain-turn-parking-lot-parking-lot/> (relating initiation of condemnation proceedings for a questionable public purpose).

5. By improving the initial offer, the likelihood of a negotiated settlement is increased, preventing condemnation proceedings in the first place. *Cf.* H. Comm. on Land and Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 9–11 (2011) (implying that, by allowing a landowner to recover attorney’s fees in a condemnation suit if it is subsequently proven a “bona fide offer” was not made, “fair offers” will be incentivized and therefore prevent a condemnation suit in the first place).

6. *See* TEX. TAX CODE ANN. § 23.01 (West Supp. 2014) (describing property tax appraisals); *id.* § 42.01 (asserting the right to judicial appeal of tax appraised value); *id.* § 25.01 (West 2008) (outlining property tax appraisal record requirements); *id.* § 25.18 (showing re-appraisal periodicity); *id.* § 25.19 (providing property owners with notice of tax appraised value); *id.* § 41.41 (authorizing right to protest tax appraised value).

7. *See* Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1410 (2009) (“[R]ecourse to preset scales or multipliers considerably reduces administrative costs as compared to flexible standards.”).

8. U.S. CONST. amend. V.

9. TEX. CONST. art. I, § 17. The original Texas Constitution of 1845 contained the requirement in Article I Section 14. *See* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1198 (1995) (“[N]o person’s property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person.”).

10. *See, e.g.*, Tex. H.B. 20, 83d Leg., 3d C.S. (2013) (proposing changes to reporting requirements in condemnation proceedings).

states,¹¹ Texas responded to the United States Supreme Court's holding in the landmark *Kelo v. City of New London*¹² case by curbing the power of eminent domain.¹³ Changes to state law encompassed the passage of an amendment to the Texas Constitution as well as changes to multiple statutes including several within the Texas Property Code.¹⁴ Chapter 21 of the Texas Property Code delineates the condemnation process, including the process to determine compensation as required by the Texas Constitution.¹⁵

The Property Code requires the condemning entity to contact the landowner and present a "bona fide" offer for the property.¹⁶ Failure to reach an agreement on the purchase price permits the condemning entity to initiate the condemnation process by filing a petition with the local district court.¹⁷ The district court appoints three special commissioners to conduct an administrative hearing to find the amount of compensation or damages the condemning entity must pay the property owner.¹⁸ Either of the parties may appeal the assessment of damages to the local district court, and the district court will adjudicate the controversy as any other Texas civil suit.¹⁹

11. See Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NAT'L CONF. OF STATE LEG. (Jan. 1, 2012), <http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-legislation-and-ballot-measures.aspx> (listing forty-two states that passed laws limiting the exercise of eminent domain since 2005).

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

13. See Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NAT'L CONF. OF STATE LEG. (Jan. 1, 2012), <http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-legislation-and-ballot-measures.aspx> (noting passage of Texas Senate Bill 7, preventing the use of eminent domain for economic development).

14. See Tex. H.R.J. Res. 14, 81st Leg., R.S., 2009 Tex. Gen. Laws 5655 (proposing an amendment to Article I Section 17 of the Texas Constitution restricting the definition of "public use"); *Amendments to the Texas Constitution Since 1876*, TEX. LEGIS. COUNCIL 8 (May 2014), <http://www.tlc.state.tx.us/pubsconamend/constamend1876.pdf> (showing House Joint Resolution 14 of the 81st Legislative Session of Texas approved by 81% of voters on November 3, 2009); see also Act of May 9, 2011, 82d Leg., R.S., ch. 81, 2011 Tex. Gen. Laws 354 (altering the education, government, local government, water, and property codes to curtail the seizure of private property through the use of eminent domain).

15. See generally TEX. PROP. CODE ANN. §§ 21.001–.023 (West 2004 & Supp. 2014), §§ 21.041–.065 (West 2000 & Supp. 2014) (describing eminent domain in the Texas Property Code).

16. See *id.* § 21.0113(a) (West Supp. 2014) ("An entity with eminent domain authority that wants to acquire real property for a public use must make a bona fide offer to acquire the property from the property owner voluntarily.").

17. See *id.* § 21.012 (detailing the required information a condemning entity must present to the district court).

18. See *id.* § 21.014 (describing the role, function, and powers of the special commissioners in the condemnation proceeding).

19. See *id.* § 21.018 (West 2004), § 21.063 (West 2000) (stating the procedure to appeal the finding of the special commissioners).

Assessing damages requires examination of a variety of factors, including property value, the use of the property, and when seizing only part of the property, the impact of the condemnation on the remainder.²⁰ The special commissioners shall consider the “fair market value” of the property in coming to their conclusion.²¹ If the entire property is seized, the fair market value of the property is the total assessment of damages.²² If the condemning entity seizes only a portion of the property, “adequate compensation is required for both the part taken and any resulting damage to the remainder.”²³ Typically, both parties will present evidence produced by their own appraisers or land use experts to state the market value of the property.²⁴

While determining fair market value appears straightforward, the commissioners or the court may take into account whether the current use of the property is the “highest and best use” possible in establishing the property’s value.²⁵

A. *Highest and Best Use Doctrine*

Highest and best use refers to “[t]he highest and most profitable use for

20. *See id.* § 21.041 (West 2000) (requiring special commissioners to admit evidence on the property’s value, any benefit or injury suffered by the property owner from the condemnation, and the use of the property).

21. *See Enbridge Pipelines (E. Tex.) LP v. Avinger Timber, LLC*, 386 S.W.3d 256, 261 (Tex. 2012) (quoting *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002)) (“Compensation for land taken by eminent domain is measured by the fair-market value of the land at the time of the taking.”).

22. *See PROP. § 21.042(b)* (West Supp. 2014) (“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 commissioners’ hearing.”).

23. *Cnty. of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004); *see also PROP. § 21.042(c)* (“If a portion of a tract or parcel of real property is condemned, the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including the effect of the condemnation on the value of the property owner’s remaining property.”).

24. *See United States v. Fuller*, 409 U.S. 488, 490 (1973) (noting “that several appraiser witnesses for respondents testified” at trial); *Enbridge Pipelines*, 386 S.W.3d at 260 (showing each party produced its own expert to demonstrate fair market value of the land in question); *Cent. Power & Light Co. v. Graddy*, 318 S.W.2d 943, 945–47 (Tex. Civ. App.—Houston 1958, no writ) (restating the expert testimony of three witnesses for appellant and six witnesses for appellees).

25. *See Graddy*, 318 S.W.2d at 949 (acknowledging the property owner is entitled to have “the highest and best use to which the land is adaptable” considered in determining the property’s value). The use of fair market value in condemnations is controversial in and of itself. *See Abraham Bell & Gideon Parchomovsky, Taking Compensation Private*, 59 STAN. L. REV. 871, 874 (2007) (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979)) (acknowledging the adoption of fair market value in the condemnation context is for practical reasons despite the lack of full compensation to property owners).

which the property is adaptable” to and may be considered in establishing market value.²⁶ Rooted in equity, the rule ensures the market value of the property incorporates uses that any willing buyer and seller would integrate into the transaction, preventing a condemning entity from undervaluing the property by basing compensation exclusively on the present use of the property at the time of the taking.²⁷ The fact finder may only consider alternative uses that the land can be reasonably adapted to in the near future; the mere possibility of a more profitable use may not be considered.²⁸ This limitation ensures the landowner will not obtain profit from the condemnation and attempts to approximate the business transaction occurring between a willing buyer and seller.²⁹ An alternate use that would require combining the property in question with adjacent parcels may be considered.³⁰ Even so, the current use is presumed to be the property’s highest and best use.³¹

The highest and best use of a condemned property becomes the nexus of litigation in condemnation cases as it dramatically affects the amount of

26. *Olson v. United States*, 292 U.S. 246, 255 (1934); see *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002) (acknowledging other suitable uses the land may be adapted to are permitted to be examined by the fact finder in determining value).

27. See *Fuller*, 409 U.S. at 490 (citing *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950)) (asserting the just compensation requirement springs “from the basic equitable principles of fairness”); *Olson*, 292 U.S. at 255 (“Just compensation includes all elements of value that inhere in the property . . . [it] does not depend upon the uses to which [the owner] has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable.”); *Enbridge Pipelines*, 386 S.W.3d at 261 (“The objective of the condemnation process is to make the landowner whole.” (citing TEX. CONST. art. I, § 17)).

28. See *Olson*, 292 U.S. at 255–56 (explaining the adaptability of the land to the more profitable use should be examined in the context of how the demand for that use affects the parcel’s market value); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 814 (5th Cir. 1979) (“The principle that just compensation cannot be predicated upon potential uses which are speculative and conjectural is of course firmly established.”).

29. See *Olson*, 292 U.S. at 255, 257 (asserting the property owner “must be made whole but is not entitled to more” and eschewing mere speculation and conjecture as “a thing to be condemned in business transactions as well as in judicial ascertainment of truth”).

30. See *id.* at 256 (allowing consideration of a use that requires combination of nearby parcels with the one in question if the combination substantially impacts the market value of the condemned parcel); *In re State*, 355 S.W.3d 611, 617 (Tex. 2011) (orig. proceeding) (quoting *State v. Windham*, 837 S.W.2d 73, 76–77 (Tex. 1992)) (applying the rule in a case of seizure of only a portion of a property and allowing consideration of the highest and best use of the whole before severance). *But see Fuller*, 409 U.S. at 493–94 (recognizing an exception to the rule when the neighboring parcels are owned by the condemning entity and the highest and best use is based upon access to the neighboring parcels via permit).

31. See *Enbridge Pipelines*, 386 S.W.3d at 261 (citing *Zwahr*, 88 S.W.3d at 628) (“There is a presumption that the highest and best use of the land is the existing use of the land.”); see also *United States v. 158.24 Acres of Land*, 515 F.2d 230, 233 (5th Cir. 1975) (finding the condemned property owner failed to present sufficient “evidence to disturb the presumption in favor of existing use”).

compensation awarded.³² As the evidence presented by both parties disputing the most profitable use of a property is fact intensive and requires in-depth knowledge of local land use and development surrounding the property, both parties must usually present expert witness testimony to support their argument.³³ Information regarding use is so important to the fact finder's determination that Texas case law also allows the parties to introduce lay opinion testimony.³⁴ In sum, the highest and best use doctrine is well-established in land use law, expert witness testimony is almost certainly required to demonstrate a tract's highest and best use, and a property's highest and best use becomes a factor in condemnation cases due to its impact on compensation.³⁵

B. *Property Tax Valuation in Texas in Brief*

The use of eminent domain is certainly controversial, as noted above, but just as controversial may be the assessment of property taxes.³⁶

32. See *Enbridge Pipelines*, 386 S.W.3d at 260 (examining the trial court's award of \$20.6 million based on the highest and best use of the property including a natural gas processing plant and rejecting Enbridge's claim that the highest and best use of the property was as rural farmland and the plaintiff was entitled to only \$47,940); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 626 (Tex. 2002) (reviewing a lower court decision involving highest and best use of a portion of a property condemned for a pipeline easement where Exxon deemed the condemned easement worth \$707 and Zwahr argued it was worth \$36,077); see also *158.24 Acres of Land*, 515 F.2d at 233 (analyzing whether the highest and best use of a property involves valuing the property as a whole or in subdivided parcels).

33. See *Enbridge Pipelines*, 386 S.W.3d at 260 (showing a witness in the case "used a comparable sales methodology, two income approaches, and additional intrinsic value analyses" to arrive at an appraisal value); *State v. Oakley*, 163 Tex. 463, 356 S.W.2d 909, 910 (1962) (recounting expert witness testimony demonstrating method and factors involved in determining the witness's conclusion).

34. See *State v. Harrison*, 97 S.W.3d 810, 815–16 (Tex. App.—Texarkana 2003, no pet.) (acknowledging the use of lay opinion testimony by the condemned property's owner because a totality of his testimony demonstrated sufficient knowledge of local land value). See generally TEX. R. EVID. 701 (allowing lay opinion testimony if it is based upon the witness's personal knowledge and it would be helpful to the fact finder in coming to a decision on an issue in the case).

35. See TEX. PROP. CODE ANN. § 21.042 (West Supp. 2014) (requiring consideration of the use of the property for assessing damages); *Olson*, 292 U.S. at 255 (citing *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1879)) (recognizing the highest and best use of a condemned property should be considered as part of the determination of market value); *Cent. Power & Light Co. v. Graddy*, 318 S.W.2d 943, 949 (Tex. Civ. App.—Houston 1958, no writ) (stating the jury should consider the highest and best use of a property in assessing damages in a condemnation case).

36. See Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY'S L.J. 553, 556–60 (2010) (asserting high-end residential and commercial properties are usually undervalued due to a lack of transaction data, thereby transferring the tax burden to middle-class homeowners); Steve Jansen, *Shakedown: The HCAD Appraisal Game*, HOUS. PRESS (Apr. 17, 2013), <http://www.houstonpress.com/2013-04-18/news/hcad-shakedown/full/> (reporting on a long-

Sensitivity to levies on property in Texas is especially acute as no state income tax exists and local property taxes form the large majority of funding for municipal governments.³⁷ Addressing concerns of Texas citizens regarding taxes, the Texas Constitution contains an entire article devoted to the subject.³⁸ Article VIII possesses detailed provisions on application,³⁹ exemptions to property tax in the state,⁴⁰ and even guidance on levying an income tax if approved by the legislature.⁴¹ The Texas Tax Code, enacted in 1979,⁴² contains the statutory guidance implementing the provisions of the Texas Constitution,⁴³ allowing county appraisal districts to determine the value of real property within their jurisdictions.⁴⁴ Local taxing authorities use these valuations to levy taxes as allowed by law.⁴⁵

standing disparity in over-valuing lower and middle-income properties versus undervaluing large industrial and commercial properties in Harris County, Texas).

37. See 2011 *Local Government Finances: How Much Does Property Tax Contribute to Total Tax?*, U.S. CENSUS BUREAU, http://www.census.gov/newsroom/releases/pdf/dataviz_updated.pdf (last visited Nov. 13, 2014) (demonstrating that property tax in Texas accounts for more than 80% of local government revenue); *Property Tax Administration in Texas*, TEX. COMPTROLLER OF PUB. ACCOUNTS 1 (Jan. 2014), <http://www.window.state.tx.us/taxinfo/proptax/pdf/96-1738.pdf> (showing property taxes are assessed locally and public education is funded primarily through local property tax revenue, with a state supplement to local schools provided through the Property Value Study).

38. See TEX. CONST. art. VIII (“Taxation and Revenue”).

39. See *id.* § 1 (allowing for property taxes, occupation taxes, and income taxes with accompanying restrictions on their application); *id.* § 2(b) (describing the qualifications to receive an exemption from occupation taxation based upon disabled veteran’s status, including percentage of disability and corresponding amount of exemption); *id.* § 8 (outlining the process for assessing the property tax liability of railroad companies).

40. See *id.* § 1-b (creating the residence homestead exemption which discounts the assessed value of a homestead); *id.* § 1-j (exempting specific tangible personal property from taxation for economic development purposes); *id.* § 1-m (authorizing the legislature to grant an exemption for a water conservation initiative); *id.* § 19 (allowing for an exemption for “[f]arm products, livestock, and poultry in the hands of the producer, and family supplies for home and farm use” to promote agriculture).

41. See *id.* § 24 (providing for a state income tax if approved by a majority of voters in a referendum).

42. See Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY’S L.J. 553, 571 (2010) (“The Texas Property Tax Code was adopted by the state legislature in 1979 and became effective January 1, 1982.”).

43. See TEX. CONST. art. VIII, § 1(b) (“All real property and tangible personal property in this State . . . shall be taxed in proportion to its value, which shall be ascertained as may be provided by law.”); TEX. TAX CODE ANN. § 23.01(a) (West Supp. 2014) (“[A]ll taxable property is appraised at its market value . . .”).

44. See TAX § 6.01(a)–(b) (West Supp. 2014) (“(a) An appraisal district is established in each county. (b) The district is responsible for appraising property in the district for ad valorem tax purposes of each taxing unit that imposes ad valorem taxes on property in the district.”).

45. See *id.* § 26.09 (specifying the method used by the county assessor or other taxing unit to

The value of real property taxed by local taxing authorities in Texas is the market value of the property.⁴⁶ The county appraisal district determines the market value of the property on an annual basis⁴⁷ and provides written notice to the property owner of the assessed value.⁴⁸ The district must also establish a robust plan to continuously analyze and update the data on properties in the district no less than every three years.⁴⁹ The Tax Code controls the methods that local appraisal districts may use in determining the value of property⁵⁰ and establishes a process for contesting the appraised value.⁵¹ The property owner may request an administrative hearing before an appraisal review board, which will determine the validity of the property valuation and may make adjustments.⁵² The Code authorizes appeal of the outcome of the

compute the property tax based upon the market value provided by the county appraisal district).

46. *See id.* § 23.01(a) (referring to the market value of property); *id.* § 25.19(f) (West 2008) (requiring the chief appraiser provide notice of the assessed market value of the land and any structures thereon).

47. *See id.* § 23.01(a) (West Supp. 2014) (stating the market value of property is appraised as of January 1); *id.* § 25.01(a) (West 2008) (“By May 15 or as soon thereafter as practicable, the chief appraiser shall prepare appraisal records listing all property that is taxable in the district and stating the appraised value of each.”).

48. *See id.* § 25.19 (containing detailed requirements on when notice is required, by what dates notice must be provided, and specifying the content of the notice to the property owner).

49. *See id.* § 25.18 (requiring a “plan for periodic reappraisal of property” incorporating individual characteristics of every property in the district, analysis of market areas in the district, and validation of a model to determine property value in the district).

50. *See id.* § 23.01(b) (West Supp. 2014) (“The market value of property shall be determined by the application of generally accepted appraisal methods and techniques . . . each property shall be appraised based upon the individual characteristics that affect the property’s market value, and all available evidence that is specific to the value of the property shall be taken into account in determining the property’s market value.”). The code provides specific direction on the use of the cost method, income method, and market data method of appraisal and allows for use of the most appropriate method. *See id.* §§ 23.01, 23.013, §§ 23.0101–.012 (West 2008) (listing the appraisal methods and procedures of the Tax Code).

51. *See id.* § 41.41 (West 2008) (showing right to protest determinations of appraisal district before appraisal review board); *id.* § 41A.01 (West Supp. 2014) (providing an alternative to judicial appeal of appraisal review board outcome through binding arbitration); *id.* § 42.01 (granting access to the district court to appeal “an order of the appraisal review board”); *id.* § 42.23 (defining the scope of review for district courts).

52. *See id.* § 41.41 (West 2008) (providing a property owner the right to appeal nine different actions of the local appraisal district, including the determination of market value); *id.* 41.47(b) (West Supp. 2014) (allowing the appraisal review board “by its order [to] correct the appraisal records by changing the appraised value placed on the protesting property owner’s property or” to make other changes that are necessary and required by law). Typically, the local appraisal district must prove the accuracy of their appraisal by a preponderance of the evidence, but there are circumstances where the burden on the local appraisal district becomes “clear and convincing” evidence, or even shifts to the property owner. *See generally id.* § 41.43.

appraisal review board by filing suit in state district court⁵³ or alternatively through binding arbitration.⁵⁴

As with seizures under the power of eminent domain, property owners at times contest the appraised market value for taxation purposes.⁵⁵ The constitutional guidance in Texas on taxation is voluminous when compared to that of eminent domain,⁵⁶ and the government exercises its authority to tax property more frequently than its power to seize property outright.⁵⁷ Considering the robust constitutional and statutory regime in place to tax property in Texas, greater familiarity of landowners with the property tax system versus the condemnation process, coupled with the recent desire to constrain the power of eminent domain post-*Kelo*, an opportunity exists to take advantage of the property tax system in the condemnation context to the benefit of Texas landowners.

III. ANALYSIS

A. *The Current Trend: Curtail Use of Eminent Domain and Protect Landowners*

The current trend in Texas seeks to curtail the use of eminent domain and to protect landowners from its use.⁵⁸ As previously noted, actions taken in concert with this trend included a popular constitutional

53. See *id.* § 42.01 (granting a right of appeal for “an order of the appraisal review board” to the affected property owner); *id.* § 42.02 (West 2008) (permitting appeal by the appraisal district); see also *id.* § 41.47(e) (West Supp. 2014) (“The notice of the issuance of the order must . . . inform[] the property owner in clear and concise language of the property owner’s right to appeal the board’s decision to district court.”). The code also grants limited authority to other parties to appeal a board’s decision in specific circumstances. See *id.* § 42.015 (West 2008) (permitting a leaseholder to appeal a board order); *id.* § 42.031(a) (“A taxing unit is entitled to appeal an order of the appraisal review board determining a challenge by the taxing unit.”); *id.* § 42.04 (extending the right to appeal to a governmental entity if it is affected by the appraisal review board’s order).

54. See TEX. TAX CODE ANN. § 41A.01 (West Supp. 2014) (providing an alternative to judicial appeal of an appraised value for a property owner if the property in question is the owner’s homestead or the appraised value is no more than \$1 million).

55. See *Dallas Cnty. v. Dallas Nat’l Bank*, 142 Tex. 439, 179 S.W.2d 288, 289 (1944) (ruling on a claim of “arbitrary, discriminative, and fraudulent methods in valuation” in an appraisal conducted by Dallas County); *Brooks v. Bachus*, 661 S.W.2d 288, 289 (Tex. App.—Eastland 1983, writ ref’d n.r.e.) (adjudicating a suit claiming improper appraisal techniques applied by county appraisal district in valuing plaintiff’s property).

56. Compare TEX. CONST. art. VIII (containing forty sections on taxation), with TEX. CONST. art. I, § 17 (showing takings clause is limited to only one section within the Texas Bill of Rights).

57. Every piece of land is taxed annually, whereas a smaller percentage of properties are affected by condemnation.

58. See Nicolas Parke, Comment, *How Much Is Fair?: Will Senate Bill 18 Ensure Condemnors Pay Just Compensation for Land Taken Due to the CREZ Transmission Lines?*, 44 TEX. TECH L. REV. 1121, 1146–48 (2012) (reciting a brief history of legislative efforts in Texas to limit eminent domain following the United States Supreme Court’s decision in *Kelo*).

amendment to the state constitution⁵⁹ and a variety of legislative actions advancing the interests of property owners.⁶⁰

Texas Senate Bill 18, passed during the Eighty-Second Legislative Session in 2011, exemplifies these recent initiatives.⁶¹ Amongst other changes, the bill added a bona fide offer requirement to Chapter 21 of the Texas Property Code to ensure landowners are delivered a reasonable offer and given sufficient time to consider that offer.⁶² The bill also added a buy-back provision to Chapter 21, allowing the property owner to repurchase the property, if it goes unused, at the same price paid to the owner during the original condemnation proceeding.⁶³ The State of Texas sought to strengthen landowner's rights and equalize the relationship between property owners and condemning entities by passing Senate Bill 18.⁶⁴ These changes also show a desire not just to address the public use controversy raised in *Kelo*, but to address financial compensation in takings.

59. See Tex. H.R.J. Res. 14, 81st Leg., R.S., 2009 Tex. Gen. Laws 5655 (restricting the meaning of "public use" in the Texas Constitution); *Amendments to the Texas Constitution Since 1876*, TEX. LEGIS. COUNCIL 8 (May 2014), <http://www.tlc.state.tx.us/pubsconamend/constamend1876.pdf> (showing House Joint Resolution 14 approved by over three-quarters of voters).

60. See generally Act of May 9, 2011, 82d Leg., R.S., ch. 81, 2011 Tex. Gen. Laws 354 (restricting the use of eminent domain only for public use, putting more procedural steps in place when condemning property, and authorizing condemned property owners to repurchase their property if it is not used); Tex. H.B. 20, 83d Leg., 3d C.S. (2013) (proposing a change to the Texas Government Code enforcing new reporting requirements on condemning entities); Tex. S.B. 180, 83d Leg., R.S. (2013) (advancing an amendment requiring the condemning entity to state what public use property is being seized for in the bona fide offer provision of Texas Property Code Section 21.0113 and improving landowners ability to repurchase condemned property); *The State of Texas Landowner's Bill of Rights*, OFFICE OF THE ATTY GEN. OF TEX. (Mar. 2012), https://www.oag.state.tx.us/agency/landowners_billofrights.pdf (summarizing property owner's rights in a condemnation proceeding as required by Texas Government Code Section 402.031).

61. See generally Act of May 9, 2011, 82d Leg., R.S., ch. 81, 2011 Tex. Gen. Laws 354 (curbing the use of eminent domain).

62. See *id.* § 8, at 358 (codified at TEX. PROP. CODE ANN. § 21.0113 (West Supp. 2014)) (requiring submission of a bona fide offer to the landowner before a condemnation petition can be filed); H. Comm. on Land and Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 10–11 (2011) (arguing the bona fide offer provision incentivizes offers that are more fair to landowners as the requirements are spelled out in the statute and the condemning entity is liable for attorney's costs in a subsequent condemnation proceeding if the landowner is awarded damages greater than 110% of the offer).

63. See Act of May 9, 2011, 82d Leg., R.S., ch. 81, § 19, secs. 21.101–103, 2011 Tex. Gen. Laws 354, 361–63 (West Supp. 2013) (detailing the requirements of a procedure for a landowner to repurchase their previously condemned property).

64. See H. Comm. on Land and Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 7 (2011) (inferring that Senate Bill 18 will improve fairness and strengthen protections for landowners in the condemnation process); Statement by Governor Rick Perry on Passage of Senate Bill 18 (Apr. 13, 2011), <http://governor.state.tx.us/news/press-release/15976> ("I applaud . . . the Texas House for

Requiring the use of the property tax valuation in a condemnation proceeding, particularly in connection with the newly codified “bona fide offer” provision in Section 21.0113 of the Texas Property Code, improves the quality of the initial offer to the landowner.⁶⁵ As the landowner receives the property tax valuation on an annual basis,⁶⁶ there should be little surprise at the assessed value.⁶⁷ Furthermore, since it is based on a neutral, third-party assessment of the property value, as opposed to the condemning entity’s own property appraisal expert, the acceptability of the offer to the landowner is likely to be improved.⁶⁸ By forcing the bona fide offer to be, at a minimum, based upon the property tax valuation, both parties may be able to achieve a fair settlement and avoid the initiation of a condemnation proceeding in the first place.⁶⁹ Promoting fair settlement between landowners and condemning entities aligns both with the current trend in Texas law⁷⁰ and reduces the docket burden on courts.⁷¹

B. *The Identical Aims of the Condemnation and Property Tax Valuation Process*

The objective in both a condemnation proceeding and the property tax valuation process is similar—establishing the fair market value of the

passing [S.B.] 18, which will help further protect property owners by strengthening our eminent domain laws. I look forward to seeing this important legislation reach my desk.”)

65. See H. Comm. on Land and Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 8 (2011) (asserting the bona fide offer provision codified in Section 21.0113 of the Texas Property Code incentivizes condemning authorities to make initial fair offers).

66. See TEX. TAX CODE ANN. § 25.19(a) (West 2008) (“[B]y May 1 . . . the chief appraiser shall deliver a clear and understandable written notice to a property owner of the appraised value of the property owner’s property if: (1) the appraised value of the property is greater than it was in the preceding year; (2) the appraised value of the property is greater than the value rendered by the property owner; or (3) the property was not on the appraisal roll in the preceding year.”).

67. *But see* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 887–88 (2007) (illustrating Minnesota landowners generally settled for a below-market value for their property in condemnation actions).

68. See *id.* (relating documentation showing the Minnesota Department of Transportation consistently low-balled property owners in condemnation cases).

69. See TEX. PROP. CODE ANN. § 21.0113(b) (West Supp. 2014) (requiring the final offer to a landowner from a condemning entity be greater than the written appraised value of the property provided to the landowner along with the offer).

70. See Nicolas Parke, Comment, *How Much Is Fair?: Will Senate Bill 18 Ensure Condemnors Pay Just Compensation for Land Taken Due to the CREZ Transmission Lines?*, 44 TEX. TECH L. REV. 1121, 1146–48 (2012) (summarizing post-*Kelo* efforts in Texas to strengthen protections for property owners in condemnation disputes).

71. See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1346 (1994) (“Clearly, lawyers, judges, scholars, disputants, and onlookers think settlement is a pretty good thing.”).

property in question.⁷² While the purpose of both processes may be different, they share similar or identical characteristics.⁷³ Both contain detailed guidance on when to initiate the process,⁷⁴ and what type of information to consider in assessing property value.⁷⁵ Also, both provide for a method of appeal, first through administrative and then judicial proceedings.⁷⁶ Since a detailed administrative, governmental, and legal structure exists already for the property tax valuation process, capitalizing on this existing structure can only streamline the process of determining a fair market value, both in the voluntary negotiation phase and the subsequent condemnation phase in eminent domain cases.

C. *Benefiting from Competing Government Priorities in the Condemnation and Tax Valuation Context*

Use of the property tax assessment takes advantage of competing government interests to the advantage of the landowner. Some property owners perceive a bias among local tax appraisal districts to over-value local properties.⁷⁷ The Texas Tax Code alludes to this bias in Section

72. Compare PROP. § 21.042 (listing the relevant considerations in arriving at an amount of damages, including principally the market value of the property in question), and *Enbridge Pipelines (E. Tex.) LP v. Avinger Timber, LLC*, 386 S.W.3d 256, 261 (Tex. 2012) (restating that adequate compensation in a condemnation proceeding is governed by the fair market value of the property involved (quoting *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002))), with TEX. TAX CODE ANN. § 23.01(a) (West Supp. 2014) (“[A]ll taxable property is appraised at its market value as of January 1.”).

73. Compare PROP. § 21.0113 (describing an initial offer for the condemned property based on a market appraisal), *id.* §§ 21.014, .041 (West 2000 & Supp. 2014) (providing an administrative forum to contest the market value of the property in a condemnation proceeding), and *id.* §§ 21.018, .063 (West 2000 & 2004) (detailing the appeals process), with TAX §§ 25.18–.19 (West 2008) (showing property tax appraisal based on market value and requirement to notify landowner of appraised value), *id.* §§ 41.41, .47 (West 2008 & Supp. 2014) (discussing the right of a landowner to appeal the appraised value to an administrative board), and *id.* § 42.01 (West 2008) (authorizing judicial appeal of the administrative board ruling).

74. See PROP. § 21.012 (West Supp. 2014) (listing the requirements a condemning entity must show when filing a condemnation petition with the local district court); TAX §§ 25.01, .18 (requiring when property tax appraisals must be completed).

75. Compare PROP. §§ 21.041, .042 (West 2000 & Supp. 2014) (citing the evidence that may be used in a condemnation proceeding to establish value and damages), with TAX §§ 23.01, .013–.02 (West Supp. 2014), and *id.* §§ 23.0101–.012, .03, 25.18 (West 2008) (specifying the type of data to be collected in support of property tax valuation and the authorized methods of appraising property in Texas).

76. See PROP. §§ 21.018, .063 (West 2000 & 2004) (permitting appeals from both the findings of a special commissioner’s hearing and the district court in condemnation proceedings); TAX §§ 41.41, 41A.01, 42.01 (West 2008 & Supp. 2014) (authorizing appeal from the finding of a property tax appraisal via an appraisal review board, then via the district court or through binding arbitration).

77. Whether this perception is accurate is far from clear in Texas. See Steve Jansen, *Texas Is*

23.01, explicitly directing incorporation of specific types of nearby properties into a market valuation that are certain to lower the property's appraised value.⁷⁸ The need to raise tax revenue most likely acts as a subconscious pressure on county tax appraisers to over-assess property values.⁷⁹ Compared to other jurisdictions, the pressure on local appraisal authorities in Texas is more acute as local governmental entities are particularly dependent on revenues from property taxes.⁸⁰

In contrast, conventional wisdom holds that condemning entities, perhaps like any prospective buyer, attempt to acquire property at a price lower than fair market value.⁸¹ Limited academic studies, as well as the existence of the bona fide offer provision in Section 21.0113 of the Texas Property Code, seem to confirm conventional wisdom.⁸² In the

Losing Out on Millions of Dollars Thanks to Its Defective Property-Tax System, HOUS. PRESS (May 1, 2014), <http://www.houstonpress.com/2014-05-01/news/texas-property-tax-assessments/full/> (reporting the Harris County Appraisal District overvalued residential home value by 16% on average in 2014); Steve Jansen, *Shakedown: The HCAD Appraisal Game*, HOUS. PRESS (Apr. 17, 2013), <http://www.houstonpress.com/2013-04-18/news/hcad-shakedown/full/> (revealing a pervasive bias towards overvaluing low and medium-value properties in the Harris County Appraisal District). *But see* Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY'S L.J. 553, 591–92 (2010) (concluding poor appraisal practices mean lower assessed property values for commercial and high-value residential properties). Whether local appraisal districts routinely overvalue properties is an unsettled question outside of Texas as well. *See* Stewart Sterk & Mitchell Engler, *Property Tax Reassessment: Who Needs It?*, 81 NOTRE DAME L. REV. 1037, 1070–71 (2006) (opining on the impact local politics can play on property tax assessments); Lee Harris, 'Assessing' Discrimination: The Influence of Race in Residential Property Tax Assessments, 20 J. LAND USE & ENVT'L. L. 1, 4 (2004) (asserting properties in majority-minority neighborhoods in New Haven, Connecticut are systematically overvalued in comparison to majority neighborhoods).

78. *See* TAX § 23.01(e) (West Supp. 2014) (requiring inclusion of nearby foreclosed properties and adjustment of market value from a declining economy in assessing market value).

79. *See* Evan Mohl & Aaron Bracamontes, *Western Refining Overvalued; City, EPISD Scrambling to Make Up Expected Tax Dollars*, EL PASO TIMES.COM (May 4, 2013, 12:00 AM), http://www.elpasotimes.com/ci_23169849/western-refining-overvalued (reporting a settlement of a lawsuit by a refinery operator against the El Paso Central Appraisal District resulting in the reduction of appraised value by more than \$400 million would cost the El Paso Independent School District over \$5 million in annual tax revenue).

80. *See* 2011 *Local Government Finances: How Much Does Property Tax Contribute to Total Tax?*, U.S. CENSUS BUREAU, http://www.census.gov/newsroom/releases/pdf/dataviz_updated.pdf (last visited Nov. 13, 2014) (showing local Texas governments depend on local property tax revenues more than 35 other states).

81. *See* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 888 (2007) (“[T]he conventional wisdom among eminent domain practitioners is that government will always try to get land on the cheap.”).

82. *See id.* (asserting a study conducted of takings cases in Nassau County, New York, from 1960 to 1964 showed “widespread and intentional undercompensation in takings settlements”); Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990–2002*, 39 J. LEGAL STUD. 201, 204 (2010) (finding that in a study of eighty-nine condemnations

condemnation context, the desire to limit outlays in the completion of major projects pressures condemning entities to make inferior offers.⁸³ Employing the tax appraised value of property takes advantage of the bias in property tax assessments while nullifying the temptation of condemning entities to exert their government influence and offer below-market compensation.⁸⁴ Pitting the competing fiscal priorities of revenue generation and cost control will therefore benefit the landowner.

D. *Reducing Costs in Condemnation Disputes by Limiting Experts*

In most cases, a disparity in resources exists between a governmental entity or common carrier and an individual property owner; such a disparity places the property owner at a disadvantage in a condemnation proceeding.⁸⁵ Generally, the condemning entity has far more resources to wield, and therefore, more evidence to present at a special commissioner's hearing or in court.⁸⁶ The cost of hiring land appraisal or land use experts

over a twelve-year period in New York City, the total compensation paid was 23% less than the fair market value of the properties condemned); Gideon Kanner, "[Un]equal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1146 (2007) (showing the wide divergence, in some cases tens of millions of dollars, between initial offer and final verdict in large California condemnation cases); see also TEX. PROP. CODE ANN. § 21.0113(b) (West Supp. 2014) (specifying the final offer to a landowner must include a copy of a written appraisal and mandating that the amount offered must be greater than the value contained in the appraisal); H. Comm. on Land and Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 9–10 (2011) (asserting the bona fide offer provision will encourage fair offers).

83. See Gideon Kanner, "[Un]equal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1104–05 (2007) (describing, for a variety of reasons, why "condemning agencies regularly reap unjustified windfalls from the fact that the majority of their offers (including the many low-ball ones) are accepted without litigation or even without involvement by a private appraiser or lawyer" and that under-compensation is widespread).

84. Cf. *id.* at 1107–09 (inferring that high-value property owners typically fare better than low-value owners in condemnation cases as they are able to afford better legal representation and condemning entities therefore render better offers to prevent litigation).

85. See *State ex rel. W. Va. Dep't of Transp. v. Cookman*, 639 S.E.2d 693, 700 (W. Va. 2006) (Starcher, J., dissenting) (describing the imbalance of power between the government and a property owner in a condemnation case), *overruled by State ex rel. W. Va. Dep't of Transp. v. Reed*, 724 S.E.2d 320 (W. Va. 2012); H. Comm. on Land and Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 8 (2011) (acknowledging the imbalance in the relationship between landowners and condemning entities); Gideon Kanner, "[Un]equal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1126 (2007) (recognizing that most small landowners are stuck with accepting below-market offers due to an inability to absorb the costs of litigation).

86. See *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting) (alleging the Court's decision incentivizes and enables the transfer of private "property from those with fewer resources to those with more"); John F. Shampton, *The Use of Statistical Inference to Establish Severance Damages in Condemnation Cases*, 2 TEX. WESLEYAN L. REV. 429, 430 (1996) ("Condemning authorities doubtless have the upper hand in most dealings with individual landowners. Economic

to testify at a hearing or at trial can be thousands of dollars.⁸⁷ Landowners typically do not have the financial resources to hire experts, and condemning entities leverage this fact to extract inadequate settlements from property owners.⁸⁸ Even when both parties are able to hire experts, testimony presented sometimes leads to widely disparate assessments of property value, leaving the fact finder to chart their own course in assessing damages.⁸⁹ Limiting expert testimony yields reduced costs for both parties and reduces the duration of a special commissioner hearing and subsequent trial proceedings.⁹⁰

E. *Limiting the Subjectivity of Land Valuation in Condemnation Suits*

Use of the local property tax assessed value will remove an element of subjectivity in establishing land value in the condemnation proceeding if a settlement cannot be reached between the two parties on compensation.⁹¹

power, experience, and a court's special indulgence through the presumption of constitutionality provide a governmental party with particularly effective tools.”).

87. Assuming a land use or appraisal expert is employed in researching and assisting in trial preparation, where an hourly rate is typical. If testifying at trial, most experts charge additional fees for travel, waiting time, and time spent on the stand. See *Summary Report of the 2012 ExpertPages Expert Fees and Practices Survey*, EXPERTPAGES.COM 1, 3, 5 (2012), http://commercialappraiser.typepad.com/files/2012_expertpages_summary_report.pdf (showing the minimum hourly rate for experts was \$187 per hour, and the average time spent on a case was forty-seven hours); see also *Expert Witness Fees: How Much Does an Expert Witness Cost?*, SEAK, EXPERT WITNESS DIRECTORY BLOG, <http://blog.seakexperts.com/expert-witness-fees-how-much-does-an-expert-witness-cost> (last visited Nov. 13, 2014) (reporting the average hourly rate for a non-medical expert witness was \$275 an hour).

88. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 874 (2007) (“Aggrieved owners often invest considerable resources in legal battles with the government in an effort to raise compensation awards.”); Gideon Kanner, “[Un]equal Justice Under Law”: *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1126 (2007) (highlighting recognition by the California Supreme Court of the impossible choice faced by small landowners in choosing a condemning entity's inadequate, below-market offer versus expending any equity in the condemned property in litigation).

89. See *Enbridge Pipelines (E. Tex.) LP v. Avinger Timber, LLC*, 386 S.W.3d 256, 260 (Tex. 2012) (noting plaintiff's expert valued the condemned property at \$20,955,000 while the defendant's expert placed the value at \$47,940); *Joyce v. Dallas Cnty.*, 141 S.W.2d 745, 746 (Tex. Civ. App.—Beaumont 1940, no writ) (“[T]here was a striking conflict between the testimony offered by appellant and the testimony offered by appellee as to the value of the land in controversy . . .”); John F. Shampton, *The Use of Statistical Inference to Establish Severance Damages in Condemnation Cases*, 2 TEX. WESLEYAN L. REV. 429, 438 (1996) (recognizing the market value established by an expert depends on whether the plaintiff or defendant hired the expert).

90. See Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1410 (2009) (endorsing the use of preset multipliers to a property's market value in condemnation proceedings to reduce administrative costs).

91. See *Joyce*, 141 S.W.2d at 746 (affirming use of a tax assessment in a condemnation case when the testimony of both parties produced striking conflict over the value of the land in question).

Commentators have argued for a variety of methods to limit subjectivity in assessing land values.⁹² These methods include the use of statistical sampling of market values for real estate.⁹³ Similarly, the Texas Tax Code allows for the use of statistical sampling, including comparable sales in assessing the property tax value.⁹⁴ Chapter 23 of the Tax Code details what type of sales may be used and gives guidance to the appraiser regarding the types of nearby properties that may be included in the statistical sample for both residential and business properties.⁹⁵ While it can be argued that use of fair market value is inherently subjective and does not provide adequate compensation,⁹⁶ leveraging the detailed process specified in the Texas Tax Code can remove a layer of subjectivity from the condemnation proceeding and assist the fact finder in assessing damages.⁹⁷

Reducing the use of land appraisal experts to establish underlying land value may not only reduce subjectivity in establishing damages, but may also improve judicial economy as the challenges of introducing expert

92. See John F. Shampton, *The Use of Statistical Inference to Establish Severance Damages in Condemnation Cases*, 2 TEX. WESLEYAN L. REV. 429, 461 (1996) (concluding that the rapid development of information technology allows courts to consider statistical evidence in computing severance damages in addition to the opinion of experts). *But see* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 875 (2007) (approving a completely subjective property valuation method in the condemnation context). *See generally* Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1395 (2009) (highlighting the subjectivity inherent in an owner's assessment of land value).

93. See Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990–2002*, 39 J. LEGAL STUD. 201, 239 (2010) (using a hedonic regression model to estimate fair market value); John F. Shampton, *The Use of Statistical Inference to Establish Severance Damages in Condemnation Cases*, 2 TEX. WESLEYAN L. REV. 429, 448–49 (1996) (championing the use of “hedonic pricing function” analysis as equal to or better than traditional market appraisal techniques).

94. See TEX. TAX CODE ANN. §§ 23.01, .013, .0101 (West 2008 & Supp. 2014) (mandating tax appraisers use “generally accepted appraisal methods and techniques” and must consider use of the “market data comparison method” in determining a property's market value).

95. See *id.* § 23.01 (West Supp. 2014) (requiring an appraiser to use the same appraisal method for a class of properties, directing that foreclosure sales be included, and mandating incorporation of individual property characteristics); *id.* § 23.012 (West 2008) (allowing for income generation to be considered in property valuation); *id.* § 23.013 (West Supp. 2014) (specifying the requirements for a “comparable sale”).

96. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 885–86 (2007) (explaining that market value frequently fails to incorporate the owner's subjective value in the property); *see also* Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1408–09 (2009) (describing legislative methods to address the subjective value homeowners add to the market value of their property).

97. See Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1408–10 (2009) (embracing the concept of a statutorily-defined modifier to market value to compensate for subjective value in takings).

opinion testimony are avoided.⁹⁸ Texas case law allows subjective opinion testimony of land experts.⁹⁹ In *State v. Oakley*,¹⁰⁰ the State's expert witness considered otherwise inadmissible hearsay evidence regarding comparable sales to establish the value of a condemned property.¹⁰¹ The court permitted such testimony as it showed the bases of the expert's subjective opinion and an expert for the landowner could have testified in a similar manner.¹⁰² In contrast, the property tax valuation process is codified.¹⁰³ Further, the challenges present in tendering an expert witness, such as overcoming voir dire and establishing the bases of the expert's opinion,¹⁰⁴ are avoided as the evidence used in the property tax assessment is obtainable from the county assessor's office and may be self-authenticated in court under the Texas Rules of Evidence.¹⁰⁵

98. See TEX. R. EVID. 705(a) (allowing the trial judge to determine if a land appraisal expert is required to testify as to the bases of an assessment); *id.* R. 705(b) (stating the trial judge may permit a voir dire of a land appraisal expert out of the hearing of the jury); *id.* R. 705(d) (mandating the trial judge perform a balancing test if a land appraisal expert uses otherwise inadmissible evidence in determining the value of the property in controversy); *Dallas Cnty. v. Crestview Corners Car Wash*, 370 S.W.3d 25, 33 (Tex. App.—Dallas 2012, pet. denied) (relating both parties objected to the methodology used by the opponent's appraisal expert).

99. See *State v. Oakley*, 163 Tex. 463, 356 S.W.2d 909, 914 (1962) (permitting the use of hearsay in expert testimony on a parcel's land value); see also *Allstate Ins. Co. v. Chance*, 590 S.W.2d 703, 704 (Tex. 1979) (per curiam) (validating the owner's subjective opinion as to value of property lost in a house fire over the assessed market value of the items as determined by Allstate's expert); *Crestview Corners Car Wash*, 370 S.W.3d at 40–41 (allowing the subjective opinion of the owner as to property value of the remainder in a partial condemnation case).

100. *State v. Oakley*, 163 Tex. 463, 356 S.W.2d 909 (1962).

101. See *id.* at 914 (“[T]he real question, however, is whether such testimony, which is inadmissible to prove the facts of such sales as evidence of the value of the property condemned, is likewise inadmissible in another capacity, that is, to show a basis of the opinion value stated by the expert witness . . .”).

102. See *id.* (reasoning that since the expert's qualifications and the existence of the comparable sales were not challenged, the trial judge did not abuse his discretion in allowing the expert to discuss the bases of his opinion).

103. See generally TEX. TAX CODE ANN. §§ 1.01–43.04 (West 2008 & Supp. 2014) (stating the entirety of the Texas Property Tax Code).

104. See TEX. R. EVID. 705(b)–(c) (permitting voir dire in a civil suit of an expert witness if it is directed at the underlying facts upon which the expert's opinion is based).

105. See TAX § 25.195 (West 2008) (detailing that the property owner may inspect and copy “all information pertaining to the property . . . considered in appraising the property, including information showing” what method of appraisal was used “and all calculations, personal notes, correspondence, and working papers used” to appraise the property); TEX. R. EVID. 902(4) (allowing certain public records, including data compilations, to be considered as self-authenticating for purpose of admission into evidence); *Williams v. Cnty. of Dallas*, 194 S.W.3d 29, 32 (Tex. App.—Dallas 2006, pet. denied) (ruling that because a tax statement was a certified copy signed by the county assessor and contained the county seal, it was self-authenticating under Texas Rule of Evidence 902).

F. *Challenges to the Use of the Property Tax Valuation*

Use of the property tax valuation as the floor for negotiation or assessment of damages in a condemnation action is certainly not a panacea for the myriad problems present in the seizure of land.¹⁰⁶ Some would argue that there can be no “adequate compensation” when the government expropriates private property through eminent domain.¹⁰⁷ Using the property tax valuation can streamline the condemnation process, but three important challenges—weaknesses in determining the tax appraised value, application of the highest and best use doctrine, and evaluating damages to the remainder in a partial taking—must be addressed.

1. Weaknesses in the Property Tax Valuation Process

To tax real property in Texas, each county tax appraisal district must determine the market value of the property,¹⁰⁸ a process shown to be less than perfect.¹⁰⁹ Each county district uses its own appraisal practice, and each appraiser can choose what methodology to use in determining the

106. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 877 (2007) (“[U]nder federal constitutional law, virtually any governmental action that is otherwise permitted by constitutional law will satisfy the public use requirement.”); Gideon Kanner, “[Un]equal Justice Under Law”: *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1107 (2007) (describing the poor quality of mass appraisals performed under government contracts in connection with large public development projects); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110, 111 (2003) (describing eighty years of precedent holding certain government regulations as having such a pervasive impact on property value as to constitute a regulatory taking).

107. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 874 (2007) (“[S]ome scholars . . . have doubted the wisdom of eminent domain power altogether.”). Additionally, using “fair market value” as the basis for compensation may be flawed as one of the elements in the definition of fair market value, a “willing seller,” is absent in the eminent domain context. See *City of Pearland v. Alexander*, 483 S.W.2d 244, 247 (Tex. 1972) (“[T]he term [fair] market value is the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell”); Gideon Kanner, “[Un]equal Justice Under Law”: *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1094–95 (2007) (suggesting that fair market value is not equivalent to just compensation in the eminent domain context).

108. See TAX § 23.01 (West Supp. 2014) (delineating market value as the object of appraisal for property tax purposes).

109. See Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY’S L.J. 553, 554–58 (2010) (highlighting problems in Texas property tax appraisal, including a case where Dallas Central Appraisal District under-valued a downtown parking lot by \$30 million); Steve Jansen, *Shakedown: The HCAD Appraisal Game*, HOUS. PRESS (Apr. 17, 2013), <http://www.houstonpress.com/2013-04-18/news/hcad-shakedown/full/> (describing systemic problems with the appraisal process in Harris County).

value.¹¹⁰ Unlike many other states, Texas does not require mandatory sales price disclosure to the appraisal districts, reducing the amount of data available to generate comparable market values of nearby properties.¹¹¹ Certain practices in use by appraisal districts challenge the statutory requirement for an individual assessment of property value¹¹² and compound the recognized problem with the use of inaccurate data in determining the property's value.¹¹³

The above weaknesses certainly pose a challenge, but the benefits to use of the tax assessed value in the condemnation context outweigh these weaknesses. The Tax Code presents a detailed and robust framework that, while not perfect, contains sufficient protections to ensure due process of law.¹¹⁴ A well-worn path exists through Texas state courts to appeal property tax appraisals.¹¹⁵ Legislative initiatives, driven by the Texas Constitution's requirement of "equal and uniform" taxation,¹¹⁶ to address the noted weaknesses are ongoing.¹¹⁷ The third-party, independent nature of the appraisals also serves to ameliorate concerns regarding use of the property tax assessed value in the condemnation context.

110. See TAX § 6.01 (West 2008) (creating an appraisal district for each county); *id.* § 23.0101 (allowing a county appraiser to "use the most appropriate method" of determining value); Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY'S L.J. 553, 563 (2010) ("When multiple professional appraisers examine a single piece of property, they often use different valuation methods and arrive at different conclusions as to the property's value.").

111. See Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY'S L.J. 553, 583 (2010) (noting Texas is among a minority of states that do not require sales price disclosure to local taxing authorities).

112. See TAX § 23.01(b) (West Supp. 2014) ("[E]ach property shall be appraised based upon the individual characteristics that affect the property's market value . . .").

113. See *id.* (placing restrictions on the use of mass appraisal techniques).

114. See *Brooks v. Bachus*, 661 S.W.2d 288, 290 (Tex. App.—Eastland 1983, writ ref'd n.r.e.) (reaffirming that the Texas Tax Code satisfies due process under the Texas Constitution).

115. See *Dallas Cnty. v. Dallas Nat'l Bank*, 142 Tex. 439, 179 S.W.2d 288, 289 (1944) (appealing Dallas County's appraisal of a trustee's estate); *Brooks*, 661 S.W.2d at 289 (appealing appraised value determined by Erath County Appraisal District); Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY'S L.J. 553, 580–82 (2010) (describing several cases adjudicating the validity of tax appraised values of real property).

116. See TEX. CONST. art. VIII, § 1(a) ("Taxation shall be equal and uniform.").

117. See Tex. S.B. 1342, 83d Leg., R.S. (2013) (proposing more judicial authority in Section 42 of the Tax Code to reject tax appraised values); Nathan Morey, Recent Development, *Unequal and Unfair: Why Texas Should Require Mandatory Sales Price Disclosure to Reconcile the Texas Property Tax Code with the Texas Constitution*, 41 ST. MARY'S L.J. 553, 585 (2010) (describing three recent bills in the Texas House and Senate that would require mandatory sales price disclosure for tax assessment purposes).

2. Application of the Highest and Best Use Doctrine

To establish the fair market value of a property, an appraiser must consider the highest and best use for which the property may be utilized in the reasonably near future.¹¹⁸ In examining the evidence in a condemnation case, the special commissioners or trial judge, in addition to reviewing market value, must examine use to determine damages.¹¹⁹ As the highest and best use is presumed to be the existing use,¹²⁰ in the majority of condemnation cases, the highest and best use rule should not affect the determination of the current market value, and the tax appraised value should be sufficient.¹²¹ It should be noted that Section 23.01 of the Texas Tax Code mandates the valuation of a residence homestead only as a homestead and does not permit other uses to be considered.¹²² Therefore Section 23.01 further minimizes the impact of highest and best use doctrine on application of the tax assessed value in a condemnation proceeding involving a homestead.

Cases arise where the highest and best use of the condemned property is not the existing use.¹²³ Such cases occur for a variety of reasons, including the owner's neglect of the property or changing market

118. *See* *Olson v. United States*, 292 U.S. 246, 255 (1934) (restating highest and best use doctrine requires consideration of other uses to determine if the highest and best use is different than the present use and if it increases the market value of the property); *United States v. 158.24 Acres of Land*, 515 F.2d 230, 233 (5th Cir. 1975) (cautioning only uses that the land may be readily converted to may be considered in evaluating highest and best use); *Cent. Power & Light Co. v. Graddy*, 318 S.W.2d 943, 949 (Tex. Civ. App.—Houston 1958, no writ) (authorizing the fact finder to consider “the highest and best use to which the land is adaptable” in measuring market value in a condemnation case).

119. *See* TEX. PROP. CODE ANN. § 21.041 (West 2000) (“As the basis for assessing actual damages to a property owner from a condemnation, the special commissioners shall admit evidence on . . . the use of the property for the purpose of the condemnation.”).

120. *See* *Enbridge Pipelines (E. Tex.) LP v. Avinger Timber, LLC*, 386 S.W.3d 256, 261 (Tex. 2012) (“There is a presumption that the highest and best use of the land is the existing use of the land.”); *see also 158.24 Acres of Land*, 515 F.2d at 233 (agreeing with the government that the plaintiffs failed to overcome the presumption that the highest and best use was the existing use).

121. Based upon the majority of condemnations being uncontested; of those that proceed to litigation, a portion will likely not contest the property's highest and best use as part of establishing market value. *See* TEX. TAX CODE ANN. § 23.01(d) (West Supp. 2014) (stating the market value is determined by the property's value regardless of use).

122. *See id.* (“The market value of a residence homestead shall be determined solely on the basis of the property's value as a residence homestead, regardless of whether the residential use of the property by the owner is considered to be the highest and best use of the property.”).

123. *See 158.24 Acres of Land*, 515 F.2d at 233 (siding with the condemnor who asserted the highest and best use of the property was ranching, as opposed to subdivision into residential tracts as claimed by the plaintiff); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 626 (Tex. 2002) (adjudicating whether “the highest and best use of the condemned property” for a pipeline easement was the existing use or if the easement constituted a separate economic unit).

conditions.¹²⁴ In any event, applying the property tax valuation presents a challenge because it looks at the present or recent past, whereas highest and best use doctrine is prospective.¹²⁵ The Texas Tax Code contains some guidance to county tax appraisers regarding use.¹²⁶ While the code addresses some aspects of use and valuation of the property, a landowner facing condemnation when changing market conditions exist or rapid development is in progress in the area may need to hire a land use expert to adjust the tax appraised value to account for the rapid change in land use in the area.

Highest and best use doctrine is firmly entrenched in land use law.¹²⁷ Putting it aside is unrealistic, but allowing the property tax valuation to be the starting point in evaluating damages in a condemnation case will reduce the reliance on experts in the proceeding.

3. Assessing Damages in a Partial Taking

Each condemnation situation is unique and impacts the landowner differently. In some cases, the entirety of the property is taken for public use.¹²⁸ More often, only a portion of the property is taken.¹²⁹ Partial

124. See John C. Peck & Kent Weatherby, *Condemnation of Water and Water Rights in Kansas*, 42 U. KAN. L. REV. 827, 859 (1994) (highlighting several reasons, including “[t]he owner’s ability to interpret the marketplace; the owner’s vision of the future; the location of the property in relation to the economic forces that help create value; and the owner’s” ability to raise capital to explain why a property may be underutilized).

125. See Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990–2002*, 39 J. LEGAL STUD. 201, 213 (2010) (“Appraisers might take the properties’ tax assessments into consideration, but only as one of the many factors, because different assessment standards are used in tax assessment (current use) and condemnation assessment (highest and best use).”).

126. See, e.g., TAX § 23.55 (describing procedures for tax appraisers in the event the use of a parcel changes from agricultural to non-agricultural use).

127. See *United States v. Fuller*, 409 U.S. 488, 490 (1973) (citing *Olson v. United States*, 292 U.S. 246, 256 (1934)) (restating that under the highest and best use doctrine, the combination of multiple adjacent parcels may be considered if the combination is the highest and best use of the condemned parcel); *Zyabr*, 88 S.W.3d at 628 (citing *Bauer v. Lavaca-Navidad River Auth.*, 704 S.W.2d 107, 109 (Tex. App.—Corpus Christi 1985, writ ref’d n.r.e.)) (“[T]he factfinder may consider the highest and best use to which the land taken can be adapted.”); *Cent. Power & Light Co. v. Graddy*, 318 S.W.2d 943, 949 (Tex. Civ. App.—Houston 1958, no writ) (acknowledging the condemned property owner may have the fact finder consider the property’s highest and best use in determining market value).

128. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 475 (2005) (describing the transfer of fee simple title of fifteen properties owned by petitioners to the City of New London).

129. See *United States v. 158.24 Acres of Land*, 515 F.2d 230, 231 (5th Cir. 1975) (“[T]he government took out of a 3,550-acre tract fee simple rights to 26.556 acres, an easement for road purposes in 0.38 acres, and an easement restricting use in 131.31 acres.”); *City of Carrollton v. Singer*, 232 S.W.3d 790, 793 (Tex. App.—Fort Worth 2007, pet. denied) (describing the acquisition of a

takings can fall into two general categories—a complete seizure and transfer of title to a part of a property,¹³⁰ or a seizure of an easement for public use.¹³¹

In the first category, basing the value of the condemned portion on the property's tax assessed value is a simple matter of multiplying the tax assessed value of the whole parcel by the percentage of the property seized. However, the Texas Property Code,¹³² case law,¹³³ and principles of equity¹³⁴ grant the landowner compensation for damages to the remainder. Except for specific cost-to-cure damages caused by the taking,¹³⁵ the fact finder must award damages by adjusting the fair market value of the remainder following the taking.¹³⁶

*Dallas County v. Crestview Corners Car Wash*¹³⁷ provides a good example of the challenge faced in assessing damages to the remainder.¹³⁸ Dallas County condemned a portion of the property owned by Crestview Corners Car Wash in order to widen an adjoining road.¹³⁹ Both parties stipulated to compensation for the portion of the property seized, but the damages

right-of-way through eminent domain to expand a local roadway).

130. *See In re State*, 355 S.W.3d 611, 612 (Tex. 2011) (orig. proceeding) (“The State sought to acquire a 39.619 acre fee tract as well as a 0.23 acre drainage easement, which would come out of the Lawses’ 185.835 acre property in Travis County.”); *Cnty. of Bexar v. Santikos*, 144 S.W.3d 455, 457–58 (Tex. 2004) (describing seizure of a strip of a property abutting a highway to support the expansion of the road surface).

131. *See Zwahr*, 88 S.W.3d at 626 (explaining Exxon’s attempt to condemn a fifty foot-wide strip of land for a pipeline easement); *Graddy*, 318 S.W.2d at 944 (“The appellant acquired an easement across a 722.8 acre tract of land . . . for the purpose of constructing an electric power line . . .”).

132. *See* TEX. PROP. CODE ANN. § 21.042(c) (West Supp. 2014) (“If a portion of a tract . . . is condemned, the special commissioners shall determine the damage to the property . . . including the effect of the condemnation on the value of the property owner’s remaining property.”).

133. *See Santikos*, 144 S.W.3d at 462 (“Damages to remainder property are recoverable,” but only if the public use of the condemned property causes the damages).

134. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324–25 (1893) (considering a right to compensation “a natural equity” incident to the exercise of the power of eminent domain (quoting *Sinnickson v. Johnson*, 17 N.J.L. 129, 145 (N.J. 1839))).

135. *See Dallas Cnty. v. Crestview Corners Car Wash*, 370 S.W.3d 25, 42 (Tex. App.—Dallas 2012, pet. denied) (“In a partial takings case, the landowner may recover as damages the costs to cure any unsafe condition on the remainder necessitated by the taking.”).

136. *See id.* at 39 (citing *City of Dallas v. Priolo*, 150 Tex. 423, 242 S.W.2d 176, 179 (1951)) (requiring injuries to a business not be listed as separate damages, but factored into the effect on “market value of the remainder”).

137. *Dallas Cnty. v. Crestview Corners Car Wash*, 370 S.W.3d 25 (Tex. App.—Dallas 2012, pet. denied).

138. *See id.* at 34 (appealing five issues where Dallas County asserted an abuse of discretion by the trial judge).

139. *See id.* at 33 (“Dallas County condemned a portion of appellees’ property for the purpose of widening Trinity Mills Road in Carrollton.”).

to the remainder were contested.¹⁴⁰ Both parties employed experts to justify their assessment of damages to the remainder.¹⁴¹ At trial, the jury awarded Crestview damages for the loss of use of the property during road construction, loss of profit as the car wash could no longer provide certain services due to the smaller size of the parcel following the taking, as well as cost-to-cure damages to correct a safety issue created by the taking.¹⁴²

Crestview demonstrates that attempting to modify the tax appraised value of the remainder without entering into an individualized and fact-intensive examination of the impact of the taking on the remainder is probably a fruitless pursuit because a partial taking of a tract will affect the use and value of the remainder in a unique way. However, it may be possible to incorporate the damage assessment on the remainder into the compensation provided for the seized portion.

The second category, the taking of an easement for public use, also poses a challenge in applying the tax appraised property value in the condemnation context. In Texas, utilities attempting to run power lines or pipelines may condemn an easement for their use.¹⁴³ As with the partial taking of a portion of a property, applying the tax assessed value to the easement can be easily determined, but the law requires computation of the impact on the remainder of the property owner's interest.¹⁴⁴

In *Central Power & Light Co. v. Graddy*,¹⁴⁵ the jury considered the impact on the remainder of a parcel of agricultural land caused by the seizure of

140. *See id.* (stating the purpose of the trial).

141. *See id.* at 38 (examining the testimony of the experts of both parties).

142. *See id.* at 33–34 (showing the compensation awarded at trial was based on the loss of ability to provide “state inspection and detailing services,” a need to move underground gasoline storage tanks, and a temporary shutdown of the business from utility outages and construction dust).

143. *See* *Tex. Pipe Line Co. v. Hunt*, 149 Tex. 33, 228 S.W.2d 151, 152 (1950) (“The Texas Pipe Line Company, condemned for pipe line right-of-way purposes, including piping of all types of petroleum products, a strip of land . . .”); *Cent. Power & Light Co. v. Graddy*, 318 S.W.2d 943, 944 (Tex. Civ. App.—Houston 1958, no writ) (summarizing a case involving condemnation of an easement to construct a power line); Laura A. Hanley, Comment, *Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, but by How Much*, 37 HOUS. L. REV. 125, 127–29 (2000) (reviewing the history of pipeline condemnation in Texas); Nicolas Parke, Comment, *How Much Is Fair?: Will Senate Bill 18 Ensure Condemnors Pay Just Compensation for Land Taken Due to the CREZ Transmission Lines?*, 44 TEX. TECH L. REV. 1121, 1135 (2012) (describing the need for an electrical utility to obtain a certificate of convenience and necessity in order to wield the power of eminent domain to construct electrical transmission lines).

144. *See* TEX. PROP. CODE ANN. § 21.042(c) (West Supp. 2014) (mandating consideration of the impact of the condemnation on the remainder of the parcel in assessing damages); *Tex. Pipe Line Co.*, 228 S.W.2d at 156 (affirming the lower court rulings entitling the property owner to compensation for damages to the remainder in a pipeline condemnation case).

145. *Cent. Power & Light Co. v. Graddy*, 318 S.W.2d 943 (Tex. Civ. App.—Houston 1958, no writ).

an easement to place power lines.¹⁴⁶ The landowner still had use of the land underneath the lines, but testimony showed the lines impeded free use of the land for agriculture.¹⁴⁷ A predictable “battle of the experts” ensued with different land values assessed for the impact on the remainder of the easement and the rest of the property.¹⁴⁸ The parties contested the impact on the potential uses of the land because of the taking,¹⁴⁹ the interference with use of the land in the easement, interference with the ability to dust crops due to the presence of the power lines,¹⁵⁰ and the reduction in land value of remaining property outside the easement.¹⁵¹ Applying the tax assessed value to the property may be difficult, but by modifying the valuation in certain circumstances as described below, it may encourage the parties to settle and prevent condemnation proceedings from being initiated.

4. Addressing the Challenges to Application of the Tax Assessed Value

Applying a multiplier to the tax assessed value of a property addresses some of the challenges presented by the lack of compensation for subjective value, as well as the imperfection present in the property tax valuation process, and reduces the complexity of damage assessment in the partial takings context.¹⁵² The multiplier would be applied to the tax assessed value and would be incorporated as part of the condemnor presenting a bona fide offer to the landowner. In the partial taking of a fee simple title to a portion of property, compensation for the seized portion would be set at 125% of its tax-assessed value, providing the landowner with compensation for the seized portion, plus a 25% markup for the impact on the remainder. The landowner would not be prevented

146. *Id.* at 944.

147. *See id.* at 945–47 (summarizing the testimony of several witnesses who asserted the presence of the power line lowered the market value of the remainder because it prevented crop dusting around the power line as well as soil cultivation using modern farm equipment).

148. *See id.* at 946–47 (noting the landowner’s expert witnesses reported a reduction in the value of the remainder of up to \$50 per acre, whereas Central Power’s experts all testified the market value of the remainder outside the easement was unaffected by the taking).

149. *See id.* (restating testimony of a witness for the landowner who claimed growing crops would be affected adversely by drainage issues created by the power line, whereas testimony from a company witness asserted that drainage would not be interfered with).

150. *Id.*

151. *Id.*

152. *See* Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1410–11 (2009) (justifying the application of multipliers to the fair market value of a condemned property to compensate for subjective or “use value”).

from contesting further damages to the remainder, but any resultant award would have the 25% markup included. While certainly not addressing all of the complex issues presented in a case like *Crestview*, the multiplier should make the initial offer more palatable to the landowner and increase the rate of settlement out of court.¹⁵³ A similar scheme can be applied to takings involving easements. In these cases, the landowner would be awarded 100% of the tax assessed value of the land encumbered by the easement. Again, the landowner is not precluded from contesting damages to the rest of the property, but receiving compensation for the easement as if the property is taken in fee simple should present a more palatable option to the landowner.

Several states apply multipliers to the property value in condemnation proceedings to protect property owners whose homesteads are impacted by a condemnation.¹⁵⁴ Michigan's state constitution requires compensation be no less than 125% of market value, in addition to compensable damages.¹⁵⁵ Indiana sets compensation at 150% of market value,¹⁵⁶ while Missouri joins Michigan in setting compensation for "condemnations that result in a homestead taking" at 125% of the property's fair market value.¹⁵⁷ These multipliers attempt to apply some

153. *See id.* (analogizing to contract law to demonstrate the acceptability of a multiplier and showing its purpose is to increase a condemned property owner's compensation); *cf.* H. Comm. on Land and Res. Mgmt., Bill Analysis, Tex. S.B. 18, 82d Leg., R.S. 9-10 (2011) (inferring that the bona fide provision incentivizes fairer offers and therefore prevents a condemnation suit in the first place). The condemnation process in Chapter 21 of the Texas Property Code demonstrates a bias toward promoting out-of-court settlement, which is further bolstered by increasing the initial amount of an offer to the property owner. *See* TEX. PROP. CODE ANN. § 21.012 (West Supp. 2014) (summarizing, in the event a condemning entity is not able to come to an agreement on compensation with the property owner, Sections 21.0111, 21.0112, and 21.0113 require a condemning entity must demonstrate this to the court to initiate the condemnation process).

154. *See* MICH. CONST. art. X, § 2 (mandating compensation of no less than 125% of fair market value); IND. CODE ANN. § 32-24-4.5-8(2) (LexisNexis 2014) (setting compensation at 150% of fair market value); MO. REV. STAT. § 523.039(2) (2006) (requiring compensation relating to seizure of a homestead be set at 125% of fair market value). Other states compensate property owners when their residence is seized using other measures. *See, e.g.*, MINN. STAT. § 117.187 (2006) (directing that compensation "must be sufficient for an owner to purchase a comparable property in the community" if the property owner must relocate as a result of the condemnation).

155. *See* MICH. CONST. art. X, § 2 ("If private property consisting of an individual's principal residence is taken for public use, the amount of compensation made and determined for that taking shall be not less than 125% of that property's fair market value, in addition to any other reimbursement allowed by law.").

156. *See* IND. CODE § 32-24-4.5-8(2) (providing a property owner whose residence is seized compensation at 150% of market value as determined by an appraisal in connection with the condemnation).

157. *See* MO. REV. STAT. § 523.039(2) (defining just compensation as "an amount equivalent to the fair market value of such property multiplied by one hundred twenty-five percent" when a

measure of compensation for the subjective elements of value inherent in one's homestead that currently go uncompensated in Texas.¹⁵⁸

To apply a similar multiplier, the fact finder in a Texas condemnation case would only have to examine if the property has a homestead exemption on file with the county appraisal district. The existence of the homestead exemption to tax appraisal in the Texas Constitution,¹⁵⁹ the exception to attachment of a judgment to a homestead in Texas law,¹⁶⁰ and the adoption of the Castle Doctrine as a justification in criminal law¹⁶¹ shows the regard Texans pay to their residences. In keeping with this sentiment and to compensate homeowners for subjective damages resulting from the condemnation of their homes, Texas should set the minimum compensation in a condemnation proceeding at 150% of the property's tax appraised value.¹⁶²

IV. CONCLUSION

The seizure of private property for the use of the sovereign is an ancient power reflected in both the United States and Texas Constitutions.¹⁶³

homestead is condemned). Missouri also allows additional compensation separate from the homestead qualification for "heritage value" in an effort to compensate for other subjective damages. *See id.* at § 523.039(3) (allowing for additional damages above fair market value if the landowner can prove majority ownership of the property by their family for greater than fifty years).

158. *See* Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1408–09 (2009) (explaining the awareness and efforts of legislators to address under-compensation of landowners because compensation based only on market value fails to account for the subjective value of a homestead).

159. *See* TEX. CONST. art. VIII, § 1-b (providing for a deduction to the appraised value of a property owner's homestead and additional deductions for a property owner over the age of 65, a disabled veteran, or the surviving spouse of a service member killed in action).

160. *See* TEX. PROP. CODE ANN. § 41.001(a) (West Supp. 2014) ("A homestead . . . [is] exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.").

161. *See* TEX. PENAL CODE ANN. § 9.32(c) (West 2011) ("A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section."); *Krajcovic v. State*, 393 S.W.3d 282, 284–85 (Tex. Crim. App. 2013) (determining whether the trial court failed to apply the Castle Doctrine per Section 9.32 of the Texas Penal Code in a murder case occurring in a homestead).

162. *See* Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 885 (2007) (noting government often fails to compensate for substantial subjective value in takings); Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1409–10 (2009) (endorsing the use of fixed-percentage multipliers to compensate for subjective "use value" in takings and advocating that lawmakers extend the concept to properties such as farms or businesses).

163. *See* U.S. CONST. amend. V (acknowledging the ability of the U.S. government to seize private property for public use); TEX. CONST. art. I, § 17 ("Taking, Damaging, or Destroying

However, this power is not limitless, as the government must provide “just” or “adequate” compensation to the private property owner in the exercise of eminent domain.¹⁶⁴ Because eminent domain challenges deeply held convictions regarding private property rights, the adequacy of compensation provided in the exercise of that power has been, and will remain, hotly contested.¹⁶⁵

Strengthening the property rights of Texas landowners when faced with the power of the government or a public carrier post-*Kelo* remains a priority of the body politic in this state.¹⁶⁶ Texas voters approved a constitutional amendment limiting the definition of “public use” in a taking,¹⁶⁷ and the legislature passed several statutes to constrain the state’s power to seize private property.¹⁶⁸ Among these, Texas Senate Bill 18

Property for Public Use.”)

164. See U.S. CONST. amend. V (requiring just compensation when a taking of private property for a public use occurs); TEX. CONST. art. I, § 17 (mandating adequate compensation be paid when the state or a subdivision thereof takes property for a narrowly defined public use); see also *Kelo v. City of New London*, 545 U.S. 469, 508 (2005) (Thomas, J., dissenting) (“This . . . [is] a bedrock principle well established by the time of the founding: that all takings require[] the payment of compensation.” (citing 1 WILLIAM BLACKSTONE, COMMENTARIES, *135 (1765))); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324–25 (1893) (asserting the right to compensation is “considered a settled principle of universal law” intertwined with the power of eminent domain (quoting *Sinnickson v. Johnson*, 17 N.J.L. 129, 145 (N.J. 1839))).

165. See *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting) (predicting increased use of eminent domain in the name of urban renewal as a result of the public purpose rationale of the majority); Gideon Kanner, “[Un]equal Justice Under Law”: *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1068 (2007) (“Americans overwhelmingly believe that the right to own and enjoy one’s property, particularly in the form of a family home, is a vital attribute of their personal liberty.”). Not only will traditional takings jurisprudence continue to evolve, but the field of regulatory takings grows more complex with the passage of time. See, e.g., *Koontz v. Saint Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2589–90 (2013) (reiterating that “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause . . . because they impermissibly burden the right not to have property taken without just compensation” in a case involving a taking as a result of a government agency withholding a land-use permit).

166. See Tex. H.B. 20, 83d Leg., 3d C.S. (2013) (proposing changes to the Texas Government Code and Texas Property Code that would require every entity wielding the power of eminent domain to justify the continued necessity of that authority); Tex. S.B. 180, 83d Leg., R.S. (2013) (attempting to amend the Texas Property Code by requiring the condemning entity to state the public use in the bona fide offer extended to the property owner); Statement by Governor Rick Perry on Passage of Senate Bill 18 (Apr. 13, 2011), <http://governor.state.tx.us/news/press-release/15976> (embracing the legislature’s efforts to curtail the use of eminent domain and protect Texas property owners).

167. See *Amendments to the Texas Constitution Since 1876*, TEX. LEGIS. COUNCIL 8 (May 2014), <http://www.tlc.state.tx.us/pubsconamend/constamend1876.pdf> (stating over 80% of voters approved House Joint Resolution 14 which limited the definition of “public use” under eminent domain in Texas).

168. See Act of May 9, 2011, 82d Leg., R.S., ch. 81, 2011 Tex. Gen. Laws 354 (altering a variety

requires that prior to initiating condemnation proceedings the condemning entity must extend a bona fide offer to the landowner.¹⁶⁹

To further the laudable goal of strengthening private property rights in Texas, a requirement should be added to the Texas Property Code directly linking the bona fide offer to the property tax valuation outlined in the Texas Tax Code. Using the property tax valuation provides several benefits and addresses some of the challenges to coming to “adequate compensation” in Texas.

Application of the property tax value as the starting point in damage assessment will be beneficial in both the negotiation and, if needed, litigation portions of the condemnation process. Under Texas law, both the property tax assessment and condemnation processes must establish fair market value of the property in question.¹⁷⁰ Requiring a condemning entity to base its offer on the property’s tax valuation provides reassurance to the landowner that a neutral, third party appraised the property, creates a reasonable starting point to negotiation, and improves judicial economy by limiting the initiation of condemnation proceedings in the first place.¹⁷¹

Competing government priorities are leveraged to the landowner’s advantage by use of the property tax appraised value in the condemnation process. Condemning entities typically present below-market offers to landowners,¹⁷² whereas many residential properties are over-valued by

of Texas codes to curtail the use of eminent domain); Landowner’s Bill of Rights Act, 80th Leg., R.S., ch. 1201, 2007 Tex. Gen. Laws 4072 (requiring a printed landowner’s bill of rights be conveyed to a property owner by the condemning entity along with the offer for compensation); Larry Morandi, *State Eminent Domain Legislation and Ballot Measures*, NAT’L CONF. OF STATE LEG. (Jan. 1, 2012), <http://www.ncsl.org/research/environment-and-natural-resources/eminent-domain-legislation-and-ballot-measures.aspx> (listing Texas Senate Bill 7 as limiting the use of eminent domain for economic development).

169. See Act of May 9, 2011, 82d Leg., R.S., ch. 81, §§ 8–9, 2011 Tex. Gen. Laws 354, 358–59 (codified at TEX. PROP. CODE ANN. § 21.0113 (West Supp. 2014)) (establishing a requirement for a bona fide offer to be proven by the condemning entity when filing a condemnation petition and specifying the contents of the offer and the time frame in which the property owner may respond).

170. See TEX. PROP. CODE ANN. § 21.042(b), (d) (West Supp. 2014) (requiring the special commissioners establish the condemned property’s market value when considering condemnation of a portion or the entirety of a property); TEX. TAX CODE ANN. § 23.01(a) (West Supp. 2014) (mandating local appraisal districts determine the market value of a property every January).

171. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 887 (2007) (“A voluntary settlement is advantageous for the government as it saves the government potential litigation costs as well as negative publicity.”).

172. See *id.* (asserting most land use attorneys believe condemning entities intentionally make below-market value offers to condemned property owners); Yun-Chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City 1990–2002*, 39 J. LEGAL STUD. 201, 204 (2010) (determining that from a study of eighty-nine condemnations over a twelve year period in

local appraisal districts.¹⁷³ Landowners are also familiar with the tax appraised value of their property,¹⁷⁴ have more knowledge of the property tax system than the condemnation process,¹⁷⁵ and typically have ample opportunity to protest their property's tax appraised value.¹⁷⁶ If condemnation proceedings are initiated, using the property tax appraised value can limit the testimony and expense of hiring appraisal experts for a hearing or trial and shorten the length of the proceedings, saving landowners and condemning entities time and money in litigation. Limiting the testimony of expert witnesses also limits the subjectivity present in the testimony of appraised value.¹⁷⁷

While some challenges exist to applying the tax appraised value, including weaknesses in determining the tax appraised value, application of the highest and best use doctrine, and evaluating damages to the remainder in a partial taking, these may be compensated for by applying a multiplier to the tax appraised value in association with presenting the "bona fide offer." Requiring 150% of the property tax value for a homestead gives fealty to the concept of the home being one's castle, addresses lack of compensation for subjective value, and limits the impact of weaknesses of tax appraisals in Texas.¹⁷⁸ Providing a 125% markup for the total seizure

New York City, the majority of settlements were less than the market value of the seized property).

173. See Steve Jansen, *Shakedown: The HCAD Appraisal Game*, HOUS. PRESS (Apr. 17, 2013), <http://www.houstonpress.com/2013-04-18/news/hcad-shakedown/full/> (reporting on a trend towards overvaluing low and medium-value properties in Harris County).

174. See TAX § 25.19 (West 2008) (providing for an annual notice requirement to the property owner of the property's appraised value for tax purposes subject to several specific limitations).

175. Compare *id.* § 25.19(b) (directing local appraisal districts include in the annual notice "a list of the taxing units in which the property is taxable; . . . the appraised value of the property for the current year," any exemptions currently listed against the property, and a detailed description of the process, date, and time to protest the valuation before an appraisal review board), with Gideon Kanner, "[Un]equal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1104–05 (2007) (asserting property owners accede to below market offers from condemnors because they don't have the knowledge and funds needed to ascertain an accurate market value and mount a robust legal defense).

176. See TAX § 42.01 (West Supp. 2014) (allowing for appeal of an appraisal review board's determination to the local district court); *id.* § 41A.01 (providing for binding arbitration in lieu of judicial appeal of determination by an appraisal review board); *id.* § 25.19(b) (West 2008) (requiring the local appraisal district to inform the property owner of "the time and procedure for protesting the value" and "the date and place the appraisal review board will begin hearing protests" in the notice of appraised value); *id.* § 41.41 (granting the right to a property owner to protest a property's tax appraised value to an appraisal review board).

177. See *Joyce v. Dallas Cnty.*, 141 S.W.2d 745, 746 (Tex. Civ. App.—Beaumont 1940, no writ) (holding a tax rendition sheet showing the value of the condemned property admissible in light of the wide disparity between the assessment of value presented in the testimony of both parties).

178. See Yun-Chien Chang, *Economic Value or Fair Market Value: What Form of Takings Compensation Is Efficient?*, 20 SUP. CT. ECON. REV. 35, 88 (2012) (concluding the most efficient

of a portion of a parcel partially compensates for damages to the remainder.¹⁷⁹ Similarly, in the case of seizure of an easement for public use, rendering 100% of tax appraised value for the easement compensates the landowner for the easement and addresses damages to the remainder. Even though this proposal does not answer the highest and best use question in every case, the presumption of current use as the highest and best use,¹⁸⁰ guidance on application of use for a homestead in Section 23.01 of the Texas Tax Code,¹⁸¹ and the multipliers specified above should reduce the impact of highest and best use in future condemnation cases.

The government's seizure of private property for public use will always challenge our sense of justice and fairness. Codifying use of the property tax valuation as the starting point for assessing damages in condemnation proceedings, along with the multipliers specified above, represents one small incremental step to defending private property rights while preserving the public's ability to undertake necessary projects for the betterment of society.

compensation in takings cases is fair market value plus added bonuses to compensate for subjective values of owner-occupied properties); Daphna Lewinsohn-Zamir, *Identifying Intense Preferences*, 94 CORNELL L. REV. 1391, 1409–10 (2009) (encouraging lawmakers to expand the use of multipliers in takings cases as a practical method of compensating for subjective value).

179. As the Property Code requires damages to the remainder be calculated, this 25% markup accelerates the process and may spur a negotiated settlement. See TEX. PROP. CODE ANN. § 21.042(c)–(d) (West Supp. 2014) (requiring the special commissioners estimate the impact of the taking on the market value on the remainder in a partial taking).

180. See *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002) (stating the rebuttable presumption that current use is the highest and best use).

181. See TAX § 23.01(d) (West Supp. 2014) (restricting the local appraisal district from considering uses other than a residence in appraising a homestead for tax purposes).