

THE TENSION BETWEEN PRIVATE PROPERTY AND PUBLIC PURPOSE

Brad Reid
Professor of Business Law
Abilene Christian University
ACU Box 29335 -- Abilene, Texas 79699
(325) 674-2768 -- reidb@acu.edu

Abstract

There is an inherent tension between the rights of individual landowners and broader social public policy goals. The most benign public policy goal might be road construction, as illustrated by the U.S. interstate highway system while the most controversial would involve efforts by elites to protect and increase the value of their real estate investments. This article examines how the urban renewal and economic development movements have contributed to dramatic changes in historical U.S. eminent domain doctrine. This article asks how these legal developments compare to traditional Biblical views of property. The article also discusses condemnation under Texas law as an illustration of the eminent domain mechanics of the process.

THE DEVELOPING DOCTRINE

There is an inherent tension between the rights of individual landowners and broader social public policy goals. The most benign of these goals might include road construction, as illustrated by the interstate highway system. The most controversial would involve efforts by elites to protect and increase the value of their real estate investments. Urban renewal was designed to create public-private partnerships through the creation of urban redevelopment corporations. The difficulty is when the power of eminent domain is used to transfer land to private entities that are primarily insulated from public accountability.

The concept of property involves the ever-changing relationships between individuals and between individuals and government. In the U.S., progressives like Jacob Riis exposed the problem of urban slums in literature such as "How the Other Half Lives."¹ The solution to these problems ranged from Jane Addams' internal to Lawrence Veiller's external.² The internal solution focused in individual self-improvement while the external solution changed the physical environment. New York's Tenement House Act of 1895 allowed the city Board of Health to condemn and demolish buildings declared unfit for human habitation. However, these efforts lacked the legal tools of detailed building codes and rapid condemnation at economically viable prices.

If tenements were to be destroyed, something must take their place to provide housing for the urban poor. Veiller, typical of reformers, resisted governmental housing stating that, "government housing plays no part in the solutions of housing problems."³ The reformers supported private associations purchasing and reviving slums, but the expense was always an

¹ Jacob A. Riis, "How the Other Half Lives: Studies Among the Tenements of New York" (1904).

² The Tenement House Problem (1903); Housing Reform Through Legislation, 51 *Annals American Academy Pd. and Social Science* 68 (1914).

³ See Max Page, *The Creative Destruction of Manhattan 90-92* at 91 (1999).

issue. Use of eminent domain for private redevelopment was believed to violate the Public Use Clause of the U.S. Constitution. However, the courts did allow “excess condemnation” of property adjacent to public projects to pay for the project.⁴

An apparent concern that eminent domain might be used to favor special interests over the public good is reflected in the 1877 decision declaring unconstitutional provisions in Michigan’s Milldam Act of 1873 allowing private companies to condemn land for the construction of water-powered mills.⁵ A like result was reached by the Illinois Supreme Court in 1903.⁶ In fact, it may be that the courts of this period rejected any governmental regulation of private enterprise. In 1888, the New York Court of Appeals invalidated a grant of eminent domain to the Niagara Falls and Whirlpool Railway Company to build a scenic railroad.⁷ Like results were reached by Minnesota⁸ and West Virginia courts.⁹

The United States Supreme Court in this period was generally supportive of the use of eminent domain for economic development. While the Court applied substantive due process to prevent governmental regulation of business, it broadly interpreted the Public Use Clause. A rare decision of the Court in 1896 disallowed an order that a railroad set aside land so that farmers might construct a cooperative grain elevator.¹⁰ That decision may contain the same period theme of protecting business. The Court wrote: “So far as it required the railroad corporation to surrender a part of its land to the petitioners,” the law was “in essence and effect, a taking of private property...for the private use of [another].”¹¹ In another decision, the Court found that the public use provisions of the Fifth Amendment applied to the states.¹²

In this period, the U.S. Supreme Court allowed the states to define public use within their jurisdictions. For example, the state was allowed to condemn land to build a tunnel for a railroad¹³ and a company could condemn land to build a power plant for a street railway.¹⁴ In 1923, the Court wrote that it would regard “with great respect” these decisions by state courts and that it would apply only limited reviews to these cases.¹⁵ Furthermore, it was “not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in order to constitute a public use.”¹⁶ Then, in 1926 came the famous case, *Village of Euclid v. Ambler Realty Company*,¹⁷ holding that zoning regulations did not violate the Fourteenth Amendment Due Process Clause. Zoning was determined to be acceptable to control public nuisances and to protect public health and safety. This opened the door to the subsequent use of eminent domain in urban renewal cases.

Concurrent with this development, some state courts viewed public use and eminent domain powers as limited. For example, a 1912 Massachusetts Supreme Court decision stated

⁴ U.S. Constitution, 5th Amendment: “...nor shall private property be taken for public use, without just compensation.”

⁵ *Ryerson v. Brown*, 35 Mich 334 (1877).

⁶ *Gaylord v. Sanitary District*, 68 N.E. 522 (Ill. 1903).

⁷ *In re the Application of the Niagara Falls and Whirlpool Ry. Co.*, 15 N.E. 429 (N.Y. 1888).

⁸ *Minn. Canal and Power v. Koochiching*, 107 N.W. 414 (Minn. 1906).

⁹ *R.R. Co. v. Iron Works*, 8 S.E. 453 (W. Va. 1888).

¹⁰ *Missouri Pacific Railway v. Nebraska*, 164 U.S. 403 (1896).

¹¹ *Id.* 417.

¹² *Fallbrook Irrigation Distract v. Bradley*, 164 U.S. 112 (1896).

¹³ *Milheim v. Moffat Tunnel Improvement Distract*, 262 U.S. 710 (1923).

¹⁴ *Hendersonville Light and Power Co. v. Blue Ridge International*, 243 U.S. 563 (1917).

¹⁵ *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923).

¹⁶ *Id.*

¹⁷ 272 U.S. 365 (1926).

that housing was not a public use that allowed the expenditure of public funds.¹⁸ While the development of the urban planning profession is beyond the scope of this article, suffice it to say that it flowered in the post Euclid environment and was a necessary precondition for the urban renewal movement. The Great Depression upset status quo urban economics and led to an increased dialogue concerning public housing.

In 1935, a federal district court held that public housing, that by definition, is not available to all citizens and could not use eminent domain since “if the property of the citizen can be condemned and taken...simply because the legislative department...may determine that the use to which this property is to be put is for the general welfare, the property of every citizen in this country would be subject to the whims and theories of any temporary majority.”¹⁹ This decision was affirmed by the Court of Appeals for the Sixth Circuit that stated “the taking of one citizen’s property for the purpose of improving it and selling or leasing it to another...is not...within the scope of the powers of the federal government.”²⁰

The passage of the Wagner Housing Act in 1937 created the United States Housing Authority and subsidies for local housing authorities, many of which were created to obtain these federal funds.²¹ This legislation provided further motivation for slum clearance. In subsequent legal battles involving these local housing authorities, the New York Court of Appeals upheld the public purpose of slum clearance determining that “slum areas are the breeding places of disease which take their toll not only on its denizens, but by spreading from the inhabitants of the entire city and state.”²² Following this lead, the Massachusetts Supreme Court distinguished its 1912 decision by stating that the prior subsidy legislation “contained no provision for the eradication of the source of disease and danger.”²³ Eminent domain could be used to remove the public nuisance of slums. This focus on the current conditions rather than ultimate uses becomes an important turning point in the use of eminent domain for urban renewal. In 1928, the U.S. Supreme Court upheld a Virginia statute requiring the destruction of red cedar trees to protect apple orchards from cedar rust disease. On a personal note, this author’s father recited how controversial this decision was. It was seen as reflecting the power of the apple grower’s association. This is another example of condition related jurisprudence.²⁴

Urban renewal attracted the attention of both liberals and conservative business interests. Nevertheless, there was resistance to centralized planning and the requirement that private property yield to this. This political debate, while significant, is beyond the scope of this article. This debate ultimately resulted in litigation in numerous state courts concerning the constitutionality of redevelopment legislation.²⁵ In particular, the focus became the legal status of efforts to condemn properties that were not yet slums and to transfer these properties to private parties in a way consistent with the Public Use Clause. The Pennsylvania Supreme Court, for example, stated that without urban renewal, cities would “continue to be marred by areas which are focal centers of disease, constitute pernicious environments for the young, and, while contributing little to the tax income of the municipality, consume an excessive proportion of its

¹⁸ In re Opinion of the Justices, 98 N.E. 611 (Mass. 1912).

¹⁹ United States v. Certain Lands in Louisville, 9 F. Supp. 137, 140 (1945).

²⁰ Certain Lands in Louisville, 78 F.2d 684 at 688 (6th Cir. 1935).

²¹ United States Housing Act of 1937, Ch. 899, 11, 50 Stat. 893 (1937) currently codified at 42 U.S.C. 1437.

²² N.Y. City Housing Auth. v. Muller, N.E. 2d 153, 154 (N.Y. 1936).

²³ Alldonn Realty Corp. v. Holyoke Housing Auth., 23 N.E. 2d 665, 668 (Mass. 1939).

²⁴ Miller v. Schoene, 276 U.S. 272 (1928).

²⁵ See, e.g., Belousky v. Redevelopment Authority, 54 A.2d 277 (Pa. 1947).

revenues because of the extra services required for police, fire, and other forms of protection.”²⁶ Thus, slum clearance “certainly falls within any conception of ‘public use’.”²⁷

In response to arguments that slum clearance involving transfers of ownership to private parties violated the Public Use Clause, the answer of the Massachusetts Supreme Court was typical: That private property cannot be taken for private use “is too well settled to require citation of authority. But the plaintiff’s argument, we think, puts the cart before the horse.”²⁸ “We are of the opinion that the main purpose of the plan is slum clearance and that the disposition of the land by sale thereafter, is incidental to that purpose. Once the public purpose contemplated by the statute has been achieved, the authority is not obligated to retain the cleared land as unproductive property.”²⁹ Some courts, such as the Supreme Court of Florida, disagreed, concluding that condemnation that resulted in private development was unconstitutional in that “if the municipalities can be vested with any such power or authority, they can take over the entire field of enterprise, without limit so long as they can find a blighted area containing sufficient real estate.”³⁰ The Georgia Supreme Court agreed determining that it could not “subscribe to the doctrine that the power of eminent domain may be resorted to every time there may be some public benefit resulting. To hold so would be to cut the very foundation from under the sacred right to own property.”³¹

URBAN RENEWAL TO LAND REFORM

In 1952, the District of Columbia Redevelopment Land Agency (DCRLA) proposed a significant program in the southwestern part of the District in which homes would be replaced with middle-class neighborhoods. Included in this project was the taking of a department store owned by Max Morris, which DCRLA argued was necessary to replan the area.³² In upholding the taking, the court determined that the taking of property to eliminate or prevent slums “injurious to the public health, safety, morals, and welfare” was valid even if the land was transferred to private parties.³³ The court did, however, note that, “those extensions of the concept of eminent domain...are potentially dangerous to basic principles of our system of government. And it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights.”³⁴ Furthermore, in matters of aesthetics, “the slow, the old, the small in ambition, the devotee of the outmoded, have no less right to property than have the quick, the young, the aggressive, and the modernistic or futuristic.”³⁵ Since the statute was vaguely written, the court questioned this broad based power noting that, “one man’s land cannot be seized by the government and sold to another merely in order that the purchaser may build upon it a better house...”³⁶ Both parties appealed to the U.S. Supreme Court.

²⁶ Id. at 282.

²⁷ Id.

²⁸ *Padaninis v. City of Somerville*, 121 N.E.2d 714, 717 (Mass. 1954).

²⁹ Id.

³⁰ *Adams v. Housing Authority*, 60 So.2d 663, 668-669 (Fla. 1952).

³¹ *Housing Authority v. Johnson*, 74 S.E.2d 891, 894 (Ga. 1953).

³² *Achneider v. D.C. Redevelopment Land Agency*, 117 F. Supp. 705 (D.C. 1953).

³³ Id. at 718-719.

³⁴ Id. at 716.

³⁵ Id. at 718-719.

³⁶ Id. at 724.

Justice Douglas wrote for the Court that Congress as administrator of the District could declare what was in the public interest subject to very narrow limitations.³⁷ Consequently, “miserable and disreputable housing conditions do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle...They may also be an ugly sore, a blight on the community which robs it of charm...The misery of housing may despoil a community as an open sewer may ruin a river.”³⁸ Congress has, he declared, the authority to “determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled,” and if officials decide upon such improvements, “nothing in the Fifth Amendment...stands in the way.”³⁹ A large area could be taken to avoid a “piecemeal approach,” and Congress could decide that the “public end may be as well or better served through an agency of private enterprises...”⁴⁰ All that property owners could expect was just compensation.

Within a decade of this decision, urban renewal as an institution was under attack for being costly, destructive of diversity, and damaging to historic landmarks such as New York City’s Penn. Station. In The Death and Life of Great American Cities, Jane Jacobs led the attack. Today the cutting edge of takings involves job creating and the 1981 Poletown case is a prime example.⁴¹ This involved the construction of a G.M. plant in Detroit in a working-class, but not slum, neighborhood. The Michigan Supreme Court upheld the taking stating: “the power of eminent domain is to be used in this instance primarily to accomplish the essential public purpose of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental.”⁴²

In 1984, the U.S. Supreme Court indicated its broad deference to the legislative branch when it approved a program by the state of Hawaii to condemn the property of large landowners in order to sell it to other residents.⁴³ Justice O’Connor wrote that the Court would accept any use of eminent domain that was “rationally related to conceivable public purpose.”⁴⁴ This trend has resulted in numerous commentaries in legal literature, most of which is critical of the Court’s failure to protect private property or seriously consider the term “public use” in the Fifth Amendment.⁴⁵ But the cases discussed in this section are just one piece of a broad trend.

In a recent article written by Ralph Nader and Alan Hirsch,⁴⁶ the authors begin with “an outlandish example: The United States government condemns a row of houses in the District of Columbia and transfers them to the leaders of the majority political party for use as personal residences. The prior homeowners, ordinary citizens who wish to remain in their homes, are compensated at a price dictated by the government and forced to move out. Would anyone doubt that this naked abuse of power is unconstitutional? In fact, case law suggests that the courts would uphold this action, and while this particular measure has not been undertaken, other

³⁷ Berman v. Parker, 438 U.S. 26, 32 (1954).

³⁸ Id. at 32-33.

³⁹ Id. at 33.

⁴⁰ Id. at 33-34.

⁴¹ Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

⁴² Id. at 459.

⁴³ Hawaii Housing Authority v. Midkiff, 467 U.S. 299 (1984).

⁴⁴ Id. at 241.

⁴⁵ See, e.g., Richard Epslein, Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations, 45 Stanford Law Review 1369 (1993).

⁴⁶ Making Eminent Domain Humane, 49 Villanova Law Review 207 (2004).

outrageous exercises of the eminent domain power occur regularly. This article addresses a legal doctrine run amok and propose a solution.”⁴⁷

The authors cite the case of *Hawaii Housing Authority v. Midkiff*⁴⁸ as an example of the “eviscerations of the public use requirement.”⁴⁹ The authors believe that, “put crudely, the [Supreme] Court came to decide that ‘liberty’ more than ‘property’, is a fundamental constitutional right that cannot be infringed absent a compelling government justification.”⁵⁰ Their proposed solution is that “courts should subject eminent domain takings to strict scrutiny where three conditions are present: (1) the land is transferred to another private party rather than held by the public; (2) the individual interest of those whose land is taken is particularly strong and monetary compensation cannot significantly compensate for the loss; and (3) the party whose land is taken is relatively powerless politically.”⁵¹ Furthermore, “enlightened legislatures should be eager to develop guidelines for courts to apply in evaluation exercises of eminent domain. There is, however, a regrettable disincentive for state legislatures to adopt such steps. Adoption of a federal legislative standard could prevent state governments from a ‘race to the bottom’ in their eagerness to please corporate benefactors by using eminent domain without any meaningful public use.”⁵²

Midkiff is as troubling a decision as the problem it sought to remedy. The Supreme Court decision begins with a discussion of the historic concentration of land ownership in Hawaii. In response to this, the legislature enacted the Land Reform Act of 1967.⁵³ This allowed condemnation of land and the transfer of land to tenants. “The legislature concluded that concentrated land ownership was responsible for skewing the State’s residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.”⁵⁴ In the resulting litigation, the federal District Court upheld the legislation while the Court of Appeals for the Ninth Circuit “concluded that the act was simply ‘a naked attempt on the part of the state of Hawaii to take private property of A and transfer it to B solely for B’s private use and benefit’”⁵⁵.

Justice O’Conner wrote, quoting Berman:

“We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determination addressed to the purpose of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia...or the States legislating concerning local

⁴⁷ Id. at 207.

⁴⁸ 467 U.S. 229 (1984).

⁴⁹ *Supra*. at 209.

⁵⁰ *Supra* at. 214.

⁵¹ *Supra* at 224.

⁵² *Supra* at 231.

⁵³ *Hawaii Housing Authority et al. v. Midkiff et al.* 467 U.S. 229 (U.S. 1984).

⁵⁴ Id. at 232.

⁵⁵ Id. at 235.

affairs...This principle admits of no exception merely because the power of eminent domain is involved...”⁵⁶

“The Court explicitly recognized the breadth of the principle it was announcing, noting:

‘Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end...Once the object is within authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area.

Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.”⁵⁷ The Court then reaches the conclusion that “the ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”⁵⁸

The Court immediately notes that, “there is, of course, a role for courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* makes clear that it is ‘an extremely narrow’ one.”⁵⁹ The Court continues by noting that “to be sure, the Court’s cases have repeatedly stated that ‘one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.’”⁶⁰ Thus, in *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896), where the ‘order in question was not, *and was not claimed to be*, ...a taking of private property for a public use under the right of eminent domain,’⁶¹ the Court invalidated a compensated taking to be proscribed by the Public Use Clause.”⁶² “On this basis, we have no trouble concluding that the Hawaii Act is constitutional. The people of Hawaii have attempted much as the settlers of the original 13 Colonies did, [citation omitted] to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State’s residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State’s police powers, [citation omitted.]”⁶³

In footnote 5 the Court writes: “After the American Revolution, the colonists in several States took steps to eradicate the feudal incidents with which large proprietors had encumbered land in the Colonies. See, e.g., Act of May 1779, 10 Henning’s Statutes at Large 64, Ch. 13, Sec. 6 (1822) (Virginia statute); Divesting Act of 1779, 1775-1781 Pa. Acts 258, Ch. 139 (1782) (Pennsylvania statute). Courts have never doubted that such statutes served a public purpose. See e.g., *Wilson v. Iseminger*, 185 U.S. 55, 60-61 (1902); *Stewart v. Gorter*, 70 Md. 242, 244-245, 16 A. 644, 645 (1889)’.”⁶⁴

⁵⁶ *Midkiff* at 239 quoting *Berman v. Parker*, 348 U.S. 26 at 32 (1954).

⁵⁷ *Id.* at 240 quoting *Berman* at 33.

⁵⁸ *Id.* at 240.

⁵⁹ *Id.* at 240 quoting *Berman* at 32.

⁶⁰ *Id.* at 240 citing *Thompson v. Consolidated Gas Corp.*, 300 U.S. 55, 80 (1937). Other citation omitted.

⁶¹ *Id.* at 240, emphasis added by the Court.

⁶² *Id.* at 241, citations omitted.

⁶³ *Id.* at 242.

⁶⁴ *Id.* at 242.

The Court upholds the Hawaii statute stating that “when the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts. Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power. Therefore, the Hawaii statute must pass the scrutiny of the Public Use Clause.”⁶⁵ The Court specifically rejects the Court of Appeals view “that government possess and use property at some point during a taking.”⁶⁶ In addition, the Court writes that, “the mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public.”⁶⁷

Also, “judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”⁶⁸ “Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.”⁶⁹ The Court concludes: “The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than confer a private benefit on a particular private party. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus, be void. But no purely private taking is involved in these cases. The Hawaii Legislature enacted the Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii – a legitimate public purpose. Use of the condemnation power to achieve this purpose is not irrational. Since we assume for purposes of these appeals that the weighty demand of just compensation has been met, the requirements of the Fifth and Fourteenth Amendments have been satisfied.”⁷⁰ Justice Marshall did not take part in this case.

REGULATORY TAKINGS

In the early days of U.S. law, the idea of governmental taking was applied to physical appropriations of private property for a public purpose. In 1922, the U.S. Supreme Court wrote that if governmental regulation “goes too far,” it has the same impact on the property owner as if the government had in fact physically taken the land.⁷¹ The court reviewed a Pennsylvania statute that limited mining activity. Writing for the majority, Justice Holmes stated that, “the general rule is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.”⁷² Precise determinations had to be made on the facts of each case. This case gave rise to the “regulatory takings” doctrine.

⁶⁵ Id. at 242-243.

⁶⁶ Id. at 243.

⁶⁷ Id. at 243.

⁶⁸ Id. at 244.

⁶⁹ Id. at 244.

⁷⁰ Id. at 245.

⁷¹ *Pennsylvania Coal Co. v. Mahen*, 260 U.S. 393 (1922).

⁷² Id. at 415.

Essentially, regulatory taking occurs when governmental regulation denies an owner of all economically viable use of the property. Regulatory takings can be grouped into two broad categories: physical invasions and wipeouts.

A physical invasion taking occurs when a regulation requires a physical occupation of land no matter how small. For example, the Supreme Court determined that a regulation requiring that television cable be placed on all apartment buildings constituted a physical invasion taking.⁷³ The second type of taking occurs when a governmental regulation results in a permanent total wipeout of all economic value. This is a rare case, but prohibiting all construction on ocean beach land is an example.⁷⁴

Government must also pay for temporary takings in which limited duration restrictions apply to land.⁷⁵ Recently the Supreme Court has decided that acquiring title after the effective date of regulation does not automatically bar a compensation claim.⁷⁶ This case involved designation of property as “coastal wetlands.” Arguably there is considerable subjectivity in this area of law.

A BIBLICAL REVIEW

Biblical interpretation (hermeneutics) is a difficult task, frequently complicated by social and cultural bias. Firstly, we must determine what is being said, and secondly, we must place what is said in a historical context that may be compared to our contemporary social, economic and political world. The Bible frequently provides broad principles rather than specific directions for Christian living with a heavy emphasis on the inner spirit rather than outward religious appearance.

In the Old Testament, land is viewed as ultimately belonging to God, thus the admonition: “The land shall not be sold in perpetuity, for the land is mine.” (Lev. 25:23). Land in Israel was divided and owned on a tribal basis (ie.: Josh. 13:15) and within the tribe there were family groups (ie.: Judges 6:11). Land was not sold outside the family group and the taking of land under various methods, such as mortgages, is condemned (ie.: Neh. 5). The redemption provisions of Jubilee assure the preservation of land ownership for the tribal or family group.

The Eighth Commandment prohibits theft and the Tenth Commandment prohibits coveting (Exodus 20). Thus, the ownership of land in the Old Testament is built of relationships to God and the tribe with the disapproval of theft and greed as guiding principles. There is no abstract right to property for its own individualistic sake, as we understand the concept today. In fact, land uses were responsibilities to the community.

These responsibilities include the following years of Exodus 23:10-11 and the Sabbatical year of Leviticus 25:2-7. This has a religious acknowledgment that the land belongs to God. Modern regulations of land use do not contain this dimension. Associated with this religious context was the concept of releases expressed in Deut. 15:1-3, which expresses a concern for the poor as part of one’s duty to God.

In Acts, we have the Christian community’s sharing expressed in Acts 4:32-37. Unlike reciprocity based on equality of social status, here there is sharing without concern for repayment. No one appears to be claiming individual ownership rights. This mirrors the Old

⁷³ *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982).

⁷⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

⁷⁵ See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465 (2002).

⁷⁶ *Palazzola v. Rhode Island*, 533 U.S. 606 (2001).

Testament statement that God will provide: “There will, however, be no one in need among you, because the Lord is sure to bless you in the land.” (Deut. 15:4). However, it is noteworthy that the giving was voluntary and the property being sold was not subject to community control. Here we may have a more clearly modern idea of private property but yet dedicated to public (community) purpose. Clearly the early house churches practiced hospitality for the benefit of the community. What is different today is the substitution of secular government for spiritual authority in our modern American society. In both Old and New Testaments, property is under God’s ultimate sovereignty and not a private, personal, individualistic sovereignty.

How are we in 2004 to understand the role of the Jewish prophets of the Old Testament? It is a tempting tradition in our Western intellectual heritage to cite the prophets as advocates for social justice and reform that speak to modern society. This approach has merit in the general understanding of the human condition, but one must not lose sight of the context in which they spoke. Jewish law united the secular and sacred in a way that our American concepts of the separation of church and state would find suspect. The prophet’s concepts of “justice” united a demand that one obey God and His commandments.

Jubilee means a “time of shouting.”⁷⁷ Leviticus 25 is the key passage. It is based upon the idea that “the land must not be sold permanently, because the land is mine [God’s] and you are but aliens and my tenants.”⁷⁸ It combines the sacred and secular economics. The purpose seems to be a rebalancing of society, the prevention of the extremes of wealth and poverty, and perhaps keeping the tribal ownership of land intact. Perhaps the best modern application concerns the dangers associated with the concentration of wealth. If one uses the concept of rebalancing and redressing the concentrations of wealth, then the U.S. Supreme Courts’ decision in *Hawaii Housing Authority v. Midkiff* is a modern secular example of this function.

Micah states: “Woe to those who plan iniquity, to those who plot evil on their beds. At morning’s light they carry it out because it is in their power to do it. They covet fields and seize them, and houses, and take them. They defraud a man of his home, a fellowman of his inheritance.”⁷⁹ Nehemiah 5 addresses the problem of land mortgages and usury. Nehemiah demands that the usury stop and that those doing this “give back to them immediately their fields, vineyards, olive groves and houses, and absolute usury you are charging them – the hundredth part of the money, grain, new wine and oil.”⁸⁰ Isaiah 5:8 pronounces a “woe to you who add house to house and join field to field till no space is left and you live alone in the land.” These passages decry the accumulating of land and particularly when done at the expense of the small landowner. In the agricultural economy of the day, owning some land was essential to support one’s family. In addition, the sins of greed and usury stand condemned. Does this have any relevance to the Poletown case?

Professor Dr. A. Rauscher said, “there are three areas of human life that need particular judiciary government because from it the existence and the future of the society are naturally dependent.”⁸¹ These are marriage and family, “work and job life; in particular of private property and property proportions,” and the state. Rauscher states, rather surprisingly, that, “in the

⁷⁷ Robert Young. *Analytical Concordance to the Bible*. Um. B. Eardmans Publishing Co., Grand Rapids, Michigan (1969).

⁷⁸ Leviticus 25:23.

⁷⁹ Micah 2:1-2.

⁸⁰ Nehemiah 5:11.

⁸¹ Rauscher, “Institutions of Social Organization: Family, Private Property, State” in *Principles of Catholic Social Teaching*, Ed. David A. Boileau; Marquette University Press; Marquette Studies in Theology No. 14 (1994), page 73.

Christian-European tradition, marriage and family, private property, and the political society were never seriously discussed.”⁸² Under liberalism, there is individualism in which “private property no longer qualifies as an organizing of social duties by which the owner has not only rights but also social duties, but it is still viewed as private rights.” “When the French Revolution and then the Napoleonic Code regarded the right to private property as a holy, inalienable right, which is only limited by the rights of a third party, then this stands in opposition to the Christian-European tradition.”⁸³ “In the Christian tradition the state and the parliament are bound to values and legal norms established beforehand, and according to Rousseau, the state is not to be concerned about these preexisting values and norms. The fixed anchor is missing from liberal position.”⁸⁴

“Hermeneutics probably first emerged as a name for this biblical discipline in J.C. Dannhauser’s *Hermeneutics Sacra* (Strasbury, 1654).”⁸⁵ The author, Bruce Corely, provides four New Testament passages as examples of interpreting (exegesis) Scriptures: (1) Opening up the Scriptures (Luke 24:27 - Jesus along the Emmaus Road); (2) Guiding through the Scriptures (Acts 8:31 - Philip and the Ethiopian); (3) Cutting straight with the Scriptures (II Tim. 2:15 - Paul’s statement to Timothy to cut a straight line); and (4) Unlocking the Scriptures (II Peter 1:19-21-no prophesy is a matter of personal interpretation).⁸⁶

The original traditional goal of exegesis was to determine the meaning intended by the author, but modern theory considers the author, text, and reader. All three are relevant. His chart of six strategies for Biblical exegesis is particularly helpful in seeing the relative importance of each depending upon the approach taken.⁸⁷ They are historical context, literal form, grammatical analysis, lexical elements, discourse argument, and theological message.

Setting refers to the historical context. Structure considers literal form. Syntax provides a grammatical analysis. Semantics concerns the meaning of words. Summation traces the logic and argument of the text, while Significance considers the message for us.

Grammatical studies require an understanding of the original Biblical text languages and the literal and figurative meaning of words. Historical consideration includes understanding the author and related culture as well as the original audience and the broader society. This provides a context for the passage in question. One significant cultural consideration is the emphasis upon collective (group) existence as contrasted with the extreme individualism of modern society.

Augustine in his book, On Christian Doctrine, listed a number of rules of interpretation. These include knowing and using original languages, looking to context, comparing clear passages with obscure ones and determining both the literal and figurative meanings. Medieval scholarship saw many layers of meaning in the text with heavy emphasis upon spiritual meanings. Abelard in Sic et Non used a critical dialectical method that demonstrated the importance of context. Reformation hermeneutics, typified by Luther (1483-1546) emphasized scripture as the ultimate source of spiritual truth but not necessarily scientific truth. The priesthood of believers allowed individuals to interpret scripture outside of institutional structures. This was dangerous when the readers were using translations and their private judgment. There was gradually a return to the grammatical-historical method. Horace Bushnell

⁸² Id. at 73.

⁸³ 74, 75.

⁸⁴ 75.

⁸⁵ Biblical Hermeneutics: A Comprehensive Introduction to Interpreting Scripture, Second Edition, Broadman & Holman Publishers. (Nashville, 2002).

⁸⁶ Page 5.

⁸⁷ Page 9.

(1802-1876) was instrumental in the beginnings of Modernism and the Social Gospel movements.

All of this leads one to be cautious in making any direct, linear application of the Bible to modern U.S. law. It is clear that greed and abuse of power by elites is condemned. Thus, one is left with many issues to carefully ponder and ultimately the spirit and purpose behind the action may be the most difficult aspect of any analysis.

CONDEMNATION IN TEXAS

Generally a condemnation case involves four steps: (1) determining the ownership of the land in question; (2) determining the interest in the land that is being taken or damages; (3) determining or addressing the requirement of public purpose; and (4) providing adequate compensation. While the power of eminent domain is inherent in the sovereign,⁸⁸ the basic Texas constitutional provision is Article I, Section 17:

“No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such persons, and, when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof.”

The Texas legislature has delegated the power and authority of eminent domain to many entities including municipalities, utility companies and other quasi-public corporations. A legislative declaration of public purpose is presumed to be valid unless clearly shown to be private.⁸⁹ This case upheld the Texas urban Renewal Law and the resale of property to private individuals.

There are two methods of taking private property. The first method follows Chapter 21 of the Texas Property Code and the second method is known as “inverse condemnation.” Under Chapter 21 of the Texas Property Code, the condemning authority first makes a determination by a formal resolution according to the particular administrative requirement of the agency and of the necessity to appropriate property for public use. The next step is to negotiate in good faith with the landowner, good faith requiring an investigation of all aspects of value and the preparation of necessary worksheets.⁹⁰

The scope of good faith negotiations have been defined by the Austin Court of Appeals in the following manner:

“We conclude that the Texas statute does not demand prolonged negotiations or a series of offers and counter-offers between the parties. Instead, the statutory prerequisite may be satisfied if the condemner makes a single bona fide offer to a landowner that the condemner in good faith feels is the amount of compensation due, and the landowner rejects that offer.”⁹¹

⁸⁸ State Highway Department v. Weber, 219 S.W.2d 70 (Tx. 1949).

⁸⁹ Davis v. City of Lubbock, 326 S.W.2d 699 (Tx. 1959).

⁹⁰ Lapsley v. State, 405 S.W.2d 406 (Tex. Civ. App. – Texarkana 1966).

⁹¹ State v. Hipp., 832 S.W.2d 71 at 77-78 (Tex. App. – Austin (1992)).

An unusual aspect of this opinion is the determination that good faith negotiations are a question of law to be determined by the court and not the jury.⁹² This contradicts numerous prior decisions that require this issue be submitted to the jury.⁹³

Furthermore, the condemning authority need not negotiate with the landowner if doing so would be unreasonable. If the landowner cannot be located or the landowner refuses to negotiate or if efforts to negotiate are “futile” then the condemning authority may proceed.⁹⁴ The condemning authority need only negotiate with the legal titleholder and not lessor.⁹⁵

If negotiations have failed, then a petition in condemnation is filed.⁹⁶ The petition describes the property to be condemned, states the intended use of the property, the names of the property owners, and that there has been a failure to agree on damages to the property.⁹⁷ In general, the petition is filed with the County Court at Law.⁹⁸

The judge of the court appoints three disinterested freeholders who reside in the county as special commissioners to assess the damage to the property being condemned.⁹⁹ If the parties agree upon commissioners, the court should give preference to them.¹⁰⁰ Once appointed, the commissioners file an oath with the court stating that they will fairly and impartially assess the damages.¹⁰¹

Each party in an eminent domain proceeding is entitled to at least eleven days advanced written notice of the hearing.¹⁰² The special commissioners only determine damages and do not determine the underlying authority to condemn the property.¹⁰³ Sections 21.041 and 21.042 of the Texas Property Code govern how the special commissioners are to fairly and impartially assess damages. Section 21.041 indicates the general topics of evidence to be received by the special commissioners. These are the value of the property being condemned, injury to the property owner, benefit to the property owner’s remaining property, and the use of the property by the condemner seeking to acquire the property.¹⁰⁴ In calculating and assessing damages, Section 21.042 sets forth the parameters under which the commissioners are to make their assessment. These include the principle that in estimating injury or benefit, the special commissioners should receive evidence on the highest and best use of the property that is or could be possible now or in the reasonable foreseeable future.¹⁰⁵

The decision of the special commissioners need not be unanimous. The commissioners also award the costs of the proceedings against any party, as they deem appropriate.¹⁰⁶ Then the commissioners make a written statement of their decision known as the Award of Special Commissioners.¹⁰⁷ This is filed with the court and notice of the decision is sent by certified or

⁹² Id. at 75.

⁹³ See, e.g., *Country of Nueces v. Rankin*, 303 S.W.2d 455 (Tex. Civ. App. – Eastland (1957))

⁹⁴ *Mid-America Pipeline Co. v. Hadiviger*, 471 S.W.2d 157 (Tex. Civ. App. – Amarillo (1971))

⁹⁵ *Aronoff v. City of Dallas*, 316 S.W.2d 302 (Tex. Civ. App. – Texarkana 1958)

⁹⁶ Tex. Prop. Code. Sec. 21.012.

⁹⁷ Tex. Prop. Code. Sec. 21.012(b).

⁹⁸ Tex. Prop. Code Sec 21.013.

⁹⁹ Id. Sec. 21.014(a).

¹⁰⁰ Id.

¹⁰¹ Id. Sec. 21.014(b).

¹⁰² Id. Sec. 21.015(a).

¹⁰³ *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240 (Tex. 1984).

¹⁰⁴ Tex. Prop. Code Sec. 21.041.

¹⁰⁵ *City of Austin v. Cannizzo*, 267 S.W.2d 808 (Tex. 1954).

¹⁰⁶ Tex. Prop. Code Sec 21.047(a).

¹⁰⁷ Id. at Sec. 21.048.

registered mail to the parties.¹⁰⁸ A party may object to the award by filing a written statement of objections on or before the first Monday following the twentieth day after the award was filed with the court.¹⁰⁹ The time period is tolled (delayed) until the required notice is mailed.¹¹⁰ If no objection is filed within the statutory period, judgment is rendered by the court based upon the findings of the special commissioners.¹¹¹ If timely objection is made, the court sets the case for trial.

Section 21.021 of the Texas Property Code provides the method by which the condemning authority can assume possession of the property pending the results of litigation. The procedure requires the condemning authority to pay either directly to the landowner or to the registry of the court, the amount awarded by the special commissioners plus any costs assessed against it.¹¹² Furthermore, an amount equal to the commissioner's award in either cash or bond must be paid into the registry of the court.¹¹³ The landowner may withdraw the funds from the registry of the court and may still litigate the question of compensation but is prevented from contesting the right of the condemning authority to take the property.¹¹⁴

Objection by any party to the award of the special commissioners transforms the administrative action into a judicial one, which is a trial de novo. Thus, the landowner is not bound by claims asserted at the special commissioners hearing.¹¹⁵ The burden of proof is on the landowner concerning the value of the land taken by eminent domain and damages.¹¹⁶

Sometimes a condemning authority has taken property for public use without first complying with the necessary statutory requirements. In this case, the landowner may file an eminent domain proceeding, called inverse condemnation, asserting a claim for compensation.¹¹⁷ The elements of this claim are that the government intentionally performed certain acts in the exercise of its lawful authority that resulted in a taking of property for public use. The determination of whether a taking has occurred is a question of law.¹¹⁸

The Texas Supreme Court has characterized three situations regarding access that give rise to claims of inverse condemnation: (1) a total temporary restriction of access; (2) a partial permanent restriction of access; or (3) a temporary limited restriction of access.¹¹⁹ Inverse condemnation may also apply to permanent takings and unreasonable interference with the right to use property. This involves the use of police power (regulatory power) and whether it is extensive enough to constitute a compensable taking. For example, in Texas, compensation was required for a city's denial of an application for a residential subdivision, even if this decision did not render the property useless and without value.¹²⁰ In general, compensable regulatory taking occurs when the government imposes restrictions that deny landowners all economically viable use of their property or unreasonably interfere with the landowners right to use and enjoy his property.

¹⁰⁸ Id. at Sec. 21.049.

¹⁰⁹ Id. at Sec. 21.018(a).

¹¹⁰ *John v. State*, 826 S.W.2d 138 (Tex. 1992).

¹¹¹ Tex. Prop. Code Sec. 21.018(a).

¹¹² Id. at 21.012(a)(1).

¹¹³ Id. at 21.021(1)(2) and (3).

¹¹⁴ *Coastal Industrial Water Authority v. Celanese Corp. of Am.*, 592 S.W.2d 597 (Tex. 1979).

¹¹⁵ *State v. Lowrie*, 56 S.W.2d 676 (Tex. Civ. App. – Austin, 1933).

¹¹⁶ *IntraTex Gas Co. v. Hilbun*, 485 S.W.2d 346 (Tex. Civ. App. – Houston, 1972).

¹¹⁷ *City of Abilene v. Burk Royalty Co.*, 470 S.W.2d 643 (Tex. 1971).

¹¹⁸ *City of Austin v. Travis County Landfill Co.*, 73 S.W.3d 234 at 241 (Tex. 2002).

¹¹⁹ *City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex. 1986).

¹²⁰ *City of Houston v. Kolb*, 982 S.W.2d 949 (Tex. App. – Houston, 1999).

Just compensation in all types of condemnation cases involves making the landowner whole by awarding him what he could have sold his land for in a free market.¹²¹ This value is determined as of the date of the taking. If only part of the property is taken, not only is the landowner entitled to the value of the actually taken land, but also any damages or destruction done to the remaining property as a result of the condemnation project.¹²²

Uses other than those for which the property is being utilized at the time of the taking may be considered in determining the highest and best use for the property.¹²³ Establishing this considers the reasonable foreseeable future. This includes an analysis of the area, the area's economic atmosphere and growth, accessibility and desirability of the area for future markets and the projected economic condition of the area, adaptability of the property to higher and better uses, and adaptability of improvements on the property to a higher use.

Market value is "the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which is either is or in all reasonable probability will become available within the reasonable future."¹²⁴ In one case, the landowner was allowed to offer evidence of the property's highest and best use as commercial even though the deed restricted it to residential as the Court found it "reasonably probable" in the foreseeable future that the land would be available for commercial use.¹²⁵ The trial court has broad discretion in making these determinations. Virtually anyone can testify as an expert witness as to the market value of the property.¹²⁶ The comparable sales method tends to be the preferred method for determining value.¹²⁷ A jury, while not bound by the testimony of an expert on market value, may not "leap entirely outside the evidence in answering any questions submitted to them."¹²⁸ The award must be within the range of testimony the jury heard.

CONCLUSION

On July 30, 2004, the Michigan Supreme Court determined that a proposed use of eminent domain to condemn real estate for the construction of a 1,300-acre privately owned business and industrial park violated the "public use" requirement of the 1963 Michigan Constitution.¹²⁹ The court began with this statement: "We are presented again with a clash of two bedrock principles in our legal tradition: the sacrosanct right of individuals to dominion over their private property, on the one hand and, on the other, the state's authority to condemn private property for the common health." The majority overruled the Poletown decision.

In contrast, on March 9, 2004, the Connecticut Supreme Court upheld a taking by the City of New London in which waterfront homes were to be seized and a privately owned office building constructed "in furtherance of a significant economic development plan that is projected

¹²¹ Tex. Const. Art. I, sec. 17,

¹²² *State v. Munday Enter.*, 824 S.W.2d 643 (Tex. App. – Austin, 1992).

¹²³ *State v. Tigner*, 827 S.W.2d 611 (Tex. App. – Houston, 1992).

¹²⁴ *State v. Windham*, 837 S.W.2d 73, at 77 (Tex. 1992).

¹²⁵ *State v. Tigner*, 827 S.W.2d 611, at 613 (Tex. App. – Houston, 1992).

¹²⁶ *State v. Taylor*, 721 S.W.2d 541 (Tex. App. – Tyler, 1986).

¹²⁷ See, e.g., *Baver v. Lavaca-Navidad River Authority*, 704 S.W.2d 107 (Tex. App. – Corpus Christi, 1985).

¹²⁸ *Wegner v. State*, 829 S.W.2d 922 (Tex. App. – Tyler, 1992).

¹²⁹ *Wayne v. Hathcock*, 2004 Mich. LEXIS 1693 (July 30, 2004).

to create in excess of 1,000 jobs to increase tax, and other revenues, and to revitalize and economically distressed city, including its downtown and waterfront areas.”¹³⁰

This court stated: “The Michigan Supreme Court’s decision in Poletown Neighborhood Council is a landmark case in the use of eminent domain. It illustrates amply how the use of eminent domain for a development project that benefits a private entity nevertheless can rise to the level of a constitutionally valid public benefit.”¹³¹ The court did state that “we decline to follow the Michigan Court’s holding that when the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Indeed, we conclude that the application of a heightened scrutiny standard is inconsistent with our well established approach of defense to legislative determinations of public use.”¹³²

These contrasting recent decisions illustrate the current crossroads our eminent domain jurisprudence faces. What does “public use” mean in 2004? May it be compared to “public purpose” or “public benefit”? The plaintiffs in *Kelo* are petitioning the U.S. Supreme Court to review the Connecticut decision on U. S. Constitutional grounds. If that occurs, there might be a shift in the contemporary meaning of “public use.”

Ultimately, we must ask what is ethical and Biblical. What would the Old Testament prophets and early Christians say to our society in 2004? Would it be to beware of greed that expands landholding at the expense of those without economic and political power and at the same time to be willing to sacrifice private interests for the benefit of the community?

¹³⁰ *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004).

¹³¹ *Id.* at 531.

¹³² *Id.*