Privatizing Eminent Domain: The Delegation of a Very Public Power to Private Non-Profit and Charitable Corporations

Abstract

In an age of privatization of many governmental functions such as health care, prison management, and warfare, this Article poses the question as to whether eminent domain should be among them. Unlike other privatized functions, eminent domain is a traditionally governmental and highly coercive power, akin to the government's power to tax, to arrest individuals, and to license. It is, therefore, a very public power.

In particular, the delegation of this very public power to private, non-profit and charitable corporations has escaped the scrutiny that for-profit private actors have attracted in the wake of the U.S. Supreme Court's decision in *Kelo*. Though delegated the very public power of eminent domain, these private, non-profit actors may only be accountable to their private boards of directors instead of to the general electorate.

This Article asserts that the largely procedural due process underpinnings of the Private Non-Delegation Doctrine (PNDD), a doctrine that has enjoyed renewed vigor in the state courts, provides an excellent means to assess the delegation of the takings power to private, non-profit corporations. The paper introduces two PNDD tests and applies these tests to two case studies in which eminent domain power has been delegated to private non-profits. Finally, in order to address the procedural due process concerns stressed by the PNDD and the two judicial tests, this Article proposes seven legislative solutions, including the use of Social Capital Impact Assessments, for state legislatures that have either delegated the takings power to private, non-profits, or that are contemplating these delegations.

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I. Introduction

It is no secret that federal and state governments increasingly contract out a number of responsibilities and functions to private parties, from prison management[2] to health care[3] to warfare.[4] It is fathomable that almost any governmental function could be outsourced to a private party.[5] However, should eminent domain, often viewed as the most public of powers,[6] be among them?

This question fundamentally arises in the context in the delegation of the takings power to private, non-profit or charitable corporations that may be accountable to no one but a board of directors and private donors, and least of all the general electorate. In the

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[2] *See* David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 818 (1987) ("Private for-profit firms now operate approximately two dozen major facilities, including at least three medium or maximum security adult correctional institutions."); *see also* Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L.REV. 911, 911-12 (1988) (noting that prison overcrowding is "pervasive" and that privatizing correctional facilities has been proposed to reduce the overcrowding problem).

[3] *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 552 (2000) (stating that "[i]n the last half century, the private nonprofit sector has become the primary mechanism for delivering government-financed human services, such as health care."). In addition, the article goes on to note that outside of health care, local governments have also contracted out their waste management and highway construction services. *Id.*

[4] Daniel Bergner, *The Other Army,* N.Y.TIMES, Aug. 14, 2005, at 29. ("Private gunmen . . . are now guarding four U.S. generals . . . . [a]nd throughout Iraq, the defense of essential military sites like depots of captured munitions has been informally shared by private soldiers and U.S. troops. If the 25,000 figure is accurate, the [private] businesses add about 16 percent to the coalition's total forces.").

[5] David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 647-48 (1986) (noting that "almost any power or function exercised by a government, particularly a state or local government, can also be exercised, unremarked, by some clearly private actor.").

[6] *See id.* at 648 ("Accepting some fuzziness at the edges, we do recognize certain powers as essentially governmental: rulemaking, adjudication of rights, *seizure of person or property*, licensing and taxation. These powers share the element of coercion, of making someone do something he does not choose to do or preventing him from doing what he wishes to do.") (emphasis added); *see also* Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L.REV. 561, 586 (1947) ("It is when delegated power affects the use of real property or the practice of a profession that the judicial nerve tingles.").

wake of *Kelo v. City of New London*,[7] for-profit private entities have garnered the most attention from legislators and the public, given the benefits that may accrue to them when government uses takings as part of an "integrated"[8] or "comprehensive"[9] economic development plan. These plans may provide revenue expansion to for-profit corporations, but also to the public in the form of increased property and sales tax revenues and additional jobs. Despite all the attention that *Kelo* generated towards the part played by for-profit corporations in the eminent domain arena, private non-profit and charitable corporations that have been delegated the takings power by state legislatures, have managed to slip under the public's and lawmakers' eminent domain radar screen. These non-profit entities have evaded the sort of scrutiny and detection that not only government, but also private for-profit corporations, that may exercise significant influence upon government in takings,[10] have historically attracted as a matter of course.

As a preliminary matter, this Article will use the term "private, non-profit corporations" as a global term for non-profit and charitable corporations, as well as for charitable organizations and urban redevelopment corporations. The common link in the nomenclature is that these corporations are largely organized for a purpose outside of

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[7] Kelo v. City of New London, 125 S. Ct. 2655 (2005). Justice Stevens wrote the majority opinion in which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Justice O'Connor authored a dissenting opinion in which Justices Rehnquist, Scalia, and Thomas joined. Justice Kennedy wrote a separate concurring opinion, and Justice Thomas filed a separate dissenting opinion.

[8] *Kelo*, 125 S. Ct. at 2666-67.

[9] *Id.* at 2668.

[10] *See, e.g.,* regarding *Kelo* and the residents in New London, Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan*, THE DAY, Oct. 16, 2005, at A1, Jane Ellen Dee, *Oh, Claire You're a Scholar and a Visionary....If Only You Could Quit Leaving Skin on the Sidewalk,* HARTFORD COURANT, Feb. 25, 2001, at 5.; *see also* Barry Yeoman, *Whose House Is It Anyway?*, AARP Magazine Online, Nov. 3, 2005, http://www.aarpmagazine.org/money/whose _house_is_it_anyway.html. (discussing the outcry against the City of New London and Pfizer Corporation upon the city's decision to use eminent domain to acquire parcels of land in the Fort Trumbull neighborhood). Another infamous example is found in Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (upholding a Michigan quick-take statute that allowed the city of Detroit to take land in the Poletown neighborhood and to transfer it to General Motors for the construction of a Cadillac auto plant because the public benefits promised by the plant were substantial); *see also* Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1868 (2005) (discussing that residents in Poletown banded together to form the Poletown Neighborhood Council to contest the takings and noting that, in *Kelo*, property owners who opposed the takings organized to file a lawsuit).

engendering profits for shareholders. Their purpose is geared towards charitable or benevolent aims.[11] Secondly, these corporations are largely entitled to favorable tax treatment.[12]

This paper will also assert that the largely procedural due process underpinnings of the Private Non-Delegation Doctrine (PNDD) may be used to assess the delegation of eminent domain power to non-profit and charitable corporations by state legislatures. The PNDD has enjoyed renewed vigor in the state courts after having been last used by the Court in the New Deal era and remaining essentially dormant in the federal courts since that time. Further, by using PNDD analysis to examine the statutory controls and legislative delegations in two case studies, in which states have delegated the takings power to non-profit and charitable corporations, this paper will also propose seven statutory procedural due process mechanisms for use by states that have delegated, or are contemplating delegating, the takings power with little or no accountability controls or safeguards.

Accordingly, Part II of this Article will explain the PNDD and the Doctrine's nexus to eminent domain. Part III will then examine the rationales for the delegation of the takings power to non-profit and charitable corporations and arguments weighing against those delegations. Part III will also discuss the principles supporting and disfavoring the wholesale abolishment of the delegation of eminent domain power to private, non-profit and charitable corporations. Part IV of this Article will explore

[11] For instance, Black's Law Dictionary defines a non-profit corporation as "a corporation organized for some purpose other than making a profit, and usually afforded special tax treatment—[a]lso termed not-for-profit corporation." Black's Law Dictionary 343 (7th Ed. 1999). In addition, Black's Law Dictionary defines a charitable corporation as "[a] nonprofit corporation that is dedicated to benevolent purposes and thus entitled to special tax status under the Internal Revenue Code—[a]lso termed eleemosynary corporation." *Id.* Finally, the same source describes a charitable organization as a "[a] tax-exempt organization that (1) is organized and operated exclusively for religious, scientific, literary, educational, athletic, public-safety, or community-service purposes, (2) does not distribute earnings for the benefit of private individuals, and (3) does not participate in any political candidate campaigns, or engage in substantial lobbying." (citing Internal Revenue Code, I.R.C. § 501(c) (3)). *Id.*

[12] *See id.*

notions of procedural due process as applied to the delegation of the takings power to private, non-profit corporations and assess arguments favoring the use of these due process principles in this area. Part IV will similarly introduce two PNDD tests largely derived from procedural due process, and it will consider a substantive due process approach to the private delegation of the takings power to non-profit corporations. Part V will then present the two case studies and apply the PNDD tests to each. Part VI will propose the seven legislative solutions, including Social Capital Impact Assessments (SCIAs), that may be used to address any procedural due process failings of private delegations of the public takings power. Part VII will conclude this paper.

II. The Private Non-Delegation Doctrine (PNDD)

A. History

In the federal courts, the general Non-Delegation Doctrine enjoyed a vibrant but brief renaissance from 1935 to 1936 when in three cases, the U.S. Supreme Court invoked the Doctrine to strike down federal legislation that had delegated power to federal agencies and to private parties.[13] In instances where power had been delegated to federal agencies, the *Public* Non-Delegation Doctrine was invoked, while instances concerning delegation of power to private parties referenced the *Private* Non-Delegation Doctrine.[14] Since then, however, the Supreme Court has yet to invalidate delegations on

[13] Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935) (invalidating a portion of the National Industry Recovery Act that delegated to the Executive the power to enact codes of fair competition in the petroleum and petroleum products industry in an effort to help the industry recover from the Great Depression), A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down Congress' delegation of power to the Executive pursuant to the National Industry Recovery Act to regulate working hours, minimum pay, and workplace standards in the live poultry industry in the New York City metropolitan area, also in an effort to revitalize this segment of the economy after hard economic times), and Carter v. Carter Coal Co., 298 U.S. 238 (1936) (overturning the Bituminous Coal Conservation Act of 1935 that called for the delegation of power to private producers of coal that elected 23 boards to set minimum coal prices for each district and that also set pay rates and working hours for mining workers. Coal producers that chose not to participate in the boards were subject to a 15 percent assessment on their sales of coal.).

[14] *See id.*

Doctrine grounds, [15] and the federal appellate and district courts have generally followed suit.[16] While there is an argument that the Non-Delegation Doctrine might be a dead-letter at the federal level,[17] many commentators have noted that there is still yet hope, as the Court has not yet rejected it outright.[18] For example, the Doctrine occasionally receives approving nods of attention in various Court opinions.[19] In contrast, however,

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[15] *See* Peter H. Aranson, Ernest Gellhorn, & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 10 (1982) (noting that *Panama Ref. Co., Schecter*, and *Carter Coal* proved to be "the Supreme Court's last and only applications of the doctrine to overturn congressional acts."); *see also* A. Michael Froomkin, *Thirtieth Annual Administrative Law Issue Governance of the Internet: Article Wrong Turn in Cyberspace: Using ICANN to Route around the APA and the Constitution*, 50 DUKE L.J. 17, 155 (2000) ("But while the Supreme Court has had no modern opportunities to revisit the private nondelegation doctrine . . . .") and Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1127 (1977) ("Despite broad statements to this effect, however, the Supreme Court has never invalidated a congressional enactment on so sweeping a ground [the Non-Delegation Doctrine]-nor could it today without, in Professor Davis' words, invalidating 'approximately one hundred percent of federal legislation conferring rulemaking authority on federal agencies . . . .'").

[16] *See* Lawrence, *supra* note 5, at 648 (noting that, in reference to the PNDD, "[s]ince Carter v. Carter Coal Co., decided a half-century ago, the federal courts have consistently allowed delegations of federal power to private actors."). *But see* American Trucking Ass'n v. EPA, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam) (noting that provisions of the Clean Air Act giving the Environmental Protection Agency the right to promulgate air quality standards nationwide was an unconstitutional delegation of power) (opinion modified on rehearing) (D.C. Cir. 1999). Professor Cass Sunstein, however, notes that this decision by the D.C. Circuit represents the "birth of a new [public] nondelegation doctrine" in which agencies articulate specific "governing legal criteria" for the decisions they make." Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 310 (1999), and Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 684 (1980) (the "Benzene" case) (Rehnquist, J., concurring) (writing that certain provisions of the Occupational Safety and Health Act was an unconstitutional public delegation of power).

[17] *See, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPERATE POWERS 20 (1999) (stating that "[t]he nondelegation doctrine is now moribund, although various law review articles try to breathe life into it every so often."), Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 132-33 (Harvard 1980) for the proposition that the nondelegation doctrine is "dead."), and George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 716 (1975) (referring to the Non-Delegation Doctrine as "nonsense").

[18] *See* Froomkin, *supra* note 15, at 155 (discussing, with respect to the Private Non-Delegation Doctrine, that "there is reason to believe that Carter Coal's fundamental limit on delegations of public power to private groups retains its validity. Admittedly, the formal clues are sparse. *While never overturned*, post-Schecter Poultry Supreme Court commentary on Carter Coal is rare.") (emphasis added); *see also* Aranson, *supra* note 15, at 12 ("Despite the Court's reluctance to apply this 'nondoctrine,' it has refused to repudiate it completely. Periodically, the nondelegation principle receives favorable mention in opinions of the Court and in those of individual justices. "); Sunstein, *supra* note 16, at 315-17 (stating that the Public Non-Delegation Doctrine is "alive and well," and lives on in the federal courts in a series of "canons of construction" that are easier for the federal courts to administer and are less unwieldy for them, but that equally reinforce traditional notions of representative democracy).

[19] *See id.*

the state courts have been fertile ground for overturning state legislation on Non-Delegation Doctrine grounds.[20]

B. Judicial Reluctance and the Private Delegation of Public Power

Courts find delegations of public power to private actors more problematic than delegations to public authorities or agencies, as there is less opportunity to hold private actors accountable at the ballot box for the choices they make with the power delegated to them.[21] Indeed, in a New Deal case, *Carter Coal*, the Court overturned federal legislation that had delegated the power to regulate wages, working hours, and working conditions to certain coal producers.[22] It noted that delegation to private persons "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interest of others in the same business."[23] Other courts have noted, when considering delegations of power to private entities, that these delegations are more constitutionally "troubling" and, therefore, "are subject to more stringent requirements and less judicial deference than public delegations."[24]

Some scholars have noted that the underlying reason that delegation of public powers to private actors is more nettlesome to the judiciary is that there are some powers

[20] *See e.g.*, Froomkin, *supra* note 15, at 155-56 ("But while the Supreme Court has had no modern opportunities to revisit the private nondelegation doctrine, the state courts have had that chance, and their treatment of the issue underlines the importance of the doctrine today."), McGowan, *supra* note 15, at 1128 (noting that the "nondelegation principle continues to have greater utility at the state level. . . ."), Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454 (Tex. 1994) (overturning the Texas legislature's creation of the "Official Cotton Growers' Boll Weevil Eradication Foundation" that had the power to assess chargers on cotton producers on PNDD grounds), and FM Properties Operating Co. v. City of Austin, 22 S.W.3d 868 (Tex. 2000) (holding that certain portions of the Texas Water Code were unconstitutional because they delegated certain legislative powers related to water quality to landowners owning 1,000 acres or more).

[21] *See* Froomkin, *supra* note 15, at 155 ("Several courts and commentators have agreed that delegations to private groups are more troubling than those to public agencies because the accountability mechanisms are weaker or non-existent.").

[22] *See supra* note 13.

[23] *Carter Coal*, 298 U.S. at 311.

[24] *FM Properties*, 22 S.W.3d at 874.

that are "essentially governmental."[25] These public powers include "rulemaking, adjudication of rights, seizure of person or property, and licensing and taxation."[26] The common denominator between them, however, is the "element of coercion." [27] For instance, one who has these powers can force someone to do something that she does not wish to do; or conversely, that same entity can force an individual *not* to do something that she would like to do.[28]

In contrast, power generally viewed as "private," is centered squarely within the ability of an individual to consent to an action, and it is primarily found in contract law or in property ownership.[29] For example, a private property owner may bar or permit others from entering her real property by caprice alone, and she may subject this admission to certain rules of her making.[30] Moreover, by virtue of her being a real property owner, she may constrain the uses of real property in the surrounding area under nuisance law.[31] In addition, the law of contracts gives private parties the right to define rules and regulations amongst themselves.[32]

Therefore, because of the coercive nature of public, or traditionally governmental power, exemplified by a lack of consent to an action or decision by an affected individual, governments choose generally to outsource or to privatize "ministerial or mechanical functions" and non-coercive responsibilities.[33] These services and functions frequently include the building of roads, waste collection, or the administration of health

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[25] Lawrence, *supra* note 5, at 648.
[26] *Id.*
[27] *Id.*
[28] *See id.*
[29] *See id.*
[30] *See* Note*, The State Courts and Delegation of Public Authority to Private Groups*, 67 HARV. L. REV. 1398, 1399 (1954).
[31] *See id.*
[32] *See id.*
[33] Suss v. American Soc. for the Prevention of Cruelty to Animals, 823 F.Supp. 181, 189 (S.D.N.Y. 1993) (holding that a business owner had standing to sue after officers of the American Society for the Prevention of Cruelty to Animals, a private non-profit corporation delegated the authority by the New York legislature to enforce state laws protecting animals, broke through a wall without a warrant into the owner's building to save a cat).

care.[34] When coercive power that is traditionally exercised by government is exercised by private parties, it is, therefore, quite understandable that courts will scrutinize that power much more closely because of an increased risk of abuse and arbitrariness.[35]

The judicial branch's concern about the delegation of public power to private parties, however, is much more than academic. Indeed, this concern has been borne out in the real world, as the way in which private delegates of public power have conducted themselves has proved historically "unsatisfactory."[36]

C. PNDD's Nexus to Eminent Domain

Although traditionally the PNDD involved the delegation of purely legislative authority to private parties, the Doctrine, as applied to eminent domain, refers specifically to the delegation of the takings power *by* the legislature *to* private parties.[37] Indeed, in

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[34] *See supra* note 3.
[35] *See id.*
[36] *See id.* (citing W. Browne, Altgeld of Illinois ch. VIII-XIC (1924), and describing the conduct of private detectives who were deputized as police officers during the railway strike of 1984); *see also* Washington v. Roberge, 278 U.S. 116, 121-22 (1928) (striking down an amendment to a zoning ordinance that required a landowner who wanted to build a retirement center for low-income elderly residents to obtain the written consent of two-thirds of the landowners within 400 feet of the site because the consenting landowners "are not bound by any official duty but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee [the landowner desiring to build the home] to their will or caprice," thereby violating the Due Process Clause); Jennings v. Exeter-West Greenwich Regional School District Committee, 352 A.2d 634 (R.I. 1976) (holding that a Rhode Island statute that required public school districts to bus schoolchildren residing within the district's boundaries to private schools unconstitutionally delegated legislative power to private schools, as they could establish how far a privately educated child could be bussed, regardless of whether the school was in the boundaries, and therefore how much the public school district would have to spend for these purposes); Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1110-1111, 17 Cal.4th 553, 593 (Cal. 1998) (Brown, J., dissenting) (writing that the Unfair Competition Law in California that gave ordinary citizens, not just public prosecutors, standing to sue delegated public authority to prosecute to private citizens, thereby holding potential defendants arbitrarily hostage to self-interested "unelected, unaccountable private enforcers, unrestrained by established notions of concrete harm or public duty, [who] seek to advance their own agendas or deploy the law as leverage to increase attorney fees.").
[37] *See* Benjamin McCorkle, *Constitutional Law-Arkansas's Nondelegation Doctrine: The Arkansas Supreme Court Defines a Limit on the Delegation of Legislation Authority to a Private Party, Leathers v. Gulf Rice Arkansas, Inc., 338 Ark. 425, 884 S.W.2d 481 (1999)*, 23 U. ARK. LITTLE ROCK L. REV. 297, 299 (2000) ("The nondelegation doctrine is the judicial interpretation of what authority a legislative body can delegate to another branch of government, administrative agencies, or non-governmental entities.").

the federal constitution[38] and in many state constitutions, only government, irrespective of the branch, may exercise the power of eminent domain - within certain parameters. These parameters are generally that "just compensation" be paid to any property owner and that the taking must occur for a "public use."[39]

Nonetheless, as traditional governmental power goes, eminent domain ranks as one of the top. It is essentially the power to seize real property using the power of coercion in lieu of consent,[40] making it, for good reason, a very public power that is traditionally reserved to government.

On the other hand, the Supreme Court held in *Luxton v. North River Bridge Company* that it is "beyond dispute" that Congress could constitutionally delegate the takings power to private, for-profit companies such as private railroad corporations.[41] These sorts of companies build railroads and bridges in order to further interstate commerce and economic growth by aiding transportation.[42] However, it may be argued that this delegation of the takings power with respect to railroad companies sounds more in Congress' power in the Constitution to regulate commerce between the states. Congress may also be explicitly recognizing the significant effect that these companies have on interstate commerce and the economic growth of the country. In addition, both

[38] The Takings Clause of the Fifth Amendment states that "Nor shall private property be taken for public use, without just compensation." U.S. CONST. art. V.
[39] The current test for whether the exercise of eminent domain satisfies the "public use" portion of the Fifth Amendment is whether or not the exercise has a "public purpose." *See Kelo,* 125 S. Ct. at 2662-63; *see also* Fallbrook Irrigation Distr. v. Bradley, 164 U.S. 112, 158-64 (1896). The Supreme Court has explicitly rejected a strict interpretation of "public use," or a definition that comprehends the exercise of eminent domain only if the real property seized will be used by the public. *Kelo*, 125 S. Ct. at 2633.
[40] *See supra* nn. 6, 25-32.
[41] Luxton v. North River Bridge Co., 153 U.S. 525, 529 (1894); *see also Kelo*, 125 S. Ct at 2673 (U.S. 2005) (O'Connor, J., dissenting) (explaining that one of the three categories in which the government may transfer private property to private entities is in the case of common carriers, such as railroad companies and utility companies that will make the property available for public use.).
[42] *See id.*

railroad and public utilities, despite being owned by private parties, neatly satisfy the "public use" parameter of eminent domain, as they are used by the public.[43]

Moreover, the private, for-profit corporation at issue in *Luxton* was a federal corporation, having been incorporated by Congressional act. It was, therefore, arguably a corporation with an inherently public nature.[44] In addition, some commentators have noted that, given the impact that railroad and public utilities have on the national economy, these private, for-profit companies should exercise eminent domain, as they save the government "time and money."[45] Furthermore, aggrieved landowners may seek just compensation through the judicial process.[46]

More importantly, public utility companies, for example, are generally highly regulated, and they must serve any customer who qualifies for service in a non-discriminatory manner, including being non-discriminatory in their rates.[47] This requirement is in contrast to other private industry.[48] In Texas, for instance, public utilities generally have the power of eminent domain, but regulation rules the roost- from the rates that are charged to customers to the requirement of acquiring licenses and franchises from state regulatory agencies and from cities, respectively, to the operation of facilities only after a state agency's approval.[49] Also, with respect to its use of eminent domain, Texas requires that a public utility may not run facilities on land acquired

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[43] *See* Elizabeth A. Taylor, *Note, The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061, 1083 (1996) (citing Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVT. L. 1,28 (1980)).
[44] *See Luxton*, 153 U.S. at 529 ("The validity of the act of Congress incorporating the North River Bridge Company rests upon principles of constitutional law, now established beyond dispute.").
[45] Lawrence *supra* note 5, at 657 (Similarly, allowing private enterprises such as railroads to directly exercise the power of eminent domain, saves the government time and money.").
[46] *See id.*
[47] *See* Chris Reeder, *Regulation by Contractors: Delegation of Legislative Power to Private Entities in Texas*, 5 TEX. TECH J. TEX. ADMIN. L. 191, 229 (2004) (noting that public utilities, though private, for-profit entities with eminent domain power have an "inherent public nature.").
[48] *See id.*
[49] *See id.*

through these coercive means unless a state agency has approved the operation.[50] Finally, the approval is based on a need for the utility.[51]

In contrast, on balance, it may be argued that private, non-profit corporations have no such effect on interstate commerce. What commercial interstate or intrastate effects that may arise, and the efficiency advantages that may be promoted by delegating the takings power to private, non-profit corporations without adequate safeguards, are outweighed significantly by procedural concerns under the Due Process Clause and notions of representative democracy.

Nevertheless, although it is certainly debatable whether or not a private, non-profit actor's exercise of eminent domain power pursuant to a delegation of the power satisfies federal or state constitutional "public use" requirements, the issue of whether or not the delegation of eminent domain itself to a private, non-profit actor accords with the accountability controls and due process underpinnings of PNDD is a separate question entirely from that of public use.[52] Perhaps, as some commentators have noted, in previous generations, when public utilities and railroads were largely the sole private actors delegated the takings power, the idea of procedural due process controls that led to the disinterested exercise of the power was effectively moot, given that the public's interest was impacted by the ability to move goods throughout the nation and access public utilities.[53] However, in today's era, when the Court most recently has expanded

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[50] *See id.*
[51] *See id.*
[52] *See, e.g.*, *Texas Boll Weevil*, 952 S.W.2d at 493 (Cornyn, J., concurring in part and dissenting in part) (noting that in response to the Texas Supreme Court's decision to strike down a delegation of legislative power to a private non-profit, deeming it unconstitutional pursuant to a eight-step inquiry, that the court failed to "consider the impact of its decision on the [Texas] Legislature's common practice of delegating eminent domain powers to private entities."); *see also FM Properties*, 22 S.W.2d at 899 (Abbott, J., dissenting) (making a similar case in answer to the Texas Supreme Court's holding that the Texas legislature had unconstitutionally delegated power to private landowners to create water quality zones and questioning how the court could "reconcile" its holding with "existing legislative grants of eminent domain power to private entities.").
[53] *See* Taylor, *supra* note 43, at 1083.

the "public use" requirement to include private economic development in *Kelo,* the time may be ripe for a separate examination of delegations to private actors that rests solely on PNDD grounds.

III. Arguments Favoring and Disfavoring the Delegation of the Takings Power to Private, Non-Profit Corporations

A. Why Delegate Eminent Domain Power to Private, Non-Profit Corporations?

As with the Public Non-Delegation Doctrine, there are a number of arguments in support of delegating the takings power to private, non-profit corporations. An obvious argument is that delegating this power to private, non-profit corporations is more efficient. Government, and therefore, taxpayers, are spared the time and expense of having to negotiate, seize, and purchase property under eminent domain, especially from recalcitrant landowners who may be opposed to the action.[54] Instead, these costs are passed on to the private, non-profit corporation, and taxpayers, therefore, save money. For instance, in order to decrease the financial burden on taxpayers, a number of judges and courts use private arbitration mechanisms in lieu of appointing public judges to hear the same cases.[55]

Moreover, government tends to be bureaucratic, and corporations more supple.[56] In the amount of time that it may take local government to seize property on behalf of a private, non-profit corporation, that same non-profit, by virtue of its non-bureaucratic nature, may have "moved on," taking and investing with it much-needed dollars in another community.

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[54] *See id.* Indeed, some judges and courts have supported private delegation because it favors more "privatization" and less government "regulation" or interference. *See Texas Boll Weevil*, 22 S.W.3d at 899 (Abbott, J., dissenting).
[55] *See id.*
[56] *See* Lawrence, *supra* note 5, at 655.

Furthermore, *political* efficiency may also warrant the delegation of eminent domain power to private, non-profit corporations. When government decides to use its takings power, interest groups opposed to the action may utilize the political process to delay or to halt the taking. The reaction by the several homeowners in *Kelo* who were opposed to the taking of their homes by the New London Development Corporation is a perfect example of this situation. Not only did the economic development plan envisioned by the city of New London experience significant delay,[57] but also the homeowners' actions sparked a nationwide outcry against the use of the takings power for economic development.[58] Similarly, in *Poletown Neighborhood Council v. City of*

[57] William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES, Nov. 21 2005, at A1. In June 2006, however, New London voted, in opposition to the stance taken by Connecticut's governor to evict the remaining hold-outs in Fort Trumbull. *See* Avi Salzman, *Connecticut City Takes First Step to Evict Eminent Domain Case,* NEW YORK TIMES, June 6, 2006, at B2. Furthermore, in July 2006, the city's Planning and Zoning Commission granted building permits for the economic development project to begin. *See* Elaine Stoll, *Commission Approves Hotel Suite Plan For Fort Trumbull*, THE DAY, July 22, 2006, at 2B.

[58] See Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2; *see also* Timothy Egan, *Rulings Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A12. Furthermore, at last count, approximately 41 states had introduced legislation to limit the use of eminent domain for private economic development in response to *Kelo. See* John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Feb. 21, 2006, at A1. For instance, in California alone, five constitutional amendments and eight proposed pieces of legislation have been put before the California Legislature to counter the Court's decision in *Kelo*. In Texas, the legislature acted swiftly and banned the use of eminent domain on behalf of a private party, except for certain uses. Among these exceptions is the taking of land for a new stadium for the Dallas Cowboys football team. In addition, in Ohio, the legislature placed a one-year moratorium on all takings soon after the *Kelo* ruling. *See id.; see also* Dennis Cauchon, *States Eye Land Seizure Limits*, USA TODAY, Feb. 20, 2006, at 1A (noting the one-year moratorium in Ohio); *see generally* Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES, Jan. 18, 2006, at C5 (discussing different measures that states have taken in response to *Kelo* and noting the opposition to the legislative groundswell from developers, some lawmakers, and the real estate community). With respect to action taken on the federal level, as of November 30, 2005, legislation was passed by Congress and signed into law by the President that makes appropriations for certain government agencies and provides that no funds shall be used for federal, state, or local projects that seek to use the power of eminent domain for economic development that would primarily benefit private parties. *See* Transportation, Treasury, and Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, § 726, 119 Stat. 2396, 2494-2495 (2005). Furthermore, the U.S. House of Representatives recently passed H.R. 4128, a bill that proposes to prevent states and their political subdivisions from receiving federal economic development funds for two years if a court of competent jurisdiction rules that eminent domain has been used for economic development. Private Property Rights Protection Act of 2005, H.R. 4128, 109th Cong. § 2(b) (2005). The same legislation also allows not only for individuals to sue local or federal government to enforce any provision of the proposed law, but also for the awarding of attorney's fees should a plaintiff prevail. *Id*. § 4(a), (c). It also prevents the federal government from using eminent domain for economic development. *Id*. § 3. The proposed law broadly defines economic development as, "taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health . . . ." *Id*. § 8(1). As of the writing of this Article, however, the U.S. Senate has not acted on this measure. In general, however, although new legislation to protect private property owners from economic

Detroit,[59] the residents of the Poletown neighborhood made national headlines by using the political process to protest General Motors (GM) and the city of Detroit for seizing their land for the construction of a Cadillac manufacturing plant. The residents achieved a temporary victory in delaying the "quick-take" project, but they were ultimately powerless to stop the takings.[60]

Therefore, much as members of Congress may relish delegating power to federal agencies because the agencies "take the heat" for unpopular decisions with the electorate and these representatives may "look good" before their constituents when opposing those decisions,[61] state legislators may often welcome the delegation of the takings power to non-profits. Legislators are ultimately removed from political and electoral accountability, yet, by virtue of the delegation, may simultaneously and indirectly bestow benefits onto powerful non-profit corporations in exchange for financial support that keeps them in office.

Yet another powerful reason that legislatures may delegate the power of eminent domain is that, as with all delegations, there is nothing in the Constitution and in many state constitutions that expressly forbids delegation of legislative power to other entities, private or public, or to other branches of government.[62] In effect, there is no Private or Public Non-Delegation Doctrine written into the Constitution or in many state

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development takings is still being introduced the legislative momentum spurred by the Supreme Court's decision in *Kelo* seems to have slowed tremendously almost a year after the decision.

[59] 304 N.W.2d 455 (Mich. 1981) (upholding a Michigan quick-take statute that allowed the city of Detroit to take land in the Poletown neighborhood and to transfer it to General Motors for the construction of a Cadillac auto plant because the public benefits promised by the plant were substantial).

[60] The residents opposed to the project in the Poletown neighborhood formed the Poletown Neighborhood Council. S*ee* Elizabeth F. Gallagher, Note, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 FORDHAM L. REV. 1837, 1868 (2005). For an excellent history of the *Poletown* case, *see generally* BRYAN D. JONES & LYNN W. BACHELOR, THE SUSTAINING HAND (1986).

[61] *See* THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE U.S. 92-3, 298-99 (1969) ("As Kenneth Davis puts it, Congress in effect says, 'Here is the problem: deal with it.") and ("A delegation of power to the president or to agencies is in reality a delegation of personal responsibility [by Congress] . . . . ").

[62] *See* Sunstein, *supra* note 16, at 322.

constitutions.[63] Indeed, Professor Sunstein notes that, with respect to the Public Non-Delegation Doctrine, the Founders did not find troublesome the delegation of power from Congress to the President for the distribution of military pensions and the granting of licenses that permitted trade with Native American groups.[64] Consequently, a literal interpretation of the Constitution and the countless state constitutions modeled after it, along with constitutional and legislative history, would suggest that the delegation of the takings power to private, non-profit corporations is constitutional.

A final reason to support the notion that the private delegation of power to non-profits is not problematic is that legislatures in delegating this power should be given deference in the decisions they make. Most notably, in *Berman v. Parker*,[65] a case in which the Court upheld the delegation of eminent domain power to the District of Columbia Redevelopment Land Agency for economic development of a slum-ridden District neighborhood, the Court stated that " . . . 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."[66] The Court went on to note that once the "public purpose had been established," "the means of executing the project are for Congress and for Congress alone to determine," and the private enterprise could serve the ends of Congress as well as government.[67]

Not only was the legislative deference espoused in *Berman* recently reaffirmed by the Court in *Kelo*, [68] but also the *Kelo* Court underscored the "great respect" that it held

[63] *See* Sunstein, *supra* note 16, at 331 (expressing the belief that the Constitution includes a Non-Delegation Doctrine, but that there is no "*express* nondelegation doctrine in the text.") (emphasis added).
[64] *See* Sunstein, *supra* note 16, at 322-23 & 331-32.
[65] 348 U.S. 26 (1954).
[66] *Id.* at 32.
[67] *Id*. at 33-34.
[68] *Kelo*, 125 S.Ct. at 2664-65.

for state legislatures' assessments and determinations of "local needs."[69] With respect specifically to the delegation of public power to private entities, some commentators have noted that such a choice can be "reasonable and therefore deserves the judicial respect given any reasonable legislative policy choice."[70] Finally, in at least one federal circuit, the Fourth Circuit has indicated that legislative deference in a case involving the use of eminent domain by the federal government to build a dam should only be disrupted if there is a case of "arbitrary, capricious, or corrupt conduct."[71]

B. Arguments In Support of Restricting Delegation of Eminent Domain Power to Private, Non-Profit Corporations

The right to seize property is a traditional government power that, like most similar government powers such as the power to arrest someone, to tax, and to license, is coercive in nature.[72] The sovereign may force an individual to do or not to do something against his or her will.[73] When this coercive power of seizure of property is delegated to private, non-profits, indeed to any private party, there is undoubtedly created an opportunity for these parties to seize property for themselves at the expense of the public. They may also act in their own interests instead of in the public's interest and to the general detriment of the public or to an individual.[74] This opportunity for "self-interested"[75] action is a result of a classic conflict-of-interest scenario.

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[69] *Id.* at 2664. In addition, at the state level, some courts have noted that the legislative branch has the sole power to "invest" certain entities at its choosing, public or private, with eminent domain power. *See, e.g,.* Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 635, 647 (Mo. 1965).
[70] Lawrence, *supra* note 5, at 651.
[71] U.S. v. 91.69 Acres of Land, More or Less, 334 F.2d 229 (4th Cir. 1964).
[72] *See supra* nn. 6, 25-29.
[73] *See id.*
[74] *See* Lawrence*, supra* note 5, at 659 (noting that "[t]he concern is that governmental power—power coercive in nature—will be used to further the private interests of the private actor, as opposed to some different public interest."); *see also* Froomkin, *supra* note 15, at 153-54 (discussing that ". . . the Carter Coal doctrine forbidding delegation of public power to private groups, in in fact, rooted in a prohibition against self-interested regulation . . . .").
[75] Lawrence, *supra* note 5, at 660.

The delegation of public power, such as eminent domain, to private parties may be contrasted with similar delegations to government agencies. However, unlike private parties, agencies are often headed by appointees of the head of the executive branch and confirmed by the legislature, or are directly elected in some states.[76] In addition, officers must generally take an oath of office promising that they will uphold the laws of the land, not their self-interest.[77] Furthermore, there is often the weight of the public purse and the prospect of a cut in funding to a particular agency by the legislature that keeps an agency accountable, should the agency be mismanaged and act in ways that benefit certain parties and not the public.[78] In contrast, delegating the power to seize property to private actors chips away at the United States' democratic form of government by giving an extraordinary power to private, non-profit corporations that are unaccountable to the electorate.[79]

In essence, there is an expectation that a government official with coercive governmental powers in hand will act in a "disinterested" way and not allow self-interest to guide his or her decision-making.[80] When this expectation is not satisfied in the public's opinion, then the electorate "may vote the [public] rascals out."[81] The public is, therefore, utilizing the ultimate mechanism of democracy, the voting booth, to rule on the government's substantive choices and the way that it chooses to exercise its power.

With private exercise of public power, however, such as the disagreeable exercise of the takings power delegated to a private, non-profit, no similar mechanism exists to

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[76] *See* Reeder, *supra* note 47, at 218, 226 (discussing the accountability measures on public agencies in Texas).
[77] *See id.* at 218.
[78] *See id.*
[79] *See* Froomkin, *supra* note 15, at 159. However, Lawrence notes that the challenge with basing a judicial decision that involves the delegation of public power to private actors on notions of representative democracy is that these notions are "supraconstitutional," and are not found in the specific text of the Constitution or in state constitutions. They may, therefore, reflect and impose a judge's value system, as opposed to the rule of law, on unsuspecting litigants. Lawrence, *supra* note 5, at 671.
[80] *Id.*
[81] Lawrence, *supra* note 5, at 660.

deal with these "private rascals."[82] In addition, a similar lack of accountability exists when this power is delegated with little or no checks on its exercise, such as ultimately holding an elected official accountable through elections.[83] This source of accountability would likely publicly present another point of view and possibly force a change or the halt of a private, non-profit's use of the power. In the eminent domain arena, it is this lack of accountability that may fuel opportunities for private, non-profits to self-aggrandize.

This reasoning led the U.S. Supreme Court in *Carter Coal* in 1936 to decry the private delegation of public power as "most obnoxious."[84] Similarly, it was this same argument that motivated a concurring opinion by the Texas Supreme Court in *Texas Boll Weevil* almost 60 years later,[85] in examining whether or not the delegation of the power to assess fees to the Boll Weevil Foundation was congruent with the Texas Constitution, to describe it as "[l]ittle more than a posse: volunteers and private entities neither elected nor appointed, privately organized and supported by the majority of some small group, backed by law but without guidelines or supervision, wielding great power over people's lives and property but answering virtually to no one."[86]

Therefore, although the delegation of eminent domain power to private, non-profit entities with little or no accountability controls may be more time and cost-efficient, as well as more politically efficient and expedient, more important values, such as procedural due process,[87] are being sacrificed. Equally troublesome is the belief that concern for deference to the legislature and the lack of explicit language in the Constitution or in many state constitutions forbidding private delegation of public power

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[82] *Id.*
[83] *See e.g. infra* Parts V.C.1.a. & b and VI.A.
[84] *See* Part II.B., *supra* nn. 22-23.
[85] *See supra* note 20.
[86] *Texas Boll Weevil*, 952 S.W.2d at 479 (Hecht, J., concurring in part and dissenting in part).
[87] Lawrence, *supra* note 5, at 682-83; *see also infra* Parts IV. A. & B.

should trump more fundamental concerns related to the prospect of the takings power's being exercised by private, non-profit corporations. These non-profits have everything to gain in their self-interest, but nothing by which to hold them accountable. In addition, legislators, by virtue of the democratic process in the United States, are not impervious to the influence of particularly powerful private, non-profit corporations, that like their for-profit cousins, are politically organized and provide electoral and financial support to legislators who may vote to delegate highly coercive power to them.[88]

Moreover, the mere threat of a private, non-profit corporation's having eminent domain power, regardless of whether or not it actually uses it to seize private property, is reason enough to argue for restrictions or controls on its use. It is likely that this mere threat is intimidating, especially to unsophisticated homeowners and small business owners who are unfamiliar with eminent domain and who may be scared into selling their real property at below-market prices at the first mention of "eminent domain" by a powerful private institution.

In addition, even should a private landowner be given a right to a judicial hearing and/or trial upon a private, non-profit corporation's assertion of eminent domain power under an enabling statute, the hiring of attorneys, court costs, and expert witnesses required for such a process may be entirely too expensive and cumbersome for the average homeowner and small business owner threatened with eminent domain. Consequently, any procedural due process rights that may be conferred to a landowner are effectively foreclosed by the sheer expense of asserting them. Furthermore, even when the enabling legislation allows for this type of judicial process, often the process

[88] *See* RICHARD POSNER, PROBLEMS WITH JURISPRUDENCE, 354 (1990). (Posner emphasizes that financial backing is the most necessary tool in winning a campaign), and Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Development Takings, and the Future of Public Use*, MICH. ST. L. REV. 1005, 1016 (2004). (stating that "[l]ittle prevents municipalities and private interests from abusing the system. Both corporate interests and political leaders dependent on their support have tremendous incentives to overestimate the economic benefits of projects furthered by condemnation.").

simply involves determining the actual value of the real property seized and addressing the issue of whether or not the compensation paid by the private, non-profit corporation is just.[89] Therefore, the question of whether or not the delegation of the takings power to a private, non-profit corporation is even valid or constitutional under Due Process or any other doctrine is similarly and effectively foreclosed in the courts for many landowners who lack the resources to undertake a full constitutional determination of the issue.[90]

Finally, one of the strongest arguments in support of statutory controls on the delegation of the takings power to private, non-profit corporations is that when government or a quasi-governmental organization chooses to exercise this power, it is often, at the very least, after intense public discussion and public hearings that provide for a significant amount of public input. The effect of these public conversations is often to compel government to consider alternative points of view that may conceivably force a re-thinking or the abandonment of its use.[91] Should these public discussions not result in outcomes favorable to the public, then the electorate has the opportunity to hold government accountable for its decision at election time by choosing to allow officials to stay in office.[92] Consequently, when government and even public agencies are expected (1) to hold public hearings, (2) are subject to being voted out of office, and (3) are expected to abide by the minimum federal constitutional requirements of "just

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[89] *See, e.g., infra* nn. 224-225, Part V.B.3.
[90] *See id.*
[91] *See, e.g.,* Rad Sallee, *Metro Schedules Three Public Hearings on New Rail Line*, HOUS. CHRON., July 14, 2006, at B7 (reporting that Houston, Texas', public transport authority, or METRO, that has eminent domain power, has scheduled a series of public hearings regarding its proposed expansion of commuter rail in neighborhoods and that contemplates the use of eminent domain).
[92] *See e.g.,* Wendy Hudley, *Allison Says Voters Wanted Change He Credits Opposition to Underpass as Key to Council Victory*, THE DALLAS MORNING NEWS, June 16, 2005, at 1S (discussing the ousting of an incumbent from the Richardson, Texas, City Council, the first in 16 years, who had supported the use of eminent domain); Clay Barbour, *Eminent Domain's Electoral Fallout, Elected Officials Face Widespread Opposition and Voter Wrath,* ST. LOUIS POST, Mar. 31, 2006, at C1; Sofia Kosmetatos, *Highland Park Incumbents Prevail, and Point to Plan for Downtown*, June 8, 2005, at 27; Lisa Smith, *St. Charles Voters Hand Mayor's Job to De Witte, Klinkhamer's Eight-year Tenure Ends Following Bitter Campaign*, DAILY HERALD, Apr. 6, 2005, at 1 (noting that now ex-mayor Klinkhamer had approved condemnation of property for a redevelopment project the year before, without involving the public).

compensation" and "public use", and any additional state requirements, it is no more than logical that private entities empowered with government-like powers to coerce the seizure of private property should be subject to even more stringent requirements.

C. A Per Se Rule Against the Delegation of Eminent Domain Power to Private, Non-Profit and Charitable Corporations?

Given the reasons outlined in Part III.B. of this Article in support of restrictions on private actor delegates in the takings context, the question arises as to whether or not there should be a *per se* rule prohibiting delegations of the takings power to private, non-profit and charitable corporations. Indeed, this line of reasoning is strengthened, as these private actors may have significant political and economic power that may bind them inextricably to elected officials and allow them to influence officials to a large degree.

Despite the persuasive arguments in favor of a per se abolishment of private delegations of the takings power, this Article takes a more pragmatic approach to them. As noted in Part V.B. of this Article with respect to the Texas Medical Center case study, the economic impact of some private, non-profit corporations delegated the takings power on local communities is immense. This economic impact, whether on an entire city, as in the Texas Medical Center case study in Houston, or on an entire neighborhood, as in the Dudley Neighbors, Inc. case study in Boston, is a double-edged sword to local communities.[93] Essentially, in exchange for this economic impact and the significant "run-off" effects onto the local community, there is an argument that it may be reasonable to afford these entities the takings power, albeit not without limits, safeguards, or controls. In addition, there is the further argument that, to a certain extent, local communities should be able to decide how much of the takings power and by what strictures they are willing to delegate to a private non-profit.

[93] *See infra* Parts V.A. & B.

Allowing room for the delegation of the takings power to these private actors, however, does not otherwise diminish the argument that there need be suitable statutory safeguards, controls, or as Professor Froomkin terms it, "accountability mechanisms" [94] that preserve procedural due process. Just as there should be no absolutes with respect to the prohibition of these delegations, private actors delegated the takings power should not be absolutely free to seize another individual's land, unfettered by appropriate and reasonable statutory safeguards that ensure that the rights of all affected individuals are respected.[95]

IV. A Procedural Due Process Approach to the Delegation of Eminent Domain Power to Private, Non-Profit Corporations

A. Procedural Due Process Generally

The delegation of any public power to private parties, including the delegation of eminent domain power to private, non-profit corporations almost automatically invokes procedural due process concerns. First, as a starting point, due process is invoked when the government, or in the case studies examined in this Article, a private actor, uses its delegated coercive power to impinge upon an individual's life, liberty, or property.[96] Second, one of the fundamental notions attached to procedural due process is ensuring that the decision-maker acts in the interest of the public, as opposed to his or her personal interest or bias, by compelling decisions that are subject to controls and safeguards.[97]

Indeed, procedural due process has been invoked to prevent "arbitrary decision-making" by those with public power, or decision-making that is affected or influenced by

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[94] *See supra* note 21.
[95] *See infra* Part VI. regarding recommendations for statutory safeguards.
[96] *See* Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 541 (1985) (stating that "[t]he point is straightforward: the Due Process Clause provides that certain substantive rights-life, liberty, and property cannot be deprived except pursuant to constitutionally adequate procedures.").
[97] *See* Lawrence, *supra* note 5, at 661.

personal interests rather than what is best for the public.[98] Conversely, if, by virtue of a private delegation of public power, a decision-maker exercises this power against an individual and is unbound by procedural due process safeguards against arbitrary or self-interested use of this power, then it may be argued that an individual may have suffered a deprivation of procedural due process.[99] Basic tenets of procedural due process, therefore, require that decision-making be disinterested. This disinterestedness, in the eminent domain context, may be ensured by the use of certain procedures, such as holding elected officials accountable for the takings decisions of private, non-profits.[100]

B. Justification for the Use of Procedural Due Process Principles in Private Delegations of the Takings Power

The theory of using due process concepts to assess the private delegation of public power is not inconceivable or extraordinary. Indeed, one scholar has noted that state courts that have struck down private delegations, in keeping with *Carter Coal*, have honed in on the self-interested nature of such delegations.[101] Furthermore, case law demonstrates that the use of public power to make self-interested decisions on behalf of a private party is violative of due process.[102] In addition, while there is an argument that

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[98] *See* Note, *supra* note 30, at 1408 (stating that "'[p]ublic' powers may mean powers which the legislature intended to be exercised for the public welfare, not the delegate's; there the effect of the rule [against private delegations of public power] is to require procedures ensuring responsible and impartial decisions. More often, the rule operates as a limitation on the creation of private powers to be exercised for the protection of some interest of the delegate.").

[99] *See id* at 1399 (commenting that "[b]ut whether or not law-making power is deemed delegated, the legislature's supreme power remains intact. The significant question therefore is one of due process: whether legislation which commits these substantial powers to private hands is reasonable."), and 1408 (noting that "a private group ought not to be given a power to restrict the activities either of its members or of outsiders where that power may be exercised arbitrarily and without adequate procedural safeguards. Thus, the rule against delegation may be regarded primarily as an extension of the constitutional principle of due process."). The nature of due process suggests that there must be action against "identifiable individuals." Lawrence, *supra* note 5, at 682. The case studies examined in this Article presume that particularized individuals are affected by takings actions by private, non-profit and charitable corporations. *See infra* Parts V.A. and B.

[100] *See infra* Part VI. for other suggested procedures or accountability mechanisms.

[101] *See* Freeman, *supra* note 3, at 585-86.

[102] *See Suss*, 823 F.Supp. at 188 (citing Gibson v. Berryhill, 411 U.S. 564 (1973), Commonwealth Coatings v. Continental Casualty Co., 393 U.S. 145 (1968), Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944), and Tumey v. Ohio, 273 U.S. 510 (1927)).

due process principles are simply inapposite to private delegations on the federal level, given the federal courts' long-time reluctance to strike down a private delegation as unconstitutional, the fact remains that a due process inquiry into private delegations has not been explicitly foreclosed by the federal courts. [103] The due process inquiry also remains popular in the state courts.[104]

In the eminent domain arena, courts have gone so far to state that due process is even invoked when attempts are made to correct partial and biased uses of governmental power, such as in the form of paying landowners for compensation for the taking of their land.[105] Furthermore, the notion of placing accountability controls and safeguards on the private delegation of the takings power is similarly not unheard of. In addition to the common requirement that a taking be used for a public use or for a public purpose, some states have taken several steps to mitigate the self-interested use of eminent domain power by requiring the approval of a state agency for a particular seizure. [106] States further require an agency to investigate the purpose for which land is seized.[107] In addition, several state courts view private use of the takings power more circumspectly than public use.[108]

C. Two Judicial Tests that Assess the Constitutionality of the Private Delegation of Public Power

1. The *Texas Boll Weevil* Test

a. Description

[103] *See* Lawrence, *supra* note 5, at 672-73.
[104] *See id.*
[105] *See Suss.*, 823 F.Supp. at 189.
[106] *See* Lawrence, *supra* note 5, at 686.
[107] *See id.*
[108] *See id.*

In its 1997 *Texas Boll Weevil* decision, the Texas Supreme Court struck down the creation and delegation of power to the private, non-profit Texas Boll Weevil Eradication Foundation by the Texas legislature as unconstitutional under the Private Non-Delegation Doctrine.[109] The legislature had created the Foundation in order to eradicate the boll weevil insect, a pest that attacks cotton crops and results in significant economic damage to cotton producers.[110] In the decision, the court outlined a preliminary three-part inquiry to use in determining the constitutionality of a private delegation.[111] This initial three-part test involves: (1) determining whether or not the powers delegated to an entity are legislative or law-making[112] pursuant to separation of powers analysis,[113] that dictates that any power deemed legislative must stay in the legislative branch; (2) assessing whether or not the delegate is private or public;[114] and (3) if the delegation inquiry survives the previous two parts, analyzing the constitutionality of a delegation under an additional eight-part test. This eight-part test has been distilled from the scholarly work of several well-known academics in the non-delegation field, such as Professors Jaffe, Liebmann, Davis, and Lawrence.[115] The *Texas Boll Weevil* court, however, made it clear that the eight-part test was strictly for private delegations, [116] noting that it was required to give "more searching scrutiny" to these delegations.[117]

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[109] *See supra* note 20.
[110] *See id.*
[111] *See* Reeder, *supra* note 47, at 213 (describing the initial three-part *Texas Boll Weevil* test).
[112] *Texas Boll Weevil,* 952 S.W.2d at 465.
[113] *Id*.
[114] *See* Reeder, *supra* note 47, at 213; *see also Texas Boll Weevil*, 952 S.W.2d at 470 ("We first address whether the Foundation is a public or private entity for purposes of the nondelegation doctrine.").
[115] Professor Jaffe is the author of the seminal law review article, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937)*; see also* Jaffe, *supra* note 6. Professor Liebmann wrote *Delegation to Private Parties in American Constitutional Law*, 50 IND.L.J. 650 (1975), *see supra* note 17, and Professor Davis authored the first edition and a 1970 Supplement to an administrative law treatise that has been heavily referred to in delegation circles entitled, K. DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1978). Professor Lawrence's work is cited throughout this Article. *See* Lawrence, *supra* note 5.
[116] *See Texas Boll Weevil*, 952 S.W.2d at 472.
[117] *Id.* at 469; *see also supra* nn. 21-25, 85-86.

Hence, the constitutional analysis in *Texas Boll Weevil* centers on whether or not there has been an impermissible delegation of legislative power, power that is supposed to lie in the legislative branch under both the United States and the Texas Constitutions.[118] Despite the initial three-part inquiry, the heart of the *Texas Boll Weevil* analysis is the following eight-part test:

> (1) Are the private delegate's actions subject to meaningful review by a state agency or other branch of state government?;
>
> (2) Are the persons affected by the private delegate's actions adequately represented in the decision making process?;
>
> (3) Is the private delegate's power limited to making rules, or does the delegate also apply the law to particular individuals?;
>
> (4) Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?;
>
> (5) Is the private delegate empowered to define criminal acts or impose criminal sanctions?;
>
> (6) Is the delegation narrow in duration, extent, and subject matter?;
>
> (7) Does the private delegate possess special qualifications or training for the task delegated to it?; and

[118] Article 1, § 1 of the U.S. Constitution notes that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art 1, § 1. Similarly, Article II, § 1 of the Texas Constitution states that "[t]he powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." TEX. CONST. art II, § 1. In addition, Article III, § 1 of the Texas Constitution mirrors the legislative vesting language of Article I, § 1 of the U.S. Constitution by affirming that "[t]he Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas.'" TEX. CONST. art III, § 1. For additional explanation of the constitutional foundations of private and public delegations of power in Texas, *see infra* note 183.

(8) Has the Legislature provided sufficient standards to guide the private delegate in its work?[119]

In elucidating this eight-part test, the Texas court further provided several indications as to how the eight factors should be weighed. For instance, the *Texas Boll Weevil* court noted that, in order for a private delegation to be an overly broad delegation of legislative power under the provision of the Texas constitution that vests lawmaking power solely in the legislature, a "majority of the factors" must be violated.[120] In addition, the court noted that the legislation at issue, the Texas Boll Weevil Act, was to be constitutionally reviewed "as a whole."[121] Nonetheless, the court signaled a cautionary note in its application of the *Texas Boll Weevil* test, stating that it was to be applied "sparingly"[122] when private delegation was "'running riot.'"[123] Moreover, the court definitively stated that a private delegation did not have to comply with all eight factors in order to pass constitutional muster under the Texas constitution- it just needed to satisfy a majority of them.[124]

b. Subsequent Glosses on the *Texas Boll Weevil* Test

i. *Proctor v. Andrews*[125]

In 1998, one year after the Texas Supreme Court identified the eight-part *Texas Boll Weevil* test, the court further clarified it in *Proctor v. Andrews*. *Proctor* called into question the constitutionality of Texas' Civil Service Act,[126] that provided firefighters and police officers means to appeal decisions made by their superiors in which they were

[119] *See Texas Boll Weevil*, 952 S.W.2d at 472.
[120] *Id.* at 475.
[121] *Id.*
[122] *Id.*
[123] *Id.* (citing Justice Cardozo in *A.L.A. Schecter Poultry Corp.*, 295 U.S. 495 at 553).
[124] *See id.*
[125] 972 S.W.2d 729 (Tex. 1998).
[126] Tex. Local Gov't Code § 143.001.

suspended, passed over for promotion, or demoted. The officer or firefighter could appeal either to the local civil service commission or to an independent third party.[127] If the officer were to choose the latter route, the city was required to request seven qualified neutral arbitrators from either the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS).[128] Under the statute, a municipality was required to strike the names of those arbitrators that it would not choose to conduct the hearings.[129] Unless the decision of this arbitrator was unlawful, the decisions were final, and the officer or firefighter effectively waived his right to appeal the decision to the district court.[130] In *Proctor,* three cases were consolidated in which the city of Lubbock had failed to request seven arbitrators or to strike arbitrators pursuant to the statute.[131] Proctor filed suit seeking a declaratory injunction compelling Lubbock's compliance, and the city counter-sued contending that the Civil Service Act was unconstitutional.[132]

The *Proctor* court held that the Texas legislature had not acted unconstitutionally in delegating lawmaking authority to private parties that were private arbitration services under Texas's Civil Service Act.[133] The court first stated that the case involved a delegation of power to a private actor,[134] and it essentially declined to conduct the private versus public actor analysis in the second part of the initial three-part inquiry that it embraced in *Texas Boll Weevil*.[135]

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[127] *See Proctor,* 972 S.W.2d at 732.
[128] *See id.*
[129] *See id.*
[130] *See id.*
[131] *See id.*
[132] *See id.*
[133] 972 S.W.2d 729 (Tex. 1998).
[134] *See Proctor*, 972 S.W.2d at 733 ("Because the delegates in the instant case are not affiliated with any department of the state government . . . .").
[135] *See supra* note 114.

Secondly, the court explained that when a private actor is the recipient of a delegation, then the constitutional underpinnings of the *Texas Boll Weevil* test stem from Article III, Section 1 of the Texas Constitution that vests legislative power in the legislative branch.[136] In contrast, the *Texas Boll Weevil* court held that the test sounded in the separation of powers provisions found in Art. II, Section 1 of the Texas Constitution.[137] Another gloss on the *Texas Boll Weevil* test that the *Proctor* court provided was to state that, even with the eight-part *Texas Boll Weevil* test, it would interpret delegations in the most constitutional light possible.[138]

ii. FM Properties Operating Co. v. City of Austin[139]

Subsequently, in 2000, the Texas Supreme Court decided *FM Properties,* a case in which the city of Austin sought a declaratory injunction against private land owners who owned more than 500 acres of land, from designating "water quality and protection zones" within Austin's extraterritorial jurisdictions.[140] The city contended that section 26.179 of the Texas Water Code,[141] that allowed landowners to designate certain water zones as "protected," was an unconstitutional delegation of power. It also provided the following five reasons to support its arguments that the pertinent section of the Water Code was unconstitutional: 1) the provision unconstitutionally delegated legislative powers to private landowners; 2) it targeted the city of Austin; 3) the statute infringed on the city's home rule powers conferred by the Texas Constitution; 4) it violated the city's

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[136] Nonetheless, the court also stated that the *Texas Boll Weevil* test could be applied to delegations of legislative authority derived from the separations of powers language in Article III, Section 1 of the Texas constitution. *See Proctor*, 972 S.W.2d at 735.
[137] *See supra* note 113.
[138] *See Proctor*, 972 S.W.2d at 735 ("Thus, we consider all eight factors, keeping in mind that if it is possible to interpret the language of the statute in a manner that renders it constitutional, we must do so.") (citing Nootsie, Ltd. v. Williamson Co. Appraisal Dist., 925 S.W.2d 659, 662) (Tex. 1996)).
[139] 22 S.W.3d 868 (Tex. 2000); *see also supra* note 20.
[140] *See Proctor,* 22 S.W.3d at 872.
[141] Tex. Water Code § 26.179.

property rights; and 5) the statute allowed private property owners to suspend the laws.[142] The court struck down the delegation of power to private landowners to create water quality zones as unconstitutional.[143]

In addition, the court in *FM Properties* provided further clarification on the weight of each the eight factors in the *Texas Boll Weevil* test. For instance, the court stated that the weight of the factors was to be determined on a case-by-case basis, according to each individual set of facts.[144] Still, it generally noted that when it came to private delegations of legislative power, two factors in the *Texas Boll Weevil* test would be most "heavily" weighted because they address the "central concerns" behind the delegation of power to private parties: (1) whether or not "the private delegate's actions are subject to meaningful review by a state agency or other branch of state government;" and (2) whether or not the "private actor has a pecuniary or other personal interest that may conflict with his or her public function."[145]

The central concerns referenced by the Texas Supreme Court in *FM Properties* are ones that necessarily invoke the procedural due process underpinnings of the PNDD advocated in this Article. These concerns are the obvious opportunities for self-interested actions or choices that may guide a private actor that has been delegated public power and whether or not there are any accompanying accountability mechanisms in the enabling legislation to make these choices as disinterested as possible.

For instance, one of the "heavily" weighted factors identified by the court in *FM Properties* focused on whether or not there is "meaningful government review," either by

[142] *See FM Properties*, 22 S.W.3d at 868, 872.
[143] *See FM Properties,* 22 S.W.3d at 868.
[144] *See FM Properties*, 22 S.W.3d at 875 ("*Boll Weevil* does not specify if any factors weigh more heavily than others, but the importance of each factor will necessarily differ in each case," and noting that the inquiry in *Texas Boll Weevil* places heavy emphasis on the first factor of the eight-part inquiry, or whether there is meaningful government review of a private delegate's action).
[145] *Id.* at 875.

a state agency or other part of government, of a private delegate's actions.[146] The requirement of "meaningful government review" goes to one of the most potent and central ways in a democracy in which private delegates of power may be held accountable for ostensibly "public" actions - directly or indirectly holding elected officials responsible for choices made by private delegates.

In addition, the other "heavily" weighted factor in the *Texas Boll Weevil* test subsequently emphasized by the Texas Supreme Court in *FM Properties* assessed the financial or personal interest that a private actor might have in exercising delegated authority to it. This factor, therefore, allowed the court to concentrate on the inherently self-interested opportunities that arise for private delegates of public power.

Finally, in *FM Properties*, the Texas court further refined the definition of legislative power, at issue in the initial three-part *Texas Boll Weevil* inquiry.[147] The court stated in *FM Properties* that legislative power is generally the power "to make rules and determine public policy," while including "many administrative aspects, including the power to provide the details of the law, to promulgate rules and regulations to apply the law, and to ascertain conditions upon which existing laws may operate."[148]

c. The *Texas Boll Weevil* Test Under Scrutiny

The eight-part *Texas Boll Weevil* test has been criticized by some commentators as too vague and subjective.[149] Indeed, although the Texas Supreme Court stated that a private delegation must pass muster under a majority of the eight factors to be

[146] *See supra* Part IV.D.1.a. note 119.
[147] *See supra* note 112.
[148] *FM Properties*, 22 S.W.3d at 873.
[149] *See* Reeder, *supra* note 47, at 222-23 (asserting that the test gives little "guidance" to lower courts, legislators, and private parties because of its "vagueness" and that it "simply describes a subjective analysis.").

nonviolative of the state constitution, it is unclear exactly how many factors constitute a majority. It is also unclear how much each factor should be weighted. For example, the delegation analysis by the court in *Texas Boll Weevil* resulted in the delegation's "failing" five of the factors, "passing" one factor, and being "inconclusive" or neutral in two others.[150] In contrast, in *Proctor*, the delegation "passed" all factors, except for one.[151] Highlighting the subjective nature of the eight-part case-by-case inquiry, the Texas Supreme Court in *Proctor* disagreed with the state court of appeals' weighing of, whether or not "the Legislature had provided sufficient standards to guide the private delegate in its work, as against the delegation."[152]

Similarly, in *FM Properties*, in which the Texas Supreme Court stated that it would weigh whether or not there was "meaningful government review" and the private delegate's interests more "heavily" than other factors, the court in a numerical breakdown determined that four factors of the eight-part *Texas Boll Weevil* test weighed against the delegation.[153] Two of these factors weighed "heavily" against the constitutionality of the delegation.[154] On the other hand, the court noted that the delegation passed muster under two of the factors and was neutral with respect to others. Thus, the numerical breakdown that permitted the court to strike down the private delegation in *FM Properties*, was four against (two heavily), two in favor, and two neutral.[155]

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[150] *See Texas Boll Weevil*, 952 S.W.2d at 473-75 (explaining and providing analysis that the first, third, fourth, seventh, and eighth factors "weighed against" the delegation, the second factor weighed in favor of it, and the fifth and sixth factors were neutral).
[151] *See Proctor*, 972 S.W.2d at 735-38 (providing a numerical tally of the analysis of the factors, in which the delegation passed all factors except for the first factor in the *Texas Boll Weevil* inquiry, and providing reasons for the analytical result).
[152] *Id.* at 737-38 (highlighting the eighth factor of the *Texas Boll Weevil* test).
[153] *FM Properties*, 22 S.W.3d at 880-88 (providing an analysis of the factors and determining that the first, second, fourth, and sixth factors of the *Texas Boll Weevil* inquiry weighed against the delegation, of which the first and fourth weighed "heavily" against it, but noting that the delegation passed muster under the third and fifth factors of the inquiry, whereas there was a neutral outcome for the seventh and eighth factors); *see also supra* note 119.
[154] *See id.*
[155] *See* Reeder, *supra* note 47, at 213.

Indeed, with the wide mix of numerical scenarios that has resulted in the application of the *Texas Boll Weevil* test in only three cases involving private delegation of power, there are conceivably a limitless number of numerical possibilities and weighted outcomes, yielding a wide band of subjectivity and making the test "susceptible to nuance."[156] Questions, therefore, abound. As one commentator has noted:

> What would be the "right" mix of factors and heavily weighted factors that would warrant upholding a private delegation? What if the enactment narrowly fails five factors, but passes the other three by a wide margin? Could a particular act fail a particular factor in such an appalling and offensive way that it requires invalidating the delegation, even if it passes all other factors? Should the courts simply count all factors as equal, or perform a weighted average balancing test? How should courts account for neutral factors?[157]

Nonetheless, while it is true that it the application of the *Texas Boll Weevil* test has not yet resulted in clear numerical formulas and weights for each of the eight factors, the Texas Supreme Court has, at each application of the test, increasingly approached this point.

For example, after applying the test only three times, the court surmised in *FM Properties* that of all eight factors, those touching upon meaningful government review and the financial or personal interest of the private delegate are most important. Furthermore, the same questions raised with respect to the lack of a clear mathematical formula for determining whether a private delegation is unconstitutional, from a federal or state perspective, are common to many case-by-case, multi-step judicial tests. The nature of the law is such that it is difficult to provide precise mathematical formulas, given the fungible nature of facts and the myriad ways in which enabling statutes authorizing private delegations may be made.

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[156] *Id.* at 223.
[157] *Id.*

Moreover, the *Texas Boll Weevil* test, while not perfect, is one of the few comprehensive tests that examine the constitutionality of the private delegations of public power. The test is, therefore, a good starting point by which to analyze this issue, given that it addresses, from a procedural due process perspective, the core concern of procedural due process, to balance and to check the self-interested use of coercive power by verifiable and appropriate accountability mechanisms.

d. Proposed Modifications of the *Texas Boll Weevil* Test that Address Procedural Due Process Concerns of Private Delegations in the Eminent Domain Context

i. The Eight-Part Core Test

The *Texas Boll Weevil* test is a good analytical starting point because it is one of the few comprehensive tests to examine the constitutionality of private delegations, and it addresses and distills many of the long-time concerns with these delegations that have been discussed by commentators. There is, nonetheless, room for improvement of the test in the eminent domain context.

For example, at least with regard to the procedural due process concerns expressed in this Article, such as the importance of ensuring disinterested application of a private delegation of public power through appropriate accountability controls, it appears that the factors embodying (1) meaningful government oversight of the delegation, (2) whether or not individuals affected by a private delegate's action have an opportunity to be heard, (3) the self-interest of the exercised action by the private delegate and how this interest affects the delegate's public function, and (4) whether or not there are any existing limitations on the private delegate's power, squarely confront the issues raised by procedural due process in the takings context in this Article.[158] Thus, from the

[158] These factors are respectively the first, second, fourth, and sixth factors of the *Texas Boll Weevil* test. *See supra* note 119.

perspective of a private delegation of eminent domain power, especially as practically illustrated in the case studies of Dudley Neighborhood Initiative, Inc. and Texas Medical Center in Parts V.A. and B. of this Article, these four factors would appear to be most relevant.

However, it may be argued that the qualification on one "heavily" weighted factor of the *Texas Boll Weevil* test, concerning a private actor's pecuniary or personal interest, should be amended. As is evidenced by the two case studies,[159] instead of qualifying the private delegate's interest in terms of one "that may conflict with his or her [the private actor's] public function,"[160] the qualification should be couched in terms that relate to a landowner's or to a resident's interest.

On the other hand, while these four procedurally due process-influenced factors may address the two particular delegates and the enabling statutes in the case studies in this Article, future statutes may conceivably arise that permit a private actor the right to define criminal sanctions if a landowner were to resist the taking of his or her property, another of the *Texas Boll Weevil* factors.[161] Therefore, although (1) meaningful government oversight of the delegation, (2) an opportunity to be heard by affected individuals, (3) an examination of the interests of the private delegate, and (4) an analysis of any existing limitations on the private delegate's power address the *current* central concerns of the procedural due process aspects of existing delegations of eminent domain power to private parties, they may not in future delegations of such power. Thus, for this reason alone, the *Texas Boll Weevil* test is useful because of its comprehensive nature in addressing a wide range of issues that may arise through private delegations of any sort

[159] *See infra* Parts V.A. and B.
[160] *Texas Boll Weevil*, 952 S.W.2d at 472.
[161] This factor is the fifth item in the *Texas Boll Weevil* test. *See supra* Part IV.C.1.a. note 119.

of traditional governmental and coercive power, but especially in the eminent domain context.

ii. The Initial Three-Part Inquiry

In addition, apart from the eight-factor core of the test, the initial three-part inquiry of the *Texas Boll Weevil* test seems to be unduly laden with particularly unwieldy issues when applying it to the private delegation of the takings power. For instance, the first part of the initial three-part inquiry centers on the issue of whether or not there has been legislative or law-making power delegated to a private actor.[162] This analysis has required, in some instances, substantial feats by the Texas Supreme Court to conform a particular delegation with nebulous definitions of legislative or law-making power to those that impact public policy or engage in rulemaking.[163]

A less unwieldy inquiry, especially in the eminent domain arena, may, however, be one that centers on determining whether or not a power is traditionally public, governmental, and therefore coercive. A coercive power is one that has traditionally been exercised by government.[164] Delegation of eminent domain power to a private actor would, therefore, clearly fit within the confines of this definition.

Moreover, the second part of the initial three-step test in recent Texas practice has often been a needlessly drawn-out examination determining whether or not an actor is public or private.[165] For instance, in *FM Properties* and in *Proctor*, the Texas Supreme Court was clear from the outset that delegation to a private actor was at issue. In *Proctor*,

[162] *See supra* nn. 112-13.
[163] *See FM Properties*, 22 S.W.3d at 873-74 (noting that legislative or law-making power is one that impacts public policy or engages in rulemaking, while failing to specify how the particular delegation at issue in the case fit into the definition) (citing *Texas Boll Weevil*, 952 S.W.2d at 466-67).
[164] *See supra* nn. 25-28 & 35.
[165] *See supra* note 114.

power had been delegated to arbitrators that were unaffiliated with state government.[166] In *FM Properties*, the delegation had been made to private landowners.[167]

In *Texas Boll Weevil*, however, the court appeared to undergo a tortured process-of-elimination analysis in determining whether or not the Official Cotton Growers' Boll Weevil Eradication Foundation was a private or a public entity.[168] On the one hand, the Texas Commissioner of Agriculture had to certify the Foundation, making the Foundation appear to be a public actor. Yet, on the other hand, the court cited the following factors to determine that the Foundation was a private actor: (1) The Foundation was ultimately a private, non-profit organization that had resulted from the petitioning of the Commissioner of Agriculture by Texas Cotton Producers, Inc., another non-profit that represented growers of cotton,[169] (2) the Foundation's board members did not have to take public oaths of office, (3) the funds collected by the Foundation were statutorily outside the scope of state funds, and (4) the funds were not subject to governmental procurement and audit requirements.[170] While theoretically there may be instances in which it may be unclear if a particular entity delegated this power is a private or a public agency, this part of the initial three-part *Texas Boll Weevil* inquiry in the eminent domain context may be unnecessary, given the limited amount of potentially private actors that fall outside the traditional delegates of eminent domain power-railroads, public utilities, and private actors of the same ilk.

2. Scrutinizing and Modifying the Lawrence Test

[166] *See Proctor*, 972 S.W.2d at 733; *see also supra* note 128.
[167] *See FM Properties*, 22 S.W.3d at 875 ("The City asserts that Section 26.179 delegates legislative power to private landowners. We agree.").
[168] *See Texas Boll Weevil*, 952 S.W.2d at 470-71 (undertaking the private v. public actor analysis).
[169] *See id.* at 459 (noting that Texas Cotton Producers, Inc. spurred the creation of the Foundation).
[170] *See id.* at 470-71.

In addition to the *Texas Boll Weevil* test, Professor Lawrence describes a very general two-step judicial analysis that may be applied to private delegations of public power and that also squarely confronts the procedural due process concerns inherent in these delegations. The first part of the test essentially asks courts to weigh the interest differentials between the public and the private delegate.[171] The interests of the public, or at least in the eminent domain context, the interests of affected landowners and the private actor, will likely exist on a continuum: those in which they are in full conflict, those in which there is no conflict, and those that may fall between these two opposing poles.[172]

The outcome of the second part of Lawrence's two-part judicial inquiry is then determined by the level of conflicting interest ascertained in the first part of his test. The second part of Lawrence's test, however, involves a court's examining whether or not there are sufficient statutory procedural safeguards, controls, or mechanisms on a particular delegation to a private party.[173] For instance, the more conflict of interest there is between a private delegate and affected landowners in a takings scenario, the more procedural safeguards Lawrence's test says there should be. Similarly, a lesser interest differential would merit fewer procedural controls on the private actor's power in the enabling delegation statute.[174] If there is no conflict of interest, then presumably there need be no accountability mechanisms included in the enabling legislation of the delegation.

The Lawrence test, like the *Texas Boll Weevil* test, is not one that would permit a quick, easy, and determinative analysis of all potential private delegations. This test necessarily implies the courts' having to make case-by-case inquiries, and perhaps

[171] *See* Lawrence, *supra* note 5, at 685, 695.
[172] *See id.* at 685.
[173] *See* Lawrence, *supra* note 5, at 685, 695.
[174] *See id.* at 685.

adjusting the rules and standards and applications over time, thus resulting in a less objective test than may be desired.

In addition, by hitting at the heart of the procedural due process underpinnings of the Private Non-Delegation Doctrine, that private delegates of public power act in a disinterested way that is ensured by statutory accountability mechanisms, Lawrence's suggested two-part inquiry is obviously less unwieldy than its eight-part *Texas Boll Weevil* counterpart. However, this greater facial efficiency may result in even more subjective and unwieldy analyses by courts, given that the latter test forces a court to consider any number of potential factors that may arise in a private delegation and to answer them forthrightly with an affirmative, negative, or neutral response. For instance, in the *Texas Boll Weevil* test, the factors centering on whether affected persons are represented in a private actor's decision to use delegated power and the pecuniary or personal interest of a private actor, arguably address the self-interested opportunity of a private delegation of public power. Moreover, the portions of the *Texas Boll Weevil* test examining meaningful government review and how narrow the delegation is in "duration, extent, and subject matter"[175] primarily confront the other main concerns of procedural due process: accountability mechanisms and controls. Tangentially, other factors of the test, including whether or not a private delegate may define criminal acts and whether the legislature has provided adequate standards to guide the delegate, also confront this main concern of procedural due process.[176]

Furthermore, while addressing the core of procedural due process, the first part of the Lawrence test may result in an even more subjective inquiry than the *Texas Boll Weevil* inquiry. There are simply no guidelines or guiding questions, unlike in the Texas

[175] *See Texas Boll Weevil*, 952 S.W.2d at 472. These factors represent the first and sixth factor of the *Texas Boll Weevil* inquiry. *See supra* note 119.
[176] These factors are five and eight of the *Texas Boll Weevil* test, respectively. *See supra* note 119.

test, that force courts to focus on the nature of the interests (both public and private) and the nature and extent of any conflicts between the private actor's interest and the affected landowner in an eminent domain context. Nonetheless, it is difficult to develop a more precise, perhaps more objective test, given the innumerable sets of facts that could arise and the varied ways in which legislation that enables delegation could be written.

Finally, this Article does not agree with the more flexible approach of the second part of the Lawrence inquiry. This second part matches the safeguards or controls to the conflict in interests between a private delegate and affected communities. As a general rule, this paper asserts that there should be a maximum number of accountability mechanisms included in enabling legislation of private delegations of eminent domain power because of the severely coercive nature of a seizure of an individual's land, be it a home, investment property, or small business. What precisely this "number" of mechanisms is, is again determined on a case-by-case, necessarily subjective inquiry.

D. An Alternative Approach: Substantive Due Process

An alternative approach that may be considered when assessing the question of whether or not the takings power should be delegated to private, non-profit corporations is substantive due process. Having considered these arguments, this Article ultimately finds them more unsatisfactory than those involving procedural due process in affording protections to those impacted by the decisions of private, non-profit corporations that use delegated eminent domain power. It has been a settled question of law that property rights are classified as economic due process rights, and they are accordingly examined under a less-stringent two-pronged test that involves answering the following inquiry: 1)

whether or not there is a legitimate end to the takings power delegation; and 2) whether the end is rationally related to the means sought by which to achieve it.[177]

Under this standard of analysis, there is little doubt that almost any private delegation of the takings power to a private, non-profit corporation would serve a legitimate end, given that a state legislature would not delegate such massive power to an entity that did not add great value, usually economic, to the state or to its subdivisions.[178] Enhancing or preserving a state's economic base is certainly a legitimate end. Secondly, there is an argument that this end is rationally related to the delegation by the state to the non-profit because it preserves economic and political efficiencies to the non-profit, as well as to the government, allowing the non-profit ostensibly to continue to add value to a state's economy. Indeed, as a practical matter, the rational basis test under which economic regulations are examined is one under which most private delegations should pass muster. As Professor Lawrence notes, "almost any delegation will be found to be a sensible means of reaching legitimate goals."[179] When faced with the rational-basis test, many courts will do almost whatever it takes to keep from striking down an economic regulation promulgated by the legislature.[180]

On the other hand, a court might not uphold a private delegation of the takings power to a non-profit corporation if the rationale for the delegation no longer fit the times.[181] This question may be important to consider in assessing the following case studies, especially that involving the Texas Medical Center. This delegation was made over fifty years ago, and it has never been litigated.[182] Notwithstanding this concern,

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[177] *See* Lawrence, *supra* note 5, at 678.
[178] *See e.g., infra* note 216 (quantifying the economic impact of the institutions of the Texas Medical Center in Houston, Texas, in terms of 63,000 additional local jobs and 3.5 billion dollars in medical research funding).
[179] Lawrence, *supra* note 5, at 679.
[180] *See id.*
[181] *See id.* at 680.
[182] *See infra* Part V.B.1. note 217.

however, a substantive due process approach, with its lessened scrutiny of a private delegation of the takings power, would simply ignore the more fundamental and significant procedural due process inquiry discussed in Parts IV. A. and B. of this Article that, at the very least, allows for a more balanced, nuanced approach to all parties affected by a private non-profit's decision to exercise the takings power delegated to it.[183]

V. An Introduction to Two Case Studies in which Eminent Domain Power Has Been Delegated to Private, Non-Profit Corporations

The two case studies discussed in this section of this Article are actual examples of instances in which the very public power of eminent domain has been delegated to a private non-profit or charitable corporation. Each case study occupies a place on the polar extremes of the procedural due process spectrum.

A. Case Study One: Dudley Neighbors, Inc./Dudley Neighborhood Street Initiative

1. History

[183] On the other hand, other courts and commentators have used a separation of powers analysis to undergird PNDD. For instance, Texas generally analyzes private delegations through a separation of powers perspective. *See Texas Boll Weevil*, 952 S.W.2d at 467 ("More commonly, however, Texas has rooted its delegation jurisprudence only in the principle of separation of powers."). In Proctor v. Andrews, 972 S.W.2d 729, 733 (Tex. 1998), however, the same court clarified that when a *private delegation* is at issue, the vesting of legislative power in the legislative branch under Article III, Section 1 of the Texas Constitution provides the appropriate constitutional basis for determining whether or not a private delegation is averse to the Texas constitution. The *Proctor* court noted that Article II, § 1 of the Texas Constitution, that constitutionally enshrines separation of powers between the three branches of Texas government, is the constitutional foundation by which to assess public delegations of power, such as those to government agencies. *See supra* note 136. Separation of Powers analysis involves adhering to the principle that government as enshrined in the federal and state constitutions is divided into three branches (judicial, executive, and legislative) that balance and check one another. However, when power is delegated to a private entity, this power is not placed within this three-tier, overlapping structure. *See* Reeder, *supra* note 47, at 219. In contrast, Lawrence notes that because privately delegated power falls outside the realm of the three-branched structure, separation of powers underpinnings for PNDD is inapposite. *See* Lawrence, *supra* note 5, at 665-66. ("Separation of powers may have some relevance to delegations of legislative power to executive agencies, in that one department might then in fact be exercising the power of another, but a private delegation does not cross the lines between departments."). This Article agrees with Lawrence. *But see supra* Part IV.D. (confirming the use of separation of powers analysis in Texas nondelegation doctrine).

Dudley Neighbors, Inc. (DNI), is the eminent domain arm of the Dudley Street Neighborhood Initiative (DSNI), a Boston, Massachusetts, community group with the mission of revitalizing the long-neglected Dudley neighborhood in the Roxbury/North Dorchester section of Boston.[184] When DSNI was formed in 1984, there were 1,300 trash-filled empty property lots in the Dudley neighborhood.[185] In particular, DNI is a non-profit urban community land trust. [186] Its charge has been to use the takings power to assemble disparate parcels of primarily vacant land in the Dudley Triangle section of the neighborhood to construct affordable housing.[187] For instance, in the early 1990's, DNI used eminent domain on 132 vacant parcels of land that were eventually used to build 134 affordable-housing units for residents of the neighborhood.[188] Subsequently, DNI's eminent domain power has been used to seize land for additional homes, a greenhouse for Dudley residents, gardens, and parks.[189]

2. Mechanics of Statutory Due Process Accountability Controls

The relevant Massachusetts enabling statute allows an urban redevelopment corporation, including a charitable corporation, to take land by eminent domain, provided that certain extensive procedures, ostensibly designed to foment accountability in the takings process, are followed.[190] Massachusetts courts view urban redevelopment corporations, although some may be technically classified as for-profit corporations, as

[184] *See* ON THE GROUND WITH COMPREHENSIVE COMMUNITY INITIATIVES, published by The Enterprise Foundation (2000), www.practitionerresources.org/cache/documents/ 19319.pdf, p.1.
[185] *See* THE CATALOGUE FOR PHILANTHROPY, http://www.catalogueforphilanthropy.org/ma/2005/dudley_street_5605.htm, last visited on July 5, 2006.
[186] *See* ON THE GROUND WITH COMPREHENSIVE COMMUNITY INITIATIVES, published by The Enterprise Foundation (2000), www.practitionerresources.org/cache/documents/ 19319.pdf, p.13.
[187] *See id.*
[188] *See id.* at pp. 13-14.
[189] *See* THE CATALOGUE FOR PHILANTHROPY, http://www.catalogueforphilanthropy.org/ma/2005/dudley_street_5605.htm, last visited on July 5, 2006.
[190] *See* MASS. GEN. L. ch. 121A, § 3, 11 (2006).

more akin to public service or charitable corporations because they are designed to benefit the public.[191]

The first step is that the Boston Redevelopment Authority (BRA) must delegate to the DNI the power of eminent domain, a power that has already been delegated to BRA.[192] Second, DNI, or any other urban redevelopment corporation formed pursuant to the statute, must be engaged in revitalizing blighted areas of certain communities in Massachusetts.[193] Third, before DNI may undertake a project, even before the exercise of eminent domain power is contemplated, it must receive approval from both the planning board and the city council of the city of Boston, following a public hearing on the issue.[194] Notice for the public hearing must be published on at least two occasions, no earlier than 14 days before the date of a hearing, in a newspaper of general circulation and posted in a conspicuous place in Boston.[195] The enabling statute then requires that a second form of mailed notice be given to all landowners who are within or abut a proposed project.[196]

In addition, the planning board submits a report, within 45 days of the public hearing, that includes an analysis of details such as whether or not the area is blighted and how the proposed redevelopment comports with the city's master plan. [197] The report must also include a recommendation to approve or to disapprove a project to the city council.[198] The city council, in turn, is then charged with submitting a report that approves or disapproves a project to the mayor, within 90 days of the public hearing and

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[191] Opinion of the Justices, 135 N.E.2d 665, 667, 334 Mass. 760, 763 (Mass. 1956).
[192] *See* MASS. GEN. L. ch. 121A, § 3 (2006); *see also* the page of DSNI's website explaining DNI at www.dsni.org/dni/, last visited on 07/03/06; ON THE GROUND WITH COMPREHENSIVE COMMUNITY INITIATIVES, published by The Enterprise Foundation (2000), located at www.practitionerresources.org/cache/documents/ 19319.pdf, p.13; Taylor, *supra* note 43, at 1075.
[193] *See* MASS. GEN. L. ch. 121A, § 3 (2006).
[194] *See* MASS. GEN. L. ch. 121A, § 6 (2006).
[195] *See* MASS. GEN. L. ch. 121A, § 6B (2006).
[196] *See* MASS. GEN. L. ch. 121A, § 6 (2006).
[197] *See id.*
[198] *See id.*

within 45 days of the council's receipt of the planning board's report.[199] Furthermore, both reports must be written and made available to the public, including copies sent by certified mail to those individuals who were notified of the public hearing.[200] Moreover, any person "aggrieved by the approval or disapproval of a project" has 60 days within the time that the city council has transmitted its report to the mayor to seek recourse in the courts.[201]

Another check on the use of eminent domain power by DNI or other urban redevelopment corporations in Massachusetts is that a project must provide a means, for persons or families who are displaced by the exercise of the power, to be provided in the site or in an equivalent area the following three items: (1) a place to live that is similar in rent to the displaced dwelling, (2) is "reasonably accessible" to their places of employment, and (3) is safe, decent, and accessible to public utilities, shopping, and public transportation.[202] A project may not be approved by the planning board or city council if contingency plans for displaced families and individuals through the use of eminent domain are not included.[203]

A final check on the exercise of the takings power by DNI is that once a project is approved by the planning board and city council, a certificate is issued to BRA. BRA then makes a third, separate and final determination of a project's approval.[204]

3. Due Process Accountability Controls in DNI's and DSNI's Organizational Structure

[199] *See id.*
[200] *See id.*
[201] MASS. GEN. L. ch. 121A, § 6C (2006).
[202] MASS. GEN. L. ch. 121A, § 6 (2006).
[203] *See id.*
[204] MASS. GEN. L. ch. 121A, § 3,6 (2006); *see also* Taylor, *supra* note 43, at 1076.

In addition to the significant statutory due process mechanisms in the enabling statute of the DNI, there are a number of other accountability controls in the organizational structure of DNI and of its parent organization, DSNI, that serve to preserve disinterested aims of procedural due process. For instance, DNI is governed by an 11-member board of directors, six of whom are appointed by DSNI and one each appointed by the mayor of Boston, the Roxbury Neighborhood Council, the city council member for the district, and the state senator and state house representative for the neighborhood.[205] DSNI, the parent organization of DNI, is in turn governed by a 29-seat board of directors, 14 of whom are residents (both adults and youth) of the Dudley neighborhood, with the remaining board members representing seven other non-profit agencies, two community churches, two neighborhood businesses, and two community development organizations.[206] Except for two seats on DSNI's board of directors, all directors are elected by Dudley neighborhood residents.[207]

4. Preliminary Analysis of Procedural Due Process Statutory and Organizational Controls

The main concern expressed in this Article with respect to the private delegation of the very public eminent domain power to non-profit and charitable corporations is that these entities will exercise the takings power in a self-interested manner to the detriment and to the exclusion of the public interest. Opportunities for this manner of exercise are ripe for non-profits delegated the takings paper in enabling statutes that do not contain certain controls, such as the electoral accountability that exists with respect to the public

[205] ON THE GROUND WITH COMPREHENSIVE COMMUNITY INITIATIVES, published by The Enterprise Foundation (2000), www.practitionerresources.org/cache/documents/ 19319.pdf, p.11.
[206] *See id.*
[207] *See id.*

exercise of eminent domain power.[208] As applied to DNI, however, this concern is significantly downplayed by the wide-ranging accountability mechanisms inherent in the enabling statute and in the organizational structures of DNI and DSNI.

For instance, in the enabling statute for Massachusetts urban redevelopment corporations, there is accountability to elected officials for an exercise of eminent domain at almost every level of local government. Indeed, approval for a project must be received by the planning board, the city council, and BRA, all public or quasi-public entities, that are either directly or indirectly accountable to voters. Moreover, even though a project does not necessarily require the approval of the mayor, he or she receives the city council's recommendation for a particular project. Therefore, Boston's mayor may ostensibly intervene politically should a particular taking and redevelopment project prove sensitive.

Furthermore, the statutory process calls for a number of opportunities for the public interest to be heard, given that the law requires that there be a joint public hearing between the city council and planning boards and that affected property owners be given at least three kinds of notice for the hearing. Also, the process includes an appeal that aggrieved property owners may use to have their say in the courts. Most importantly, when it comes to the use of eminent domain power by DNI or similar urban redevelopment corporations, the process requires that redevelopment projects may not be approved by the planning board if there are no relocation plans for affected residents or landowners.

These numerous statutory accountability processes in the exercise of eminent domain power by DNI serve as checks on the self-interested use of the takings power, and they may be juxtaposed to similar accountability mechanisms in the organizational

[208] *See supra* note 92.

structure of DNI and DSNI. For instance, five of DNI's board of directors are selected by elected representatives at all levels of state and local government. Should these representatives approve a taking that is contrary to the Dudley community's will, then presumably the elected officials responsible for their selection may be held accountable on Election day. Furthermore, the remaining six directors of DNI are selected by DSNI, of which 27 of its directors are selected by the residents of the Dudley neighborhood and of which 14 must be residents of the community.

These six directors of DNI are therefore held at least indirectly accountable for their vote to use eminent domain power by the ostensibly affected residents of its exercise. Organizational controls call for the Dudley community to be in ultimate control of the use of eminent domain power by DNI, checks that are in great contrast to the self-interested use of power that is ripe for abuse in the Texas Medical Center case study.[209]

Yet another foundational and historical check on the use of eminent domain power by DNI is that its parent organization, DSNI, was borne out of efforts by the community, in partnership with a local foundation, to improve the neighborhood.[210] Thus, to the extent that DNI uses its privately delegated takings power, the community-focused roots of DNSI inform DNI's actions by essentially forcing it to use its power in ways with which the community will agree. Even though DNI's actions may be deemed self-interested because they benefit the community, they are wholly disinterested because one particular person or private party is not benefiting - it is likely the entire Dudley neighborhood.

B. Case Study Two: The Texas Medical Center (TMC)

[209] *See infra* Part V.B.
[210] *See* Taylor, *supra* note 43, at 1078-79.

1. History

The second case study that this Article will examine is that of the Texas Medical Center (TMC) in Houston, Texas. TMC is a non-profit charitable corporation[211] that oversees the largest medical complex in the world,[212] spans more than 1,000 acres of land in the heart of Houston,[213] to which over 13 hospitals, two medical schools, four nursing schools, with additional schools of dentistry, public health, and pharmacy belong.[214] Although TMC does not itself provide patient care or employ any medical personnel, it owns and manages much of the real property and provides maintenance and ancillary services, including upkeep of roads, landscaping, and constructing of parking facilities, for its 42 member institutions.[215] In addition, the member institutions brought approximately $3.5 billion in medical research funding to Houston between the years 2000 and 2004, employed over 63,000 workers in 2004, and had 5.2 million patient visits in 2004 alone.[216]

TMC was granted the power of eminent domain in 1959.[217] It has used its takings power on at least one occasion in 2004 to condemn a residential house in an adjacent

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[211] *See* TEX. REV. CIV. STAT. art. 3183b-1 § 1 (2005).
[212] *See http://www.visithoustontexas.com/visitors/fast_facts/,* last visited on July 5, 2006.
[213] *See http://www.tmc.edu/masterplan/2006/HiRes2006updatev.2.pdf*, p.2, last visited on July 5, 2006.
[214] *See http://www.tmc.edu/tmc-introduction.html*, last visited on July 5, 2006.
[215] *See* http://www.tmc.edu/tmc-facts.html, last visited on July 5, 2006.; *see also* http://www.guidestar.org/pqShowGsReport.do?np. oID+14224, last visited on July 11, 2006.
[216] *See* http://www.tmc.edu/tmc-facts.html, last visited on July 5, 2006.
[217] *See* TEX. REV. CIV. STAT. art. 3183b-1 (2005). Although the statute does not mention TMC by name, the description of the non-profit charitable corporation contained in the statute matches that of TMC. For instance, section one of the statute notes that "[a]ny nonprofit corporation incorporated under the laws of this state for purely charitable purposes and which is directly affiliated or associated with a medical center having a medical school recognized by the Council on Medical Education and Hospitals of the American Medical Association as an integral part of its establishment, and which has for a purpose of its incorporation the provision or support of medical facilities or services for the use and benefit of the public, and which is situated in any county of this state having a population in excess of six hundred thousand (600,000) inhabitants according to the most recent Federal Census shall have the power of eminent domain and condemnation . . . ." TEX. REV. CIV. STAT. art. 3183b-1 § 1 (2005).

neighborhood as part of a plan to construct a five-story, approximately 500-space parking garage on land previously occupied by houses in a residential neighborhood.[218]

2. Mechanics of Statutory and Organizational Due Process Controls

In comparison to the statutory due process controls and accountability mechanisms of the previous case study, DNI, TMC has very little restrictions or accountability mechanisms on its takings power. Indeed, sections two and four of the Texas enabling statute allow TMC "full authority and [eminent domain] power" "for the purpose of acquiring lands adjacent to or contiguous (whether or not separated by public thoroughfares)" to it for the construction, maintenance, and operation of "facilities dedicated to medical care, teaching, and research for the public welfare, including ancillary or service activities generally and customarily recognized as essential to such facilities in a medical center."[219] In addition, sections three and four of the statute permit TMC to use its taking power to transfer title or to lease property acquired through eminent domain to any "nonprofit corporation, association, foundation, or trust" for 99 years with a renewal option.[220]

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[218] *See* Texas Medical Center v. Joe Alfred Izen, Jr. & City of Houston, Texas, No. 814.303 (Harris County Ct. Aug. 13, 2004) (noting that the county commissioners' award to TMC assessed the value of the seized real property at $80,000 in the condemnation proceeding). In the interest of full disclosure, the Author notes that the taking of this real property occurred in her neighborhood and the plan and eventual construction of the parking garage in violation of private deed restrictions was vigorously protested by the Central City Preservation Coalition, the arm of the neighborhood homeowner's association designed to protest the construction and taking. The author was Vice-Chair of this organization. For Texas legislative hearings regarding the neighborhood's protests, *See* Texas House Bill 2537 in the Land and Resource Management Committee (during the 79th Regular Session), http://www.house.state.tx.us/fx/av/committee79/50421p25.ram Representative Garnet Coleman's, the Texas House of Representatives member who aided the Central City Preservation Coalition, exchange with Rep. Beverley Wooley on Texas Senate Bill 62, regarding limitations on eminent domain, on the floor of the Texas House is at 1:10:10 in: http://www.house.state.tx.us/fx/av/chamber79/081005a.ram In addition, as a result of these protests in the Author's neighborhood, a city-wide civic group, Citizens Against Eminent Domain Abuse, was formed, of which the Author is Chair.

[219] TEX. REV. CIV. STAT. art. 3183b-1 §§ 2,4 (2005).

[220] TEX. REV. CIV. STAT. art. 3183b-1 §§ 3,4 (2005).

There do, however, appear to be three statutory restrictions on TMC's takings power. First, section five of the law notes that should TMC acquire property through eminent domain and choose not to use the acquired land "for the purpose of medical care, teaching, or research or essential ancillary and service activities," then title to the seized property will revert to the original owner or to his or her "heirs, devisees, or assigns."[221] Second, section six of the enabling statute, a recent amendment to it, requires that before TMC begins the takings process or records title to acquired real property, it must provide "written notice by certified mail" to each recorded landowner of property for each parcel of land that it "seeks to acquire or purchase; or that is not more than 200 feet from any boundary of any unit of real property."[222] The intended use of the property, whether it is seized through eminent domain or purchased outright, must not comport with deed restrictions.[223] Third, the statute mandates that should TMC exercise its takings power, then a condemnation hearing must be held in which three special county commissioners award damages and costs to an aggrieved landowner for his or her property.[224] However, once TMC pays the damages and costs to a landowner, deposits this money with the court, and executes a bond, then it may take possession of the seized property.[225]

With respect to the issue of accountability restrictions in TMC's organizational structure, in contrast to DNI and DSNI, there is no direct or indirect accountability to the electorate or populations affected by a taking of land. Indeed, TMC is a privately-run

[221] TEX. REV. CIV. STAT. art. 3183b-1 § 5 (2005).
[222] TEX. REV. CIV. STAT. art. 3183b-1 § 6 (2005). Deed restrictions are private contractual limitations on the use of real property that run with the land, commonly found on parcels of land located in established neighborhoods in Houston, Texas. Because the city of Houston does not have zoning requirements that restrict the use of land by city ordinance, many neighborhoods rely on deed restrictions to ensure that the residential character of lots in neighborhoods is preserved.
[223] *See id.*
[224] *See* TEX. REV. CIV. STAT. art. 3183b-1 § 6(a) (2005) and TEX. PROP. CODE. § 21.021(a) (2005); *see also supra* note 89.
[225] *See* TEX. PROP. CODE. § 21.021(a) (2005).

non-profit organization with a privately-appointed board of directors that remains largely anonymous to the public and to the electorate.[226]

3. Preliminary Analysis of Procedural Due Process Accountability Mechanisms

The statutory restrictions on TMC's eminent domain power are minimal at best, especially in comparison to those of the first case study, DNI. In addition, the controls resist a due process appellation. For instance, the reversion interest to the original landowner that is mandated if TMC does not use land seized by eminent domain for medical care, teaching, research, or ancillary or service purposes,[227] comprehends little of the "disinterested" concerns inherent in procedural due process. The reversion of land occurs only after 1) the taking has taken place and 2) the passage of time has elapsed to indicate that TMC will not use the acquired land in accordance with the statutorily mandated restriction on its use. Therefore, TMC may still fundamentally exercise the public power of eminent domain in a self-interested way, until it chooses not to use the property for a particular purpose. Nonetheless, this statutorily mandated purpose may in itself be deemed self-defeating, given that there is no time restriction included in the statute as to when reversion may take place, once TMC has failed to comply with the purpose of the seized land.

Does reversion take place after 30 days, months, years, etc.? Therefore, what accountability mechanisms may have been contemplated in the statute with respect to reversion are negated by the lack of a time requirement regarding when a purpose is unfulfilled and when reversion must occur.

[226] For instance, information on board members is publicly unavailable on guidestar.org, a public interest website that tracks non-profit organizations and lists the board members of many non-profit organizations. *See* http://www.guidestar.org/pqShowGsReport.do?np. oID+14224, last visited on July 11, 2006.
[227] *See supra* note 221.

Moreover, the notice requirements in the statute that become effective once TMC decides to pursue condemnation or even to purchase real property for an intended use that does not accord with private deed restrictions,[228] are helpful in that they alert surrounding landowners, as well as the owner of targeted property, to potentially incompatible uses of real property. The notice requirements may also help neighborhoods and individuals to mount and to mobilize a potential political solution to the use of eminent domain or the purchase of real property by TMC. While this recent amendment to the TMC enabling statute may be considered welcome relief to landowners in an area targeted for exercise of eminent domain power, the fact remains that while TMC may give notice, it may also ultimately exercise its delegated right to eminent domain, regardless of the interests of a neighboring community. Thus, this notice restriction does not address the underlying procedural due process concern of disinterested action found in TMC's private exercise of eminent domain power.

In addition, the third statutory restriction on TMC's use of the takings power, regarding the mandate that a condemnation hearing be held and three commissioners be appointed to assess the value of the land taken by TMC,[229] is similarly unavailing. At the point that a condemnation hearing is held, the only purpose of the proceeding and appointment of the commissioners is to determine the compensation that should be awarded a landowner whose property has been seized.[230] This hearing does not contemplate the constitutional question of whether or not TMC, as a private actor, should have been delegated the extremely public power of eminent domain, without more forceful accountability and due process mechanisms.[231]

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[228] *See supra* note 222.
[229] *See supra* nn. 218, 224.
[230] *See supra* Part III.B., nn. 89-90, 218.
[231] *See supra* nn. 218, 224.

Further, the TMC enabling statute includes two instances in which general procedural due process concerns such as the disinterested exercise of the takings power are effectively circumscribed. For instance, the statute authorizes that TMC may exercise eminent domain power for ancillary or service purposes related to medical care, teaching, and/or research.[232] However, the statute does not include any statutory limitations or definitions of what constitutes an ancillary or service purpose that would merit the use of eminent domain. Therefore, because these terms remain undefined, arguably any arbitrary or self-interested purpose on the part of TMC could be used to justify the organization's exercise of eminent domain. These arbitrary or self-interested purposes could ostensibly include parking or recreational facilities in a particular area in which TMC was able to acquire real property at relatively low market rates, such as what happened in the TMC's most recent exercise of eminent domain.[233] These acquisitions are in comparison to alternative sites with potentially higher costs but lower indices of social and public disruption.

Moreover, the enabling statute arguably allows TMC to be a virtual property Pac-Man, gobbling up land, via the takings power, that is ever contiguous or adjacent to its previously acquired property.[234] Therefore, as the non-profit attains property, either through outright purchase of land through negotiations with a landowner or through use of the coercive power of eminent domain, real estate next to this property is then at risk or is under statutory threat of being seized. The effect of this statutory permissiveness is to provide TMC with almost blank-check authority to exercise or to threaten to exercise eminent domain powers on land that is located near any of its property, regardless of the location of the land, how it is currently being used, and future plans for its use by TMC.

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[232] *See supra* note 219.
[233] *See supra* note 218.
[234] *See supra* note 219.

Finally, even if TMC does not use its power of eminent domain delegated to it by the Texas legislature, by virtue of its having the power under the enabling statute, private property covenants restricting the use of the land, or deed restrictions, acquired by TMC are effectively extinguished.[235] The effect of this statutory permissiveness, therefore, appears to be just the sort that potentially provides a breeding ground for opportunities by private non-profit actors to use the mere threat of eminent domain authority in self-interested ways and that ignores the interests of the larger public and community.

C. Application of the Modified *Texas Boll Weevil* and Lawrence Tests to DNI and TMC

1. DNI

a. Application of the *Texas Boll Weevil* Test to DNI

Under the modified *Texas Boll Weevil* test, DNI, the Boston-based, private, non-profit corporation delegated the power of eminent domain that was introduced in Part V. A. of this Article, would pass with flying colors. For instance, the analysis under the modified Texas test for private delegations of eminent domain power proposed in this Article begins with an initial two-part inquiry as to (1) whether or not traditionally governmental, coercive powers, i.e. public powers, have been delegated, and (2) whether or not these public powers have been delegated to a private entity that rests outside the traditional constitutional categories of private entities delegated the power of eminent domain, such as railroads companies and public utilities. As applied here, by virtue of its being delegated the power of eminent domain, a traditionally governmental power that is

[235] *See* Letter from Robert B. Neblett III of Jackson Walker L.L.P. to Andrew Icken, Executive Vice President of TMC (Jan. 21, 2005), ("At your request we have set forth below a legal explanation of how the Texas Medical Center's ("TMC") acquisition of real property located within the Central City subdivision of Houston (the "Property") has extinguished any applicable deed restrictions. . . . Furthermore, the fact that some of the Property was acquired by purchase, instead of condemnation, does not affect the outcome. The deed restrictions are nonetheless terminated by TMC's acquisition.") in reference to the private deed restrictions in the Houston neighborhood in which TMC exercised the takings power delegated to it to build a parking garage prohibited by the restrictions; *see also supra* note 218.

coercive because it can force a landowner to relinquish her real property irrespective of her wishes, DNI has accordingly been delegated a public power. Secondly, DNI is not a railroad, public utility, or other company that would fall within the traditional permissible private eminent domain categories - it is a private, non-profit company, albeit with a sizeable community influence over it.

The next step in the application of the modified eight-part *Texas Boll Weevil* test to DNI is an analysis pursuant to the following factors:[236] (1) whether or not there is meaningful government review of a private delegate's actions by "a state agency or other branch of state government," (2) whether or not individuals who are affected by the delegate's actions have adequate representation in the delegate's "decision making process," (3) assessing the private delegate's economic and/or personal interest, and (4) analyzing whether or not the delegation is "narrow in duration, extent, and subject matter."[237]

With respect to the issue of whether or not there is meaningful government review as applied to DNI, it is apparent that this factor weighs in favor of the delegation of the takings power to DNI. The Massachusetts enabling statute allows for at least five levels of government review by a state agency or other branch of state government.[238] For instance, both the city council and the planning board must approve a project of DNI, encompassing two levels of review by state government.[239] BRA, the delegating entity of eminent domain power to DNI, must then perform a tertiary review of the project and then approve or disapprove it.[240] Fourth, with respect to the specific use of eminent

[236] *See supra* Part IV. C.1.d.i. (advocating a limitation of the *Texas Boll Weevil* test to these four factors, respectively factors one, two, four, and six of the original *Texas Boll Weevil* test, but also recognizing that this limitation may not address the particularities of divers enabling legislation that delegate the takings power to private entities).
[237] *See supra* note 158.
[238] *See supra* Part IV.A.2., nn. 192-99.
[239] *See supra* nn. 197-99.
[240] *See supra* note 204.

domain power by DNI, the Massachusetts enabling statute requires that unless reasonable contingency plans are made by DNI for any residents displaced by eminent domain, then the city council and the planning board may not approve the redevelopment project.[241] Finally, a fifth level of direct government review is that anyone, within 60 days of the city council's having approved or disapproved a project in its report to the mayor, has the statutory right to seek review by the state courts.[242]

Not only, however, does the enabling legislation for DNI and similarly situated community development corporations in Massachusetts allow for multiple levels of government review by a number of branches and offices of government, but also the particular organizational structure of DNI's board of directors serves as an *indirect* source of government review on the takings plans of DNI. For instance, four out of the eleven board members of DNI are selected by the mayor, city council representative, state house representative, and state senate representative for the Dudley neighborhood.[243] Hence, if a particular taking proves controversial, then the members of DNI's board appointed by elected officials, presumably before approving a project, would likely vote in a manner not inconsistent with electoral forces, allowing these officials to stay in elected office. Therefore, the five levels of direct government review by varied branches and offices, in addition to the indirect government review by a number of different elected offices, ensure that the meaningful government review portion of the modified *Texas Boll Weevil* test is satisfied.

Moreover, with respect to the issue of whether or not affected persons by a private delegate's actions are adequately represented in the delegate's decision-making process, it appears that this inquiry similarly satisfies notions of procedural due process in four

[241] *See supra* nn. 202-203.
[242] *See supra* note 201.
[243] *See supra* Part V.A.3., note 205.

ways. Three of these ways are direct, and one is indirect. First, the enabling state statute requires that two types of notice be sent to any landowner whose land is adjacent to a project not more than 14 days in advance of the joint public hearing of the city council and planning board.[244] Second, the landowners have an opportunity, in advance of a project's approval by the city council and the planning board, to voice their concerns and to be heard before the decision-makers. Third, the fact that contingency plans must be erected for any resident affected by a project that involves the taking of land, necessarily implies that affected residents have a say in a project that involves eminent domain, if only to communicate how they might be impacted.[245] Fourth, an *indirect* way in which affected persons are represented in DNI's decision-making process is that Dudley neighborhood residents, whether or not landowners, essentially elect six out of DNI's eleven directors.[246] Neighborhood residents elect the vast majority of the directors of DNCI, which then chooses six of DNI's board members.[247] Therefore, because affected landowners and residents of any takings power that DNI may exercise have four levels of representation, this element of the modified *Texas Boll Weevil* test also weighs in favor of the delegation of the takings power to DNI.

With respect to the part of the modified *Texas Boll Weevil* test that addresses the private delegate's economic or personal interest regarding the exercise of the takings power, it is similarly apparent that this factor also weighs in favor of the delegation of eminent domain power to DNI. In DNI, the interests of it and the community at large, including landowners and residents, are intertwined. For example, DNI's stated charge, which then necessarily guides its interest, is to assemble and to develop vacant land parcels in the Dudley neighborhood of Boston, for the purpose of primarily constructing

[244] *See supra* nn. 195-96.
[245] *See supra* nn. 202-03.
[246] *See supra* nn. 205-207.
[247] *See id.*

affordable housing for its residents.[248] Indeed, the Massachusetts enabling statute mandates that DNI have revitalization at the core of its mission.[249] Therefore, while DNI may arguably have a self-interested motive to achieve its core mission, this mission and interest is inherently guided and tempered by the community. Thus, there is little conflict with DNI's interest and the larger interest of the Dudley neighborhood.

An analysis of whether or not the delegation is narrow in scope also responds favorably to the delegation of the takings power to DNI. For instance, while there is no technical limit on the duration of the eminent domain power of DNI, presumably there is a practical limit on it, given that there is only a certain amount of land that may be revitalized in the neighborhood. Moreover, DNI's power is statutorily limited by BRA's delegation of eminent domain power to it.[250] BRA could presumably revoke the power that it has delegated once DNI's mission of revitalizing the neighborhood has been accomplished. In addition, DNI is limited to exercising eminent domain power within the confines of the Dudley neighborhood, and it can only act to use this power in revitalizing the area. Consequently, DNI is limited in content and subject matter, and this fourth element weighs in favor of the delegation.

While recognizing that the previously discussed four elements of the modified *Texas Boll Weevil* test are likely most important with respect to the delegation of eminent domain power to private, non-profit actors, this Article is also cognizant that other elements of the original eight-part Texas test may be invoked in any number of statutes that delegate the takings power to these non-traditional private actors of eminent domain.[251] Therefore, for purposes of being as comprehensive as possible, this Article

[248] *See supra* note 187.
[249] *See supra* note 193.
[250] *See supra* note 192.
[251] *See supra* Part IV.C.1.d.i.

will also undertake analysis of DNI pursuant to the remaining elements of the original *Texas Boll Weevil* test.

First, with respect to the element of the original test encompassing whether or not the "private delegate's power is limited to making rules" or simply applying the law to particular individuals,[252] it would appear that this element is inconclusive as applied to DNI and eminent domain power. DNI's delegation involves neither making rules nor its applying the law to certain persons. Second, the inquiry weighs in favor of the delegation because DNI does not have the power to define criminal acts or to impose criminal sanctions, another element of the original Texas test. Third, the Texas test similarly weighs in favor of DNI's delegation of the takings power, as DNI was specifically created to assemble vacant land for the DSNI using eminent domain authority, and arguably it has special qualifications to exercise the power.[253] Finally, with respect to the element of whether or not the legislature has provided adequate standards to the private delegate in the original Texas test, the Massachusetts legislature and BRA directly and indirectly have provided standards that guide DNI in the exercise of its taking power. For example, they have mandated that DNI's takings power may only be exercised for the revitalization of the Dudley neighborhood and that any exercise of the takings power that impinges on residents be counter-balanced with contingency plans for them.[254]

b. Application of the Lawrence Test to DNI

As applied to a modified form of the Lawrence test, the delegation of eminent domain power to DNI similarly passes constitutional muster for purposes of procedural

[252] *See supra* note 119.
[253] *See supra* note 187.
[254] *See supra* nn. 192-93 & 202-03.

due process. For example, the first part of the Lawrence inquiry examines the nature and extent of any conflicts of interest between the private delegate and the public, or at least those persons affected by the delegate's choice to exercise its delegation.[255] For the reasons outlined in Part V.C.1. above, it is apparent that there is very little conflict-of-interest between DNI, when it chooses to exercise its statutorily delegated eminent domain power, and affected persons, primarily residents and landowners of the Dudley neighborhood.

Moreover, under the modified version of the Lawrence test advocated in this Article, that notes that there must be the maximum number of safeguards possible on a private delegate,[256] there are a number of accountability mechanisms on DNI's exercise of the takings power from a procedural due process perspective. These controls include the amount of input and approval that elected officials have on the exercise of this public power, to the almost equivalent amount that the Dudley community at large has.

2. TMC

a. Applying the Modified *Texas Boll Weevil* Test to TMC

The first two parts of the initial three-part inquiry of the modified *Texas Boll Weevil* test certainly arrive at the conclusion that TMC is a non-profit charitable corporation, as it is a clear private actor that has been delegated the very public power of eminent domain.[257] In addition, under the modified eight-part *Texas Boll Weevil* test, the result is one that weighs against the delegation of the takings power to TMC in the

[255] *See supra* Part IV.C.2.
[256] *See supra* Part IV.C.2.
[257] *See supra* Part V.B. nn. 211-217.

current version of the enabling statute under procedural due process principles. Therefore, in comparison to the DNI case study, TMC appears to occupy the opposite end of the procedural due process spectrum.

For example, under the modified *Texas Boll Weevil* test, there is little, if any, meaningful government review of an exercise of eminent domain power by TMC.[258] While the enabling statute permits an aggrieved landowner to have a formal hearing about the contested parcel of land, this hearing is simply to assess the value of the property by three commissioners appointed by the county.[259] Its purpose is not to afford procedural due process in the sense of constitutionally contesting TMC's disinterest in the exercise of the takings power and accountability controls that favor this disinterest.[260] Other than this hearing by the judicial branch, however, no other branch of government, state agency, or branch of municipal or county government has the power to review an exercise of eminent domain power by TMC.

This lack of governmental oversight is even more telling, given that even when TMC acquires property though direct purchase, any deed restrictions, or contractual restrictions on the use of land that run with the land are extinguished, simply by virtue of this private, non-profit's eminent domain power.[261] Thus, that TMC's power is hardly subject to government review, much less meaningful review, appears to weigh "heavily" against the delegation of eminent domain power to it, much like the result of the application of this element of the original *Texas Boll Weevil* test to private landowners delegated the power to control water quality in *FM Properties*.[262] In addition, this result

[258] *See supra* Parts V.B.2. and V.B.3.
[259] *See supra* nn. 225 & 229-230.
[260] *See id.*
[261] *See supra* note 235.
[262] *See supra* nn. 144-46 (for an analysis of the application of the original *Texas Boll Weevil* test in *FM Properties*).

is in marked contrast to that found with respect to DNI, a delegation that includes copious amounts of direct and indirect meaningful government review.[263]

Moreover, under the modified version of the *Texas Boll Weevil* test, the issue of whether or not affected persons by a taking are adequately represented in the process to seize the property, similarly weighs against the delegation to TMC. While affected persons in the DNI case study, both landowners and residents, are seemingly represented to a large extent and exert influence in a decision by DNI to use the takings power, persons affected by a similar decision by TMC have little or no representation.[264]

Arguably, however, the recent amendment to the Texas enabling legislation that mandates that affected landowners be notified via certified mail, should the organization purchase or acquire property through eminent domain for a purpose that would not comport with private deed restrictions, is a step in the direction of providing affected persons more representation in the decision-making process.[265] For instance, this notice would ostensibly permit aggrieved parties, who may be affected either by the taking of land or a use of land that is incompatible with its historical use and current surroundings of the property, to use political activism to compel representation and perhaps influence in TMC's decision-making process. On the other hand, there is no guarantee that a community could accomplish this aim, and there is no certainty attached to its results, unlike with the Massachusetts enabling legislation. Therefore, this element of the revised Texas test weighs against the delegation of eminent domain power to TMC.

The portion of the modified Texas test examining whether or not the private delegate has a pecuniary or personal interest in the exercise of eminent domain power, also results in an unconstitutional delegation of the takings power pursuant to federal

[263] *See supra* Part V.C.1.a.
[264] See supra Parts V.B.2. and V.B.3.
[265] *See supra* note 222.

procedural due process notions. For instance, unlike DNI, a private, non-profit corporation that is heavily rooted in the community and is controlled to a large extent by the residents of the Dudley neighborhood, TMC's organizational structure as a non-profit land management and parking concern to its member institutions inherently serves to create a clash of interest with communities. This conflict of interests is only enhanced by the fact that TMC's board of directors is hidden from view and is unaffiliated with affected communities.

Proof of this clash is found in the sole instance in which TMC used eminent domain and outright purchase to acquire real property in a Houston-area neighborhood to construct a multi-level parking garage. This parking facility was prohibited under the covenants that limited land use in the neighborhood to residential, single-family homes.[266] Furthermore, despite the fact that the organization used its power of eminent domain for only one parcel of land,[267] and acquired the other parcels of land for the parking garage through outright purchase, TMC still "used" its eminent domain power to automatically extinguish the private land covenants, or deed restrictions, on the purchased parcels that restricted the use of the property.[268] Thus, as in *FM Properties*, this clash of interests between not only TMC and a targeted landowner, but also a surrounding community, weighs "heavily" against the delegation of power.[269]

The final part of the modified *Texas Boll Weevil* test in the eminent domain context involves assessing whether or not the private delegation is limited in "duration, extent, and subject matter."[270] As applied to TMC, this element similarly weighs against the delegation of eminent domain power to it. For instance, the enabling statute permits

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[266] *See supra* note 218.
[267] *See id.*
[268] *See supra* note 235.
[269] *See supra* nn. 144-46 (explaining the application of the original *Texas Boll Weevil* test in *FM Properties*).
[270] *See supra* note 119 (referencing the sixth factor of the original Texas test).

TMC to acquire property through eminent domain and therefore to extinguish private deed restrictions in adjacent communities in perpetuity. There is little restriction on when TMC's delegated power of eminent domain terminates.[271] The sole limitation on any duration of TMC's exercise of the takings power occurs *after* the power has been exercised, in which real property will revert to the original owner if the entity does not use it for the purposes designated in the enabling statute.[272] Furthermore, in contrast to the larger purpose of revitalizing the Dudley neighborhood for which DNI may use seized land, the purposes for which TMC may use taken land are extremely broad. These purposes also do not necessarily fit within a larger goal of community development. They range from the building of medical facilities used for teaching, research, and patient care purposes to ancillary or service purposes such as parking, a garbage dump, or even attractive landscaping.[273]

Moreover, TMC is authorized to use its statutorily delegated takings power on any real property that is adjacent to or contiguous to its existing property, however the property was acquired.[274] Thus, the use of eminent domain power to acquire one parcel of property would then justify the exercise of the takings power on adjacent land sites, permitting a seemingly endless use of eminent domain and infringement upon applicable land covenants. Therefore, in stark divergence from the delegation of eminent domain power to DNI, that limits an exercise of the power to the Dudley neighborhood as long as BRA permits and for revitalization purposes only,[275] the duration, extent, and subject matter of TMC's delegation is extremely broad in scope and weighs against the delegation under procedural due process principles. Thus, all four elements of the

[271] *See supra* Parts V.B.2. and V.B.3.
[272] *See supra* note 221.
[273] *See supra* nn. 215 & 218-19.
[274] *See supra* note 219.
[275] *See supra* Part V.C.1.a.

modified Texas test weigh against the constitutionality of the delegation of eminent domain power to TMC, including two that weigh "heavily" against the delegation under the Texas Supreme Court's holding in *FM Properties*.

b. Applying the Original *Texas Boll Weevil* Test to TMC

Even under a more comprehensive approach of an application of the Texas test, encompassing the remaining elements of the original *Texas Boll Weevil* test, the delegation of eminent domain power to TMC still violates basic notions of procedural due process. For instance, while TMC, in its application of the takings power, does not make rules or apply the law to particular to particular individuals, it also is not empowered to define criminal acts or to impose criminal sanctions on recalcitrant landowners, two elements, respectively, of the original test.[276] Thus, the delegation weighs in favor of the delegation on the latter factor. On the other hand, it is also apparent that TMC is not specially qualified or trained to exercise eminent domain power,[277] given that its primary role is as a land management company, not purveyor of eminent domain power, in contrast to DNI. Furthermore, the Texas legislature provided little, if any standards that would guide a more disinterested use of eminent domain power by TMC, another element of the original Texas Boll Weevil test.[278] Combining these results with those of the application of the modified test, a numerical tally indicates that a majority of the factors weighs against the delegation of the takings power.

c. Applying the Lawrence Test to TMC

[276] These are the third and fifth factors, respectively, of the original *Texas Boll Weevil* test. *See supra* note 119.
[277] This element references the seventh element of the original *Texas Boll Weevil* test. *See supra* note 119.
[278] This element refers to the eighth factor of the Texas test. See *supra* note 119.

Under a modified Lawrence test, for all of the reasons noted in the application of the modified version of the *Texas Boll Weevil* test in Part V.C.2.a. above, it is clear that a large gap exists between the interests of TMC and affected landowners and residents in the non-profit's exercise of eminent domain power.[279] Moreover, given the large interest differential between TMC and surrounding communities and landowners, and the correspondingly few number of statutory safeguards included in the Texas enabling legislation, especially in relation to the Massachusetts enabling legislation for DNI, there are not an appropriate amount of safeguards included in the Texas legislation.

VI. Statutory Solutions

A. A Range of Proposals

As exemplified by the TMC case study, the coercive nature of delegated eminent domain power increases the opportunities for abuse and self-interested action in the hands of private delegates operating under little or no accountability mechanisms. Short of advocating a per se rule against the delegation of eminent domain power to private, non-profit and charitable corporations, this Article proposes a number of solutions that legislatures may use to increase public accountability, lessen self-interested action, and mandate that private, non-profit corporations delegated the takings power comport more forcefully with fundamental notions of procedural due process and of representative democracy. In addition, this Article advocates taking a more comprehensive approach to these statutory solutions, ensuring that a number of accountability safeguards are included in legislation, as in the Massachusetts/DNI case study, rather than just a single

[279] *See id. &* nn. 244-46.

safeguard. It is also important to remember that, some legislatures, upon a re-visiting of existing legislation or legislative proposals, may simply forgo a delegation at all, given the ramifications under procedural due process.

First, an obvious statutory solution is one that is included in the enabling legislation for the DNI case study, as well as suggested by the amended and original versions of the *Texas Boll Weevil* test. This solution involves inclusion of statutory provisions that mandate that an exercise of eminent domain by a private charitable corporation be approved by a state agency, a state legislature, or even several offices of local government. The preference, however, is that officials who are directly elected by the voting populace must approve a takings exercise.[280] For instance, in the case of DNI, a development project must be approved by three levels of local government: (1) the Boston city council, (2) the city's planning board, and (3) BRA.

Furthermore, the idea of ensuring that a private actor's taking power is submitted for a review by a governmental office is not unheard of. Indeed, when public utilities or railroads that have been delegated the takings power chooses to exercise it, they must often seek approval from a branch of state government.[281] In addition, the provisions allowing for an official who is directly elected to approve an exercise of the takings power by a private, charitable corporation serve as further assurance that the private delegate will not take arbitrary, self-interested action that is unaccounted for.

A second legislative solution is to include a damages provision in the enabling legislation of the delegation for an affected landowner or resident that is harmed by an

[280] In Virginia, for example, the Jamestown-Yorktown foundation, a public foundation created by the state to preserve the historical quarters of the original Jamestown settlement, has the power of eminent domain in order to take property that would advance its historical mission, but any exercise of the eminent domain power must be approved by the governor, a directly elected official, VA. CODE ANN. § 23-288 (2006).

[281] *See e.g.,* note 50 (noting the requirement for state agency approval for an exercise of the takings power by a public utility); s*ee also* Lawrence, *supra* note 5, at 686 (discussing that ". . . but many states have imposed additional procedural requirements on private condemners alone. Frequently statutes require private condemners to secure the approval of a state agency before initiating the condemnation action, and the agency may investigate the particular project quite closely to assure that it furthers the public interest.").

exercise of the takings power by a non-profit corporation.[282] This largely economic remedy would go above and beyond any compensation paid to landowners for the value of their seized land, and in the case of business owners, could include the loss of goodwill and business losses. The damages could also extend to affected residents, who may not be landowners, but who are residential or commercial leaseholders. Similarly, damages could be extended to individuals in a community who are affected by a private, non-profit corporation's incompatible use of seized land in an area.[283] A third approach is to mandate standard procedures, such as public hearings to which affected parties such as landowners, residents, community groups, and representatives of the private, non-profit corporation would be invited and given reasonable time and notice to air their views publicly. The mandate of public hearings would ostensibly accompany any delegation of eminent domain power to a private charitable actor, and they could be held directly before an elected body that will approve or disapprove an exercise of the takings delegation, such as in the DNI case study. Hearings could also be conducted before an advisory body or state agency that will provide recommendations for action to elected officials who must provide final approval of an exercise of the takings power.

Moreover, not only could these hearings be used to air potentially opposing points of view related to a private non-profit's exercise of eminent domain power, but also they could be used to evaluate and to provide oversight of the charitable corporation's actions with respect to ways in which it has dealt with affected persons in the community and for its plans for the seized land. An example of this sort of oversight is found in the DNI case study, in which contingency plans for residents and landowners affected by DNI's

[282] *See* Lawrence, *supra* note 5, at 691-92 (noting that "[o]ccasionally, a damages remedy might be a safeguard."); *see also* Professor Linda Crane, John Marshall University School of Law, Address in response to this Paper at the 2006 annual meeting of the Midwestern People of Color Legal Scholarship Conference (Jun. 3, 2006).
[283] *See e.g., supra* note 218.

use of eminent domain must be included in order for the city council and planning board to approve a revitalization project. Nonetheless, both types of hearings would likely add a veneer of fairness to an exercise of the takings power by a private non-profit corporation, especially one that is governed by a board of directors that is shielded from public scrutiny, such as in the TMC case study.

Still a fourth statutory solution that would counter-balance the effects of private board of directors' discussions and meetings that are largely held out of public view and that are related to the exercise of eminent domain power by a private, non-profit is one that would mandate that these meetings be subject to a state's Open Records or Open Meetings Acts.[284] This type of statutory provision may allow elected officials who must approve a private exercise of eminent domain power, as well as persons affected by its exercise, to evaluate fully the consequences and justifications of the exercise.

In keeping with this fourth recommended solution, a fifth proposal is to ensure that the delegation is subject to a state's Sunset Act, in which there would be a time cap placed on the exercise of the takings power of perhaps five to ten years.[285] This type of provision specifically addresses whether or not the private actor's actions are limited in duration.[286]

Yet a sixth solution is to include in enabling legislation that the exercise of the takings power be subject to a state's equivalent of the Administrative Procedure Act.[287] This sort of statutory provision would treat private, charitable corporations in an equivalent manner to state agencies that also exercise public, coercive powers, injecting a level of substantive and procedural fairness into a non-profit's exercise of the takings

[284] *See* Reeder, *supra* note 47, at 220.
[285] *See id.*
[286] This concern addresses the sixth factor of the original *Texas Boll Weevil* test. *See supra* note 119.
[287] *See id.*

power. It would also have the effect of mandating consistent, proven procedures in an exercise of eminent domain power.

B. Social Capital Impact Assessments (SCIAs): Opening Up The Process

A seventh legislative solution is to require that private, non-profits perform a Social Capital Impact Assessment (SCIA), a study that would evaluate the impact of the exercise of the takings power on a community.[288] The idea of SCIAs largely derives from Environmental Impact Statements (EIS), that are mandated in the National Environmental Policy Act (NEPA) in response to any action by a federal agency that may have a significant impact on the environment.[289] A draft EIS must be made available to the public early enough in the deliberative process in order for the public to comment meaningfully on an agency's decision.[290] An agency must then respond to the public's comments in a final EIS.[291]

Although criticized for being too time-consuming, expensive, and unduly procedurally-oriented,[292] the EIS process has been highly successful in opening up the decision-making process of federal agencies to previously disempowered community and

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[288] *See* Asmara Tekle Johnson, *Desperate Cities: Eminent Domain and Economic Development in a Post-Kelo World*, 16 CORNELL J. LAW & PUBLIC POL'Y ____ (2006) (proposing the implementation of Social Capital Impact Assessments when eminent domain is used for economic development purposes in order to provide increased public transparency and accountability to these decisions).

[289] National Environmental Policy Act, 42 U.S.C. § 4332(C) (2006).

[290] *See* Jeannette MacMillan, Note, *An International Dispute Reveals Weaknesses in Domestic Environmental Law: NAFTA, NEPA, and the Case of Mexican Trucks (*Department of Transportation v. Public Citizen), 32 ECOLOGY L.Q. 491, 494 (2005); *see also* Regulations for Implementing NEPA, 40 C.F.R. § 1501.7 (2006) (requiring that once an agency decides that it will undertake an EIS and before it publishes a draft EIS, it must publish a Notice of Intent that provides public participation in determining the "scope" of the EIS and significant issues related to it), and Regulations for Implementing NEPA, 40 C.F.R. § 1503.1 (2006) (inviting comments by the public and other agencies).

[291] Regulations for Implementing NEPA, 40 C.F.R. § 1503.4 (2006) (requiring that the lead agency respond to the public's comments); *see also* Brian Cole et al., *Prospects for Health Impact Assessment in the United States: New and Improved Environmental Impact Assessment or Something Different?*, 29 J. HEALTH POL. POL'Y & L. 1153, 1162 (2004).

[292] *See* MacMillan, *supra* note 290, at 521; *see also* Cole, *supra* note 291, at 1163 & 1169 (noting that EISs can cost several hundred thousand to several million dollars and may take an average of one or two years, if not longer, to complete).

environmental groups concerning determinations of these agencies that may significantly impact the physical environment.[293] Indeed, EISs have been instrumental in forcing the redesign, reconsideration, or even withdrawal of decisions of federal agencies that severely impact the environment.[294] The result has been to provide a framework for public debate concerning environmental decision-making that previously was non-existent.[295]

In the eminent domain arena, SCIAs have been recommended as a way to involve and to empower oft-neglected community groups and individuals who are impacted by economic development takings using a similar process to EISs in the environmental/NEPA context.[296] SCIAs could be mandated either through enabling legislation or through the courts. They would assess the social impact of an economic development taking on a community by compelling the response of a governmental entity and its private partners to 14 questions that address community concerns. These studies would also be provided to the public early enough for reasonable notice and comment by the public. Therefore, the idea is that, as in the environmental context, economic development takings would similarly be opened up.[297] The relevant 14 questions are as follows:

> 1. How will the taking or development project disrupt existing land uses?;

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[293] *See* Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 205, 207 (1998); *see also* MacMillan, *supra* note 290, at 529.

[294] *See* Caldwell, *supra* note 293, at 207. For instance, the EIS process was instrumental in halting projects that affected old-growth forests and the northern spotted owl. *See* Thomas Sander, Environmental Impact Statements and Their Lessons for Social Capital Analysis, http://www.ksg.harvard.edu/saguaro/pdfs/sandereisandsklessons.pdf at 2 (last visited on Dec. 15, 2005) (citing Mark Bonnet & Mark Zimmerman, *Politics and Preservation: The Endangered Species Act and the Northern Spotted Owl*, ECOLOGY L.Q. 105-71 (1991), and Northern Spotted Owl v. Hodel, 716 F. Supp. 479 (D. Wash. 1988) (halting attempts to log the habitat of the northern spotted owl after it was declared a threatened species by the Fish & Wildlife Service)).

[295] *See* Johnson, *supra* note 288, at ____.

[296] *See id.*, supra note 288 at _____.

[297] *See id.*

2. How will the taking or development affect neighborhood integrity?;

3. Will the taking or revitalization project displace and relocate homes, families, and businesses?;

4. What opposition, if any, exists to the taking or project?;

5. If neighborhood integrity is to be affected or the taking or revitalization project is to displace homes, families, and businesses, how can these effects be mitigated?;

6. If displacement and relocation identified in Question Three occur, how many homes, families, and businesses will be relocated?;

7. If displacement and relocation occur, how many opportunities will there be for displaced residents to occupy space in the new development as a home or as a small business?;[298]

8. If there is no plan to have displaced residents occupy space in the new development as a home or as a small business, what proposals do the relevant government entities have to relocate residents or small business owners to an equivalent site?;

9. What is the economic impact of the displacement of these homes, families, and businesses on the city and state's purse, in the form of lost real property and sales taxes, jobs generated by small businesses that may be displaced, and revenues generated by these businesses?;

10. What is the ethnic and racial breakdown of the families who may be displaced?;

11. What is the promised economic impact of the takings, in terms of employment opportunities and tax revenue gained?;

12. Is the promised economic impact referred to in Question Eleven realistic and practical, in light of other potentially uncontrollable factors, such as the availability of financing for the project, key tenants and institutions that

[298] Housing provisions in the new development plan for some of the displaced residents in *Berman* were specifically noted by the Court in that case. *Berman,* 348 U.S. at 30-31. At least one-third of the new residential units were to be "low-rent housing with a maximum rent of $17 per room per month." *Id.*

> may occupy the project, or the economic health of these key tenants?;
>
> 13. What ties, if any, do the private entities that stand to gain from the economic development project have with any state or local governments exercising eminent domain or promulgating legislation in support of its exercise?; and
>
> 14. What alternatives exist to placing the economic development project in the proposed site?[299]

There is no reason, however, that SCIAs could not be expanded to go beyond economic development takings and to provide a global statutory solution to takings in general, especially those by private, non-profit actors delegated this power. Statutorily implemented SCIAs would likely address the legislative or due process concerns of PNDD and the *Texas Boll Weevil* and Lawrence tests by essentially injecting public input and a measure of accountability into the takings decisions of private non-profit delegates. For instance, in the NEPA/environmental arena, EISs are often made available to public officials for their public comments.[300] By mandating that SCIAs concerning a private, non-profit entity's use of its delegated takings power be provided to pertinent elected officials, and subsequently providing a forum for officials to respond and to comment on a non-profit's proposed action, affected communities would be afforded a golden opportunity to determine their representatives' stance on a proposed taking. Communities could then subsequently decide their agreement with this stance on Election day. At a minimum, however, this Article recommends that SCIAs be included as part of the "record" before elected officials or before advisory groups to elected officials that have final say over a non-profit's exercise of the takings power.

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[299] Johnson, *supra* note 288, at _____.
[300] *See* Caldwell, *supra* note 293, at 207; *see also* MacMillan, *supra* note 290, at 519-20.

VII. Conclusion

In an era in which many services are privatized by government, from prisons to war, it is no surprise that the privatization movement would inevitably extend to the traditionally governmental, very public and coercive power of eminent domain. Having escaped the harsh scrutiny that followed the Court's *Kelo* decision and that upheld economic development takings that benefit for-profit private parties, takings by private, non-profit and charitable corporations merit, however, equal concern. These entities often operate in the shadows of governmental and electoral oversight and are largely governed by privately shielded boards of directors.

This Article advocates that the Private Non-Delegation Doctrine, a doctrine that remains alive and well in state courts, and that is based upon fundamental notions of procedural due process and of representative democracy, provides an excellent basis for assessing the exercise of the takings power by private, non-profit corporations. The version of the Private Non-Delegation Doctrine supported in this paper suggests that private, non-profit actors with coercive power, such as the takings power, should be required to act in a disinterested manner through a number of proposed accountability mechanisms, including holding elected officials accountable for the takings decisions of these entities.

Moreover, the Doctrine is embodied in two tests that are discussed and ultimately modified in this Article for use in non-traditional private delegations of eminent domain power. These tests include the *Texas Boll Weevil* case used by the Texas Supreme Court to evaluate private delegations of power, as well as one proposed by Professor David Lawrence. Both tests, however, highlight the importance of accountability measures and disinterested action by a private delegate, the two underlying concerns related to

procedural due process and American representative democracy in the Private Non-Delegation Doctrine.

Using the original and modified versions of the *Texas Boll Weevil* and Lawrence tests, two case studies of private, non-profit and charitable corporations delegated eminent domain power, the Dudley Neighborhood Initiative, Inc. in Boston, Massachusetts, and the Texas Medical Center in Houston, Texas, are examined. Analysis of these case studies reveals that they occupy opposite poles of the Private Non-Delegation continuum from a procedural due process perspective.

To address the procedural due process concerns stressed by the Private Non-Delegation Doctrine and the need for appropriate accountability safeguards and mechanisms, this Article advocates seven legislative solutions that may be included in enabling legislation for these types of delegation. Short of establishing a per se rule against the delegation of eminent domain to private, non-profit corporations, these solutions, in a time where privatization is a popular panacea for a number of ills, may provide a cure to the pinctures of procedural due process that may result when the very public power of eminent domain is delegated to private, non-profit corporations.