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# Eminent Domain a Decade After Kelo: Are Takings to Build Professional and College Sports Stadiums in Texas a Valid Public Use?

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# EMINENT DOMAIN A DECADE AFTER KELO: ARE TAKINGS TO BUILD PROFESSIONAL AND COLLEGE SPORTS STADIUMS IN TEXAS A VALID PUBLIC USE?

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ABSTRACT

*This Comment addresses the controversial Kelo v. City of New London decision and focuses on the state of Texas' response to Kelo through its enactment of section 2206.001 of the Texas Government Code. This Comment discusses the implications of this statute in the realm of professional and college sports stadiums in Texas. Additionally, this Comment provides a background in the evolution of the eminent domain doctrine and prominent Supreme Court decisions expanding an authorized entity's eminent domain power under a broadened definition of the entity providing a "public use." The arguments are analyzed for whether Texas college and professional stadiums provide a public use, concluding that land takings from private landowners for the purpose of building sports stadiums constitutes a permissible public use under the Kelo standard. Land takings to build a sports stadium likely constitute a public use because it provides access to public participation, national prominence, revenue, tax benefits, and hurricane shelter for its citizens. Finally, this Comment proposes legislative amendment to section 2206.001(c) of the Texas Government Code that would raise the threshold for landowner's compensation from 100% of the fair market value to 150%—250% of the fair market value of the property. A higher compensation would reimburse the landowner for the equity value of the property and would help prevent potential holdouts.*



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## I. INTRODUCTION

The stadium boom in Texas over the last three decades is a result of private developers, city officials, and universities dreaming of economic development and mass revenue. Professional football stadiums such as AT&T Stadium, NRG Stadium, BBVA Compass Stadium, and the Alamodome have all been built within the previous three decades.[1] Additionally, fourteen out of thirty-one college football stadiums in Texas were built within the same period.[2]

As the home of two professional sports franchises—the Texas Rangers and the Dallas Cowboys—the City of Arlington has built professional stadiums under the state's eminent domain power by first approving the stadium projects through a majority vote of its citizens[3] and second by condemning landowners' property needed for the stadium project through compensation for the fair market value ("FMV") of their properties.[4] In 1994, the former owner of the Texas Rangers—George W. Bush—and his partners put together land takings, which some argue "shortchanged local landowners by several million dollars" for the value of their homes.[5] Thus, private landowners essentially gave up their land to the City in return for a sum of money.[6]

Arlington punted on the decision of whether to build Rangers Ballpark, giving its residents the opportunity to veto the ballpark in a city-wide vote.[7] The greatest voter attendance in the city's history resulted in a decisive "yes" by a margin of 30% more residents voting in

1. *See Texas Professional & College Football Stadiums*, TEXASBOB, http://texasbob.com/stadium/index.html [https://perma.cc/6CWB-T8F4] (last visited Feb. 18, 2019).

2. *Id.*

3. *See How George W. Bush Scored Big with the Texas Rangers*, CTR. FOR PUB. INTEGRITY (Jan. 17, 2000), https://www.publicintegrity.org/2000/01/18/3313/how-george-w-bush-scored-big-texas-rangers [https://perma.cc/2CB4-GTKL].

4. *See id.*

5. *See id.*

6. *See id.*

7. *See* Richard Greene, *At Ballpark, Eminent Domain Worked As It Is Supposed to Work*, STAR-TELEGRAM (Feb. 12, 2016, 6:28 PM), http://www.star-telegram.com/opinion/opn-columns-blogs/richard-greene/article60139506.html [https://perma.cc/Q2VD-TBQ9].

favor of the new ballpark.[8] Not long after the citizens of Arlington passed a half-cent sales tax increase to fund construction of Rangers Ballpark,[9] the Legislature unanimously passed the public purpose of the ballpark.[10]

As a result of the deal, Arlington formed the Arlington Sports Facilities Development Authority, Inc. ("ASFDA"), which managed the land construction project surrounding Rangers Ballpark.[11] In order to build the ballpark, the ASFDA took thirteen acres of private land that would be utilized for parking and future development.[12] Even if landowners did not agree to the price offered by the Rangers, the ASFDA could take possession of the land under eminent domain laws and allow the price of the land to be resolved in court.[13] What makes this type of condemnation so intriguing is that the Legislature has never allowed a Texas municipal authority to condemn private property for the advantage of a sports organization.[14]

Arlington paid off its thirty-year bond on the ballpark in merely eleven years, less than half the amount of time initially expected.[15] Consequentially, in 2004 Arlington proposed another stadium project, which would become the new home for Jerry Jones' Dallas Cowboys.[16] Arlington persuaded voters that because the Rangers Ballpark debt was paid off, a large amount of sales tax would be available to build the new football stadium.[17] Primarily, it argued that tourists "who stay in local hotels, rent cars, buy tickets to Arlington events, and spend money at the venue, local shops, bars, and restaurants" would pay a large amount of the sales tax.[18] As a result of many months of Arlington's advertising, its citizens approved the increase in "sales, hotel and motel, and car-rental taxes" in order to pay Jones' $650 million stadium."[19]

8. *See id.*

9. *See* Tom Farrey, *Man Builds Ballpark, Ballpark Makes Man*, ESPN (Nov. 9, 2000), http://static.espn.go.com/mlb/bush/saturday.html [https://perma.cc/Y9UN-P6JN].

10. Greene, *supra* note 7.

11. *See How George W. Bush Scored Big with the Texas Rangers*, *supra* note 3.

12. *See* Erin A. Stanton, *Home Team Advantage?: The Taking of Private Property for Sports Stadiums*, 9 N.Y. CITY L. REV. 93, 94 (2005).

13. *How George W. Bush Scored Big with the Texas Rangers*, *supra* note 3 (Several landowners filed lawsuits regarding the land takings and won $11 million in settlement.).

14. Farrey, *supra* note 9.

15. Don Wall & Michael Nimocks, *Stadium Story*, COWBOYS STADIUM SCOREBOARD (Cowboys Stadium Working Grp., Arlington, Tex.), Jan. 2011, at 4, 8, http://www.arlington-tx.gov/citysecretary/wp-content/uploads/sites/14/2014/06/Cowboys-Final-Scoreboard-Report-01-11.pdf [https://perma.cc/6JA2-9X9S].

16. *See* Greene, *supra* note 7.

17. Wall & Nimocks, *supra* note 15.

18. *Id.*

19. *Homeowner, Arlington Settle Eminent Domain Case Before Trial*, ESPN (Feb. 7, 2007, 1:22 PM), http://www.espn.com/espn/wire/_/section/nfl/id/2757309 [https://perma.cc/A79A-UYR7].

Arlington has benefitted greatly from its entertainment venues, including increases in "jobs, revenues from rents, sales tax revenue and more pay for much of the cost to provide public services and facilities for all Arlington residents."[20] Additionally, Arlington claims that its national publicity and job growth has made its taking of private property for a public purpose a success. However, the question remains as to whether our government is allowing a larger variety of takings that should not be constitutionally permitted against citizens with fundamental rights to use and enjoy land.

Land takings under eminent domain laws have dramatically risen since the United States Supreme Court's decision in *Kelo v. City of New London* expanded the government's power to condemn land for an economic development plan that constitutes a "public use," rather than providing a benefit for merely a certain group of people.[21] Specifically, in the realm of sports stadiums, the issue remains muddy at best as to whether a city's or university's taking of private land is being used for an actual "public use."[22] But, when a university (public or private) and a professional sports team (with the help of a city) take land from private landowners for the purpose of building sports stadiums, the taking likely constitutes a permissible "public use" under the *Kelo* standard because it provides access to public participation[23], national prominence[24], revenue, tax benefits[25], and even hurricane shelter for its citizens.[26]

Section I introduces the controversy of an expanded definition of "public use" for sports stadium takings under eminent domain. Section II will explain the evolution of the eminent domain doctrine and the prominent Supreme Court decisions expanding the government's (both state and federal) power under a broadened definition of a "public use." Section III will highlight the controversial *Kelo v. City of New London* decision and the Court's reasoning for expanding eminent domain. Section IV will discuss Texas' response to *Kelo*, which allows states to limit the definition of public use, and the enactment of section 2206.001 of the Texas Government. In Section V this Com-

20. Greene, *supra* note 7.

21. Kelo v. City of New London, 545 U.S. 469, 478 (2005); *see infra* Section III.

22. *See infra* Section IV.

23. David Humphrey, *Jerry Jones Gave Texas More than the Cowboys. Don't Forget JerryWorld*, STAR-TELEGRAM (Aug. 1, 2017, 8:48 AM), http://www.star-telegram.com/sports/nfl/dallas-cowboys/article164708327.html [https://perma.cc/XNY3-4FQN].

24. *See* Wall & Nimrocks, *supra* note 15, at 3.

25. *See* Greene, *supra* note 7.

26. Travis Fedschun & Benjamin Brown, *Tropical Storm Harvey Evacuees Surge to Houston Shelters, Including Sports Arena, Religious Centers*, FOX NEWS (Aug. 30, 2017), http://www.foxnews.com/us/2017/08/30/houston-shelters-including-sports-stadiums-mosques-swell-with-harvey-evacuees.html [https://perma.cc/5NSV-WBZ4].

ment will use case studies[27] to evaluate whether college and professional stadiums within Texas provide a public use. Finally, in Section VI this Comment will propose legislative amendment to section 2206.001(c) of the Texas Government Code that would reimburse the landowner for the equity value of the property and prevent potential holdouts.

## II. EVOLUTION OF EMINENT DOMAIN DOCTRINE FROM THE SUPREME COURT OF THE UNITED STATES

The history of eminent domain begins with an analysis of its roots in the Fifth Amendment's Takings Clause of the Constitution, expands with the Supreme Court's *Kelo* decision, and develops with the States' response to *Kelo's* "public use" standard by enacting statutes that limit its holding as much as possible. In 2005, the Supreme Court of the United States controversially expanded the definition of "public use" under the Fifth Amendment's Takings Clause, but the doctrine of eminent domain began as a narrow, formulaic test that restricted Congress' takings of private land.[28]

Eminent domain is essentially the government's authority to take private property away from landowners for a public use.[29] Furthermore, eminent domain is a right that does not need constitutional authority because it is a function of sovereignty.[30] The purpose behind the eminent domain doctrine involves building projects that will provide a public use to society and will reduce the threat of potential holdouts on the property.[31] "[W]ithout the power of eminent domain, thin markets may make the acquisition of property prohibitively expensive, because of monopoly pricing by the sellers who 'hold out' . . . ."[32] The surplus that the government receives as a result of eminent domain projects essentially extends the benefit of public projects more uniformly throughout society—through "general taxpayer savings rather than through large awards to a lucky few [landowners]."[33]

27. *See infra* Section V. The case studies include an analysis of whether the land takings of Texas A&M University, Baylor University, and the Dallas Cowboys provide a public use.

28. *See* Kelo v. City of New London, 545 U.S. 469, 478-83 (2005).

29. Michael Birch, *Take Some Land for the Ball Game: Sports Stadiums, Eminent Domain, and the Public Use Debate*, 19 SPORTS LAW. J. 173, 177 (2012).

30. Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).

31. Alex Hornaday, Note, *Imminently Eminent: A Game Theoretic Analysis of Takings Since* Kelo v. City of New London, 64 WASH. & LEE L. REV. 1619, 1640–41 (2007).

32. *See* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 534 (2006); *see* Hornaday, *supra* note 31, at 1641, n. 143.

33. John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 809 (2006).

Thus, eminent domain permits an authorized entity to compel the trade of a land for a public use.[34]

When the federal government condemns land under the theory of eminent domain, the Fifth Amendment Takings Clause explicitly limits its power, stating that private land "[shall not] (1) be taken for public use, (2) without just compensation."[35] Because of these limitations, an authorized entity may only take land that provides a benefit to the general public and just compensation to the landowners.[36] When an authorized entity takes one's private land, the owner should receive the FMV of his or her land, not the amount calculated for a corporation or other entity's gain, in order to remedy his or her losses.[37] The judiciary determines whether the government's objective is truly a "public use," but once the objective is within the scope of the government's power, then the method by which the government achieves eminent domain remains at its discretion.[38] Finally, the city council implements the power of eminent domain, and it "must itself officially express the intention and necessity to condemn the land in question."[39]

During the early formulation of the "public use" test in 1795, the Supreme Court stated that the test should be extremely formulaic and narrow because an authorized entity's takings should only be done out of urgency and necessity.[40] However, the test broadened in the late 19th century into the 20th century to include government takings for private parties' uses, such as building milldams, irrigating farmland, and constructing highway systems.[41]

In the late 19th century, the Supreme Court selectively incorporated the Fifth Amendment's Takings Clause in the Fourteenth Amendment, such that eminent domain became applicable to state

34. Hornaday, *supra* note 31, at 1643.

35. U.S. CONST. amend. V; United States v. 11.355 Acres of Land in Dall. Cty., Tex., 51 F. Supp. 752, 754 (N.D. Tex. 1943).

36. Birch, *supra* note 29, at 178.

37. *See* United States *ex rel.* Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 275–81 (1943).

38. *See* Berman v. Parker, 348 U.S. 26, 32–33 (1954).

39. City of Austin v. Whittington, 384 S.W.3d 766, 781 (Tex. 2012) (quoting Burch v. City of San Antonio, 518 S.W.2d 540, 545 (Tex. 1975)).

40. Adrianne Archer, Comment, *Restricting* Kelo*: Will Redefining "Blight" in Senate Bill 7 Be the Light at the End of the Tunnel?,* 37 ST. MARY'S L.J. 795, 803 (2006).

41. *Id.* at 806. *See also* OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 498–99 (2d ed. 2001) (stating "there has been a gradual liberalization of the term once again, leading to some suggestion that the public-use requirement poses little obstacle to most programs that any government would be likely to undertake"); Head v. Amoskeag Mfg. Co., 113 U.S. 9, 26 (1885) (holding that the general mills acts were a permissible governmental taking that constitutes a public use having regard to the "public good" and the "rights of the riparian proprietors"); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 162–63 (holding that an irrigation system is a public use because all individuals possess the same right to use the water); West River Bridge Co. v. Dix, 47 U.S. 507, 530-31 (1848) (holding that taking private property for building a highway is a public use and not a benefit for a private corporation).

governments.[42] The Supreme Court stated in *Kohl v. U.S.*—one of the first and most prominent eminent domain cases—that the States' use of eminent domain was permissible to the extent that it remains necessary under the States' constitutional powers bestowed upon them.[43]

Over the last half of the 20th century and into the 21st century, the Supreme Court of the United States has refined the standard of what constitutes a permissible taking. The Supreme Court held in *Berman v. Parker* that a redevelopment plan for a blighted region in Washington, D.C., remained valid under the Takings Clause because Congress holds the police power to determine which takings are necessary for the public's welfare.[44] The Court reasoned that the "concept of public welfare is broad and inclusive . . . It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious[,] . . . clean, well-balanced[,] and carefully patrolled."[45] Because the District of Columbia Land Agency desired to build new streets, schools, and various public resources, the court considered this redevelopment plan an acceptable condemnation for a public use.[46]

Another prominent eminent domain case, *Hawaii Housing Authority v. Midkiff,* upheld the *Berman* standard by further stating that the "public use requirement is . . . coterminous with the scope of a sovereign's police powers."[47] In this case, only a few families owned almost all of Hawaii's residential property, and essentially every resident was required to pay rent to those families.[48] The Hawaiian government proposed a taking that would result in the government reselling the land to the occupants so as to "correct [the] historic inequities."[49] The court reasoned that Hawaii's land taking system actually provided a protection for lessees from the oligarchy of families, and the State's eminent domain power includes looking out for this type of public welfare.[50]

Each land taking that the Supreme Court has previously held as constitutional involves a condemnation by a public government that provided a benefit directly to the public whether it be for developing a blighted region or for protecting residents from an oligarchy of land-

42. *See* Kelo v. City of New London, 545 U.S. 469, 479–80 (2005); Patricia J. Askew, Comment, *Take It or Leave It: Eminent Domain for Economic Development—Statutes, Ordinances, & Politics, Oh My!,* 12 TEX. WESLEYAN L. REV. 523, 528 n.35 (2006) (stating that "principles embodied in the Takings Clause of the Fifth Amendment have been incorporated into the Fourteenth Amendment").

43. 91 U.S. 367, 372 (1875).

44. Berman v. Parker, 348 U.S. 26, 32–33 (1954); Archer, *supra* note 40, at 809.

45. *Berman*, 348 U.S. at 33.

46. *Id.* at 34–35.

47. 467 U.S. 229, 240 (1984).

48. *See id.* at 232–33; Philip Weinberg, *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?,* 35 ENVTL. L. 311, 315 (2005).

49. *See Midkiff*, 467 U.S. at 245; Weinberg, *supra* note 48.

50. *Midkiff*, 467 U.S. at 241–42.

owning families.[51] The threshold line for determining whether takings were used for a "public benefit" became much more blurred after the Supreme Court decided in favor of a contentious taking in *Kelo*.

## III. *KELO V. CITY OF NEW LONDON*

The Supreme Court's controversial decision in *Kelo* significantly expanded the public use standard and motivated state legislatures around the country to respond by providing more protections for landowners' rights.[52] In 2005, the Supreme Court held in *Kelo* that the City of New London's taking of the Fort Trumball Development area from private landowners for the purpose of economic development constituted a "public use" under the Fifth Amendment.[53]

The City of New London wished to rejuvenate its downtown area by attracting new corporations that would bring new visitors and revenue to the city.[54] As a result, New London created the New London Developmental Corporation ("NLDC") to help the city organize economic development.[55] New London attracted the Pfizer Corporation that built its property adjacent to the homes at issue here.[56] In 1998, Pfizer declared that it would develop a global research building on the property adjacent to the Fort Trumball area.[57] After obtaining approval from the City Council and conducting development meetings with the NLDC, the New London Development Agency took various properties in order to build this new facility.[58] But private landowners, including Kelo, claimed that New London's takings were outside the scope of its authority under the Fifth Amendment's Takings Clause.[59]

The private landowners argued that the number of improvements to their land along with the right to use and enjoy their property should render New London's takings void.[60] Petitioner Kelo made numerous improvements to her home before the threat of eminent domain became apparent, and another petitioner had lived in her home for 60 years.[61] The petitioners claimed their property was not taken due to its location in a blighted area, but rather because their land was situated in New London's development region.[62] Petitioners sought in-

51. *See* Weinberg, *supra* note 48, at 316.
52. *See Kelo*, 545 U.S. at 489-90; Askew, *supra* note 42, at 546.
53. *Kelo*, 545 U.S. at 484.
54. Kelo v. City of New London, No. 557299, 2002 WL 500238, at *43 (Conn. Super. Ct. 2002), *aff'd in part, rev'd in part*, 843 A.2d 500 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).
55. *Id.* at *2.
56. *Id.*
57. *Id.*
58. *Id.* at *1–2.
59. Kelo v. City of New London, Conn., 545 U.S. 469, 475 (2005).
60. *Kelo*, 2002 WL 500238, at *3.
61. *Kelo*, 545 U.S. at 475.
62. *Id.*

junctive relief rather than simply accepting the sum of money offered because they wished to remain in the homes that they loved.[63]

The trial court held that New London's taking remained permissible as a "public use," and the intermediate court affirmed in part and reversed in part, holding that lands taken for an economic development project that created "new jobs [and] increase[ed] tax and other revenues" met the public use standard under the state and federal constitutions.[64] The Supreme Court of the United States "granted certiorari to determine whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment."[65]

The Court stated several principles of eminent domain that stand under the common law.[66] First, the sovereign may not take the property of a landowner exclusively for the resolution of transferring it to another landowner.[67] Second, the State's transferal of property for a "public use" is a permissible taking of land, but a taking for a "private benefit" is a constitutional violation because no legitimate governmental purpose would exist.[68] In other words, a state's taking of private land under the "mere pretext of a public purpose" in which its true goal is a private benefit is void as well.[69]

The Court reasoned that the prior narrow test of "use by the public" gradually broadened throughout the 19th century due to impracticalities, such as determining what percentage of the public must use the land and at what monetary value.[70] Thus, toward the end of the 19th century when the Court started to apply the Fifth Amendment to the states, it broadened the test for a permissible taking to whether the taking serves a "public purpose."[71] The Court intentionally proposed this broad standard to give legislative bodies room to implement statutes accordingly.[72] Furthermore, the Court stated that a theme of federalism corresponds with giving state legislatures and state courts the authorization to determine local needs.[73]

The Court reasoned that New London's economic development plan would deliver profits for the community, such as new job opportunities and tax revenue increases.[74] It found that New London "is endeavoring to coordinate a variety of commercial, residential, and

63. *Kelo*, 2002 WL 500238, at *1.
64. *Id.* at *44; Kelo v. City of New London, 843 A.2d 500, 520 (Conn. 2004).
65. *Kelo*, 545 U.S. at 477.
66. *Id.*
67. *Id.*
68. *Id.* at 477 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1945)).
69. *Id.* at 478.
70. *Id.* at 479.
71. *Id.* at 480.
72. *Id.*
73. *Id.* at 482.
74. *Id.* at 483.

recreational uses of land, with the hope that they will form a whole greater than the sum of its parts."[75] Accordingly, the Court held that because the New London's plan for economic development constituted a permissible "public purpose," the land takings met the "public use" requirement under the Fifth Amendment Takings Clause.[76] Thus, the *Kelo* decision created a new standard that land takings must be for a "public use,"[77] and land takings meet the public use standard if they (1) provide a public purpose, (2) grant a benefit on the public, or (3) advance the states' police powers.[78]

Perhaps as a response to her opinion in *Midkiff*, Justice Sandra Day O'Connor's dissent listed three prominent types of eminent domain takings, which include the following: (1) "transfer [of] private property to public ownership;" (2) "transfer [of] private property to private parties;" and (3) "transfer of private property to remedy an identifiable public harm."[79] She argued that the majority's holding continues to overreach because economic development is not an area of eminent domain under the Court's precedent.[80]

## IV. EMINENT DOMAIN DOCTRINE IN TEXAS AND ITS RESPONSE TO *KELO*

### A. *Texas' Doctrine of Eminent Domain: Pre-Kelo*

A history of the Texas eminent domain law must be discussed before engaging in an analysis of Texas' response to the *Kelo* decision. The Texas Constitution states that "[n]o person's property shall be taken . . . for or applied to public use without adequate compensation being made, unless by the consent of such person."[81] The Texas Constitution further lists the ways in which the state government may exert its eminent domain power, including for the public or for the State's ownership, use, and enjoyment.[82]

The authorized entity seeking condemnation usually negotiates with the private landowner to buy the land, but if the parties cannot reach an agreement on damages, the entity must file a condemnation petition in the county or district court.[83] According to section 21.012(b) of the Texas Property Code, the petition for condemnation requires a description of the property and the purpose for condemnation.[84] Fur-

75. *Id.*
76. *Id.* at 484.
77. *Id.*
78. Askew, *supra* note 42, at 534 (quoting 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7.01[1] (3d ed. 2005)).
79. Archer, *supra* note 40, at 813 (quoting *Kelo*, 545 U.S. at 497-98 (O'Connor, J., dissenting).
80. *See Kelo*, 545 U.S. at 494 (O'Connor, J., dissenting).
81. TEX. CONST. art. I, § 17.
82. *Id.*
83. City of Austin v. Whittington, 384 S.W.3d 766, 772 (Tex. 2012).
84. TEX. PROP. CODE ANN. § 21.012(b) (West 2014).

ther, the judge appoints special commissioners as disinterested parties to conduct a valuation of the land.[85] Litigation may result if one of the parties files written objections in response to the special commissioners' findings with the court, and through this litigation the "condemner may take possession of the condemned property by paying the damages determined by the special commissioners and executing a bond approved by the court to secure payment of potential additional costs that could be awarded at trial or on appeal."[86]

In 1987, citizens voted to amend the Texas Constitution, expanding the definition of public use to encompass "expenditures for economic development."[87] Previously, the Texas Constitution forbade using the state's public funds for private entities, and opponents of the amendment claimed that "taxpayers' money [should not be given] to private interests."[88] The supporters of the amendment, however, won the majority vote, and the amended Texas Constitution now states that "the legislature may provide for the creation of programs. . . for the public purposes of development and diversification of the economy of the state . . . or the development or expansion of transportation or commerce in the state."[89] The Texas Constitution placed a limit on the Legislature's power by requiring a majority voter approval of the registered votes within the county or political subdivision voting on the matter.[90] The 1987 amendment paved the way for successive legislative enactments permitting economic development that was in relation to a public use.[91]

### B. *Senate Bill 7*

The *Kelo* decision struck a nerve with private landowners throughout the country, many of whom argue that an individual's land remains as his "castle" to fully enjoy and use without government interference for arguably indirect reasons.[92] In response, the Texas Legislature enacted a series of statutes, with the judiciary's support, that prohibited an authorized entity from taking private land for the

85. *Whittington*, 384 S.W.3d at 773 (citing Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172, 179 (Tex. 2004)).

86. *Id.* (citing TEX. PROP. CODE ANN. § 21.021(a) (West 2014).

87. *See* Askew, *supra* note 42, at 538; *see also* TEX. CONST. art. III, § 52-a.

88. House Research Organization, Special Legislative Report No. 138, at 15 (Aug. 17, 1987), https://lrl.texas.gov/scanned/Constitutional_Amendments/Amendments70_HRO_1987-11-03.pdf [https://perma.cc/3A9C-LFXC].

89. TEX. CONST. art. III, § 52-a.

90. *See id.*

91. *See* TEX. LOC. GOV'T CODE ANN. § 380.001 (West 2006) (stating various ways in which the government can provide economic development); *see also* Askew, *supra* note 42, at 538.

92. *See* Richard A. Epstein, Kelo v. City of New London *Ten Years Later*, NAT'L REV. (June 23, 2015, 8:00 AM), http://www.nationalreview.com/article/420144/kelo-v-city-new-london-ten-years-later-richard-epstein [https://perma.cc/TS8D-XPQQ].

purpose of economic development when it is not related to the public's use.[93]

Immediately in 2005—the same year that the *Kelo* decision was handed down—the Texas Legislature passed Senate Bill 7, which proposed an amendment to the Texas Government Code that would provide limitations on land takings using eminent domain.[94] The proposed statute defined which entities would be subject to Texas's eminent domain laws, limited the permissible takings of private property, and clarified which entities would be authorized by law to condemn private property.[95] But, the proposed statute—section 2206.001 of the Texas Government Code—created an exception for "any voter approved sports and entertainment facility."[96]

### C. *Section 2206.001 of the Texas Government Code: Limitation on Eminent Domain for Private Parties or Economic Development Purposes*

In 2005, the Texas Legislature enacted Senate Bill 7 into law as section 2206.001 of the Texas Government Code.[97] This statute limits land takings by the following entities: "(1) state agenc[ies], including an institution of higher education as defined by [s]ection 61.003 [of the Texas] Education Code; (2) a political subdivision of this state; or (3) a corporation created by a governmental entity to act on behalf of the entity."[98]

In 2016, the Texas Legislature added another prohibition on authorized entities, expanding the provision to the following four prohibitions on land takings under eminent domain: (1) takings that provide a private benefit; (2) takings that provide a public use that is "merely a pretext to confer a private benefit;" (3) takings for "economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm

93. *See* TEX. GOVT. CODE ANN. § 2206.001 (West Supp. 2018); TEX. LOC. GOV'T CODE ANN. § 251.001 (West 2016); TEX. CONST. art. III, § 52-a; City of Austin v. Whittington, 384 S.W.3d 766, 790–91 (Tex. 2012); Askew, *supra* note 42, at 541.

94. Act of Sept. 1, 2005, 79th Leg., 2d C.S., ch. 1, § 1, sec. 2206.001, 2005 Tex. Gen. Laws 1 (current version at TEX. GOV'T CODE § 2206.001).

95. *See id.*

96. Cristin F. Hartzog, Note, *The "Public Use" of Private Sports Stadiums:* Kelo *Hits A Homerun for Private Developers*, 9 VAND. J. ENT. & TECH. L. 145, 168 (2006).

97. TEX. GOVT. CODE ANN. § 2206.001 (West Supp. 2018).

98. § 2206.001(a).

on society from . . . blighted areas,"[99] and (4) takings that are not for the public's use.[100]

As proposed in Senate Bill 7, the statute specifically permits eminent domain takings by legally authorized entities when "a sports and community venue project [is] approved by voters at an election held on or before December 1, 2005, under Chapter 334 or 335, Local Government Code."[101] Consequentially, this provision is precisely what allowed for the building of the Dallas Cowboys Stadium in Arlington, Texas, under the state's eminent domain powers.[102]

### D. *Right of Eminent Domain Statute*

Previously, section 251.001 of the Texas Government Code used the phrase "public purpose."[103] In response to *Kelo*, however, in 2011 the Texas Legislature enacted a new version of the statute that replaced "public purpose" with "public use."[104] Section 251.001 of the Texas Local Government Code sets guidelines for eminent domain power, stating that "[w]hen the governing body of a municipality considers it necessary . . . the municipality may exercise the right of eminent domain for a public use to acquire public or private property, whether located inside or outside the municipality."[105] Further, the statute lists various examples of takings for a "public use," such as for "providing, enlarging, or improving of a municipally owned city hall[,] . . . school[,] or other educational facility."[106]

### E. *Texas Supreme Court*

The Texas Supreme Court has held that an individual's property may not be condemned under eminent domain unless its purpose is for a public use.[107] The Court has defined "public use" as "when the

99. *See* TEX. GOVT. CODE ANN. § 2206.001(b)(3) (West Supp. 2018) (takings for slum or blighted areas under: (A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or Section 311.005(a)(1)(I), Tax Code).

100. § 2206.001(b). Takings from slum or blighted areas are limited to activities arising "under: (A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or (B) Section 311.005(a)(1)(I), Tax Code." GOV'T § 2206.001(b)(3).

101. § 2206.001(c)(6).

102. *See infra* Section V.

103. Act of Sept. 1, 2011, 82nd Leg., R.S., ch. 81, § 3, 2011 Tex. Gen. Laws 81 (current version at TEX. LOC. GOV'T CODE § 251.001(a)).

104. *Id.*

105. TEX. LOC. GOV'T CODE ANN. § 251.001(a) (West 2016).

106. *Id.*

107. Borden v. Trespalacios Rice & Irrigation Co., 86 S.W. 11, 14 (Tex. 1905), *aff'd*, 204 U.S. 667 (1907).

public obtains some definite right or use in the undertaking to which the property was devoted."[108]

The Texas Supreme Court has emphasized deference to the Legislature in declaring the confines of a public use, except for circumstances in which the use is "manifestly wrong or unreasonable," or it is for the benefit of a private entity.[109] When the issue is whether an eminent domain proceeding was committed through "fraud, bad faith, [or] . . . arbitrariness and capriciousness," then this question is usually a question of law for the court.[110] A jury should hear the case only if disputed facts arise.[111]

Additionally, furthering the development of "public use" jurisprudence in Texas is the Supreme Court's decision in *City of Austin v. Whittington*. Here, the Texas Supreme Court held that the taking of private property to build a parking garage remained permissible because the taking for a "public building" did not violate section 2206.001(b)(3) of the Texas Government Code, which prohibits the use of eminent domain power for economic development purposes unless the economic development is related to a public purpose.[112] The Court reasoned that because the parking garage would be open to the public and "the primary purpose of the garage is to support the expanded convention center," the City's purpose for the takings constituted a public use.[113]

## V. PUBLIC USE ARGUMENTS: COLLEGE AND PROFESSIONAL SPORTS STADIUMS IN TEXAS

Land takings for the specific purpose of building sports stadiums under eminent domain have become a highly litigated topic in Texas. The U.S. Supreme Court has not decided on the specific issue of whether a land taking for the purpose of building a sports stadium constitutes a "public use" under the *Kelo* standard.[114] However, Justice O'Connor listed "stadiums" under the second type of eminent domain—transferring private property to private parties.[115] In *For The*

108. City of Austin v. Whittington, 384 S.W.3d 766, 779 (Tex. 2012) (citing Coastal States Gas Producing Co. v. Pate, 309 S.W.2d 828, 833 (Tex. 1958); *see also* Hous. Auth. of Dallas v. Higginbotham, 143 S.W.2d 79, 84 (Tex. 1940) ("It is immaterial if the use is limited to the citizens of a local neighborhood, or that the number of citizens likely to avail themselves of it is inconsiderable, so long as it is open to all who choose to avail themselves of it." (quoting West v. Whitehead, 238 S.W. 976, 978 (Tex. Civ. App.—San Antonio 1922, writ ref'd)).

109. *See* Askew, *supra* note 42, at 540.

110. *Whittington*, 384 S.W.3d at 777.

111. *See id.* at 778.

112. *Id.* at 790–91.

113. *Id.* at 791.

114. Tyson E. Hubbard, Note, *For the Public's Use? Eminent Domain in Stadium Construction*, 15 SPORTS LAW. J. 173, 177 (2008).

115. Kelo v. City of New London, 545 U.S. 469, 498 (2005) (O'Connor, J., dissenting); Hubbard, *supra* note 114.

*Public's Use? Eminent Domain in Stadium Construction*, Tyson Hubbard analogized sports teams to the business of railroads.[116] He compared the railroads' power to assert eminent domain when they "lay tracks and then charge the public for access to their trains," to sports teams' power to assert eminent domain when they "build stadiums and then charge the public for access to their venue."[117]

Consequentially, contentious litigation has broken out in state courts to determine whether the taking of private property for building a sports stadium is a public use.[118] The analysis here will evaluate the prominent arguments for and against whether land takings for the purpose of building college and professional stadiums are truly for the public's use.

### A. *College Stadiums*

Texas law permits the taking of privately-owned land for the construction of college stadiums. A university's board of regents has eminent domain powers; however, individual homeowners would disagree that college sports stadiums truly constitute a public use.[119]

The eminent domain rules for primary and secondary school districts are clear and codified in Section 11.55 of the Texas Education Code which states that "an independent school district may, by exercising the right of eminent domain, acquire the fee simple title to real property on which to construct school buildings or for any other public use necessary for the district."[120] Furthermore, when one of the state's political subdivisions begins eminent domain proceedings, the district court has the authority to decide any issue—such as the authority to take property under eminent domain and the calculation of damages—that may arise.[121]

In the realm of Texas public higher education, however, a higher education entity does not possess any eminent domain powers itself.[122] But, the Texas Education Code permits a higher education entity's board of regents, such as the Texas A&M Board of Regents, to take any property that "the board considers necessary and proper to carry out its powers and duties" in accordance with the Texas Property

116. Hubbard, *supra* note 114.

117. *Id.*

118. *See* ESPN, *supra* note 19.

119. *See* Archer, *supra* note 40, at 840.

120. TEX. EDUC. CODE ANN. § 11.155(a) (West 2013).

121. TEX. PROP. CODE ANN. § 21.003 (West 2013); Circle X Land & Cattle Co., Ltd. v. Mumford Indep. Sch. Dist., 325 S.W.3d 859, 863 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

122. TEX. EDUC. CODE ANN. § 53.32 (West 2013); *see also* § 61.003(8) (Defining higher education entities as "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section.").

Code.[123] For example, in 2017, a university's board of regents took private property to build academic buildings.[124] This example of a condemnation provides a benefit to the public because an academic building may be utilized by citizens, such as for dental care.[125] However, a university's condemnation of a residential neighborhood in order to build a football stadium tends to raise eyebrows as to whether the taking truly provides a public benefit.

A university's land takings for the construction of college stadiums call into question whether the taking would benefit the public outside of its direct benefits for the university and its neighboring communities. In her article *Restricting Kelo: Will Redefining "Blight" in Senate Bill 7 Be the Light at the End of the Tunnel?*, Adrianne Archer argues that cities profit from revenue and tax benefits that are produced from a university and the bordering property.[126] Furthermore, various stadiums have been utilized by the public for high school sporting events. For example, McLane Stadium at Baylor University hosted the University Interscholastic League ("UIL") state football quarter-finals.[127] Finally, college stadiums in Texas promote civic pride in the city's home team that translates into new property developments and restaurants in the stadium's surrounding area.[128]

In contrast, landowners have raised the argument that stadium projects could increase property taxes as a direct result of the location.[129] Residential landowners may not want to, or cannot afford to, pay a higher property tax merely to build a college sports stadium. A

123. § 85.32; *see also* Archer, *supra* note 40, at 840–41.

124. Robert Wilonsky, *A Real Kick in the Teeth as Texas A&M Takes the Elbow Room to Make Room for a Dental College*, DALLAS NEWS (Apr. 4, 2017), https://www.dallasnews.com/opinion/commentary/2017/04/04/real-kick-teeth-texas-am-takes-elbow-room-make-room-dental-college [https://perma.cc/7TYT-XQF8]; Caroline North, *Death of a Dive Bar: Elbow Room Is Officially Rubble*, DALLAS OBSERVER (July 25, 2017, 11:09 a.m.), http://www.dallasobserver.com/music/dallas-preservationists-worked-to-save-elbow-room-but-they-ran-out-of-time-9695874 [https://perma.cc/TDU9-HRX3].

125. *See id.*

126. Archer, *supra* note 40, at 839–40.

127. *2017 Football Conference 6A D2*, MAXPREPS, http://www.maxpreps.com/tournament/5lQ-21gcEeeT-Oz0u-e-FA/7EyHIlgcEeeT-Oz0u-e-FA/football-fall-17/2017-uil-football-state-championships-2017-football-conference-6a-d2.htm [https://perma.cc/ANA3-M38S] (click on Show Details of W5 Carrol v. W8 Midway); *see also* Jason Orts, *New View for the Red & Blue: Midway Unveils Football Stadium*, WACO TRIB.-HERALD (Aug. 25, 2010) (Midway utilized Baylor University's previous football stadium, Floyd Casey Stadium, for its home field for an entire football season.), https://www.wacotrib.com/waco_today_magazine/new-view-for-the-red-blue-midway-unveils-football-stadium/article_4af05983-ba67-5173-9b3e-c67c3390e224.html [https://perma.cc/4UMB-8L6Q].

128. Cindy V. Culp, *East Waco Neighborhood Watchful as New Baylor Football Stadium Develops*, WACO TRIB.-HERALD (Apr. 8, 2012), http://www.wacotrib.com/news/east-waco-neighborhood-watchful-as-new-baylor-football-stadium-develops/article_b0a7f91a-8e0f-5d54-aa65-5b8d4ee14582.html [https://perma.cc/F6M2-BV4X].

129. *Id.*

university's board of regents may rely upon the city and major donors to build these stadiums;[130] however, recent changes to federal tax law may affect sports donations in the near future.[131]

In December 2017, both the U.S. Senate and House passed a tax bill that no longer allows athletic donations as charitable contributions and as a result, sports stadium donors will be prohibited from writing off this expense as a portion of their tax deductibles.[132] Residential landowners would argue that if the university cannot properly fund its stadium project, then the landowners should not have to endure the burden of increased property taxes. Finally, residential landowners have argued that the traffic and parking problems that coincide with the hustle and bustle of game day are a nuisance to the neighborhood.[133]

### B. *Professional Stadiums*

In order to justify professional stadium projects under the *Kelo* analysis, Cristin F. Hartzong argues in *The "Public Use" of Private Sports Stadiums: Kelo Hits A Homerun for Private Developers* that these stadiums which obtain at minimum partial private funding, if not entirely privately-owned, must use the economic development argument to justify its takings.[134] Thus, if building a professional sports stadium is "rationally related to such an economic plan" rather than "[a mere] pretext of a public purpose," then the professional stadium passes the public use test under eminent domain.[135]

Property rights advocates would argue that professional sports teams are privately owned by individuals and do not provide a public use that is rationally related to an economic development plan.[136] Thus, the argument could be made that a private/public partnership is a way for professional sports teams to exploit a city without really creating any tangible benefit from revenue or jobs. For example, with the Dallas Cowboys project in Arlington, "[s]ome people were philosophically opposed to the private/public partnership and thought that the Cowboys should spend their own money to build the stadium without public financial support."[137] A great number of professional

130. *See* Brad Wolverton & Sandhya Kambhampati, *Colleges Raised $1.2 Billion in Donations for Sports in 2015*, CHRON. HIGHER EDUC. (Jan. 27, 2016), https://www.chronicle.com/article/Colleges-Raised-12-Billion/235058 [https://perma.cc/HP82-UVMN].

131. Kristen Clarke, *Senate Tax Bill May Affect Stadium Expansion*, TCU360 (Dec. 8, 2017), https://www.tcu360.com/2017/12/senate-tax-bill-may-affect-stadium-expansion/ [https://perma.cc/TTL5-VCJ6].

132. *Id.*

133. Culp, *supra* note 128.

134. Hartzog, *supra* note 96, at 156–57.

135. *Id.* at 158.

136. *See id.*

137. Wall & Nimocks, *supra* note 15, at 5.

stadiums, however, provide an avenue toward the respective cities' economic development by transforming its depressed and blighted regions.[138]

Additionally, landowners who value their homes as their "castle" would argue that professional teams are essentially producing a profit for the owner rather than providing a benefit to the public. The team's owner would counter that the stadium is made available to the public. But, are these tickets really available to the general population when it costs an average of $110.20 for attending a game for the Cowboys at AT&T Stadium?[139] Additionally, CNBC states that the total cost for attending a Cowboys game—which includes the price for beer, soda, hot dog, and parking—is $333.40.[140]

Further, no evidence exists that "the level or the growth rate of real per capita personal income is enhanced by construction of a sports arena or stadium."[141] When polled, 83% of economists believed that "[p]roviding state and local subsidies to build stadiums for professional sports teams is likely to cost the relevant taxpayers more money than any local economic benefits that are generated."[142] Economic growth is contingent upon the development of the "physical and human capital stocks and on technological change."[143] Thus, the causal connection between a sports environment and these constructs is questionable.[144]

Instead, governments could allot the public's tax money toward the more worthwhile expenses, such as "local infrastructure, public safety, education, and other forms of economic development."[145] Wolla stated in his article *The Economics of Subsidizing Sports Stadiums* that infrastructure could "increase productivity because it reduces the cost (in time and money) of transporting goods and people from one place to another," and education buildings produce "human capital investment" by facilitating a place for students to obtain the requisite knowledge and skills for their future jobs.[146]

138. Hubbard, *supra* note 114, at 175.

139. Emmie Martin, *The 10 Most Expensive NFL Teams to Watch Live*, CNBC (Sept. 10, 2017, 11:00 AM), https://www.cnbc.com/2017/09/08/most-expensive-nfl-teams-games-to-attend.html [https://perma.cc/EH3P-5BM8].

140. *Id.*

141. Hartzog, *supra* note 96, at 159 (quoting Dennis Coates & Brad R. Humphreys, *The Growth Effects of Sports Franchises, Stadia, and Arenas*, 18 J. POL'Y ANALYSIS & MGMT. 601, 622 (1999)).

142. Scott A. Wolla, *The Economics of Subsidizing Sports Stadiums*, PAGE ONE ECON. (May 2017), https://files.stlouisfed.org/files/htdocs/publications/page1-econ/2017-05-01/the-economics-of-subsidizing-sports-stadiums_SE.pdf [https://perma.cc/N9ZU-MPN5].

143. Dennis Coates & Brad R. Humphreys, *The Growth Effects of Sports Franchises, Stadia, and Arenas*, 18 J. POL'Y ANALYSIS & MGMT. 601, 622 (1999).

144. *Id.*

145. *See* Hartzog, *supra* note 96, at 159.

146. Wolla, *supra* note 142, at 2–3 (citing Miller, Matt & Bullard, James, *Bullard: Infrastructure Plan Could Boost Productivity*, BLOOMBERG (Nov. 18, 2016, 8:11 AM)

As an example of promoting education subsidies, a member of the Cincinnati city government opposed his city's initiative to build a new sports stadium by arguing for the sales tax to go towards the city's poor, bankrupt schools that were in dire need of the city's funding.[147] He argued that the business executives who pushed for these new stadiums are not the ones sending their children to the public schools, and the city's priority should be focused on improving its school systems first and recreational sports stadiums later.[148] Weinberg argued in *Eminent Domain For Private Sports Stadiums: Fair Ball or Foul?* that "[t]he support for this profligate subsidization when public schools, mass transit, and public health are in desperate need of municipal funds derives in large measure from the milking of sports fans' emotions and civic pride."[149]

In contrast, proponents for sports stadiums as a public use would argue that professional sports stadiums are a commodity that not only generate revenue for the state and individual cities, but they also create common bonds among the community that unite citizens behind supporting the home team. Generally, sports stadiums create an environment for fans to come together. For example, Eckstein and Delaney state in their article that stadium supporters use noneconomic justifications to argue in favor of building professional sports stadiums, and the non-economic benefits are "community self-esteem" and "community collective conscience."[150] Internal community self-esteem persuades residents to build new stadiums in order to avoid losing its status as an individual city, and external community self-esteem convinces residents that new amenities and national prominence will result from a new professional sports stadium.[151] Community collective conscience signifies "shared values, beliefs, and experiences that bind community members to one another."[152]

The authors found through a study of ten cities across the nation that are building new sports stadiums that the arguments of community self-esteem and community collective conscience seem most applicable to "smaller cities, newly emerging cities (in the South and West), and those cities that have suffered serious population decline."[153] Internal community self-esteem motivates the residents of these cities to prevent another city from taking over and prevents the

http://www.bloomberg.com/news/videos/2016-11-18/bullard-infrastructure-plan-could-boost-productivity [https://perma.cc/RL52-LA8R].).

147. Rick Eckstein & Kevin Delaney, *New Sports Stadiums, Community Self-Esteem, and Community Collective Conscience,* 26 J. OF SPORT & SOC. ISSUES 235, 241–42 (2002).

148. *Id.*

149. Weinberg, *supra* note 48, at 320.

150. Eckstein & Delaney, *supra* note 147, at 236.

151. *Id.* at 238.

152. *Id.*

153. *Id.* at 243.

city from becoming less prominent within the state or country.[154] Further, their findings indicate that appeals to the residents by targeting community self-esteem and community collective conscience could be more effective than appeals stating economic benefits.[155]

Another public benefit of the new stadiums is increased employment opportunities. Sports stadium projects have the ability to create new construction jobs during a stadium's building phase.[156] When the stadium construction is complete, stadium projects create new jobs in ticket sales, parking, concessions, and other game-day staff positions.[157] Then, the money that parking attendants, restaurant workers, and stadium workers spend from their income will circulate throughout the local economy.[158] This example is what economists call the multiplier effect, which means that "one dollar of spending (by consumers, businesses, or government) creates more than one dollar in economic activity."[159] In 2015, the economic impact of millions attending St. Louis Cardinal home games was $343.9 million.[160] Thus, a new sports stadium can generate a worthwhile economic impact that gives back to the local people whose increased taxes paid for the project.

Economists also do not consider the prospect of "opportunity costs" in building sports stadiums. An opportunity cost is "the value of the next-best alternative when a decision is made."[161] In the realm of sports stadiums, economists must weigh the "seen" and "unseen" consumer expenses.[162] The consumer's "seen" expenses are spent while attending a sporting event, and the money a consumer would expend otherwise is the "unseen" expenses.[163] Wolla asserted in his article that "[i]f [consumers] were not spending on sporting events, they would instead spend on museums, movies, concerts, theater, restaurants, and so on."[164] Thus, the consumer money expended at new sports stadiums would be "diverted spending" rather than "new spending."[165]

Not only do professional stadiums create an economic impact, but they also provide shelter for victims of hurricanes and natural disasters, such as the Toyota Center in Houston, Texas, that provided shelter to victims in the aftermath of Hurricane Harvey.[166] Professional

154. *Id.*
155. *See id.* at 245–46.
156. Wolla, *supra* note 142, at 1.
157. *Id.*
158. *Id.*
159. *Id.* at 2.
160. *Id.* at 1.
161. *Id.* at 2.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. Fedschun & Brown, *supra* note 26.

sports stadiums also provide a location for local high school teams to play football games. For example, in 2017, AT&T Stadium in Arlington hosted the UIL high school state title games for each division for a reduced price of $15 per ticket.[167] These reduced prices allowed people who may not be able to afford a Cowboys ticket the chance of experiencing AT&T Stadium. Jones himself dreamed of AT&T Stadium not only being the home field for the Cowboys but to be a venue utilized for multiple purposes including high school football games.[168] The stadium has hosted a number of events, such as "Super Bowl XLV . . . the NBA All-Star Game, NCAA Men's Final Four, NCAA Women's Final Four, CONCACAF soccer, concerts, rodeos, motocross and even the ultra-popular Wrestlemania."[169] As evidenced in the vast scope of events hosted in this stadium, AT&T is noticeably much more than simply a football stadium.[170]

Additionally, as interest in the location of sports stadiums develop, "the value of existing commercial and residential property is likely to improve"[171], and new retail and commercial facilities may pop up in these growing areas. A concrete example of a sports team owner's partnership with a city and school district is "The Star" in Frisco, Texas.[172] Together, Jerry Jones and the City of Frisco, built "The Star," which serves as the Cowboy's headquarters and a "mixed use development."[173] The Star's prominence in Frisco has resulted in a boom of retail development with plans for an Omni Frisco Hotel and Baylor Scott & White Sports Therapy & Research facility.[174] Thus, the establishment of this professional sports facility will now result in higher revenues in tourism for the City of Frisco, a new hotel for visitors, and a sports therapy center to serve the team and the public.[175]

### C. *Case Studies*

The following case studies of Texas A&M University, Baylor University, and the Dallas Cowboys further evaluate sports stadium condemnations as a public use.

167. *UIL Football Championship Schedule*, STATESMAN, https://www.statesman.com/NEWS/20171217/UIL-football-championship-schedule [https://perma.cc/76D6-KN9U] (last visited Feb. 7, 2019); Michael Florek, *UIL Football State Championships to Remain at AT&T Stadium in 2018, 2019,* SPORTSDAY HS (May 9) https://sportsday.dallasnews.com/high-school/high-schools/2018/05/09/uil-football-state-championships-remain-att-stadium-2018-2019 [https://perma.cc/8TZ2-FGNU] (Cowboys Stadium has held the UIL state championships from 2011 to 2014 and 2016 to 2017. Further, Cowboys Stadium will hold the championship game in 2018 and 2019.).

168. *See* Humphrey, *supra* note 23.

169. *Id.*

170. *See id.*

171. Wolla, *supra* note 142, at 2.

172. *See* Humphrey, *supra* note 23.

173. *Id.*

174. *Id.*

175. *See id.*

### 1. Texas A&M University

First, in 2001, the Texas Legislature enacted section 85.32 of the Texas Education Code providing that the Texas A&M University System board may "exercise the power of eminent domain to acquire real property the board considers necessary and proper to carry out its powers and duties."[176] Further, the statute limits the board's actions to "exercis[ing] the power of eminent domain in the manner prescribed by Chapter 21, Property Code . . . ."[177] In 2016, for example, Texas A&M University's Board of Regents approved the condemnation of The Elbow Room, a Dallas landmark bar, in order to build its new College of Dentistry.[178] Preservation Dallas, a non-profit organization, and the Texas Landmark Commission attempted to make the Elbow Room a historic landmark, but the City of Dallas already granted demolition permits before they could make this designation.[179] The new dental school will increase the Texas A&M College of Dentistry's enrollment by 25% and it will provide the Dallas/Fort Worth metroplex another option for dental care.[180]

### 2. Baylor University

Second, unlike public universities, private higher education institutions are not permitted to use eminent domain in order to take land.[181] These institutions may however push for rezoning districts in order to allow the city to take land under the category of a blighted region. Beginning in 2011, Baylor University built its new football stadium, McLane Stadium, on the banks of the Brazos River and along the I-35 corridor.[182] "The stadium, along with the frontage road bridges [and] the new Umphrey pedestrian bridge . . . have reshaped the front door to Baylor and downtown Waco."[183] Mega-donor Drayton McLane believed that the stadium project would enhance Waco and Baylor through the development of new hotels, restaurants, and entertainment.[184]

176. TEX. EDUC. CODE ANN. § 85.32(a) (West 2002).
177. EDUC. § 85.32(b).
178. Wilonsky, *supra* note 124.
179. North, *supra* note 124.
180. Candace Carlisle, *Texas A&M to Begin $127M Building in Deep Ellum to Boost Dallas Enrollment,* DALLAS BUS. J., (Oct. 18, 2017, 3:27 P.M.), https://www.bizjournals.com/dallas/news/2017/10/18/texas-a-m-to-begin-129m-building-in-deep-ellum-to.html [https://perma.cc/K5C7-YHJ2].
181. TEX. EDUC. CODE ANN. § 53A.32 (West 2013).
182. Culp, *supra* note 128.
183. J.B. Smith, *Stadium Rising: The Story of McLane Stadium, From Start to Finish*, WACO TRIB. (Aug. 29, 2014), https://www.wacotrib.com/sports/baylor/baylor_stadium/stadium-rising-the-story-of-mclane-stadium-from-start-to/article_d9e6a3c6-1f87-5fc9-8c1b-99ae1a8c8bf5.html [https://perma.cc/EWT9-PSNU].
184. Cindy V. Culp, *McLane Pledges Large Donation to Baylor for On-Campus Football Stadium*, WACO TRIB. (Mar. 14, 2012) https://www.wacotrib.com/news/mc

With the new stadium project underway, nearby neighborhoods became worried that Baylor would need more land for parking around the stadium, and as a result, the neighbors organized the Olive Heights Association to fight off the looming threat of losing their homes.[185] "The worry is that if a number of lots are purchased by people who [do not] live in the area, that could change the atmosphere of the neighborhood."[186]

### 3. Dallas Cowboys

Finally, in 2009, Jerry Jones built a $1.2 billion stadium in Arlington, Texas, that is affectionately known as "Jerry World."[187] Several years prior in 2004, however, the proposition authorizing construction of Cowboys Stadium almost failed due to lack of support among Arlington residents.[188] Consequentially, the Mayor of Arlington, along with representatives of the Dallas Cowboys, generated sufficient support through advertisements and presentations throughout the city.[189] Dallas Cowboys Director of Client Services and Corporate Communications Brett Daniels stated, "[w]e had to get our message across that Cowboys Stadium would put North Texas on the global map [sic] and create an economic engine for the business community and the citizens of Arlington."[190]

Together Jerry Jones and the City updated residents on the stadium's progress with encouraging letters from the Mayor, City Manager, and other city officials stating that construction of the stadium would result in national entertainment prestige for Arlington with "opportunities such as the NBA All-Star game and Super Bowl SLV" and in tax benefits for "Arlington and North Texas residents."[191] Their hard work paid off and 58% of voters approved the proposition.[192]

In 2007, the City of Arlington settled what might have become the "first Dallas Cowboys stadium eminent domain case" to make it to trial.[193] After the City took landowners' homes through the use of eminent domain needed for the new Dallas Cowboys stadium, residents responded with lawsuits challenging the amount of money they received in exchange for their place of dwelling.[194] "The city withdrew [ten] eminent domain cases, and five lawsuits have been settled since

lane-pledges-large-donation-to-baylor-for-on-campus-football/article_595c9911-75a1-57ef-8c88-0c7f5b2903f7.html [https://perma.cc/GJ73-6YTM].

185. Culp, *supra* note 128.
186. *Id.*
187. Humphrey, *supra* note 23.
188. Wall & Nimocks, *supra* note 15, at 8.
189. *Id.* at 9.
190. *Id.*
191. *Id.*
192. *Id.*
193. ESPN, *supra* note 19.
194. *See id.*

the fall. One is pending in state district court, and [seventy-five] are pending in Tarrant County Court."[195] For example, landowner Johnny Johnson lived in his home for sixteen years before the city took his land toward the end of 2005.[196] Johnson claimed that his home appraised out to $106,000 at market value, but the city merely offered $75,000 for Johnson's home and land.[197] "The Tarrant Appraisal District had valued the property at $24,000 for taxing purposes."[198] Before the case went to trial, the parties settled at $100,000.[199]

Even though a stadium may provide many benefits for its home city, the issue remains—in college sports stadiums as well—whether a city's benefit of growth and economic development translates to the public obtaining a benefit. In evaluating both sides of the public versus private use debate, college and professional sports stadiums provide a public use to citizens because sports stadiums provide access to public participation, national prominence, revenue, tax benefits, and even act as hurricane shelters for its citizens. The totality of these opportunities for citizens to obtain access to the stadium, along with the stadium's benefits to the city, outweigh the argument of sports stadiums as a private use. When the purpose for the land taking is for building a sports stadium, however, a higher threshold for the amount of compensation would provide additional protections for private landowners who fear sports stadium condemnations.[200]

## VI. PROPOSAL FOR A LEGISLATIVE AMENDMENT TO SECTION 2206.001(C) OF THE TEXAS GOVERNMENT CODE

Eminent domain is here to stay because of the development and revenue it provides. Where does this leave residential landowners? Frequently, they are not fully compensated when their homes are taken for a sports stadium. The judicial system is too costly and taxing upon individuals, and thereafter, will offer little relief. An amendment to section 2206.001(c) of the Texas Government Code—which provides the exception for an authorized entity's condemnation of "a sports and community venue project approved by voters at an election held on or before December 1, 2005, under Chapter 334 or 335, Local Government Code"[201]—is likely the best method to further protect private citizens' home values.

Analyzing other states' judiciary holdings and guidelines is useful in understanding how to provide appropriate protections to landowners while maximizing the opportunity for cities and corporations to create

195. *See id.*
196. *See id.*
197. *See id.*
198. *See id.*
199. *See id.*
200. *See infra* Section VI.
201. TEX. GOV'T CODE ANN. § 2206.001(c)(6) (West 2016).

a new source of revenue and employment opportunities in under-developed regions. In 1981, the Supreme Court of Michigan in *Poletown Neighborhood Council v. City of Detroit* held that the City's takings to build an assembly plant for General Motors constituted a public use.[202] The Court reasoned that even though the land takings would benefit the corporation, an increase in Detroit's employment opportunities would also meet the public use requirement.[203]

However, in 1988 the Michigan Supreme Court in *City of Wayne County v. Hathcock* overturned the controversial standard in *Poletown*.[204] The Court turned to the state constitution's public use standard that emulated the Fifth Amendment.[205] The Court's final conclusion reasoned that even though the public would benefit from employment opportunities, "the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement."[206] Since the "gains to private parties outweighed the public benefits," the Court held that the land taking did not provide a public use.[207]

Additionally, in *Schreiner v. City of Spokane*, the Court of Appeals of Washington, Division III held that a land taking under the doctrine of eminent domain in order to build a "multi-purpose facility" utilized for "sports and entertainment" established a constitutional condemnation.[208] Similar to the ASFDA, the City of Spokane formed Spokane PFD to examine the financial capacity to build "a new multi-purpose community center and to finance, construct[,] and ultimately own and operate the facility."[209] Section 35.59.050 of the Revised Code of Washington Annotated permits Spokane PFD to take land for "a sports and entertainment facility 'by lease, sublease, purchase, or sale,'" and the statute explicitly states that the achievement of this land taking "is declared to be a strictly public purpose of the municipality . . . ."[210] The court reasoned that the construction of a multi-purpose community center and the attainment of a sports and entertainment arena under eminent domain embody a similar idea—the "provision of a facility for civic entertainment, cultural and educational events."[211]

Cities across the country own professional football stadiums and allow National Football League teams to utilize the space on game

202. *See* Weinberg, *supra* note 48, at 316 (citing Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981)).
203. *See id.*
204. *See id.*; Cty. of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).
205. *See Hathcock*, 684 N.W.2d at 786–87.
206. *Id.* at 783.
207. Weinberg, *supra* note 48, at 316.
208. *See* Schreiner v. City of Spokane, 874 P.2d 883, 887–88 (Wash. Ct. App. 1994).
209. *Id.* at 887.
210. *Id.*; WASH. REV. CODE. ANN. § 35.59.050 (West 2016).
211. *Schreiner*, 874 P.2d at 888.

day.[212] For example, the City of Baltimore owns Camden Yards Stadium, while the Baltimore Ravens do not pay rent to play there but retain half of the revenue from non-football events held in the stadium.[213] The Congressional Research Service assessed that for every new employment position created by the new stadium project, taxpayers spent $127,000–$331,000. Nevertheless, Camden Yards Stadium was deemed as an "integral part of Baltimore's renaissance" in the Inner Harbor, which is the city's most popular tourist district.[214]

Additionally, cities have used a referendum to vote on the decision to build a professional sports stadium.[215] In *Eminent Domain for Private Sports Stadiums: Fair Ball or Foul?*, Weinberg argued that this practice "allows politicians to wash their hands of the situation" by leaving the decision to the voters.[216] However, referendums consume public funds in different ways when cities spend months and thousands of dollars on advertising the benefits of building a stadium.[217] Citizen voters are given fair notice and an opportunity to vote on keeping a professional team, which in turn would raise the property taxes. Thus, proponents of a city-wide vote would argue that residents who oppose funding a professional football team should simply vote against the measure.

Texas statutes provide similar opportunities for cities to use eminent domain power to build sports stadiums while maintaining some protections for landowners by including four limitations on land takings.[218] Like the Michigan Constitution, Texas's statute emphasizes the importance of evaluating the underlying purpose of condemnation in determining whether a taking is constitutional. The four statutory limitations on takings[219] aim to restrict needless condemnations that fail constitutional muster. However, like section 35.59.050 of the Revised Code of Washington Annotated that permits entities to build "sports and entertainment facilit[ies],"[220] section 2206.001(c) of the Texas Government Code allows authorized entities using eminent domain to build sports and community venue projects with voter approval.[221]

Essentially, the Texas Legislature limited the *Kelo* holding by enacting limitations on an authorized entity's condemnations, but also pro-

212. *See* Weinberg, *supra* note 48, at 320–21.
213. *See id.*
214. *See id.*
215. Michael Farren & Thomas Savidge, *A Win for San Diego, Voters Wisely Rejected Paying for a New Stadium for the NFL's Chargers.*, U.S. NEWS & WORLD REP. (Nov. 14, 2016, 10:45 A.M.), https://www.usnews.com/opinion/articles/2016-11-14/san-diego-voters-wisely-reject-new-chargers-stadium.
216. *See* Weinberg, *supra* note 48, at 322.
217. *See* Wall & Nimocks, *supra* note 15, at 26–30.
218. TEX. GOV'T CODE ANN. § 2206.001 (West 2016).
219. GOV'T CODE § 2206.001(b).
220. WASH. REV. CODE. ANN. § 35.59.050 (West 2016).
221. TEX. GOV'T CODE ANN. § 2206.001(c)(6) (West 2015)

vided an avenue for entities to build their sports stadiums under eminent domain. This carrot-and-stick approach seems to function in Texas with the Dallas Cowboys Stadium, which is living proof of a stadium built subsequently to the enactment of section 2206.001 of the Texas Government Code. Arlington residents approved the one-half cent sales tax increase,[222] and the stadium has provided Arlington with national prominence and revenue.[223] However, one vital issue in the statute remains in legal contest: whether residential landowners are fully compensated for the value of their homes. Courts have held that the landowner should be compensated for the FMV of their homes.[224] But the FMV arguably does not fully compensate the landowners' loss of their rights to use and enjoy their homes.[225]

For example, if a residential landowner were to sell his or her home in an arms-length transaction, the landowner would want to sell the home above the FMV to maximize the landowner's profits.[226] In *Law and Economics*, Robert Cooter and Thomas Ulen argue that mutual gain is the ideal result that encourages sales, but the result of a taking under eminent domain is merely a unilateral gain of the authorized entity.[227] The public-use requirement avoids the abuse that a private landowner would have endured if an entity were allowed to take land from one private landowner and sell that land to another private buyer below the landowner's likely offered price.[228] However, the public-use standard does not completely solve the issue of efficiency in takings because landowners will likely not be compensated from the entity at their preferred price, and they would lose out on any potential profit from a sale of the home.[229]

For example, suppose that the City of Arlington took Johnny's land under eminent domain in order to build the Dallas Cowboys Stadium. Suppose that the City expected to pay $11 million in order to build the stadium, and the FMV of Johnny's home was $130,000. If Johnny's house is subjectively valued at $250,000, then Johnny would lose $120,000 that he potentially could have gained from selling his home.

As Jon Fee stated in his article *Eminent Domain and the Sanctity of Home*, a residential taking should provide the compensation that would "make the owner indifferent to the land acquisition at issue (not indifferent to the government's choice to use eminent domain as the means of acquisition), accounting for the owner's reasonable sub-

222. Wall & Nimocks, *supra* note 15, at 7–9.
223. *See* Greene, *supra* note 7.
224. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 176 (Berkeley Law Books, 6th ed. 2016) (2012), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1001&context=books [https://perma.cc/4P2Q-363F].
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *See Id.* at 177.

jective value."[230] Fee also warned against compensating above the owner's subjective value because the government should be permitted to keep the surplus of its building project for itself and for the public's benefit.[231] However, because the public use in this situation would be for the building of sports stadiums, rather than more easily accessible public parks and highways, then the owner's subjective value should not be the highest threshold when the taking is for the purpose of building a sports stadium.

Therefore, the best method to fully compensate the residential landowner for losing the right to sell, use, and enjoy the home is to establish a higher threshold for compensation, such as 150–250% of the property value, when authorized entities are taking land for the purpose of building "sports and community venue project[s]." For example, Indiana enacted a similar provision that would provide compensation higher than 100% of the FMV.[232] As a result, the residential landowner would be fully compensated for the home's equity if the landowner could have sold it in an arms-length transaction.

Unsurprisingly, a higher compensation for the landowner would result in losses for the city and sports team. Taxpayer money would be spent here to pay more than the FMV in order to compensate a subjective value that we cannot measure. Additionally, the cost of building sports stadiums would increase and, therefore, chill the construction of sports stadiums in Texas.

These ramifications of a higher threshold for landowner compensation may stand as true, but the issue remains as to how much our society is willing to take from landowners to build sports stadiums. As Richard Epstein stated, compensation that "lies between the general market value and some higher subjective valuation . . . permits the owner to duplicate the condemned facilities and thus regain [leftover money] . . . ."[233] By compensating the landowner 150–250% of the FMV, the city would compensate an amount somewhere between the landowner's subjective value, which is higher than what the city would want to pay, and the FMV, which is likely lower than the owner would want to receive.

Finally, compensation that is greater than FMV and is closer to the owner's subjective value would incite the landowner to peacefully give up the property rather than become a holdout. A primary purpose of eminent domain is to prevent the landowner from becoming a

230. Fee, *supra* note 33, at 807.

231. *Id.* at 808–09.

232. IND. CODE ANN. § 32-24-4.5-8(2)(A) (West 2013) ("Payment to the owner equal to one hundred fifty percent (150%) of the FMV of the parcel as determined under IC 32–24–1").

233. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 183 (Harvard Univ. Press 1985).

holdout, which would raise the costs of other tracts of land.[234] As further incentive to peacefully give up the property, the city could provide the landowner compensation at 150–250% of the FMV with the understanding that the landowner would not be permitted to bring any claims against the city for the compensation price.

## VII. CONCLUSION

The Texas Legislature responded to the landmark *Kelo* holding by enacting statutes that limited an authorized entity's ability to condemn land from private landowners.[235] However, the statute provides an exception that entities may use eminent domain to build sports and community venue projects.[236] Texas's law for taking land to build sports stadiums is similar to other states with its use of residential voter approval to build a stadium. Residential voter approval is an excellent way to achieve the direct democracy principles that our country was founded upon.

However, the compensation to residential landowners for the FMV of their land fails to fully compensate the landowners for the sentimental loss of their home and their rights to use, enjoy, and sell their homes. Therefore, an amendment to section 2206.001 of the Texas Government Code—providing a higher threshold for landowner compensation, such as 150–250% of the property value, when authorized entities are taking land to build "sports and community venue project[s]"—provides a framework for a university's board of regents or a city to fully compensate the landowner.

234. Cooter & Ulen, *supra* note 224, at 177 ("Even when owners do not hold out, the possibility of doing so can dramatically increase the transaction costs of purchasing contiguous property.").

235. TEX. GOV'T CODE ANN. § 2206.001 (West 2016); TEX. LOC. GOV'T CODE ANN. § 251.001 (West 2018).

236. § 2206.001(c)(6).