

HOME TEAM ADVANTAGE?: THE TAKING OF PRIVATE PROPERTY FOR SPORTS STADIUMS

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I. INTRODUCTION

It was 1957, and Brooklyn Dodgers fans were in mourning. Their championship team was suddenly being taken from them, as owner Walter O'Malley decided to move the team to Los Angeles after losing his fight with New York City to get a new ballpark. Although the Dodgers were being taken from Brooklyn, something even more vital was being taken from the residents of the Los Angeles neighborhood Chavez Ravine: their homes.

Eminent domain has long been exploited as a means of taking private property for sports arenas, but it is only now emerging as a public issue. Private enterprises that own sports teams are looking for prime real estate in order to relocate and build larger, more sophisticated stadiums. This real estate is centrally located in populated cities and conveniently accessible by public transportation. It is occupied by millions of people who reside in houses and apartments or own and operate stores, restaurants, and other businesses—people who are part of a community and have no intention of moving. Yet, when private corporations persuade local governments to exercise their powers of eminent domain, unsuspecting residents are forcibly bought out of their property to make way for retractable-rooftop stadiums with luxury box seats and large parking lots.

Such were Walter O'Malley's intentions in 1955, when he began to complain that the Brooklyn Dodgers had "outgrown" Ebbets Field.¹ He sold the stadium because "[h]e wanted a new, larger, round, domed ballpark which he thought would be fine at Atlantic and Flatbush [A]venues."² Brooklyn Borough President John Cashmore approved a plan to build a new ballpark, but the Parks Commissioner Robert Moses did not. Moses chastised O'Malley

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¹ John Manbeck, *Stadium Battles Both Past and Present*, BROOK. PAPERS, Feb. 7, 2004, at 14.

² *Id.*

for even considering using public money and the city's powers of eminent domain to build a sports stadium.³ Today, new developers and politicians have replaced the Moseses and O'Malleys of the 1950s. Once again in Brooklyn, New York on the corner of Atlantic and Flatbush Avenues, private developers wish to use the state's eminent domain powers to condemn the land so they can build a new arena—this time for the New Jersey Nets basketball team.⁴

This misuse of eminent domain is not unique to New York. In Arlington, Texas, the city created a separate corporation, the Arlington Sports Facilities Development Authority, Inc. and endowed it with the power of eminent domain.⁵ The Authority used this power to seize thirteen acres of private property for the Rangers' new ballpark.⁶ In New Jersey, plans to relocate the Devils hockey team are seen as part of the revitalization of downtown Newark.⁷ The projected area for this new arena consists of existing offices that had relocated downtown in an attempt to revive the area.⁸ The Boston Red Sox have asked the city to use its eminent domain power to acquire fourteen acres of land for a proposed new stadium, which would be adjacent to the team's current location at Fenway Park.⁹

Section II of this Article describes the development of eminent domain and its role in urban renewal. It discusses the taking of private property for private sports enterprises under the guise of "redevelopment" in the public interest. Section III examines the evolving interpretation of "public use" and explores the latitude of municipal power in its authority to take private land through condemnation to build new sports stadiums. Section IV argues that history and case studies show that sports stadiums are not a public benefit and that private land should not be taken for their construction. Section V suggests proposals to protect the public from private takings, including a strict interpretation of "public purpose." This Section also discusses recent cases defining "public purpose" and the future application of eminent domain.

³ *Id.*

⁴ *Id.*

⁵ See ARLINGTON SPORTS FACILITIES DEVELOPMENT AUTHORITY, INC., THE BALLPARK IN ARLINGTON, <http://www.ci.arlington.tx.us/finance/pdf/sports/finplan1.pdf>.

⁶ Robert Bryce, *Stealing Home*, TEX. OBSERVER, May 9, 1997, at 6.

⁷ See Joan Gralla, *Newark, N.J. Says Wins Devils Hockey Team*, REUTERS, Feb. 10, 2004.

⁸ *Id.*

⁹ Meg Vaillancourt, *Springfield Ballpark Ruling Could Affect Fenway Proposal: Critics Welcome Judge's Decision Against City's Land-Takings*, BOSTON GLOBE, Mar. 1, 2000, at C20.

II. EMINENT DOMAIN AND ITS ROLE IN URBAN RENEWAL

The Constitution of the United States provides that a person shall not be deprived of private property unless that property is being taken for a public use and the property owner is provided with just compensation.¹⁰ Historically, the theories of John Locke, which inspired the governmental structure of the United States, included a strong conviction that government is formed to protect the property of individuals, not to take their property away.¹¹ The public use exception in the Fifth Amendment was intended to ensure that if one person's private land was taken, it would be for the benefit of the public. The authority given to the government to take someone's private property has developed into the doctrine of eminent domain.

Eminent domain is defined as "[t]he inherent power of a governmental entity to take privately owned property, [especially] land, and convert it to public use, subject to reasonable compensation for the taking."¹² Although the Fifth Amendment cannot restrict the powers of the states with regard to eminent domain, it is obligatory on states by virtue of the Fourteenth Amendment, which prohibits the states from depriving any person of his property without due process of law.¹³

Each state has similar legislation governing the power of eminent domain. For example, New York's constitution declares that local governments "shall have power to take by eminent domain private property within their boundaries for public use . . . but no more than is sufficient to provide for appropriate disposition or use of land . . . for such public use . . ."¹⁴ It also enables the

¹⁰ U.S. CONST. amend. V.

¹¹ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, 285-302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). See also William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 595 (1972). Stoebuck notes that allowing the use of eminent domain to transfer private property to other private parties "would violate the most fundamental Lockean principle that governments were instituted to protect every man's property against his neighbor's depredations." *Id.*

¹² BLACK'S LAW DICTIONARY 444 (8th ed. 2005).

¹³ See *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). "The Takings Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation." *Id.* (citation omitted). "The Fifth and Fourteenth Amendments do not prohibit the taking of property without just compensation. Therefore, there is no constitutional injury until the plaintiff has availed himself of the state's procedures for obtaining compensation for the injury, and been denied compensation." *San Remo Hotel v. City & County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) (citation omitted).

¹⁴ N.Y. CONST. art. IX, § 1, subsec. (e).

legislature to authorize and regulate the power of eminent domain.¹⁵

Similarly, California empowers its legislature with eminent domain decision-making.¹⁶ Although its constitution states that the power of eminent domain can be exercised to acquire property for public use only, "public use" is not specifically defined.¹⁷ Texas allows local governments to decide what can be taken via eminent domain.¹⁸ However, before the authority acquires the private property, it must adopt a resolution "describing the real property and declaring the acquisition of the property necessary for the purposes of the authority."¹⁹

All states are congruous with the federal Constitution in that the taking by eminent domain must be for a public purpose, and that the property owner must be compensated for the fair market value of the property.²⁰ However, states are not consistent in their definition of what constitutes public purpose, causing an inconsistent application of eminent domain throughout the country.

A. *The History of Public-Private Takings*

The U.S. Supreme Court has long recognized that the authority of sovereigns to take private property for public use is well-founded at common law and is also constitutionally guaranteed.²¹ Although eminent domain may seem to require an unfair sacrifice by property owners, if used appropriately, "it was and is a necessary compromise in the tension between the rights of private citizens and the interests of the public."²²

In *Berman v. Parker*, the Supreme Court upheld the constitutionality of an urban renewal plan that took property from private owners in a "blighted" area and resold it to developers who would promote a safe environment and desirable economic develop-

¹⁵ *Id.*

¹⁶ CAL. CONST. art. I, § 19 ("The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings . . .").

¹⁷ *Id.*

¹⁸ TEX. LOC. GOV'T CODE ANN. § 392.061(a) (Vernon 1999).

¹⁹ *Id.* "An authority may acquire an interest in real property, including a fee simple interest, by the exercise of the power of eminent domain after it adopts a resolution describing the real property and declaring the acquisition of the property necessary for the purposes of the authority under this chapter." *Id.*

²⁰ U.S. CONST. amend. V.

²¹ See *Kohl v. United States*, 91 U.S. 367, 372 (1876) ("The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to take lands for public uses.")

²² Bill Sizemore, *Eminent Domain, A Court Repents*, Aug. 12, 2004, <http://www.newswithviews.com/Bill/sizemore24.htm>.

ment.²³ Congress enacted the District of Columbia Redevelopment Act of 1945 to combat the decaying housing conditions in Washington, D.C. through redevelopment of blighted areas.²⁴ This Act allowed for the acquisition of private property that would immediately be transferred to private entities pursuant to a land-use plan for development of business, housing, and similar uses.²⁵ The Supreme Court upheld the taking of a department store as a valid public use because "Congress and its authorized agencies have made determinations that [took] into account a wide variety of values."²⁶ *Berman* permitted the government to take private land from one and give it to another by utilizing its eminent domain power in order to redevelop "blighted" areas.²⁷ Furthermore, the Supreme Court established in *Berman* that deference is given to legislative intent when considering what constitutes a public use under the Fifth Amendment.²⁸

In 1981, the Michigan Supreme Court decided the landmark case *Poletown Neighborhood Council v. City of Detroit*.²⁹ That case permitted the city of Detroit to condemn nearly 500 acres of private land under eminent domain and sell it to General Motors.³⁰ Approximately 1400 homes and over 100 businesses were forced to relocate so General Motors could build a new auto plant with the condition that it would alleviate unemployment and revitalize "the economic base of the community."³¹ Historically, this decision broadened the interpretation of "public purpose" to include a "public-private" taking.³² A "public-private" taking occurs when the government takes private property for a public purpose through its eminent domain power, but conveys the property to a private entity.³³ For over two decades, *Poletown* set precedent until *County of Wayne v. Hathcock*,³⁴ in which the Michigan Supreme Court over-

²³ 348 U.S. 26, 35-36 (1954).

²⁴ *Id.* at 28.

²⁵ *Id.* at 29.

²⁶ *Id.* at 33.

²⁷ *Id.* at 35.

²⁸ *Id.* at 33.

²⁹ 304 N.W.2d 455 (Mich. 1981).

³⁰ *Id.* at 460.

³¹ *Id.* at 459.

³² See William Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231, 257 (1984) (arguing that *Poletown* sets a "dangerous precedent").

³³ Jeffrey W. Scott, *Public Use and Private Profit: When Should Heightened Scrutiny Be Applied to "Public-Private" Takings?*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 466, 466 (2003).

³⁴ 684 N.W.2d 765, 787 (Mich. 2004).

turned *Poletown*. The court ruled that personal property rights are fundamental rights protected under the state constitution, and the *Poletown* decision was a "radical departure" from those constitutionally protected rights.³⁵ But the reversal of *Poletown* may have come too late, as the court's ruling in that case paved the way for the historically liberal interpretation of public purpose.³⁶

For example, the U.S. Supreme Court further expanded the public use interpretation in 1984. In *Hawaii Housing Authority v. Midkiff*, the Hawaii legislature had ascertained that seventy-two private individuals owned approximately half of the state's land.³⁷ This prompted the legislature to conclude that the real estate market was skewed and that a public purpose existed for the legislature to act.³⁸ To solve these problems, the legislature created a mechanism to condemn and transfer ownership of the landowners' land to current tenants.³⁹ The Supreme Court, in upholding Hawaii's public-private transfer scheme, found that such takings were within the scope of the Fifth Amendment's Public Use Clause.⁴⁰

The *Midkiff* decision also reaffirmed the deference given by the Court to legislative determinations of public use by applying low-level scrutiny, the rational basis test.⁴¹ The Court said, "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."⁴² Therefore, "if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."⁴³ The policy behind this deference is that legislatures are better able than the courts to assess the public purposes advanced by an exercise of eminent domain.

More recently, the Supreme Court affirmed its prior decisions when it ruled in the controversial eminent domain case involving the city of New London's taking of privately owned houses to make way for an "integrated development plan designed to revitalize its

³⁵ *Id.*

³⁶ See, e.g., *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Tolksdorf v. Griffith*, 626 N.W.2d 163 (Mich. 2001); *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996).

³⁷ 467 U.S. 229, 232 (1984).

³⁸ *Id.*

³⁹ *Id.* at 233-34.

⁴⁰ *Id.* at 231-32, 241-42.

⁴¹ *Id.* at 241.

⁴² *Id.*

⁴³ *Id.* at 244.

ailing economy.”⁴⁴ The development project would be constructed on ninety acres in Fort Trumbull, Connecticut, which was inhabited by 115 privately owned properties.⁴⁵ Its projected use would comprise of a waterfront conference hotel, restaurants, shopping venues, several marinas, a U.S. Coast Guard Museum, office and retail space, and eighty new residences to create an urban community.⁴⁶ Citing *Midkiff* and *Berman* in its decision, the Supreme Court stated that although the city could not take the petitioners’ land simply to confer a private benefit on a particular private party, the taking was legal because the development plan was not adopted to “benefit a particular class of identifiable individuals.”⁴⁷ It further noted that it has long rejected “any literal requirement that condemned property be put into use for the . . . public.”⁴⁸ Instead, it has “embraced the broader and more natural interpretation of public use as a ‘public purpose.’”⁴⁹

This ruling is unsound in two ways. First, it supports the theory that if the private parties associated with a taking are not absolutely identified (e.g., private parties purchasing the property from developers once construction is complete), the taking will be legal because, at the time of the taking, no named private individuals will benefit.⁵⁰ Second, as Justice O’Connor stated in her dissent, the Court abandoned its “long-held, basic limitation on government power. Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded,” which essentially erases the words “for public use” from the Takings Clause of the Fifth Amendment.⁵¹

As the public use benefit is seemingly fading from the application of eminent domain, jurisdictions throughout the nation have applied their own interpretation as to what constitutes a public purpose.

B. “Blight” Eradication as a Public Purpose

State and local governments, empowered by eminent domain, have capitalized upon this broadened application of “public use.”

⁴⁴ *Kelo*, 125 S. Ct. at 2656.

⁴⁵ *Id.* at 2659.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2662.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.* at 2661-62.

⁵¹ *Id.* at 2671 (O’Connor, J., dissenting).

Under the guise of "revitalization" or "urban renewal," officials determine what geographical areas would be best served by condemnation and redevelopment. These targeted areas usually consist of minority and low-income communities that have little voice in the decision-making process.

In order to legally condemn property, the local government or authority must establish that the area is blighted.⁵² A "blighted area" is defined as "[a]n unaesthetic and uneconomic section; an area of such kind that razing all the buildings will serve a public purpose, even though a few of them may not be substandard or blighted."⁵³ Pertaining to real estate, it is an area "marked by termination of healthy growth and development accompanied by deterioration and decline of property values . . . the shame of every metropolis."⁵⁴

It is widely held that urban renewal or redevelopment and the elimination of blight are public purposes, and that state legislatures may properly grant the right of eminent domain to housing authorities or local governments to carry out such purposes without constitutional violation.⁵⁵ The theory is that these slums, or "blighted" areas, are a "breeding ground for juvenile delinquency, infant mortality, crime, disease, and waste."⁵⁶ Therefore, it is for the benefit of the public if the government condemns these areas, takes the property via eminent domain, and then conveys the land to a private developer to "revitalize" the community.

When confronted with issues of urban development legislation, courts have consistently deemed an area "blighted" based on

⁵² See generally *Emmington v. Solano County Redev. Agency*, 195 Cal. App. 3d 491 (1987) (holding before a project area can properly be selected for redevelopment, it must be blighted); *Berman*, 348 U.S. at 26 (enforcing the District of Columbia Redevelopment Act, which granted power to acquire real property through eminent domain for the prevention, reduction, and elimination of blight).

⁵³ BALLENTINE'S LAW DICTIONARY 141 (3d ed. 1969).

⁵⁴ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 233 (3d ed. 2002).

⁵⁵ See *Berman*, 348 U.S. at 26. See also, *Gohld Realty Co. v. City of Hartford*, 104 A.2d 365, 369 (1954) ("[T]he acquisition of property for the purpose of eliminating substandard, insanitary, deteriorated, slum or blighted conditions . . . [and] the exercise of powers by municipalities acting through agencies known as redevelopment . . . are public uses and purposes for which public money may be expended and the power of eminent domain exercised."); *Hunter v. Norfolk Redev. & Hous. Auth.*, 78 S.E.2d 893, 896 (Va. 1953) (holding that the clearance and reconstruction of blighted areas are necessary for the public welfare); *Hous. & Redev. Auth. v. Greenman*, 96 N.W.2d 673, 680 (1959) ("[T]he elimination of a slum district is a direct benefit to all property owners, even as the establishment of a parkway would be a benefit to them all.").

⁵⁶ Jonathan M. Purver, Annotation, *What Constitutes "Blighted Area" Within Urban Renewal and Redevelopment Statutes*, 45 A.L.R.3d 1096, 1100 (1972).

its overall condition and not “the condition of individual parcels and structures” within the area.⁵⁷ The Court in *Berman* allowed the government to attack the blight problem in an entire neighborhood, “rather than on a structure-by-structure basis.”⁵⁸ Therefore, thriving, enterprising businesses and residential communities located too close to blighted areas can be condemned if they are obstacles to redevelopment plans for the area as a whole.

For example, Los Angeles removed a flourishing residential community in Chavez Ravine under the guise of eminent domain for a baseball stadium for the Dodgers.⁵⁹ Chavez Ravine was home to about 1100 “mainly poor, mainly Mexican American families.”⁶⁰ Funded by the National Housing Act of 1949, the city cited Chavez Ravine as a “blighted area” and notified residents that it would purchase their property and rebuild the area to create more than 10,000 new and improved housing units.⁶¹ The letters containing this eviction notice also promised the homeowners first choice of the housing to be built.⁶² The city then began buying the property and condemning the homes. It also evicted those residents who did not want to leave by using its powers of eminent domain. In 1953, the Housing Authority cancelled the housing project.⁶³ It became clear that there would be no federal homes in Chavez Ravine and no civic attempt to honor the right of first choice in new homes that had been promised to its residents.⁶⁴ That year the Housing Authority sold 170 acres of Chavez Ravine to Los Angeles.⁶⁵ The city then contracted with Walter O’Malley to transfer the Brooklyn Dodgers to the West Coast, offering Chavez Ravine for their future stadium. Opponents of this deal criticized the city for the betrayal of its previous commitment to keep Chavez Ravine for public use. Councilman Edward Roybal urged, “It is not morally or legally right for a governmental agency to condemn private land, take it away from the property owner through [e]minent [d]omain proceedings, then turn around and give it to a private person or corporation for private gain. This I believe is a gross misuse of

⁵⁷ *Id.*

⁵⁸ *Berman*, 348 U.S. at 34.

⁵⁹ See Manbeck, *supra* note 1, at 14.

⁶⁰ Mike Boehm, *Requiem for the Ravine*, L.A. TIMES, May 18, 2003, at E1.

⁶¹ DON NORMARK, CHAVEZ RAVINE, 1949: A LOS ANGELES STORY 17-18 (1999).

⁶² See *id.* at 18.

⁶³ *Arechiga v. Hous. Auth. of Los Angeles*, 7 Cal. Rptr. 338, 340 (Cal. Dist. Ct. App. 1960).

⁶⁴ *Id.* at 340-41.

⁶⁵ NORMARK, *supra* note 61, at 21.

[e]minent [d]omain.”⁶⁶

Chavez Ravine represented a struggle between residents of a neighborhood community, who were fighting to keep their homes, and city officials, who—by labeling the Chavez homes “blighted”—could use the power of eminent domain for the purpose of redevelopment. This is a perpetual struggle to which residents and businesses in susceptible communities are subject. As most courts have left the interpretation of “public use” to state and local legislators, condemnation of private property in anticipation of new stadium construction has become a recognized power of city officials.

The “blight” theory has been further established throughout the country in situations where officials have located real property ideal for a future stadium and then used their power of eminent domain to evict current inhabitants. For example in 1998, the city of Cincinnati entered into an agreement with a private developer to redevelop its riverfront area, which would include the construction of Paul Brown Stadium—the new football stadium for the Bengals. The agreement specified that this redevelopment would “eliminate blight and transform the riverfront into a nucleus of economic development”⁶⁷ Pursuant to Ohio’s Revised Code, which declared that the board “may acquire, construct, improve, maintain . . . or otherwise contract for the acquisition or use of sports facilities,”⁶⁸ the County Board acquired the riverfront property, using eminent domain to remove existing businesses, and commenced construction.

Riverfront business owners whose property was taken from them argued unsuccessfully that their land was not blighted.⁶⁹ They also argued that the county could not use eminent domain powers to take the land, because a football stadium is not considered a public use.⁷⁰ The judge disagreed, stating that there are intangible benefits to the taxpayers flowing from the presence of a National Football League franchise in the county.⁷¹

Property owners do not have much influence in determining what is considered blighted. More states need to enact legislation to define blight so that a bright-line test can be applied to potentially condemned areas. As it currently stands, in most states the

⁶⁶ Chavez Ravine Historical Timeline (on file with New York City Law Review).

⁶⁷ State *ex rel.* Cincinnati Enquirer v. Krings, 758 N.E.2d 1135, 1136 (Ohio 2001).

⁶⁸ OHIO REV. CODE ANN. §307.023 (West 2005).

⁶⁹ Steve Goldsmith, *Eminent Domain Ruling by Ohio Judge Clears Bond Sale for Cincinnati Stadium*, BOND BUYER, Dec. 26, 1997, at 29.

⁷⁰ *See id.*

⁷¹ *See id.*

public does not know how to defend against the accusation that a neighborhood is blighted and in need of "redevelopment" because there is no concrete definition of blight in the legislation. Due to the ineffectiveness of the blight argument, residents must argue the same issue that the Cincinnati business owners argued: A stadium is not a public use.

III. "PUBLIC USE" DEFINED AND EXPANDED IN THE STADIUM CONTEXT

"Public use" is defined as "[t]he public's beneficial right to use property or facilities subject to condemnation."⁷² There are two basic views of public use: the broad, "advantage-to-the-public" view, and the narrow, "use-by-the-public" view.⁷³ Courts have virtually abandoned the narrow use-by-the-public application because it requires that the public directly benefit from the proposed condemnation.⁷⁴ Instead, courts have applied the broad definition such that if a taking could promote the general welfare of the public, it satisfies the public use requirement of the Fifth Amendment, regardless of what private enterprises benefit.⁷⁵ Moreover, if the identities of the private recipients are not immediately identifiable at the time of taking, the taking is not considered to be benefiting private parties at all.⁷⁶

Because legislation does not define "public use," the lack of constraint, combined with broad case interpretation, has encouraged city and state officials to err on the side of private developers. The local rules of eminent domain facilitate this process in that they incorporate "sports facilities" into their definition of what is considered a public use.⁷⁷ Eminent domain is no longer a con-

⁷² BLACK'S LAW DICTIONARY 1288 (8th ed. 2005).

⁷³ See Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205-06 (1978) (discussing the basic meaning of the two public use perspectives).

⁷⁴ *Id.* at 205 (suggesting that the broad advantage-to-the-public view is favored by today's courts interpreting "public use").

⁷⁵ See generally *Kelo v. City of New London*, 125 S. Ct. 2655 (2005); *Tolksdorf v. Griffith*, 626 N.W.2d 163 (Mich. 2001); *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365 (N.D. 1996).

⁷⁶ *Kelo*, 125 S. Ct. at 2661-62 n.6 ("It is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown.").

⁷⁷ See e.g., TEX. LOC. GOV'T CODE ANN. § 325.036 (a) (Vernon 1999) (a sports facility district may acquire by condemnation any land "necessary to construct or improve a sports facility"); CAL. GOV'T CODE § 25351 (West 2003) (defining "public building" to include a "stadium, coliseum, sports arena, or sports pavilion or other building for holding sports events"); CONN. GEN. STAT. ANN. § 32-650 (West 2003) ("[T]he devel-

cise doctrine, but rather a broad guideline giving power to state and local governments to dictate where it will be used and how it will benefit the public. More frustrating is that state legislatures empower local governments, authorities, and even corporations with this authority.⁷⁸

In New York, the state may delegate the right of eminent domain to a corporation provided the property is to be taken for a public use.⁷⁹ Since the interpretation of public use is broad, and its application varies in each jurisdiction, the state is giving private corporations control over its residents' constitutionally protected rights. The lack of a concise definition of public use threatens security in homes and businesses because it empowers private corporations to use the government's takings power to benefit from private property. This is what fuels developers to set their sights on prime real estate in hopes of using eminent domain to remove the established businesses and residences to make way for a more lucrative development.⁸⁰ Such unconscionable abuse of government power has become commonplace across America.⁸¹

A. *The Los Angeles Dodgers: Stadiums Are a "Public Use"*

Consider the city officials of Los Angeles in the 1950s. In order to acquire the Brooklyn Dodgers, the city executed a contract with the Brooklyn National League Baseball Club. It promised to convey to the ball club approximately 185 acres of land it owned in Chavez Ravine. In addition, Los Angeles would use its "best efforts" to acquire additional land totaling about 300 acres.⁸² The California Supreme Court described "best efforts" by stating that the city

opment and operation of the stadium facility, convention center, related parking facilities and other related public improvements and state participation in and assistance to such associated private development are significant governmental uses and functions for which the exercise of state power may be exercised and are public purposes . . . and in the public interest and for the public benefit . . .").

⁷⁸ N.Y. CONST. art. IX, § 1, subsec. (e) ("Local governments shall have power to take by eminent domain private property within their boundaries for public use . . ."); CAL. CONST. art. I, § 19 ("The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings . . ."); TEX. LOC. GOV'T CODE ANN. § 392.061 (a) (Vernon 1999).

⁷⁹ *In re Northville Dock Pipe Line Corp. v. Fanning*, 21 N.E.2d 220, 221 (N.Y. 1968) ("It is well established . . . that a corporation . . . must be acting for a 'public use' when it seeks to exercise its condemnation powers.").

⁸⁰ Dana Hedgpeth, *Supreme Court Case Could Affect Baseball Stadium*, WASH. POST, Feb. 23, 2005, at E1.

⁸¹ *Id.*

⁸² *City of Los Angeles v. Superior Court of Los Angeles*, 333 P.2d 745, 749 (Cal. 1959).

could spend up to \$2,000,000 to place the property in a proper condition to convey to the ball club. Los Angeles would retain title to 40 of the 300 acres for twenty years "to assure performance by the ball club of its obligations to provide and maintain certain recreational facilities during that period, after which title is to be conveyed to the club."⁸³

In applying the doctrine of eminent domain, the court determined that the city had a proper public purpose. It viewed the contract as a whole, stating that "the fact that some of the provisions may be of benefit only to the baseball club is immaterial, provided the city receives benefits which serve legitimate public purposes."⁸⁴ The court further elaborated that the "transfer of Wrigley Field from the ball club to the city," as well as the construction and maintenance of the recreational facilities were "obviously for public purposes."⁸⁵

As for the additional acreage the city would acquire, the court held that this land would be part of the consideration of the contract that enabled the city to enter into an advantageous bargain for a legitimate public purpose.⁸⁶ The city's acquisition of land for the purpose of immediately selling it to a private corporation did not have an effect on the court's ruling, which cited the city charter that stated that the city was authorized to buy "anything useful or convenient" in connection with the exercise of its powers.⁸⁷

This holding gave city officials bargaining power in their efforts to attract sports clubs. Under the pretext of public benefit, local governments in California could condemn and acquire land through eminent domain and then use it as a bargaining tool to contract with sports franchises. A few years later, the *City of Anaheim* expanded this interpretation.

B. *Anaheim Angels: "Public Use" Includes Stadium Parking Lots*

In *City of Anaheim v. Michel*, the city had already built and developed Anaheim Stadium next to the defendants' property, but it also wanted to condemn the defendants' land for parking and accessibility to the stadium. The lower court had concluded that Anaheim lacked the power to exercise eminent domain for sports

⁸³ *Id.* at 749.

⁸⁴ *Id.* at 751.

⁸⁵ *Id.*

⁸⁶ *Id.* at 752.

⁸⁷ *Id.*

arena parking.⁸⁸

However, the Court of Appeals, citing the California Code of Civil Procedure,⁸⁹ held that the city's use of the stadium and surrounding parking area constituted a public use. It stated that while the statute conferring the power of eminent domain should be strictly construed, its construction should not frustrate legislative intent.⁹⁰ This further broadened the power of eminent domain to condemn private property for parking and ingress and egress associated with a multi-purpose stadium, subject only to proof by the government authority that the land is being acquired for a public use.⁹¹

The expansive interpretation of public use to include stadiums and their parking facilities has enabled states to anticipate economically viable and accessible locations for potential sports stadiums. Working in conjunction with private businesses and developers, local officials compete for and acquire national sports teams by offering new and sophisticated stadiums situated in profitable locations. Although sports stadiums might benefit the public by providing entertainment to the people and perhaps boosting the local economy,⁹² the real benefit goes to the private corporations that profit from constructing, developing, and selling the land that was basically handed over to them.

C. *The Texas Rangers: "Public Use" Allows Private Gain*

In what is considered the "first time in Texas history that the power of eminent domain has been used to assist a private organization like a baseball team,"⁹³ the Texas Rangers received legislative approval for the creation of the Arlington Sports Facilities Development Authority, Inc. (ASFDA), a quasi-governmental entity endowed with the power of eminent domain.⁹⁴ Through the

⁸⁸ *City of Anaheim v. Michel*, 66 Cal. Rptr. 543, 545 (Cal. Ct. App. 1968).

⁸⁹ *Id.* Section 1238.1 of the California Code of Civil Procedure provided that the right of eminent domain may extend to property used for "[o]ff-street motor vehicle parking places, including property necessary or convenient for ingress thereto or egress therefrom." *Id.* This section was repealed in 1975 as unnecessary because numerous other statutes were deemed to authorize city acquisition of private property for parking facilities. *Id.*

⁹⁰ *Id.* at 546.

⁹¹ *Id.*

⁹² Errol A. Cockfield, Jr., *Jets Stadium Report: City Fumbled Numbers*, *NEWSDAY*, July 2, 2004, at A5 (stating that the proposed new Jets stadium would create 3586 jobs, attract 20 non-sports events each year, and reap \$28,400,000 in new city tax revenue).

⁹³ Bryce, *Stealing Home*, *supra* note 6, at 8.

⁹⁴ See generally *ARLINGTON SPORTS FACILITIES DEVELOPMENT AUTHORITY, INC.*, *supra* note 5.

ASFDA, the Rangers were able to seize thirteen acres of private property to build their new ballpark.⁹⁵

Although the Rangers and city officials argued that condemnation did not exceed governmental power,⁹⁶ several lawsuits have sprung from this action.⁹⁷ The Mathes family owned three parcels of land, consisting of nearly thirteen acres, located near the stadium site. Using its eminent domain powers, ASFDA seized the land and offered below-market value for all three tracts.⁹⁸ In May of 1996, a county court found ASFDA's offer too low and awarded the Mathes family the difference.⁹⁹ This ruling has since been appealed by ASFDA, which thought it excessive.

However, what is truly excessive is that the Rangers ball club, a private corporation, receives all the revenue generated by the Mathes' land and other land acquired by eminent domain. Presently, the Texas Rangers have development rights over the entire 270-acre complex, which includes an amphitheater, office buildings, shops, and restaurants.¹⁰⁰ Arlington Mayor Richard Greene believed there was a public benefit to be derived from building the ballpark. He stated, "This project is for the direct benefit of the Rangers and the community. There's a mutual benefit in this project, and it's well accepted and well established in law that this project was eligible for that public purpose."¹⁰¹

Another recipient of the "direct benefit" of the ballpark was then-Governor George W. Bush, who had a personal ownership interest in the team. It has been speculated that Bush and other Rangers managers conspired to use the government's power of eminent domain to further their own private interests.¹⁰² A Texas newspaper wrote, "whether the public interest issue is taxes, size of government, property rights or public subsidies of private sports ventures, Bush's personal ownership interest in the Texas Rangers baseball team has been wildly at odds with his publicly declared

⁹⁵ Bryce, *Stealing Home*, *supra* note 6, at 8.

⁹⁶ *Id.* at 10.

⁹⁷ See *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960, 962 (5th Cir. 1994) (finding that "Arlington exercised its eminent domain power for a valid public purpose," although Arlington planned to transfer the property to the Rangers for a future private office complex); see also *G.P. Show Productions Inc. v. Arlington Sports Facilities Dev. Auth. Inc.*, 873 S.W.2d 120, 123 (Tex. App. 1994) (holding that a property owner, including a "lessee for years," is entitled to both a condemnation award and moving expenses).

⁹⁸ Bryce, *Stealing Home*, *supra* note 6, at 8.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 10.

¹⁰¹ *Id.*

¹⁰² *Id.* at 6.

positions on those issues."¹⁰³ After convincing Arlington officials to acquire the land via eminent domain, passing a sales tax increase to pay for 70% of the new stadium, and allowing the Rangers to buy the stadium for one-third of its actual construction cost,¹⁰⁴ it seems that "Bush and his partners hit what can only be described as a towering home run" when they sold the Texas Rangers for \$250,000,000.¹⁰⁵ For his \$605,000 investment, Bush received between \$10,000,000 and \$14,000,000.¹⁰⁶

IV. WHY SPORTS STADIUMS ARE NOT A PUBLIC BENEFIT

A. *The Beneficiaries of New Stadiums*

The tendency of sports teams to relocate has increased because of advances in stadium technologies.¹⁰⁷ The standard, multi-purpose stadium of the 1960s and 1970s has morphed into a sophisticated, single-sport arena with "luxury suites, club boxes, elaborate concessions, catering, signage, advertising, theme activities, and even bars, restaurants, and apartments with a view of the field."¹⁰⁸ With this variety of moneymakers, a new stadium can generate up to \$30,000,000 in extra revenues a year for the team it houses.¹⁰⁹

City leaders have become very aggressive in the competition to acquire a professional sports team. Not only will a professional team put their city "on the map," but it will also bring in more revenue opportunities. Usually, city officials do not give residents an opportunity to participate in, or object to their plans, insisting instead that a new sports arena will improve the local economy.¹¹⁰ They argue that the building of a new stadium will create construction and stadium jobs, attract tourists and new industry to boost the local economy, and the overall increase in local income will have a "multiplier effect," which will cause still "more new spending and

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Robert Bryce, *Governor Deadbeat*, AUSTIN CHRON., Jan. 16, 1998, <http://www.austinchronicle.com/issues/vol17/issue19/pols.bush.html>.

¹⁰⁶ *Id.*

¹⁰⁷ Roger G. Noll & Andrew Zimbalist, *Sports, Jobs, and Taxes: Are New Stadiums Worth the Cost?* 15 BROOKINGS REV. 35, 37, available at <http://www.brookings.org/press/review/summer97/noll.htm>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Neil deMause, *The Jets' End Run: Will Bloomberg and Pataki Spend Billions Without Legislative Approval?*, VILLAGE VOICE, Nov. 16, 2004, <http://www.villagevoice.com/news/0446,demause,58454,5.html>.

job creation.”¹¹¹ These are the same officials who attend games sitting next to wealthy developers and team owners in the “sparkling new luxury boxes,” while the average fan faces steeply increased ticket prices.¹¹²

B. *Studies Show: New Stadiums Have No Public Benefit*

In reality, a new sports facility has an extremely small effect on the overall economic activity and employment. A study by the Brookings Institution found that “[n]o recent facility appears to have earned anything approaching a reasonable return on investment Regardless of whether the unit of analysis is a local neighborhood, a city, or an entire metropolitan area, the economic benefits of sports facilities are de minimus.”¹¹³ Construction jobs are temporary, and new stadium jobs pay minimum wage.¹¹⁴ Such “benefits” are both provisional and minimal.

These expensive new stadiums are often funded by taxes that disregard residents’ economic status.¹¹⁵ In city after city, funds desperately needed by schools or that would otherwise be used to improve the local infrastructure and enhance job opportunities are unreasonably allocated to pay the construction costs of these stadiums.¹¹⁶ While attendance may increase when a new stadium is built, football and baseball both share ticket revenues with other cities, leaving the local community little to gain.¹¹⁷ Additionally, the bulk of the sports revenue “goes to a relatively few players, managers, coaches, and executives who earn extremely high salaries”¹¹⁸ and usually do not live where the team plays, so their income is not spent locally.¹¹⁹

C. *Resident Opposition*

Some taxpayers are objecting to their money and their land

¹¹¹ Noll & Zimbalist, *supra* note 107, at 36.

¹¹² JOANNA CAGAN & NEIL DEMAUSE, *FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT*, at viii-ix (1998).

¹¹³ Noll & Zimbalist, *supra* note 107, at 36.

¹¹⁴ Robert A. Baade, *Stadiums, Professional Sports, and Economic Development: Assessing the Reality*, HEARTLAND POLICY STUDY, No. 62, Apr. 4, 1994, at 20, available at <http://heartland.org/pdf/19765a.pdf>. “The types of jobs induced by stadium activity are typically low-wage and seasonal: ticket takers, ushers, vendors, restaurant and bar workers, guards, parking lot attendants, and so on.” *Id.*

¹¹⁵ CAGAN & DEMAUSE, *supra* note 112, at 150.

¹¹⁶ *Id.*

¹¹⁷ Noll & Zimbalist, *supra* note 107, at 36.

¹¹⁸ *Id.* at 37.

¹¹⁹ *Id.* at 36.

benefiting private corporations and team owners. After watching their half-cent sales tax increase pay for the acquisition of private land, as well as the construction costs of building a new stadium for the Bengals, Ohio residents were angry that the football team continued to lose after they moved into the new stadium for the 2000 season. In 2001, the *Cincinnati Enquirer* won the right to provide the public with access to all documents regarding the contract for development of the stadium; the stadium was a public benefit, therefore the public had a right to access its records.¹²⁰ This was a setback to private developers because they now had to make all relevant documents pertaining to "cost overruns," communications between parties, and other reports available to the public.¹²¹ Additionally, a federal court recently ruled that a taxpayer could pursue a lawsuit alleging the NFL has illegally used its clout to extort new stadiums from cities.¹²² U.S. District Judge S. Arthur Spiegel opined that the NFL was "able to coerce the construction of a new stadium and negotiate unjustifiably favorable lease terms solely because of the monopoly that they enjoy over professional football."¹²³ These rulings have provided Ohio residents the right to retrieve the stadiums' construction and financial records and use this information in their future suit against the NFL.

Other residents inhabiting areas of potential stadium development are also voicing opposition. Indeed, this is becoming a national issue, as an overwhelming amount of sports teams are seeking to relocate to larger, more sophisticated stadiums. In New York, both Brooklyn and the Upper West Side of Manhattan are being considered for the future stadiums of the New Jersey Nets and the New York Jets, respectively. Although residents of both communities are actively voicing their opposition, at the time this article was written, only the plans for the Jets stadium on the Upper West Side have been thwarted.¹²⁴

In October of 2004, the Pratt Institute Center for Community and Environmental Development conducted a survey of Prospect Heights residents for their reaction to the potential development of a 19,000-seat arena and basketball sports complex in their vicin-

¹²⁰ *Cincinnati Enquirer*, 758 N.E.2d at 1141.

¹²¹ *Id.*

¹²² See Kevin Osborne, *Bengals Case Prompts Lawsuit*, CINCINNATI POST, Mar. 30, 2004, at 6A.

¹²³ *Id.*

¹²⁴ *NY Jets Football Team Gives Up W. Side Stadium Site*, REUTERS, Aug. 31, 2005, http://www.redorbit.com/news/sports/226565/ny_jets_football_team_gives_up_w_side_stadium_site/index.html.

ity.¹²⁵ Prospect Heights is a Brooklyn neighborhood that cherishes its sense of community, security, and social and economic diversity.¹²⁶ The survey concluded that although the residents would like to see development in their community, such development should create affordable housing, good jobs, and most importantly, improve public education, ease traffic and parking congestion, and enhance neighborhood safety.¹²⁷ The majority of the respondents were very concerned about being displaced through the use of eminent domain, which had been suggested by the developer and project advocates.¹²⁸

Unsurprisingly, education, affordable housing, permanent employment, and security from crime were priorities for the respondents, which, coincidentally, would benefit the public as a whole.¹²⁹ However, the Prospect Heights study showed that the stadium complex would negatively impact Prospect Heights; it would not incorporate the interests of the residents and businesses in the community. Instead, it would only further the interests of the private developers at the community's expense.

Similarly in Minneapolis, Minnesota, officials tried to gain support for new stadiums for the Twins and the Vikings by advocating a better "quality of life." They posited that new stadiums would give "causes to root for" and "provide the elderly . . . with something to brighten their lives."¹³⁰ These meager arguments prompted residents to state that there were other ways to benefit the public, with one witness—an economist—testifying before the Tax Committee that investing in early childhood education would be more beneficial.¹³¹ Throughout the country, as residents become more aware that they might be at risk of eminent domain

¹²⁵ *Prospect Heights Neighborhood Survey*, PRATT INSTITUTE CENTER FOR COMMUNITY AND ENVIRONMENTAL DEVELOPMENT, Oct. 2004, at 1, <http://www.prattcenter.net/pubs/prospectsurveyreport.pdf> ("Prospect Heights, a neighborhood of 20,000 people near downtown Brooklyn, has been the focus of significant media attention after the unveiling of the proposed redevelopment of the Brooklyn Atlantic Yards Project by Forest City Ratner Companies in the spring of 2004. The multi-billion dollar plan includes a 19,000-seat Arena and basketball sports complex, commercial space for office and retail, and market-rate housing.")

¹²⁶ *Id.* at 2 ("According to the 2000 U.S. census, 14% of Prospect Heights residents are Latino, while 86% are non-Latino. Of the non-Latino population, 28% are white, 51% are black, 4% are Asian and 3% are of two or more races.")

¹²⁷ *Id.*

¹²⁸ *Id.* at 5.

¹²⁹ *Id.* at 3.

¹³⁰ Aron Kahn, *Quality-of-Life Issue Debated*, ST. PAUL PIONEER PRESS, Apr. 28, 2004, at 5B.

¹³¹ *Id.*

proceedings for future sports complexes, they have become more vocal in determining what will and will not benefit the public, thereby creating their own definition of "public use."

V. PROTECTING THE PUBLIC FROM PUBLIC TAKINGS

Over time, eminent domain has become a tool misused by city officials. As former Detroit Mayor Dennis Archer so eloquently put it, "[w]ith the new powers we have with eminent domain, we can now go to the three cement companies along the river and relocate them to another area."¹³² These "new powers" must not be misconstrued by government officials and agencies. There is no public benefit in forcing a family to leave its home, or a business to change locations to make room for the construction and private benefit of a sports stadium. If privately owned sports stadiums are believed to be a public benefit, shopping centers, movie theaters, corporate office centers, and even restaurants can be considered a benefit to the public as well. The motivation behind all of the above is profit¹³³—not profit that will be invested in the public community, but rather private profit that will end up in the bank accounts of a few individuals.¹³⁴

The powers of eminent domain must be regulated so that if a public taking does occur, it will be the public who truly benefits. The Framers of the Constitution could not have anticipated such exploitation of the "public purpose" exception to the Fifth Amendment. Therefore, it is up to current legislators to regulate the untamed power of eminent domain. The following are suggested remedies and precautions to protect the public and curtail the misuse of eminent domain.

A. *Determination of Actual Economic Benefit to the Public*

When developers and team owners introduce the idea of relocating a sports team to a specific city, they claim the benefits to the

¹³² R.J. King, *Riverfront Rebirth to Cost \$5 Billion*, DETROIT NEWS, June 11, 1999, at 4B (mentioning the city's acquisition of land for two new stadiums for the Detroit Tigers and Detroit Lions).

¹³³ See generally CAGAN & DEMAUSE, *supra* note 112; KEVIN DELANEY & RICK ECKSTEIN, *PUBLIC DOLLARS, PRIVATE STADIUMS: THE BATTLE OVER BUILDING SPORTS STADIUMS* (2003).

¹³⁴ DELANEY & ECKSTEIN, *supra* note 133, at 40 (stating that publicly financed stadiums are likened "to other pieces of the city's publicly financed infrastructure, such as libraries, parks, and museums . . . [b]ut among all these entities, only the stadium is a privately owned, for-profit business that can be sold for a huge private windfall after it is built.").

public through economic development will outweigh the costs and inconvenience that the public might experience.¹³⁵ Many city officials support the theory that the construction of a state-of-the-art stadium will not only appease the team, but will also provide thousands of temporary and permanent jobs to local residents who will ultimately have the privilege of attending the games and rooting for their home team.¹³⁶

As previously mentioned, the Brookings Institution conducted a survey examining “the local economic development argument from all angles: case studies of the effect of specific facilities, as well as comparisons among cities and even neighborhoods that have and have not sunk hundreds of millions of dollars into sports development.”¹³⁷ Their findings are surprising in that, contrary to popular belief, the public does not benefit from the acquisition of private property for use as a sports stadium.¹³⁸ The study found that sports teams and facilities are not a source of local economic growth and employment.¹³⁹ Sports facilities do not attract tourists or new industry.¹⁴⁰

The Brookings study also concluded that the magnitude of public investment exceeds the financial benefit of a new stadium to a team.¹⁴¹ Host cities generally pay more than \$10,000,000 per year for the privilege of having a stadium in their community.¹⁴² Even the most successful new stadiums end up costing residents money. For example, Oriole Park costs Maryland residents \$14,000,000 per year.¹⁴³ This leads to the conclusion that stadiums

¹³⁵ *Id.* Advocates of stadiums have argued that a “city’s professional sports are capable of doing what religion cannot: bringing disparate people together around a shared urban identity.” *Id.*

¹³⁶ *See, e.g.*, Press Release, George E. Pataki, Governor, Governor Pataki, Mayor Bloomberg and New York Yankees Announce Plans for Area Revitalization and New Stadium (June 15, 2005), http://www.nylovesbiz.com/press/press_display.asp?id=620.

¹³⁷ Noll & Zimbalist, *supra* note 107, at 36. For more information see Sports, Jobs, and Taxes: The Economic Impact of Sports Teams and Stadiums (Roger G. Noll & Andrew Zimbalist eds., 1997).

¹³⁸ Noll & Zimbalist, *supra* note 107, at 36-37.

¹³⁹ *Id.* at 36.

¹⁴⁰ *Id.* Oriole Park at Camden Yards might be considered an exception to this rule, since about a third of attendees at Orioles games reside outside the Baltimore area. In addition, Baltimore is just forty miles from Washington, D.C. which, until recently, had no major league baseball team. *Id.* Despite Oriole Park’s advantages, “the net gain to Baltimore’s economy in terms of new jobs and incremental tax revenues is only about \$3 million a year—not much of a return on a \$200 million investment.” *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

are more an economic drain than a benefit to the public. An additional study by the Heartland Institute supports this conclusion. In that study, twenty-seven out of thirty cities with sports stadiums constructed within the past ten years showed no compelling relationship between the presence of the new stadium and actual per-capita personal income growth.¹⁴⁴ In the remaining three cities, the existence of a sports stadium had a negative impact.¹⁴⁵

Therefore, before condemning private land to be used for a future stadium, state legislators need to thoroughly research the advantages and disadvantages to the affected public. Using case studies of comparable cities before and after stadium construction, officials can determine if the public really will benefit from this expensive and extensive transformation. Stadiums that would have a negative financial impact on the local residents are not an advantage to the public.

B. *Strict Interpretation of "Public Use"*

While considering whether or not to deprive persons of their private property, the judiciary should apply a strict interpretation of "public use,"¹⁴⁶ only considering a taking to be for the public if the land will provide guaranteed direct benefits to society.¹⁴⁷ One approach is to apply a balancing test. Using this approach, a court would review the factors considered by the state or local officials. Such factors include the cost and effect of relocating existing businesses and residences to make way for the stadium complex, the disruption of local neighborhoods, the projected cost and benefit to the community, and the practicability of the public use of the stadium. The realistic projected public benefit would have to outweigh the private gain in order for a taking to be constitutional.

Some courts have taken similar approaches in observing a strict interpretation of "public use." The Superior Court of Massachusetts "excoriated Springfield Mayor Michael J. Albano for improperly using the city's eminent domain powers to take privately owned land to build a minor league ballpark."¹⁴⁸ Specifically, the court ruled that the city acted in bad faith in exercising the power

¹⁴⁴ Baade, *supra* note 114, at 15.

¹⁴⁵ *Id.*

¹⁴⁶ See *City of Springfield v. Dreison Investments, Inc.*, No. 19991318, 991230, 000014, 2000 WL 782971, at *50 (Mass. Super. Ct. Feb. 25, 2000) (holding that if the dominant reason for the taking was to benefit private interests, it would be invalid).

¹⁴⁷ Scott, *supra* note 33, at 475.

¹⁴⁸ Vaillancourt, *supra* note 9, at C20.

of eminent domain to acquire title.¹⁴⁹

The state of Massachusetts has avoided these specious condemnations, opting to use eminent domain for actual public purposes like roads, schools, police stations, utilities, parks, and conservation of open spaces.¹⁵⁰ A Massachusetts Superior Court ruling against public land-taking for a ballpark in Springfield has quieted recent proposals for a \$660,000,000 plan to build a new Fenway Park on a fifteen-acre parcel of privately owned land next to the old stadium.¹⁵¹ Stadium opponents will surely use this decision to challenge any Boston eminent domain proceedings. Though Red Sox proponents may argue that the taking of land for a sports stadium is a valid public purpose, in Massachusetts “the extension of public privileges, powers, and exemptions and the use, rental and operation of the projects must be adequately governed by appropriate standards and principals set out in legislation.”¹⁵² Since the legislation has no clause allowing a taking of private property to benefit private interests, Massachusetts courts will not extend the application of eminent domain to seize land for privately owned sports teams.

Another significant judicial stride in the strict interpretation of “public use” is the 2004 Michigan Supreme Court opinion in *County of Wayne v. Hathcock*, which overruled the *Poletown* decision.¹⁵³ The justices in *Wayne* agreed that *Poletown* was “a radical departure from fundamental constitutional principles,” and they “must overrule *Poletown* in order to vindicate our Constitution, protect the people’s property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law.”¹⁵⁴ This was a groundbreaking step towards the narrow application of the “public use” doctrine. The court stated, “Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been

¹⁴⁹ *Dreison Investments Inc.*, 2000 WL 782971, at *45 (Springfield had attempted to take a shopping mall and manufacturing plant by eminent domain to build a minor league ballpark.).

¹⁵⁰ Dana Berliner, *Eminent Domain for Sox Is Off-Base*, BOSTON HERALD, Jan. 15, 2001, at 23.

¹⁵¹ DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 99 (2003), available at http://www.castlecoalition.org/pdf/report/ED_report.pdf.

¹⁵² Joan Vennoch, *Judge’s Decision Is Bad News for Red Sox*, BOSTON GLOBE, Apr. 18, 2000, at A11.

¹⁵³ *Wayne*, 684 N.W.2d at 787.

¹⁵⁴ *Id.*

mandated by our constitution”¹⁵⁵ It cited the dissent by Justice Ryan in *Poletown*, which put forth three principles to determine “public use.”¹⁵⁶ The first principle discussed by Justice Ryan is that a private land transfer to a private entity must involve “‘public necessity of the extreme sort otherwise impracticable.’”¹⁵⁷ The second principle concerns a situation in which a transfer of private land “to a private entity is consistent with the constitution’s ‘public use’ requirement when the private entity remains accountable to the public in its use of that property.”¹⁵⁸ Finally, “condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern.”¹⁵⁹ This analysis to determine “public use” has overruled the historically overbroad application and will hopefully set precedent for future cases.

As some state courts are progressively narrowing the definition of “public use” in takings cases, their strict interpretation must be applied to takings for sports stadiums, where developers and sports franchises have avoided the open real estate market and maximized their own profits at the public’s expense. Courts should therefore contemplate such factors considered in Massachusetts and Michigan and apply the narrowest interpretation of “public use.”

C. Concise Legislative Definition of “Public Use”

If the judicial branch fails to narrowly interpret “public use,” consistent legislation should be passed to regulate the powers of eminent domain. City officials and authorities are largely unchecked in their power to control “redevelopment” and therefore have acquired an influential role in the real estate market.¹⁶⁰ As a result, municipal agencies become dominated by large private corporations, enabling such corporations to gain ownership of prime locations that they would not otherwise be able to obtain.¹⁶¹

Legislation should mandate that any land to be condemned

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 781.

¹⁵⁷ *Id.* (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J., dissenting)). “[T]he exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.” *Id.*

¹⁵⁸ *Hathcock*, 684 N.W.2d at 782.

¹⁵⁹ *Id.* at 782-83.

¹⁶⁰ Scott, *supra* note 33, at 470.

¹⁶¹ *Id.*

via eminent domain should be in the amount that is justifiably needed. In order to propose an eminent domain proceeding, city officials should be required to specify the amount of land needed for their redevelopment project, the amount of private land that will be taken, and the reason for it. After the preliminary requirement of land use specification, city officials should then apply the balancing test. If the public benefit received from the taking outweighs all private benefit, the eminent domain proceedings can be justified. This type of legislation could be applied on the federal or state level.

At a state level, federal subsidies given to states for funding stadiums and other sports complexes should be conditioned on the results of a two-prong test. First, state officials must prove that the land being taken is the justifiable amount needed for redevelopment. Second, they must meet the requirements of the balancing test by proving that the public benefit will outweigh the private gain. If both prongs are met, then the federal government should reward state and local governments with subsidies and tax incentives to construct the stadium. The application of the two-prong test would avoid unfair competition among states in their attempts to attract sports franchises because all states would have to guarantee public benefit in order to be financially subsidized. If a state fails the two-prong test and cannot prove that the public will benefit from the takings, funding will not be available. This could also quash potential rivalry among cities and states for sports teams because they will not have substantial financial backing to support the construction of a new stadium. Finally, it would leave the funding of new stadiums to private corporations and investors, who are the ultimate beneficiaries.

In light of the *Kelo* decision, some state and federal legislators have proposed and enacted legislation that would protect the private property of U.S. citizens.¹⁶² There are several bills pending in Congress specifically limiting both federal and state use of eminent domain.¹⁶³ Stating that “the protection of private property is one

¹⁶² Donald Lambro, *Alabama Limits Eminent Domain*, WASH. TIMES, Aug. 4, 2005, at A1. After the *Kelo* decision, legislation to end or limit the use of eminent domain was introduced in seventeen states: Alabama, California, Connecticut, Delaware, Florida, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, and Texas. *Id.*

¹⁶³ See Eminent Domain Limitation Act of 2005, H.R. 3631, 109th Cong. § 3(b)(1) (2005) (prohibiting the use of eminent domain for economic development); see also Private Property Rights Protection Act of 2005, H.R. 3135, 109th Cong. (2005) (preventing states from using “economic development as a reason for exercising [their] power of eminent domain if [f]ederal funds would contribute in any way” to

of the three basic tenets of American government” and that it is the “constitutional duty of the Federal Government to defend the Constitution,” Congress has declared that “economic development is not a public use, for the purposes of eminent domain.”¹⁶⁴ The Eminent Domain Limitation Act of 2005 even cites the *Kelo* opinion and states that this expansion of the definition of public use “significantly threatens[s] private property rights.”¹⁶⁵

In Alabama, legislation was recently passed¹⁶⁶ prohibiting “governments from using their eminent-domain authority to take privately owned properties for the purpose of turning them over to retail, industrial, office or residential developers.”¹⁶⁷ It was signed by Republican Governor Bob Riley, who opposed the Supreme Court’s *Kelo* ruling, calling it “misguided” and a “threat to all property owners.”¹⁶⁸ Governor Riley added that a “property rights revolt is sweeping the nation, and Alabama is leading it.”¹⁶⁹ It is obvious that the state was reacting to the very facts which gave rise to *Kelo*—and making a good-faith attempt to prevent a recurrence of those facts.

New York also responded to the *Kelo* decision with proposed legislation to amend its eminent domain procedure law.¹⁷⁰ Although it recognized the Supreme Court’s decision to expand the eminent domain power, New York legislators acknowledged that “since the taking of a person’s home or dwelling is oftentimes a traumatic process, procedural safeguards and transparency are necessary to protect the citizens of this state.”¹⁷¹ Such proposed bills include a mandatory vote of local government for instances where eminent domain is proposed for the condemnation and transfer of land to a private developer,¹⁷² municipal approval of the exercise of eminent domain when the primary purpose is economic development, and the creation of a temporary state commission to consider further eminent domain reforms.¹⁷³

the exercise of eminent domain, and also prohibiting the federal government from using “economic development as a reason for exercising its power of eminent domain”).

¹⁶⁴ H.R. 3631, 109th Cong. (1st Sess. 2005).

¹⁶⁵ *Id.*

¹⁶⁶ ALA. CODE § 11-1B-2 (2005).

¹⁶⁷ Lambro, *supra* note 162, at A1.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See A9050, Assem., Reg. Sess. (N.Y. 2005); A8865, Assem., Reg. Sess. (N.Y. 2005); A9043, Assem., Reg. Sess. (N.Y. 2005).

¹⁷¹ A9050, Assem., Reg. Sess. (N.Y. 2005).

¹⁷² A8865, Assem., Reg. Sess. (N.Y. 2005).

¹⁷³ See A9043, Assem., Reg. Sess. (N.Y. 2005).

The fact that over a quarter of states have rapidly moved to amend their eminent domain law in favor of a more narrow interpretation of public use exemplifies that the majority of the Supreme Court Justices do not share a similar interpretation of the public use exception to the Fifth Amendment as do the citizens of this country.

VI. CONCLUSION

The exploitation of eminent domain to take private land for sports arenas is a public issue that must be addressed. The list of sports teams wishing to relocate to newer, larger stadiums is extensive, with a new team added regularly. It is crucial that the public be aware of this practice so that it can react before a developer sets his sights on a community for a future stadium. Studies have shown that new stadiums do not bring economic benefit to communities subjected to such transformation. While authorities are seizing property of residents and businesses through eminent domain under the guise of "public use," in reality, the actual beneficiaries of such takings are private developers and team owners. Although some state courts and legislators have made advances in addressing the interpretation of "public use," a strict definition must be consistently applied throughout the nation. If the Supreme Court will not take the appropriate steps, then lawmakers must continue to respond to the concerns of the public by creating protective legislation to narrowly define "public use" and safeguard the individual's constitutional right to own property. Finally, the public, as a whole, must continue to express shock and discontent over what officials and legislators believe to be in the public's best interest.