The Kelo Effect: Eminent Domain and Property Rights in Louisiana

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I. INTRODUCTION

Most property owners in America have never contemplated the idea that one day the government might force them to leave their home. However, United States law has long recognized the power of a government as sovereign to take private property for what has sometimes been deemed a "public good,"¹ "public benefit,"² or "public necessity."³ The traditional notion of the purposes for which the government was authorized to take private property included building roads,⁴ railroads,⁵ and erecting dams.⁶ Justification for these types of takings rests upon the belief that the individual must forego his right to property for the sake of a common good benefiting society at large.⁷

From this country’s beginnings, the founders recognized the potential for abuse with respect to the government’s eminent domain power. In order to combat potential abuse, they placed a restriction on “takings” in the Fifth Amendment: “nor shall private property be taken for public use, without just compensation.”⁸ At first glance, this clause plainly seems to contain a restriction, i.e., that the government shall not take property unless it is for public use and just compensation is paid. The evolution of the “public use” limitation evidences an ever-

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* At the time of this publication, the Louisiana Legislature has proposed an amendment to the Louisiana Constitution, Article I, Section 4(B). The proposal awaits a vote of the citizens. See S.B. 1, 2006 Leg. Reg. Sess. (La.).
7. Compensation for the taking plays a key role and adds to the justification for the government’s taking of property, but that is not the focus of this comment. Its sole focus is the public use requirement.
8. U.S. CONST. amend. V.
broadening interpretation by both legislatures and courts. Thus, a once-meaningful restriction is in danger of becoming an empty guarantee. 9

The constitutional line dividing justified and unjustified takings has become a highly debated issue both at the federal and state levels. The United States Supreme Court’s latest pronouncement on the issue in Kelo v. City of New London, Connecticut 10 has fueled the debate. In Kelo, a five to four decision, the Court explicitly held that “[the] city’s decision to take property for the purpose of economic development satisfies the ‘public use’ requirement of the Fifth Amendment.” 11 Louisiana, like many other states, has sprung into action in response to this decision. Specifically, Louisiana legislators are in the process of drafting provisions in an attempt to protect property owners in this state from the sort of taking that occurred in Kelo. 12

This comment focuses on Louisiana’s law of eminent domain and on Kelo’s impact on the interpretation of that law. It also gives suggestions as to the future path of Louisiana law so that this state might protect property rights to a greater extent than required by the United States Constitution as interpreted in Kelo. This landmark case undoubtedly broadened, for better or for worse, the scope of the government’s power to use eminent domain. The initial reaction among many is that Kelo was wrongly decided. As Justice John Paul Stevens points out in the majority opinion, however, states are free to enact greater protections of property than those required by the United States Constitution. 13 This comment is meant to function as a guide for


11. Id. at 2661.


the State of Louisiana as to measures that might prevent the type of taking that occurred in Kelo.14

The following section, Part II, analyzes the Kelo facts and the reasoning of the majority, concurring, and dissenting opinions of the United States Supreme Court. Part II concludes by outlining the historical basis concerning the law of eminent domain. The current Louisiana constitutional provision on property rights and the ways in which it might be interpreted to prevent a Kelo taking are discussed in Part III-A. Part III-B analyzes a recent case in which a Louisiana court addressed an issue very similar to the one in Kelo and how that case, or one like it, could be decided if it were to reach the Louisiana Supreme Court. Possible revisions of the constitutional provision on property are assessed in Part IV-A. Part IV-B addresses a Michigan case which might serve as a model for the Louisiana courts when addressing any future Kelo takings.

II. BACKGROUND: Kelo vs. New London and Historical Analysis

The decision in Kelo stands as a vitally important development in the law of eminent domain because it has the potential to affect the lives of many in this country. This section discusses the facts from which the case arose, along with the majority, concurring, and dissenting opinions. This case arguably represents the outer limits of the government’s power to take property under the Federal Constitution. Understanding this limit helps to guide the development of Louisiana’s constitutional law on takings as will be explored later in this comment. At the end of this section, the origin of the power of eminent domain and its development in this country are also discussed.

A. Kelo Facts

In 2000, on the day before Thanksgiving, Susette Kelo returned to her home in New London, Connecticut, to find a

14. Hereinafter referred to as a “Kelo taking”; that is, one where a private home is taken for the purpose of economic development.
condemnation notice nailed to her door. The reason for her eviction was that the City of New London had approved a redevelopment plan that called for the condemnation of approximately 115 privately-owned properties so that the area could be turned into an industrial park, including office space, hotels, and restaurants. The New London Development Corporation ("NLDC"), a private nonprofit entity which had been created some years earlier to assist the city in economic development, was authorized by the city to condemn the properties in this area. Moreover, as long as Ms. Kelo remained in the house, the city required that she pay rent.

Most of the owners of these properties in New London acquiesced to the city's demand and voluntarily sold their homes to the NLDC. Susette Kelo and a few of her neighbors, however, refused to leave and subsequently filed suit in the New London Superior Court in December 2000. Petitioners claimed, inter alia, that the taking of their property violated the "public use" restriction in the Fifth Amendment. After a seven-day bench trial, the court issued a permanent restraining order prohibiting the taking of the part of the condemned property owned by the plaintiffs. On appeal by both sides, the Connecticut Supreme Court reversed the trial court and held that all of the city's takings were constitutional. The Supreme Court of the United States granted Susette Kelo's petition for certiorari.

B. Kelo Decision

The Supreme Court of the United States presented the issue very succinctly: "We 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

15. Laura Mansnerus, Ties to a Neighborhood At Root of Court Fight, N.Y. TIMES, July 24, 2001, at B5.
17. Id.
18. Id. at 2660.
19. Id.
20. Id.
Amendment." At the outset, the *Kelo* Court recognized two distinctly opposite approaches to the problem. The first is the longstanding and widely-accepted principle of Justice Samuel Chase, who proclaimed in *Calder v. Bull* that the government cannot take property from one citizen and give it to another. The competing approach, and the one ultimately adopted by the Court in *Kelo*, proclaims that "a State may transfer property from one private party to another if future 'use by the public' is the purpose of the taking." The Court recognized that this was a close case; it did not involve a purely private taking, which was condemned in *Midkiff*, nor was this development to be used by the general public in the same way as a road or post office. This case presented a novel question for the Court to consider.

Justice Stevens's majority opinion very quickly deviated from the words of the Constitution. Stevens proclaimed that past jurisprudence had "embraced the broader and more natural interpretation of public use as 'public purpose'" when interpreting the takings clause of the Fifth Amendment. After essentially redefining the term "public use" in this manner, the Court went on to discuss *Berman* and *Midkiff*, precedents that arguably controlled the outcome of the present case. As would be expected when affirming the actions of a legislature, the Court described the test for the restriction on takings as being very broad, "reflecting our longstanding policy of deference to legislative judgments in this field." The Court quoted from *Midkiff*: "[T]he State’s purpose of eliminating the 'social and economic evils of a land oligopoly' qualified as a valid public use." While the majority felt that the condemnations in *Kelo* were not beyond federal constitutional limits, the majority opinion closed by pointing out that states are not precluded from

24. *Id.*
25. *Id.* (citing 3 U.S. 386, 388 (1798)).
26. *Id.*
29. See discussion of cases infra Part II.C.
31. *Id.* at 2664.
imposing greater restrictions against the power of eminent domain, either by state constitution or statutes.\(^{32}\)

Justice Anthony Kennedy concurred in the majority opinion, but wrote separately to add further observations. His opinion recognized "the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings."\(^{33}\) While Justice Kennedy did not speculate as to what types of "cases might justify a more demanding standard," he ultimately decided that this was not a case that required a departure from the deferential standard articulated in Berman and Midkiff.\(^{34}\) Justice Kennedy's concurrence is significant because it recognized that there may be situations when a reviewing court should use a more stringent standard of review.

Justice Sandra Day O'Connor and Justice Clarence Thomas both wrote in dissent of the majority opinion. Justice O'Connor's opinion was fierce in her belief that the majority opinion went too far in upholding the taking in this case. She began by stating the well-known presumption that no words are needlessly used when interpreting the Constitution.\(^{35}\) She recognized that the determination of public or private use is one for the legislature to make and the Court should give "considerable deference" when analyzing the constitutionality of that decision.\(^{36}\)

Justice O'Connor identified three broad categories of takings that comply, in her view, with the public use requirement. The first category involves takings where the property is to be used as a road, hospital, or military base.\(^{37}\) The second category involves transfers of "private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, a public utility, or a stadium."\(^{38}\) The third category, as Justice O'Connor pointed out,

\(^{32}\) Id. at 2668.
\(^{33}\) Id. at 2670 (Kennedy, J., concurring).
\(^{34}\) Id.
\(^{35}\) Id. at 2672 (citing Wright v. United States, 302 U.S. 583 (1938)) (O'Connor, J., dissenting).
\(^{36}\) Id. at 2673.
\(^{37}\) Id.
\(^{38}\) Id.
accommodates "certain exigencies" and in this group she cited Berman and Midkiff.\textsuperscript{39}

Justice O’Connor recognized, as the majority opinion did, that Berman and Midkiff serve as guiding precedents in this case. Her dissent, however, factually distinguished these cases from Kelo because in those cases "each taking directly achieved a public benefit" while taking petitioners’ homes in the present case would achieve no such direct benefit.\textsuperscript{40} Justice O’Connor’s dissent concluded with the proposition that "any property may now be taken for the benefit of another private party."\textsuperscript{41} She predicted that the victims of these takings will be the poor and those who are helpless in the political process, while "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."\textsuperscript{42}

Justice Thomas joined in Justice O’Connor’s dissent, but also wrote separately.\textsuperscript{43} His opinion was based on a strict reading of the Constitution and his perception of the original understanding of the Public Use Clause as a "meaningful limit on the government’s eminent domain power."\textsuperscript{44} Justice Thomas questioned the majority’s reliance on Berman and Midkiff as precedents. He avowed that the decisions in those cases resulted from reliance on a line of unsound jurisprudence, and thus urged the Court to "consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property."\textsuperscript{45}

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 2674.
\textsuperscript{41} Id. at 2677.
\textsuperscript{42} Id.
\textsuperscript{43} Justice Thomas’s dissent is not surprising given his affinity for the property theories of Professor Richard A. Epstein, who vigorously touts the right to property. See Jeffrey Rosen, The Unregulated Offensive, N.Y. TIMES, Apr. 17, 2005, at § 6.
\textsuperscript{44} Kelo, 125 S. Ct. at 2678 (Thomas, J., dissenting).
\textsuperscript{45} Id. at 2686.
C. History and Development of Eminent Domain

The law of eminent domain has no clear beginning. A prominent scholar on the subject noted:

The origin of the power of eminent domain is lost in obscurity, since before the title of the individual property owner as against the state was recognized and protected by law, the right to take land for public use was merged in the general power of the government over all persons and property within its jurisdiction.\(^{46}\)

Historically, the concept of eminent domain evolved independently within both the civil and common law jurisdictions.\(^{47}\) Over time, any distinctions that had been present vanished.\(^{48}\) By the onset of the French Revolution, the power of eminent domain was virtually identical in the civil and common law spheres.\(^{49}\)

1. U.S. Law Generally

While the public use requirement is a highly-debated issue today and has been for quite some time, it did not seem to be very significant at the time of the adoption of the Constitution.\(^{50}\) In England at the time, eminent domain law was well-settled, largely out of necessity, because a large number of people lived in a relatively small geographical area.\(^{51}\) The right to own private property, and, accordingly, a restriction on the government’s

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47. See generally id.
48. Id.
49. Id. at 13.
50. This is evidenced by the lack of writing on the subject:
Eminent domain was employed without objection for purposes such as mills, private roads and the drainage of private lands, which now seem rather private than public, and the extension of the power to any uses directly or indirectly enuring to the public good was not one of the evils of which the colonists complained.

Id. at 118.
51. Id. at 11.
power to take it, constituted an important issue given the relative scarcity of land. No such concern existed in America where land was abundant. As Nichols, an important scholar in this area, noted, as to "the taking of property for the benefit of some enterprise in which the public welfare is to an insufficient but none the less perceptible degree involved[,] . . . it had apparently never occurred to anyone that it might be attempted." It was not until the nineteenth century, when private corporations entered into public transportation and local governments became more proactive with public works projects, that the uses for which eminent domain could be employed became an issue.

The true intent of the framers in enacting the "public use" provision may never be fully known. Some propose that the provision is merely a descriptive term, so as to differentiate a taking for "public use," which requires compensation, from other types of takings that do not require compensation. However, courts of the United States have largely dismissed this interpretation, viewing the "public use" provision as a restriction on eminent domain power.

The prohibition against taking property for anything other than a public use seemed to evolve from a reference to "higher law" and the perhaps erroneous view that the public use

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52. Id. at 119.
53. Id. at 118.
54. See Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings" Clause, 53 HASTINGS L.J. 1245, 1299-1301 (2002). Harrington argues that there were three types of takings recognized under Anglo-American law at the end of the eighteenth century: takings by taxation, forfeiture, and expropriation. Id. He further argues that only takings by expropriation require compensation, which is what was meant by the "public use" provision in the Fifth Amendment. Id. See also Nichols, supra note 46, at 118 (similarly arguing that "public use" was not a limitation, but the mere recognition in the fundamental law of the principle which requires compensation to be paid when property is taken).
provision was necessarily a restriction.\textsuperscript{57} This is the basis from which the law of eminent domain has developed. It seems as though the question of whether what the courts understood as a restriction in the public use provision should be interpreted broadly or narrowly was of little importance.\textsuperscript{58} Once the question became relevant in the mid-nineteenth century, a very narrow view of public use emerged: "public benefit was insufficient, and public use began to be defined as use by the public."\textsuperscript{59} According to Philip Nichols, Jr., the reason for this narrow view was that "the courts, feeling the full implications of their role as guardians of property rights, began to see danger in a definition of public use so broad that any purpose might be held to justify a taking."\textsuperscript{60}

The Mill Act cases demonstrate the implementation of this narrow view of public use.\textsuperscript{61} These cases involved state statutes that authorized the erection of dams for water power purposes. As a result of these dams, surrounding privately-owned lands were flooded.\textsuperscript{62} Initially, the courts did not question the use of eminent domain power to erect dams. Some jurists, such as Chief Justice Lemuel Shaw of Massachusetts, "had no hesitation in holding that such expropriations were valid under the power of eminent domain because of the general benefit which the growth of industry conferred upon the community as a whole."\textsuperscript{63} With the emergence of the narrow doctrine, courts began to hold unconstitutional the statutes that authorized the erection of dams by finding that they were for a private use.\textsuperscript{64}

Over time, the narrow doctrine fell out of favor with courts. An early example of the decay of the narrow doctrine occurred in \textit{New York City Housing Authority v. Muller}:\textsuperscript{65} "It . . . held that

\begin{itemize}
\item \textsuperscript{57} "Surely, if the framers of the Constitution had meant that property should not be taken for private use at all, they would have said so." \textit{Id.} at 616 (citing Harvey v. Thomas, 10 Watts (Pa.) 63, 66 (1840)).
\item \textsuperscript{58} \textit{Id.} at 617.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 618.
\item \textsuperscript{61} \textit{See, e.g.}, Chase v. Sutton Mfg. Co., 58 Mass. 152 (1849).
\item \textsuperscript{62} Nichols, Jr., \textit{supra} note 56, at 619.
\item \textsuperscript{63} \textit{Id.} (citing \textit{Chase}, 58 Mass. at 169).
\item \textsuperscript{64} \textit{Id.} \textit{See also} Loughbridge v. Harris, 42 Ga. 500 (1871); Sadler v. Langham, 34 Ala. 311 (1859).
\item \textsuperscript{65} 1 N.E.2d 153 (N.Y. 1936).
\end{itemize}
condemnation for housing and slum clearance was for a public use and purpose, and every state court which has considered the question since has reached the same result: A narrow construction of the public use provision of the takings clause was all but destroyed in the United States Supreme Court case of *Berman v. Parker*. That case involved a redevelopment plan to revitalize certain areas of Washington, D.C. The appellant owned a department store in the area that was to be condemned, and challenged the government's use of eminent domain. The Court began its analysis by giving great deference to legislative judgments in terms of social legislation. It then went on to articulate that "the role of the judiciary in determining whether that power [eminent domain] is being exercised for a public purpose is an extremely narrow one." The Court completely omitted an explanation of how the term "public use" had become "public purpose" as used in the previous recitation. Next, the Court stated that public safety, public health, morality, peace and quiet, and law and order are illustrations of the scope of eminent domain power, and not limits upon it. The Court then identified a constitutional principle which represents the antithesis of the traditionally narrow doctrine: "The concept of the public welfare is broad and inclusive."

A further deterioration of the public use provision as a limitation on governmental power occurred in *Hawaii Housing Authority v. Midkiff*. The issue presented in that case was whether an act authorizing the taking of real property from a lessor and transferring it to a lessee, where just compensation was paid, violated the Fifth Amendment. This seemed to be the exact scenario envisioned by Justice Chase in condemning a law that "takes property from A. and give(s) it to B," writing that

68. *Id.* at 32.
69. *Id.*
70. *Id.*
71. *Id.* at 33.
73. *Id.* at 231.
such a law would be "against all reason and justice." In addressing the question posed in *Midkiff*, Justice O'Connor's majority opinion reached a different conclusion than that of Justice Chase. The Court found that the act authorizing takings did not violate the Fifth Amendment due to the unique situation presented by the facts of the case. This case arose because a relatively small number of people owned most of the land in the State of Hawaii, largely as a result of Hawaii's history prior to attaining statehood. The act in question sought to redistribute land among citizens in order to end the oligopoly on land ownership in that state. The Court employed a rational basis test to determine constitutionality and asked whether the exercise of eminent domain power was rationally related to a conceivable public purpose. The Court decided that it could not "condemn as irrational the act's approach to correcting the land oligopoly problem."

2. *Louisiana Particularly*

The power of eminent domain is inherent in a sovereign government. Under the principle of United States federalism, there exists a dual sovereignty among the state and federal governments. From this structure, it follows that both sovereigns, federal and state, may exercise the power of eminent domain. While the federal government is only bound by the limitations in the Federal Constitution, a state is bound by both its own constitution and the Federal Constitution through the Supremacy Clause and the Fourteenth Amendment. The practical result of federalism with respect to eminent domain is that the state may

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75. *Id.*
77. *Id.* at 242.
80. U.S. CONST. amend. XIV, § 1. The Fifth Amendment was made applicable to the states through the Fourteenth Amendment. *See* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897).
protect the right to property to a greater extent than the Federal Constitution, but it may not provide less protection.81

The Louisiana Constitution of 1921 contained a limitation on the power to expropriate.82 Article 1, section 2 stated: "[P]rivate property shall not be taken or damaged except for public purposes."83 The question of what constitutes a public purpose has "never proved an easy one for the courts or for commentators."84 This has been true for courts generally, and Louisiana's courts are no exception. Louisiana's current constitution, adopted in 1974, added to the limitation on expropriation set out in the previous constitution. The relevant language can now be found in Article 1, section 4:

Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question….85

The adequacy of the provision has been questioned after the Kelo decision. The next section analyzes the implications of the current provision, as well as its application in a recent Louisiana case that confronted the same issue as Kelo.

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81. Justice Stevens highlighted this idea at the end of the majority opinion in Kelo, saying, "[w]e emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power." Kelo v. City of New London, Conn., 125 S. Ct. 2655, 2668 (2005).

82. "Expropriation" is the civil law term for a taking. BLACK'S LAW DICTIONARY 621 (8th ed. 2004). The terms "expropriation" and "eminent domain" are used interchangeably in this comment.

83. LA. CONST. of 1921, art. I, § 2.

84. Dakin & Klein, supra note 78, at 18.

85. LA. CONST. art. I, § 4(B).
III. ANALYSIS

This section discusses the current state of Louisiana law on the subject of eminent domain, and *Kelo*'s potential effects on that law. The first subsection analyzes the current property provision of the Louisiana Constitution and asks how that law might apply to the facts of *Kelo*. The second subsection explores a Louisiana case involving economic development and eminent domain.

A. Louisiana’s Constitution—The Current Provision

The initial excitement in Louisiana over adopting a post-*Kelo* amendment in order to protect property rights may be unnecessary. The Louisiana Constitution’s property provision in its current form may already be construed as more restrictive than the federal provision and could prevent the type of taking that occurred in *Kelo*. The current provision differentiates between public and private takings, imposing a higher standard for the latter.86 As former Louisiana State University Law Professor Lee Hargrave reported, some members of the Constitutional Convention of 1974, which finalized the language of the property amendment, proposed that the higher standard of “public and necessary purpose” apply to all takings.87 The previous provision of the 1921 Constitution read: “[P]rivate property shall not be taken or damaged except for public purposes.”88 According to Professor Hargrave, the change in language “provoked intense controversy [and] was only resolved by the final compromise provision which applied the higher standard to takings by private entities but continued the old standard to takings by public agencies.”89

A further limitation on private takings is that “whether the contemplated purpose be public and necessary shall be a judicial question, and determined as such without regard to any legislative

86. Id.
88. LA. CONST. of 1921, art. 1, § 2.
Professor Hargrave noted that this provision’s goal is to allow the courts to decide whether a certain purpose is “public and necessary” without deferring to any presumption of constitutionality. This represents a significant departure from the federal scheme. Generally, federal courts will give great deference to the judgment of a legislature as to what constitutes a “public use.” However, in Louisiana, private takings require the judiciary to determine whether the purpose for a particular taking conforms with constitutional requirements without any degree of deference to a legislative judgment.

The distinction between public and private takings in Louisiana’s Constitution begs the question: what constitutes a public taking versus a private taking? The “public and necessary” standard for private takings “is intended to apply to private persons, to private corporations, and to quasi-public corporations or persons such as public utilities.” The standard for public takings applies to “all state agencies and all political subdivisions of the state . . . the parishes, municipalities, special districts, etc.” Applying the public versus private inquiry required by the Louisiana Constitution to the facts of Kelo indicates that the taking in that case would be considered private because the NLDC, a private entity, executed the taking. If the taking in Kelo were to be scrutinized under this more exacting standard, it is much less likely that the court could sustain that taking. In order to pass Louisiana constitutional muster, the taking must be determined “public and necessary” by the judiciary without any deference to the initial judgment of the legislature.

90. Id. at 17. See also LA. CONST. art. I, § 4(B).
91. Hargrave, supra note 87, at 17.
92. According to critics, this may be unwise because judges are ill-equipped to make these sorts of thorough inquiries.
94. This distinction is only relevant to the “taker”; i.e., whether the entity executing the taking is public or private.
95. Hargrave, supra note 87, at 16 n.75 (citing Delegate Walter Lanier explaining the final compromise proposal in Proceedings, Sept. 13, at 54).
96. Id. at 16 n.76.
It might be possible, however, for a Louisiana court to sustain takings like that in *Kelo* by characterizing the act as a "public taking" and, thereby, only requiring the lesser standard. This might easily be done by portraying the NLDC as merely acting on behalf of the city, thereby triggering the lesser standard of "public taking." If the taking in *Kelo* met the "public use" requirement of the Federal Constitution, a standard that is stricter than Louisiana's "public purpose" requirement, such a taking in Louisiana might be upheld based on the lesser standard.97

Under the current Louisiana Constitution, the outcome of an expropriation case will always depend upon the category of taking, whether private or public.98 A court could almost always find a way to categorize a taking as private (to condemn an expropriation) or as public (to approve it). The current provision arguably gives courts too much discretion to choose when to affirm and when to condemn a taking. This vagueness in the law might convince the citizens of Louisiana that the current state and federal provisions do not adequately protect property, and that a state constitutional amendment should be enacted.

B. A Louisiana Court's Approach: City of Shreveport v. Chanse Gas Corporation

Louisiana's Second Circuit Court of Appeal recently confronted an issue very similar to *Kelo*. In *City of Shreveport v. Chanse Gas Corp.*,99 the city sought to expropriate land owned by the gas company for the purpose of building a convention center and hotel. The second circuit had to decide whether an expropriation for economic development was a "public purpose." A case of first impression for a Louisiana court, the second circuit explicitly held that expropriation in order to build a convention center was a public purpose, thereby affirming the trial court's ruling on the issue.100 However, the question of

97. Stricter in the sense that "purpose" is broader than "use" in the plain meaning of those words.
98. See LA. CONST. art. I, § 4(B).
100. Id.
whether economic development constitutes a “public purpose” under the Louisiana Constitution, as it does on the federal level after *Kelo*, remains unsettled law because the Louisiana Supreme Court has yet to directly rule on the question.

If this particular case had arisen after *Kelo*, it could be factually distinguished in numerous ways. The most significant distinction is the planned use of the property. In *Kelo*, the planned use of the property was for an office complex for Pfizer, Inc. In *City of Shreveport*, the expropriated land was to be used to build a convention center. The function of a convention center much more closely constitutes a “public purpose” as required by the Louisiana Constitution, and probably would even meet the more stringent standard of “public use” to a significantly greater degree than an office complex. A convention center might even meet the old, narrow “use by the public” test of the nineteenth century.\(^{101}\) That standard required actual use by the public, a test that significantly limited the types of projects for which the government’s eminent domain power might be employed.\(^{102}\)

The second distinction between *Kelo* and *City of Shreveport* involves the nature or previous use of the property subject to expropriation. In *Kelo*, private homes were the target of the government’s eminent domain power. In contrast, commercial property was the subject of the expropriation in *City of Shreveport*. The United States Constitution recognizes the sacredness of the home.\(^{103}\) When a person’s home is the subject of expropriation, the law should recognize this factual distinction. A proposed taking of a private home should be the sort of circumstance that Justice Kennedy’s *Kelo* concurrence recognized as warranting a more exacting standard of judicial review.\(^{104}\)

The United States Supreme Court has recognized a higher standard of judicial review in the context of fundamental

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101. *See supra* Part II.C.
102. Those projects that could meet this high standard might include a road, post office, or an airport.
104. *See supra* Part II.C.
rights, an approach that might be mimicked by state courts in the area of eminent domain. If a fundamental right is infringed upon by a particular law or governmental action, the Court will employ a strict scrutiny analysis, whereby it will ascertain whether the law in question advances a compelling state interest, and, if so, whether it does so by the least restrictive means. This type of analysis could have been used by the Court in Kelo, and could be used by the Louisiana courts if such a case were to arise. The right to one's home and an individual's right to be let alone may be considered the fundamental rights at issue here. These are the important rights Justice Louis Brandeis famously spoke of many years ago. The right to be free from governmental intrusion in the home, if not explicitly in the text, certainly may be encompassed by the Court's recognition of the right to privacy found within the penumbras of the Constitution.

A much more obvious and simple way for a Louisiana court to avoid Kelo's result is to recognize that the standard under the state constitution is different than the federal rule. This would be especially true for private takings, which require a higher standard to be constitutional. Even in the case of public takings that require a "public purpose," a Louisiana court might use a teleological argument to hold that the standard under the

106. Id.
107. Critics might draw a distinction here between the right of privacy in one's home and the right to own or possess a particular home.
110. A teleological argument analyzes the purpose for which the law was enacted. Once the purpose has been identified, a court should rule in a way so as to further this purpose, not frustrate it. BLACK'S LAW DICTIONARY 1504 (8th ed. 2004). This argument would certainly carry more weight if an amendment were passed (in the wake of Kelo) which evidenced the will of the citizens of Louisiana to change the law so as to provide greater protection of property rights.
Louisiana Constitution is different than that of the Federal Constitution.

IV. PROPOSED SOLUTIONS

The most significant step that Louisiana could take in advancing property rights is to amend the state constitution, as discussed in the first subsection below. In addition to such an amendment, Louisiana courts could look to other states, particularly Michigan, for guidance on a jurisprudential approach to reviewing the constitutionality of takings, as discussed in the second subsection below.

A. The Future of Louisiana Property Rights: A Constitutional Amendment

Greater protection of property rights might be afforded by some relatively minor revisions to the current constitutional provision. The language should not differentiate between an expropriation by the state and an expropriation by a private entity authorized by the state. The current provision makes such a distinction to provide for greater protection of property rights when a private entity is the expropriating authority. This higher standard should apply in both cases, making the distinction irrelevant. Under the current provision, the drafters did not have any sound basis for employing different standards depending on who is doing the taking; therefore, eliminating the distinction between public and private takings is completely reasonable.

In addition to eliminating the distinction between the state and a private entity authorized by law to expropriate, the new provision on property should require that all takings be made only

111. To describe the amendment process briefly, the legislature proposes a constitutional amendment, and the citizens of Louisiana vote on whether to adopt it.
112. The standard is "public purpose" when there is a taking by the state and "public and necessary purpose" when there is a taking by a private entity authorized by law to expropriate.
113. See Hargrave, supra note 87, at 16. The different standard was merely the result of a compromise, not the result of any sound or unified policy determination.
for a "public and necessary use." This change will accomplish two things. First, by the addition of the term "necessary," it will require the higher standard to be met for any type of taking. Second, changing the word "purpose" to "use" will further limit the scope of the government's eminent domain power. The plain meaning implies that the term "public use" is necessarily more restrictive than "public purpose." The distinct act of amending the state constitution is a strong indication of intent to protect property rights and limit the ability of government to employ eminent domain. If an amendment passes without this change, the broader term "purpose" will undoubtedly provide less protection than if it was replaced by "use."

The relevant language of Article 1, section 4(B) should be amended to read:

Property shall not be taken or damaged by the state or its political subdivisions except for public and necessary uses and with just compensation paid to the owner or into court for his benefit. Whether the use is public and necessary shall be a judicial question . . . .

These few revisions would have a significant impact on the future of Louisiana law. The next section provides a framework that Louisiana courts might adopt when applying the law in an expropriation case.115

B. The Poletown Factors: A Model for Louisiana

In 1981, the Detroit Economic Development Corporation sought to acquire a large tract of land in an area called Poletown by using the power of eminent domain. The land was to be given to General Motors Corporation as a site for the construction of an assembly plant. The Poletown Neighborhood Council and

114. It will also put Louisiana in line with the majority of other states whose constitutional limitation on takings requires a "public use" and not a "public purpose."

115. This framework might be applied either under the current provision or under the amendment proposed in this comment because the Michigan constitutional provision is sufficiently similar to Louisiana's so that similar judicial analysis is justified. See infra note 116.
individual residents brought suit against the city of Detroit to prevent the taking. The Michigan Supreme Court ruled the taking valid under that state's constitution. Justice James Ryan wrote a powerful dissent in which he utilized a three-factor analysis, as described below, to find the taking unconstitutional. In a case decided in 2004, County of Wayne v. Hathcock, the Michigan Supreme Court, in expressly overruling Poletown, adopted Justice Ryan's methodology.

The controversy in Poletown was very similar to the one in Kelo. Justice Ryan's reasoning in the Poletown dissent, now the law in Michigan, might be adopted by the Louisiana Supreme Court. Justice Ryan set out three potential factors to identify whether a "public use" is present. If any one factor is met, the taking will meet the "public use" requirement and, thus, will be deemed constitutional.

The first of Justice Ryan's factors concerned transfers of land that involve "public necessity of the extreme sort otherwise impracticable: the indispensability of collective action." Examples include takings for "highways, railroads, canals, and other instrumentalities of commerce." The second factor involved "continuing accountability to the public." This factor is satisfied by "the retention of some measure of government control over the operation of the enterprise after it has passed into private hands." Justice Ryan cited the example of a privately-owned railroad that is subject to governmental regulation, whose continued existence depends upon the land being used as a railroad for the public. Justice Ryan's third factor is met if the choice of land to be condemned involves an independent public

117. Id. at 472.
118. 684 N.W.2d 765 (Mich. 2004).
119. Poletown, 304 N.W.2d at 478.
120. Id.
121. Id. at 479.
122. Id.
123. Id.
An example might be consideration of the location of population centers when building a railroad or natural conditions such as the location of waterways. 125

If Justice Ryan’s three-factor analysis had been used to decide the Kelo case, the result likely would have been different. The NLDC’s economic development plan in Kelo was not a “public necessity of the extreme sort” envisioned by Justice Ryan’s first factor. Nor was the condemned property susceptible to continuing accountability to the public as per Justice Ryan’s second factor. The only governmental control over the property in Kelo involved the right of the government to collect taxes. 126 This is not the type of regulation “over the operation of the enterprise” that this factor requires. As for the third factor, Justice Ryan recognized that it might be met by condemnation of “blighted” areas for the sake of public health and safety. This, however, was not the reason for the condemnation in Kelo. The government showed no evidence of blight, nor that the properties subject to condemnation posed a threat to public health and safety.

Just as the Michigan takings in Poletown and County of Wayne could not meet this test of “public use,” it is unlikely that the taking in Kelo could have met this standard. This three-factor test laid out by Justice Ryan represents a simple illustration of the means by which a state may provide greater protection of property rights beyond what is required by the Federal Constitution.

V. CONCLUSION 127

Kelo has undoubtedly changed the landscape of property rights under the Federal Constitution. The effects of the decision are

124. Id. at 480.
125. Id.
127. Ironically, as of February 2006, Ms. Kelo remains living in her home in New London, and a compromise that would allow her and the other plaintiffs in the case to remain living in their neighborhood is being negotiated. See William Yardley, Compromise in Connecticut Property Seizure Case, N.Y. TIMES, Feb. 8, 2006, at B5.
already becoming apparent. Florida’s Riviera Beach is using eminent domain to implement a development project similar to the one in *Kelo*.\(^\text{128}\) Eminent domain is also being considered in the Ninth Ward of New Orleans in the wake of Hurricane Katrina.\(^\text{129}\) These instances of government entities using eminent domain to acquire property are undoubtedly just the beginning. Congress has taken notice. In late 2005, the House overwhelmingly approved a bill by a vote of 376–38 that would withhold federal money from state and local governments that use eminent domain to condemn the property of businesses and homeowners for commercial purposes.\(^\text{130}\) The states also have an opportunity to combat the effects of *Kelo*, and virtually all have taken actions, including advancing bills and constitutional amendments to limit the scope of eminent domain.\(^\text{131}\) Louisiana’s political and legal climate has changed somewhat in the post-Katrina world, but the scope of the government’s power of eminent domain remains an important issue, one that should not be overlooked.

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* The author wishes to thank Professor Paul R. Baier for his continuous support in drafting this comment.