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Saving Private Development: Rescuing Louisiana from Its Reaction to Kelo

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Saving Private Development: Rescuing Louisiana from Its Reaction to *Kelo*

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I. INTRODUCTION

The U.S. Supreme Court's 2005 decision in *Kelo v. City of New London, Connecticut*[1] sent shockwaves through state legislatures across the nation. The decision allowed a Connecticut municipality to use eminent domain to redevelop a non-blighted residential area in partnership with a private developer.[2] Though the decision was hardly the earth-shaking result that many unfamiliar with existing law believed,[3] public outcry was swift. Since *Kelo*, forty-seven state legislatures have considered legislation to redefine their eminent domain laws.[4]

Historically, Louisiana state and local governments have displayed caution in exercising their expropriation powers.[5] Yet, Louisiana reacted to *Kelo* with three rigid constitutional amendments that would be difficult to repeal if found unworkable. One of Louisiana's amendments (hereinafter "Amendment 5"),[6] which passed by popular vote on September 30, 2006,[7] (1) forbids government from taking property "for predominant use by" or "transfer of ownership to any private person or entity"; (2) narrowly defines "public purpose" as either "a general public right to a definite use of the property," a public ownership of land designated for specific enumerated uses, or a removal of a threat to public health or safety; and (3) forbids government from considering economic development, tax revenues, or any incidental

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1. 545 U.S. 469 (2005).

2. *Id.*

3. *See, e.g.*, Kate Moran, *Amendment Limits Use of Expropriation Powers*, TIMES-PICAYUNE (New Orleans), Sept. 27, 2006, at A1.

4. *See infra* Part II.C.

5. *See infra* Part II.D. "Expropriation" is the civil law equivalent to the common law "eminent domain."

6. The amendment was labeled "Constitutional Amendment No. 5" on the September 30, 2006 ballot. *See* HOUSE LEGISLATIVE SERVS., LA. HOUSE OF REPRESENTATIVES, CONSTITUTIONAL AMENDMENTS FOR CONSIDERATION IN 2006 3 (2006), http://www.legis.state.la.us/election2006/06amendments.pdf [hereinafter 2006 AMENDMENTS].

7. *See Louisiana Secretary of State Official Election Results, Results for Election Date: 9/30/06*, http://www.sos.louisiana.gov:8090/cgibin/?rqstyp=elcinq&rqsdta=start (query "Amendments & Multi-Parish Propositions" for "9/30/06" election results) [hereinafter *Election Results*].

benefit to the public in determining whether the taking is for a public purpose.[8] Amendment 5, in conjunction with two other amendments passed along with it,[9] ranks as one of the most aggressive reactions to *Kelo* taken by any state;[10] it changes current Louisiana law drastically[11] and comes at a time when vast devastation remains across South Louisiana following Hurricanes Katrina and Rita.[12]

Amendment 5 is poorly drafted. It fails in its mission to protect property owners because it includes contradictory and overbroad exceptions yet succeeds in constraining one of the most basic and essential functions of government: economic development.[13] Economic development is an essential policy of government because stimulating the economy increases the public's wealth. If the provisions in Amendment 5 are interpreted wrongly, Louisiana's economic future could suffer. The amendment has the potential to quash the government's Takings Power in many instances where it would be necessary and good for the state, such as during the hurricane recovery effort.

This Comment argues that Amendment 5's purpose is to codify Justice O'Connor's dissenting opinion in *Kelo*. Justice O'Connor contended that eminent domain should not be used for a *purely* economic purpose when property is transferred to a private person because the sovereign would in effect be taking property from one party for transfer to a higher taxpayer.[14] She did not, however, support depriving government of its ability to involve private parties in remedying affirmative harms in the community. This

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8. 2006 La. Acts No. 851, *reprinted infra* app.

9. "Constitutional Amendment Nos. 4 and 6" on the September, 30, 2006 ballot also change expropriation law in Louisiana. *See* 2006 AMENDMENTS, *supra* note 6, at 3–4. Amendment 4 reduces the compensation awarded in a taking from compensation "to the fullest extent" to "just compensation" if the property is taken for hurricane protection. 2006 La. Acts No. 853. Amendment 6 requires that any property taken be offered back to the owner before sale or lease to a private party. 2006 La. Acts No. 859.

10. *See infra* Part II.C.

11. *See infra* Part III.

12. Expropriation is "a tool that many expected to be used to reinvent neighborhoods devastated by Hurricane Katrina." Moran, *supra* note 3.

13. *See infra* Part IV.

14. *See infra* Part II.B.

Comment concludes, then, that Amendment 5's "predominant use" provision should be read to limit the purpose of the taking, not its mechanism; that the "threat to public health or safety" exception should be applied broadly; and that the "economic development" and "incidental benefits" limitations should be read narrowly. These recommendations would satisfy concerns raised by Justice O'Connor without greatly affecting Louisiana's economic future.

Part II of this Comment details the historical and legislative contexts in which Amendment 5 was drafted. It discusses the history of the Takings Power under the Federal Constitution, the *Kelo* decision, and the subsequent reaction to *Kelo* by other states. Part II(D) then discusses the parallel history under the Louisiana Constitution and supporting statutes leading up to the drafting of Amendment 5. Part III discusses the text of Amendment 5 and its potential effects on property rights, economic development, and on current hurricane recovery efforts. Finally, Part IV analyzes the issues mentioned in Part III and recommends sound judicial interpretations for the several provisions of the amendment that would protect property owners without inhibiting hurricane recovery plans or other well-planned economic development efforts in Louisiana's future.[15]

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15. Though they are many, this Comment does not analyze issues surrounding compensation awarded for expropriated property. *See* 2006 La. Acts No. 851 (amending LA. CONST. art. I, § 4(B)(5)) (expanding compensation "to the full extent of [the owner's] loss," to include "all costs of relocation, inconvenience and any other damages"); 2006 La. Acts No. 853 (amending LA. CONST. art. I, § 4(H)) (limiting compensation for property taken for hurricane protection construction to that which is required under the federal Fifth Amendment Takings Clause); *see also* Mark Davis, *A Whole New Ballgame: Coastal Restoration, Storm Protection, and the Legal Landscape After Katrina*, 68 LA. L. REV. 419 (2008) (discussing the impact of this compensation scheme dichotomy on rebuilding coastal area protection following the hurricanes); Letter to the Editor, Charles E. Soileau, *Proposal Could Bankrupt Government*, THE ADVOCATE (Baton Rouge), Sept. 21, 2006, at B10 (arguing that Amendment 6's compensation scheme will cost state and local governments many millions of dollars more for even the most traditional takings).

This Comment also does not discuss the potential implications of Amendment 6's right of first refusal requirement, which could be considerable. *See* 2006 La. Acts No. 859 (amending LA. CONST. art. I, § 4(G)). The provision is presented in some detail in a companion article in this issue, John J. Costonis, *Two Years*

II. BACKGROUND

A. History of the Federal Public Use Clause

1. The Founding and Purpose of Eminent Domain

For centuries, government has exercised the power of eminent domain to take privately-owned property for the greater good.[16] It is, in essence, government's power to compel the sale of property at a fair price when the sale is in the interest of the public.[17] This power has long been considered inherent in and necessary to a sovereign's existence[18] and paramount to all private rights, because the right of the individual must not supersede the needs of the whole.[19]

When property is needed for the greater economic good, eminent domain is the tool the sovereign uses to combat the "holdout."[20] The holdout is the individual property owner who sits on the site of a planned public project and, realizing his sudden bargaining power, resists sale in an effort to gain a higher-than-market price for his property.[21] This tactic effectively puts money in the pocket of the individual when it should be spent on the public at large. For example, a sovereign may need land to build a road. Landowners in the path of the planned road could hold out sale until the government has paid exorbitant sums for the needed land. Public funds are in this way transferred unnecessarily to

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and Counting: Land Use and Louisiana's Post-Katrina Recovery, 68 LA. L. REV. 349, 379–80 (2008).

16. *See generally* Scott Ledet, Comment, *The* Kelo *Effect: Eminent Domain and Property Rights in Louisiana*, 67 LA. L. REV. 171, 178–79 (2006).

17. 29A C.J.S. *Eminent Domain* § 3.

18. United States v. Lynah, 188 U.S. 445 (1903); Kohl v. United States, 91 U.S. 367 (1875); W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848).

19. *W. River Bridge*, 47 U.S. at 531–32. The eminent domain power should therefore be exercised with great caution. Orleans-Kenner Electric Ry. Co. v. Metairie Ridge Nursery Co., 68 So. 93, 95 (La. 1915).

20. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 3.6 to .7 (3d ed. 1986).

21. *Id.*

private pockets in the interest of public need. Eminent domain prevents this scenario.

2. The Limitations on Eminent Domain

Because the eminent domain power is inherent and necessary for a sovereign, it requires no constitutional recognition.[22] Thus the power is not *granted* by the Federal Constitution but is *limited* in the Fifth Amendment Takings Clause, which states, "private property [shall not] be taken for public use, without just compensation."[23] The clause invokes two requirements: (1) that the taking serves a "public use," and (2) that just compensation is paid to the owner.[24] This section explores the question: what is "public use" in federal law?

An early constraint to public use was recognized in *Calder v. Bull*, where Justice Chase opined that "a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it."[25] This reasoning suggests that public use must involve use by more than a single private party but does not expound further on the requirement.[26] A look at subsequent federal case history reveals three applications of public use that have been found constitutional: "public ownership," "use by the public," and a third more recent, but generally accepted application, "public purpose."[27]

22. People v. Adirondack Ry. Co., 176 U.S. 335, 346–47 (1900); U.S. v. Jones, 109 U.S. 513 (1883); Boom Co. v. Patterson, 98 U.S. 403 (1878).

23. U.S. CONST. amend. V.

24. Kelo v. City of New London, Conn., 545 U.S. 469, 495–96 (O'Connor, J., dissenting) (citing Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003)).

25. 3 U.S. (3 Dall.) 386, 388 (1798).

26. The restriction set out in *Calder* is still good law today. *See, e.g.*, *Kelo*, 545 U.S. at 478 & n.5 (majority opinion); *but see id.* at 494 (O'Connor, J., dissenting).

27. *Id.* at 497–98.

a. Traditional Public Uses

The oldest and most established public use application is "public ownership."[28] That is, the government may take land from a private citizen and convert it to publicly-owned property such as a road, a school, or a park.[29] This application requires that ownership of the property be transferred to the public.

In the nineteenth century, a second public use application developed when private entities called "common carriers" began stepping in to perform certain functions in place of government.[30] Under this "use by the public" application, the government takes property and transfers it to these common carriers, such as railroad or utility companies, who then convert it to property available for use by the public, in such forms as railroads, oil pipelines, or electrical infrastructure.[31] Although the property must be *made available* to the public, the common carriers maintain ownership. This public use application may be characterized as a public right to physical access to the property for a specific utility.[32]

The first major problem with the "use by the public" application revealed itself in the Mill Acts cases,[33] in which private mill owners were given authority to flood upstream properties (after paying just compensation) in the interest of creating dams.[34] The Mill Acts were essential to manufacturers dependent on water power and beneficial to the public in effect, but did not fit the existing public use test because the public did not physically use the flooded property.[35] These and later cases illustrated the

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28. *Id.* (citing Old Dominion Land Co. v. U.S., 269 U.S. 55 (1925); Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923)).

29. *Id.*

30. *Id.* (citing Nat'l R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407 (1992); Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30 (1916)).

31. *Id.*

32. *Id.* at 513 (Thomas, J., dissenting).

33. *See, e.g.*, Chase v. Sutton Mfg. Co., 58 Mass. (4 Cush.) 152 (Mass. 1849).

34. *Kelo*, 545 U.S. at 476–77 & n.8 (majority opinion) (citing Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 619–24 (1940)).

35. *Id.*

shortcomings of such a narrow public use interpretation to accommodate the "evolving needs of society."[36] Thus, in the following century, the traditional public use restrictions gave way to a third, broader limitation, referred to as "public purpose."[37]

b. Public Purpose

"Public purpose" may be characterized as a general benefit to the public's welfare.[38] The public purpose application naturally extends from the use by the public application because it allows government to use eminent domain to transfer property to one or more private entities, who are not necessarily common carriers, but who still make use of the property in a way that is beneficial to the public at large.[39] Two U.S. Supreme Court cases in the twentieth century, *Berman v. Parker*[40] and *Hawaii Housing Authority v. Midkiff*,[41] demonstrate the public purpose application.

In *Berman*, Congress passed a statute authorizing local officials in Washington, D.C. to take a blighted neighborhood and redevelop it.[42] Though the redevelopment would not necessarily make the entire property available for physical use by the public, the city cited dilapidated housing, overcrowded dwellings, and public health concerns as public purposes behind the taking.[43] Plaintiff brought an action against the city because the

36. *Id.* at 476. *See also* Ledet, *supra* note 16, at 178–79.

37. *See, e.g.*, *Kelo*, 545 U.S. at 476–77 ("Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed 'the inadequacy of use by the general public as a universal test.' . . . We have repeatedly and consistently rejected that narrow test ever since." (citing Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906))).

38. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Berman v. Parker, 348 U.S. 26 (1954).

39. *See, e.g.*, *Kelo*, 545 U.S. at 476 (allowing a taking in a case where "the City is [not] planning to open the condemned land—at least not in its entirety—to use by the general public . . . [n]or will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers").

40. 348 U.S. 26 (1954).

41. 467 U.S. 229 (1984).

42. *Kelo*, 545 U.S. at 497 (O'Connor, J., dissenting).

43. *Id.* (citing *Berman*, 348 U.S. at 30, 34).

redevelopment plan included his department store, which itself was not "blighted."[44] The Supreme Court in *Berman* upheld the taking of the plaintiff's non-blighted property pursuant to a plan of general urban renewal in the surrounding neighborhood. This holding set three important precedents. First, it allowed for a blighted neighborhood to be taken for redevelopment even when the condemned lands may be sold or leased to private interests.[45] Second, it emphasized deference to legislatures in determining what constituted a "public purpose."[46] Third, it established that a sovereign may evaluate a region as a whole, and not individual properties therein, to determine if the region needs redeveloping.[47]

Later, in *Hawaii Housing Authority v. Midkiff*,[48] the Court affirmed the legislative-deference approach outlined in *Berman* by upholding a Hawaii statute that transferred titles from lessors to lessees (for just compensation) for the public purpose of reducing a severe concentration of land ownership.[49] At the time, ninety-six

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44. *Id.* The District of Columbia Redevelopment Act of 1945, which authorized the taking in *Berman*, did not define "blight." *See, e.g.*, Brief for Appellants at 13–14, *Berman*, 348 U.S. 26 (No. 22). The City argued that the word has no consistent definition (perhaps for good reason), but offered generally that a blighted area possesses physical characteristics such as "dilapidated, substandard, and worn out dwellings," unsanitary facilities, crowding, inadequate light and air, and conditions conducive to the spread of disease, and that blighted areas generally cause economic losses on those property owners within them and on the community as a whole. Brief for Renah F. Camalier & Louis W. Prentiss, Commissioners of the District of Columbia, Appellees at 2–3, 7–8, *Berman*, 348 U.S. 26 (No. 22).

45. *Kelo*, 545 U.S. at 498.

46. *Berman*, 348 U.S. at 33–34 ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . Here one of the means [to these ends] chosen is the use of private enterprise for redevelopment of the area. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.").

47. *Kelo*, 545 U.S. at 499 (O'Connor, J., dissenting) ("[W]e did not second-guess [Congress'] decision to treat the neighborhood as a whole rather than lot-by-lot." (citing *Berman*, 348 U.S. at 34–35)).

48. 467 U.S. 229 (1984).

49. *Id.* at 242–43 ("When the legislature's purpose is legitimate and its means are not irrational, . . . empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.").

percent of Hawaii's privately-owned land was owned by only a handful of landowners who inflated land prices and thus "injur[ed] the public tranquility and welfare."[50] The state and local authorities believed that invoking the power of eminent domain was the only effective method of combating the existing oligopoly.[51] A unanimous Court, led by Justice O'Connor, declined to "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'"[52] Since the statute in *Midkiff* reasonably benefited the public at large by freeing the residential market, the Court declined to upset it.[53]

In both *Berman* and *Midkiff*, opponents argued that the takings effectively allowed government to take property from A for the sole benefit of private party B in violation of the "rule" established long ago in *Calder v. Bull*.[54] The Court disagreed in both instances.[55] It held that as long as the Court finds the benefit associated with the taking is not limited to "a particular class of identifiable individuals," a sovereign may transfer property to another private party in an eminent domain taking.[56] Thus, the Court carved out for itself the limited role of judging whether the taking's benefit stretches beyond the private party to the taking, concerning itself not with the "mechanics" of the taking but with its effect.[57]

Leading up to the *Kelo* decision in 2005, then, the federal eminent domain power had involved transfer to private parties for a variety of purposes. Notably, neither *Berman* nor *Midkiff*

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50. *Id.* at 232.

51. *Id.* at 233.

52. *Id.* at 241 (quoting United States v. Gettysburg Elec. R. Co., 160 U.S. 668, 680 (1896)).

53. *Id.*

54. *See supra* notes 25–26 and accompanying text; *Midkiff*, 467 U.S. at 239–45; *Berman*, 348 U.S. at 33–34.

55. *Midkiff*, 467 U.S. at 239–45; *Berman*, 348 U.S. at 33–36.

56. *Midkiff*, 467 U.S. at 245.

57. *Id.* at 244. By "mechanics" the Court refers to the means by which the government chooses to effect the public benefit. *Id.* In *Midkiff*, the "mechanism" was transferring property titles from lessor to lessee. *Id.* In *Berman*, the "mechanism" was creating a redevelopment plan and employing a private developer to implement it. 348 U.S. at 33–36.

prompted significant negative public reaction. The discrepancy in the public reactions to *Berman* and *Midkiff* versus the public outcry following *Kelo* suggests that some element of the facts or the holding in *Kelo* was offensive to the public in a way that the facts and holdings in *Berman* and *Midkiff* were not. The following section outlines the *Kelo* decision, its facts and argument, and endeavors to explore why it incited such an explosive public response.

B. The Kelo v. City of New London[58] *Decision*

Kelo involved a "public-private taking."[59] Ms. Susette Kelo and her co-plaintiffs resided in a region of New London, Connecticut that was the subject of a comprehensive redevelopment plan proposed by the city in conjunction with a new Pfizer research facility to be built on adjacent property.[60] The region, which had suffered tax revenue and population declines, had been designated a "distressed municipality," though not "blighted."[61] Though parts of the redevelopment included publicly-owned space such as a park, museum, and river walk, other parts included private space such as offices, a shopping district, and a hotel.[62] The city created a private, non-profit entity (the New London Development Corporation or "NLDC") to plan and execute the redevelopment.[63] It cited economic revitalization,

58. 545 U.S. 469 (2005).

59. *Id.* As used herein, a "public-private taking" means a taking in which the government takes the property through eminent domain, then transfers title or leases it to a private entity which redevelops the area according to the government's regulations. Since *Berman*, these kinds of partnerships have been commonplace. *See infra* Part IV.

60. *Id.* at 473–75.

61. *Id.* at 473. This is arguably the only factual distinction between *Berman* in 1954 and *Kelo* in 2005. It raises the question, if New London had designated the region surrounding Ms. Kelo's home as "blighted" (though that term traditionally has maintained no consistent definition, see *supra* note 44), would the public still have reacted as severely to the *Kelo* outcome?

62. *Id.* at 474; *id.* at 495 (O'Connor, J., dissenting).

63. *Id.* at 473 (majority opinion); *id.* at 495 (O'Connor, J., dissenting).

job creation, increases in tax revenue, and maximizing public access to its waterfront as public purposes for the taking.[64]

Ms. Kelo and her co-plaintiffs owned well-kept, middle income homes, some of which had been in their families for generations.[65] They argued that economic development and tax revenues, in themselves, are not "public uses" under the Fifth Amendment Takings Clause.[66] The Court disagreed in a 5–4 decision. Following the precedents established in *Berman* and *Midkiff*, the Court deferred to the city's finding that economic development served a public purpose in this case.[67] The Court did not, as perhaps much of the public believed, stretch the definition of public purpose to include public-private development. That was done over fifty years earlier in *Berman*.

Justice Stevens wrote for a majority which included Justices Ginsburg, Souter, Kennedy, and Breyer.[68] The majority affirmed that under no circumstance may property be taken from A for the sole purpose of transferring it to B but did not find such a transfer in *Kelo*.[69] Instead, it reiterated its pattern of "affording legislatures broad latitude in determining what public needs justify the use of the takings power."[70] The majority supported the wisdom of this approach by pointing out the changing needs of society and the intimacy with which these needs are connected with their particular localities.[71] The Court gave great weight to the thorough investigation and intensive planning project undertaken by the local authorities to determine that the redevelopment was in the public's best interest and was not beneficial to any single class of

64. *Id.* at 478 n.6 (majority opinion).

65. *Id.* at 475; *id.* at 494 (O'Connor, J., dissenting).

66. *Id.* at 475 (majority opinion); *id.* at 495–96 (O'Connor, J., dissenting).

67. *Id.* at 476–89 (majority opinion).

68. *Id.* at 470.

69. *Id.* at 477. The majority declined to establish "a bright-line rule" that would prevent "a city from transferring citizen A's property to citizen B for the sole reason that citizen B will put the property to a more productive use." *Id.* at 486–87. If such a one-to-one transfer did ever occur, it "would certainly raise a suspicion that a private purpose was afoot." *Id.*; *see also id.* n.17.

70. *Id.* at 483.

71. *Id.* at 482–83 (citing Hairston v. Danville & W. Ry. Co., 208 U.S. 598 (1908)).

persons.[72] Finally, the majority invited any state legislature to impose stricter "public use" requirements in its own laws if it found this holding troubling.[73]

Justice Kennedy, in concurrence with the majority, attempted to set a test for when a court should rule against the legislature in eminent domain cases.[74] He opined that a court must "strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."[75] Particularly for a public-private taking, Justice Kennedy argued, a court must ensure the economic advantage it brings to the public is not "incidental to the benefits that will be confined on private parties" to the development.[76]

Many who disagreed with *Kelo*'s majority aligned themselves with Justice O'Connor's dissent. Justice O'Connor, writing for Justices Rehnquist, Thomas, and Scalia, argued that the majority shirked its judicial responsibility by not drawing a distinction between public need and public betterment.[77] She argued that the incidental public benefits in the *Kelo* taking "such as increased tax revenue, more jobs, [and] maybe even aesthetic pleasure" are insufficient to constitute "public uses."[78] She distinguished *Berman* and *Midkiff* by reasoning that the takings in both of those cases were necessary to combat an "affirmative harm on society."[79]

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72. *Id.* at 484. Petitioners had argued that the New London development primarily benefited Pfizer, but "[e]ven the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer." *Id.* at 492 (Kennedy, J., concurring) (citing Kelo v. New London, Conn., 843 A.2d 500, 595 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part)).

73. *Id.* at 489 (majority opinion). This language may be what signaled state legislatures and the media to come to attention over eminent domain law.

74. *Id.* at 491 (Kennedy, J., concurring).

75. *Id.*

76. *Id.*

77. *Id.* at 497–505 (O'Connor, J., dissenting). She argued that the majority blurred the line between the state's police power, which allows the state to protect the public's health, safety, and welfare, and eminent domain's "public use" requirement. *Id.* at 501.

78. *Id.* at 497–505.

79. *Id.* at 500 ("in Berman through blight resulting from extreme poverty and in Midkiff through oligopoly resulting from extreme wealth"); *but see id.* at 486 n.16 (majority opinion).

Thus, in order to find a public purpose correlative to a public-private taking, Justice O'Connor would require a public *harm* for which the taking serves as a necessary remedy. She did not condemn economic development as *a* public purpose; she merely disparaged it as the *sole* public purpose justifying a taking.[80]

The *Kelo* decision did little to change federal eminent domain law. It simply affirmed a line of cases that began generations ago with *Berman* and added, if anything, that public purposes may be purely economic. However, economic development has long been a recognized and important function of government. For this reason, the national public outcry is peculiar. Perhaps the public agreed with Justice O'Connor that an affirmative harm must be present before government can exercise eminent domain. Perhaps the public identified with Ms. Kelo and her newly renovated oceanfront home and would impose a harsher limit on takings of residential properties. Perhaps the public, like Justice Thomas, would prefer to ignore a hundred years of jurisprudence and eliminate eminent domain for all but literal public *use* takings. All told, something about Ms. Kelo's plight struck a chord with the American public and incited perhaps the most far-reaching public reaction to a Supreme Court decision in recent history.[81]

C. States' Reactions to Kelo

Forty-seven states considered legislation in reaction to *Kelo*.[82] Following the 2006 regular sessions, twenty-eight states including

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80. Justice Thomas wrote a lengthy dissenting opinion that pleaded for the Court to read "public use" literally and to abandon the "public purpose" doctrine it has applied for the last century. *Id.* at 505–23 (Thomas, J., dissenting). As Part II.D of this Comment explains, the Louisiana Constitution uses the "public purpose" language as opposed to the more narrow "public use" clause. For this reason, Justice Thomas' dissent is less relevant to analyzing expropriation law in Louisiana.

81. *See, e.g.*, Moran, *supra* note 3 ("'It has only been 15 months since Kelo came down, and to have this many states take this much action so quickly is fairly unprecedented,' said Larry Morandi, director of state policy research at the National Conference of State Legislatures.").

82. Kevin McCarthy, *OLR Research Report: Recently Enacted Eminent Domain Laws*, July 6, 2006, *available at* http://www.cga.ct.gov/2006/rpt/2006-R-0394.htm.

Louisiana passed some type of legislation amending their eminent domain laws.[83] The laws fall generally into seven categories. They:

> (1) limit or prohibit eminent domain for economic development;
> (2) limit economic development takings of blighted areas;
> (3) restrict the definitions of "public purpose" or "public use";
> (4) employ procedural safeguards against eminent domain abuse;
> (5) award more than just compensation for a taking;
> (6) establish rights of first refusal to the owner of the taken property; or
> (7) place a moratorium on eminent domain use for economic development and create an investigatory task force in the interim.[84]

Almost all of these states passed flexible statutes, as opposed to more rigid constitutional amendments.[85] Only six states, including Louisiana, enacted constitutional amendments in reaction to *Kelo*,[86] and of these amendments, only three employ changes arguably as drastic as Louisiana's. Michigan's amendment prohibits economic development takings altogether and requires governments to show by clear and convincing evidence that a targeted area is blighted; New Hampshire's amendment also prohibits takings for private development; and South Carolina's amendment prohibits purely economic takings except for

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83. *Id.*

84. *Id.*

85. *See, e.g.*, Moran, *supra* note 3 ("'For the most part, states did not choose the constitutional amendment route because they are not real clear on what the implications of their actions might be,' said Morandi of the National Conference of State Legislatures. 'A lot of states are saying we need to do something, but let's not lock it into the constitution just yet. Let's do a statutory change so if things happen we did not anticipate, we can change the statute.'")

86. Castle Coalition, *2006 Election Wrap Up*, http://www.castlecoalition.com/media/releases/11_8_06pr.html.

traditional public uses and defines blight as a threat to public health and safety.[87]

Louisiana passed three constitutional amendments in reaction to *Kelo*, including Amendment 5. By comparison, Louisiana's reaction to *Kelo* is most similar to South Carolina's because Amendment 5 prohibits purely economic takings altogether and any takings for use by or transfer to private entities, except when the taking is for an industrial purpose.[88] It also limits public purpose to traditional public uses and the removal of threats to public health or safety.[89]

However, Louisiana also employed additional safeguards that even South Carolina did not. Louisiana's Amendment 5 increases the required compensation for taken property to include "all costs of relocation, inconvenience and any other damages"[90]—a compensation scheme that far exceeds those of most other state laws—unless the property is taken for hurricane protection construction as stipulated in Amendment 4 of the 2006 Constitutional Amendments.[91] Additionally, Amendment 6 requires that any surplus property be offered back to the original owner at market value.[92]

Thus, Louisiana succeeded in passing a collection of amendments that together make up the most drastic reaction to *Kelo* taken by any state. The amendments employ *all* of the seven tactics implemented by other states except the moratorium and the procedural safeguards.[93] Yet, as the next section shows, Louisiana had already employed effective procedural safeguards against expropriation abuse and an increased compensation scheme. Therefore Louisiana arguably needed no *Kelo* reaction at all. The following section explores the history of expropriation in Louisiana leading up to the firestorm following *Kelo* and explains

87. McCarthy, *supra* note 82. Florida and Georgia are the final two states that enacted constitutional amendments in reaction to *Kelo*. They both allow public-private takings with approval of elected officials. *Id.*

88. 2006 La. Acts No. 851, *reprinted infra* app.

89. *Id.*

90. *Id.*

91. 2006 La. Acts No. 853.

92. 2006 La. Acts No. 859.

93. *See supra* Part II.C, ¶ 1.

why a drastic and rigid package of constitutional amendments in Louisiana may have been a mistake, especially considering the uncertainties belying its post-hurricane reality.[94]

D. History of Expropriation in Louisiana

Louisiana's expropriation power developed independently from the federal power. Since 1921, Louisiana has not bound its expropriation power to the federal "public use" standard but has instead applied the broader "public purpose" standard.[95] Because the federal courts had in essence applied the same standard by that time,[96] the courts' interpretations of Louisiana's public purpose clause paralleled that of the federal courts thereafter.[97] However, Louisiana employed certain additional mechanisms to keep its expropriation power in check, including statutory procedural safeguards and increased compensation schemes. These have been effective in limiting the use of expropriation in Louisiana.

Three safeguards have been particularly effective in preventing expropriation abuse in Louisiana. First, the 1974 Constitution requires that a taking by a private entity, such as a common carrier, must be for a "public *and necessary* purpose."[98] Because public-

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94. Conspicuously absent from the *Kelo*-reactors is Mississippi, who sits in a similar post-Katrina posture as Louisiana. It did not react to *Kelo* in its 2005 or 2006 legislative sessions, partially because of these uncertainties.

95. "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." LA. CONST. art. I, § 2 (1921) (emphasis added).

96. *See supra* Part II.A.

97. The only difference, of course, was that Louisiana courts did not struggle with the competing "public use" interpretations as did the federal courts. See, for example, Justice Thomas' dissent in *Kelo*, discussed *supra* note 80.

98. LA. CONST. art. I, § 4 (1974) ("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 . . . ." (emphasis added)); *see also* W. Lee Hargrave,

private takings usually involve benefits to the private entity as well as the public, the heightened standard balances the potential for abuse.

Second, the constitution awards the owner of taken property compensation "to the full extent of his loss," as opposed to the federal "just compensation" award, and grants him a request for a jury trial to determine compensation.[99] State courts have interpreted this last clause to include attorneys' fees, relocation expenses, and other incidental costs to the property owner: a compensation scheme that far exceeds the federal standard and that of most other states.[100]

Third, a governing authority is statutorily required to approve any taking by a municipal corporation before it can proceed.[101] This requirement has been particularly effective in preventing expropriation abuse in Louisiana because the local elected officials are well aware that expropriating their constituents' private property, when not absolutely necessary, costs them their jobs.[102]

The Declaration of Rights of the Louisiana Constitution of 1974, 35 LA. L. REV. 1, 17 (1974).

99. LA. CONST. art. I, § 4 (1974) ("In every expropriation, a party has the right to trial by jury to determine compensation, and the owner shall be compensated to the full extent of his loss.").

100. *See e.g.*, State, Dept. of Transp. and Dev. v. Dietrich, 555 So. 2d 1355, 1358 (La. 1990) ("[F]ull compensation should include moving costs, costs to relocate, inconvenience, and loss of profits from takings of business premises. Where economic losses suffered by a business have been proven, damages for incidental and consequential loss must be awarded to fully compensate the owner." (footnote omitted)); State v. Constant, 369 So. 2d 699, 702 (La. 1979) ("[A]n owner [must] be put in as good a position pecuniarily as he would have been had his property not been taken.").

101. "Where a price cannot be agreed upon with the owner, any municipal corporation of Louisiana may expropriate property whenever such a course is determined to be necessary for the public interest by the governing authority of the municipality . . . ." LA. REV. STAT. ANN. § 19:102. "Governing authority" means "the body which exercises the legislative functions of the political subdivision"—either the city council or the police jury presiding over the municipality in which the taking occurs. LA. CONST. art. VI, § 44.

102. *See, e.g.*, Archived Broadcasts of House of Representatives Civil Law Committee Meeting, May 2, 2006, at 3:26, http://house.louisiana.gov/rmarchive/Ram/RamMay06/0502_06_CLP.ram [hereinafter Civil Law Committee Meeting, May 2] (testimony of Dan Garrett, Police Jury Association of

Because of these safeguards, expropriation in Louisiana is rarely employed and used by municipalities strictly as a last resort. It has not been abused.[103] In the 2006 legislative session, the legislature reviewed expropriation cases over the previous century and found only three that involved a public-private taking for a partially economic purpose: *Board of Commissioners New Orleans Exhibition Hall Authority v. Missouri Pacific Railroad Co.*;[104] *Town of Vidalia v. Unopened Succession of Ruffin*;[105] and *City of Shreveport v. Chanse Gas Corp.*[106]

The *New Orleans Exhibition Hall Authority* ("*NOEHA*") case was the first case in the state in which economic development was cited as the purpose for the taking.[107] The taking involved commercial property for a New Orleans Convention Center expansion, and the landowner was a highly sophisticated developer whose principal complaint was the compensation the city offered.[108] The NOEHA, being a private entity, was required to prove both public necessity and public purpose before the court

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Louisiana) ("Anybody who has ever been at a city council meeting or a police jury meeting when you've got a vote to expropriate property (for any reason . . . to fix a road that's a death trap), it's still an unbelievably difficult vote. . . . The situation you run into is you never get to the court of appeals because . . . if you have to take somebody's house, that's a big deal . . . . Those local elected officials feel that more than you can possibly believe, because they're casting that vote with those [property owners] sitting ten feet away from them.")

103. The Institute for Justice in Arlington, Virginia defines eminent domain "abuse" as eminent domain that is used "for private, economic development." Civil Law Committee Meeting, May 2, *supra* note 102, at 2:31–:32 (statement by Scott Bullock, Institute for Justice). The Institute represented the plaintiffs in the *Kelo* case before the U.S. Supreme Court and has played a principal role in crafting the reactive state legislation. *Id.* Scott Bullock of the Institute helped to craft Louisiana's amendment language. *Id.* Yet, the Institute itself admits "Louisiana has been relatively modest in its use of eminent domain for private parties." DANA BERLINER, CASTLE COALITION, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN 86–88 (2003), *available at* http://www.castlecoalition.org/pdf/report/ED_report.pdf.

104. 625 So. 2d 1070 (La. App. 4th Cir. 1993).

105. 663 So. 2d 315 (La. App. 3d Cir. 1995).

106. 794 So. 2d 962 (La. App. 2d Cir. 2001).

107. 625 So. 2d 1070.

108. *Id.*

would grant the taking. The court acknowledged NOEHA's "public purpose of promoting economic growth and development of the area," and did not question it.[109] The taking proceeded.

The *Town of Vidalia* court weighed the question of whether a development aimed at economic revitalization was a valid public purpose in Louisiana.[110] Like *Kelo*, the mixed-use development plan in *Vidalia* included (1) a hotel and retail center, (2) a marina and boat ramp, (3) an outdoor theater, (4) a river walk, (5) a visitors' center and ferry terminal, and (6) a park with landscaping.[111] Defendants in the *Vidalia* case were co-owners in an unopened succession of what amounted to a half-acre of land.[112] They did not live or conduct business on the land at the time of the taking, and they too were principally concerned with the compensation awarded.[113] The court defined a public purpose as "any allocation to a use resulting in advantages to the public at large" and because the townspeople of Vidalia supported it, granted leave for the taking.[114]

Economic development as a public purpose was again contested and affirmed in *Chanse Gas*.[115] The city sought to take property for the purpose of building a convention center and adjacent hotel by the river.[116] The main purpose cited for the development was economic growth.[117] The property owners in the *Chanse Gas* case were large corporations who had put the land up for sale until the city expressed interest then raised the price, seemingly to take advantage of the state's generous expropriation compensation scheme.[118] The court discussed the federal precedents in *Berman* and *Midkiff*, and the state precedents in *NOEHA* and *Vidalia*, to conclude that "economic development, in

109. *Id.* at 1074–75.

110. 663 So. 2d 315. The plaintiffs also cited historical, educational, and recreational benefits to the public. *Id.* at 317–19.

111. *Id.*

112. *Id.* at 316.

113. *Id.*

114. *Id.* at 319.

115. 794 So. 2d at 971.

116. *Id.* at 966–67.

117. *Id.* at 967–68.

118. *Id.* at 971, 967.

the form of a convention center and headquarters hotel, satisfied the public purposes and public necessity requirements of Art. 1, § 4 and R.S. 19:102."[119] The court further argued that even the legislature has expressed that economic development is a valid public purpose.[120] The ensuing development was universally believed to be a good one that brought about positive economic impact in the area.[121]

These three cases illustrate that "public purpose" has not been defined differently in Louisiana than in federal case law leading up to *Kelo*, but unlike the Federal Constitution, Louisiana employs other safeguards to ensure that expropriation is used sparingly. Perhaps because of these safeguards, even when expropriation has been used for public-private takings in this state, it has been met with public approval. The predominant issues in these cases involved not "public purpose" but the amount of compensation. And, like the aftermaths of *Berman* and *Midkiff* on the federal stage, none of these cases incited significant negative public or legislative reaction. Perhaps the takings were less offensive because they all involved commercial property as opposed to private residences like those in *Kelo*. Regardless, the 2006 legislative session saw three rigid constitutional amendments pass through the legislature and the public in the following September that place further restrictions on the use of expropriation in Louisiana.

III. THE AMENDMENT

This section discusses the final text of Amendment 5,[122] which, between its introduction and enactment, faced opposition from

119. *Id.* at 971–74.

120. *Id.* at 973 n.12 (citing LA. REV. STAT. ANN. §§ 33:9021(4)–(5) (1997), Polk v. Edwards, 626 So. 2d 1128 (La. 1993)). Note also that following these cases and following the legislative approval of Amendment 5, the Louisiana Supreme Court affirmed that economic development is a valid public purpose in Louisiana, though the case did not involve expropriation. Bd. of Dirs. of Indus. Dev. Bd. of Gonzales, La., Inc. v. All Taxpayers, Prop. Owners, Citizens of Gonzales, 938 So. 2d 11 (La. 2006).

121. Civil Law Committee Meeting, May 2, *supra* note 102, at 3:22 (testimony of Dan Garrett, Police Jury Association of Louisiana).

122. *See infra* app.

many groups.[123] Though the amendment passed almost unanimously through the legislature, it passed popular vote with a majority of only fifty-five percent.[124] This disconnect between Amendment 5's popularity among legislators and among voters could suggest that whatever purpose Amendment 5 was intended to effect was not met in its final draft. This section first analyzes the proposed purpose of Amendment 5 and then discusses the textual concerns it raises.

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123. These groups include: the Acadiana Economic Development Counsel, the City of New Orleans, the City of Shreveport, the Lafayette Consolidated Government, the Louisiana Association of Realtors, the Louisiana Conference of Mayors, the Louisiana Municipal Association, the Police Jury Association of Louisiana (*see* Civil Law Committee Meeting, May 2, *supra* note 102, at 3:36 (statements by Chairman Ansardi)), the Baton Rouge Area Chamber of Commerce (*see* Press Release, Baton Rouge Area Chamber, Baton Rouge Area Chamber Endorses Eight Amendments (Sept. 25, 2006), *available at* http://www.brac.org/site.php?pageID=199&newsID=37), the Bureau of Government Research (*see* Alan Sayre, *Louisiana Voters Consider Limits on Government Taking of Land*, 9/28/06 APALERTPOLITICS 16:44:26, Sept. 28, 2006), the Council for a Better Louisiana, the Times-Picayune, the Public Affairs Research Council (*see* Editorial, *Vote on Amendments*, TIMES-PICAYUNE (New Orleans), Sept. 28, 2006, at B6), and the National Federation of Independent Business (*see* Mark Ballard, *La. First to Vote on Expropriation: 3 Amendments Spell Out Government's Ability to Take Property*, THE ADVOCATE (Baton Rouge), Sept. 18, 2006, at A1).

124. Amendment 5 passed the Senate unanimously with two senators absent, *see* La. Legislature, Senate Vote on SB 1: Final Passage (Apr. 11, 2006), http://www.legis.state.la.us/billdata/streamdocument.asp?did=380010, passed the House 91–3 with eleven representatives absent, *see* La. Legislature, House Vote on SB 1: Final Passage (May 23, 2006), http://www.legis.state.la.us/billdata/streamdocument.asp?did=394558, and was concurred with in the Senate 36–1 with two senators absent, *see* La. Legislature, Senate Vote on SB 1: Concur (May 31, 2006), http://www.legis.state.la.us/billdata/streamdocument.asp?did=396209. Though its author Senator Joe McPherson went on record to predict a "well over 90%" popular vote passage, *see* Civil Law Committee Meeting, May 2, *supra* note 102, at 4:04 (testimony of Sen. McPherson), the amendment only passed with 55% of the popular vote, *see Election Results*, *supra* note 7. *See also* Mark Ballard, *Property Proposal's Supporters Claim Radio Turned Tide*, THE ADVOCATE (Baton Rouge), Oct. 2, 2006, at A4.

A. The Overall Purpose of Amendment 5

To understand the purpose for the several individual changes Amendment 5 makes, it is important to understand the impetus for Amendment 5 as a whole. The timing and debates surrounding Amendment 5 illustrate that its impetus was to protect Louisiana property owners against the same fate as Ms. Kelo and her co-plaintiffs.[125] Representative "Peppi" Bruneau, who co-authored Amendment 5 with Senator Joe McPherson, characterized the bill's purpose as follows: "to prevent expropriation by a public entity of a person's property for economic development and to 'flip' that to a third party."[126]

In debate, proponents spoke often and passionately of a looming, menacing threat called "Big Box Inc." that waited to encroach on poor, property-owning farmers and rip them from their family homes.[127] This threat echoes those that Justice O'Connor warned against in her dissenting *Kelo* opinion when she wrote: "Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[128] Thus, the overall purpose of the amendment would be well characterized as an effort to codify Justice O'Connor's dissent in *Kelo*.

B. Textual Concerns

The final text of Amendment 5 changes article I, section 4 in four ways—three of which are pertinent to this Comment—and

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125. *See* Archived Broadcasts of House of Representatives Floor Day 32, May 23, 2006, at 3:15, *available at* http://house.louisiana.gov/rmarchive/Ram/RamMay06/06RS_Day32.ram [hereinafter House Floor, May 23] (statement by Rep. Bruneau) ("Absent *Kelo*, we wouldn't be here today.").

126. Civil Law Committee Meeting, May 2, *supra* note 102, at 2:17 (statement by Rep. Bruneau); *see also* House Floor, May 23, *supra* note 125, at 2:57, 3:05 (statements by Rep. Bruneau).

127. *See, e.g.*, Civil Law Committee Meeting, May 2, *supra* note 102, at 2:43 (statement by Rep. Mike Strain). "Big Box, Inc." is a made-up term the politicians used to describe large corporations who presumably offer higher taxes to the local authorities.

128. Kelo v. City of New London, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).

changes article VI, section 21. First, the amendment disallows property from being taken either for "predominant use by" or "transfer to" any private person or entity, except when the purpose is industrial (that which is governed by article VI, section 21).[129] Second, it limits "public purpose" to a general public right to a definite use of property, a continuous public ownership designated for certain enumerated uses, or an elimination of a threat to public health or safety.[130] Third, it disallows economic development, tax revenues, or any incidental benefit to the public from being considered in determining whether a public purpose exists.[131] Fourth, though unimportant for this discussion,[132] it expands compensation awarded for the taking.[133] Finally, Amendment 5 provides an exception for takings pursuant to article VI, section 21, "industrial use" takings, to the limitations set in article I, section 4.[134]

1. The "Predominant Use" Limitation

The "predominant use" limitation prevents government from taking property for predominant use by or transfer to private parties.[135] This sounds similar to the limitation expressed in *Calder v. Bull* back in 1798, which prevented taking property from A for transfer to B.[136] However, the extent of this limitation is in question. What is predominant use? If government takes property in a blighted neighborhood and leases it to a private party to redevelop it into low income housing, a common practice today, is that "predominant use by a private person or entity"? What if effecting the lease was not the reason behind the taking, but was simply the result of the taking? The word "for" could be read to limit the taking's *mechanism* and not merely its *effect*.[137]

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129. LA. CONST. art. I, § 4(B)(1), *reprinted infra* app.
130. LA. CONST. art. I, § 4(B)(2).
131. LA. CONST. art. I, § 4(B)(3).
132. *See supra* note 15.
133. LA. CONST. art. I, § 4(B)(5).
134. LA. CONST. art. I, § 4(B)(1); LA. CONST. art. VI, § 21.
135. LA. CONST. art. I, § 4(B)(1).
136. 3 U.S. 386 (1798).
137. *See* Civil Law Committee Meeting, May 2, *supra* note 102, at 3:14 (testimony of Brian Blaesser, National Association of Realtors).

This provision was likely included to prohibit expropriation for private development of the type involving Big Box, Inc., discussed above.[138] However, common practice in redevelopment projects today involves publicly-created authorities that hire private developers to execute or manage the development.[139] For example, the New Orleans Superdome is public property but was built and is maintained by a private entity with expertise in stadium construction.[140] Even a more traditional public use, a hospital, is typically built and maintained under this public-private regime.[141] Preventing property from being taken for "predominant use by a private person or entity" could easily be construed to prevent even these types of private developers from being involved in redevelopments if expropriation is invoked.

A related concern is whether the amendment prevents mixed *use* takings. These occur when the public owns part of a project but private entities contribute their support as well.[142] The *Vidalia* case discussed in Part II(D) is an example of a mixed use taking that was widely praised. Another example of a mixed use project in negotiation at the time Amendment 5 was passed is a proposed cargo airport project in Ascension Parish. It included the construction of several privately-owned restaurants and retail outlets that would serve to support the airport employees and guests, but the amendment would restrict the seized private property to use by the airport only, disallowing use by these

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138. *See supra* Part III.A.

139. *See, e.g.*, Archived Broadcasts of House of Representatives Civil Law Committee Meeting, Mar. 21, 2006, http://house.louisiana.gov/rmarchive/Ram/RamMar06/0321_06_CLP.ram [hereinafter Civil Law Committee Meeting, March 21] (testimony of John J. Costonis, eminent domain expert). For a thorough explanation on how public-private redevelopment partnerships work, see Marc Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court:* Kelo v. City of New London, *in* THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 41 (Vt. J. Envtl. L. 2006), *available at* http://www.vjel.org/books/pdf/PUBS10003.pdf.

140. Pub. Affairs Research Council of La., Inc., *Guide to the Constitutional Amendments, September 30, 2006, Ballot*, Sept. 8, 2006, at 14 [hereinafter "PAR Guide to Constitutional Amendments"].

141. *See* Mihaly, *supra* note 139.

142. "These kinds of relationships are the rule, not the exception." Mihaly, *supra* note 139, at 53.

businesses.[143] Amendment 5's ambiguous "predominant use" language could force Louisiana's development projects into the dark ages of urban planning by requiring these public-private relationships and developments to be purely public.[144] This would place the state last on the list of many sophisticated developers, hampering efforts by community leaders to lure them to invest with the state.[145]

2. The Three "Public Purpose" Limitations

The three definitions of "public purpose" in Amendment 5 are no less problematic.[146] The first limits public purpose to "a general public right to a definite use of property."[147] This language originated from the Supreme Court of West Virginia in 1883 and is part of a test proposed by Judge Green for how to determine when a taking is constitutional if "the property is in the direct use and occupation of a private person or of a private corporation" (i.e., when it is by a common carrier).[148] The first prong of his three-prong test states: "The general public must have *a definite and*

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143. PAR Guide to Constitutional Amendments, *supra* note 140, at l2.

144. *See, e.g.*, Civil Law Committee Meeting, May 2, *supra* note 102, at 3:29 (testimony of James Babbs, citizen of New Orleans) ("All cities of all parts of all states at all times, we do not need unnecessary restrictions on the powers of our parish and municipal governments to the judicious use of expropriation. It may well turn out to be essential to the survival of communities like mine. And it may involve the transfer of some private property to some other private persons for their private uses.").

145. *See* House Floor, May 23, *supra* note 125, at 3:53 (debate by Rep. Ansardi).

146. LA. CONST. art. I, § 4(B)(2), *reprinted infra* app:

> (2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "public purpose" shall be limited to the following:
>
> (a) A general public right to a definite use of the property,
>
> (b) Continuous public ownership of property dedicated to one or more of the following objectives and uses . . . ,
>
> (c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.

147. *Id.* ¶ (2)(a).

148. Varner v. Martin, 21 W. Va. 534, 556, 1883 WL 3202, at *15 (W. Va. 1883). Common carriers were the only private entities engaged in takings of property during that time. *See supra* Part II(A).

fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested . . . ."[149] Thus, this provision appears to condone the traditional "common carrier" use of expropriation.

One striking issue with the adoption of this clause in conjunction with the "predominant use" clause, though it was not raised during legislative debate, is that the origin of the language itself implies that the property was taken "for predominant use by" a private entity: a common carrier. If a court reads the "predominant use by a private person or entity" clause to apply to all private entities, even common carriers will be prevented from their traditional role as expropriators.

The second "public purpose" limitation provides that the taking may be for "a continuous public ownership of the property dedicated to one or more of [some enumerated] uses."[150] Again, this provision simply allows for the more traditional use of expropriation. However, the drafters enumerate specific public uses that could prove inflexible over time. Further, the "continuous public ownership" language could be interpreted to mean that expropriated property can never be sold, even if it is found unnecessary in a development.[151] The hurricane recovery

149. Louisiana adopted this language in 1930 in *River & Rail Terminals v. Louisiana Railway & Navigational Co.*, 130 So. 337 (La. 1930). The case states, "It is well settled that there must be *a general public right to a definite use of the property*, as distinguished from a use by a private individual or corporation which may prove beneficial or profitable to some portion of the public." *Id.* at 340 (emphasis added). More recent courts have not read public purpose to be limited to this provision even in the case of common carriers. *See, e.g.*, Town of Vidalia v. Unopened Succession of Ruffin, 663 So. 2d 315 (La. App. 3d Cir. 1995); Tex. Pipe Line Co. v. Stein, 190 So. 2d 244 (La. App. 4th Cir. 1966). Instead, like the federal courts, Louisiana courts have stated, "'actual public use' is not the criteria by which public purpose is determined." *Tex. Pipe Line*, 190 So. 2d at 250.

150. LA. CONST. art. I, § 4(B)(2)(b). *See infra* app. for the several enumerated uses.

151. *See, e.g.*, Ballard, *supra* note 123 ("Storm-shattered neighborhoods in New Orleans need to replace roads, sewers, natural gas lines and electricity service. This requires billions of dollars of investment, which requires planning. Some property necessarily needs to be taken and resold, but that likely would not be allowed if the amendments pass, [eminent domain expert John] Costonis

effort may be an example of an unimagined situation in which expropriation is needed to remove ruined property and place it back in commerce, but these inflexible parameters could handcuff government's options. This is not the time, some say, to limit government's authority when it comes to traditional expropriation.[152]

On the other hand, enumerating upwards of twenty instances in which expropriation is allowed invites lawyers to argue that the constitution green-lights expropriation for any purpose that reasonably fits these definitions.[153] In other words, a political subdivision can still take property for anything that could be reasonably characterized as a "park," "convention center," etc., as long as it is publicly-owned. Thus advocates for economic development are quick to point out to property rights advocates that this provision does little to protect property rights; it simply expands the powers of government.[154]

The third definition of "public purpose" allows for property to be taken if it is "a threat to public health or safety."[155] This language is undefined, but echoes the traditional state police powers, even though it excludes "welfare or morals." The language seems to codify Justice O'Connor's preference that expropriation be limited to "an affirmative harm on society,"[156] though one could argue "a threat to public health or safety" is distinct from a perhaps broader "affirmative harm on society."[157]

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said."). This concern has also been raised in light of the right of first refusal provision included in Amendment 6. *See* sources cited *supra* note 15.

152. *See, e.g.*, Moran, *supra* note 3; Civil Law Committee Meeting, March 21, *supra* note 139 (testimony of John J. Costonis, eminent domain expert).

153. *See, e.g.*, Mark Ballard, *Expropriation Amendment Called "Trojan Horse" by Foe*, THE ADVOCATE (Baton Rouge), Aug. 26, 2006, at A1.

154. *See* Civil Law Committee Meeting, May 2, *supra* note 102, at 3:35 (testimony of James Babbs, citizen of New Orleans).

155. LA. CONST. art. I, § 4(B)(2)(c).

156. Kelo v. City of New London, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting).

157. For example, Justice O'Connor characterized the taking in *Midkiff* as one that corrected the "affirmative harm" of oligopoly. *Id.* Oligopoly may not be, however, a "threat to public health or safety."

Courts could interpret this provision to prevent expropriation of blighted neighborhoods throughout the state, which could seriously hamper the hurricane recovery effort.[158] Laws passed in Louisiana as recently as 2005 suggest that expropriating blighted property is a common practice in the state and is supported by its legislators.[159] These laws, in general, give authority to political subdivisions to expropriate or otherwise acquire property that has been shown to be blighted in conformity with approved parish plans. Indeed, the cities of New Orleans and Baton Rouge, and the parishes of St. Bernard and St. Charles, enacted redevelopment plans pre-Katrina invoking expropriation, if necessary, for various blighted neighborhoods in their jurisdictions.[160]

However, the "threat to public health or safety" language does not match the definitions of "blight" set out in the so-called "blight statutes." Those definitions include circumstances that could be characterized as threats to public health or safety, but also considerations characterized as threats to public welfare or morals.[161] For example, they include diversity of ownership and defective titles as reasons why a city might want to expropriate property.[162] If a court determines that blighted or hurricane-ravaged areas are not included in the "threat to public health or safety" exception, the amendment may have gone further towards inhibiting economic development than originally intended.

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158. *See* Civil Law Committee Meeting, May 2, *supra* note 102, at 3:13–:14 (testimony of Brian Blaesser, National Association of Realtors); Civil Law Committee Meeting, March 21, *supra* note 139 (testimony of John J. Costonis, eminent domain expert).

159. *See, e.g.*, LA. REV. STAT. ANN. §§ 33:4625 (the "Parish Redevelopment Law"), 4720–20.151, 9097.2 (2007).

160. *See* § 33:4720–20.151 (including the "New Orleans Community Improvement Act," the "St. Charles Parish; Acquisition and Sale of Blighted Property," the "St. Bernard Parish Redevelopment Law," and the "South Burbank Crime Prevention and Development District"). Many of these laws were effective June 21, 2005, two months before Hurricane Katrina struck, and two days before the *Kelo* decision was handed down from the Court. *Id.*

161. *See, e.g.*, St. Bernard Parish Redevelopment Law, § 33:4720(Q)(1) (defining "blighted area" as a "menace to the public health, safety, morals, or welfare").

162. Civil Law Committee Meeting, May 2, *supra* note 102, at 3:13 (testimony of Brian Blaesser, National Association of Realtors).

Additionally, even if a court allows blighted-area takings, it could construe this exception in conjunction with the "predominant use" provision and inhibit cities from partnering with private developers to redevelop blighted property.[163]

3. Eliminating Economic Considerations

Amendment 5 also prevents courts or governing authorities from considering economic development, tax revenues, or any incidental benefit to the public in determining whether a proposed expropriation contains a public purpose.[164] The amendment does not define "economic development" nor "any incidental benefit." If they are to be ignored when a court determines whether a public purpose exists for a taking, what exactly are they?

The biggest difficulty with this provision is that economics could be considered the underlying purpose of any number of governmental takings. For example, consider one of the most traditional public purposes: a road. Arguably, roads are principally built for economic development because they facilitate commerce. They also create ease of transportation to citizens, but this could be characterized as a mere "incidental benefit" to the larger economic development end. Since incidental benefits are also prohibited from consideration, now the amendment has eliminated the use of expropriation for roads. The interpretations of these two provisions are so uncertain that their potential effects on the future of Louisiana's economic development projects range from detrimental to devastating.

4. The Industrial Use Exception

The final amendment significant to this Comment is the change to article VI, section 23. The Amendment 5 drafters included a

163. "One of the principals that we talk about with the realtors is the importance of government being able to play a complementary role when the market does not intervene. That involves land assembly; that involves often properties that are of a certain condition that the market won't enter." Civil Law Committee Meeting, May 2, *supra* note 102, at 3:19 (testimony of Brian Blaesser, National Association of Realtors).

164. LA. CONST. art. I, § 4(B)(3), *reprinted infra* app.

major exception to the limitations articulated in article I, section 4: the industrial use exception. Article VI, section 21 already provided that property may be taken for any industrial purpose[165] and transferred to a third party.[166] The changes made to the section are: (1) that the port authorities authorized to take property are expanded from "deep-water" ports to all "public" ports; (2) that the section is excused from the restrictions of article I, section 4; and (3) that bona fide homesteads[167] are exempt from the industrial use takings.[168]

The industrial use exception is significant simply because the drafters chose to leave it in place and give it a reprieve from all the other limitations added to article I, section 4. It is curious why the drafters believed that *industrial* private parties were any more favorable to property owners than other private parties. As one property rights advocate put it, the amendment may disallow Toyota from erecting a car dealership on your farmland, "but if Toyota wants to build a plant on your property, there's nothing we can do about that."[169] The fact that the drafters chose to pardon industrial use takings from the limitations added to article I, section 4 could suggest that they concede benefits of economic development expropriations.

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165. The legislators defined "industrial," roughly, as anything not "retail." *See, e.g.*, Civil Law Committee Meeting, May 2, *supra* note 102, 2:28–:29 (testimony of Sen. McPherson).

166. LA. CONST. art. VI, § 21 (1974). An accompanying statute authorizes political subdivisions or ports who expropriate (or in any way acquire) properties for industrial purposes to transfer them to a third party, most likely the attracted industry. LA. REV. STAT. ANN. § 33:4712.2 (2007). The statute sets forth the limitation that the transfer must be preceded by a fourteen-day public notice, and if five percent of the population objects, a public hearing is held and a popular vote follows. *Id.*

167. The "bona fide homestead" is defined by article VII, section 20(A)(1) as one or more tracts of land "with a residence on one tract and a field with or without timber on it, pasture, or garden on the other tract or tracts, not exceeding one hundred sixty acres, buildings and appurtenances, whether rural or urban, owned and occupied by any person or persons owning the property in indivision."

168. LA. CONST. art. VI, § 21, *reprinted infra* app.

169. Civil Law Committee Meeting, May 2, *supra* note 102, 4:08–:09 (question to Sen. McPherson by Rep. Cravins).

C. Hurricane Recovery: A Final Consideration

A final, heavily-debated topic, and arguably the least resolved, involves the effects of Amendment 5 on hurricane-ravaged South Louisiana. Louisiana has recently suffered the worst natural disaster in U.S. history, and the third largest hurricane disaster in U.S. history, one after the other, in Hurricanes Katrina and Rita. The storms left over 200,000 homes and 81,000 businesses damaged or destroyed across the state.[170] The effect that Amendment 5 may have on these areas is unknown.

Property rights advocates argue that hurricane victims should be allowed to decide for themselves what to do with their property.[171] Many are fearful that opportunistic developers will come from out of state and dictate how neighborhoods will be redeveloped. They argue that if developers want to aid in the rebuilding effort, they should enter the market through negotiation and purchase.[172] However, as long as these outside developers represent private industrial entities, Amendment 5 allows them to come.[173] It also allows government to take property and turn it into a park, a convention center, or any number of other publicly-owned lands.[174] The only thing Amendment 5 disallows is non-industrial public-private takings that are designed to bolster the state's economy.[175]

Advocates for economic development caution against hamstringing government any further in the wake of its most criticized failure in recent history.[176] Notably, Mississippi has not

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170. La. Recovery Auth. & La. Remembrance & Rebirth, *Hurricane Katrina Anniversary Data for Louisiana* 3, 9 (2006), http://rememberrebirth.org/documents/LouisianaKatrinaAnniversaryData082106.pdf.

171. *See, e.g.*, Moran, *supra* note 3 ("'I don't think we need social engineers to tell us what we should do with our property,' said Rep. Peppi Bruneau, R-New Orleans, co-sponsor of the amendment. 'People have the right to build their homes back if they want to.'").

172. *Id.*

173. *See supra* Part III.B.4.

174. *See supra* Part III.B.2.

175. *See supra* Part III.B.3.

176. *See, e.g.*, Moran, *supra* note 3 ("Others say the legislation could straitjacket government at a time when it needs to find creative ways—perhaps with the help of the private sector—to put ruined property back in commerce.

passed limitations on its eminent domain laws in the wake of *Kelo*,[177] and developers keeping track of state laws may choose Mississippi over Louisiana when choosing with whom to invest.[178] In sum, while property rights advocates may assail government for invoking expropriation during such a sensitive time, Amendment 5 unfortunately does not help their claim. All the amendment could do at this point is to deprive government of its choice to do well by its expropriation power and revitalize the economy.

Even though Amendment 5 passed popular vote on September 30, 2006, it is fraught with inconsistencies and unclear provisions that the courts must now interpret. It is imperative that the courts do so correctly. Many issues hang in the balance, including the rights of property owners across the state, the state's economic future, and the fate of the hurricane recovery effort currently underway. Some of Amendment 5's effects were intentional and cannot be helped. Some, however, are wholly in the hands of the interpreter. The next section takes up the terms and provisions of Amendment 5 that are subject to interpretive debate and recommends how these provisions must be read together to best protect property rights without hamstringing economic development.

IV. ANALYSIS AND RECOMMENDATIONS

Amendment 5 purports to protect property rights but succeeds only in inhibiting economic development in the state.[179] If the overall purpose of the amendment is to codify Justice O'Connor's dissent in *Kelo*,[180] it should not be read to restrict expropriation any more than she would have restricted it in her *Kelo* dissent. Thus,

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'If I were going into a voting booth and I were from New Orleans, I would think very hard about whether I want to deprive government of the capacity to do things that will clearly have to be done to effectuate post-Katrina recovery,' said John Costonis, chancellor of the Louisiana State University Law Center.").

177. *See supra* note 94.

178. *See* House Floor, May 23, *supra* note 125 (statement by Rep. Ansardi).

179. PAR Guide to Constitutional Amendments, *supra* note 140, at 12 ("[J]udicial interpretations may lead to unintended consequences—detrimental to property rights, economic development and rebuilding needs.").

180. *See supra* Part III.A.

this section takes a more in-depth look at the *Kelo* opinion and investigates what exactly it holds and what it does not. In light of this purpose, this section then discusses the various Amendment 5 provisions that *are* subject to interpretive debate and supports certain readings that make for a consistent furtherance of this overall purpose.

A. The Overall Purpose of Amendment 5

As mentioned, the overall purpose of Amendment 5 is to prevent property from being taken for economic development and flipped to a third party. This suggests that it is meant to ensure that Justice O'Connor's concerns in *Kelo* do not transpire. It is worth noting, however, that the *Kelo* majority specifically refuted the argument that its holding would allow situations suggested by Justice O'Connor, where one private entity is allowed to take the property of another simply because it can pay more taxes. It did not say, as one expert argued, that government can take your property and build a Wal-Mart on it,[181] just for the purpose of increased tax revenue. So before further evaluating the meanings behind Amendment 5, it is important to understand exactly what portions of *Kelo* that Amendment 5 intends to prevent.

1. Bad Facts Make Bad Law

It is clear that something about the *Kelo* opinion offended American property owners. More than likely, it was that the media and others framed its result to be that the Constitution allowed Suzette Kelo's unoffending home to be torn down to make way for a shopping center. This was no doubt the result of the case, but it is not the full story.

Ms. Kelo and her co-plaintiffs represented the vast minority of property owners in the New London redevelopment area. Their crusade to save their properties ran afoul of the best interests of the city, as determined by intensive, careful research on the part of the NLDC and the approval of a vast majority of its citizens. Yet these facts were not articulated to the public through the opinion nor the

181. Moran, *supra* note 3 (statement by expropriation expert Michael Rubin).

media. As Professor Costonis remarks in his article printed in this law review issue,

> One would never know from the *Kelo* opinions, public comment on them, or the Louisiana amendments that the City of New London was seeking to address the very same range of problems, exclusive of flooding, that beset New Orleans—pre- and post-Katrina—on all sides: population loss, poverty and unemployment, displacement of major employers and industry, inferior public education and health facilities and services, and a depressing array of other urban ills.[182]

Unfortunately for the American public, one must admit that Ms. Kelo's plight tugs insistently at the heart strings. Most of us have homes like Ms. Kelo's charming beachfront cottage, to which we are attached and with which we would not like to part. Yet Marc B. Mihaly argues in his article *Public-Private Redevelopment Partnerships and the Supreme Court* that the plaintiffs in *Kelo* were dreadfully atypical parties to redevelopment condemnations and that, in fact, actual condemnation for *any* redevelopment is a rarity and condemnation of residential properties occurs even less frequently.[183] The reason for this is that condemnations undergo intense public scrutiny, requiring approval by the full community before they are ever allowed to continue. We are not told, Mihaly argues, that regardless of what state Ms. Kelo had resided in, "the condemnation could not have proceeded without the likely consent of a committee representing Ms. Kelo and her neighbors." Once a community of property owners agrees that a need exists, reason dictates that eminent domain must be exercised to combat the minority holdouts, just as it has been used for centuries.[184]

Despite the anomalousness of the case facts, the Supreme Court granted certiorari, decided the case based on legal precedent,

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182. Costonis, *supra* note 15, at 377 n.96.

183. Mihaly, *supra* note 139, at 44. ("In those few situations where condemnation is used, and in those even far fewer that involve residential land, an infinitesimal number would involve condemnation of a cluster of single-family residences in a functioning residential neighborhood.").

184. *See supra* Part II.A.

and as the adage goes, "bad facts make bad law."[185] Based on the facts presented and the result they produced, public outrage ensued.

2. Living with the Law: Kelo*'s Effect on Amendment 5*

Notwithstanding the "bad facts" in *Kelo*, the majority's legal reasoning was prudent. Recall that the Court proceeded from the premise that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*."[186] It went on to say, "the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party," as such a taking would serve no legitimate public purpose and would not withstand public scrutiny.[187]

Why then did Justice O'Connor argue that the majority would allow the "replacing [of] any Motel 6 with a Ritz-Carlton"?[188] First, she reasoned that it is difficult for a court to determine when a taking is intended to benefit a particular private party and when it benefits the public,[189] but she failed to acknowledge the vast public scrutiny that any condemnation must undergo before it ever gets to a court. The sensitive nature of the condemnation almost guarantees that if hidden agendas are afoot—and even if they are not—they will certainly be alleged and investigated. As in Louisiana, the sovereign will already have had to prove a valid purpose to its electorate before a judge ever reviews the case. This explains why the Supreme Court has not yet heard a case for an economic development taking where it found no public purpose.

Second, Justice O'Connor pointed out that even if a taking does benefit the public incidentally, "private property is still

185. Justice Stevens himself indicated in a later speech that he disagreed with the result in policy, but felt compelled by precedent to reach his conclusion. Mihaly, *supra* note 139, at 41 n.1 (citing Justice Weighs Desire v. Duty (Duty Prevails), N.Y. TIMES, Aug. 25, 2005, at A1.2).

186. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

187. *Id.*

188. *Id.* at 503.

189. *Id.* at 502.

forcibly relinquished to new private ownership."[190] However, this reasoning ignores the legal precedents of both *Berman* and *Midkiff*, the latter of which Justice O'Connor herself authored. Both of those cases involved the "forcible" taking of private property for new private ownership and were decided instead on the basis of their benefit to the public.

Public backlash following *Kelo* proved that between the majority and Justice O'Connor, Justice O'Connor was most effective in garnering public support for her opinion and reasoning. The purpose of Amendment 5 is to apply expropriation law in Louisiana as Justice O'Connor would have applied it in *Kelo*. That is, economic development alone is not a public purpose; the public purpose must remedy some *affirmative harm* in the community. Her opinion does not, however, rule out public-private economic development takings altogether because she does not wish to overturn *Berman*. The taking in *Berman* involved a private developer, just like the taking in *Kelo*, and one purpose for the taking was economic revitalization of the area. The fact that development is conducted by a private party and the private party is one beneficiary of the development does not necessarily imply that a valid public purpose is not also present. This affirms that Louisiana law still allows property like that in *Berman*—an economically decrepit area that is a threat to public health or safety— to be taken, but would not allow a taking like that in *Kelo*, a private development in an un-blighted area with a strictly financial benefit.

B. Textual Analysis

This section analyzes the text of Amendment 5 and recommends sound judicial interpretations that will support its purpose without devastating economic growth efforts across Louisiana. Note, however, that some issues arise here that courts may not be able to resolve.[191] For example, it is clear from the amendment that the legislature intended for article VI, section 21

190. *Id.* at 503.

191. If a law is clear and unambiguous and does not lead to absurd consequences, a court may not interpret it beyond its text. LA. CIV. CODE ANN. art. 9 (2007).

(the industrial use exception) to be excepted out of the provisions added to article I, section 4. Property rights advocates must simply take comfort in the fact that an industrial expropriation cannot be exercised against a bona fide homestead. However, many concerns raised by advocates for economic development can be addressed and cushioned by court interpretation.

1. The Predominant Use Requirement

> Except as specifically authorized by Article VI, Section 21 of this Constitution, property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.[192]

This provision is arguably the most restrictive if interpreted incorrectly. As discussed in Part III, the provision could be read literally to prevent even common carriers from owning or using expropriated property. If this is the case, expropriation in Louisiana would be thrown into the nineteenth century,[193] and Amendment 5 would have an effect clearly unintended by its drafters.[194]

More likely, this provision could prevent common "mixed use" public-private developments of today and grossly retard future developments in the state. The drafters likely meant for this provision to protect against property being seized for transfer to the menacing Big Box, Inc., but they disregarded or were ignorant to the fact that redevelopment projects in Louisiana are spearheaded by local government, not Big Box predators, and must be supported by communities before they can go forward.[195] In

192. LA. CONST. art. I, § 4(B)(1), *reprinted infra* app.

193. *See supra* Part II.A.2.a.

194. *See* Civil Law Committee Meeting, May 2, *supra* note 102, 2:24–:25 (statement by Sen. McPherson that expropriation by common carriers is not a subject of controversy and should not be limited by the amendment).

195. Mihaly argues that the reason the *Kelo* Court was so unconvincing in its opinion is because none of the Justices presented a clear understanding of how modern government-assisted economic redevelopment projects work. Mihaly, *supra* note 139. He argues that in today's redevelopment projects "use-by-the-public" cannot be distinguished from private land use, nor can government

today's redevelopments, Big Box is not the aggressor. On the contrary, local government is the aggressor and Big Box is the tool it uses to confer a benefit on the public. Unlike Big Box, local government is answerable for its actions to the voting public. The agreement it makes with Big Box is highly scrutinized and negotiated under the watchful eye of the public and does not go forward without public support.

"Mixed use" developments of today blur the line between who is using the property "predominantly" and who is using it partially. Moreover, transferring property to a developer, who then carries out the will of the community, is common practice and an important function of government.[196] Reading this provision literally would alienate any developers outside the state who seek to invest here and effect any public-private takings now or in the future.

Thus, courts must consider this provision as analogous to the well-settled requirement that property cannot be taken from *A* for the sole purpose of transferring it to *B*. In other words, courts should interpret this provision to scrutinize a taking's *effect*, not its *mechanism*, just as the Supreme Court did in *Berman* and *Midkiff*. The manner in which federal courts have framed this rationale is to say that the transfer may not solely benefit a particular class of persons.[197]

To construe this language in this way, the courts must rely on the use of the word "for" in the beginnings of each of the two limitations: property shall not be taken *for* predominant use or *for* transfer to any private entity. The courts must interpret this word structure to mean that the law focuses not on the *mechanism* of the taking, but on its *purpose* or effect. Even if the mechanism of the taking involves "predominant use" or "transfer to" a private entity, as long as the taking was not transacted for that reason alone, then the taking passes this provision. As one appellate court stated, "a use of the property by a private individual or corporation, when

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motivation be distinguished from private profit; the two are too well intertwined. *Id.*

196. *See supra* Part III.B. (Superdome example).

197. Kelo v. City of New London, 545 U.S. 469, 477 (2005).

such use is merely incidental to the public use of the property by the state or its political subdivision, does not destroy an otherwise valid public purpose."[198]

Some may argue that this interpretation is too benign and will not remedy the injustice of the *Kelo* result. However, the several other limitations in Amendment 5 will serve that purpose. Even if the "predominant use" provision is interpreted to scrutinize the purpose of the taking and not the mechanism, the purpose is still limited to the three restrictions set in article I, section 4(B)(2). These accomplish Justice O'Connor's goal: to eliminate purely economic public purposes by requiring an affirmative harm on society before a government may exercise eminent domain.

The interpretation recommended herein will temper the impact of Amendment 5 on land use planning and will present courts with a familiar parameter under which to analyze public purpose. As the *Berman* and *Midkiff* cases illustrate, it is not important for the courts or a constitutional amendment to govern the mechanism of a taking, but only to evaluate the breadth of the benefit it incurs.

2. The Three "Public Purpose" Limitations

> (2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "public purpose" shall be limited to the following:
>
> (a) A general public right to a definite use of the property,
>
> (b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:
>
> . . . .
>
> (c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.[199]

As explained in Part III(B)(2) above, the language in the first "public purpose" limitation, "a general public right to a definite use of the property," originates from jurisprudence and traditionally applies to takings for use by common carriers. During Amendment 5's drafting, legislators debated whether to include the

198. Crooks v. Placid Refining Co., 903 So. 2d 1154, 1165 (La. App. 3d Cir. 2005).

199. LA. CONST. art. I, § 4(B)(2), *reprinted infra* app.

common carrier exception in the "continuous public ownership" section of the amendment or to give common carriers their own exception. They concluded that since no one had ever raised an issue as to common carriers, and since it is necessary that such entities be authorized to exercise takings power, common carriers should have their own exception. The language used here is equally uncontroversial, and a court should interpret it to apply to common carriers just as it has been applied jurisprudentially in Louisiana since 1930.[200]

The provision discussing "continuous public ownership" represents the drafters' version of the traditional public ownership doctrine. Three concerns have been raised with it. First, these enumerated uses are so specific that courts may be unwilling to stretch them enough to account for unforeseen public needs, such as those presented by Hurricanes Katrina and Rita. However, this is unlikely because the language used is undefined and general in nature.[201]

Conversely, property rights advocates fear that courts will allow certain unintended takings to fit themselves into one of the enumerated uses.[202] However, the requirement that the development must be continuously owned by the public makes it equally unlikely that any unintended takings will offend these property-owners any more than taking property for a convention center or museum would.[203] As long as it is publicly owned, the taking cannot be more traditional than that.

A third concern is more important. Takings for large-scale redevelopment projects, such as those that will be part of the hurricane recovery, will necessarily involve taking property

200. *See supra* Part III.B.2.

201. *See* LA. CONST. art. I, § 4(B)(2) (e.g., "other public transportation," "navigational protection," "recreational facilities," "public utilities").

202. *See supra* Part III.B.2.

203. Notably, the drafters' inclusion of "convention center" as an enumerated use suggests that of the three cases in which a private economic development taking has occurred in Louisiana, the legislature supported at least two. Both *NOEHA* and *Chanse Gas* were takings for the purpose of building convention centers. *See supra* Part II.D. This suggests the legislature approved of the *results* in these cases, if not their reasoning. Though there is no evidence that the legislature sought to overturn the third case, *Vidalia*, the case was not mentioned in legislative debate as one that offended the public.

without putting all of it to public use. It is possible that the "continuous public ownership" provision could inhibit government's ability to properly plan the redevelopment because unused land may not be resold, and wooed private developers, not wanting to get stuck with the bill, will not come to the table.

Courts should therefore construe this language to be binding only insofar as the taking is planned. In other words, as long as the land is *intended for* continuous public ownership, a court should find a sufficient public purpose. Courts can study planning documents and uses of surrounding property to determine the expropriator's intent.[204]

Some may argue that limiting the provision to this interpretation could encourage government to feign certain intentions prior to any kind of taking and then resell the property to Big Box. Again, this ignores the intense public scrutiny any taking undergoes. Further, another constitutional provision prohibits this: Newly amended article I, section 4(G) requires that any expropriated property not used for its designated purpose must be offered back to the original owner at fair market value within two years of completion of the project.[205]

Finally, the "threat to public health or safety" exception represents the only extension of "public purpose" that Amendment 5 allows beyond the traditional public uses.[206] It is a relatively narrow extension but affirms the theory that Amendment 5's purpose was to codify Justice O'Connor's dissent in *Kelo*. As mentioned, the only difference between her dissent and

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204. The expropriator for purposes such as sewage and electricity will not necessarily be a sovereign. Various energy companies, telephone companies, and water and sewage plants are among a select group of private entities that have been granted expropriation powers by statute. *See, e.g.*, PAR Guide to Constitutional Amendments, *supra* note 140, at 10.

205. 2006 La. Acts No. 859. As has been mentioned, this is a hugely confining requirement that warrants its own study outside the scope of this Comment. Nonetheless, it is the law and will surely curb or perhaps transform the expropriation process in the future. *See* Costonis, *supra* note 15, at 383–85 (likening the right of first refusal provision to a "poison pill" in a "corporate take-over attempt" given its public auction requirement and 30-year duration, but positing that possible loopholes include structuring the transfer as a 501(c)(3) donation or an article VII, section 14(C) cooperative endeavor).

206. LA. CONST. art. I, § 4(B)(3).

Amendment 5 is that she would require an "affirmative harm on society" rather than the arguably more narrow "threat to public health or safety." If a court interprets the language to be the same as Justice O'Connor's "affirmative harm on society," then Louisiana's blight statutes could remain.

Public health and safety are two elements of the familiar police power afforded to states: that of protecting the public's health, safety or welfare, and sometimes morals. When speaking of the police power, health and safety are rarely separated from welfare. The fact that the Amendment 5 drafters separated them in Amendment 5 is a strong argument that they intended to draw a distinction between the extent of the expropriation power and the extent of the police power in this state.

Justice O'Connor made the same distinction in her *Kelo* dissent when she lamented the link the Court drew between the two powers in *Berman* and *Midkiff*.[207] The reason she does not go on to propose defining public purpose as a removal of a threat to public health or safety, and not welfare, is likely that she could not frame the holding in *Midkiff* as such. Justice O'Connor herself described the oligopoly in *Midkiff* as an "injury to the public welfare and tranquility." She could not stretch that fact-pattern to find a threat to health or safety. From this one could draw one of two conclusions: (1) Justice O'Connor would have limited public purpose as a threat to public health or safety had she not been

207. *See* Kelo v. City of New London, 545 U.S. 469, 501–02 (2005) (O'Connor, J., dissenting) ("There is a sense in which this troubling result follows from errant language in *Berman* and *Midkiff*. In discussing whether takings within a blighted neighborhood were for a public use, *Berman* began by observing: 'We deal, in other words, with what traditionally has been known as the police power.' 348 U.S., at 32, 75 S. Ct. 98. From there it declared that '[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear.' *Id.*, at 33, 75 S. Ct. 98. Following up, we said in *Midkiff* that '[t]he "public use" requirement is coterminous with the scope of a sovereign's police powers.' 467 U.S., at 240, 104 S. Ct. 2321. This language was unnecessary to the specific holdings of those decisions. *Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for 'public use' for the reasons I have described. The case before us now demonstrates why, when deciding if a taking's purpose is constitutional, the police power and 'public use' cannot always be equated.")

bound by her own words in *Midkiff*; or (2) Justice O'Connor concedes that certain conditions, such as a concentration of land ownership which are not necessarily injurious to health or safety, are still worthy circumstances in which to invoke the Takings Power.

Admittedly, however, Amendment 5's phrasing is clear, and likely not subject to interpretive debate. It would be difficult for a court to read "threat to public health or safety" to allow a taking that benefits the public's *welfare* when that word is so pointedly absent. Therefore, one must concede that certain situations which in the past have spurred municipalities to expropriate blighted properties—concentrations of land ownership or invalid titles, for example—no longer warrant expropriation in Louisiana.

One question is left to interpretive analysis: when the taking would disrupt a threat to public health or safety, though there does not already exist a harm, is the taking valid under Amendment 5? The use of the word "threat" necessarily implies that the harm may occur *in the future*. Thus, for example, a hurricane-ravaged neighborhood in New Orleans that is cleaned and gutted, but still abandoned, could be characterized as a "threat" to public safety because abandoned buildings tend to attract vagrancy and criminal activity.

If government is going to be allowed its expropriation power to rebuild neighborhoods in the wake of the storm, it must do so under the threat to public health or safety exception, because otherwise the acquired land would have to remain public, common carrier, or industrial property. Courts must not allow the "threat to public health or safety" provision to prevent expropriation in the hurricane recovery effort.

Expropriation is a necessary practice for government to effect redevelopment in decrepit or destroyed municipalities, even if an effect of the taking is economic. As Professor Costonis states, "To collapse the values associated with combating the[] ills [in New London at the time of *Kelo* and in New Orleans today] into something called 'economic development' is as callous as portraying the city as a behemoth running roughshod over its undefended citizens . . . ."[208] Where homes remain abandoned and

208. Costonis, *supra* note 15, at 377 n.96.

undeveloped, government must be able to expropriate the region and contract with developers to execute a revitalization plan.

Some have argued that if one or two homeowners in a neighborhood redevelop, then the entire neighborhood will be restricted from redevelopment because the individual redeveloped homes are not threats to public health or safety.[209] However, as this Comment has argued, Amendment 5 does not overturn *Berman*, which states that a municipality may evaluate a region as a whole, and not individual properties therein, to determine if a taking is warranted.[210] Nothing in Amendment 5 states that a *particular* plot of land must be evaluated separately from its neighbors. A court should not read a requirement into Amendment 5 that is not already there.

3. Eliminating Economic Considerations

> (3) Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.[211]

Finally, Amendment 5 takes economic development, tax revenues, or "any incidental benefit to the public" out of the determining factors of whether a public purpose exists.[212] As mentioned, Justice O'Connor did not disdain economic development as *a* factor in determining public purpose; she simply disapproved of its employ as the *sole* factor. Economic development is not an evil governmental end. In Louisiana's case especially, it is one of its most fundamental and important goals.

Louisiana has been at the bottom of the economic totem pole for too long.[213] By passing Amendment 5, its proponents have made known that their priorities lay elsewhere. They purport to be

209. PAR Guide to Constitutional Amendments, *supra* note 140, at 13.
210. *See supra* Part II.A.
211. LA. CONST. art. I, § 4(B)(3).
212. *Id.*
213. *See* House Floor, May 23, *supra* note 125 (statement by Rep. Ansardi).

fighting a phantom threat of property right infringement (that is not industrial in nature),[214] but this threat is well contained.[215] Disengaging government from economic development is an unnecessary sacrifice in Louisiana's reaction to *Kelo*.

Fortunately, the provision can be read as unnecessary. With the restrictions in section 4(B)(2) already in place, a public purpose must involve either a traditional use or a threat to public health or safety. The benefits to the public in both of those will include more than straight economics. The only way in which this provision can serve to further hamper economic development is if it is applied in the absurd manner mentioned in Part III(B)(3) above—that even a road is an invalid public purpose because it extends an economic benefit.

Courts have broad discretion in interpreting these last two provisions and are urged to exercise it. Both provisions should be read narrowly and should not be used as barriers to economic development takings that result in benefits to the public.

Because Amendment 5 prevents economic development, increased tax revenue, or any incidental benefits to the public from being considered in determining public purpose, a court must lower the standard of scrutiny for determining when a taking furthers a legitimate governmental end. As this Comment makes clear, expropriations in Louisiana occur *only* when absolutely necessary for public benefit. They pass strict public scrutiny before ever entering a court of law. If state and local authorities, and a community at large support a taking, and the government can show that the taking is rationally related to a removal of a threat to public health or safety, then the court must not stand in the way of economic development simply because it is a predominant (and *positive*) effect of the taking.

V. CONCLUSION

The U.S. Supreme Court decision in *Kelo* shocked the nation, but not all of its facts were presented to the public. Louisiana's reaction was knee-jerk and resulted in inconsistent provisions that

214. *See supra* Part III.A.
215. *See supra* Part II.D.

fail to add protections for property-owners in the state. Instead, the amendment could be read to hamstring public-private economic development and further disrupt an already struggling hurricane recovery effort. Public-private developments are not the enemy. Local governments rely on, and indeed seek out, private dollars to nurture and repair neighborhoods. Political processes ensure that these projects obtain overwhelming community support before they go forward, and that the results are beneficial. Amendment 5 must not be read to prevent these projects just because they involve parties that seek a profit. The public too seeks a profit in entering into agreement with them: economic development. It is therefore imperative that courts across the state interpret the provisions of Amendment 5 as herein recommended. Louisiana's economic future depends on it.

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APPENDIX

Amendment 5 amends article I, section 4(B) to state (bold and underlined words added):

ARTICLE I. DECLARATION OF RIGHTS

. . . .

§4. Right to Property

. . . .

(B)(1) 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. **Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.**

(2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23* of this Constitution, "public purpose" shall be limited to the following:

(a) A general public right to a definite use of the property,

(b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:

(i) Public buildings in which publicly funded services are administered, rendered, or provided.

(ii) Roads, bridges, waterways, access to public waters and lands, and other public transportation, access, and navigational systems available to the general public.

(iii) Drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally.

(iv) Parks, convention centers, museums, historical buildings, and recreational facilities generally open to the public.

(v) Public utilities for the benefit of the public generally.

(vi) Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.

(c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.

(3) Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose

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* Article VI, section 23 grants local governments the power to expropriate for public purposes:

§23. Acquisition of property.

Section 23. Subject to and not inconsistent with this constitution and subject to restrictions provided by general law, political subdivisions may acquire property for any public purpose by purchase, donation, expropriation, exchange, or otherwise.

pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.

(4) 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, whither the purpose is public and necessary shall be a judicial question.

(5) In every expropriation **or action to take property pursuant to the provisions of this Section,** a party has the right to trial by jury to determine **whether the** compensation **is just,** and the owner shall be compensated to the full extent of his loss. **Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.**

(6) No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction.

Amendment 5 also amends article VI, section 21 to read (bold and underline words added; struck through words deleted):

ARTICLE VI. LOCAL GOVERNMENT

. . . .

§21. Assistance to Local Industry

(A) Authorization. In order to (1) induce and encourage the location of or addition to industrial enterprises therein which would have economic impact upon the area and thereby the state, (2) provide for the establishment and furnishing of such industrial plant, **(3) facilitate the operation of public ports,** or ~~(3)~~ **(4)** provide movable or immovable property, or both, for pollution control facilities, the legislature by law may authorize, subject to restrictions it may impose, any political subdivision, ~~deep-water~~ **public** port commission, or ~~deep-water~~ **public** port, harbor, and terminal district to:

(a) issue bonds, subject to approval by the State Bond Commission or its successor, and use the funds derived from the sale of the bonds to acquire and improve industrial plant sites and other property necessary to the purposes thereof;

(b) acquire, through purchase, donation, exchange, and ~~(subject to Article I, Section 4)~~ expropriation, and improve industrial plant buildings and industrial plant equipment, machinery, furnishings, and appurtenances, **including public port facilities and operations which relate to or facilitate transportation of goods in domestic and international commerce**; and

(c) sell, lease, lease-purchase, or demolish all or any part of the foregoing.

. . . .

(D) Property excepted. The bona fide homestead, as defined by Article VII, Section 20(A)(1), shall not be subject to expropriation pursuant to this Section.