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### Expanding Expropriation: The Subordination of Property Rights to Eminent Domain in St. Bernard Port, Harbor & Terminal District. v. Violet Dock Port, Inc. LLC

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EXPANDING EXPROPRIATION: THE SUBORDINATION OF PROPERTY RIGHTS  
TO EMINENT DOMAIN IN *St. Bernard Port, Harbor & Terminal District. v.*  
*Violet Dock Port, Inc., LLC*

*Stephen Marsalis\**

I. INTRODUCTION

Private property is a long-held principle in American law. One of the limitations placed on the right of property is taking private property under eminent domain, pursuant to the Fifth Amendment's Takings Clause. In recent years, the United States Supreme Court has expanded the definition of public use under the clause to include such factors as tax revenue and economic development in the case of *Kelo v. City of New London*.<sup>1</sup> In response to this expansion, a number of states decided to modify their constitutions and laws to limit the definition of public use to give greater protections of private property than what is guaranteed at the federal level.<sup>2</sup> Louisiana was one such state. A state constitutional amendment was passed after *Kelo* which expressly prohibited the consideration of tax revenue, economic development, or any incidental public benefit when determining whether the taking of property under eminent domain was for a public purpose.<sup>3</sup> The Louisiana Constitution also prohibits the expropriation of a business for the purpose of halting competition with a government enterprise.<sup>4</sup> Unfortunately, Louisiana has not been as successful in limiting eminent domain in actual practice.

The limitations on the power of the state government and local governments to take private property was part of an effort to strengthen the property rights of individuals in Louisiana. However, in the case *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, the Louisiana Supreme Court addressed these provisions of the Louisiana Constitution in a different light. This Note will analyze the majority and

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\* Stephen Marsalis is a 2020 graduate of Mississippi College School of Law. The author would like to thank Professor Mark Modak-Truran for his advice throughout the drafting of this Casenote. The author is also grateful to his friends and family for their support.

1. *Kelo v. City of New London*, 545 U.S. 469 (2005).

2. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

3. LA. CONST. ANN. art. I, § 4(B)(1) (2019); 2006 La. Sess. Law Serv. 851 (West).

4. LA. CONST. ANN. art. I, § 4(B)(6) (2019).

minority opinions from the case, specifically, the court's broad definition of public use, the factual circumstances surrounding the public port's expropriation of Violet Dock Port, and the issues raised for private property owners by the majority's holding. The Note will also highlight the diverse views on the acceptable interpretation of public purpose in eminent domain law. Finally, this article will highlight the potential solutions for the issues raised by the majority holding.

## II. FACTS AND PROCEDURAL HISTORY

### *A. Facts*

Since 2001, the St. Bernard Port ("The Port"), a public port, experienced greater demand for handling cargo.<sup>5</sup> The Port handles various types of cargo in its operations and is one of the busiest ports in the United States.<sup>6</sup> The Port started to run out of space for its operations, and its customers desired more space, as well as a facility for liquid cargo.<sup>7</sup> With operations nearly at capacity, the Port sought 75 acres of land ("Property") along the Mississippi River in order to expand.<sup>8</sup> The Port determined that the Property in question, which was owned by Violet Dock Port, Inc., L.L.C. (Violet), was more suitable for handling large cargo ships than other sites due to the Property's shape and depth of its water.<sup>9</sup> The land was also satisfactory because the Port would be able to have a cargo facility close to a rail line.<sup>10</sup> All other available properties in St. Bernard Parish were inadequate for the Port's needs for a facility on the river.<sup>11</sup>

At that time, the Property also had five berths, a "parking lot for ships," which Violet utilized for ship berthing, mooring, and repairs.<sup>12</sup> Violet had a contract with the Military Sealift Command, a civilian branch of the United States Navy, to berth<sup>13</sup> and repair oceangoing vessels.<sup>14</sup> In 2007, the Port made an offer to Violet to purchase the Property in the

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5. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 239 So. 3d 243, 246 (La. 2018).

6. *Id.*

7. *Id.*

8. *Id.* at 246-47.

9. *Id.* at 247.

10. *Id.*

11. *Id.*

12. *Id.*

13. Berthing is "to bring (something, such as a ship or automotive vehicle) into a berth," Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/berthing>, (Feb. 15, 2019).

14. *St. Bernard Port*, 239 So. 3d at 247.

amount of \$10 million.<sup>15</sup> The next year, the Port arrived at a tentative deal with Violet for Violet to sell the Property for \$14 million.<sup>16</sup> Two years later, the Louisiana Department of Transportation & Development's Port Priority Program gave the Port a \$15 million grant to be used in the Property's acquisition.<sup>17</sup> The Port offered to pay Violet the fair market value of \$16 million, which Violet rejected in favor of seeking a purchase price of \$35 million from the Port.<sup>18</sup> Negotiations then failed, and the Port began proceedings for expropriation<sup>19</sup> of the Property.<sup>20</sup>

### *B. Procedural History*

The Port filed a petition in December 2010 to expropriate the Property and made a deposit of \$16 million in the District Court's registry, which the petition stated was for expansion of the Port's facilities.<sup>21</sup> The petition asserted that construction of the Port's expansion would take eight to ten years to accomplish, and that during that time, the Port would try to form a new contract with the U.S. Navy.<sup>22</sup> Violet removed the case to federal court based on Violet's contract with the Navy asserting the Port's expropriation was under the color of federal law.<sup>23</sup> The district court rejected Violet's removal arguments and remanded the case to state court, holding that the Port's naval contract did not account for its expropriation of all of Violet's property, merely a small part of it.<sup>24</sup>

The state trial court held that the expropriation was not for the purpose of taking Violet's lease with the Navy but was for the construction of a terminal to permit transport of bulk commodities.<sup>25</sup> The court also held that the Port's expropriation was part of an extension of services in the Parish.<sup>26</sup> Violet appealed this ruling to the Louisiana Fourth Circuit Court of Appeals and the Louisiana Supreme Court, both of which denied the

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Expropriation is "the action of the state in taking or modifying the property rights of an individual in the exercise of its sovereignty," Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/expropriation>, (May 12, 2019). It is another term for the use of eminent domain.

20. *St. Bernard Port*, 239 So. 2d at 247.

21. *Id.*

22. *Id.* at 247-48.

23. *Id.* at 248.

24. *Id.*

25. *Id.*

26. *Id.*

appeals.<sup>27</sup> The case then went to trial for the valuation of the Property with the court establishing just compensation at \$16 million.<sup>28</sup> This was based on the Port's experts' assertions that the Property's best use was for layberthing and aggregate operations, while Violet argued compensation should be \$51 million to \$67 million.<sup>29</sup> A divided court of appeals panel upheld the district court's ruling.<sup>30</sup> The majority holding reasoned that the trial record supported the trial court's ruling, while one judge dissented.<sup>31</sup> Violet moved for a rehearing of the matter which the court of appeals denied.<sup>32</sup> The Louisiana Supreme Court then granted writ to hear Violet's appeal.<sup>33</sup>

### III. BACKGROUND AND HISTORY OF THE LAW

#### A. Federal Jurisprudence

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation."<sup>34</sup> Like the rest of the Bill of Rights, the Takings Clause was initially applied only to the federal government.<sup>35</sup> However, the Supreme Court began to apply the provisions of the Bill of Rights over time via incorporation under the Fourteenth Amendment. The first provision to be incorporated was the Takings Clause in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*.<sup>36</sup> There, the Court held that a state taking private property for public use without providing just compensation violates the Due Process Clause of the Fourteenth Amendment.<sup>37</sup> The Court has reasoned that the Takings Clause serves the purpose of "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice,

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27. *Id.* at 249.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. U.S. CONST. amend. V.

35. *See* *Barron v. City of Baltimore*, 32 U.S. 243, 250-51 (1833) (holding that since there is no express limitation on the state governments in the Bill of Rights, the amendments contained therein are only a restriction on the federal government, and do not apply to the states).

36. *See* *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

37. *Id.*

should be borne by the public as a whole.”<sup>38</sup> The Supreme Court has had difficulty deciding when government actions causing economic harm should be borne by the general public or only by a select few private parties, with such decisions typically depending on the facts of each case.<sup>39</sup>

While the Takings Clause ostensibly serves as a limitation on the power of the government to take property, the restrictions of the clause have been weakened over time by broader interpretations of what constitutes a public use. In *Berman v. Parker*, the Supreme Court expanded the scope of such permissible public use takings. In that case, the Court held that the government may take private property from one owner and give it to another so long as it is part of a greater public purpose plan, including redevelopment of the particular area.<sup>40</sup> This redevelopment can be to make an area of a city more aesthetically pleasing, in addition to traditional health and safety purposes.<sup>41</sup> The Court reasoned that Congress could decide that the public interest might be better served by a private entity than a government department, and the Court could not state that “public ownership is the sole method of promoting the public purposes of community redevelopment projects.”<sup>42</sup> Once a public use has been found, the legislature has the requisite discretion to determine how much land to take and what nature it should be.<sup>43</sup> It is not for courts to determine if such redevelopment plans only require taking buildings that are “unsafe, unsightly, or insanitary,” which are within the traditional police powers of the states.<sup>44</sup> The Court further held, “[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”<sup>45</sup>

The scope of the Takings Clause was further broadened in *Hawaii Housing Authority v. Midkiff*. There, the Court held that breaking up land concentrated in an oligopoly of landowners was a valid public purpose under the Fifth Amendment.<sup>46</sup> Justice O’Connor gave the opinion of the Court, noting that “public purpose” is synonymous with the states’ police power and reasoning that land oligopolies cause “artificial deterrents” in real estate markets, which falls under the purview of government

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38. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

39. *Id.* at 124.

40. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

41. *Id.*

42. *Id.* at 34.

43. *Id.* at 35-36.

44. *Id.* at 36.

45. *Id.* at 32.

46. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-42 (1984).

oversight.<sup>47</sup> Courts have a limited role in reviewing eminent domain proceedings, and as long as eminent domain is “rationally related to a conceivable public purpose,” courts should defer to the public purpose determinations of legislative bodies.<sup>48</sup>

The apex of the Takings Clause’s jurisprudence occurred in *Kelo v. City of New London*. In that case, the City of New London, Connecticut, attempted to acquire the property of various property owners to give to Pfizer, Inc. as part of an economic development scheme.<sup>49</sup> The city had a high unemployment rate and hoped to create over a thousand jobs through its development plan.<sup>50</sup> The New London Development Corporation (NLDC) was created by the city council to enact the plan and was empowered to utilize eminent domain.<sup>51</sup> The land would be used for new residences, malls, and a hotel.<sup>52</sup> The property owners had their property taken under eminent domain after the state supreme court upheld the takings as constitutional.<sup>53</sup>

The United States Supreme Court upheld the takings by the City of New London, with Justice Stevens noting that the definition of “public use” had expanded over time, and that public use encompassed economic development by the government, as well as gaining additional tax revenue.<sup>54</sup> The Court noted that private property may not be transferred to another private party with no justification.<sup>55</sup> It cannot be merely to benefit a private party.<sup>56</sup> However, property may be transferred to another private owner if a public use is the reason for the taking.<sup>57</sup> The taking here was in pursuit of a well-planned development scheme and, thus, was not for the benefit of any particular individuals.<sup>58</sup> In light of the entire plan, the city’s desire to remedy economic distress was entitled to the court’s deference.<sup>59</sup>

The court specifically held that “[p]romoting economic development is a traditional and long-accepted function of government.”<sup>60</sup> This purpose is no less a public purpose than takings to eliminate blight or break up land oligopolies, and there is no basis for not including economic

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47. *Id.*

48. *Id.* at 241.

49. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005).

50. *Id.*

51. *Id.*

52. *Id.* at 474.

53. *Id.* at 476.

54. *Id.* at 479; *Id.* at 483-84.

55. *Id.* at 477.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 483-84.

60. *Id.* at 484.

development as a public purpose.<sup>61</sup> The court reasoned that public use of a property will commonly be a benefit to a private party, and government ownership of property taken under eminent domain will not always be the best option.<sup>62</sup>

In a dissenting opinion, Justice O'Connor noted that the majority's rationale would allow any private property to be taken by the government and given to another private party so long as it was used in a manner the government felt was better for the public.<sup>63</sup> Under this "incidental public benefit" definition, there is virtually no distinction between public use and private use of property, thereby eviscerating the Fifth Amendment.<sup>64</sup> The purpose of this clause was to protect property owners against a political majority.<sup>65</sup> While courts grant great deference to legislative determinations of public use, they must still review the acts of the political branches if the restrictions of the Fifth Amendment are to have any real force.<sup>66</sup> Traditionally, public use has meant taking property for a government use, such as a road, or for a private actor, such as a railroad acting as a common carrier when the public will have access.<sup>67</sup> In some cases, when the other criteria are not practical, takings are permitted when there will be a later private use, as was permitted in *Berman* and *Midkiff*.<sup>68</sup> Those decisions are distinguishable from the present one, however, since both of them were directly addressing harms to the public, specifically those of blight and the concentration of land ownership.<sup>69</sup> Here, there is no direct harm posed by the properties that were condemned in New London.<sup>70</sup> The majority reasoning expanded public use to include incidental benefits, perhaps even for "esthetic" reasons.<sup>71</sup> Such a definition means the Fifth Amendment does not contain any real limitations on the government's power of eminent domain.<sup>72</sup> The overly broad definition given shows that "public use" is not always the same as a state's police power.<sup>73</sup>

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61. *Id.* at 484-85.

62. *Id.* at 485-86.

63. *Id.* at 494 (O'Connor, J., dissenting).

64. *Id.*

65. *Id.*

66. *Id.* at 497.

67. *Id.* at 497-98.

68. *Id.* at 498.

69. *Id.* at 500.

70. *Id.*

71. *Id.* at 501. Justice O'Connor also warns that, "if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power." *Id.*

72. *Id.*

73. *Id.* at 501-02.



Justice Thomas made similar arguments against the new definition of public use in his dissent, while also arguing the decision was one in a line of cases intended to make the Public Use of the Fifth Amendment<sup>74</sup> a “virtual nullity.”<sup>75</sup> This is accomplished by the majority reinterpreting the Public Use Clause as the Public Purpose Clause, instead of upholding the clause as a “meaningful limit on the government’s eminent domain power.”<sup>76</sup> Expanding the definition of public use too far would make the clause “surplusage.”<sup>77</sup> Justice Thomas further argued that if government takes property, gives it to a private owner, and the public does not actually use it in some way, then it is not truly for a public use.<sup>78</sup> Rather, the property must be utilized by the general public in some fashion in accordance with the historical meaning of the text.<sup>79</sup> Historically, taking property for the removal of a public nuisance was distinguished from taking it for public use, with public use takings always requiring compensation.<sup>80</sup> Justice Thomas then compared the word “use” in the Fifth Amendment with its inclusion in other parts of the Constitution, concluding that it should be defined more narrowly than the majority’s definition.<sup>81</sup> Finally, Justice Thomas reasoned that the case would result in poor communities being

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74. U.S. Const. amend. V (“private property [shall not] be taken for public use, without just compensation”).

75. *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting).

76. *Id.*

77. *Id.* at 507.

78. *Id.* at 508.

79. *Id.*

80. *Id.* at 510 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 135 (1765); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 275 (1827)).

81. *Id.* at 509-10 (internal citations omitted). Specifically, Justice Thomas notes:

Article I, § 8 grants Congress power “[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.” Here again, “use” means “employed to raise and support Armies,” not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning. Tellingly, the phrase “public use” contrasts with the very different phrase “general Welfare” used elsewhere in the Constitution . . . (“Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States”); preamble (Constitution established “to promote the general Welfare”). The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. . . . The Constitution’s text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

unable to defend their property from being taken by private parties with greater political power.<sup>82</sup>

### *B. The Louisiana Constitution*

Even before the reaction to *Kelo v. City of New London*, the constitution of Louisiana contained strong protections for property rights. When the Constitution of 1974 was adopted, its Declaration of Rights fundamentally altered the approach to constitutional rights in the state.<sup>83</sup> While the Constitution of 1921 had taken a collective approach to rights, such as referring to the rights of the people in general, the 1974 Constitution altered most of these provisions in favor of individual rights.<sup>84</sup> It was noted by one of the drafters of the Declaration that state constitutions can create stronger protections than the federal constitution.<sup>85</sup> Thus, the Declaration of Rights provided that its guarantees could not be disturbed by the legislature and even limited the police powers of the state in its language.<sup>86</sup> These guarantees included equal protection under the law and the right to property.<sup>87</sup>

The 1974 Declaration contained the most restrictive limitations on the state's power to take property of any state constitution of the time.<sup>88</sup> The original Declaration provided:

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 to expropriate, except for a public and necessary purpose, and with just compensation paid to the owner.<sup>89</sup>

The only exception to the property rights clause was for the taking of property, "necessary for levee and levee drainage purposes."<sup>90</sup> The Constitution of 1974 thus limited takings of private property significantly

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82. *Id.* at 521-22.

83. Louis "Woody" Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 9 (1975).

84. *Id.*

85. *Id.* at 11.

86. *Id.* at 14-15.

87. *Id.* at 16; *Id.* at 19.

88. *Id.* at 19.

89. *Id.* at 19 n.50 (citing LA. CONST. ANN. art. I, § 4 (1974)).

90. *Id.* (citing LA. CONST. ANN. art. I, § 4 (1974)).

more than the requirements of the Fifth Amendment to the United States Constitution.<sup>91</sup> The Constitution also provided the property owner must “be compensated for the full extent of his loss.”<sup>92</sup> The Declaration further provided “[n]o business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with government enterprises. However, a municipality may expropriate a utility within its jurisdiction.”<sup>93</sup> This clause serves to protect private businesses in the state from government takings which are merely meant to benefit government enterprises.

### C. Louisiana Jurisprudence

An important decision in Louisiana eminent domain caselaw came about in *State ex rel. Department of Highways v. Bitterwolf*. There, the State of Louisiana sought to expropriate a tract of land from the defendant in order to improve a state highway.<sup>94</sup> Upon announcing it would be taking the property in the area for the highway, property values decreased in the area.<sup>95</sup> Defendant purchased a tract of land to be expropriated in the future after the State’s announcement but before the expropriation.<sup>96</sup> After the State filed a petition in court with \$21,395.00 to be paid for compensation for the property, Defendant filed a response alleging just compensation was \$75,000.<sup>97</sup> The trial court ruled in favor of Defendant, awarding \$41,662.96 for the property obtained by the State and \$29,917.01 for Defendant’s severance damages to his remainder.<sup>98</sup> The court of appeals affirmed, holding that Defendant had the right to compensation for the property’s depreciation resulting from the State’s project.<sup>99</sup> The appeals court reasoned that the statutory ban on taking into account changes in valuation of property resulting from the improvement proposed by the government applied to the defendant, even if the defendant’s purchase was after the government’s announcement.<sup>100</sup>

The Louisiana Supreme Court took up the case to consider whether the statute applied to owners who purchased property after the government

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91. *Id.* at 15; *Id.* at 21-22.

92. *Id.* at 23.

93. *Id.* at 24.

94. *State ex rel. Department of Highways v. Bitterwolf*, 415 So. 2d 196, 198 (La. 1982).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 199.

100. *Id.* (citing LA. STAT. ANN. § 48:453 (1982)).

announced its plans to expropriate it.<sup>101</sup> The court held that, “[t]he adjustment to market value required by this statute applies only to changes in value which occur subsequent to the expropriatee’s purchase of the property.”<sup>102</sup> The court reasoned that an owner should not be able to gain a benefit by getting greater compensation than what he paid for property by purchasing it after he is aware of the government’s plans.<sup>103</sup>

In *State ex rel. Department of Highways v. Rapier*, the court addressed how to determine the proper level of compensation. In that case, the Louisiana Department of Highways filed suit to expropriate land.<sup>104</sup> The district court granted the Department’s expropriation claim and the Department’s deposit of \$11,000 for just compensation.<sup>105</sup> The owner argued the land was worth \$87,000 since it could be utilized for residential use, and after a trial, the district court awarded the defendant compensation of \$79,099.80, subtracting the \$11,000 already paid by the Department.<sup>106</sup> The state court of appeals affirmed, and the case went to the Louisiana Supreme Court.<sup>107</sup> The state supreme court held:

[T]he proper measure of compensation is the market value of the thing taken, i. e., the price for which the property could be sold by a willing and informed seller to a willing and informed buyer in the condition in which it stood, as well as under the usual circumstances existing, at the time of the expropriation. Further, as it said, market value means the worth of the land considered in the light of its best and highest use, this being the most favorable employment to which the property is adaptable and may reasonably be put in the not too distant future.<sup>108</sup>

The court further noted that a property owner has the requirement to prove a claim for greater compensation.<sup>109</sup> Applied to the facts of the case, the court found the defendant had proven his burden of showing the land was usable for residential property.<sup>110</sup>

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101. *Id.*

102. *Id.* at 203.

103. *Id.*

104. *State ex rel. Department of Highways v. Rapier*, 164 So. 2d 280, 281 (La. 1964).

105. *Id.* at 281-82.

106. *Id.* at 282.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 287.

*D. The States' Responses to Kelo v. City of New London*

In response to *Kelo v. City of New London*, the voters of the state of Louisiana approved a constitutional amendment that further limited the definition of public use. The Constitution already provided:

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.<sup>111</sup>

After the reforms, it further provides, “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.”<sup>112</sup> Thus, the state constitution expressly prohibits the broad interpretation of public purpose handed down in *Kelo*.<sup>113</sup>

The Louisiana Constitution does allow for ports to expropriate property, which was the issue in the instant case. The clause states that to facilitate industry, local governments, terminal districts, and public ports may “acquire, through purchase, donation, exchange, and 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 the transportation of goods in domestic and international commerce.”<sup>114</sup> Nevertheless, the other provisions of the state constitution still prohibit elements such as tax revenue from being considered as a factor in determining public use, as well as prohibiting the government from halting competition with business enterprises.<sup>115</sup>

In addition to Louisiana, many other states have passed legislation or constitutional amendments to limit eminent domain powers with varying

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111. LA. CONST. ANN. art. I, § 4(B)(1) (2019).

112. *Id.* art. I, § 4(B)(3) (2019). The provision was added after the *Kelo* decision. 2006 La. Sess. Law Serv. 851 (West).

113. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 239 So. 3d 243, 257 (La. 2018) (Weimer, J., dissenting).

114. LA. CONST. ANN. art. VI, § 21(A)(4)(b) (2019).

115. *Id.* art. I, § 4(B)(3), (2019)

degrees of success. These reforms were mixed in their effectiveness at preventing the potential use of *Kelo*'s interpretation of eminent domain.<sup>116</sup> States who increased private property protections typically did so through citizen-initiated popular referendums.<sup>117</sup> Louisiana appears to be the only state whose legislature approved a constitutional referendum to limit the definition of public use and further protect private property.<sup>118</sup> One analysis found that while most states passed some reforms in the wake of *Kelo*, only eighteen enacted reforms that were effective at limiting at least some of the effects of the case.<sup>119</sup>

One of the primary issues in limiting eminent domain abuse was that many state and local governments retained the ability to take property with minimal justification condemning property for issues like "blight" when they are banned from taking it for economic development.<sup>120</sup> Another problem with the effectiveness of reforms is that a law will prevent the taking of property for private purposes but will still allow the taking of property by a private entity under the argument that it is for a public purpose, thus permitting the same kind of takings as *Kelo* with no additional protections.<sup>121</sup> Louisiana is one of three states, along with Arizona and Oregon, that did enact reforms that banned takings for economic development along with greater restrictions on the definition of blight.<sup>122</sup> It was also the only state to accomplish this through a legislatively-initiated referendum rather than a citizen-initiated one.<sup>123</sup> The Louisiana Constitution does provide for eminent domain for "[t]he removal of a threat to public health or safety caused by the existing use or disuse of the property."<sup>124</sup> This provision does not allow for the taking of property for blight under any circumstance, but instead is limited to threats to public health and safety. Thus, taking property simply for aesthetic purposes is prohibited under Louisiana's post-*Kelo* reforms.<sup>125</sup> The Louisiana Constitution also provides that any unused property taken in eminent domain is to be offered for sale to the original owner or their heirs before being sold by the state.<sup>126</sup>

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116. Somin, *supra* note 2, at 2143.

117. *Id.* at 2143-44.

118. *Id.* at 2144.

119. *Id.* at 2115.

120. *Id.* at 2114.

121. *Id.* at 2120.

122. *Id.* at 2144.

123. *Id.*

124. LA. CONST. ANN. art. I, § 4(B)(2)(c) (2019).

125. The limitations on blight were added to the Louisiana Constitution in 2006, after *Kelo*. 2006 La. Sess. Law Serv. 851 (West).

126. LA. CONST. ANN. art. I, § 4(H). This section was also part of the post-*Kelo* amendments. 2006 La. Sess. Law Serv. 859 (West).

Some state courts have rejected *Kelo*'s rationale. The supreme courts of Ohio and Oklahoma both rejected the majority's rationale in *Kelo* and held that their state constitutions did not allow for eminent domain for the purpose of economic development.<sup>127</sup> The supreme courts of Ohio and New Jersey have also held that there are limits to condemnation of property for blight.<sup>128</sup> Whether judicial scrutiny of the definition of public purpose was caused by *Kelo* is unclear, since there had been a trend in some courts in that direction for several years prior to the case.<sup>129</sup> Four states—Illinois, Michigan, Montana, and South Carolina—ruled that economic development takings were prohibited by their state constitutions in the years leading up to *Kelo*.<sup>130</sup> In fact, in the ten years prior to *Kelo*, only the Connecticut Supreme Court upheld eminent domain for economic development as a valid public purpose.<sup>131</sup> Regardless, the trend among state supreme courts to address the issue has been to prohibit takings for economic development.

IV. *St. Bernard Port, Harbor & Terminal District v. Violet Dock Port, Inc.*

A. *Majority Holding*

The key issue in *St. Bernard Port* was whether the expropriation of the Property by the Port was authorized by the United States and Louisiana constitutions.<sup>132</sup> The Fifth Amendment to the United States Constitution, applied to the states under the Fourteenth Amendment, provides, “No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”<sup>133</sup> The Louisiana Constitution provides that 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 . . . .”<sup>134</sup> The court noted that expropriation of property must be made for a “public purpose” and provide “just compensation.”<sup>135</sup> The majority noted

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127. Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV'T. L. REV. 1, 7 (2011).

128. *Id.* at 13-14.

129. *Id.* at 21-22.

130. *Id.* at 21.

131. *Id.* at 22.

132. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 239 So. 3d 243, 249 (La. 2018).

133. *Id.* (citing U.S. CONST. amend. V).

134. LA. CONST. ANN. art I, § 4(B)(1) (2019).

135. *St. Bernard Port*, 239 So. 3d at 250.

that the trial court's ruling would be overruled only if the factual findings were "manifestly erroneous."<sup>136</sup> The court focused on the issues regarding (1) public purpose, (2) the business enterprise clause, and (3) the just compensation clause.

### 1. Public Purpose

The court noted that *Kelo v. City of New London* established that, under the U.S. Constitution, takings are for a public purpose when they are for economic development.<sup>137</sup> However, following the decision, voters in Louisiana approved a state constitutional amendment to narrow the definition of public purpose for expropriations, which included expropriations for "public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce."<sup>138</sup> The court held that it would not overturn the trial court's factual finding that the Port's expropriation was for a public purpose, as it was not "manifestly erroneous" for the trial court to do so.<sup>139</sup>

### 2. The Business Enterprise Clause

Violet argued that the expropriation was in violation of the business enterprise clause of the state constitution, which states that "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."<sup>140</sup> Violet contended that the Port's expropriation of the Property was to obtain Violet's revenue from the lease with the Navy and to halt competition.<sup>141</sup> The court held that Violet's cargo operations were actually "negligible." Violet's business was focused on layberthing, while the Port was engaged in the business of cargo.<sup>142</sup> The court further noted that it would not overturn the trial court's decision absent manifest error, and the decision was not clearly wrong, thus affirming the trial court's ruling.<sup>143</sup>

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136. *Id.*

137. *Id.*

138. *Id.*; LA. CONST. ANN. art I, § 4(B)(2)(b)(vi) (2019).

139. *St. Bernard Port*, 239 So. 3d at 251.

140. *Id.* at 251; LA. CONST. ANN. art. I, § 4(B)(6) (2019).

141. *St. Bernard Port*, 239 So. 3d at 251-52.

142. *Id.* at 252.

143. *Id.*



### 3. Just Compensation

The court noted that the owner must be compensated when the government expropriates property.<sup>144</sup> The formula for determining just compensation included taking into account “the full extent of the loss” as well as “the fair market value of the property,” which the court reasoned was defined as “the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote or contrary to the law.”<sup>145</sup> In order to determine the value of the property, the court stated it considers the “most profitable use to which the land can be put by reason of its location, topography, and adaptability.”<sup>146</sup>

The court also reasoned that the use of the property at the time is assumed to be the best use, and the landowner has the burden of proof to show a different and superior use.<sup>147</sup> Therefore, the court reasoned Violet’s use of the land when it was expropriated was considered the ideal use of the property, but Violet could overcome that burden by a preponderance of the evidence.<sup>148</sup> The court concluded that the trial court erred in evaluating the testimony of experts’ valuation of the Property by choosing the Port’s experts over Violet’s experts.<sup>149</sup> The court held that the finder of fact is allowed to examine the “strengths and weaknesses of expert testimony.”<sup>150</sup> The trial court’s decision was prejudicial to Violet by setting just compensation at the level determined by the Port’s experts, which was exacerbated by the appellate court’s failure to conduct a *de novo* review of the issue.<sup>151</sup> The court remanded the case to the court of appeal solely for the goal of determining just compensation by taking into account the evidence of the case and the principles established by the court.<sup>152</sup> On remand to the Louisiana Circuit Court, compensation was increased to “\$28,764,685, together with interest and attorneys’ fees as provided for by law,” and then remanded to the trial court.<sup>153</sup> The Louisiana Supreme Court

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144. *Id.*

145. *Id.* at 253 (citing LA. STAT. ANN. § 19:9(a) (2018); *Exxon Pipeline Co. v. Hill*, 788 So. 2d 1154, 1159 (La. 2001); *West Jefferson Levee Dist. v. Coast Quality Constr. Corp.*, 640 So. 2d 1258, 1277 (La. 1994)).

146. *Id.* (citing *Exxon Pipeline*, 788 So. 2d at 1160).

147. *Id.*

148. *Id.*

149. *Id.* at 254.

150. *Id.* (citing *West Jefferson Levee Dist.*, 640 So. 2d at 1277).

151. *Id.*

152. *Id.* at 254-55.

153. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 255 So. 3d 57, 63 (La. Ct. App. 2018).

later denied a rehearing of the case.<sup>154</sup> The plaintiff later petitioned for a writ of certiorari in the United States Supreme Court, which was denied.<sup>155</sup>

### *B. Dissenting Opinions*

#### 1. Justice Weimer

Justice Weimer argued that the majority opinion upended the protections for private property enshrined in the state constitution and opened up businesses to a greater chance of government takeovers which will hamper businesses from engaging in economic activities that compete with government entities.<sup>156</sup> Weimer noted the strict protections for private property that have been put into the Louisiana Constitution requiring expropriations be for a “public and necessary purpose” and the compensation be for the “full extent of [the owner’s] loss.”<sup>157</sup>

The Business Enterprise Clause in Article I of the Louisiana Constitution further restricted the reasons private property may be expropriated, and the strict provisions of the state constitution were passed by voters to protect property from excessive government interference.<sup>158</sup> Weimer noted it is possible an expropriation may have the effect of shutting down a business, but this is permissible so long as the purpose of the expropriation is not made with that goal in mind, but rather the goal of a valid public use, such as a public highway.<sup>159</sup>

Regarding the interpretation of the constitutional text, Justice Weimer began with the principle that “the starting point in interpreting constitutional provisions is the language of the provision itself and that, when the language of a constitutional provision is clear and unambiguous, that language must be given effect.”<sup>160</sup> Examining the litigation history of the case, Justice Weimer noted that the Port wanted to acquire the Property to expand port services and to bring in “needed revenues” for the parish.<sup>161</sup> Weimer reasoned that the district court committed error in its analysis that

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154. *St. Bernard Port, Harbor & Terminal Dist.*, 255 So. 3d, *reh’g denied*, 2018 La. LEXIS 729, at \*1 (La. Ct. App. March 13, 2018).

155. *St. Bernard Port, Harbor & Terminal Dist.*, 255 So. 3d, *cert. denied*, 139 S. Ct. 375 (2018).

156. *St. Bernard Port*, 239 So. 3d at 255 (Weimer, J., dissenting).

157. *Id.* at 255-56 (citing LA. CONST. ANN. art. I, § 4(B) (2019)).

158. *Id.* at 256-57.

159. *Id.* at 257.

160. *Id.* (citing *La. Dep’t of Agriculture and Forestry v. Sumrall*, 728 So. 2d 1254, 1258 (La. 1999)).

161. *Id.* at 258.

necessitates a de novo review by the court.<sup>162</sup> The record indicated that the trial court made no determinations on the facts or law regarding Violet's argument that the expropriation of the Property was unconstitutional because it was done for the purpose of stopping competition.<sup>163</sup> The trial court's opinion also included economic factors that are specifically prohibited from the determination by Section 4(B)(3).<sup>164</sup> The trial court chose instead to focus its analysis on whether the taking was for a public purpose while ignoring the issue of whether the expropriation violated the business enterprise clause.<sup>165</sup> By affirming the ruling of the trial court, the majority disfavored the limitations prescribed by the business enterprise clause, despite the clause's stated limitations.<sup>166</sup> Takings of property must be construed strictly against the party attempting to take the property, which is consistent with the principles of the Louisiana Constitution.<sup>167</sup> Weimer argued that, even without examining the record, by not taking into account the effects of the taking, the decision would permit any authority essentially unlimited power to take property so long as it showed an "ostensibly proper" reason for the expropriation.<sup>168</sup> The majority's actions were thus "constitutionally deficient" under the standards required by the state constitution.<sup>169</sup>

Justice Weimer proceeded to analyze the expropriation under a de novo standard, noting that Violet argued the Port was taking the Property to operate Violet's layberthing and use its docks for future cargo, which Violet was expanding on its own.<sup>170</sup> Additionally, the Port noted in a letter to the Department of Transportation and Development (DOTD) that it would gain significant revenue from the Navy lease, essentially stating the contract could be used by the DOTD to determine the rate of return necessary for the Port to get DOTD funding of the project.<sup>171</sup> When the trial of the instant case began, the Port had entered into a contract with the Navy for layberthing at the site.<sup>172</sup> When the trial court determined just compensation, the Port argued, and the trial court held, that the ideal use of the property was not for cargo as the Port originally argued, but for layberthing with a terminal, which was the current use by Violet for the

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162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 259.

166. *Id.*

167. *Id.*

168. *Id.* at 260.

169. *Id.*

170. *Id.* at 261.

171. *Id.*

172. *Id.*

Property at the time.<sup>173</sup> Weimer argued that under the facts of the case, the Port expropriated the Property from Violet with the plan of using Violet's existing infrastructure and customers for funding the expansion of the Port's cargo operations.<sup>174</sup> Since the Port expropriated the Property for this purpose, Weimer contended the expropriation was unconstitutional under de novo review.<sup>175</sup>

Justice Weimer reached the same conclusion under the manifest error standard of review.<sup>176</sup> While deference is given to the trial courts, Weimer argued that the appellate courts have the duty to determine if a trial court ruling is inconsistent with the evidence.<sup>177</sup> The objective facts showed that the taking was going to eliminate Violet as a competitor, in spite of the Port's subjective arguments to the contrary.<sup>178</sup> Once the expropriation had been approved, the Port did an about-face and argued that the best use of the Property was for layberthing, which was what Violet had been using it for and was actively working to expand.<sup>179</sup> The majority relied on the federal district court's opinion, which held in favor of allowing the expropriation when it remanded the case back to the state court.<sup>180</sup> The federal district court also favored, in Weimer's opinion, a "primary purpose" test which was in contradiction to the plain language of the state constitutional provisions, a test which would eviscerate the protections of Section 4(B)(6).<sup>181</sup> Justice Weimer argued the future consequences of the majority's decision would allow future public ports to expropriate private ports so long as the public port was not currently engaged in the business of the private port.<sup>182</sup> The Port's taking of Violet's property was against the letter and spirit of the Louisiana Constitution.<sup>183</sup> Justice Weimer concluded the Constitution of Louisiana forbids the government from expropriating private businesses in order to operate the businesses or terminate competition.<sup>184</sup>

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173. *Id.* at 262.

174. *Id.*

175. *Id.* at 263.

176. *Id.*

177. *Id.* (citing *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 639 So. 2d 216, 221 (La. 1994)).

178. *Id.* at 263-64.

179. *Id.* at 264.

180. *Id.*

181. *Id.*

182. *Id.* at 265.

183. *Id.*

184. *Id.* (Guidry, J., dissenting).

## 2. Justice Guidry

Justice Guidry's dissent argued that the St. Bernard Port's expropriation was an unconstitutional violation of the Business Enterprise Clause's limitation in the Louisiana Constitution.<sup>185</sup> Justice Guidry further contended that the trial court committed manifest error by finding the Port did not violate the business enterprise clause, since the Port's plan was predicated on acquiring Violet's assets and utilizing Violet's layberthing and cargo business for funding of its own plans.<sup>186</sup>

## V. ANALYSIS

### *A. Undermining the Declaration of Rights*

The Declaration of Rights in the Louisiana state constitution grants individual rights that are more limiting on the government than the corresponding limitations in the federal constitution. One of these provisions is the right to private property. In response to *Kelo v. City of New London*, the state legislature passed an amendment to further restrict the government's power to take private property. This amendment was approved by the voters of the state in a general election. In *St. Bernard Port*, the Louisiana Supreme Court weakened private property protections and expanded the ability of the state government and local governments to take private property by ignoring the real issues in the case record, including the violations of the business enterprise clause and the economic development and tax revenue factors inappropriately weighed by the majority.

One of the reasons for the Port's expropriation of Violet Dock Port was the desire to gain a contract with the Navy. However, the Declaration of Rights expressly prohibits a business enterprise being seized for the purpose of the government operating the enterprise or halting competition with a government enterprise. By failing to acknowledge the Port's desire to gain a Navy contract, the majority overlooked a key goal of the Port, which is barred from being a valid reason. This dilutes the property protections guaranteed by Article I, Section 4(B)(6) of the state constitution. Based on this precedent, any government organization can seize a private business and stop competition with the government so long as the reviewing court can find some public purpose. The rationale allows reviewing courts to ignore the factual circumstances in favor of pretextual reasons cited by the government authority in question.

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185. *Id.*

186. *Id.*

This is further evidenced by the fact the Violet Dock Port was just as capable of gaining a contract with the Navy as the St. Bernard Port, as well as developing the Property for increased cargo capacity. Indeed, Violet was in the process of gaining a naval contract, and St. Bernard Port eventually sought to use the Property for the same purposes as Violet. Allowing the expropriation under the circumstances only exacerbates the problems in the case. It serves as an opportunity for the government to expend valuable legal and judicial resources taking private property for the same use that the private owner is using it for in the first place. It is thus economically inefficient as well as being dangerous to private property protections. Allowing an expropriator to switch the use of property gained under eminent domain after the fact to the original use by the private owner violates the business enterprise clause and permits government authorities to violate the letter and spirit of the state constitution.

Another problem with the majority ruling is the economic development factors that were weighed by the court. The majority factored in issues such as government revenue and employment in the area when making its decision. This is a clear violation of Article I, Section 4(B)(3). This section was passed as a direct result of *Kelo v. City of New London* as a means of prohibiting the government from taking property merely for a purpose like increasing tax revenue. By weighing these considerations, the majority ignored the restrictions of Section 4(B)(3) and paved the way for future expropriations that raise the exact kinds of problems the provision was intended to solve. Similar to *Kelo*, under the majority ruling, any government entity can now potentially take property for the purpose of increasing tax revenue. If the *St. Bernard Port* precedent is followed, it could severely undercut the limitations of the clause.

As Representative Jenkins noted, “[a] bill of rights in a state constitution can give protection to other rights not recognized by the Federal Constitution.”<sup>187</sup> This is one of the primary reasons for the right to property under the Louisiana state constitution. The prohibition on factoring economic development as a public purpose was in direct response to a perceived inadequate protection of private property owners by the United States Supreme Court in its caselaw. This devotion to individual rights is reflected in Section 1 of the Louisiana Declaration of Rights which states, “[t]he rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.”<sup>188</sup> This clause places the Declaration of Rights above the rest of the state constitution and constitutes

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187. Jenkins, *supra* note 83, at 11.

188. LA. CONST. ANN. art. I, § 1 (2019).

a limitation on the police power of the state.<sup>189</sup> The Declaration provides various other limitations on the government, such as a requirement for the government to pay property owners for the full extent of their loss and a ban on the seizure of personal effects (except for contraband).<sup>190</sup> The provisions on private property and throughout the Louisiana Declaration of Rights comprise a broad protection of individual rights, greater than those afforded by the United States Constitution. Indeed, the United States Supreme Court in the past has been willing to subject property rights to what amounts to a rational basis standard of judicial review.<sup>191</sup> By ignoring the invalid reasons of St. Bernard Port for expropriation of Violet Dock Port, the majority in the case undermines and attempts to reason its way out of the enumerated individual rights in the state constitution. The people of the state, through the constitution, have entrusted the judiciary with the duty to protect certain fundamental rights against impermissible government constraint.<sup>192</sup> They have chosen to accomplish this end by disallowing certain policies in the political process, even by the people's elected representatives.<sup>193</sup> The majority decision undermines this principle.

### *B. Application of the Kelo Standard*

In *Kelo*, Justice O'Connor warned of the potential problems that would arise from an overly broad definition of public use that permitted takings for "esthetic" reasons.<sup>194</sup> She reasoned that it could essentially remove the phrase "public use" from the Constitution if taken to its logical

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189. Jenkins, *supra* note 83, at 15. Jenkins further shows this by pointing out that the 1921 Constitution provided that "the police power of the state shall never be abridged," while the Constitution of 1974 removed this language in favor of declaring rights "inviolable" by the state. *Id.* at 15 n.29.

190. LA. CONST. ANN. art. I, § 4(B) (2019).

191. See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241-42 (1984) (noting that the Court has never barred compensated takings of property for public use when "the exercise of the eminent domain power is rationally related to a conceivable public purpose . . .").

192. Jenkins, *supra* note 78, at 15 n.29 (noting that "the sovereign authority of the state originates with the people . . . and the people can therefore place whatever limitations on the police power they may choose, when they enact their constitution. By their vote in favor of the new Constitution, the people of Louisiana did in fact place substantial limits on the exercise of the police power in this state"); See also *Bd. of Comm'rs of Orleans Levee Dist. v. Dep't of Nat. Res.*, 496 So.2d 281, 286 (La. 1986) ("[I]t is a general principle of judicial interpretation that, unlike the federal constitution, a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature.").

193. *Id.*

194. *Kelo v. City of New London*, 545 U.S. 469, 501 (2005) (O'Connor, J., dissenting).

conclusion.<sup>195</sup> She also presciently warned that the majority opinion and Justice Kennedy's concurrence would be ineffective at preventing pretextual takings in the name of economic development given their deferential standards.<sup>196</sup>

An example of the pretextual takings highlighted by Justice O'Connor was seen in 2006 in the Federal Court of Appeals for the Second Circuit where taking private property from owners who wanted to build a CVS Pharmacy was allowed, even though the private developer who condemned the property then proceeded to build a Walgreens Pharmacy.<sup>197</sup> Similar to O'Connor's concerns, the majority opinion in *St. Bernard Port* threatens to effectively expunge the restrictions on public use from the Louisiana Constitution. If a court may ignore the clear indications that a taking of private property is for economic development, as *St. Bernard Port* did through its rationale for the expropriation, then any taking has the potential to be justified. While appropriate deference should be given to government entities exercising eminent domain, without proper judicial oversight (and for private entities exercising expropriation, as mandated by the Louisiana Constitution),<sup>198</sup> the strictures of the Louisiana Constitution will serve as no more than "hortatory fluff."<sup>199</sup> Additionally, Justice Thomas' warning is applicable here. He stated many poor communities could be disadvantaged in their ability to defend their property from being taken by the government under the court's rationale.<sup>200</sup> Applied to the instant case, many people with less financial and political influence will be unable to properly defend their property from expropriation, especially when courts are so deferential to other government authorities. Allowing eminent domain in those situations will likely result in "public use" takings that are "suspiciously agreeable" to powerful corporations.<sup>201</sup>

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195. *Id.*

196. Specifically, Justice O'Connor stated: If legislative prognostications about the secondary public benefits of a new use can legitimate a taking, there is nothing in the Court's rule or in Justice Kennedy's gloss on that rule to prohibit property transfers generated with less care, that are less comprehensive, that happen to result from less elaborate process, whose only projected advantage is the incidence of higher taxes, or that hope to transform an already prosperous city into an even more prosperous one.

*Id.* at 504.

197. *Somin, supra* note 126 at 31-32 (citing *Didden v. Village of Port Chester*, 173 F. App'x 931 (2d Cir. 2006)).

198. The Louisiana Constitution provides that the issue of whether a private entity's expropriation of property is for a public and necessary purpose "shall be a judicial question." LA. CONST. ANN. art. I, § 4(B)(4) (2019).

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

200. *Id.* at 506 (Thomas, J., dissenting).

201. *Id.*



Constitutional rights should be subject to a higher burden for the government to impose limitations on them.

The rationale in *St. Bernard Port* risks making Louisiana's constitutional reforms ineffective, similar to the attempts in other states that ended up permitting takings for blight.<sup>202</sup> Furthermore, the majority ignored the trend in other states of increasing wariness by courts of government overuse of eminent domain. As previously noted, other state supreme courts have held their constitutions to prohibit economic takings both before and after *Kelo*,<sup>203</sup> but the Louisiana Supreme Court here appeared to ignore the state constitution's explicit repudiation of *Kelo*'s rationale. Allowing takings based on a pretextual public use gives the greatest possible deference to the expropriating government authority, which serves as an abdication of the duty of Louisiana courts to determine public use.

Even under its broad definition of public use, the precedent of *Kelo* would still prohibit the takings in the case at bar. The Supreme Court in *Kelo* noted that a court should invalidate a taking that is carried out simply to benefit a private party.<sup>204</sup> Justice Kennedy argued that a stronger test might be necessary for certain classes of eminent domain.<sup>205</sup> This includes private transfers where there is a danger of "undetected impermissible favoritism of private parties;" although, economic development by itself would not justify this standard.<sup>206</sup> On petition for a writ of certiorari to the United States Supreme Court, Violet Dock Port noted that the primary purpose of the expropriation was for St. Bernard Port to transfer it via a lease to a private entity, Associated Terminals.<sup>207</sup> The plan was then for Associated Terminals to operate the facilities since the facilities it was currently using were full.<sup>208</sup> This type of eminent domain is the exact type that is prohibited under *Kelo*. It was for the purpose of taking Violet Dock Port's property, which was already being used, to then give it to Associated Terminals. While Justice O'Connor's sense of foreboding regarding the problems with the *Kelo* majority's reasoning has been vindicated, the actions of St. Bernard Port are still a direct violation of even the lower

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202. Somin, *supra* note 2, at 2114.

203. Somin, *supra* note 126, at 21-22.

204. *Kelo*, 545 U.S. at 477 ("[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.").

205. *Id.* at 493 (Kennedy, J., concurring).

206. *Id.*

207. Petition for Writ of Certiorari, *Violet Dock Port, Inc. v. St. Bernard Port, Harbor, & Terminal Dist.*, \_\_\_ No. 17-1656, 2018 WL 2933183 at \*2-3 (U.S. June 11, 2018).

208. *Id.*

standards of *Kelo*, as well as the greater restrictions of the Louisiana Constitution.

*C. The Problem with the Manifest Error Standard*

Manifest error as a standard of review is incompatible with the high burden the government should bear to exercise eminent domain. It is inconsistent with the precedent of multiple state supreme courts that have addressed the issue of appellate review of trial court determinations of public use, holding that public use determinations are to be assessed as a matter of law.<sup>209</sup> If the Louisiana Supreme Court uses the lower standard of manifest error, it will contribute to the split among states over the review of eminent domain, which the United States Supreme Court will hopefully clarify in the future. More importantly, it makes property rights subject to where a person lives. If a local court makes a wrong decision, the burden of overcoming the lower court's factual findings will often be too high for many people to protect their property rights. This standard bears the risk of making the Public Use Clauses of the federal and state constitutions subject to the whims of local city councils and expropriating authorities. So long as the state supreme court is unwilling to address these problems, people's rights will be subject to the arbitrary determinations of local governments, which in many instances could be beholden to powerful political interests.

The manifest error standard is also inconsistent with the practice of the United States Supreme Court. The federal standard of public use determination, while deferential, is viewed as a judicial question.<sup>210</sup> The state supreme court should follow the practice of the United States Supreme Court toward government actions that infringe upon individual rights by examining them under the light of judicial scrutiny. Given the reticence of the United States Supreme Court to apply the deference of the manifest error standard to eminent domain, the Louisiana Supreme Court would best uphold the federal and state constitutions by reexamining application of this standard.

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209. See *County of Hawaii v. C & J Coupe Family P'ship*, 198 P.3d 615, 637 (Haw. 2008); *Southwest Ill. Dev. Auth. v. National City Envtl.*, 768 N.E.2d 1, 8 (Ill. 2002); *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337-38 (Pa. 2007); *Rhode Island Econ. Dev. Corp. v. Parking Co., L.P.*, 892 A.2d 87, 96, 103 (R.I. 2006).

210. *Cincinnati v. Vester*, 281 U.S. 439, 446 (1930); *U.S. ex rel. Tenn. Valley Auth. v. Welch*, 327 U.S. 546, 552 (1946).

### D. The Solution

#### 1. Applying De Novo Review

A better resolution to the case would be application of the de novo standard of review by appellate courts in the state. The state constitution vests courts with the responsibility to determine if a taking is for a public purpose. The Louisiana Supreme Court should review eminent domain appeals de novo as an issue of law rather than granting undue deference to the trial court. The burden should be upon the government to establish that an expropriation is for a public purpose. There should be a presumption against the government and in favor of individual rights, which would fulfill the constitutional guarantee that individual rights are “inalienable by the state and shall be preserved inviolate by the state,”<sup>211</sup> and that “[n]o person shall be deprived of life, liberty, or property, except by due process of law.”<sup>212</sup> This standard would be in accord with the spirit of the law as well as the practices of the federal judiciary and many state judiciaries.

#### 2. Upholding the Declaration of Rights

The court’s decision in the instant case weakened individual rights in the State of Louisiana. Remedy of the issue can be attained through proper enforcement of the strictures of the Declaration of Rights in the state constitution instead of abdication of the judicial role in protecting liberty. Applying de novo review would permit appellate courts to review all the facts of each individual case. Under that standard, the state supreme court would be able to see that the taking in the instant case was based on a desire to give a private business benefits rather than a valid public use. It would permit the court to dismiss inappropriate economic factors weighed by the lower courts as well. Finally, it would serve to affirm the will of the voters of the state to limit the authority of government in favor of greater protection of property.

### VI. CONCLUSION

The power of eminent domain is an area of law that is ripe for abuse if it is interpreted too broadly. In response to *Kelo*, the people of Louisiana approved a state constitutional amendment to protect their property rights. Unfortunately, the *St. Bernard Port* case represents a retreat from that overarching principle. The majority ignored the *St. Bernard Port*’s desire to

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211. LA. CONST. ANN. art. I, § 1 (2019).

212. *Id.* art. I, § 2 (2019).

take Violet Dock Port to gain a naval contract. By failing to consider this factor, the majority disregarded the prohibition on government expropriations for the purpose of halting competition with a government enterprise. Violet Dock Port could have bid for the naval contract, and therefore, St. Bernard Port was barred from expropriating Violet Dock Port. When individual rights are in question, courts should not defer to overbearing government judgments.

Additionally, the majority also weighed inappropriate factors such as economic development and area employment. It also granted too much deference to the determinations of local courts and local government authorities by application of the manifest error standard of review. By taking these elements into consideration in their opinion, the Louisiana Supreme Court removed the force of the Declaration of Rights. By weighing these factors, the court has allowed for the disregard of property rights in favor of a broad definition of public purpose, the exact broad definition that the amendments were supposed to prevent. The majority and minority opinions furthered the debate over eminent domain that has continued since *Kelo*, a debate that will likely continue under the court's current jurisprudence.