



THIS LAND WAS MADE FOR YOU, ME, AND THE GOVERNMENT: LOUISIANA’S INTERPRETATION OF EMINENT DOMAIN POST-KELO.

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT V. VIOLET DOCK PORT, INC., 2017-0434 (LA. 1/30/18); 239 So. 3D 243.

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I. INTRODUCTION

The influential United States Supreme Court case *Kelo v. City of New London*¹ dramatically expanded the power of eminent domain and increased right-to-take litigation. To minimize *Kelo*'s effect, many states immediately imposed strict limitations on eminent domain power. However, are these limitations actually doing any work? Or, as many fear, is *Kelo* so influential that state legislatures will struggle to successfully restrict eminent domain power?

In *St. Bernard Port, Harbor & Terminal District v. Violet Dock Port, Inc.*, the Supreme Court of Louisiana held that the expropriation of a private port was constitutional and did not violate any pre-or-post-*Kelo* private property protections guaranteed in the Louisiana Constitution.² As Louisiana's first eminent domain case after *Kelo*, *St. Bernard* represents an uncharacteristic expansion of eminent domain in Louisiana. In *St. Bernard*, the court adopted a highly deferential "manifest error" standard of review and accepted the government's alleged "public purpose" on its face without any investigation.³ Unfortunately, this high deference minimizes the burden imposed on expropriating authorities and will increase expropriations in Louisiana. This Comment argues that the Louisiana Supreme Court implemented an inappropriate standard of review and deviated from Louisiana's historical devotion to protecting property rights. This Comment also discusses several private property protections embedded in the Louisiana Constitution that the court either misinterpreted or ignored. Finally, this Comment suggests that *St. Bernard* will have a devastating impact on private businesses, which may be subject to expropriation as long as the government can present a beneficial public purpose.

II. HISTORICAL BACKGROUND

A. *The History of Eminent Domain*

The Fifth Amendment of the United States Constitution states: "nor shall private property be taken for public use, without just compensation."⁴ This amendment recognizes the government's preexisting power to take private property for public use, commonly known as eminent domain. According to *Boom Co. v. Patterson*, eminent

1. 545 U.S. 469 (2005).
2. 2017-0434, p. 10 (La. 1/30/18); 239 So. 3d 243, 251.
3. *Id.* at pp. 10–12; 251–52.
4. U.S. CONST. amend. V.

domain “requires no constitutional recognition; it is an attribute of sovereignty.”⁵ To seize property through eminent domain, the governmental entity must prove that the taking—or expropriation—is for a “public use” and must pay “just compensation” to the former property owner.⁶ Most eminent domain cases turn on whether the government satisfies the public use requirement.

Since the turn of the century, courts have held that public use only requires a finding of a “public purpose” and does not demand actual “use by the public.”⁷ Courts historically have viewed the requirement as a necessary restriction on eminent domain. However, the highly controversial and notorious United States Supreme Court case *Kelo v. City of New London* weakened the restriction by broadening the definition of public use.⁸

B. Kelo v. City of New London: The Supreme Court’s Expansive Definition of Public Use

Kelo set forth one of the most expansive interpretations of public use. *Kelo* held that governments can seize private property and transfer it to a private party as long as the transfer furthers “economic development.”⁹ In *Kelo*, homeowners of a blue-collar neighborhood appealed a Connecticut Supreme Court decision that approved the City of New London’s (“City’s”) redevelopment plan.¹⁰ The City’s plan would destroy and transform 115 privately-owned properties into an industrial area that included office spaces, hotels, restaurants, condominiums, and a new research center for Pfizer Pharmaceutical Company.¹¹ The City argued that its redevelopment plan would “create in excess of 1,000 jobs, increase tax and other revenues, and . . . revitalize an economically distressed city.”¹² Although the City intended to transfer the land to a private developer, the Supreme Court held, in a 5-4 decision, that the City’s “carefully considered” [economic] development plan” stated a sufficient purpose that satisfied the Fifth Amendment’s public use

5. 98 U.S. 403, 406 (1878).

6. U.S. CONST. amend. V.

7. *Kelo v. City of New London*, 545 U.S. 469, 479–80 (2005); G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653, 1660 (2006).

8. *Kelo*, 545 U.S. at 489–90.

9. *Id.* at 489.

10. *Id.* at 473, 475–76.

11. *Id.* at 474.

12. *Id.* at 472.

requirement.¹³ As a result, the Court broadly expanded the public use definition by holding that economic development alone satisfies the public use clause.

However, the majority noted that “nothing in our opinion precludes any State from placing further restrictions on its exercise of the taking power.”¹⁴ Justice Stevens emphasized that states can impose public use requirements that are stricter than the federal baseline.¹⁵ Therefore, *Kelo* permitted states to address and possibly strengthen the public use requirement as a matter of state law. According to Professor Robert Williams, *Kelo* “spurred a wave of consideration of the issue by state legislatures, and by courts under their analogous state constitutional provisions.”¹⁶ After *Kelo*, over thirty states enacted legislation to limit its eminent domain power.¹⁷ This massive reaction demonstrates *Kelo*’s drastic departure from the original understanding of eminent domain and highlights the states’ immediate desire to abate the power.

C. *The Louisiana Constitution Before and After Kelo*

Louisiana’s constitutions historically have included more eminent domain limitations and private property protections than the U.S. Constitution and other state constitutions.¹⁸ This constitutional history illustrates Louisiana’s long-term commitment to protecting private property and preventing judgments analogous to *Kelo*.

Louisiana’s 1974 Constitution included multiple amendments that expanded personal property protections. For example, the 1974 Constitution expanded the “just and adequate compensation” clause to include compensation to “the full extent of [the owner’s] loss.”¹⁹ The 1974 Constitution also narrowed the public use requirement to a “public and necessary purpose” requirement.²⁰

Additionally, the 1974 Constitution added a new constraint referred to as the “business enterprise clause.”²¹ It provides, “[n]o business

13. *Id.* at 476 n.4, 478, 489–90 (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

14. *Id.* at 489.

15. *Id.*

16. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 6 (2009).

17. ERIN ELENA SMITH, *STATE REACTION TO KELO V. CITY OF NEW LONDON* 3 (2007), <https://oaktrust.library.tamu.edu/bitstream/handle/1969.1/5694/ErinESmithThesis.pdf?sequence=3&isAllowed=y>.

18. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2017-0434, pp. 2–3 (La. 1/30/18); 239 So. 3d 243, 256 (Weimer, J., dissenting).

19. *Id.*; LA. CONST. art. I, § 4(B)(5).

20. LA. CONST. art. I, § 4(B)(4) (emphasis added).

21. *St. Bernard*, 2017-0434 at p. 10; 239 So. 3d at 251.

enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise.”²² The clause was the “first provision in any state constitution to prohibit the government from seizing the means of production.”²³ It offers a special protection, unique to Louisiana, that insulates private business owners and their property from the threat of eminent domain.

Furthermore, motivated by *Kelo*, the Louisiana legislature added even more private property protections to the current constitution. After *Kelo*, many states passed statutes limiting their eminent domain powers,²⁴ while others, including Louisiana, passed constitutional amendments that voters approved in the 2006 election.²⁵ Generally, reform legislation fell into five categories: (1) “prohibiting eminent domain for economic development,” (2) limiting the public use requirement, (3) “restricting eminent domain to blighted properties,” (4) “imposing a moratorium on eminent domain use for economic development purposes,” and (5) “increasing the compensation amount for condemned property [when the property] is a person’s principle residence.”²⁶

Kelo and the devastating effects of Hurricane Katrina influenced Louisiana’s 2006 amendments, which limited the definition of public use and rejected economic development as a sufficient purpose.²⁷ For example, section 4(B)(1) of the current Louisiana Constitution precludes the expropriation of property for predominant use by a private entity or for the transfer of ownership to a private entity.²⁸ The amendment also provides a limited and exclusive list of circumstances that qualify as a public purpose.²⁹ The 2006 amendments illustrate Louisiana’s desire to limit the broadening effects of *Kelo* and maintain its legacy of protecting private property rights. However, Louisiana’s Supreme Court decision in *St. Bernard* derailed this legacy.

22. LA. CONST. art. I, § 4(B)(6).

23. *St. Bernard*, 2017-0434 at p. 3; 239 So. 3d at 256 (Weimer, J., dissenting) (citing Louis Woody Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 24 (1975)).

24. Mary Massaron Ross & Kristen Tolan, *Legislative Responses to Kelo v. City of New London and Subsequent Court Decisions—One Year Later*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 52, 53, 55 (A.B.A. ed., 2006); SMITH, *supra* note 17, at 3.

25. *St. Bernard*, 2017-0434 at pp. 3–4; 239 So. 3d at 256.

26. Ross & Tolan, *supra* note 24, at 53.

27. See LA. CONST. art. I, § 4.

28. LA. CONST. art. I, § 4(B)(1).

29. LA. CONST. art. I, § 4(B)(2) (listing public purpose examples such as roads, bridges, waterways, drainage, flood control, navigational protections, etc.).

III. STATEMENT OF THE CASE

At issue in *St. Bernard* was whether St. Bernard Port (“the Port”), a public port, could expropriate Violet Dock Port (“VDP”), a nearby private port, with about a mile of river-front property.³⁰ For decades, VDP serviced commercial vessels and contracted with the Navy to layberth and service Navy ships.³¹ VDP had three docks for layberthing military ships and began constructing a berth to handle cargo in 2010.³² To expand its cargo operations, VDP obtained cargo permits and entered into an option agreement to buy ten adjoining acres to store aggregate bulk cargo.³³

As one of the busiest cargo facilities in the country, the Port needed to expand to meet growing demand.³⁴ The Port determined that VDP was the only space that could accommodate its expansion needs and offered to purchase the property in 2007.³⁵

After several failed attempts to negotiate a purchase price, the Port filed its petition for expropriation, asserting that the Port needed VDP’s property to handle bulk cargo operations.³⁶ In other words, the Port pursued its eminent domain powers to acquire VDP. The petition stated that the Port’s property development plan would occur in three phases and take eight to ten years to complete.³⁷ During Phase I, the Port intended to contract with the Navy and continue operations similar to VDP.³⁸ After Phase I, the Port would transform the property into a dry and liquid bulk cargo facility.³⁹ The petition pleaded that this development plan would “create jobs and benefits” for citizens in the area.⁴⁰

VDP filed a motion to dismiss the expropriation, which challenged the Port’s public purpose.⁴¹ The trial court held a hearing to consider the public purpose of the expropriation.⁴² VDP argued that the Port’s true motive was to take over its Navy lease.⁴³ Although the Port claimed that

30. *St. Bernard*, 2017-0434 at pp. 1–2, 11; 239 So. 3d at 246, 261.

31. *Id.* at pp. 11–12; 261.

32. *Id.* at p. 3, n.3; 247 n.3.

33. *Id.* at pp. 12–13; 261.

34. *Id.* at pp. 2–3; 246–47.

35. *Id.* at pp. 3–4; 247.

36. *Id.* at p. 4; 247.

37. *Id.*

38. *Id.* at p. 13; 262.

39. *See id.* at p. 12; 261.

40. *Id.* at p. 4; 248.

41. *Id.* at p. 13; 262.

42. *Id.* at p. 5; 248.

43. *Id.*

the lease was “an afterthought” and its primary focus was cargo, the Port admitted that during Phase I, it would simply acquire VDP and use the property in the same fashion as VDP.⁴⁴ Despite this admission, the district court denied VDP’s motion and granted the Port’s petition after determining that the Port’s purpose was to build and operate a terminal accommodating the transport of bulk commodities for national and international commerce.⁴⁵

The case proceeded to trial solely to determine just compensation.⁴⁶ VDP’s experts claimed that the highest and best use of the property was a cargo facility and, therefore, compensation should be between \$51 and \$67 million.⁴⁷ However, the court rejected VDP’s argument and sided with the Port’s experts, who argued that the highest and best use was only layberthing and limited aggregate operations.⁴⁸ Therefore, as the Port’s experts suggested, the court granted just compensation of only \$16 million.⁴⁹

On appeal, a divided court affirmed the expropriation and compensation.⁵⁰ The Supreme Court of Louisiana granted VDP’s writ application to determine whether the expropriation of VDP satisfied the public purpose requirement of article I, section 4(B)(1), and whether it violated the business enterprise clause in article I, section 4(B)(6) of the Louisiana Constitution.⁵¹ The Louisiana Supreme Court affirmed the court of appeals in a 4–3 decision, which held that the Port did not violate the business enterprise clause because it did not plan to operate VDP’s enterprise identically or halt competition.⁵² Additionally, the court reasoned that the expropriation served an appropriate public purpose—to “facilitate the transport of goods or persons in domestic or international commerce.”⁵³ Therefore, the court ruled that the expropriation of VDP was constitutional.⁵⁴

44. *Id.* at p. 5, 13; 248, 262.

45. *Id.* at p. 6; 248.

46. *Id.* at p. 7; 249.

47. *Id.* at pp. 6–7; 249.

48. *Id.*

49. *Id.* at p. 7; 249.

50. *Id.*

51. *Id.* at p. 2; 246.

52. *Id.*; see LA. CONST. art. I, § 4(B)(6).

53. *St. Bernard*, 2017-0434 at pp. 1–2; 239 So. 3d at 246.

54. *Id.* at p. 2; 246. However, the court found that the trial court made a legal error in setting just compensation, which the court of appeals failed to correct. *Id.* Therefore, the court remanded the matter to the court of appeal solely to recalculate the amount of just compensation. *Id.*

IV. THE COURT'S REASONING

A. *The Louisiana Supreme Court Majority Opinion: Justice Crichton*

The majority applied a mere “manifest error” standard of review: “[w]hether the expropriator’s purpose is public and necessary is a judicial determination that will *not* be reversed on appeal absent manifest error.”⁵⁵ The court then highlighted article I, section 4 of Louisiana’s Constitution, which provides a list of circumstances that satisfy the public purpose requirement.⁵⁶ According to the provision, the government may expropriate property for “[p]ublic ports . . . to facilitate the transport of goods or persons in domestic or international commerce.”⁵⁷

Justice Crichton concluded that the trial court correctly determined that the Port’s purpose for expropriation was to “build and operate a terminal to accommodate transport of liquid and solid bulk commodities into national and international commerce to and from St. Bernard.”⁵⁸ With little analysis, the court held that this purpose fell squarely within the listed constitutional definition of public purpose, and therefore the trial court’s ruling was not manifestly erroneous.⁵⁹

Additionally, the court held that the trial court was not manifestly erroneous in holding that the business enterprise clause did not apply from a factual standpoint.⁶⁰ VDP argued that the purpose of the Port’s expropriation was either to take VDP’s revenue stream from the Navy lease or halt competition from VDP’s budding cargo operations.⁶¹ Both purposes would violate the business enterprise clause.⁶² However, relying solely on the Port’s testimony, Justice Crichton rejected VDR’s claims.⁶³ First, the court reasoned that according to the Port, the Navy lease was just “an afterthought,” and the Port’s primary purpose was to expand its cargo operations.⁶⁴ Second, the court stated that according to the Port, VDP’s cargo operations were “negligible;” therefore, the Port’s plan would not “halt competition.”⁶⁵ The majority court accepted the

55. *Id.* at p. 8; 250 (quoting *Exxon Mobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So. 3d 192, 200 (La. 2010)) (emphasis added).

56. LA. CONST. art. I, § 4(B)(2).

57. LA. CONST. art. I, § 4(B)(2)(vi).

58. *St. Bernard*, 2017-0434 at p. 10; 239 So. 3d at 251.

59. *Id.* at pp. 10–11; 251.

60. *Id.* at p. 11; 251–52.

61. *Id.*

62. *Id.* at p. 11; 252; LA. CONST. art. I, § 4(B)(6).

63. *St. Bernard*, 2017-0434 at p. 11–12; 239 So. 3d at 252.

64. *Id.*

65. *Id.*

Port's claims, without investigation, and therefore held that the expropriation did not violate the business enterprise clause.⁶⁶

B. The Dissenting Opinion: Justice Weimer

Justice Weimer's dissent criticized the majority's use of an inappropriate standard of review and its failure to apply the business enterprise clause. The district court determined that the business enterprise clause did not apply from a *factual* standpoint, and therefore applied the manifest error standard.⁶⁷ However, the manifest error standard assumes that the trier of fact applied the correct law.⁶⁸ Justice Weimer argued that "a deeper look into the district court's reason[ing]" revealed an error in its legal analysis.⁶⁹ The district court only focused on economic factors—such as additional revenues and employment opportunities—which courts explicitly cannot consider when determining whether a public purpose exists, and ignored the business enterprise clause.⁷⁰ Therefore, Justice Weimer concluded that the district court erred and de novo review was required.⁷¹

Additionally, the dissent accused the majority of "simply accept[ing] at face value the Port's stated reason for expropriating [VDP's] property without considering the effect of that taking."⁷² Justice Weimer employed a slippery slope argument to demonstrate that the majority's analysis was constitutionally deficient because, if accepted, the standard would enable any party to expropriate property "as long as it professed an ostensible proper motive."⁷³ This is not the intention of the business enterprise clause.

According to Justice Weimer, the Port violated the business enterprise clause because it only expropriated VDP to continue VDP's operation and halt competition; two purposes that the business enterprise clause rejects.⁷⁴ First, the dissent argued that the Port planned to take over the exact same Navy contract VDP participated in.⁷⁵ Second, the dissent stressed that the Port *admitted* that Phase I of its plan, the only funded phase, would consist of simply acquiring the

66. *Id.* at pp. 11–12; 252.

67. *Id.* at p. 6; 258 (Weimer, J., dissenting).

68. *Id.* at p. 7; 258–59 (citing *Winfield v. Dih*, 816 So. 2d 942, 948 (La. Ct. App. 2002)).

69. *Id.* at p. 6; 258.

70. *Id.* at p. 7; 258.

71. *Id.* at p. 6; 258.

72. *Id.* at p. 9; 260.

73. *Id.* at p. 10; 260.

74. *Id.*; LA. CONST. art. I, § 4(B)(6).

75. *St. Bernard*, 2017-0434 at p. 14; 239 So. 3d at 262.

property and enabling its Marine Terminal Operator to use the site in the same manner as VDP.⁷⁶ Third, the dissent stressed that VDP's expansion into the cargo handling arena would directly compete with the Port.⁷⁷ According to Justice Weimer, this evidence is sufficient to prove that the Port violated the business enterprise clause.⁷⁸

V. ANALYSIS

The Supreme Court of Louisiana mimicked *Kelo* by adopting extremely broad interpretations of eminent domain and public use. These interpretations seem to defy the Louisiana Constitution, which has historically prioritized private property rights. Additionally, *St. Bernard* highlighted the conflict regarding the proper standard to review a trial court's public use determination under the Fifth Amendment. In *St. Bernard*, the Louisiana Supreme Court implemented an inappropriate standard of review and ignored a prominent interest of the Louisiana Constitution by expanding eminent domain power. Additionally, the court either misinterpreted or ignored several private property protections guaranteed by the Louisiana Constitution.

A. *Standard of Review*

St. Bernard held that the Fifth Amendment's public use requirement poses a question of fact reserved for the trial court, which is only subject to a manifest error review.⁷⁹ This is the same standard the Connecticut Supreme Court adopted in *Kelo*.⁸⁰ However, is this standard really appropriate when a constitutional right—or the American dream of owning property—is in question? The answer is, of course, it depends. State courts have reached conflicting decisions regarding the appropriate standard of review in appellate taking cases.⁸¹ Unlike the Connecticut and Louisiana Supreme Courts, the Supreme Courts of Illinois, Pennsylvania, Hawaii, and Rhode Island all have held that whether a taking satisfies the public use requirement is a judicial question of law that requires de novo review on appeal.⁸² The Illinois Supreme Court reasoned, “[i]t is incumbent upon the judiciary to ensure that the power

76. *Id.*

77. *Id.*

78. *Id.* at p. 15; 263.

79. *Id.* at p. 8; 250 (majority opinion).

80. See *Kelo v. City of New London*, 843 A.2d 500, 540 (Conn. 2004), *aff'd*, 545 U.S. 469 (2005).

81. Petition for Writ of Certiorari at 14–15, *St. Bernard*, 239 So. 3d 243 (No. 17-1656).

82. *Id.* at 15.

of eminent domain is used in a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question.”⁸³

Under the manifest error standard, the judiciary is unable to ensure that an exercise of eminent domain complies with the framers’ intent. In *St. Bernard*, the trial court investigated but ultimately deferred to the Port’s stated purpose, the appellate court deferred to the trial court, and the Louisiana Supreme Court deferred to the appellate court.⁸⁴ This vicious cycle illustrates the dissent’s slippery slope fear that as long as an expropriating authority professes an “ostensible proper motive,” courts will defer to the expropriating party.⁸⁵

Additionally, the *St. Bernard* court failed to apply constitutional fact doctrine, which requires de novo review. The constitutional fact doctrine mandates that courts review *factual* determinations de novo when those determinations stem from constitutional claims.⁸⁶ VDR’s constitutional right to own private property without the risk of expropriation, protected by the Fifth Amendment, was at issue in *St. Bernard*. Therefore, VDR asserted a constitutional claim which requires de novo review under the constitutional fact doctrine.

In *Bose Corp. v. Consumers Union*, the United States Supreme Court supported the constitutional fact doctrine, stating that appellate courts have “an obligation to ‘make an independent examination of the whole record’” to ensure that constitutional rights are protected.⁸⁷ This doctrine should apply when an expropriating authority threatens private property rights to ensure that property owners receive adequate judicial review.⁸⁸ Therefore, the *St. Bernard* court should have applied the doctrine and reviewed the trial court’s determinations de novo. This heightened

83. *Id.* at 16 (citing *Sw. Ill. Dev. Auth. v. Nat’l City Env’tl., L.L.C.*, 768 N.E.2d 1, 8 (Ill. 2002)).

84. *St. Bernard*, 2017-0434 at p. 10; 239 So. 3d at 251. *See also* *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 809 F. Supp. 2d 524, 527 (E.D. La. 2011); *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2016-0096, p. 15 (La. App. 4 Cir. 12/14/16); 229 So. 3d 626, 637, *aff’d in part, rev’d in part*, 239 So.3d 243 (La. 2018).

85. *St. Bernard*, 2017-0434 at p. 10; 239 So. 3d at 260 (Weimer, J., dissenting) (arguing that simply accepting the face value of the Port’s stated reasoning without considering the effects of the taking is constitutionally deficient).

86. Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 289–90 (2017).

87. Petition for Writ of Certiorari at 20, *St. Bernard*, 239 So. 3d 243 (No. 17-1656) (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–86 (1964) (applying the constitutional fact doctrine to an alleged First Amendment violation)); *see also* *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (holding that the district court’s determinations that reasonable suspicion and probable cause existed should be reviewed de novo).

88. Petition for Writ of Certiorari at 21, *St. Bernard*, 239 So. 3d 243 (No. 17-1656).

review would not only protect VDP's constitutional rights, but could also eliminate confusion clouding the private property protections ensured by the Louisiana Constitution. Furthermore, enhanced judicial scrutiny would ensure that the governmental authority's stated public use is more than a pretextual public benefit.⁸⁹

B. *Pretextual Benefit*

Although the dissent focused on Louisiana's unique business enterprise clause, it is arguable that the Port's expropriation simply did not satisfy the public purpose requirement of the United States and Louisiana Constitutions. The Louisiana Constitution specifies that "property shall not be taken . . . 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."⁹⁰ In *Kelo*, the Supreme Court stated that a government cannot "take property under the mere pretext of a public purpose, when its actual purpose [is] to bestow a private benefit."⁹¹ Similar to Justice Weimer's dissent in *St. Bernard*,⁹² Justice Kennedy's *Kelo* concurrence stressed that solely incidental or pretextual public benefits could satisfy the public purpose requirement if courts did not closely investigate the justifications alleged by the expropriating party.⁹³ Justice Kennedy argued that courts should "strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits."⁹⁴ He also concluded that "there may be categories of cases in which the transfers are so suspicious, or . . . the purported benefits are so trivial or implausible, that courts should presume an impermissible private purpose."⁹⁵

Does *St. Bernard* fall under this pretextual benefit category? Although Justice Weimer's dissent primarily focused on the appropriate

89. Corinne Calfee, Note, *Kelo v. City of New London: The More Things Stay the Same, the More They Change*, 33 *ECOLOGY L.Q.* 545, 560 (2006).

90. LA. CONST. art. I, § 4(B)(1).

91. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005); see also *Middletown Twp. v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (requiring courts to examine "the 'real or fundamental purpose' behind a taking") (quoting *In re Bruce Ave.*, 54 A.2d 277, 283 (1947)); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required, . . . where the ostensible public use is demonstrably pretextual."); Brief for Violet Dock Port as Amici Curiae Supporting Petitioner at 14, *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 239 So. 3d 243 (La. 2018) (No. 17-1656).

92. See *supra* Section IV.B.

93. *Kelo*, 545 U.S. at 490–91 (Kennedy, J., concurring).

94. *Id.*

95. *Id.* (finding that no such circumstance existed in the *Kelo* case).

standard of review and the business enterprise clause, it is plausible that the *St. Bernard* expropriation also violated Louisiana Constitution article I, section 4(B)(1), which prohibits the transfer of expropriated property to a private entity.⁹⁶ The Fourth Circuit indicated that the Port planned to have Associated Terminals, a private entity,⁹⁷ operate VDP's facility in the same fashion as VDP for eight to ten years.⁹⁸ The public could not confer an extra benefit solely from this change of ownership. Rather, only the private entity, Associate Terminals, would benefit. In fact, after the expropriation, Associated Terminals "established a virtual monopoly over the operation of port sites within St. Bernard's jurisdiction."⁹⁹ The Louisiana Supreme Court dismissed Associate Terminal's massive benefit in a mere footnote, which stated, "[t]he Port's plan to lease the Property to another entity to operate does not change our analysis."¹⁰⁰ However, even if the private benefit did not "change [the court's] analysis," the court should have at least contemplated whether the public benefits the Port alleged were merely set forth to cover up the benefits Associate Terminals received.

Although it is unclear if the Port's expropriation violated the public purpose requirement, the presence and dominance of Associate Terminals, a private entity, in the Port's plan should have alerted the Louisiana Supreme Court to take a deeper look into the true motives of the plan. However, the court failed to investigate the Port's motives, and instead adopted the manifest error standard.¹⁰¹ In one sentence the supreme court dismissed a further investigation by stating, "we cannot say that the trial court's finding was manifestly erroneous."¹⁰² This holding blindly accepts the Port's stated purpose, which violates the Fourth Circuit's rule that "the law governing [expropriation] proceedings

96. LA. CONST. art. I, § 4(B)(1).

97. ASSOCIATED TERMINALS OF ST. BERNARD, L.L.C., TERMINAL TARIFF 1 (Dec. 1, 2002), https://stbernardport.com/sites/default/files/tariffs/associated_terminals_terminal-slip_tariff.pdf ("Associated Terminals of St. Bernard, L.L.C. is a privately owned company and not associated with any city, state, or federal agency, therefore use of these facilities is by private contract by and between Associated Terminals and interested parties.").

98. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2016-0096, pp. 3-4 (La. App. 4 Cir. 12/14/16); 229 So. 3d 626, 639 (Lobrano, J., dissenting), *aff'd in part, rev'd in part*, 2017-0434 (La. 1/30/18); 239 So.3d 243.

99. Arif Panju & Anya Bidwell, *Court Case a Stand for Property Rights*, ADVOC. (Oct. 25, 2017, 6:00 PM), https://www.theadvocate.com/baton_rouge/opinion/article_2e8b3fac-b8f9-11e7-a519-87cf3b5a4fd3.html.

100. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2017-0434, p. 11 n.11 (La. 1/30/18); 239 So. 3d 243, 252 n.11.

101. *Id.* at pp. 10-12; 251-52.

102. *Id.* at p. 10; 251.

must be strictly construed *against* the expropriating authority.”¹⁰³ Therefore, the supreme court should have adopted a de novo standard of review and attempted to uncover the Port’s actual purpose for expropriating VDP.

C. The Business Enterprise Clause

In his dissent, Justice Weimer focused on Louisiana Constitution article I, section 4(B)(6), or the business enterprise clause. The 1974 Louisiana Constitution adopted the business enterprise clause, which provides, “[n]o business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise.”¹⁰⁴ Justice Weimer argued that the Port’s expropriation violated both prongs of the clause; the Port intended to operate the enterprise in the same fashion as VDP and quash competition from VDP’s cargo operations.¹⁰⁵

St. Bernard was the first case that analyzed Louisiana’s unique business enterprise clause. Other states have enacted similar provisions, but no state has adopted identical language. For example, the Alabama Constitution provides:

[T]he exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use *in the same manner* in which the property and franchises of individuals are taken and subjected.¹⁰⁶

Similar to Louisiana, Alabama prohibits taking and using land in the “same manner” as the former private owner.¹⁰⁷ However, unlike Louisiana, no other state constitution specifically states that a government authority cannot exploit eminent domain to halt competition.¹⁰⁸ This additional protection is consistent with Louisiana’s

103. *State ex rel. Dep’t of Transp. & Dev. v. Estate of Davis*, 572 So. 2d 39, 42 (La. 1990) (emphasis added) (citing *State, Dept. of Highways v. Jeanerette Lumber & Shingle Co.*, 350 S. 2d 847 (La. 1977)). The Fourth Circuit accepted but incorrectly quoted this rule in *Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. College v. Villavaso*, 2014-1277, p. 7 (La. App. 4 Cir. 12/23/15); 183 So. 3d 757, 763.

104. LA. CONST. art. I, § 4(B)(6).

105. *St. Bernard*, 2017-0434 at pp. 10–11; 239 So. 3d at 260–61 (Weimer, J., dissenting).

106. ALA. CONST. art. I, § 23 (emphasis added).

107. *Id.*

108. See *Current State Constitutional Provisions About Eminent Domain*, CASTLE COALITION,

constitutional history of limiting eminent domain power and protecting private property.

Unfortunately, the excessive private property protections embedded in Louisiana's constitutional history did not resonate with the trial court, appeals court, or Louisiana Supreme Court in *St. Bernard*. The trial court failed to apply the business enterprise clause at all. The court merely mentioned the clause in its second-to-last footnote, stating, "no Louisiana court has yet interpreted the language of that section."¹⁰⁹ Lack of judicial interpretation is not a sufficient excuse to ignore a constitutional provision that is clearly relevant to the case at hand. Additionally, the court of appeals dismissed VDP's claim that the taking violated the business enterprise clause by simply stating that the constitutional rights of article I, section 4 are subject to the exception provided in article VI, section 21.¹¹⁰ Section 21 states:

[I]n order to . . . facilitate the operation of public ports, . . . the legislature by law may authorize, subject to restrictions it may impose, any political subdivision, public port commission, or public port, harbor, and terminal district to: . . . 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.¹¹¹

Without explanation, the court stated that the article VI, section 21 exception applies to the business enterprise clause and concluded that the trial court's determination that the Port's expropriation satisfied the public purpose requirement was not manifestly erroneous.¹¹²

Judge Lobrano's dissent fiercely disagreed with the court of appeals's finding that article VI, section 21 is an exception to the business enterprise clause. Judge Lobrano argued, "[section] 21 serves only to authorize public ports to exercise eminent domain to accomplish their

<http://castlecoalition.org/current-state-constitutional-provisions-about-eminent-domain> (last visited Mar. 1, 2019).

109. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 809 F. Supp. 2d 524, 537 n.51 (E.D. La. 2011).

110. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2016-0096, p. 6 (La. App. 4 Cir. 12/14/16); 229 So. 3d 626, 632-33, *aff'd in part, rev'd in part*, 2017-0434 (La. 1/30/18); 239 So.3d 243.

111. LA. CONST. art. VI, § 21 (emphasis added).

112. *St. Bernard Port, Harbor & Terminal Dist.*, 2016-0096 at pp. 5-7; 229 So. 3d at 632-33.

public purpose, ‘subject to restrictions it [the Legislature] may impose.’ Nothing in . . . [section] 21 grants public ports unfettered and unrestricted exercise of their eminent domain power.”¹¹³ Additionally, a different provision of the Louisiana Constitution—article I, section 4(B)(1)—specifically references article VI, section 21 as an exception, but the business enterprise clause—article I section 4(B)(6)—does not.¹¹⁴ Therefore, section 21 does not apply to the business enterprise clause because unlike other provisions, the business enterprise clause does not reference section 21 as an exception. Instead, the business enterprise clause serves as an exception to section 21.

The court of appeals failed to acknowledge this relationship and used section 21 as an excuse to avoid applying the business enterprise clause. If section 21 applied to the business enterprise clause, then public ports would have an unfettered right to expropriate private property, even if the port’s purposes were solely to operate the enterprise identically or halt competition.¹¹⁵ This was not the Legislature’s intent when adding the unique business enterprise clause, which protects *all* private businesses. Delegate Jenkins, the co-author of the business enterprise clause, stated that “the [business enterprise clause] should be broadly interpreted to prevent both direct and indirect efforts to seize *any* private industry.”¹¹⁶ A broad interpretation of the clause would classify private ports as a protected industry.

The trial court and court of appeals wrongly determined that the business enterprise clause did not apply to the Port’s expropriation. Unlike the trial court and the court of appeals, the Louisiana Supreme Court did acknowledge the clause, but held that the Port did not violate it.¹¹⁷ However, the supreme court misconstrued the business enterprise clause and ignored the Legislature’s intent to protect private businesses.

As Justice Weimer argued in his dissent, the Port violated both prongs of the business enterprise clause. First, the Port violated prong one by intending to use VDP to generate revenue in the same fashion as VDP. The Port argued, and the majority accepted, that the Navy lease

113. *Id.* at p. 2; 638 (Lobrano, J., dissenting) (emphasis omitted).

114. LA. CONST. art. I, § 4(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.”) (emphasis added).

115. *St. Bernard Port, Harbor & Terminal Dist.*, 2016-0096, pp. 4–5; 229 So. 3d at 639–40.

116. Louis Woody Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 24 (1975).

117. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 2017-0434, pp. 10–12 (La. 1/30/18); 239 So. 3d 243, 251–52.

was just “an afterthought” and not a primary part of its plan.¹¹⁸ However, this was false. The Port’s expropriation petition stated that its plan would take place in three phases, and in the first phase, lasting eight to ten years, the Port “intends to enter into a new contract with the Military Sealift Command for its *continued* use of [VDP].”¹¹⁹ The Port indicated that it would derive \$550,000 per year through the Navy lease, revenues that VDP generated in the exact same way each year.¹²⁰ Additionally, the Port admitted that during Phase I, the only funded phase, it would merely acquire the property and enable Associate Terminals—its privately-owned Martine Terminal Operator—to use the property for stevedoring activities, just as VDP did.¹²¹ The expropriation of a business enterprise for the government or its chosen beneficiary—Associate Terminals—to operate in the same fashion as the original owner is a constitutional violation the business enterprise clause was enacted to prevent.¹²² Therefore, this expropriation violated prong one of the business enterprise clause.

The Port argued that although Phase I did involve operating VDP’s business in a similar fashion, Phase I was a short-term plan to generate funds for Phase II, which involved creating a future dry and liquid bulk cargo facility.¹²³ However, VDP was expanding its cargo operations at the time of the expropriation.¹²⁴ Therefore, Phase II violated both prong one and prong two of the business enterprise clause by implementing the same use and halting competition.

The Port and the majority argued that VDP’s cargo operations were “negligible” and therefore did not “compete” with the Port.¹²⁵ However, there is no doubt that VDP engaged in cargo operations and attempted to expand them.¹²⁶ For example, VDP obtained permits to allow more cargo operations and to construct a new berth for cargo use.¹²⁷ Additionally, VDP entered into an option contract to lease a new berth and ten adjoining acres to store bulk cargo.¹²⁸ The dissent argued that although VDP was not an active competitor in bulk cargo in the past, VDP did attempt to expand its bulk cargo operations, which would be in

118. *Id.* at p. 11; 252.

119. *Id.* at p. 13; 262 (Weimer, J., dissenting) (emphasis added).

120. *Id.* at p. 12; 261.

121. *Id.* at p. 13; 262.

122. *Id.* at pp. 14–15; 262–63.

123. *Id.* at p. 11; 252 (majority opinion).

124. *Id.* at p. 14; 262 (Weimer, J., dissenting).

125. *Id.* at p. 12; 252 (majority opinion).

126. *Id.* at pp. 13–14; 262 (Weimer, J., dissenting).

127. *Id.* at pp. 12–13; 261.

128. *Id.* at p. 12–13; 261.

direct competition with the Port.¹²⁹ Therefore, the Port eliminated this cargo competition by expropriating VDP, which violates prong two of the business enterprise clause. The expropriation of VDP allowed a governmental entity to increase its market share and prevent a growing competitor from expanding its business, which falls squarely under the prohibited action of “halting competition with a government enterprise.”¹³⁰

Furthermore, the Port later changed its argument to lower the amount of just compensation awarded to VDP. First, the Port claimed that it was not merely continuing VDP’s enterprise because its primary motive behind the expropriation was to create a future dry and liquid bulk cargo facility.¹³¹ However, when the court contemplated the “highest and best use” of the property for compensation purposes, the Port abandoned its primary purpose argument and contended that the highest and best use of the property was continued layberthing for the Navy and other enterprises.¹³² The Port’s inconsistent conclusions beg the question of what the Port’s real motive was for expropriating the property. However, the majority court refused to recognize the Port’s inconsistency and granted minimal just compensation consistent with the Port’s layberthing argument.¹³³ This led to an unconstitutional expropriation of VDP, which violated the business enterprise clause and VDP’s constitutional rights embedded in the U.S. and Louisiana Constitutions.

VI. IMPLICATIONS

The *St. Bernard* decision will have catastrophic implications that will affect Louisiana property owners and, more specifically, private business owners. First, *St. Bernard* establishes that the manifest error standard of review is the appropriate standard in eminent domain cases. This allows a governmental authority to expropriate land as long as it presents a motive that the trial court finds serves a public purpose. The manifest error standard is not a high burden and does not account for solely pretextual benefits. Additionally, the majority’s interpretation of a constitutional exception applying across the board instead of only when it is specifically mentioned could lead to future constitutional misinterpretations unintended by the Legislature. Finally, whether a government entity can expropriate an on-going business and transfer it

129. *Id.* at p. 17; 264.

130. *Id.* at p. 15; 262–63.

131. *See id.* at p. 11; 252 (majority opinion).

132. *Id.* at pp. 13–14; 262 (Weimer, J., dissenting).

133. *Id.* at pp. 1–2; 246 (majority opinion).

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to another private party is an issue that arises periodically, but the *St. Bernard* court affirmatively held that it is constitutional. This poses a major threat to private businesses that compete with a governmental entity, because the entity may expropriate the business property as long as it convinces a trial court that its use will create a greater public benefit. Therefore, contrary to Louisiana's strong constitutional history favoring private property rights, the Louisiana Supreme Court ruled in a way, without much analysis or questioning, that favored extensive and far-reaching eminent domain power.

VII. CONCLUSION

There is no doubt that the United States Supreme Court decision in *Kelo* influenced *St. Bernard* and many other cases across the country. Although multiple states enacted post-*Kelo* legislation to limit eminent domain power, *St. Bernard* illustrates that courts may not apply these post-*Kelo* reactions as strictly as the Legislatures intended. If a state like Louisiana, which historically imposed strict limitations on eminent domain, could reach a decision like *St. Bernard*, then other states with fewer limitations or protections will too. The *St. Bernard* decision represents an expansion of eminent domain power and confirms that no property owner is safe, even if the relevant state constitution specifically protects the particular owner.