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Carol N. Brown

University of Richmond, cbrown5@richmond.edu

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Chapter 8

Kelo v. City of New London and the Prospects for Development after a Natural Disaster

Carol Necole Brown

Government's growing role as a participant in public-private economic development partnerships has prompted the judiciary to revisit the nature of the public use requirement under the Takings Clause of the Fifth Amendment¹ as evidenced by the United States Supreme Court's 2005 decision in *Kelo v. City of New London*.² Private property owners have been and are continuing to oppose joint urban development projects between government and private developers, commonly referred to as economic development takings.³ These projects require the use of eminent domain and the transfer of private property to private developers in the pursuit of plans that serve public uses.⁴ As the frequency and magnitude of these joint ventures increase, so too does the blurring of the public use versus private use distinction.

1 Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in ZONING AND THE AMERICAN DREAM 348 (Charles M. Haar & Jerold S. Kayden eds., 1989).

2 *Kelo*, 545 U.S. 469, 125 S. Ct. 2655 (2005).

3 See, e.g., *Poletown v. City of Detroit*, 410 Mich. 616 (1981), *overruled by* *County of Wayne v. Hathcock*, 471 Mich. 445 (2004) (as an example of the long history of struggle between government and private citizens regarding the propriety of economic development takings); *Kelo*, 125 S. Ct. at 2675.

4 See, e.g., Ryan Chittum, *Eminent Domain: Is It Only Hope for Inner Cities?*, WALL ST. J., Oct. 5, 2005, at B1 (statement of private property owner in East St. Louis, Illinois: "[E]minent domain is a horrible law ... I feel that it's a little bit worse than communism."). *Id.* at B6. The court in *Poletown* held that the condemnation of private property and its transfer to General Motors Corp. for construction of an assembly plant was not a taking of private property for private use but rather for a public purpose. *Poletown*, 410 Mich. at 616, *overruled by* *Hathcock*, 471 Mich. at 445. More than twenty years later, the court overruled itself.

Because *Poletown's* conception of a public use – that of “alleviating unemployment and revitalizing the economic base of the community” – has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of “public use” ... cannot reflect the common understanding of that phrase ...

In 1981, the Supreme Court of Michigan made history in the area of eminent domain jurisprudence in *Poletown Neighborhood Council v. City of Detroit*.⁵ *Poletown* defined an era characterized by the broad interpretation of the scope of the public use doctrine to justify local and state governments' exercise of their takings power in furtherance of economic development initiatives.⁶ In 2004, Michigan's highest court once again left an indelible mark on the eminent domain landscape when it overturned *Poletown* in a widely publicized decision, *County of Wayne v. Hathcock*.⁷ While *Hathcock* was being decided by the Supreme Court of Michigan, *Kelo* was proceeding through the Connecticut state judicial process. Eventually, the United States Supreme Court granted certiorari in *Kelo*. The nation's highest court would consider the same question that the Michigan courts had been grappling with for years, whether the public use requirement for takings was broad enough to include the exercise of eminent domain powers solely for economic development purposes.

The devastation visited upon the Gulf Coast region in the same year that *Kelo* was decided intensified the attention directed toward *Kelo* and the exercise of eminent domain for economic development. New Orleans suffered extensive damage when Hurricane Katrina ravaged the Gulf Coast region in 2005. More than two-thirds of the City's rental housing, both affordable and market-rate, was destroyed and thousands of its citizens were displaced across the country.⁸ The hardest hit populations tended to be the poor and minorities. In Hurricane Katrina's aftermath, some observers questioned whether the poor would be allowed back into New Orleans and whether *Kelo*'s affirmation of the constitutionality of economic development takings would be used by state and local government to separate the poor from their property and transfer it to wealthy developers for purposes of economic development.

This chapter considers the *Kelo* case and inquires whether an inevitable consequence of the Supreme Court's decision is increased gentrification and class segregation of our already heavily divided urban landscape, especially following a natural disaster such as the one visited upon the Gulf Coast region, specifically

5 *Poletown*, 410 Mich. at 616, *overruled by Hathcock*, 471 Mich. at 445.

6 Amanda S. Eckhoff & Dwight H. Merriam, *Public Use Goes Peripatetic: First, Michigan Reverses Poletown and Now the Supreme Court Grants Review in an Eminent Domain Case*, EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 33 (Dwight H. Merriam & Mary Nassaron Ross eds., 2006).

7 *Hathcock*, 471 Mich. at 445.

8 *The Road Home Rental Housing Program: Consequences for New Orleans* 1 (Bureau of Gov't Research Sept. 2006), http://www.bgr.org/Consequences_for_N.O._091506.pdf (last visited Jan. 17, 2007); Sheila Crowley, *Presentation to Gulf Coast Recovery and Rebuilding Caucus, U.S. House of Reps.* (Mar. 7, 2006), http://www.nlihc.org/detail/article.cfm?article_id'3415&id'72 (last visited Jan. 17, 2007) (discussing, on behalf of the National Low Income Housing Coalition, the shortage of affordable housing in the broader context of the Gulf Coast region and estimating, conservatively, a loss of more than 214,400 affordable housing units in the region in 2005 from hurricanes and flooding). Dr. Crowley also noted that, as of the time of her briefing before the House of Representatives, there were in excess of 20,000 vacant rental units needing repair in New Orleans that were privately owned and that this housing could be used to provide housing to distressed people by making money for rehabilitation available to owners.