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John A. Lovett*

Hurricane Katrina has altered the way our nation discusses many important issues. But did Hurricane Katrina change our thinking about fundamental property relationships as well? Although some scholars commented on the general political meaning of Katrina and some even debated whether it was worth rebuilding New Orleans and how to approach such a staggering decision, relatively few legal scholars have analyzed whether the events of August 29, 2005 have fundamentally altered our national discussion about property.3

One reason for this failure to explore the link between disasters like Katrina and property law is that property law is typically understood as an institution whose identity and purpose is intimately associated with the task of promoting stability, not with responding to the kind of radical change that Katrina wrought. For example, two currently prominent property law scholars, Abraham Bell and Gideon Parchomovsky, claim that property as an institution is “organized around creating and defending the value inherent in stable ownership,” that is, it “recognizes and helps create stable relationships between persons and assets.”4 Economist Hernando De Soto likewise suggests that many of property law’s functional virtues—its ability to represent the potential non-physical surplus value of an asset, to integrate data about assets into a unified informational system, to make people accountable for contracts and debts—all serve to enhance the stability of property relationships and thus make them capable of generating economic growth.5 To be sure, some scholars, like Joseph Singer and Gregory Alexander, while recognizing the importance of continuity, assert that the stability of property rights depends paradoxically on their contingency and malleability—on their capacity to be modified or restrained to

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1 See e.g., Jedediah Purdy, Democracy and Disaster, DIE ZIET, Sept. 6, 2005, available at (www.newamerica.net/index.cfm?pg=article&docID=2543).


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take into account the intersecting rights and needs of others.\(^6\) Overall, though, scholars from diverse theoretical perspectives assume that property law is fundamentally geared toward promoting stability, even if they have not always framed their inquiries in terms of property’s stability protecting function.\(^7\)

Despite this profound but occasionally contested association between property and stability, this article seeks to explore the relationship between property law and events like Hurricane Katrina, events that are characterized above all by their tendency to produce what this article calls “radically changed circumstances.” By examining a range of formal and informal property relationships among individuals or juridical entities that share ownership, use, control or management of some shared resource—whether that resource is a single piece of tangible property or some complex, interconnected set of assets like the houses, apartments, businesses, streets, schools and parks that comprise an entire community—this article seeks to understand how people and institutions embedded in such relationships can respond to circumstances of radical change.

Part I of this article therefore attempts to create a theoretical framework for approaching the subject of property law in the context of events producing radically changed circumstances. It does so by first defining events of radically changed circumstances and then exploring the mismatch between traditional notions of property law focused on stability and environments of radical change. Part I next visualizes a taxonomy of property relationships that is useful for understanding their ability to respond to radical change and then describes some of the typical problems and decisions that confront participants after an event of radical change. Part I finally develops a set of normative criteria for evaluating the resiliency of various property regimes in the wake of radical change.

Part II of the article then turns to two typical and important property relationships—between landlord and tenant and mortgagor and mortgagee—and examines how these relationships’ default rules, voluntary arrangements and markets have fared under the pressure of Hurricane Katrina. In general this analysis reveals that longer term, more indefinite and largely voluntary property relationships that are characterized by extensive private ordering and risk-spreading, that set aside resources for rebuilding \textit{ex ante} and that enjoy practices of mutual accommodation are more likely to show resiliency.

\(^6\) JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 84-86 (2000); GREGORY ALEXANDER, COMMODITY AND PROPERTY 5-6 (1997).

\(^7\) See \textit{e.g.}, Morris R. Cohen, Property and Sovereignty, 13 CORNELL L. Q. 8, 15-16 (1927) (describing, “occupation theory” of property as based on the assumption that continued possession creates expectations in the possessor and others that society could not easily upset without “rendering human relations insecure”); Carol Rose, The Shadow of the Cathedral, 106 Yale L. J. 2715, 2187-88 & 2198 (1997) (explaining the legal system’s overwhelming preference for property rules, despite their imperfections in situations of high transaction costs, as resulting from their ability to inspire individual investment, planning and effort and encourage parties to learn to bargain with each other); Richard A. Epstein, A Clear View of the Cathedral, 106 Yale L. J. 2091, 2097-99 (1997) (suggesting that the primary reason for property rules’ dominance is their promotion of the stability of possession, particularly among strangers); Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle, 110 Yale L. J. 1, 63-64, 66-67 (2000) (justifying standardization of property forms in the common law in terms of its tendency to promote stability or at least well ordered and deliberate legislative change).
than those that are shorter term, more finite and involuntary in nature and whose default rules make exit easy for the party with greater power but re-entrance difficult for the weaker party.

Part II also explores how another more complex and inchoate kind of property relationship—that between a city (New Orleans) and its inhabitants—has weathered the radical change created by Hurricane Katrina and suggests that the “stickiness” of this relationship may be a source of its ultimate resiliency. Finally, Part II analyzes a series of federally funded and state administered programs designed to restore housing—a crucial common resource and public good—in the post-Katrina environment using the normative criteria developed in Part I. This section demonstrates that government policy makers seeking to rebuild crucial common resources can learn valuable lessons from the experiences of traditional private property regimes.

I

A Theoretical Framework for Approaching Property in the Context of Radically Changed Circumstances

A. Events of Radically Changed Circumstances—Terminology and A Few Defining Characteristics

To understand how property relationships are affected by and can respond to events like Katrina, we need to focus first on what is particularly distinctive about these events that make them capable of producing “radically changed circumstances.” Before elaborating on the unique characteristics of such an event, however, we should consider why it might be appropriate to use this descriptive term at all.

One reason to use the phrase “radically changed circumstances” is that the term “changed circumstances” has a long, though contested, pedigree in property law. Indeed, courts and property lawyers have for years recognized that sometimes a seemingly perpetual property relationship that originates in an otherwise binding contractual agreement can be altered or terminated in the context of changed circumstances. A classic example is the so called “changed conditions doctrine” under which an easement or real covenant may be altered or even terminated if the surrounding circumstances have changed to such a degree since its creation that its original purpose may no longer be accomplished. Although the doctrine has been subjected to serious academic criticism precisely because of its tendency to promote uncertainty about land transactions, particularly across generational horizons, recent commentary has noted the potential

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relevance of this old but controversial common law notion to the conditions created by events like Hurricane Katrina.10

Another reason for using the descriptive phrase “radically changed circumstances” is that it will be more productive to focus on the context in which change unfolds rather than the instrument of change itself. In other words, an analysis of the relationship between property and “radically changed circumstances” might prove to be applicable to many other kinds of environmental and social transformations that societies have faced in the past or will confront in the future. These radical transformations might include those associated with global climate change or sudden political or economic upheavals and not merely those triggered by natural phenomena such as earthquakes and hurricanes.11

Finally, the breadth of the phrase “radically changed circumstances” avoids two narrowing tendencies. First, it avoids the arbitrary monetary measurements of the scale of natural or man-made calamities typical of the insurance industry.12 Second, it sidesteps technical debates among experts in disaster management and recovery (and at least one well known federal judge) who have created their own taxonomies of “everyday community emergencies,” “disasters,” “catastrophes,” and even “mega-catastrophes.”13 While these distinctions are no doubt useful in analyzing and planning for emergency response efforts, another more humanistic and integrating label is appropriate for evaluating the long-term effects of these events on property relationships.

What has made the experience of Hurricane Katrina unique then in recent American memory, and what it shares with other large scale natural and man-made disasters like the Chicago fire of 1871, the San Francisco earthquake of 1906, and the Indian Ocean tsunami of 2004, are four primary characteristics which frequently conspire


10 See David Weissmann, Removing Restrictive Covenants as Burdens to a Disaster Response, 20 (No. 5) PROB. & PROP. 45, 48 (Sept.-Oct. 2006) (arguing that devastation caused by Katrina might lead to attempts to use doctrine to lift covenants restricting new kinds of redevelopment).
11 See generally JARED DIAMOND, COLAPSE (2005) (discussing how societies in various locations around the world have responded to dramatic human induced changes and exogenous ones).
12 See Mortgage Banker’s Ass’n White Paper, Natural Disaster Catastrophic Insurance: The Commercial Real Estate Finance Perspective 3 (2006) (noting insurance industry’s definition of “a catastrophic event” as one resulting in insured losses of $25 million or more”).
13 See E.L. Quarantelli, Catastrophes are Different from Disasters: Some Implications for Crisis Planning and Managing Drawn from Katrina (2006) (paper on file with author) (defining the first three categories); RICHARD A. POSNER, CATASTROPHE: RISK AND RESPONSE 5-6 (2004) (defining a “mega-catastrophe as one with the potential to “threaten the survival of the human race”). See generally Ronald W. Perry, What is a Disaster?, in HANDBOOK OF DISASTER RESEARCH, I. 12-14 (Havidan Rodriguez et al., eds., 2006); WHAT IS A DISASTER?: PERSPECTIVES ON THE QUESTION (E.L. Quarantelli, ed., 1998).
together to produce a situation of radically changed circumstances. No single one of these characteristics, however, is necessary to produce an event of radically changed circumstances. They are simply the most common and distinctive characteristics of the phenomenon.

**Suddenness:** First, events like Katrina are uniquely capable of producing radically changed circumstances because they arrive suddenly. They are spawned over a very short time span—not over the course of decades, or even years, but in a matter of weeks, days, or maybe just within a few hours or minutes. Thus, hurricanes, earthquakes, fires, floods, outbreaks of disease or war are all characterized by this first quality of suddenness. A slow environmental or socio-economic decline, on the other hand, although it might also produce radically changed circumstances over time, is a phenomenon of a different order specifically because its gradual emergence might give participants in property relationships who can detect the emerging trend some time to plan for and alter those relationships in anticipation of the coming change. This is not to say, however, that an analysis of radically changed circumstances and property has no bearing on these more gradually unfolding changes, but just that such transformations were not its immediate stimulus.

**Unexpectedness:** Second, an event like Katrina is unique because it is in some sense unexpected. Although we all know that disasters like hurricanes, earthquakes and floods will occur from time to time (and thus prudent property owners will take precautions like acquiring hazard insurance and prudent governments will create disaster response agencies like FEMA), these events are still unexpected in the sense that no one can predict with any real accuracy where in a broad geographic region or when exactly in the future such an event will occur and overall their general probability of occurring remains low or unknown. It is this fundamental unexpectedness of disasters that makes them capable of producing change which still takes us by surprise.

**Intensely Disruptive:** Third, while many events such as a local fire, flood or even a tornado can cause sudden and unexpected change to those directly affected, an event capable of producing radically changed circumstances will cause pain, suffering, and transformation of the physical and social landscape that penetrates especially deeply into a community’s entire fabric of life. It will affect multiple aspects of law, markets and

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14 *See* LAWRENCE J. VALE & THOMAS J. CAMPANELLA, THE RESILIENT CITY: HOW MODERN CITIES RECOVER FROM DISASTER 7 (2005) (drawing distinction between protracted socio-economic decay and disasters and noting that it is often more difficult for cities to respond with resilience to the former). Of course, some social and environmental trends emerge slowly but still produce radical consequences that catch societies by surprise with their severity. As with global warming, the consequences of these changes are often difficult to detect because their trend lines can be masked by frequent, short term, random fluctuations and because “creeping normalcy” can conceal these “noisy fluctuations.” DIAMOND, supra note 11, at 425.

15 *See* Peter Whoriskey, *South Spent Millions on a Hurricane Season that Wasn’t*, WASHINGTON POST, Oct. 19, 2006, at A11 (reporting on anticipated rough 2006 Atlantic hurricane season that never materialized); POSNER, supra note 13, at 6 (observing that word “catastrophe” usually designates an event “believed to have a very low probability of materializing but that if it does materialize will produce a harm so great and sudden as to seem discontinuous with the flow of events that preceded it”).

16 *See* Singer, supra note 3, at 267-68 (describing the intense pain that destruction of even a single house can cause to its owner occupants).
communal structures all at once. Moreover, the intensity of the disruption caused by an event of radically changed circumstances will be so severe that it will have the effect of creating a cleavage in time, an overwhelming psychological sense in the affected community of a time before and after. With Katrina this psychological disruption is unmistakable. It affects everyone in the community, even those whose own property was not directly damaged by Katrina’s wind or water. In New Orleans and on the Gulf Coast, there was a time “pre-Katrina” and “post-Katrina,” a time before the flood and after. In short, the community’s collective consciousness has been shattered into pieces that cannot easily be put back together again.

Geographically Pervasive: Finally, and perhaps most importantly, while many casualty inflicting events such as a fire, an explosion, a tornado, or even an act of terrorism, might affect either a small or large number of persons (from the residents of a single home to hundreds or even thousands of residents or occupants of a large building or a neighborhood), an event causing radically changed circumstances will extend over a vast geographic area encompassing an entire city, region, or multiple states. Thus, events like Hurricane Katrina, which killed more than 1500 people, directly affected 1.5 million across a three state region the size of the United Kingdom and destroyed or damaged 300,000 homes, and the 2004 Indian Ocean tsunami which killed more than 200,000 people, displaced more than 2 million people and destroyed or damaged 370,000 homes, are paradigmatic examples of phenomena producing radically changed circumstances.

As noted above, however, one should not overstate the necessity of any single criteria. Some events might only be marked by two or three of these characteristics but still could qualify as events that produce radically changed circumstances. For example, the hurricane that killed 6000 to 8000 residents of the City of Galveston in 1900 or the terrorist attacks on the World Trade Center that killed thousands in New York City on 9/11

17 See Quarantelli, Catastrophes are Different, supra note 13, at 2-5 (noting that “catastrophes,” as opposed to “disasters,” are characterized by their pervasive impacts on community structures, family support networks, and government institutions).
18 See VALE & CAMPANELLA, supra note 14, at 11 (observing how focus on death totals misses the psychological trauma disasters can inflict on communities, victims and “all those who are physically removed from the disaster, yet nonetheless consider themselves to be victims”). Quarantelli explains this change in consciousness by noting the more extensive and long lasting media coverage of catastrophes than mere disasters. See Quarantelli, supra note 13, at 5.
19 The now iconic source of post-Katrina New Orleans zeitgeist who has documented this radically altered sense of identity is CHRIS ROSE, 1 DEAD IN ATTIC (2005).
20 See Quarantelli, supra note 13, at 4 (identifying geographically widespread regional disruptions as one of the hallmark characteristics of a true “catastrophe”).
22 Human Rights Center, University of California, Berkeley, After the Tsunami: Human Rights of Vulnerable Populations 1 (October 2005), in FARBER & CHEN, supra note 21, at 116; Bill Clinton, Recovering From Tragedy: Lessons from Tsunami Reconstruction after Two Years, WASHINGTON POST, Dec. 26, 2006, at A25. Events producing literally hundreds of thousands of deaths are not limited to our recent memory. In 1657, the great Meireki fire killed an estimated 108,000 inhabitants of Edo, Japan, the predecessor of modern Tokyo. Carole Hein, Resilient Tokyo: Disaster and Transformation in the Japanese City, in VALE & CAMPANELLA, supra note 14, at 215.
might not have been geographically pervasive, but they still caused radically changed circumstances in the specific places where they occurred. Conversely, some disasters that caused relatively few deaths, like the great fire in London in 1666 which killed less than 10 people, still caused widespread physical destruction and radical change. In the end the purpose of thinking about events like Hurricane Katrina as events producing radically changed circumstances, rather than as disasters or catastrophes, is contextual. It should focus our attention not just on the immediate effects these events produce (as painful and dramatic as they may be) but on how people embedded in property relationships—and specifically those who share some control, ownership, use or claims to a particular resource in either a formal or informal legal structure—experience these property relationships in the wake of such events.

B. The Mismatch between Property Law and Events of Radical Change

If an event of radically changed circumstances can be defined in terms of the presence of all or at least several of these characteristics, what might this mean for property law and property relationships involving shared or common resources? Many property law scholars define the goal of property law as an institution as being fundamentally geared toward the promotion of stability—stability in ownership, stability in markets for exchange, and stability in communities. For instance, as noted earlier, Abraham Bell and Gideon Parchomovsky, building on Locke, Marx and others, have recently claimed that the entire structure and purpose of property law can be explained in terms of its tendency to protect and enhance the value inherent in stable ownership of things. A number of the specific benefits they associate with the vigorous protection of private property rights and the protection of “value” are directly linked to the promotion of stability. These include property rights’ tendency to promote efficient sharing of information among individuals and create network benefits for society at large, to reduce defensive costs of monitoring assets to individuals and enforcement costs for society at large, to increase the number of voluntary and beneficial transactions, to permit efficient separation of possession and ownership which can put assets in the hands of those most skilled at using them and support compatibility with use and possession of other objects, and finally to create opportunities for positive free-riding through the creation of markets for assets and services that are public goods themselves and lead to macro-economic development. In short, the stability inherent in well defined and well protected property rights in their view produces numerous individual and social benefits.

Almost twenty years ago, Carol Rose similarly and famously illuminated some of the major developments in property law—the demise of caveat emptor, the evolution of the equity of redemption in mortgage law, and changes in the use and interpretation recording acts—by explaining that the oscillation from crystalline property rules to muddy standards and then back to ex ante crystalline contractual agreements which seek to reestablish

24 Vale & Campanella, supra note 14, at 10.
25 See Vale & Campanella, supra note 14, at 9-10 (noting that 1666 fire in London destroyed 80% of the city).
26 Bell and Parchomovsky, supra note 4, at 538.
27 Id. at 55-56.
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Predictability is motivated by this same desire for stability, among parties who do not expect to have repeat dealings with each other.\(^\text{28}\) Even commentators like De Soto who emphasize the utility of property law in permitting corporeal and incorporeal things to be turned into fungible commodities capable of being divided, combined, leveraged and exchanged for new things and thus highlight its ability to facilitate change, still recognize that stability and predictability of property rules are essential to its exchange promoting function.\(^\text{29}\) Thus, most property law observers would likely agree that much of property law is designed to create stable environments in which people can exercise predictable control over the tangible and intangible objects of value in their world and to exchange those objects within stable and predictable parameters.

If this is true, then events like Katrina which produce radically changed circumstances present a challenge to property law institutions because by definition they create conditions of great instability and unpredictability. They upset settled expectations and put large numbers of people at risk of losing control of the tangible and intangible resources that are central to their lives. Recognizing this mismatch between property law’s general stability enhancing aims and the instability inducing nature of events like Katrina leads me to pose a few basic questions. First, how does property law—and more specifically property relationships governed by default rules and contractually arranged variations on default rules—respond to these kinds of conditions? Second, and perhaps more important, what kind of property relationships and property rules will enable people who share the use, ownership, control or management of some common resource—be it a house, a commercial building, a business, a pool of cash, or even a neighborhood or a city—to respond to events of radically changed circumstances in ways that demonstrate resiliency and are efficient and fair?

In order to answer these questions it will be helpful first to sort property relationships in some meaningful way—to group them into some revealing categories that might stimulate further analysis. At the same time, we also need some normative criteria to help determine whether a property relationship’s response is actually desirable—whether it is efficient and fair.

C. Two Axes of Property Relationships

The first step then toward developing normative tools to evaluate property relationships in the context of radically changed circumstances is to visualize some of the most common property relationships encountered today in the United States in the context of a few simple descriptive categories so that we can next determine whether these descriptive categories reveal anything significant about property various relationships’ capacity for responding to radical change. To accomplish this first categorization task, we can plot some common resource or shared resource property relationships across two different spectrums or axes. The results appear in Figure One below:

\(^{28}\) Carol Rose, Crystals and Mud in Property Law, 40 STAN. L. REV. 577 (1988).

\(^{29}\) De Soto, supra note 5, at 56-58.
On the horizontal axis of *Figure One*, property relationships are mapped in terms of their typical duration and the degree to which they are temporally bounded. At the left end are relatively short term and temporally finite relationships—for example between a buyer and seller of real property in an executory contract or between a landlord and tenant in a residential apartment lease. At the right end of the spectrum are longer term relationships that are potentially (but not necessarily) infinite in duration or that at least have no certain ending point. Examples of these are relationships between a serviant and dominant estate holder pursuant to an easement or covenant, between homeowners in a common interest community, and between tenants in common or co-owners resulting from family inheritance. Although these relationships can be dissolved either by mutual agreement or sometimes by unilateral action (*e.g.*, partition of co-ownership), their potential for longevity makes them particularly interesting in the context of radical change.

Somewhere in the middle of this temporal spectrum are intermediate length relationships which may or may not have a pre-determined termination date but whose duration is nonetheless bounded in some way. Two classic examples of such an intermediate length relationship would be that between a life estate holder (or usufructuary) and a reversioner or remainderman (or naked owner) or between two spouses
in a marriage. Although a life estate or marriage must inevitably end at some point in time (when the life tenant or spouse dies or when a divorce occurs), the exact termination date could be tomorrow or seventy years from now. Other examples of intermediate length property relationships with more precisely scheduled ending points include the relationship between a mortgagor and mortgagee bound together for the life of a typical 15 or 30 year residential home loan or between a landlord and tenant in a long term ground lease.

To add more specificity to this categorization effort, we can chart property relationships on the vertical axis of Figure One in terms of their source—how property relationships come into being or are created. At the bottom of this axis are relationships which individuals enter more or less “voluntarily,” either by mutual contract or by some other form of voluntary commitment, such as leases, mortgages established to finance the purchase of a home, easements and real covenants (at least at the moment of their initial creation or subsequently assuming effective constructive notice) and marital property relationships. At the top of this axis are relationships that are created involuntarily, either by operation of law or as the result of a gift or conveyance from a third party, such as concurrent ownership or life estate and remainder relationships established by inheritance. In other words, this spectrum moves from relationships that are largely “chosen” (at least from a perspective of their formal creation) to ones that are largely “given.”

Of course, there are many other potential axes or spectrums one could imagine for mapping property relationships. One might focus for instance on the geographical or territorial space covered by the relationship, the frequency of participants’ repeat dealings with each other, whether the goal of the relationship is purely economic or has a primarily social character, or simply the number of parties to the relationship. While a complete visualization of property relationships would need to account for all of these different characteristics, the focus here is on just these two basic characteristics—the temporal length or degree of finitude of the relationship and the nature of its creation—because these two produce some useful initial conclusions about the ability of certain property relationships to respond to radically changed circumstances.

D. Repeat Problems and Decision Trees in the Wake of Radically Changed Circumstances

Before evaluating the efficiency and fairness of any particular set of property relationships in response to events of radical change, this analysis can be further sharpened

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30 I recognize here that “voluntariness” is a relative concept. Although a hypothetical American might theoretically be free to enter into any number of property relationships, a person’s starting point in life (the wealth, income, education, and other forms of social capital they possess at the outset) may starkly limit choices as to what kinds of property relationships can be entered. See Singer supra note 3, at 294-95 (explaining that market transactions are not purely voluntary just because they are entered without threat of violence); Cohen, supra note 7, at 12-3 (noting fictional nature of “free bargains”).


32 See Rose, supra note 28, 601-03 (observing the prevalence of crystalline rules when parties do not have long term relationships with each other).

by identifying several repeat problems that typically occur when any group of common resource owners or property relationship participants is faced with either radical change or even an event causing more predictable and smaller scale change. Those repeat problems in turn each require a set of related decisions to be made, which might be understood as decision trees with numerous branches emanating from a core question or issue.

**Preservation**: First, participants in a common resource or property sharing relationship whose common resource has been damaged, destroyed or put at risk by a sudden change must usually decide in quick order if and how to preserve that resource. In the case of a building that has suffered wind damaged from a hurricane this might mean making emergency repairs to a roof or fixing broken windows. In the case of flood damage, preservation might require immediate steps to “gut” the structure to minimize the risk of mold contamination and then more costly efforts to replace damaged parts of the building. In the case of a structure that suffered partial damage from fire, this might entail immediate structural repairs to prevent collapse or efforts to secure the structure from looters.

But whatever these initial “conservatory acts” might be, the common stakeholders of the resource will typically face several inter-related sub-questions. Which commoner is responsible for initiating these necessary repairs? How far should the necessary repairs go in rebuilding or improving the property? Is the consent of all commoners required for necessary repairs? If one commoner acts unilaterally, is this person entitled to reimbursement from the others? In some property relationships at the voluntary or relatively short term ends of our axes (for example in leases or mortgages), responsibility for these conservatory decisions is allocated by ex ante private ordering. But in other relationships, particularly at the involuntary and long term ends of our spectrum (e.g., inherited co-ownership), decision making authority is often not established ex ante and thus default property law rules must resolve conflicts and will tend to favor or reward decisive action by any participant, even if it is undertaken unilaterally.

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36 In Louisiana civil law, a co-owner can unilaterally take necessary steps to preserve the co-owned asset, and may also claim proportional reimbursement from other co-owners for necessary expenses incurred, along with expenses for ordinary maintenance and repairs. La. Civ. Code arts. 800 & 805 (West Supp. 2006). Further, a co-owner can also bring a declaratory judgment action to determine if repairs are necessary and reimbursable. Miller v. Seven C’s Properties, LLC, 800 So.2d 406, 410-11 (La. Ct. App. 3 Cir. 2001). At common law, logic and fairness also dictate that if a co-tenant (or at least one in possession) who fails to make necessary repairs is potentially liable for permissive waste, he should have a cause of action for contribution for necessary repairs undertaken to prevent such waste from occurring. 4 THOMPSON ON REAL PROPERTY, SECOND THOMAS EDITION §32.07(b) (David A. Thomas ed. 2004). But in practice common law courts often do not reward unilateral conservatory actions with immediate reimbursement and often permit reimbursement only through a contribution claim at partition or as a setoff against another co-owner’s claim for a share of rents and profits. Hanoch Dagan & Michael Heller, *The Liberal Commons*, 110 YALE L. J. 549, 612 (2001)
Substantial Alteration and Improvement: A second repeat problem concerns whether substantial physical alterations or improvements of the common property or changes in use should occur to respond to the changed circumstances. In the case of a home or building ravaged by a flood, hurricane or fire, the commoners might disagree whether the resource should be rebuilt just as before, or whether it should be reshaped, expanded or altered. For example, can one common owner of a house previously used as a primary residence transform it into rental or commercial property capable of generating income? Should a public housing project that was exclusively rented to low income families be demolished and replaced with a privately financed mixed income development.37

Just as with preservation, undertaking substantial alteration and improvement often entails complex second order decisions. Should the consent of all commoners or participants in the property relationship be required? Should some form of majority or super-majority decision making? Should commoners who make unilateral alterations or improvements receive reimbursement or be penalized? In the case of consensual and relatively short-term relationships like leases, the answers to these questions will often be provided by the initiating contracts.38 In the case of longer term or more involuntary relationships, background legal rules again are decisive and tend to require unanimous consent by the members of the relationship.39

Exit and Entrance: The final two repeat problems most likely to arise after an event of radically changed circumstances concern commoners’ ability to “exit” from or regain “entrance” to the property relationship.40 If a participant in a property relationship can no longer afford to participate in the relationship or wants to leave, how will her ability to exit be accommodated? Will she have a right to transfer her property interest to a third party? Should the state be required to become a buyer of last resort? Should a commoner be able to demand dissolution of the entire property relationship even if other commoners object? Should any limits be imposed on the ability of commoner to exit—perhaps through rights of first refusal granted to other members, exit taxes or delay periods?41 In short, to what extent should a right of exit be protected or can limits be imposed on exit rights that might benefit other participants?

When a commoner loses access to a resource or his place in a property relationship, these same questions can also be reframed in terms of entrance or re-entrance rights or conditions. This, of course, is an especially acute problem in post-Katrina New Orleans where thousands of residents who enjoyed deep ties of kinship and social allegiance to the

37 See infra notes 310-326 and accompanying text.
38 See infra notes 106-115 & 143-148 and accompanying text.
39 See Dagan & Heller, supra note 36, at 614 (observing American common law’s preference for unanimity as the governing principle for all major management decisions).
40 See Id., at 567-71 (elaborating on the importance of “exit” as bedrock liberal value); Peñalver, supra note 31 (discussing the value of “entrance” as alternative key value). These scholars borrow the key term “exit” and the idea that exit can serve to discipline social organizations from ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 22-25 (1970)).
41 See Dagan & Heller, supra note 36, at 598-60 (endorsing limited exit rights).
city were displaced from their homes and neighborhoods. How then do legal rules or institutional structures regulate the desires of commoners who seek to re-enter property relationships or re-establish themselves in a community? Should new commoners be allowed to enter the communal structure if they take the place of a displaced commoner? Although not every event of radical change will raise all these issues, in Part we will see that in fact many of these problems must be confronted for participants to endure and thrive.

E. Criteria for Evaluating Property Regimes in the Context of Radical Change

The final step in framing an analysis of property law’s responsiveness to events of radical change, however, is to develop some criteria for gauging the effectiveness of a particular property relationship’s ability to confront these problems. What might these criteria be and how can they be derived? This section sets forth five criteria that will be useful in evaluating a property relationship’s adaptability and resiliency in the face of radical change. The next major part of this article will then take these criteria and use them to evaluate how a few common property relationships and a number of government programs aimed at restoring the key resource of housing have fared under the pressure of Katrina’s crucible.

Here, however, each criterion is stated in the form of an axiom which sums up one major trait that enables a property relationship or regime to restore itself and thrive—in short to respond with resiliency—in the wake of an event of radically changed circumstances. The first three criteria are more descriptive in nature in that they represent observations about characteristics of property regimes which experience has shown to be useful and efficient in a broad set of contexts. The last two are more openly normative or prescriptive in nature in that they are based not just on utilitarian rationales but also on ideal visions of what a fair and just property system would look like. This section also traces each criterion to the work of property law theorists and other scholars whose insights formed their basis. In sum, this normative synthesis is admittedly pluralistic—even pragmatic—in nature, not tied to the ideological or theoretical principles underlying any school of legal theory or property theory. In other words, this enumeration of normative principles is derived from a wide range of sources and prescriptive insights that shed light on the problems confronted by people or institutions embedded in property regimes faced with radically changed circumstances.

1. Resilient property regimes facilitate (a) relatively quick action to preserve commonly held resources and (b) democratically oriented and trust enhancing decisions to substantially improve and adaptively alter those resources.

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42 See infra notes 211-220 and accompanying text.
43 For resiliency as an overarching metaphor for understanding events of radical change and for the device of stating axioms of resiliency, I am indebted to VALE & CAMPANELLA, supra note 14, at 3-23 & 335-55.
44 See Jedediah Purdy, The American Transformation of Waste Doctrine: A Pluralist Perspective, 91 CORNELL L. REV. 653, 654-55 (2006) (defining a pluralist interpretation as one that appreciates that people actually pursue a variety of goals and that diverse values and “goods” may all be legitimate).
**Speed and Physical Reconstruction:** These two inter-related factors seem to dominate the observations of today’s mass media and many policy experts in their reporting on the recovery of New Orleans and the Gulf Coast. Whether it was one of the countless newspaper articles which tried to gage New Orleans’ recovery at the one year anniversary of Katrina or the Brookings Institute’s prominent “Katrina Index” which publishes monthly assessments of various indicia of recovery such as hospital re-openings, building permits issued, unemployment rates, repopulation, and the availability of public transportation, these two factors seem to be the first and maybe even unavoidable criteria for assessing any property relationship or institution’s resiliency in the wake of catastrophe. And so perhaps it makes sense for property law scholars to evaluate a property relationship’s ability to respond to events of radical change by measuring the speed with which its participants are able to restore physically the commonly held resource to its former use so that it can once again produce value for its users.

**Avoiding Anti-Commons Tragedies and Promoting Consensus Oriented and Flexible Decision Making Structures:** But while speed and aggregate reconstruction are thus both important, these two measurements alone might be misleading. After all, when even a relatively contained disaster like the San Francisco earthquake of 1906 occurs, history teaches us that the phases of the affected community’s recovery unfolds logarithmically and thus will take many years and even decades to complete, not months and days. Given that Hurricane Katrina devastated communities on a far wider geographical scale than this kind of “typical” disaster and wiped out most of their institutions in a single stroke, we might expect recovery to take even longer. Thus, the criteria of speed and aggregate physical reconstruction, as important they are, should be supplemented by considering how decisions about rebuilding are made and whether this process allows members of the property relationship to achieve consensus about whether to restore a resource to its previous condition, improve it or substantially alter its use.

The focus here on the methods of decision making is shaped by the insights of Michael Heller, Hanoch Dagan and Thomas Mitchell. In his seminal article on the “tragedy of the anticommons,” Michael Heller explained how a group of people embedded in a property relationship with a shared resource (whether it was a shuttered store front in post-communist Russia, land on a Native American reservation, or a farm owned as “heir property” by a large group of African Americans) might find their ability to put the resource to its most efficient use debilitated by the fact that their ownership or control stakes were too fragmented, giving too many players a veto right over decisions

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46 VALE & CAMPANELLA, supra note 14, at 336-37 (explaining how the temporal phases of recovery unfold on a logarithmic scale so that each phase takes approximately ten times as long as the previous on and thus in a typical major disaster like the San Francisco earthquake of 1906 it will take the community a thousand weeks (i.e., twenty years) to complete the cycle of recovery).
about how to use or alter the use of the resource. Later, Heller and Dagan built on Heller’s initial insight and constructed a model of a “Liberal Commons” as an ideal form for shared resource use and management. This model has many rich implications for thinking about property relationships in the context of events of radical change to which I will return later, but several key elements of their Liberal Commons model are important here.

First, Dagan and Heller claim that any member of the property relationship should be able to undertake investments that are necessary to prevent harm to the resource or to protect continued ownership and possession—i.e., taking conservatory action—and should likewise be able to obtain pro-rata contributions from other members of the relationship to reimburse them for such investments. When it comes to altering or substantially improving the resource, however, Dagan and Heller recommend that default rules (a) postpone mandatory contribution requirements at least until the relationship terminates or one commoner wants to leave the relationship and (b) encourage commoners to employ democratic decision making as the decisions about investments in improvements become more complex and weighty. Here it is important to consider the potential value of democratic decision making rules as opposed to rules requiring unanimous consent. According to Dagan and Heller and the social science research on which they rely, the former can perform better because they (1) can avoid costly anti-commons problems (and thus increase the speed of decision making), (2) actually enhance social relationships which further catalyze trust and cooperation, and (3), by giving an empowering “voice” to more participants, increase the chances that a property regime will be able to adapt to changing social, economic and environmental conditions.

The prototypical examples of property relationships that take advantage most effectively of this kind of democratic and cooperation building decision making for Dagan and Heller are common interest communities or condominiums where property owners have come to together more or less voluntarily for significant but nevertheless limited purposes of sharing the resources of a residential community. In his ground breaking scholarship on African American rural land loss, Thomas Mitchell similarly recommends that rules governing tenancy in common ownership be reformed to make it easier for landowners to adopt modernized forms of property ownership like the trust and the limited liability corporation (LLC) that similarly take advantage of the possibility of majority or super majority decision making and thus allow more adaptive use of a commonly owned

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48 Id.
49 Dagan & Heller, supra note 36.
50 Id. at 586-87.
51 Id. at 578-88.
52 Id. at 590. Here, Dagan and Heller suggest that the scope of democratic decision making should be broadest when there is a need for dynamic management and acute risks of anti-commons tragedy, Id. at 591, and should be more constrained when there are high risks of minority exploitation—e.g., in relation to “the most significant decisions concerning the management of the commons resource.” Id. at 592.
53 Id. at 597-98 (mentioning condominiums as voluntary and relatively low intensity form of common ownership). See also Michael A. Heller, Common Interest Developments at the Crossroads of Legal Theory, 37 URB. LAWYER 329, 331-32 (2005) (describing CIC’s as taking advantage of democratic governance mechanisms); Dagan & Heller, supra note 33, at 53 (citing CIC’s as paradigmatic example of an economic property institution that solves conflicts well).
When we turn to our cases studies in Part II, we will find that while both the speed and quantity of aggregate rebuilding activity are crucial for assessing property institutions’ resiliency and government programs’ usefulness after Katrina, the process of decision making about restoration, if it is mishandled, can lead to mistrust that frustrates the goals of efficient and equitable recovery.

2. Resilient property regimes encourage parties to spread risk and to enlist *ex ante* exogenous institutional and financial resources to respond to radical change.

The next important hallmark of a property regime that is capable of responding to events of radically changed circumstances in a way that allows its members to survive or even thrive is the presence of some fund of exogenous resources to call upon to finance and jump start efforts to preserve, repair, improve or alter the resources. One reason that almost all cities in the modern era afflicted with large scale disasters have recovered to some degree is that their resilience is, in the words of Lawrence Vale and Thomas Campanella, literally “underwritten by outsiders,” whether in the form of federal disaster aid in the U.S, international humanitarian aid outside the U.S., and, perhaps most important, private insurance proceeds.

Property theorists have also pointed out that ideal property regimes are characterized by this same tendency to spread risk and provide *ex ante* for exogenous resources to be set aside (or perhaps for resources to be created and stored endogenously) in case the shared resource is endangered by some casualty or sudden change in the physical, economic or social environment. Robert Ellickson, for instance, brought this tendency into sharp focus with his classic study of early European pioneer settlements in North America when he observed that one reason these communities adopted group ownership forms at their outset was precisely because of their inability to spread risk in more conventional ways such as through multigenerational kinship networks, insurance markets and government welfare programs. Even more recently, scholars like Jedediah Purdy and Robert Hocket have also emphasized that risk spreading and creating exogenous relief sources are key features of healthy property regimes in areas as diverse as secondary markets and insurance for home loan mortgages and a newly theorized form of insurance against technology and market driven shocks to employment prospects. When we turn to

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our cases studies, we will see the benefits of risk spreading and *ex ante* exogenous resource provision dramatically illustrated in the case of mortgagor-mortgagee relationships and we will see that Louisiana’s Road Home housing program is fundamentally an *ex poste* attempt to make up for the failure to provide for these conditions *ex ante*. 59

3. Resilient property regimes take advantage of opportunities to obtain the benefits of economies of scale in responding to radical change.

The third characteristic of resilient property regimes is that they typically take advantage of opportunities to obtain the benefits of economies of scale in responding to events of radical change. If the members of a particular property relationship must rebuild on their own and their ownership or use shares are too small or fragmented to justify large expenditures of resources on recovery, a shared property resource may not be rebuilt, restored or altered to adapt to new circumstances. But if the property relationship applies to a large enough set of resources often it is easier to call upon exogenous resources to aid in recovery or to insure against future risks.

This common phenomenon that property itself becomes more dynamic when it reaches a physical or financial scale that makes investment more productive has been observed by numerous property scholars. Dagan and Heller note that in agricultural settings larger parcels can be more useful than smaller ones because of economies of scale in fencing and cultivation costs and that similarly in urban settings they may allow for the construction of more valuable improvements. 60 Robert Ellickson similarly observes that sometimes increasingly large parcel sizes may be efficient even if this increasing scale entails group ownership and the inefficiencies of having to engage in pervasive intra-group monitoring because the costs of perimeter monitoring drop and because it becomes possible to employ more specialized equipment and workers to exploit the land. 61 Hernando De Soto observes that one of the great benefits of enforceable, efficient and recognizable property rights is that they allow resources to be bundled together in large enough packages to be able to leverage further investment. 62 Bell and Parchomovsky similarly note that beneficial economies of scale can be achieved in monitoring and enforcements costs when people cooperate to create a stable property regime. 63 And finally Thomas Mitchell has pointed out that one of the most significant costs of extreme fragmentation of tenancy in common ownership of African American rural “heir property” is, in addition to its vulnerability to loss through partition sales, its tendency to become underutilized because its owners cannot obtain loans to develop the property or agree on plans for redevelopment. 64 In the case studies portion of this article, we will see how this important goal of creating property systems that create economies of scale to respond to

59 See infra notes 190-194 & 233-240 and accompanying text.
60 Dagan & Heller, supra note 36, at 572. In his earlier article, Heller also illustrated the same them in the context of the reconstruction of post-earthquake Kobe, Japan and for Native American land ownership on reservations. Heller, supra note 47, at 684-87.
61 Ellickson, supra note 57, at 1327-34.
62 DE SOTO, supra note 5, at 56-57.
63 Bell & Parchomovsky, supra note 4, at 561.
64 Mitchell, supra note 54, at 518.
mass destruction can be crucial and how government sponsored proposals to rebuild hurricane damaged communities in Louisiana have responded in turn.\(^\text{65}\)

4. **Resilient property regimes facilitate exit from property regimes for those who wish or need to leave in ways that still encourage trust and cooperation if possible.**

The last two criterion that we should apply when evaluating how property relationships respond to events of radical change blend both utilitarian and justice based theories of property law. First, drawing on the work of Dagan and Heller once more, I suggest that property relationships which hope to survive crises created by radically changed circumstances will need to preserve the ability of common resource owners to exit from that relationship, but in ways that still seek to promote trust and cooperation.\(^\text{66}\) In situations of relative stability, well protected, though not absolute, rights of exit are valuable for two primary reasons. First, they provide a kind of shield, a literal or figurative space, which guarantees individual liberty and autonomy and which individual commoners can use to protect themselves from the harmful, invasive, opportunistic actions of other members of the group.\(^\text{67}\) Second, well protected exit rights serve to discipline other commoners and in turn promote cooperation and trust.\(^\text{68}\) Examples of exit rights noted by Dagan and Heller include the rights of partners or beneficiaries to terminate a partnership or trust, the rights of spouses to seek divorce, and the rights of shareholders to sell their shares or liquidate a corporation.\(^\text{69}\)

Dagan and Heller’s only in depth study of exit rights unfortunately complicates matters. Building on the work of Thomas Mitchell,\(^\text{70}\) Dagan and Heller sought to examine how the default rules of tenancy in common land ownership have contributed to the loss of African American “heir property.”\(^\text{71}\) Unlike Mitchell’s own subsequent scholarship, however, Dagan and Heller did attempt to assess how severe the purported problem of African American land loss really is by using any kind of rigorous analytical tools. Nor did they attempt to explore the complex nexus of causes for this reported phenomenon.\(^\text{72}\) But putting these deficiencies aside, Dagan and Heller’s largely theoretical study is still richly suggestive.

\(^{65}\) *Infra* notes 280-292 and accompanying text.


\(^{67}\) Id. at 568.

\(^{68}\) Id. at 568.

\(^{69}\) Id. at 597.

\(^{70}\) See Id. at 604, n. 203 (acknowledging Mitchell’s then unpublished LLM thesis as a general source).

\(^{71}\) Id. at 604-609.

\(^{72}\) Compare Dagan & Heller, *supra* note 36, at 610 (claiming there is no way to “tease out the causal links between formal law and the informal norms and practices among black farm families and surrounding communities”), and Thomas Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 *Wisc. L. Rev.* 557 (2005) (undertaking and reporting on just such an empirical study that Dagan and Heller claimed was impossible). Among Mitchell’s key findings are that: (1) the extent of existing black rural landownership, often held by absentee owners, is actually much larger than is commonly understood; (2) partition sales may only be a relatively minor causal factor in accounting for the black rural land loss, at least as compared to other causes like foreclosure sales; and (3) underutilization may be a more significant problem than actual loss of ownership. Id. at 577-78. 583-85 & 609.
Although American law’s protection of concurrent owners’ exit rights should, under their framework, theoretically curb the tendency of other concurrent owners to act selfishly, engage in excessive free-riding, or hoard too much of the fruits and benefits of the co-owned resource, Dagan and Heller nevertheless acknowledge the significant role that tenancy in common partition rules can play in making exit too easy—essentially by allowing owners of very small co-ownership shares (whether they are family members or outsiders) to demand partition at any time, which can then lead to forced partition sales at which other co-owners cannot competitively bid for the property. 73 These exit rights thus can destabilize a property relationship and lead to the loss of the many economic and subjective interests and values associated with ownership of heir property. 74

Because of these risks Dagan and Heller acknowledge that some “soft constraints” on exit—exit taxes, exit delays, rights of first refusal—might be permissible to the extent they enhance cooperation and are not too prohibitive. 75 Yet in the end, Dagan and Heller claim that preserving exit rights is paramount because they symbolize liberalism’s “own commitment to geographical, social, familial and political mobility.” 76 Thus, despite their discussion of the pathological tendencies of American co-ownership law and its deleterious effects on African American land loss, they still assert that “relatively free exit” through partition (though ideally mediated by some Continental reforms regulating the process of partition) is still “essential to the functioning of a liberal commons.” 77

In the context of radically changed circumstances, exit rights (and some cooperation enhancing limitations on exit rights) can play an important role in discouraging opportunistic commoners from exploiting the new conditions for selfish gain and in protecting individual liberty interests when individual commoners decide that their futures require them to adapt, move, and preserve the proportionate economic value of their interests in a property regime. At the same time, and especially in the context of landlord tenant law, we will see how exit rights that are too easy to exercise can be harmful to a member of a property relationship who is in a particularly weak position as a result of an event creating radically changed circumstances.

5. **Resilient property regimes facilitate entrance for those who wish to join or rejoin communities and also spread access to common resources more widely and equitably.**

If exit is important to property relationships faced with radically changed circumstances, then it probably comes as no surprise that entrance or sometimes re-entrance is crucial as well. In recent years, numerous scholars have taught us the

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73 Id. at 607-08.
74 Id. at 608-09. Mitchell, in essence, agrees with this analysis in his most recent work, observing that forced partition sales do not guarantee that the co-owner with the strongest subjective valuation of co-owned land will emerge from a partition sale as the actual owner. Mitchell, supra note 72, at 586-88.
75 Dagan & Heller, supra note 36, at 598-601 and 617-620.
76 Id. at 568.
77 Id. at 619.
importance of facilitating “entrance” into property relationships and have explained the value of enhancing access to property itself.

Eduardo Peñalver, for instance, challenging Dagan and Heller, asserts that it is a mistake to conceptualize property rules exclusively in terms of exit rights because the vision of negative liberty that privileges such rights is founded on an illusory sense of self-sufficiency and autonomy. The norms and commitments that govern our lives as “robustly social” creatures, Peñalver suggests, often make legally protected exit rights and the potential for individual liberty they are supposed to support too costly or impractical for many people to exercise. Thus, property rules should be judged more in terms of how they facilitate “entrance” not merely “exit.” Echoing one of his key sources, Gregory Alexander, Peñalver calls property “a means of anchoring the individual in the structure of power and virtue,” and extols the social benefits that can result from even the most humblest and commonplace form of property ownership—ownership of a home—in terms of promoting stronger social attachments to neighborhood and neighbors, greater involvement in local politics, and the trust and cooperation needed to engage in numerous repeat market transactions regarding property. In other words, what Peñalver seems to be describing here, much like Bell and Parchomovsky’s recent endorsement of property as a vehicle to protect the value inherent in stable ownership, is a set of externalities or social benefits that flow not just to the individual property owner but to society at large from widespread and well protected ownership rights.

In his recent article, After the Flood: Equality and Humanity in Property Regimes, Joseph Singer echoes some of Peñalver’s themes but goes further and uses Hurricane Katrina as a springboard to discuss our nation’s failure to structure property regimes to take care of the needs of the weakest and most vulnerable members of our society. Singer, like Peñalver, begins with a critique, not of property as exit per se, but of what he calls “libertarian institutionalism,” a world view holding that the basic obligation of law and government is simply to design the proper foundational institutions (regulated

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78 Peñalver, supra note 31, at 1892-94.

79 Id. at 1911. In developing his critique of Dagan and Heller’s theory of “property as exit,” Peñalver draws crucially on an “Aristotelian conception of human nature,” one which Gregory Alexander describes as having “continuously understood the individual human as an inherently social being, inevitably dependent on others not only to thrive but even just to survive.” Id. (quoting ALEXANDER, supra note 6, at 1-2 (1997)). See also Peñalver, supra note 31, at 1917-1918 (asserting that “the nearly universal persistence of private property systems . . . constitutes additional evidence of the profoundly social nature of human beings” because cooperation is necessary to construct the systems).

80 Id. at 1919-1921 and 1956. Key examples of regimes with costly exit rights are the family (and particularly parents’ commitments to children), and the Amish community. Id. at 1914 & 1956-57.

81 Property as entrance thus regards ownership not merely as a means of obtaining refuge from the coercive demands of state and community, but as binding people together in social groups. Id. at 1938-39.

82 Id. at 1939 (quoting ALEXANDER, supra note 6, at 31).

83 Peñalver calls this the “weak” form of property as entrance. Id. at 1948-1951. Peñalver acknowledges there can be a dark side to the socializing effects of ownership—its tendency to lead to social conformity (e.g., the stereotypical and easily caricatured suburban homeowner) and, worse still, and when entire communities of owners actively discriminate against minorities or women. Id. at 1952-1954.

84 Bell & Parchomovsky, supra note 4, at 558-563 (enumerating several benefits to society as a whole from protection of stable ownership).

85 Singer, supra note 3, at 245-246, 252-254.
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markets, access to public education, a judicial system to resolve disputes and enforce contracts and property rights) that provides all members of society with an equal opportunity to obtain property, wealth, and happiness. Once these institutions are put in place, every man and woman should be able to obtain as much property as they want or deserve. According to this libertarian institutional framework, if poverty persists, then the fault lies in the lack of ambition, intelligence, and effort of those who find themselves in poverty.86

Singer finds two major flaws with this viewpoint. First, it ignores the degree to which actual discrepancies in income, wealth and social advantage prevent equal opportunity and freedom at the outset,87 a phenomenon we all saw demonstrated in the tragic days that followed Hurricane Katrina when the poorest and weakest among the city’s inhabitants were left to struggle to survive on their own. Second, institutional libertarians underestimate the amount of government intervention that is actually required to establish the institutions necessary for their conception of individual liberty to be achieved in actual practice.88 The primary alternative view, what Singer calls “democratic pragmatism,” assumes that the continued presence of poverty in our society demonstrates that our institutions have failed.89 Singer’s goal, however, is to move beyond democratic pragmatism and point to a more inspiring and, he hopes, unifying way of thinking about property regimes—one that ultimately judges all government and judicial action by a “humanity test,” a test that asks whether the institution or policy or legal decision can be justified by the outcome it produces for those who are most vulnerable in our society and for those who come out on the losing end.90

Like Peñalver,91 and John Rawls, one of his primary sources,92 Singer thus advocates spreading wealth and property to as many people as possible so that everyone has at least some minimum level of property and favors reducing (but not altogether eliminating) disparities in wealth and income.93 He also, much like Peñalver, seeks to show how all members of society are fundamentally dependent on government institutions and social networks for support and security (especially when calamity hits) and how the philosophical debate between positive and negative liberty overlooks this fundamental

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86 Id. at 254-256.
87 Id. at 256.
88 Singer, supra note 3, at 256-258.
89 Id. at 259.
90 Id. at 339-342. Similarly, Singer points to Johan van der Walt’s argument that justice requires us to be attentive above all to the effects of law on those on the losing side of a dispute or conflict—those most harmed by our institutional choices about distributions of resources. Id. at 288-98 (citing JOHAN VAN DE VALT, LAW AND SACRIFICE 15 (2005)).
92 Singer admits that this conception is closely associated with the moral and political philosophy of John Rawls. Singer, supra note 3, at 259 (citing JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001); JOHN RAWLS, A THEORY OF JUSTICE (1971)).
93 Singer, supra note 3, at 259. Singer also relies on John Locke’s famous “proviso” for his position that a legitimate property regime must provide some minimum level of property for everyone. Id. at 327 (citing JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed. 1952 (1690))).
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interconnectedness of our lives. Finally, and perhaps most distinctively, Singer calls on our moral, philosophical and especially our religious traditions to awaken a sense of responsibility to our fellow humans and to remind us of the necessity of treating all fellow humans as ends in themselves—as worthy of equal respect and dignity—rather than simply as means to an end.

In sum, theorists like Peñalver and Singer, teach us that a property regime that hopes to thrive in the wake of an event producing radical change must promote entrance or re-entrance into its network of relationships and, if its members are truly courageous, might use the event to minimize excessive concentrations of property and to insure that more people can enjoy community enhancing and individual freedom enhancing benefits of property ownership. Thus, the ability of property relationships to respond to events of radical change can be measured not just through the lens of wealth maximization alone, but through the lens of wealth spreading as well.

II

Testing Property Relationships’ Capacity to Respond to Radically Changed Circumstances

This part of the article explores two traditional property relationships (between landlord and tenant and mortgagor and mortgagee) and another kind of relationship less commonly viewed through the lens of property law (between a city and its inhabitants). The goal here is to examine how the default rules, private ordering choices, and actual market performances of these relationships, together with the government programs aimed at furthering recovery of the people and institutions in these relationships, measure up under the normative criteria developed in the preceding section. These three examples are explored because they open windows into various locations on our two-dimensional map of property relationships.

A. Landlord – Tenant Relationships

We begin with one of the most common property relationships of all—between a landlord and tenant. This relationship is in theory at least voluntary in origin in that landlords and tenants in competitive and thick markets are free to choose one another. The duration of this relationship, however, can vary from a short month to month or year long residential lease to a lengthy ten, thirty or even ninety-nine year commercial or ground lease. At traditional common law, the tenant is understood as holding a finite possessory estate in land, either for some specified period of time or, if the lease is at will, until either

94 Singer, supra note 3, at 261-66. In this respect, Singer reminds us, just as the legal realists did, that legal rights and property rights are nothing more than social relationships between people about control over and access to things. Id. at 266. Thus, at moments of great vulnerability, like fires and natural catastrophes, the ability to recover property depends on government support and a complex web of social relationships. See Id. at 267-69.

95 Singer, supra note 3, at 288-329.
tenant or landlord wishes to terminate, while the landlord is understood as holding an estate of longer duration. Although this relationship does not formally create concurrent ownership of a single resource, in a functional sense it does create a kind of mutually beneficial and shared use, management and control of a resource made possible by the decoupling of ownership and possession.

What emerges from this examination of the capacity of landlord-tenant relationships to respond to events of radical change is a paradox. On an individual level, and particularly in the commercial context, these relationships seem to create what Dagan and Heller would call an effective “liberal commons.” Their default rules and the detailed private contractual arrangements these rules stimulate (a) often clearly allocate decision making responsibility for preservation, repair and substantial alteration and improvement of leased premises, (b) insure that exogenous resources are available for rebuilding, and (c) generally permit relatively easy and efficient exit and entrance.

At the same time, as recent experiences in New Orleans and on the Gulf Coast show, the legal structure of landlord tenant relationships can be much more problematic in the residential context. While default rules on repair obligations are relatively clear and theoretically even beneficial to tenants and exit is easy for landlords, entrance and re-entrance can become very difficult for tenants. Yet even this conclusion must be qualified in complex ways. On one hand, as the most recent data suggests, the overall residential rental market in New Orleans is now bouncing back with some resiliency. On the other hand, access to housing for those at the very bottom of the socio-economic ladder remains limited and this scarcity puts considerable pressure on those members of society who are most vulnerable.

1. Responses to Destruction—Repair and Termination Rights


We can begin our analysis of landlord tenant relationships by observing that, at traditional common law, when a building on leased improvement is destroyed by a casualty not attributable to the fault of either the landlord or tenant, the lease endures, and the landlord and tenant both remain bound by their respective obligations, including the tenant’s obligation to pay rent. This rule, derived from the common law’s traditional understanding of a lease as a conveyance of an estate in land, rather than a mutual contract, was reinforced by the principle that a landlord and tenant’s obligations were independent, not mutual. These repair rules thus reinforced a hierarchical understanding of the landlord-tenant relationship in which the tenant was subordinate and was solely

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97 Dagan & Heller, supra note 36.
100 See Id. § 9:1.3, at 9-13 (explaining that because a landlord’s express covenant to repair was assumed to be independent of a tenant’s covenant to pay rent, courts frequently held that a landlord’s breach of a repair covenant did not excuse nonpayment of rent and thus a tenant remaining in possession could only sue for damages).
responsible for negotiating and drafting more favorable terms. In other words, the repair rules constituted classic examples of “status confirming” or “transformative” default rules or at least a fairly strong “equilibrium inducing” or “bargaining default” or “penalty default” rules that encouraged a party unhappy with the result (here presumably a tenant) to bargain for alternative terms.\textsuperscript{101}

Over the years, significant statutory and common law exceptions to these traditional rules emerged. For instance, when a lease covered only an apartment, a part of a building or certain rooms, courts frequently held that destruction of the entire building would terminate the lease.\textsuperscript{102} Further, starting prior to the 1970’s and more frequently thereafter, many states adopted statutes that excuse a tenant from paying rent while casualty damaged premises remain unrepaired and even permit termination of the lease, provided (a) the tenant has not contractually assumed responsibility for repairs and (b) the tenant (or any sub-tenants) is free from fault.\textsuperscript{103} Most important, in states adopting the implied warranty of habitability, landlords can be held in breach of this warranty if they fail to rebuild residential premises.\textsuperscript{104} Finally, some courts have employed contract principles such as “impossibility” or “impracticality” of performance, “frustration of purpose,” or “commercial frustration” to justify termination of leases in cases involving destruction of a leased building.\textsuperscript{105}

Although this general evolution of default rules towards a presumptive assignment to the landlord of the primary duty to maintain and repair a damaged structure subject to a lease is certainly welcome, both the harshness of the traditional common rule and the uncertainties and inadequacies of its various statutory modifications have often led well counseled landlords and tenants (in commercial settings at least) to draft special “catastrophe” or “fire” clauses that provide alternative remedies in the event of unintended

\textsuperscript{101} See Purdy, supra note 44, at 667 (drawing on definitions first articulated by Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. CAL. INTERDISC. L. J. 389 (1993)). See also Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L. J. 87, 91 (1989) (defining a penalty default rule as one “designed to give at least one party to the contract an incentive to contract around the default rule” and noting that they are “purposefully set at what the parties would not want—to encourage the parties to reveal information to each other or to third parties”). See also FRIEDMAN & RANDOLPH, supra note 98, §§ 9:1.2 & 9:1.3 (noting that courts tended to assume that a landlord’s duty to restore or rebuild was strictly limited in the event of any contract ambiguity).

\textsuperscript{102} STOEBUCK & WHITMAN, supra note 96, at §6.86; FRIEDMAN & RANDOLPH, supra note 101, § 9:1.1, at 9-4.

\textsuperscript{103} STOEBUCK & WHITMAN, supra note 96, at §6.86; FRIEDMAN & RANDOLPH, supra note 98, § 9:2, at 9-18. See also Id. § 9:1.1, at 9-3 (noting that only “a few states refused to follow the common law rule” and thus treated the lease as a contract, “an agreement for a continuous exchange of value between landlord and tenant”).

\textsuperscript{104} STOEBUCK & WHITMAN, supra note 96, at §6.86. Tenants may also effectively terminate a lease “by invoking the traditional doctrine of constructive eviction.” Id. at 408.

\textsuperscript{105} Id. §§ 6.87; FRIEDMAN & RANDOLPH, supra note 98, § 9:1.1, at 9-3 and § 9:1.4. See e.g., Albert M. Greenfield & Co. v. Kolea, 380 A.2d 758, 759-60 (Pa. 1977) (noting both common law exceptions and holding that complete destruction of leased parking garage by accidental fire frustrated purpose of lease and justified its termination); but see Smith v. Roberts, 370 N.E.2d 271, 273-74 (III. 1977) (demonstrating narrower interpretation of frustration of purpose doctrine and only terminating lease when fire destroyed building owned by tenant adjacent to leased premises and thus frustrated purpose of lease in a manner that was not reasonably foreseeable by parties).
of the leased premises. These provisions may shift responsibility for repair to one or the other party depending on the level of destruction to the property and frequently provide for power of termination in cases of the most complete destruction.\textsuperscript{106} This private ordering phenomenon illustrates how default rules—whether they are harsh penalty setting/bargain inducing default rules or gap filling/problem solving ones that try to approximate what parties might rationally chose in optimal bargaining conditions\textsuperscript{107}—can have the desirable effect of causing parties to bargain consciously for rules that more closely match their actual intentions and economic interests. When an event of radical change does occur then, parties who have engaged in this kind of detailed \textit{ex ante} contractual ordering will more likely be able to agree on who is responsible for initiating or making repairs and whether or not the landlord-tenant relationship is at an end.

One example of this relationship between harsh or inadequate default rules and contractually arranged lease terms illustrates this phenomenon. In one of the earliest innovations on the traditional common law rule, New York adopted a statute, copied by at least seven other states, permitting a tenant who is free from fault, and absent any contrary contract provisions, to surrender possession and be relieved of rent whenever a building is “destroyed or so injured by the elements, or by any other cause as to be untenantable, and unfit for occupancy.”\textsuperscript{108} Yet because it rigidly requires the tenant \textit{either} to surrender possession and effectively terminate the lease before obtaining rent relief \textit{or} to continue to pay rent without being able to demand restoration of the property, and because it fails to provide any way for a tenant to obtain rent abatement or compel repairs when a casualty causes partial damage or major inconvenience but less than complete destruction or “untenantability,” the statute leaves a large gap in landlord-tenant relations.\textsuperscript{109} Given this default scheme’s drastic consequences, commentators report that New York real estate lawyers almost invariably suppress it by negotiating and drafting overriding clauses for their clients in commercial leases.\textsuperscript{110}

In short, it appears that sophisticated or well counseled commercial parties routinely negotiate and draft carefully worded stipulations governing the many issues that can arise when a leased structure is partially or totally destroyed by some casualty, including the degree or causes of destruction that might trigger termination options or restoration obligations,\textsuperscript{111} when the tenant might obtain rent abatement,\textsuperscript{112} what kind of apportionment, if any, should occur for rent payments made in advance of the

\begin{itemize}
\item \textsuperscript{106} STOEBUCK & WHITMAN, \textit{supra} note 96, at §6.86; FRIEDMAN & RANDOLPH, \textit{supra} note 98, § 9:6, at 9-45.
\item \textsuperscript{107} Purdy, \textit{supra} note 44, at 659 & 665-67.
\item \textsuperscript{108} N.Y. Real Prop. Law. § 227 (McKinney 1989). \textit{See also} FRIEDMAN & RANDOLPH, \textit{supra} note 98, § 9:2, at 9-24, n. 126 (citing other state statutes that copy the New York law). For illustrations of the harsh choice between surrender and continuing to pay rent created by the New York statute, see \textit{Schleiffer v. Brooklyn Trust Co.}, 74 N.Y.S.2d 322 (Sup. Ct. 1947) (holding that tenants had no right to resume possession of leased premises once they involuntarily surrendered possession due to fire and were relieved of duty to pay rent), and \textit{Schreiber v. Schaeffer}, 201 N.Y.S.2d 826 (App. Term. 1960) (holding that although fire rendered premises untenantable, tenant remained liable for rent because he continued to use them).
\item \textsuperscript{109} FRIEDMAN & RANDOLPH, \textit{supra} note 98, § 9:2, at 9-25.
\item \textsuperscript{110} Id. § 9:2, at 9-26.
\item \textsuperscript{111} Id. §§ 9:4, 9:5, 9:6 & 9:8.
\item \textsuperscript{112} FRIEDMAN & RANDOLPH, \textit{supra} note 98, § 9:6, at 9-48.
\end{itemize}
destruction,\textsuperscript{113} which party, if any, is obligated to repair or restore the damaged property, and to what standards and for what purposes the repair may be undertaken,\textsuperscript{114} along with the closely related issues of insurance maintenance obligations and insurance proceeds distribution, especially when the leased premises are subject to a mortgage.\textsuperscript{115} What we see then, in the commercial leasing context at least, is a set of default rules that have largely been supplanted by private ordering. Because of the significant amount of investment and risk anticipation that takes place in a commercial lease setting, parties will tend to make \textit{ex ante} decisions regarding repair and termination rights that will be enforced by courts as long the contract language is relatively clear.

In residential leases, on the other hand, one suspects that tenants are more likely to rely on jurisprudential or statutory formulations of the implied warranty of habitability to be absolved of major repair obligations and to obtain rent abatement or lease termination. A determination of whether this reliance is reasonable or fool hardy must thus be made on a state by state basis. In Mississippi, for instance, where Katrina wrecked a huge amount of residential rental property and caused massive dislocation,\textsuperscript{116} tenants’ protection in the wake of an event of radical change is not as strong as one might hope. Although Mississippi adopted the implied warranty of habitability into residential leases by statute in 1991,\textsuperscript{117} a tenant’s remedies for breach of these duties seem to be limited to terminating the lease \textit{or} repairing the defect as long as the cost of the repair is equal to or less than one month’s rent.\textsuperscript{118} Although a tenant is entitled to rent abatement when leased premises are completely destroyed by a casualty not of his own making,\textsuperscript{119} a tenant’s ability to withhold rent and stay in possession of a partially damaged building or surrender possession while the premises are uninhabitable and reclaim possession later is not addressed by the state’s statutory scheme or its case law. Further, if a tenant fails to pay rent, a landlord is entitled to evict the tenant with remarkable dispatch. A three day notice requiring either payment of the overdue rent or surrender of possession and another three to five day wait after a summons is filed with a local court are the only delays standing between a landlord and a judicial eviction order, making exit quite easy for a landlord to achieve.\textsuperscript{120} Similarly, while

\textsuperscript{113}Id. § 9:3.

\textsuperscript{114}Id. §§ 9.6 and 9:8, at 9-53.

\textsuperscript{115}Id. §§ 9:7 and 9:8, at 9-54-55.

\textsuperscript{116}See Michael Kunzelman, \textit{After Katrina, Tenants Face Mass Evictions}, CHICAGO TRIBUNE, April 30, 2006 (reporting on wave of evictions along Mississippi Gulf Coast).

\textsuperscript{117}MISS. CODE ANN. § 89-8-23(1)(a)-(b) (Lexis 1999) (requiring residential landlords to comply with applicable building and housing codes affecting health and safety and to maintain a dwelling’s plumbing, heating and cooling systems in the same condition they were in at the start of a lease). See also O’Cain v. Harvey Freeman and Sons, Inc. of Miss. 603 So.2d 824, 827-33 (Miss. 1991) (confirming adoption of the implied warranty of habitability as requiring landlord to provide a reasonably safe premises at inception of lease and to exercise reasonable care to repair dangerous defective conditions upon notice by tenant).

\textsuperscript{118}MISS. CODE ANN. §§ 89-8-13(2) & 89-8-15 (Lexis 1999).

\textsuperscript{119}Id. § 89-7-3. See also Miller v. Miller, 64 So.2d 739 (Miss. 1953) (allowing commercial tenant to obtain rent abatement after destruction of substantially all of leased gas station for two month period that building was not tenable and was undergoing repairs paid for by tenant; but rejecting tenant’s claim for reimbursement for cost of restoration because limited covenant for repairs in which tenant was assigned responsibility for interior repairs and landlord was assigned responsibility for exterior repairs—roof, outside walls and foundation—was not applicable in event of complete destruction and thus traditional common law rule absolving landlord of any restoration obligations applied).

\textsuperscript{120}MISS. CODE ANN. §§ 89-7-27 & 89-7-31 (Lexis 1999).
the default rules assign primary responsibility for preservation and rebuilding to the landlord, a residential tenant may have difficulty enforcing that allocation of duties if the repairs needed are significant or if the tenant must find and pay for alternative housing while waiting for repairs to be made. When we turn to examine the specific repair and termination rights of landlords and tenants in Louisiana, the state where Hurricane Katrina and Rita caused even more extensive damage, we discover that a residential tenant’s reliance on statutory default rules also might not be so well founded.

b. Louisiana: Default Rules and Private Ordering

In Louisiana, the default legal landscape appears at first glance to be quite favorable to tenants when it comes to resolving disputes about repairs, destruction of the leased premises and termination rights, but closer examination reveals much more ambiguity. Louisiana lease law begins with the principle stated in Article 2682 of the Louisiana Civil Code that one of the lessor’s primary obligations is “to maintain the thing in a condition suitable for the purpose of which it was leased.”121 Based on this foundational principle, the Civil Code thus requires the lessor to make “all repairs” to the leased thing necessary to maintain it in this condition, except those attributable to the lessee’s fault or those for which the lessee expressly assumed responsibility,122 including any repairs needed to remediate normal wear and tear.123

However, if serious repairs are needed during the term of the lease and cannot be postponed until its termination, the lessee’s remedies in the event the lessor does not make requested repairs,124 just as we saw in New York, are not ideal. In this situation, the lessee has in effect three remedial options, each of which could be problematic in the context of an event of radically changed circumstances. First, under Article 2694 of the Civil Code, the lessee can make repairs on his own and either demand “immediate reimbursement of the amount expended for the repair” or “apply that amount to the payment of rent,” but only if (a) the lessee has previously made a demand and given the lessor a “reasonable time” to make the requested repairs, (b) the repairs were in fact “necessary,” and (c) the amount expended was “reasonable.”125 Second, the lessee can bring an action to cancel

121 LA. CIV. CODE ANN. art. 2682(2) (West 2005). Another principal obligation of the lessor, just as in common law jurisdictions, is “to protect the lessee’s peaceful possession of for the duration of the lease.” Id.
122 Id. art. 2691.
123 Id. art. 2692, cmt (c).
124 A corollary to the lessor’s basic obligation to make all necessary repairs is the lessee’s duty to inform the lessor, “without delay when the thing has been damaged or requires repair.” LA. CIV. CODE ANN. art. 2688 (West 2005). If a lessee fails to inform the lessor of the need for repairs, the lessor may have a claim for damages against the lessee. Id. In an event of radically changed circumstances, when a tenant might not be allowed access to the premises because of a mandatory evacuation, this rule could impose unfair hardship on a lessee if courts were to apply it literally. Erin Bohacek, A Disastrous Effect: Hurricane Katrina’s Impact on Louisiana Landlord-Tenant Law and the Need for Legislative and Judicial Action, 52 LOY. L. REV. 877, 892-93 (2006).
125 LA. CIV. CODE ANN. arts. 2694 (West 2004). See Davilla v. Jones, 436 So.2d 502, 509 (La. 1983) (emphasizing that lessee can only make repairs and deduct rent after making demand on lessor and the lessor refuses or neglects to make the necessary repairs).
the lease. The lessee can simply abandon the leased premises without liability for further rent if the premises are unfit for their intended use.

Surprisingly, what the tenant generally cannot do is stay in possession and withhold rent from the lessor to put economic pressure on the lessor to make the necessary repairs. This powerful remedy that Louisiana civil law trained judge J. Skelly Wright brought to the common law with his landmark ruling in Javins v. First National Realty Corp., has been specifically rejected by a consistent line of judicial decisions which continue to insist that the lessee’s obligation to pay rent is independent of any obligation on the part of the lessor to maintain and repair the leased premises and thus the tenant faced with a recalcitrant landlord unwilling to make necessary repairs may only cancel the lease or seek to make repairs on his own and deduct rent. The only narrow exceptions to this general rule preventing a tenant to remain in possession and withhold rent arise when either the leased premises are partially (but not totally) destroyed, or a landlord affirmatively prevents a tenant for making necessary repairs and deducting rent. Similarly, even if the lessor does perform the immediate repairs for which he is obligated under Article 2691 and these repairs cause the lessee inconvenience or loss of use of the leased thing, Article 2693 of Civil Code allows a court (not the lessee) to choose either rent abatement or dissolution of the lease depending on a variety of factors including the parties’ relative fault, if any, the length of the repair period, and the extent of use. So even here, a tenant may not unilaterally withhold all or part of the rent.

In a context of radically changed circumstances, the seemingly tenant friendly rules permitting rent abatement while a landlord’s repairs are underway under Article 2693 or permitting rent abatement if the tenant conducts repairs under Article 2694, or lease termination and abandonment if the premises are no longer fit for their intended purposes, can easily be undermined. First, if a residential tenant has few alternative housing options available because an entire region’s housing stock has been decimated, a tenant who elects to make repairs on her own and claim a rent reduction under Article 2694 may have to endure sub-standard housing conditions for a lengthy period of time, while still continuing to pay at least partial rent. Further, if the tenant makes repairs on her own under Article

127 Freeman v. G.T.S. 363 So.2d 1247, 1250 (La. Ct. App. 4 Cir. 1978); Lacour v. Myer, 98 So.2d 308, 309 (La. Ct. App. 1 Cir. 1957) (recognizing lessee’s right to abandon when constructively evicted due to lessor’s wrongful cutting of water supply to leased camp).
130 Board of Comm’rs of the Port of New Orleans v. Turner Marine Bulk, Inc., 629 So.2d 1278, 1285 (La. App. 4 Cir. 1993); Davilla v. Jones, 436 So.2d 507, 510 (La. 1983); Degrey v. Fox, 205 So.2d 849, 851-52 (La. App. 4 Cir. 1968); Ghar v. Prudhomme, 181 So. 604, 606 (La. App. 2 Cir. 1938).
131 See L.A. Civ. Code Ann. art. 2715 (West 2004), discussed infra notes 139-146 and accompanying text.
132 Lake Forest v. Katz and Besthoff No. 9, Inc., 391 So.2d 1286, 1288-89 (La. App. 4 Cir. 1980).
2694,134 she might not be able to prove that she is entitled to rent abatement under its mushy reasonableness standards which could permit a landlord to raise doubts as to what is a “reasonable” time for a lessor to make repairs given limited access to a region in the wake of a disaster and other demands on lessors, or what costs are “reasonable” given labor and construction material shortages.135 Thus, if the tenant goes ahead and makes the repairs and later cannot convince a court that the lessor was given sufficient notice136 and opportunity to make the repairs or that the tenant’s repairs were truly necessary or reasonable in cost, the tenant may still owe full rent or suffer the risk of eviction. In addition, as Louisiana law generally prevents a tenant from unilaterally withholding rent and continuing to occupy the leased premises even when a lessor has breached his repair duties under Articles 2691, a lessee with modest resources may not be able to force a lessor to make these repairs or may not be able to commence the litigation necessary to be assured that either the lease has terminated or that the casualty has resulted in a partial destruction allowing her to stay in possession and withhold rent. Finally, if a tenant simply abandons the premises (and is lucky enough to find substitute accommodations), the tenant risks still being liable for rent if the lessor can convince a court that the premises are still fit for their intended purpose. All of these deficiencies suggest that the Louisiana Civil Code authorities allowing a claim of rent abatement in the face of a recalcitrant or undercapitalized landlord may be more theoretical than real.137

Ironically, a tenant’s remedies are potentially more robust if a more significant and completely unforeseen casualty results in partial, but not total, destruction of the leased premises. Although Article 2714 provides for automatic lease termination when a leased thing is totally destroyed by an unforeseen event for which neither lessor nor lessee is at fault,138 a rule that makes some sense because the resource generating the lease relationship no longer exists, if a similar event causes only partial destruction of the leased thing or in some other way substantially impairs its use, Article 2715 allows a court either to order a diminution of the rent or to dissolve the lease.139 The court must make this choice by considering “the circumstances of both parties” and which remedy is “more appropriate under the circumstances.”140 Further, because the Civil Code does not provide any

134 Id. art. 2694.
136 Case law also holds that lessors may contractually obligate lessees to provide written notice of the need for repairs before being able to make repairs and deduct the cost under Article 2694. See Lee v. Badon, 487 So.2d 118, 119 (La. Ct. App. 4 Cir. 1986).
137 See Bohacek, supra note 124, at 905-06 (2006) (recommending lessees be given an automatic right to rent abatement in the event serious damage goes unrepaired and shifting burden to landlords to sue to collect rent); Paul du Plessis, Of Mice (and Other Disasters) and Men—Rent Abatement Due to Unforeseen and Uncontrollable Events in the Civilian Tradition, 17 Tul. Eur. & Civ. L.F. 113, 139-40 & 142-46 (2002) (discussing weakness of rent abatement remedy under former 1870 Civil Code articles for urban leases and even more dramatically for rural agricultural leases).
138 LA. CIV. CODE ANN. art. 2714 (West 2005).
139 Id. art. 2715.
140 Id. The second paragraph of Article 2715, which eliminates the diminution of the rent option provided in the article’s first paragraph only applies to situations involving use impairment “caused by circumstances external to the leased thing,” which apparently means cases not involving partial destruction at all, but rather
definition or criteria for making the crucial total versus partial destruction distinction in cases where the facts are ambiguous. Louisiana courts have resorted to multi-factor tests to facilitate their decision making process in this kind of situation. These multi-factor tests, unpredictable as they may be, at least allow parties which did not make specific contractual arrangements for these contingencies to make ex post arguments to a court which will be able to weigh varying forms of evidence in a context rich setting.

Just as we in common law jurisdictions, because of the inherent unpredictability of the default rules, sophisticated parties can, and often do, provide for different outcomes in the event of total or partial destruction of a leased thing—outcomes which courts will enforce. In one recent post-Katrina decision, for instance, a court rejected a lessee’s plea to apply Article 2715 and instead enforced a “destruction of premises” provision in a twenty year commercial ground lease requiring the lessee to repair or replace a building damaged or rendered “untenantable” by fire or other casualty unless the destruction occurred within the last three years of the lease. Because the Katrina damage occurred before the final three year termination option period began and because the ground itself was still capable of sustaining a retail establishment, the court ruled in favor of the lessor, holding that the lessee was required to replace the damaged structures and pay the rent pursuant to the lease. Similarly, in another recent post-Katrina decision involving a ground lease that assigned repair responsibilities for new improvements to the lessee, the court held that because the ground itself had not been destroyed, the tenant could not terminate the lease by claiming partial destruction under Article 2715, even though a key improvement (a bulkhead) had been heavily damaged, if not destroyed.

conditions such as reduced access to light or view or use restrictions imposed by zoning or other governmental regulations. Id., cmt (c).

141 See Bossier Center v. Palais Royal, Inc., 385 So.2d 886, 888-889 (La. Ct. App. 2d Cir. 1980) (employing seven factor test to determine whether a tornado inflicted “mere damage” or “injury” to a shopping center or “partial destruction”); Eubanks v. McDowell, 460 So.2d 42, 44 (La. App. 1 Cir. 1984) (applying Bossier Center test to an apartment lease and concluding that relatively minor damage to apartment caused by flooding only constituted “mere injury” requiring “repairs” and thus tenant was only entitled to partial rent reduction).

142 Compare Bossier Center, 385 So.2d at 889 (displaying mistrust of landlord’s “experts” and relying more heavily on photographs of damaged shopping center to conclude that extensiveness of damage, significant cost of repairs in comparison to value of entire structure, and significant amount of time lessee would be out of possession of the premises while repairs were completed mandated a finding of “partial destruction”); with Chivleatto v. Family Furniture & Appliance Center, 196 So.2d 298, 300-301 (La. App. 4 Cir. 1967) (concluding that damage to commercial property caused by Hurricane Betsy, though substantial, amounted to only partial, not total destruction, and thus giving lessee the option to terminate the lease under 1870 Civil Code and lease clause that mirrored Civil Code rules). See also Scurray v. Tennant, 457 So.2d 199, 201 (La. App. 2 Cir. 1984) (finding parties’ contracting language “obscure” and concluding damage was extensive enough to give tenant right to terminate lease).

143 LA. CIV. CODE ANN. art. 2691 (West 2005) (specifically recognizing that lessor repair obligations exclude “those for which the lessee is responsible”); Hebert v. Neyrey, 445 So.2d 1165, 1168 n.3 (La. 1984) (recognizing that lessees may assume obligation to maintain premises in good condition).


145 Id. at *4-5. Interestingly, the court also noted that changed economic and demographic conditions in the surrounding neighborhood did not render the properties unfit for their intended use because the lessor never guaranteed the profitability of the land for a retail establishment. Id. at *4.

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If we examine the Civil Code’s provisions on repair obligations as “gap filling” or “problem solving” default rules supposedly intended to reflect a term that the parties would have chosen if they had focused on it at the moment of contract formation,\footnote{Purdy, supra note 44, at 659.} it seems they make sense for most relatively short term or residential leases in that they assign repair responsibility to the party (the lessor) who usually has more resources immediately available to pay for necessary repairs (assuming the lessor is the insured party under an insurance policy) and to the party that will have the greatest long term interest in preserving the future economic value of the underlying asset (assuming the structure and improvements were primarily built by the lessor). The criticism we can make here is that by not allowing a lessee to deduct rent and remain in possession without fronting the cost of repairs, the Civil Code and its jurisprudence undermines the underlying allocation of responsibilities the Civil Code purports to establish. Conversely, with long term leases or carefully negotiated commercial leases—\textit{e.g.}, ground leases or variations of net leases—which are likely to involve a well financed and sophisticated lessee who is assigned insurance responsibilities and who may design and pay for substantial improvements in the property, we are most likely to find lease provisions that reverse the Civil Code’s default presumptions.\footnote{TITLE, supra note 128, §§ 18:32 and 18:33 (citing cases).}

In the end, this survey of repair and termination rules suggests that although commercial landlords and tenants may often carefully pre-arrange their contractual rights and liabilities in the event of a major unforeseen casualty, a residential tenant could find herself unexpectedly vulnerable. Although her right to make necessary repairs on a leased apartment or house and deduct the cost from the rent provided she has given the landlord reasonable notice and time to cure might be a sufficient remedy for relatively minor, inexpensive and routine repairs, the inability of a tenant to remain in possession and withhold rent in the event that a landlord fails to perform major repairs and leaves the premises more or less uninhabitable may often give a tenant only one option—termination or abandonment, a choice that may be extremely painful in the context of radically changed circumstances. In short, these default rules might force a tenant to \textit{exit} a lease relationship without offering any means of re-entry and further may provide no real incentive for a landlord to quickly restore and repair the resource upon which both parties are dependent, unless the landlord’s real intent is to terminate the lease and find a new tenant willing to pay a much higher amount of rent.

c. \textit{Eviction Procedures in the Wake of Katrina}

One more common landlord-tenant problem in the wake of an event radically changed circumstances will arise if a typical residential tenant with a short term lease fails to pay rent or communicate with the landlord because he has been displaced to another city, perhaps hundreds of miles away, and the landlord is eager to clear out the tenant’s personal belongings and either commence major repairs or re-let the premises to a new tenant.\footnote{Bohacek, supra note 126, at 880-81.} In stable environments, these situations are difficult enough. But in a situation
like the aftermath of Hurricane Katrina, when thousands of tenants are displaced and temporarily prohibited from returning home, when mail and communication services are disrupted for long periods of time, and when the region’s rental housing stock is devastated, this legal process can fail to serve the reasonable expectations of both landlord and tenant. On one hand, a tenant might reasonably expect that her right to return to an apartment will be secured as long as access to the community is prohibited and might further expect that her rent liability will be suspended until the community is reopened and repairs are completed. On the other hand, a landlord might reasonably expect, once official prohibitions on return are lifted, that if an individual tenant fails to return and reoccupy the apartment or fails to communicate with the landlord and resume paying rent, the tenant has decided to abandon the premises, giving him the right to declare the lease dissolved, commence summary eviction proceedings, and reoccupy the premises and re-let to another tenant.

When we examine how summary eviction procedures work under the pressure of an event of radically changed circumstances, we find evidence that exit becomes even easier for landlords while tenants’ ability to regain possession of leased premises can be too easily lost. Although Louisiana, like almost every other state, generally forbids self-help evictions by landlords and requires a landlord to use judicial process to regain possession of leased premises, Louisiana’s two-step summary eviction process can be manipulated with relative ease by landlords eager to dispossess tenants and regain control over leased premises even in the context of an event of radically changed circumstances. In an ordinary case, a landlord may commence an eviction proceeding by delivering to the tenant a written notice allowing him five days to vacate the premises. As short as it is, this five day notice period can be crucial for many tenants as it might enable them to remove their belongings from the premises, find alternative lodgings or storage, or prepare to challenge the landlord’s action. However, because a tenant may waive this right to receive a written notice to vacate through an automatic dissolution clause in a lease (a practice common in commercial leases), the next stage in the eviction process is even more important.

150 Id. at 880. See also LA. CIV. CODE ANN. arts. 2693, (West 2005) (providing for rent abatement if necessary repairs conducted by lessor result in lessee suffering inconvenience or loss of use of thing).
151 JOSEPH W. SINGER, INTRODUCTION TO PROPERTY § 10.4.4.1, at 464 (2d ed.2005). LA. CIV. CODE ANN. arts. 2704 (West 2005) (“If the lessee fails to pay the rent when due, the lessor may . . . dissolve the lease and may regain possession in the manner provided by law.”)
152 TITLE, supra note 128, § 18:72; SINGER, supra note 157, § 10.4.4.3, at 465-66.
153 See Bohacek, supra note 124, at 880-81 (reporting that after Governor Kathleen Blanco’s 59 day post-Katrina eviction moratorium lapsed in November 2005, the number of eviction notices filed in New Orleans soared).
154 LA. CODE CIV. PRO. ANN. art. 4701 (West 1998); TITLE, supra note 128, § 18:73.
155 See Bohacek, supra note 126, at 898-904 (describing plight of New Orleans tenants’ whose belongings were left on the streets of the city by landlords clearing out premises for purposes of repairs and Louisiana legislature’s relatively weak temporary legislation designed to provided some minimal protection to tenants’ belongings); LA. ACTS 2005, 1st Ex. Sess. No. 56; LA. REV. STAT. ANN. § 3391 (West. Supp. 2007) (terminated effective June 30, 2006).
156 LA. CODE CIV. PRO. ANN. art. 4701 (West 1998); TITLE, supra note 128, § 18:71; see e.g., Wilson v. Fuqua, 553 So.2d 926, 927 (La. Ct. App. 4 Cir. 1989) (enforcing commercial tenant’s waiver of five day notice to vacate).

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If the lessee fails to vacate as requested in the five day notice, or if the lessee has waived this notice period, the landlord may then file a pleading known as a “rule for possession” stating the grounds upon which eviction is sought and providing the tenant with an opportunity to show why he should be allowed to remain in possession.157 Normally a hearing on a rule for possession cannot take place until at least three days after it has been served on the lessee,158 a period which is on the short end of the typical notice period around the country.159 Although this brief notice period theoretically gives a tenant some opportunity to cure a default or challenge the basis for the pending eviction, its ability to protect tenants is also easily undermined. Not only have courts tended to overlook significant defects in service and permitted evictions to proceed as long as the tenant receives some actual notice, as manifested by attendance at a necessary hearing,160 but landlords are also permitted to skip filing a rule for possession at all, and thus avoid the general rule against self-help, if they can demonstrate “a reasonable belief that the lessee or occupant has abandoned the premises.”161 What’s more, Louisiana law allows landlords to deliver required notices and pleadings, including the crucial rule for possession, by merely “tacking” the documents to the door of premises, as long as the landlord shows that (1) “the premises are abandoned or closed,” (2) “the whereabouts of the lessee or occupant is unknown,” or (3) the tenant somehow received actual notice of the hearing.162

Events and litigation after Katrina have amply demonstrated the weakness of these technical rules governing termination of a landlord tenant relationship. In one case a coalition of displaced tenants and community groups from New Orleans filed a lawsuit in federal court alleging that the practice of “tacking” eviction notices on the doors of leased premises did not provide them with adequate notice and opportunity to defend against an eviction in the specific context of post-Katrina New Orleans.163 At first the plaintiffs and defendants (local public officials responsible for carrying out summary evictions along

157 LA. CODE CIV. PRO. ANN. art. 4731 (West 1998); TITLE, supra note 128, § 18:73.
158 LA. CODE CIV. PRO. ANN. art. 4732 (West 1998).
159 SINGER, supra note 151, § 10.4.4.3, at 468.
160 See e.g., Abrimson v. Ethel Kidd Real Estate, 926 So.2d 568, 570 (La. Ct. App. 4 Cir. 2006) (holding that notice by “tacking” was constitutionally sufficient because residential tenants were present in court for eviction hearing and thus had opportunity to be heard); French Quarter Realty v. Gambel, 2005-0933 (La. Ct. App. 4 Cir. 12/28/05), 921 So.2d 1025, 1027-29 (rejecting constitutional due process challenge on ground that residential tenant received mail notice of eviction proceeding four days prior to hearing for rule for possession and thus had opportunity to participate in hearing). But see South Peters Plaza, Inc. v. P.J. Inc., 933 So.2d 876, 878 (La. Ct. App. 4 Cir. 2006) (vacating eviction as invalid because commercial tenant received only three working days of notice of hearing of rule for possession, not the three days required by statute).
161 LA. CODE CIV. PRO. ANN. art. 4731(B) (West 1998). The indicia of “abandonment” to determine whether a lessor can skip the rule for possession stage of a summary eviction include: “a cessation of business activity or residential occupancy, returning keys to the premises, and removal of equipment, furnishings, or other movables from the premises.” LA. CODE CIV. PRO. ANN. art. 4731(B) (West 1998). See TITLE, supra note 128, § 18:72 (noting the exception to the self help rule).
162 LA. CODE CIV. PRO. ANN. art. 4703 (West 1998); Abrimson v. Ethel Kidd Real Estate, 926 So.2d 568, 570 (La. Ct. App. 4 Cir. 2006) (tacking sufficient if tenants show up at hearing).
with the Department of Homeland Security and FEMA) agreed to a consent order in November 2005 which required the local officials to cooperate with FEMA in efforts to locate tenants and mail them notice of eviction pleadings and which provided that a hearing could not be set less than 45 days from the date of mailing the notice.\textsuperscript{164} In April 2006, however, the district court allowed a collection of property owners and property managers to intervene in the suit on the ground that the original parties had not properly represented their interest in being able to swiftly evict tenants and commence repair and re-letting of their property in a timely manner.\textsuperscript{165} A few months later, the consent order finally elapsed, allowing evictions to take place once again using tacking and extremely short notice periods even though many tenants remain displaced and cannot find alternative housing.\textsuperscript{166}

In another case, a group of largely elderly and disabled, low income and African American tenants of a large downtown New Orleans apartment building sued their landlord and others alleging wrongful and discriminatory eviction under Louisiana law and federal law.\textsuperscript{167} Although the court originally denied the defendants’ initial motion to dismiss,\textsuperscript{168} the court later granted summary judgment in part dismissing the plaintiffs’ discriminatory impact claims under section 3604 of the Fair Housing Act because all of the tenants were evicted regardless of their race, age or disabled status, and also dismissed their wrongful eviction claims for lack of supplemental jurisdiction while allowing plaintiffs leave to re-file them in state court.\textsuperscript{169} In the end, the plaintiffs remain displaced from their apartments, although the defendant professes to be willing to re-let units to the original tenants, the apartments remain uninhabitable and largely un-repaired, and the future of the building remains unclear.\textsuperscript{170}

As these cases and our review of basic procedural rules shows, the protections supposedly provided by summary eviction process are easily undermined when tenants are involuntarily displaced by an event of radically changed circumstance. The result is that while landlords may find it fairly easy to exit from the lessor-lessee relationship and commence repairs allowing them to take advantage of new market opportunities if they have the resources to do so, tenants who do not want to exit or who wish to regain access to their homes face major hurdles.

4. Reality Checks—How Have Landlords and Tenants Fairied in the Rental Market Post Katrina?

\textsuperscript{164} Id. at *1. The district court subsequently modified the consent order to provide a 30 day waiting period for areas in the region which escaped heavy flooding and set this order to expire on March 1, 2006, while the parts of Orleans Parish heavily impacted remained subject to the 45 day waiting period until November 22, 2006. Id.

\textsuperscript{165} Id. at *4-5.

\textsuperscript{166} The demise of the consent order is reported by William Quigley, counsel for the plaintiffs, in an electronic correspondence on file with the author.


\textsuperscript{168} Id. at *2-3.

\textsuperscript{169} Order and Reasons, Bailey v. Lawler-Wood Housing LLC, Civil Action No. 0-5193, 5-10 (E.D. La. Jan. 9, 2007) (on file with author).

\textsuperscript{170} See Electronic correspondence from Jessica W. Hayes, counsel for the plaintiffs, on file with author.
With this picture of background default rules, contractual arrangements, and procedural safeguards in mind, it is worth examining, if only briefly, what has actually happened to the commercial and residential rental markets in the months and first few years after Hurricane Katrina hit the New Orleans region. Although data is not yet available to analyze these two markets as comprehensively as one might like, several recent reports begin to reveal the complex market conditions that have begun to emerge. As this article’s study of the background legal relationships might suggest, there appears to be greater inter-dependence among commercial landlord and tenants than among residential lessors and lessees. At the same time, both markets may eventually prove to be more resilient than some critics have anticipated.

In the commercial sector, as early as July 2006 (just eleven months after Katrina came ashore), the office leasing market in New Orleans had regained a surprising amount of vitality.\(^{171}\) This market was characterized by a strong demand for office space in downtown New Orleans and in the nearby suburbs that far outstripped supply, with the result that average rental rates rose steadily across the metropolitan area.\(^{172}\) The market for commercial retail space, however, was a different story. On Royal Street, a famous destination for antique and art seeking tourists in the heart of the French Quarter, a substantial reduction in the number of conventioneers and tourists visiting the city during the first half of 2006 caused merchants to suffer the worst retail downturn in recent memory. Yet because landlords there did not want to terminate leases (in part because there were few prospective retailers waiting in the wings and also because they did not want to assume responsibility for insuring the property, a suddenly increasing cost that is typically assumed by the retail commercial lessee), landlords cut rents dramatically—sometimes by as much as 50%—to help their tenants survive until the conventions and tourists return in sizable numbers.\(^{173}\) Elsewhere in the French Quarter, on famous Bourbon Street for instance, where other tourist oriented retailers also suffered substantial losses, commercial rents also declined—but not as much as on Royal Street.\(^{174}\) These stories, anecdotal as they may be, confirm that commercial landlords and tenants tend to see each other as interdependent players in a relatively long term relationship. Although their rights and responsibilities for repair, reconstruction and improvement of the leased property may be carefully negotiated in leases, they have a tendency to cooperate and accommodate when threatened by economic dislocation caused by an event of radically changed circumstances.

Turning to the residential rental sector, we find a market that undoubtedly passed through an initial crisis stage marked by extreme housing shortages and sharp rent

\(^{172}\) Id. The causes for the sharp rise in office rental rates included the conversion of older high rise office buildings (typically Class B structures) into residential use to meet new housing demands, the arrival of new businesses responding to the economic opportunities in the area, landlords seeking to pass on increased operating costs, including higher insurance premiums, and of course hurricane damage to some existing structures. Id.
\(^{174}\) Id.
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increases but that may now be returning to a new equilibrium. According to a Times Picayune analysis of advertisements for more than 1400 apartments and houses across the New Orleans metropolitan area published in October 2006 (14 months after Katrina), rents had increased by roughly 70%—from slightly over $800 per month pre-Katrina to $1,357 per month at the time of the study, although it was not clear whether these figures represented average or median rents or applied to small, large or average sized apartments. A more thoroughly documented study prepared by the University of New Orleans confirms that residential rents did increase post-Katrina but reports that the average rental increase for the entire metropolitan area was only 27.62% (from $747 to $954 per month). This immediate increase was felt most acutely in the City of New Orleans (Orleans Parish), where there was an immediate post storm rent increase of 42%, because rents there were actually relatively affordable prior to Katrina due to its once relatively large supply of affordable housing.

This dramatic increase in residential rents in the metropolitan area immediately after Katrina was attributable to several causes: (1) a dramatic reduction in the supply of residential housing all across the region, but particularly in the City of New Orleans itself, as a result of hurricane damage; (2) a sudden influx of as many as 30,000 temporary construction workers into the city increasing demand at the same time that supply was reduced; (3) landlords with heavily damaged but uninsured or underinsured properties attempting to pass on repair costs to tenants; (4) landlords seeking to pass on dramatically increased property insurance costs to tenants. Unfortunately, no hard data evaluating the relative importance of these factors currently exists.

175 Jeffrey Meitrodt, Rising Rent, THE TIMES PICAYUNE (New Orleans), Oct. 15, 2006, at A1. To illustrate the temporary disappearance of affordable rental units, the Times Picayune noted that only nine apartments were available for $500 or less per month in the early fall of 2006, compared to 243 in 2005. Id. 176 Real Estate Market Data Center and Center for Economic Development, University of New Orleans, Metropolitan New Orleans Real Estate Market Analysis 65 (Vol. 39 March 2007); Ivan J. Miestchovich, Jr., New Orleans Metro Single Family and Multi-Family Overview, UNO/Latter & Blum Economic Outlook and Real Estate Forecast Seminar, 71 (March 8, 2007). 177 Id. at 66. See also United States Census Bureau, 2004 American Community Survey, New Orleans City, Louisiana, Selected Housing Characteristics, at 3, available at http://factfinder.census.gov/servlet/ADPTable7?_bm=y&geo_id=16000US2255000&-qr_name=ACS_2004_EST_G00_DP4&-gc_url=&-ds_name=ACS_2004_EST_G00 &-lang=en&-redoLog=false (last visited Feb. 27, 2007) (noting that in 2004 in Orleans Parish the medium rent was only $566, 35,219 units rented for less than $500, and 69,479 units rented for less than $750—more than 2/3 of the entire parish wide market of 95,910 renter occupied units); Meitrodt, supra note 175 (also documenting widespread availability of apartments for less than $500 according to 2005 census figures—26,000 units or 32% of total market). 178 Id. (reporting that Katrina destroyed or severely damaged more than 43,000 rental units in Orleans Parish alone, or almost one half (45%) of its entire rental housing stock). See also Office of Gulf Coast Rebuilding (OCGR), Current Housing Unit Damage Estimates, Hurricanes Katrina, Rita and Wilma, Feb. 12, 2006, at 23, available at http://www.dhs.gov/xlibrary/assets/GulfCoast_HousingDamageEstimates_021206.pdf (last visited Feb. 26, 2007) (estimating that the number of rental units destroyed or that suffered severe or major damage from either flood or wind is actually 51,681, or more than 50% of the city’s rental units). 179 Meitrodt, supra note 175. 180 Id. According to the UNO report, apartment owners in post-Katrina New Orleans have been confronted with property insurance premium increases of anywhere from 200% to 400%. Market Analysis, supra note 176, at 57.
During the fall of 2006, as thousands of apartments have been repaired, as many construction workers have left or are leaving the region, and as families temporarily forced into apartments while they repaired their homes have now moved back, rental rates actually began to fall in some areas and stabilize in the metropolitan area as whole indicating that demand and supply are now beginning to reach a new equilibrium. Indeed, an informal survey of advertised apartments undertaken by the author and an assistant over a three day period in late January 2007 revealed that over 600 apartment units were listed as available with rents ranging from as low as $475 per month to as high as more than $3,000 per month and that rents for typical one and two bedroom apartments averaged $813 and $1,129 per month respectively.\(^{181}\) The University of New Orleans study confirms our informal findings by revealing that rents have been essentially flat across the metropolitan region in the fall of 2006 (rising only .02%), have only risen 5.5% in Orleans Parish during this period, and the immediate post-Katrina occupancy rate of 95.3% fell to 91.9% in the fall of 2006 for entire metro area.\(^{182}\) Perhaps the real problem then in the residential rental market at the moment is no longer an absolute shortage of rental housing, but a mismatch between the housing available and those who are looking to rent—particularly workers hoping to return to the city but who have either not yet landed jobs and whose still relatively low wages and uncertain credit status make them risky prospective tenants for landlords worried about paying their bills.\(^{183}\)

In the final section of this part, I will examine some of the federally funded and state administered programs designed to respond to this shortage of affordable housing in the New Orleans region. But for now what all of this suggests is that property relationships for landlord and tenant in the wake of an event of radically changed circumstances can be relatively robust and sturdy in some cases, especially for commercial landlords and tenants bound to each other in long term leases with carefully drafted often interlinking duties and responsibilities for repair, maintenance and insurance obligations, but that they can be precarious in other cases, particularly for displaced residential tenants who are easily evicted and who are forced to wait on uncertain market forces and imperfect government programs to restore affordable housing options.

**B. A Medium Term and Partially Chosen Relationship—Mortgagor and Mortgagee**

Moving along our two axes of property relationships in Figure One, we find another widespread form of property relationship that dominates many American property owners’ relationship to their single most important asset, the family home. The relationship, of course, is that between mortgagor and mortgagee. Given that the residential landlord and tenant relationships examined in the previous section are marked by tenant vulnerability, it may surprise some that mortgagor-mortgagee relationships with respect to single family homes have demonstrated relative resiliency and stability in the wake of Hurricane Katrina.

\(^{181}\) Report compiled by John A. Lovett and Sam Steinmetz on file with author.

\(^{182}\) Market Analysis, supra note 176, at 65-68; Miestchovich, supra note 176, at 71.

\(^{183}\) Meitrodt, supra note 175.
In the initial weeks and months after Katrina, many observers and politicians predicted a catastrophic rash of foreclosures on residential mortgage loans along the Gulf Coast that would leave thousands of mortgagees facing bankruptcy and lenders holding billions of dollars of worthless property.\textsuperscript{184} This initial fear was justified to some degree because immediately after Katrina the percentage of delinquent home mortgage loans on the Gulf Coast did increase dramatically.\textsuperscript{185} The much feared surge in foreclosures, however, never occurred. In fact, recent statistics issued by the National Mortgage Bankers Association demonstrate that delinquency rates have now decreased substantially from their immediate post-Katrina and Rita highs,\textsuperscript{186} and even more important, foreclosure rates in Louisiana have actually remained below pre-Katrina levels, with only 1.65\% of loans in foreclosure in the third quarter of 2006, a rate that is actually below the state’s foreclosure rate for all of 2004.\textsuperscript{187} The data on Mississippi tells an almost identical story, with foreclosure rates that are actually lower post-Katrina than before the storm.\textsuperscript{188} Even in the sup-prime loan category (comprised of loans to borrowers who are especially high credit risks), the percentage of mortgage loans in foreclosure in Louisiana in the third quarter of 2006 remained roughly consistent with pre-Katrina figures and was only a few percentage points higher than in the United States as a whole.\textsuperscript{189}

Five factors appear to account for the ability of these residential mortgagor-mortgagee relationships to ride out Katrina’s radically changed circumstances. First, mortgagors and mortgagees’ practice of private ordering to anticipate the risk of destruction of mortgaged property and to enlist exogenous resources (insurance) to aid in responding to radical change made these relationships sturdier and more long-lasting. Almost all conventional home mortgage documents will require a borrower to insure encumbered improvements on the mortgaged property against fire and a wide variety of

\textsuperscript{184} See Scott Gold and E. Scott Reckard, \textit{Foreclosure Fears Rise in Katrina’s Wake}, LOS ANGELES TIMES, Dec. 27, 2005 (reporting on foreclosure fears after biggest mortgage lenders’ initial 90 day forbearance periods ended); Bill Walsh, \textit{Plan Would Buy Homes, Ease Mortgage Fears}, THE TIMES PICAYUNE (New Orleans), Nov. 18, 2005 (reporting on Congressional bill designed to respond to perceived foreclosure threat).

\textsuperscript{185} See JAN. 2007 \textbf{KATRINA INDEX} 55, at \url{http://www.gnocdc.org/KI/KatrinaIndex.pdf} (last visited 1/31/2007) (reporting statistics provided by Mortgage Bankers Association through the third quarter of 2006). Right after Katrina and Rita hit the Gulf Coast, the total number of mortgage loans past due surged to 24.6\% in Louisiana in the third quarter of 2005 and only fell to 20.8\% in the fourth quarter. Id. The numbers in Mississippi were similar but not quite as high: 17.4\% and 16.9\% in the third and fourth quarters of 2005 respectively. See DEC. 2006 \textbf{KATRINA INDEX} 45, available at \url{http://www.brookings.edu/metro/metro.htm}.

\textsuperscript{186} See JAN. 2007 \textbf{THE KATRINA INDEX}, supra note 185, at 55 (showing that overall delinquency rates continued to decline throughout 2006 with the total number of mortgage loans past due declining from 13.7\% in the first quarter of 2006 to 9.5\% in the third quarter, a percentage that is still higher, however, than the national average of 4.84\% for the third quarter of 2006).

\textsuperscript{187} Id. In 2004, the foreclosure rate in Louisiana hovered between 1.8\% and 1.7\%. In 2005 prior to Katrina, it had dropped slightly further to 1.6\% and 1.4\% in the first and second quarters respectively. Id.

\textsuperscript{188} See DEC. 2006 \textbf{KATRINA INDEX}, supra note 185, at 45.

\textsuperscript{189} JAN. 2007 \textbf{KATRINA INDEX}, supra note 185, at 53 (revealing a 5.54\% foreclosure rate for sub-prime loans in Louisiana, compared to a 3.86\% rate nationwide and rates that hovered between 5.3\% and 6.5\% in 2004 in Louisiana).
other hazards. Moreover, if the borrower fails to comply with this covenant, the documents will permit the mortgagee to obtain property insurance on its own and charge the cost to the borrower, even if its cost is more expensive than what the borrower might have obtained on his own. (This latter practice is called “force-placing” insurance.) This nearly universal practice of contractually stipulating responsibility for insuring the mortgaged property has assured that at least some external financial resources are available for rebuilding. In this sense, homeowners entwined in a property relationship with a mortgagee actually benefited from their obligation to insure the mortgaged property.

A second related reason the Gulf Coast did not experience a large wave of foreclosures is that federal regulation played a constructive role in making flood insurance more readily available for properties at risk of flooding. Under the National Flood Insurance Program (NFIP), borrowers whose homes are located in federally designated flood plains and who obtain mortgage loans issued by federally insured financial institutions are required to obtain flood insurance to protect at least the outstanding loan balance from damage caused by flooding. As a result of widespread compliance with this policy and some local and national lenders’ practice of requiring flood insurance policies even for homes not in the designated flood plain and or of requiring enough flood insurance to cover up to 80% of the value of the home, $16.7 billion in NFIP supported flood insurance proceeds flowed to the region after the 2005 hurricanes and undoubtedly enabled many homeowner-mortgagors to either begin rebuilding or at least to pay off their mortgages once their flood insurance claims were paid. Of course some homeowner-mortgagors were significantly underinsured for flood damage. These homeowners, however, tended to own more valuable homes that had appreciated significantly in recent years and thus often failed to purchase enough flood insurance to cover the actual cost of rebuilding or simply did not realize they could buy excess coverage beyond the standard $250,000 federally supported policy amount.

191 NELSON & WHITMAN, supra note 190, § 4.13, at 162.
193 See Jeffrey Meitrodt & Rebecca Mowbray, After Katrina, Pundits Criticized New Orleans, THE TIMES PICAYUNE (New Orleans), Mar. 19, 2006, at A1 (reporting that Louisiana had highest level of NFIP participation of any state in the nation, 64% of Louisiana homes that sustained hurricane related flood damage were covered by flood insurance, participation in the program was even stronger in New Orleans where 67% of homeowners had flood insurance, and over $12 billion in flood insurance proceeds had flowed into Louisiana by February 2006 and were expected to reach $13.8 billion). See also Rebecca Mowbray, Flood Insurance Requirement Proves Shrewd, THE TIMES PICAYUNE (New Orleans), Mar. 19, 2006, at A13 (reporting on conservative policies of one local savings and loan to mandate big flood insurance policies for all its New Orleans area borrowers and policy of Fannie Mae to require enough flood insurance to cover the unpaid principal balance or 80% of the home’s value).
194 Although the maximum amount of coverage under a NFIP sponsored flood insurance policy is $250,000 for a single family home, additional coverage can be purchased for higher premiums. See Mowbray, supra note 207.
A third significant factor accounting for mortgagor-mortgaghee resiliency stems from the standardization of home mortgage documents resulting from the impact of secondary mortgage market holders. Today almost all conventional mortgage documents for single family home loans originated by institutional lenders and anticipated to be sold into the secondary market provide that in the event of a covered loss, the insurance proceeds may be applied to restoration or repair of the mortgaged property as long as (1) restoration or repair is economically feasible and (2) the lender’s security is not lessened or impaired. 195 Because of this contractual stipulation that reinforces a borrower’s expectation that an insurance policy whose premiums he has paid will enable him to rebuild and that deviates from the majority jurisprudential default rule favoring unconstrained lender discretion on the application of insurance proceeds, 196 a typical institutional home loan mortgage holder will allow the proceeds to be used for rebuilding. 197 The effect of this widespread set of contractual terms after the hurricanes of 2005 seems to have been that most mortgagees have only required that insurance proceeds be placed into escrow accounts and have disbursed the funds as progress on rebuilding takes place, just as with a typical construction loan. 198 As a result, many mortgagor-homeowners whose homes were destroyed or severely damaged by Katrina and Rita have, if they desired, been able to access insurance proceeds to rebuild their homes, even though mortgagees might have plausibly asserted in some cases that restoration of mortgaged property is not economically unfeasible or would lessen the mortgagee’s security, at least in areas heavily damaged areas where all property values have declined. Of course, some mortgagees voluntarily chose to apply their insurance proceeds to pay down or completely pay off their mortgages either to free themselves from any debt obligation in the face of their own uncertainty about whether to rebuild or because they seized the opportunity to refinance their debt at lower interest rates. But even in these cases foreclosure was still avoided.

The fourth major reason for the relative resiliency of mortgagor-mortgaghee relationships originates in the risk spreading structure of the current home loan industry.

195 Id. § 4.15, at 167. Randolph, supra note 190, at 15 & 20. Conversely, mortgage documents governing unconventional seller financing or commercial loans typically grant the mortgagee unfettered discretion to apply insurance proceeds to the outstanding loan balance or to restoration of the mortgaged property. Id.

196 NELSON & WHITMAN, supra note 190, § 4.15, at 168-69 (critiquing majority rule and articulating rationales for pro-mortgagor rule stated in RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 4.7(b) (1997) and in Schoolcraft v. Ross, 146 Cal. Rptr. 57 (1978)). But see Randolph, supra note 190, at 15-21 (arguing in favor of majority rule supporting lender discretion at least in commercial cases and non-institutional home lender cases).

197 NELSON & WHITMAN, supra note 190, § 4.15, at 167; Randolph, supra note 190, at 15 & 20.

198 See Bean v. Prevatt, 935 So.2d 557, 560 (Fla. Dist Ct. App. 2006) (commenting on this widespread practice in Florida in the wake of Hurricane Wilma). Although numerous conversations the author has had with homeowners and mortgage lending officers confirm this practice, one possible exception is represented by a federal district court petition filed on behalf of a purported class of homeowners whose homes were damaged as a result of Katrina and which alleges that insurers paid the proceeds of “forced placed” policies exclusively to lenders-mortgaggees, thus preventing mortgagors from collecting or using the proceeds. Complaint-Class Action, Anderson v. Ace Insurance Co., Civil Action No. 06-5485, at 14 (E.D. La. Aug. 29, 2006). One report in the press suggests that this is an experience which at least a few other homeowners have experienced. Rebecca Mowbray, Insurance Companies Taking Heat from Clients, THE TIMES PICAYUNE (New Orleans) Dec. 08, 2006.
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Even with the substantial insurance proceeds that were potentially available to repair damaged homes or pay down loan balances, many borrowers undoubtedly found themselves in precarious default situations after the hurricanes because of storm induced unemployment or other financial strains, especially as they waited for insurance claims to be settled and paid. Yet the extraordinary risk spreading capacity of the secondary residential mortgage enabled mortgage holders to forebear patiently on the thousands of technically delinquent mortgage loans. Immediately after the storms’ destruction, for instance, the Federal Home Loan Mortgage Corporation (FHLMC or “Freddie Mac”), a federally chartered corporation that buys mortgages from banks and other lenders, implemented a blanket moratorium on foreclosures in all Louisiana parishes affected by Hurricanes Katrina and Rita lasting until August 31, 2006 and further allowed almost 18,000 borrowers to delay the resumption of their mortgage payments. As a result of these policies, less than one percent of Freddie Mac’s borrowers had been foreclosed on as of January 2007. Fannie Mae, another even bigger buyer and bundler of mortgages in the secondary market, also implemented a foreclosure moratorium and provided 35,000 borrowers extra time to make payments after the storms. Because most locally originated loans had been sold into the secondary market, the well diversified mortgage holders (especially the large quasi-governmental players like Fannie Mae and Freddie Mac) could institute these generous forbearance plans enabling many mortgagors to re-establish their lives, re-establish employment, and undertake the painstaking process of making insurance claims and ultimately either resuming payment or at least paying off their mortgages with insurance proceeds.

Finally, and undoubtedly, some degree of simple mortgagee self-interest also accounts for the absence of numerous foreclosures on the Gulf Coast after Katrina and Rita. If mortgagors had commenced large numbers of foreclosures, the results would surely not have been very fruitful given that so much mortgaged property was heavily damaged and property values (in flooded areas at least) were suddenly lowered. Foreclosure sales, to the extent they could have been achieved at all (and many borrowers might have simply handed over possession of mortgaged property voluntarily), would have brought in low prices and left mortgagees seeking to collect large deficiency judgments against stressed out and financially weakened borrowers. Other lenders may have also preferred generous work out packages that would at least preserve favorable interest rates rather than force borrowers into pre-payment situations through threatened foreclosures. In the end, however, it is likely that all of these factors—mortgagee self interest in requiring property insurance and avoiding unprofitable foreclosures, federal flood insurance

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199 For an overview of the development of the secondary mortgage market, see NELSON & WHITMAN, supra note 190 § 11.3; Robin Paul Malloy, The Secondary Mortgage Market: A Catalyst for Change in Real Estate Transactions, 39 S.W. L.J. 991 (1986); Hocket, supra note 58, at 104-20.

200 See ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: CASES, PROBLEMS AND MATERIALS 623 (2002) (elaborating on how the development of the secondary market enables lenders to diversify their investment portfolios across geographic borders and thus reduce the risk of localized economic downturns).


202 Id.

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requirements, the standardization of favorable insurance proceed application clauses in mortgage documents, and the risk spreading structure of the secondary mortgage market itself—all came together to enable mortgagor and mortgagee to ride out the radical change wrought by Katrina and Rita with surprising stability and continued interdependence.

C. A City and its Citizens

1. Cities as a Common Resource Property Relationship

Where do cities fit into this framework for analyzing the relationship between property regimes and radically changed circumstances? Returning to Figure One, our graph mapping property relationships in terms of their origins, duration and finitude, the reader will find a dot representing the relationship between a city or region and its inhabitants. This dot appears because cities can in some sense be understood as a particularly complex, multi-layered property relationship in which local governmental and civic leadership and a city’s inhabitants each share a measure of ownership, control, use, and management of a set of common resources. Those resources can be tangible—the streets, avenues, parks, schools, public buildings and infrastructure and housing stock of the city or region. And they can also be intangible—the spirit, the sense of “community,” the shared social norms and values that bind people together, perhaps quite tightly in a small town or village, or in the looser yet nevertheless real ways that resemble what Gerald Frug has evocatively described as the “being together of strangers” typical of life in our large metropolitan cities.

This city-citizen relationship appears right in the middle of Figure One—roughly equidistant from the poles of each axis—for several reasons. First, the temporal duration of any individual’s relationship with a city or region is neither clearly short term and finite nor long term and indefinite. On one hand, a United States citizen is theoretically free to pick up and move from one municipality to another anytime he or she wants. And indeed, many local governments’ attempts to lure new residents and new businesses to move to their communities by offering tax breaks and other financial incentives reflect this open-ended, contingent, itinerant quality of our attachments to any given place. Further, modern technology and growing affluence have made voluntary relocations so much easier for many of us to undertake.

On the other hand, as theorists and social scientists tells us, and as our common experience confirms, there are often very heavy costs (both social and economic)

204 Jared Diamond similarly views entire societies as common pool resource communities and analyzes them within the frames of traditional property paradigms such as the “tragedy of the commons” and “prisoner’s dilemma.” Diamond, supra note 11, at 428-30.


206 On a theoretical level, this “competition among groups for members” is “the central claim of the so-called ‘Tiebout’ Hypothesis, which points out that local governments will compete among themselves in order to satisfy the diverse preferences of mobile residents for particular mixtures of government services, yielding an optimal outcome.” Peñalver, supra note 31, at 1922 (citing Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416, 419-20 (1956)).
associated with relocating one life (let alone the lives of an entire family) to another city or region.\textsuperscript{207} To use the language of the property theorists, it can be quite difficult for a citizen to \textit{exit} from a relationship with a city or region because of both the bonds of affection, kinship and social dependence that are created whenever a citizen lives any place for some period of time and because of the many significant transactions costs a citizen would incur in breaking off that relationship. Thus, the relationship between a citizen and a city is not as short term, finite and easily terminated as in a typical residential lease. But at the same time it is not indefinite and immutable either.

Returning to the vertical axis in Figure One, we can see that the bond between a city and its citizenry is also not entirely involuntary like the connection between family members who fall into concurrent ownership as the result of an inheritance. In fact, for citizens with considerable financial assets, strong educations, employment marketability, and relatively weak social ties to any particular community, the origin of the relationship between a particular citizen and his or her city may seem entirely voluntary and chosen. But for many others, those with less economic mobility and much deeper social bonds to a special place or community, their relationship to their city or region may feel anything but voluntary. It may feel, in fact, more like a “given” fact of life, a phenomenon over which they have exercised very little conscious choice.\textsuperscript{208} To borrow the paradigm developed by Margaret Radin, a citizen’s connection with his or her city—particularly for those born in a community or who have developed strong and deep community commitments—might not be characterized by fungibility but rather by the notion of personhood.\textsuperscript{209} In other words, because a citizen’s identity as a person may be deeply connected with their community, they may be quite reluctant to give up a stake in that community, and thus the relationship between citizen and city can acquire a degree of “stickiness,” if not outright immobility.\textsuperscript{210} This socially derived “stickiness” is thus in tension with the theoretical mobility and exit rights we supposedly enjoy, and it is this “stickiness” that explains locating the city-citizen relationship right at the center of Figure One.

2. \textbf{New Orleans as an Especially Sticky City-Citizen Relationship.}

How does New Orleans fit into this framework? Is it a city populated with highly mobile and easily transportable professionals for whom a disaster might have merely provided a convenient pretext for relocation? Or is it a city comprised of residents whose bonds to place and community make relocations very costly in social and economic terms? The answer, as many observers have intuited, appears to be the latter.

According to official census data, the City of New Orleans (\textit{i.e.}, Orleans Parish) had a remarkably high ratio of residents prior to Katrina who were born in Louisiana as opposed to those who were born out of state. Indeed, according to the 2000 Census, 77% of the city’s residents were Louisiana born, a ratio that is remarkably high in its own right.

\textsuperscript{207} See Peñalver, \textit{supra} note 31, at 1919-24 (emphasizing the often high social costs of exercising a right to exit from a stable community).

\textsuperscript{208} Id. at 1921-24.


\textsuperscript{210} Peñalver, \textit{supra} note 31, at 1922.
but that is also relatively high in comparison to other similarly sized Southern cities according to geographer Richard Campanella. What’s more, this ratio was apparently only increasing in the first four years of the twenty first century. If we consider the entire New Orleans metropolitan area, the incidence of Louisiana nativity was only slightly lower, indicating that the close ties between residents and local community spread across the entire region.

Yet despite this region wide trend toward high levels of local nativity, the dispersion of native born New Orleans residents was not uniform. According to Campanella, certain areas of the city (notably the French Quarter, the Warehouse District, the Garden District, and the Uptown University area) had much lower incidences of Louisiana and New Orleans nativity—between 50% and 66% in some areas and less than 50% in others. Sadly, overlaying a map of extensive flood damage on top of a map depicting local nativity reveals that the areas hardest hit by Katrina’s flooding tend to be those with disproportionately high local nativity. Thus, it turns out that while over 200,000 New Orleanians whose residences were flooded had been born in Louisiana, less than 50,000 of the city’s flood victims were born elsewhere. If statistics were available for the incidence of New Orleans specific nativity, Campanella predicts that the figures would likely be even more disparate. In short, what this means is that the residents with the deepest local roots—those for whom the cost and burdens of exit are especially steep—were precisely the inhabitants who suffered the most severe damage and dislocation. If these New Orleans residents are not willing or able to return to the city, Katrina will have dealt, in Campanella’s words, a “devastating blow to genuinely local culture, as manifested in dialect, flood, customs, religion and worldview.”

For purposes of understanding the City of New Orleans’ capacity for responding to an event of radically changed circumstances, however, this special demographic characteristic represents a source of both strength and weakness and has important implications for policy makers. On one hand, if the ties of local culture, kinship, religion, local identity prove to be enduring—if there is indeed an abiding stickiness between New Orleans and its residents, this might help the City retain a large enough portion of its

211 RICHARD CAMPAANELLA, GEOGRAPHIES OF NEW ORLEANS: URBAN FABRICS BEFORE THE STORM, 403 (2006).
213 According to a 2005 census update, the incidence of Louisiana nativity was estimated to have been only slightly lower (76.3%) for the entire New Orleans MSA in the eight months prior to Katrina, and it only fell to 75.2% in the four months after Katrina. 2005 American Community Survey Gulf Coast Area Data Profiles, New Orleans-Metairie-Kenner, LA Metropolitan Statistical Area, available at http://www.census.gov/acs/www/Products/Profiles/gulf_coast/tables/tab2_katrinaK0100US2203v.htm (last visited 1/25/2007).
214 CAMPAANELLA, supra note 211, at 403.
215 Id. at 403.
216 Id.
217 Id.
residents to regain its vitality and thrive. On the other hand, this high in-state nativity ratio is also a sign of the city’s long term economic stagnation in that it reveals the City’s inability to attract new citizens or retain recent arrivals, especially those with much needed professional training and skills. Another irony is that because the areas of New Orleans that have always attracted more outsiders were also the areas that survived largely intact, the city’s future citizenry may well be comprised of more people from other places, which could mean greater economic health, but few social ties to place and neighborhood, and a less pronounced local identity.

D. Evaluating Government Programs to Restore Housing for Renters and Owners in New Orleans and on the Gulf Coast

1. The Problem and the Programs

Now that we have located the city-citizen relationship on our map of property relationships and seen how one of New Orleans relatively unique demographic characteristics makes it resemble more of a long-term, given relationship, this last portion of the article will address how different government sponsored programs have responded to the problem that many commentators consider to be the single biggest obstacle to the city and the entire region’s recovery—the acute housing shortage created by Katrina. Among all the fabrics of community life that Katrina tore apart (including health care, criminal justice system, public education, city infrastructure and utilities), perhaps the single most damaging wound that Katrina inflicted was on the region’s housing stock.

In Louisiana alone, hurricanes Katrina and Rita combined to destroy or inflict severe or major damage to 204,500 housing units: 123,500 owner occupied homes and 82,000 rental units. Although the initial extreme shortage in affordable rental housing in


\[\text{See Johnson, supra note 3, at 329-33 (emphasizing need for affordable housing in the Gulf Coast region post-Katrina).}\]

PROPERTY AND RADICALLY CHANGED CIRCUMSTANCES

New Orleans may be easing a little, the region could still use much more affordable housing. Indeed, some economists and observers estimate that the entire Southeast Louisiana area could use as many as 45,000 new or refurbished rental units and that New Orleans could absorb 30,000 of them.\textsuperscript{223} Although Mississippi’s housing losses and needs are not as large in absolute numbers, they too remain acute. In Mississippi, Katrina destroyed or severely damaged 24,088 rental units and inflicted major damage to an additional 45,776 rental units.\textsuperscript{224} According to recent reports, as many as 83,000 residents of the Mississippi Gulf Coast are still residing in 30,456 FEMA trailers as of January 2007.\textsuperscript{225} In short, until the entire region can substantially restore its housing stock, recovery will remain painstaking and slow.

Rather than describe in detail the various federally funded and state administered housing recovery programs currently underway in Louisiana and Mississippi, this last part will highlight several of the key characteristics of these programs and evaluate them in terms of the normative criteria developed in Part I. First, however, a brief overview of the principal programs is necessary.

\textit{The Mississippi Development Authority’s Homeowner Assistance Program: Phase I (Mississippi Phase I)}: This program, funded with $3 billion of Mississippi’s $5 billion in federal Community Development Block Grant (CDBG) allocation from Congress as special hurricane relief appropriated in December 2005,\textsuperscript{226} is designed to compensate a narrow class of homeowners for uninsured losses. This target group consists of homeowners from four Gulf Coast counties whose homes were damaged or destroyed by Katrina’s storm surge, who carried standard homeowner’s property and casualty insurance policies, but who did not have any or sufficient flood insurance because they lived outside the NFIP flood plain and thus were advised or reasonably believed that flood insurance was unnecessary.\textsuperscript{227} Although Mississippi officials originally estimated that as many as 26,800 homeowners might qualify for relief,\textsuperscript{228} as of early March 2007, 18,114 homeowners had applied for grants under this program, 14,623 homeowners had been determined to be eligible for benefits, 12,946 grants had closed, and 11,476 homeowners

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from the federal Office of Gulf Coast Rebuilding). \textit{See also OGCR Housing Damage Estimates, supra} note 178, at 7-13.


\textsuperscript{224} OGCR Housing Damage Estimates, \textit{supra} note 178, at 12.


\textsuperscript{228} Id.
had actually received grant benefits totaling $798,000,000.\textsuperscript{229} The benefits under this program are capped at $150,000 per eligible homeowner.\textsuperscript{230}

To obtain a Phase I grant an eligible homeowner must simply execute covenants to assure that any home rebuilt with the grant funds will be covered by flood insurance in the future, (b) will be elevated above new advisory base flood elevations, and (c) will comply with all applicable building codes.\textsuperscript{231} Once a grant closing occurs, funds are distributed directly to the recipient, with no limitations on their use unless the home is encumbered by a mortgage, in which case the grant is co-paid to the mortgagee and homeowner and its use is then determined under state and federal law and the applicable mortgage documents.\textsuperscript{232}

\textit{The Louisiana Recovery Authority’s Road Home Homeowner Assistance Program (“the Road Home”).} This massively scaled $7.5 billion program, funded with $6.3 billion in CBDG funds and another $1.2 billion in federal hazard mitigation grant dollars, is designed to provide compensation for uninsured losses of all Louisiana homeowners across the state whose homes were damaged or destroyed by Hurricanes Katrina or Rita as a result of either flooding or wind.\textsuperscript{233} Unlike Mississippi’s Phase I plan, eligibility is not dependent on the home being located outside the flood plain or on whether the home was covered by a flood or even a standard homeowner’s policy.\textsuperscript{234} The program does, however, assess a thirty percent moral hazard penalty against homeowners who did not carry the appropriate form of insurance on their home—flood insurance if the home was located in an NFIP flood zone, or a standard homeowner’s policy otherwise.\textsuperscript{235}

Just as in Mississippi, homeowners who receive a grant and plan to use them to rebuild their homes or purchase new homes in Louisiana must sign “covenants” requiring maintenance of general casualty and flood insurance, compliance with new more demanding building codes and new advisory base flood elevations.\textsuperscript{236} But unlike Mississippi, homeowners must also agree that rebuilt or new homes in Louisiana purchased with grants will remain owner occupied for at least three years, either by the grant recipient or a subsequent purchaser who agrees to assume the owner occupancy

\begin{itemize}
  \item[\textsuperscript{229}] Mississippi Development Authority, Homeowner Assistance Program – Phase 1, Weekly Update, at http://www.mississippi.org/content.aspx?url=/page/hoassistprogram1& (last visited 03/08/2007).
  \item[\textsuperscript{230}] Miss. Phase I, \textit{supra} note 227, at 6.
  \item[\textsuperscript{231}] Id. at 5.
  \item[\textsuperscript{232}] Id. at 9.
  \item[\textsuperscript{234}] Approved Action Plan, \textit{supra} note 233, at 6-7.
  \item[\textsuperscript{235}] Id. at 9.
  \item[\textsuperscript{236}] Id. at 5-7.
\end{itemize}
Eligible homeowners who do not commit to rebuild their homes or purchase a new one in Louisiana will see the amount of their grant awards reduced by 40% unless they are 65 years of age or older. Just like the Mississippi Phase I program, benefits are capped at $150,000 per eligible homeowner.

As has been widely reported, the pace of implementation of the Road Home Program has been notoriously slow but has just recently begun to quicken. As of early March 2007, more than 112,000 Louisiana homeowners have applied for grants under the program, benefits have been calculated for more than 46,500 of these applicants, benefit award letters have been sent to almost 41,000 homeowners, 20,000 homeowners have selected their benefit options, and 2790 homeowners have actually closed grants and begun to receive their benefits.

The Louisiana Recovery Authority’s Rental Property Programs: In response to the acute need for more affordable rental housing, Louisiana has designed two programs to be funded with a portion of its CDBG allocation. The first is its $593 million Low Income Housing Tax Credits Piggyback Program, (“LIHTC Piggyback Program”) which is designed to promote the creation of affordable rental housing by offering large scale developers tax credits that can be used in conjunction with federal Gulf Opportunity Zone Act tax credits. The second, even larger component is its $869 million Small Rental Property Repair Program (“Small Rental Property Program”), which offers landlords who own small rental properties of 1-10 units zero percent interest and potentially forgivable loans if they agree to make their units affordable to low to moderate income tenants. The amount of the potential loan increases from $25,000 to $100,000 per unit depending on the degree of affordability from market rents that the landlord is willing to accept (i.e., affordable to renters with 50%, 65% or 80% of the area’s medium income). If the

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237 Id. at 5-7 and 13. If a homeowner receives a low interest compensation loan in lieu of or in addition to a grant, the homeowner must agree to a five year owner occupancy covenant which cannot be assumed by a buyer. Proposed Action Plan, supra note 233, at 12.
238 Approved Action Plan, supra note 233, at 11. The exception for “elderly” homeowners to this 40% move away penalty is documented in the Proposed Action Plan, supra note 233, at 16-17.
239 Approved Action Plan, supra note 233, at 8.
242 Affordable Rental Housing Amendment, supra note 241, at 6-9; April 6, 2006 Amendment, supra note 241, at 23-25. See also Associated Press, Landlords to Split 869M in Recovery Funds, NEW ORLEANS CITY BUSINESS, Jan. 25, 2007 (explaining details of first round of small landlord program funding).
243 Id.
landlord keeps the rent caps in place for a full 10 years, the loan will be completely forgiven.244 The State hopes to rebuild 18,000 units over the course of the next several years through this program.245 Although its details have not yet been finalized, Mississippi also plans to launch a $125 million program also designed to stimulate small scale landlords to repair their properties and make them available at affordable rents by offering $25,000 partially forgivable loans to small scale landlords who agree to rent caps affordable to low to moderate income tenants.246

**Mississippi Development Authority Homeowner Assistance Program Phase II:**
This program is geared specifically toward homeowners who lived in Mississippi’s Gulf Coast counties whose homes were damaged or destroyed by storm surge but who were: (a) either completely uninsured or significantly underinsured (i.e., they lacked a standard homeowner’s property and casualty insurance policy or they lived in the pre-Katrina NFIP flood plain but lacked any or adequate flood insurance); (b) lived either inside or outside the flood plain; and (c) have household incomes at or below 120% of the Area Median Income (AMI).247 Although it initially contemplated imposing a three year owner occupancy covenant on recipients of these grants, Mississippi now will simply require recipients to accept the same insurance, building code and flood elevation covenants used in its Phase I program.248 Grants under this program are capped at $100,000 per homeowner and Mississippi plans to fund it with $700 million of the original $3 billion in federal CDBG funds it allocated for homeowner assistance grants under its Phase I program.249 Finally, just as with Louisiana’s Road Home program, grant awards for homeowners who had at least some form of insurance will have their grant awards calculated at 100% of their uncompensated damage, but those without any insurance at all when Katrina hit will see their grant awards calculated at 70% of their uncompensated damage (in effect a 30% moral hazard penalty), unless they are over 65 years of age, disabled, or have a household income at or below 60% of AMI.250

**The Baker Bill:** The final program to understand before beginning our critique is one that was proposed in late 2005, garnered the support of many Louisiana residents and its congressional, state and local leaders, but was ultimately shelved due to opposition from President Bush and members of the United States Senate.251 This proposal, authored by U.S. Congressman Richard Baker of Baton Rouge, sought to create a massive new federal agency that would have been called the Louisiana Recovery Corporation.252 This entity, which would have been capitalized by the sale of government bonds and theoretically

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244 Id.
245 Id.
248 Id. at 6.
249 Id. at 2.
250 Id. at 3-4.
251 For an analysis of the “Baker Bill,” see Lovett, supra note 226 at 50.
would have generated income to pay off those bonds, 253 would have administered a massive buy-out of damaged homes and commercial properties and the mortgages encumbering them and would have overseen the redevelopment of those properties. 254 Unlike the Road Home Program, it offered eligible property owners just one option—selling out to the LRC. 255 The LRC, it was hoped, would have taken the thousands of parcels it acquired, cleared debris and cleaned up environmental contamination, re-bundled them into larger parcels, and then presumably sold them to private developers who would then have constructed large new housing developments. 256

2. A Critique of Housing Program Designs

a. Achieving Quick Preservation, Repair, Improvement and Alteration Decisions and Action

If we begin evaluating these housing recovery programs by measuring the mere speed with which they enabled property owners to make decisions about preserving, repairing, rebuilding, altering or improving their property, the program that has been most successful is Mississippi’s Phase I homeowner program. There are three reasons this program has been able to close grants for almost 90% of the eligible homeowners who applied in less than a year from its official start date.

First, Mississippi designed its grant calculation process with simplicity of administration in mind by using as the crucial starting point the smallest of the following figures: (a) $150,000, (b) 135% of the pre-Katrina insured value of the home, or (c) the greater of either an SBA or MDA damage assessment. 257 As there could be no dispute about the pre-Katrina insured value of an eligible home and as damage assessments were relatively straightforward because so many homes were completely destroyed, Mississippi avoided the complex grant benefit calculation process that has plagued Louisiana’s Road Home program, and especially its confusing determination of an eligible home’s pre-storm

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253 Id. § 104.
254 Id. § 105. In particular, the Baker Bill proposed to pay owners 60% of their equity in destroyed or damaged property and mortgagees at least 60% of the outstanding loan balances, up to a maximum value of $500,000 per property, with mortgagors and mortgagees sharing any losses in equal proportions. Id. § 106(h). Although property owners would not have been permitted to receive “windfall gains,” the bill did not identify how insurance proceeds would be accounted for in determining buy-out awards. Id. § 106(h)(1)(B).
255 Significantly, the bill prohibited the LRC from using use eminent domain to acquire property. Id. § 102(e). Interestingly, the bill also offered property owners who sold out the option of acquiring a right of first refusal to purchase an interest in real property of comparable size and location in the eventual new developments that would emerge, Id. § 106(d), and also proposed creating a trust or usufruct like structure for property owners who wanted to transfer their property only conditionally to the LRC for purposes of land clearing and environmental remediation and who then would reacquire the property by paying the LRC back for its expenses. Id. § 106(e).
256 Id. § 107 (setting forth LRC’s land disposition procedures and developer selection criteria)
value. Second, by limiting eligibility in Phase I to homeowners who carried standard property and casualty insurance policies, Mississippi may have screened out homeowners with fewer financial resources and thus those most likely to have lacked clear and unfractured title to the property. This choice probably increased the program’s efficiency but not its fairness and its usefulness to those who are most vulnerable and in need of assistance.

The final reason for the relative speediness of the Phase I program is that it offered eligible homeowners only one straightforward choice—a compensation grant with no major use restrictions attached. In contrast, Louisiana’s Road Home offered eligible homeowners four choices—(1) a grant to rebuild their home at its original location, (2) a relocation grant requiring homeowners to convey their property to the State in exchange for funds to buy another home in Louisiana, (3) an unconditional sale grant requiring homeowners to convey their property to the State with no commitment to buy another home but imposing the 40% move away penalty, and (4) selling their home on the private market and assigning a rebuild grant to the buyer. This multiplicity of choices (putting aside the accompanying administrative complexity) may have compounded Louisiana homeowners’ uncertainty about accepting a Road Home grant at all and slowed down the implementation of the Road Home. In fact, among the approximate 41,000 Louisiana homeowner’s whose Road Home benefits have been calculated and communicated to them by early March 2007, only 21,000 have selected a benefit option, indicating either dissatisfaction with the amount of the grant award or indecision as to which option, if any, to accept. In sum, the lesson here may be how simplicity of benefit calculations and limiting choices can speed up a property restoration program’s delivery of benefits and how a well-intentioned multiplicity of choices can reinforce severe collective action problems already endemic in an environment of radically changed circumstances.

b. Enlisting Exogenous Resources Ex Ante—Covenants and Insurance Markets

To calculate a basic rebuilding grant, Louisiana’s Road Home starts with the lesser of (1) the home’s pre-storm value (apparently, the value of the improvement separate from the land upon which it is situated), or (2) the estimated cost of replacing or restoring the home. Approved Action Plan, supra note 243, at 9; Proposed Action Plan, supra note 233, at 16. Because the cost of construction materials and labor has increased dramatically since the storm, replacement costs frequently exceed the home’s pre-storm value, which results in the home’s pre-storm value becoming the crucial starting point. This has in turn led to considerable controversy about how best to determine pre-storm value. See David Hammer, Road Home Shifts Stance on Funding Appraisals, THE TIMES PICAYUNE (New Orleans), Feb. 21, 2007 (detailing adjustments made in determining the crucial pre-storm value figure).


The right of a homeowner to assign rebuilding grant rights under option 1 to a “buyer” of their lot and damaged home is recognized by the LRA if the assignment takes place after the official launch of the Road Home program. Approved Action Plan, supra note 233, at 13; Proposed Action Plan, supra note 233, at 18. One problem with the assignment option as a redevelopment tool is that the assignee must also sign the three year owner occupancy covenant, thus precluding assignments to speculating developers who might buy damaged properties in bulk, rebuild with Road Home grant money and then re-sell. Id.

Pipeline Report, supra note 240, at 1.
Both Louisiana and Mississippi’s homeowner assistance programs deserve credit for at least attempting, by use of their covenants, to assure that rebuilt homes will be insured in the future against all potential hazards including major flooding. There are only two problems with these efforts. In Louisiana, it is likely that the proposed Road Home covenants requiring homeowners to purchase certain kinds of insurance are not enforceable as “running covenants against the land” as described by the program itself.\textsuperscript{262} Instead, they will only be enforceable as a personal obligation against the original homeowner recipient who signs the covenants and an immediate assignee who expressly assumes this obligation.\textsuperscript{263} Second, both Louisiana and Mississippi have seen major property insurers either withdraw entirely from the states, announce they are no longer writing new policies in affected areas (at least for wind and hale coverage), or dramatically increase premiums or raise deductibles on traditional wind and hale coverage.\textsuperscript{264} The actions of these private insurers will continue to place enormous pressure and risk on Louisiana and Mississippi’s state sponsored property insurers of last resort, to whom many homeowners must now turn for property and casualty insurance. In sum, although these programs merit praise for attempting to enlist \textit{ex ante} exogenous support,\textsuperscript{265} legal and market factors beyond their control may limit these efforts’ effectiveness.

c. Achieving Economies of Scale: The Limitations of Land Assembly Strategies and Tax Incentive Tools

The next metric for assessing these housing recovery programs is how well they achieve the goal of creating economies of scale, particularly for building the large volume of new housing needed post-Katrina. The government sponsored program that was most concerned with this goal was undoubtedly Congressman Baker’s proposed Louisiana Recovery Corporation Act,\textsuperscript{266} which some analysts estimated had the potential to acquire more than 100,000 parcels of damaged property through its single buy-out option, bundle them into larger tracts and then sell them to major developers who could use their nationally scaled finance, design and construction resources to create massive new

\begin{footnotesize}
\begin{footnote}{262} A copy of “The Road Home Declaration of Covenants Running with the Land Hurricane Katrina / Hurricane Rita” has been provided to the author by First American Title Co. (On file with author).
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\begin{footnote}{263} In Louisiana, neither predial nor personal servitudes may impose affirmative obligations binding the owner of burdened immovable property “to do anything.” See \textit{La. Civ. Code} arts. 651 (West 1980) (rule for predial servitudes); \textit{La. Civ. Code} arts. 640 (West 1980) (“The right of use may confer only an advantage that may be established by a predial servitude”). The only exception is when “building restrictions” are established pursuant to a general plan governing building standards, specified uses and improvements by a subdividing owner or by agreement of all owners of an affected area. \textit{La. Civ. Code} arts. 775-76 (West 1980).
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\begin{footnote}{265} Despite the general advisability of enlisting external support \textit{ex ante}, sometimes it is better to use local resources and expertise in responding to a disaster. The Road Home program clearly erred on this front by failing until recently to use local appraisers to do the crucial task of calculating eligible homes’ pre-storm value. See Hammer, \textit{supra} note 258 (explaining how Road Home administrator first sought to use computer automated appraisal programs to determine pre-storm value and later realized that individualized local appraisals would be needed).
\end{footnote}

\begin{footnote}{266} H.R. 4100, \textit{supra} note 252.
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\end{footnotesize}
subdivisions and apartment complexes.\textsuperscript{267} The Baker Bill’s strength, as well as its greatest potential weakness, however, was that because it only offered property owners one choice—selling to the LRC—many property owners might have rejected the LRC’s offers, and this might have made it difficult for the LRC to achieve its land assembly goals, especially since the corporation was prohibited from exercising eminent domain.\textsuperscript{268} In the end, scattered redevelopment patterns might have emerged anyway with many property owners—especially those with sticky attachments to the city or region—left to use their own limited resources to finance rebuilding of their damaged property. On the other hand, if the Baker Bill had emerged as the only “deal” available in Louisiana, many homeowners might have taken it and waited somewhere in the region to see what kind of redevelopment emerged and perhaps exercised the right of first refusal option the bill proposed offering in conjunction with its buy-out packages to entice homeowners to return to their communities.\textsuperscript{269} In any event, now that Louisiana has committed to its Road Home incentive structure and most eligible Louisiana homeowners seem to be choosing the rebuild option and foregoing the two buy-out options (except in a few specific communities like St. Bernard Parish),\textsuperscript{270} the LRA will have relatively limited opportunity to achieve economies of scale by buying out damaged property and assembling large parcels to entice major developers.

The other major opportunity for creating economies of scale—especially with regard to affordable rental housing—appears through the developer tax credit incentives offered under Louisiana’s LIHTC Piggyback Program\textsuperscript{271} and the Gulf Opportunity Zone Act\textsuperscript{272} to which it is tethered. Interestingly, while the well publicized shortage of affordable housing is, not surprisingly, spurring some for-profit and non-profit developers to attempt to rehabilitate large apartment complexes, particularly in New Orleans East, an area that had a large concentration of such complexes before Katrina,\textsuperscript{273} this activity is being led by out-of-state developers who are not counting on government funded tax credit programs. In fact, these developers are often bypassing millions of dollars worth of tax credits offered in through the Gulf Opportunity Zone Act and through Louisiana’s

\textsuperscript{267} Indeed, one private study which analyzed how property owners might have “rationally” responded to the Baker Bill predicted that owners of 131,000 housing units out of a total of 166,000 units in the five parishes most severely affected by Hurricane Katrina would have accepted the LRC’s buy-out offers. Gerson Lehrman Group, \textit{Rebuilding after Katrina: An Assessment pf H.R. 4100, “The Louisiana Recovery Corporation Act,”} 8 (March 27, 2006).

\textsuperscript{268} See H.R. 4100, supra note 252, § 106(h) (outlining buyout option); Id. § 102(e) (prohibiting use of eminent domain).

\textsuperscript{269} Id. § 106(d) & (e).

\textsuperscript{270} See Road Home Update, supra note 240, at 1 & 11-12, discussed infra notes 293-295.

\textsuperscript{271} See supra note 251.


Piggyback program because the projects have become extremely difficult to finance under the current incentive structures. The problem is that just as dramatic property insurance and construction cost increases are adding significantly to project costs, the long-term obligations imposed to keep rents affordable for a sizable portion of tenants in order to obtain the tax credits makes it impossible for developers to anticipate even modest profit margins unless they can be assured that median incomes in the area will rise steadily in the future. 274 Compounding this profitability squeeze are concerns about theft of building materials, fears of higher utility rates and property taxes escalating to compensate for smaller population bases, not to mention rising political opposition in middle class constituencies to locating these projects in areas where large parcels exist and where they previously were found—New Orleans East—in the name of not “concentrating poverty.” 275

One element of the Gulf Opportunity Zone Act, however, is spurring large scale private development in the region’s housing stock—the prospect that developers may write off 50% of the cost of their projects from income taxes in the year of completion if they are able to complete them by the end of 2008. 276 Unlike the original pre-Katrina owners who are prevented from using this “bonus depreciation” because of their receipt of insurance proceeds, new out of state developers, who are buying up damaged apartment complexes in New Orleans East and elsewhere, can take advantage of the market opportunity created by the housing shortage and by the bonus depreciation because they tend to have lots of cash, strong relationships with national lenders, large out of town construction teams that can be mobilized for work on projects and, most significantly, own enough property spread across the country that they can bargain for affordable property insurance premiums. 277 Some brokers estimate that between 3500 and 7000 apartment units could be rebuilt by these developers chasing the bonus depreciation or simply the market opportunity created by the rental housing shortage. 278

What this shows us is that there may be limited utility in the government orchestrated tax-credit incentive programs that link the availability of tax advantages to commitments to achieve the otherwise laudable goal of creating affordable housing. 279

274 Id. (reporting that due to property insurance costs no more than 1000 apartments are being renovated using tax credits in New Orleans East); Rebecca Mowbray, High Costs Threaten Housing Plans, THE TIMES-PICAYUNE (New Orleans) Jan. 16, 2007) at A1 (illustrating insurance and construction cost and profit margin squeeze because of rental caps for entire region).
276 26 U.S.C.A. § 1400M(d) (Supp. 2006); Novogradac, supra note 272, at 176.
277 Thomas, supra note 273.
278 Greg Thomas, Many Apartments Slated for Comeback, THE TIMES-PICAYUNE (New Orleans) Sept. 28, 2006 (reporting that of the approximately 7000 apartment units in eastern New Orleans prior to Katrina, 2600 are already under renovation and 4700 units are slated for renovation by private investors).
What may work better and lead to positive economies of scale in creating affordable housing are simpler tax incentives that allow developers more freedom to respond to market opportunities or, even more simply, direct government investment in building public housing.

d. Compensation versus Incentive Models—Facilitating Entrance and Exit for Homeowners

One of the most important criteria for assessing how any property regime responds to an event of radical change is how well it facilitates participants’ ability to both enter and exit from a property relationship. Application of this criterion to the major post-Katrina homeowner assistance programs produces several important insights. Recall that the major homeowner programs launched so far—Mississippi’s Phase I and II programs and Louisiana’s Road Home—are designed with different objectives in mind. Mississippi has chosen to employ a compensation model by offering eligible homeowners grants to compensate for uninsured losses with few strings attached.280 Louisiana, on the other hand, has chosen an incentive model that offers a substantially larger grant to homeowners who opt to rebuild their homes or buy new ones in state and plans to enforce this structure by requiring homeowners who choose these options to sign three-year owner occupancy covenants.281 This basic design contrast highlights several policy problems and issues.

First, it is uncertain whether Louisiana’s owner occupancy covenants are even enforceable against the immovable property itself as “running covenants.” Because the Louisiana Civil Code generally does not permit enforcement of servitudes that restrict what an owner can do with his or her immovable property except in limited circumstances—when there is a dominant estate whose owner can enforce the restriction,282 when there is a scheme of interlocking building restrictions in a common interest community or planned development,283 or for conservation purposes284—the LRA’s owner occupancy covenant will not be a “covenant running with the land” as it would like to pretend, and instead may only be enforceable against the grant recipients personally or against transferees who voluntarily agree to assume this obligation.285

Second, even assuming this owner occupancy covenant is meaningfully enforceable, enforcing it against a homeowner or a subsequent buyer who rents out the home during the three year period (or puts it to some other valuable economic use) may

utility of tax incentive structures as economic development tools unless combined with direct grants and coordinated public-private partnerships and local planning).

280 Supra notes 226-32 & 247-50 and accompanying text.

281 Supra notes 233-239 and accompanying text.

282 LA. CIV. CODE ANN. arts. 646 & 647 (West 1980) (a predial servitudes must benefit a dominant estate). See also LA. CIV. CODE ANN. arts. 639 & 640 (West 1980) (a personal servitude of right of use, the equivalent of a common law easement in gross, “may confer only an advantage that may be established with a predial servitude.”) (emphasis added).

283 LA. CIV. CODE ANN. arts. 775, 776 & 778 (West 1980).


285 This likelihood is recognized in the actual covenant form created by First American Title. Supra note 262, paragraph 1.
well be counter productive, especially as this homeowner is simply responding to the heightened demand for rental housing. By penalizing this opportunistic and socially constructive market choice, Louisiana’ officials seem determined to recreate communities’ pre-storm economic and social structures in a way that frustrates the goal of helping displaced homeowners and renters adapt to changed circumstances and return to areas like New Orleans.

Third, the manner in which the LRA is implementing its 40% move-away penalty raises a host of discrimination concerns. Because the LRA has chosen to exempt homeowners who are 65 and older from the penalty, the program might well violate age discrimination provisions in both the Community Development Block Grant Act and the Stafford Act. In fact, FEMA’s concern about age discrimination in relation to this senior citizen preference is reportedly already delaying Louisiana’s receipt of an expected $1.2 billion in federal hazard mitigation funds that could be used to pay for grants to homeowners who prefer to sell their properties. In recognition that disabled homeowners might have compelling reasons not to commit to buy another home in state, the LRA has recently announced that this group might also be exempted from the move-away penalty. Although this recognition is laudable, many others who are not technically disabled but still have compelling reasons to move may still be unfairly penalized. Finally, because of the peculiar way the LRA is calculating the move-away penalty—by deducting the penalty off the top from a home’s pre-storm value (or the cost to replace or repair the home) and not after insurance proceeds are deducted—the penalty drastically reduces the grant awards of Louisiana homeowners who were partially but not fully insured, compared to those who were completely uninsured. This mathematical quirk bizarrely penalizes those who paid for some insurance more than those who completely avoided this precautionary cost. In short, all of this raises serious doubts about the fairness of the Road Home’s incentive structure.

Finally, two inter-related efficiency questions about the Road Home’s incentive structure should be addressed. First, is the program’s exit penalty feature (which the program’s designers might label a re-entrance incentive) really worth the extra administrative complexity and discriminatory effects it entails? And, second, is the program’s multiple option structure exacerbating the massive collective action dilemma that already plagues the region or is it is encouraging most Louisiana homeowners to remain or return to their communities? Definitive answers will not be known for many years, but so far the data suggests that two trends are emerging. First, as previously reported, many

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... homeowners are in fact having a hard time deciding whether to stay in or recommit to the region. (Recall that among the 41,000 Road Home applicants who have received their grant calculations, only 21,000 have selected a benefit option.)

Although this low decision making rate may reflect that some applicants have not been awarded any benefits at all or that others are unhappy with the amount awarded and are now appealing the benefit calculation, it is clear that a substantial number homeowners are paralyzed with indecision, not sure which option to choose.

The second trend is more encouraging because it suggests that the Road Home applicants are in fact holding their ground and preserving their social, economic and cultural ties to the City of New Orleans or the Southeast Louisiana region as they make their actual grant selection decisions. Among the more than 21,000 eligible homeowners who have actually been notified of their grant award amount and selected their benefit option, 84.6% have chosen option 1 (rebuild), 12.8% option 2 (to buy a new home elsewhere in Louisiana), and only 2.6% option 3 (a unconditional buy-out with no option to remain in Louisiana).

In the City of New Orleans, where particularly strong ties of nativity, culture and community exist, the percentage of homeowners notified of their grant award who have chosen option 1 (rebuild) is even higher at 86.8% than the state wide figure, and an additional 10% have chosen option 2, leaving only 3% taking option 3.

The only area where we see a different pattern is in heavily flood damaged St. Bernard Parish where only 53% of notified homeowners have chosen option 1, and the rest have chosen one of the two buy-out options (the vast majority of these choosing option 2).

Although these statistics could still change as the Road Home program matures, for now they could be explained in several ways. On one hand, they may well indicate that the Road Home’s incentive structure is working as designed by rewarding re-entrance as opposed to exit. Alternatively, they may simply prove that Louisiana homeowners (and New Orleans area ones in particular) are stubbornly determined to remain in the region or are facing other less quantifiable exit costs that are impelling them to plan to remain. If this second explanation is true, then the complex incentive structure Louisiana created was unnecessary because most of its eligible homeowners would have stayed anyway, or worse, may only have created unfair discrimination, produced agonizing indecision for some, and harshly, and perhaps unlawfully, penalized others who had no choice but to exit their long term relationship with the city and its region.

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290 Road Home Update, supra note 240 at 1; Pipeline Report, supra note 240, 1 & 4.

291 See David Hammer, Indecision Clogging Road Home, THE TIMES PICAYUNE (New Orleans) Feb. 19, 2007, at A1 (reporting that of 12,529 fence sitters, three quarters had delayed a decision while they appealed or questioned an award); David Hammer, Policy Snarl Adds to Road Home Detours, THE TIMES PICAYUNE (New Orleans) Feb. 27, 2007, at A1 (reporting that among the 17,000 homeowners who have not yet selected a benefit option, 11,000 are challenging the amount awarded).

292 One report indicated that of 17,000 applicants who had been issued award letters and were not challenging their awards at the time, 5000 were “sitting on the fence,” uncertain of what action to take. Id.

293 Road Home Update, supra note 240, at 1.

294 Pipeline Report, supra note 240, at 25.

295 Id.
e. **Small Scale Landlord Assistance Programs—Will Buying Rent Caps with Incentive Grants and Loans Work?**

The next important program to consider is Louisiana’s Small Rental Property Program whose goal is to induce the once ubiquitous small landlords of the region to keep rents affordable to low and moderate income renters in exchange for zero interest loans that may be completely forgiven if the landlord complies with rent caps for a 10 year period. In short, it is program of induced or incentivized rent control.\(^{296}\) If landlords do sign up for the program in large numbers and build the 18,000 units the LRA anticipates, then the program’s designers will rightfully brag that they have avoided the alleged downside of coercive rent control programs—primarily reduced incentive for property owners to build new rental housing or maintain existing rental units.\(^{297}\) On the other hand, if the program falls flat and rents remain high, some critics will claim that traditional rent control should been implemented—at least temporarily—in the immediate period after Katrina. These critics might observe that rent control policies in the United States were initially created in response to emergency housing situations—particularly housing shortages resulting from World War I and II.\(^{298}\) They might also note that after Katrina and Rita the Louisiana legislature recognized that sometimes more invasive government intervention in residential real estate markets is justifiable when it explicitly permitted local governments to enact inclusionary zoning laws.\(^{299}\)

In the specific context of contemporary New Orleans, the LRA’s rental housing programs can be criticized from multiple perspectives. First, as one influential local think tank charged, by incorporating aggressive rent control incentives into both the LIHTC Piggyback Program and the Small Rental Repair Program (but especially the former), the LRA’s programs could convert more than 15,000 market rate units into government subsidized, rent-restricted units, and this would have the disastrous effect of further concentrating poverty, especially in the City of New Orleans where two thirds of these units would be located.\(^{300}\) To avoid this situation, LRA could have devoted more

\(^{296}\) See *supra* notes 242-245 and accompanying text.

\(^{297}\) See Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brook. L. Rev. 741, 767-70 (1988) (claiming that rent control statutes depress future total return on investments, reduce investment itself and exacerbate housing shortages and asserting that in absence of rent controls, housing markets respond quickly to supply and demand disequilibrium after disasters like the 1906 San Francisco earthquake); Anthony Downes, *Residential Rent Controls: An Evaluation* 1-2 (1988) (suggesting that rent control is only justifiable if demand for housing has risen sharply and construction of new housing units is legally restricted to conserve resources for some other purpose—e.g., a war effort—and these two conditions are expected to last for some time). *But see* Curtis J. Berger, *Home is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 Brook. L. Rev. 1239, 1246-47 (1989) (suggesting that empirical support for criticism of rent control is inconclusive because housing shortage is the condition that justifies imposition of rent control in the first place and because abandonment rates are often high in cities without rent control as well).


\(^{300}\) BGR Report, *supra* note 241, at 1 & 3.
resources to its Small Rental Repair Program and softened its rent restrictions. This strategy might have spurred rebuilding more quickly and efficiently in areas that already had plenty of small landlords and healthier mixed income populations because its subsidies are much less expensive per unit than the Piggyback program and thus could have been stretched farther and put to work faster.\(^{301}\)

At the same time, the LRA could be criticized for not investing enough resources in serving the needs of low to moderate income residents and especially in affordable rental housing programs.\(^{302}\) Recent statistics provided by the LRA partially refute this claim at least by demonstrating that 48% of homeowners who have selected their benefit options under the Road Home program have incomes in the low to moderate range and that 55% of all Road Home dollars are flowing to such homeowners.\(^{303}\) Although this suggests that many \textit{homeowners} in the hurricane affected areas lacked high incomes, it remains true that low to moderate income renters have yet to see significant relief from the Road Home program. Of course, the ultimate success of the Small Rental Repair Program will depend on how many small landlords sign up for the program and how many units actually get constructed that are reserved for low to moderate income residents. At this point it is too early to make any conclusive judgments.

f. Spreading Access to Property Ownership—Small Steps or Wasted Opportunities?

Another critique that can be made of all of these programs is the lack of focus on the task of turning renters into homeowners. This is surprising given that one of the most frequently cited statistics about New Orleans’ social vulnerability prior to Katrina was its low homeownership rate of 47% compared to a 67.9% rate across Louisiana, and \(\text{__}\) rate nationwide.\(^{304}\) Although the LRA has been criticized by Louisiana legislators and by policy analysts for not investing heavily in programs to assist renters in becoming homeowners,\(^{305}\) and although the benefits of homeownership in terms of economic independence, social stability and community and civic engagement have long been recognized by academics,\(^{306}\) the LRA still has only set aside $40-50 million for a first-time

\[^{301}\text{Id. at 4-5.}\]


\[^{303}\text{See Pipeline Report, \textit{supra} note 240, at 6.}\]


\[^{305}\text{Id; BGR Report, \textit{supra} note 241, at 5.}\]

\[^{306}\text{Hocket, \textit{supra} note 58, at 118; Mitchell, \textit{supra} note 54, at 532-544.}\]
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buyer program that has yet to be designed. Missippi, on the other hand, has indicated that it will develop a program to assist renters’ transition to home ownership and that it will allocate $117 million in tax exempt bonding authority to the Mississippi Home Corporation to issue mortgage revenue bonds which can be used to reduce home ownership acquisition costs by offering below market interest rates and assistance with closing costs.

Undoubtedly, there are many ways in which a homeownership access program might be designed. It might give renters grants to use for down payments. It might, as Mississippi appears to be doing, help them “buy down” interest rates to below market rates so that monthly mortgage payments become affordable to buyers with modest incomes. It might include training on how make budgets and how to live within them to enable potential homebuyers to improve their credit status. In fact, an ideal renter-homeowner conversion program would probably include all of these components. But so far the LRA has failed to address this subject in a meaningful way. This is unfortunate because, as we saw in the previous sections of this article, although not free of risk or instability, mortgagor-mortgagee relationships have proven to be much more stable and resilient in the wake of an event of radically changed circumstances than landlord-tenant relationships.

The Humanity Test—Did We Focus on the Most Vulnerable First?

A final question to raise in evaluating all of government housing initiates is whether, in the words of Joseph Singer, we are taking adequate care of the most vulnerable, those who have come out on the losing end of society’s competition for resources and wealth. This is a difficult question to answer, of course, because defining who the most vulnerable members of society are in any given place and time is not a simple task. It might be answered by focusing on racial and ethnic minorities who have suffered from generations of discrimination. It might take into account persons with physical or mental disabilities. It might be answered by examining the needs of the elderly or of children, or of those without their own means of transportation. Indeed, for all of these populations, Katrina placed a spotlight on their vulnerability.
Yet in terms of property relationships, it is possible that the most vulnerable were the 5100 families who resided in New Orleans’ public housing projects prior to Katrina.\textsuperscript{312} As has been widely reported, these housing projects, which began to be constructed in the 1940’s, were afflicted with chronic problems, including the severe neglect and uninhabitability of at least 7500 units,\textsuperscript{313} highly concentrated poverty and unemployment, high crime rates and drug addiction.\textsuperscript{314} Their residents suffered from lack of access to quality public education and were undoubtedly deprived of other forms of social capital. And yet these housing projects were nonetheless home for these 5100 New Orleans families. Although Katrina spared a few of the projects, several of the largest projects were flooded and have remained largely closed ever since. At the moment, some 1200 to 1300 families have been allowed to repopulate a few of the projects, but apparently many more families would like to do so.\textsuperscript{315}

In June 2006, the federal Department of Housing and Urban Development, which had taken over the Housing Authority of New Orleans (HANO) in 2002 because of its chronic poor management, announced plans to demolish four of the city’s largest projects and construct low density, mixed income residential communities in their place to be financed largely by issuing low-income housing tax credits to private developers.\textsuperscript{316} This announcement immediately stirred intense controversy in New Orleans. Within two weeks, a federal class action lawsuit was filed on behalf of the former residents claiming that the projects’ structures only needed minor repairs to become habitable again.\textsuperscript{317} In addition, numerous protests have occurred at the projects, with former residents occasionally breaking into and occupying buildings to demonstrate that the apartments could be cleaned and repaired with little more than bleach and elbow grease and thus could once again provide very low cost housing to the city’s poorest residents.\textsuperscript{318} Historic preservation advocates also joined the battle, claiming that the projects’ historic structures

\begin{itemize}
\item\textsuperscript{312} Gwen Filosa, \textit{HANO Urged to Save Public Housing}, \textit{The Times Picayune} (New Orleans), Feb. 2, 2007. An additional 9000 families rented apartments in New Orleans with the assistance of Section 8 vouchers prior to Katrina. Gwen Filosa, \textit{Displaced Residents File Suit}, \textit{The Times Picayune} (New Orleans), June 28, 2006.
\item\textsuperscript{313} Id.
\item\textsuperscript{315} Filosa, \textit{HANO}, supra note 312.
\item\textsuperscript{316} The 169 page HANO/HUD draft plan is available at \texttt{http://www.hano.org/documents/annual-plan-draft-2007.pdf}. For excellent reporting on the proposed plan and the history of the projects, see generally Filosa, supra note 315; Gwen Filosa, \textit{HANO Ok’s Razing of 4 Housing Complexes}, \textit{The Times Picayune} (New Orleans), Dec. 8, 2006; Gwen Filosa, \textit{Demolition is Development’s Destiny}, \textit{The Times Picayune} (New Orleans), Oct. 18, 2006); Laura Maggi, \textit{A Grand Scheme For Reinventing Public Housing is in the Works, But Displaced Residents Want Action Now}, \textit{The Times Picayune} (New Orleans), Oct. 18, 2006.
\item\textsuperscript{317} Filosa, \textit{Displaced Residents}, supra note 312.

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were actually well constructed and, if properly refurbished, would be more valuable aesthetic assets for the city than the new, potentially less sturdy, smaller scale structures that HUD’s developers would build in their place.319

At this point, no one knows what will be the outcome of this intense dispute. In a recent summary judgment decision, the federal district court hearing the former residents’ lawsuit dismissed their claims seeking to block demolition of the structures as premature, dismissed racial discrimination claims finding that returning the residents to the projects would ironically have more of a discriminatory, re-segregating impact than HUD’s plans, and dismissed claims based on alleged violations of international law.320 The court, however, sustained the residents’ claims based (1) on alleged violations of the Fair Housing Act provision requiring HUD to administer “programs and activities relating to housing and urban development in a manner affirmatively to further the policies of the Act”,321 (2) constructive eviction under Louisiana law, (3) breach of contract, and (4) procedural due process under the U.S. Constitution.322 In effect, the court held that a trial will be necessary to decide the number of units that are presently habitable, the extent of repairs needed to render other units habitable, the number of tenants who wish to return and are able to return, and the merits of current HUD’ current program of providing section 8 rental assistance vouchers to former residents but which the residents claim are inadequate because of the shortage of housing in the area and the vouchers’ failure to cover non-rental costs such as utilities.323 Finally, Congress has now joined the fray with a bill that recently emerged from the U.S. House of Representatives Financial Services Committee and that would specifically require HUD to replace every public housing unit in New Orleans that it wants to demolish and would immediately require HUD to open 3000 public housing units in the city.324

In the end, it is hard to overestimate the symbolic significance of this dispute for property relationships in the wake of Hurricane Katrina. On one hand, one could praise HUD for seizing the opportunity of an event of radically changed circumstances to de-concentrate poverty and spread access to more healthy property relationships. Certainly the officials at HUD and some of the non-profit developers with whom it will collaborate on the redevelopment projects sincerely believe they are serving the public interest by breaking up these long under-financed, poorly maintained, and unsafe communities.325 On the other hand, as the fierce opposition and dramatic actions of the former residents demonstrates, the apartments in these much maligned projects were nevertheless homes

323 Id. at *13.
325 Filosa, Demolition, supra note 316.
and their occupants have powerful personhood attachments to the communities that developed, in spite of all odds, in their midst.\textsuperscript{326}

This article does not claim to have a solution to this dispute but simply suggests that most of the normative criteria developed in Part I should be considered in charting the future of this property relationship. Here HANO-HUD endeavored to make a quick decision to alter the resource at the heart of the relationship in the hope of spreading access to stable and socially enhancing forms of property ownership and de-concentrating poverty. But because it failed to make this decision in a democratic forum that sought consensus and largely ignored the personal attachments, social connections and experiences of the residents who were most directly affected, it has lost an opportunity to build trust and foster the kind of efficiency enhancing cooperation that can mark a more carefully constructed property regime. Similarly, HUD-HANO seems to have forgotten the importance of facilitating entrance for those affected by radical change as well as the goal of facilitating exit.

III. Conclusion

The goal of this article has been to assess how property relationships respond to events like Hurricane Katrina that produce radically changed circumstances. Some property relationships characterized by their relatively long or indefinite durations and by their largely voluntary origin—landlords and tenants in commercial leases and mortgagor-mortgagee relationships to be specific—tend to have features that allow them to fare surprisingly well under the pressure of an event of radically changed circumstances. The tendency for participants in these relationships to use private ordering to allocate preservation and repair responsibilities even in the face of ambiguous or unfavorable default rules, to assure that external financial resources are available to support rebuilding activities, to spread risk and to compromise, forbear and accommodate each other’s needs in an effort to preserve long-term interdependence accounts for their surprising resiliency in the face of radical change.

Relationships that are shorter and more finite in duration and that are more marked by involuntariness—between a residential landlord and tenant in a community with relatively scare rental housing—present greater perils, at least for the weaker party. Although default rules might at first glance seem reasonably well designed to protect the more vulnerable party (the contemporary urban renter), closer examination reveals that these default rules often fail to provide this vulnerable party with the ability to preserve an interest in a valuable resource. We have also discovered that the relationship between a city and its citizens can be conceived of as a particularly “sticky” (that is, relatively involuntary and long-term) one if its citizens have strong ties of nativity and culture to a particular place such as New Orleans.

\footnote{\textsuperscript{326} See e.g., David Hammer, Housing Agencies Sue to Remove Protestors, \textsc{The Times Picayune} (New Orleans), Jan. 23, 2007 (quoting a protest organizer at the St. Bernard project whose family has lived there for generations: “This is not the only thing that I know, but this is where I want to be, by choice. It’s where I feel safe at.”).}
Finally, when government programs are designed to rebuild a city or region that has suffered from an event of radically changed circumstances, policy makers might be wise to tailor their programs to conform with some of the normative insights that can be gleaned from this study of how traditional property relationships respond to events of radical change. Although it may be years before the property regimes and common resources that were threatened (and in some cases nearly extinguished) by Hurricane Katrina fully recover, the insights from this study should enrich our understanding of these relationships and help policy makers, legislators, judges and advocates endow them with greater resiliency in the face of future events of radical change.