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## Overcoming Another Tragedy in New Orleans: Rebuilding in the Wake of "Kelo" and Act No. 851

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# Overcoming Another Tragedy in New Orleans: Rebuilding in the Wake of *Kelo* and Act No. 851

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## I. INTRODUCTION

*The questions are simple. Do you want to better protect the property rights of private citizens in Louisiana? Do you want to make sure government can no longer take your home for industrial development purposes? Do you want to ensure those protections in our state constitution? . . . Voters in Louisiana have an opportunity to take an important step to ensure property-rights protections in the expropriation debate. I urge them to step up and act. It is act now or leave the expropriation issue to be decided by the courts or future unknown legislation. Do you really want to risk that?*

*Senator Joe McPherson<sup>1</sup>  
Louisiana Senate District 29*

During Hurricanes Katrina and Rita, thousands of Gulf Coast residents lost their homes, their possessions, their savings, and some, their lives. Those states hit hardest by the hurricanes have struggled to recover. In places like New Orleans, where hundreds of thousands of residents evacuated and may never return, uncertainty regarding the future of private property has become a fact of life. As the excerpt from Senator McPherson's letter indicates, arguably the single most critical question facing local and state governments trying to rebuild the devastated coast is how to encourage use of abandoned properties to spark the economy.

Michael A. Heller explores this question in an article that analyzes historical situations in which property has gone underused for long periods of time.<sup>2</sup> American property law supports an owner's right to subdivide ownership in her property. According to Heller, however, beneath this seemingly free ability to divide ownership lies a subtle property law doctrine that prevents and abolishes excessive

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1. Joe McPherson, Letter to the Editor, *Pass Amendment on Property Rights*, ADVOCATE (Baton Rouge), Sept. 28, 2006, at B10.

2. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

fragmentation and thus ensures that owners have the ability to put property to its most productive use.<sup>3</sup> Heller elaborated on these general anti-fragmentation ideas with a theory he called the “tragedy of the anticommons.”<sup>4</sup>

The tragedy of the anticommons is often described by comparison to the tragedy of the commons.<sup>5</sup> In a commons, “multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude another.”<sup>6</sup> When a commons is created, the given resource is prone to overuse because all parties have unlimited access to it.<sup>7</sup> Anticommons property represents the mirror image of commons property; it is “a property regime in which multiple owners hold effective rights of exclusion in a scarce resource.”<sup>8</sup> In an anticommons, the given resource is prone to underuse because owners typically exercise their exclusionary rights and prevent others from using the land.<sup>9</sup> The so-called tragedy of the anticommons occurs when the resource is under-consumed relative to the social optimum.<sup>10</sup> Overcoming an existing tragedy of the anticommons requires bundling property rights, through either government or markets, into the hands of a smaller number of parties who will not prevent one another from using the property.<sup>11</sup>

Heller’s theory deserves more attention in light of recent developments in constitutional law and the unique challenges facing governments and property owners in Louisiana after Hurricanes Katrina and Rita. In 2005, the Supreme Court released a controversial opinion in *Kelo v. City of New London* that arguably extended the government’s already broad authority to take private property under its eminent domain power provided by the Fifth Amendment.<sup>12</sup> The majority opinion, written by Justice Stevens,

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3. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1165 (1999) (“Hidden within the law, however, is a boundary principle that limits the right to subdivide private property into wasteful fragments.”).

4. *Id.* at 1170-72.

5. Heller, *supra* note 2, at 622. See generally Garrett Hardin, *The Tragedy of the Commons*, 168 SCIENCE 1243, 1244 (1968) (introducing the concept of the “tragedy of the commons”).

6. Heller, *supra* note 2, at 622.

7. *Id.*

8. *Id.* at 668.

9. *Id.* at 624.

10. *Id.* at 677.

11. *Id.* at 640.

12. 545 U.S. 469 (2005); see U.S. CONST. amend. V (“[P]rivate property [shall not] be taken for public use, without just compensation.”). *Kelo* remains the authoritative case on eminent domain, as the Court recently denied a petition for writ of certiorari in another takings clause case. *Didden v. Village of Port Chester*, 173 F. App’x 931 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007). For a general discussion of eminent domain, see BLACK’S LAW DICTIONARY 562 (8th

defined “public use” to allow governments to take property from individuals and sell it to private owners who intend to build hotels, restaurants, and retail and office space on the property.<sup>13</sup> Claiming that the Court had long rejected a literal definition of “public use,” the majority suggested that a taking for any “public purpose” satisfies the Fifth Amendment.<sup>14</sup> In dissent, Justice O’Connor claimed that *Kelo* eviscerated constitutional protections by permitting a government to take property and transfer it to another private owner so long as that government thought that the second owner would put it to a use more beneficial to the community.<sup>15</sup>

Fearing that *Kelo* gave state and local governments too much discretion to take property whenever they so desired, Louisiana passed an amendment to its state constitution that prohibited governments from taking property “for predominant use by any private person or entity” or “for transfer of ownership to any private person or entity” in the fall of 2006.<sup>16</sup> Although the amendment provides some exceptions to the aforementioned rule, it is clearly “part of a national backlash against the outrageous *Kelo* decision.”<sup>17</sup> Louisiana was the first of thirteen states in the fall of 2006 to vote on an amendment to its state constitution that would limit a government’s ability to use eminent domain to take property purely for the purpose of economic development,<sup>18</sup> just as had been contemplated in areas of New Orleans such as the Ninth Ward.<sup>19</sup> As of January 2007, thirty-four states had passed legislation similar to Louisiana’s amendment.<sup>20</sup>

The Louisiana amendment passed by a much smaller margin than many expected, with fifty-five percent voting in favor and forty-five percent opposed.<sup>21</sup> Some believe that the vote was close, not because voters opposed limiting the government’s eminent domain

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ed. 2004), which defines eminent domain (also called “condemnation” or “expropriation”) as “[t]he inherent power of a governmental entity to take privately owned property . . . and convert it to public use, subject to reasonable compensation for the taking.”

13. *Kelo*, 545 U.S. at 474, 480-86.

14. *Id.* at 480.

15. *Id.* at 494 (O’Connor, J., dissenting).

16. LA. CONST. art. I, § 4 (amended 2006).

17. John Kramer & Lisa Knepper, *Louisiana Ratifies Eminent Domain Reform*, CASTLE COALITION, Oct. 4, 2006, [http://www.castlecoalition.org/media/releases/10\\_4\\_06pr.html](http://www.castlecoalition.org/media/releases/10_4_06pr.html).

18. *Id.*; Mark Ballard, *Property Proposal’s Supporters Claim Radio Turned Tide*, ADVOCATE (Baton Rouge), Oct. 2, 2006, at A4.

19. Shaheen Pasha, *Property Grabs and the Gulf*, CNN/MONEY, Oct. 5, 2005, [http://money.cnn.com/2005/10/05/news/economy/eminent\\_domain\\_katrina/index.htm](http://money.cnn.com/2005/10/05/news/economy/eminent_domain_katrina/index.htm).

20. Linda Greenhouse, *Justices Decline to Take Up New Eminent Domain Case*, N.Y. TIMES, Jan. 17, 2007, at A16.

21. Ballard, *supra* note 18.

powers, but out of fear that the proposed amendment's convoluted language would actually *expand* the government's ability to take property.<sup>22</sup>

This note analyzes how both *Kelo* and the Louisiana constitutional amendment relate to Heller's theory of the tragedy of the anticommons and explains why Heller's proffered solutions are not the answer for New Orleans, where the underuse of abandoned private property has inhibited the city's recovery from Hurricanes Katrina and Rita. Part II provides a detailed explanation of Heller's theory, the *Kelo* decision, and the Louisiana amendment. Part III clarifies why parts of post-Katrina and Rita New Orleans meet Heller's definition of an anticommons and proposes that *Kelo* offered the government an opportunity to overcome the tragedy. It then evaluates the Louisiana amendment from Heller's perspective to explain why it will likely hinder economic development in New Orleans and identifies some of the shortcomings of Heller's theory so as to explain the passage of the amendment. Part IV proposes alternative options for governments that want to encourage the use of property without employing the authority granted by *Kelo*. Importantly, unlike *Kelo*, the solutions offered in Part IV do not grant governments the authority to force citizens out of their homes against their will; instead, they provide the government with a means to enable individuals to overcome the tragedy by attacking the transaction costs that individuals typically encounter in trying to consolidate rights by themselves.

## II. BACKGROUND

Before analyzing the specific property issues associated with rebuilding New Orleans, one must fully understand the three principal sources undergirding this Note's analysis: Heller's article, in which he explains the tragedy of the anticommons,<sup>23</sup> the *Kelo* opinions,<sup>24</sup> and the Louisiana constitutional amendment passed in response to *Kelo*.<sup>25</sup> This Section provides a detailed description of each.

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22. See *id.* (describing campaign by attorney Paul Loy Hurd of Monroe in the three weeks preceding the vote as aimed at convincing Louisianans that the amendment was a "Trojan Horse" that would expand the government's eminent domain powers because of its vague language).

23. Heller, *supra* note 2.

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

25. LA. CONST. art. I, § 4 (amended 2006).

### A. Heller's Theory: The Tragedy of the Anticommons

Heller's theory of the anticommons has been cited as one of the principal justifications for takings by governments under the Fifth Amendment.<sup>26</sup> After describing the principles behind his theory, this Note presents examples of real-world anticommons property to clarify Heller's ideas and provide points of comparison for the current situation in New Orleans. The list of examples in this section is illustrative, but not exhaustive.<sup>27</sup>

#### 1. Heller's Definition of an Anticommons and His Hypothesis

Heller frames his tragedy of the anticommons theory as a foil to the tragedy of the commons.<sup>28</sup> In a commons, "multiple owners are each endowed with the privilege to use a given resource, and no one has the right to exclude another."<sup>29</sup> When a commons is created, the given resource is prone to overuse; examples include depleted fisheries and overgrazed fields.<sup>30</sup> The mirror image of commons property, anticommons property is a regime in which multiple owners hold effective rights of *exclusion* in a scarce resource.<sup>31</sup> Unlike the previous attempts to define an anticommons, Heller's definition recognizes that significant exclusion often has the same detrimental effects on society as does total exclusion.<sup>32</sup> According to Heller:

A tragedy of the anticommons can occur when too many individuals have rights of exclusion in a scarce resource. The tragedy is that rational individuals, acting

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26. See, e.g., Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 533 n.4 (citing Heller's article as one of "[a] number of recent articles [that has] been distinguished by their excellence and the importance of their contributions to the revival of property").

27. Heller, *supra* note 2, at 682-86 (including as examples, in addition to those mentioned later in this section, the Quaker Oats Big Inch Land Giveaway and Fractionation of Native American Allotted Lands); see also Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 700 (1998) (also including patent and copyright as potential examples).

28. For a general discussion of the tragedy of the commons, see Hardin, *supra* note 5.

29. Heller, *supra* note 2, at 622.

30. *Id.*

31. *Id.* at 668; see *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (asserting that the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property"); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 22-23 (1913) (characterizing property as legal relations between and among legal subjects); Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1055-56 (1989) (noting that the concept of property has changed from a theory of "thing ownership" to that of a "bundle of sticks").

32. See Heller, *supra* note 2, at 667-69 (explaining that the previous definitions of Michelman, Dukeminier, and Krier, which claimed an anticommons existed only when all owners possessed rights to exclude all others, prevented those scholars from identifying a real-world anticommons).

separately, may collectively waste the resource by underconsuming it compared with a social optimum.<sup>33</sup>

Because any individual has the power to exclude all others from the property in an anticommons, putting that property to use requires unanimous consent among owners. Such unanimity usually proves difficult to attain; thus, resources either go under-used or go to waste entirely.<sup>34</sup> In modern society, transaction costs and other factors make it less likely that parties will acquire the exclusionary rights of others; as a result, the tragedy of the anticommons is difficult for both individuals and governments to overcome.<sup>35</sup> The next section of this Note explores overcoming the tragedy in greater detail.

Perhaps Heller's description of the Moscow storefront best exemplifies the tragedy of the anticommons. Many Moscow storefronts remain unoccupied years after the Soviet Union's collapse.<sup>36</sup> Under the socialist regime, all property belonged to "the people as a whole," and as such, socialist law did not delineate physical and legal boundaries of private property.<sup>37</sup> Although storefronts were privatized after the Soviet Union collapsed in the early 1990s, and the transition to markets began, most remain empty.<sup>38</sup>

Heller explains this phenomenon by characterizing the storefronts as anticommons property—property in which multiple owners hold rights of exclusion in a scarce resource.<sup>39</sup> During the process of privatization in Russia, the new legal regime ratified some existing socialist and informal use rights while superimposing a new set of market ownership rights.<sup>40</sup> Put simply, these stores remained empty because during this transition different parties, including local, regional, and federal authorities, as well as private citizens, gained the right to exclude one another from the same piece of property.<sup>41</sup> Because more than one individual possessed exclusionary rights, any potential use of the storefront required the unanimous consent of numerous parties. In practice, obtaining such consent proved virtually impossible because, in the rare instances where the parties could be

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33. *Id.* at 677.

34. *Id.*

35. *See id.* at 625-26 ("Neither [a commons nor an anticommons] would be tragic in a theoretical world of costless transactions, because people could trade their initial endowments until resources were put to their highest-valued uses. . . . [In practice], however, efficient bargains fail because transaction costs, strategic behaviors, and cognitive biases defeat informal negotiations, and communities of owners are not close-knit.").

36. *Id.* at 622-23.

37. *Id.* at 629.

38. *Id.* at 633.

39. *Id.* at 623.

40. *Id.* at 637.

41. *Id.* at 635-38.



congregated, each party thought it could put the property to its most productive use.<sup>42</sup> Thus, disagreement among owners prevented property use and the tragedy of the anticommons occurred in the storefronts.<sup>43</sup>

Post-earthquake Kobe, Japan also exemplifies the tragedy of the anticommons. Reconstruction of Kobe has proven difficult because, in the mid-20<sup>th</sup> century, the Japanese government created an anticommons regime by subdividing property to the point where a building could be placed on a plot that consisted of dozens of smaller parcels, each about the size of a "U.S. garage."<sup>44</sup> Seventy percent of Kobe's buildings have not been rebuilt since an earthquake destroyed the city in 1995 because rebuilding requires the cooperation of several landowners and such cooperation does not exist.<sup>45</sup>

## 2. Overcoming the Tragedy

According to Heller, "avoid[ing] anticommons property is one element that may determine whether countries progress to First World prosperity or spiral downward to Third World despond."<sup>46</sup> So how does a society avoid creating an anticommons? For newly formed societies or newly inhabited properties, Heller argues that useable private property emerges less successfully from resources that begin with divided ownership than from resources that begin with a single owner holding the traditional bundle of legal rights.<sup>47</sup> However, the word "begin" limits the hypothesis's usefulness in solving modern crises in our country; most properties have experienced some form of ownership for hundreds of years. In other words, this opportunity to "start" with bundled land and rights has already been lost.

More interesting is the issue pertinent to rebuilding New Orleans: how best to overcome a tragedy of the anticommons once it exists. Heller leaves that question mostly unresolved by explaining what needs to happen without offering a viable solution. He explains that to overcome an existing anticommons, a society must transition to a private property regime that better aligns each owner's interest with efficient use by forcing the private property owner to face the full

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42. *Id.* at 639.

43. *Id.*

44. *Id.* at 684-85.

45. *See id.* ("In one block of Kobe, over 300 renters, lessees, landowners, and subletters own often-overlapping claims, and each one must agree before rebuilding can go forward. . . . [S]everal years after the Kobe earthquake, seven out of ten buildings remain damaged or in rubble; rebuilding plans are set, but are blocked by owners.")

46. *Id.* at 659.

47. *Id.* at 631.

cost of underconsumption.<sup>48</sup> This transition occurs by consolidating rights into a useable bundle in the hands of a single owner.<sup>49</sup>

In theory, such a consolidation of rights can occur through markets or through governments.<sup>50</sup> By the market route, a property bundler acquires each right from its current holder either legally or illegally, by means such as purchasing.<sup>51</sup> By the government route, governments intervene to redefine and reallocate property rights among individuals by means such as expropriation.<sup>52</sup>

In practice, transitioning to a society in which one owner faces the full cost of underconsumption is difficult. Anticommons property would not be tragic in a world of costless transactions because individuals would trade their initial endowments until resources were in the hands of those who would put them to their highest-valued use.<sup>53</sup> The market route fails in the real world, however, because individuals bargaining for the exchange of resources act inefficiently as a result of transaction costs, strategic behaviors, and cognitive biases.<sup>54</sup> Similarly, governments struggle to overcome the tragedy because it is difficult to calculate compensation and they fear demoralizing potential investors.<sup>55</sup> Heller concludes his description of the anticommons by posing the ultimate question that this Note hopes to answer: "What is to be done?"<sup>56</sup>

Heller applies his theories of how a society can overcome the tragedy of the anticommons to his Moscow storefront example.<sup>57</sup> Converting the storefront from anticommons to useable private property requires transitioning from multiple owners, each exercising a right of exclusion, to a sole decision-maker, who controls an entire bundle of rights.<sup>58</sup> To have useable private property in a storefront, "a

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48. *Id.* at 678.

49. *Id.* at 640.

50. *Id.*

51. *Id.* at 640-41 ("In a legal transaction, a property bundler would buy each right from its holder through formal, enforceable contracts. In the storefront example . . . negotiations may only be possible through informal or corrupt channels. Over time, these corrupt channels can be routinized and may replace legal transactions.").

52. *Id.* at 641.

53. *Id.* at 625.

54. *Id.* at 625-26.

55. *Id.* at 679.

56. *Id.*

57. *Id.* at 641; *see also* Christopher Stadnick, Standard Setting Organizations: Answer to the Tragedy of the Anticommons? 4-5 (Nov. 12, 2002) (unpublished paper), available at [http://www.law.upenn.edu/fac/pwagner/ideas/stadnick\\_paper.pdf](http://www.law.upenn.edu/fac/pwagner/ideas/stadnick_paper.pdf) (applying Heller's theories to the semiconductor industry: noting that under certain circumstances industry standard setting can be a solution to the anticommons tragedy and indicating the ability of the semiconductor industry to reduce transaction costs and facilitate licensing).

58. Heller, *supra* note 2, at 640.

sole owner must in principle be able to sell or lease the property, receive the revenue from the sale or lease, occupy the premises, and determine how a lessee may use the property.”<sup>59</sup>

In theory, markets or governments could overcome the tragedy in Moscow by consolidating rights into one owner.<sup>60</sup> Heller explains the market solution by contrasting the empty storefronts to the flourishing metal kiosks established by entrepreneurs.<sup>61</sup> Unlike the storefront operators, kiosk owners avoided the tragedy of the anticommons by acquiring a full bundle of rights to their property through bribery of government officials and the local mafia.<sup>62</sup> This was possible because the kiosk owners faced significantly fewer transaction costs than the storeowners—they needed to bribe only a limited number of officials and an easily identifiable criminal organization.<sup>63</sup> The storefront owners, conversely, needed to bargain with countless, likely unidentifiable, co-owners.<sup>64</sup> Lower transaction costs are the primary reason that kiosk owners escaped the tragedy while store owners did not.<sup>65</sup>

In addition to economic transaction costs, Heller explores the problems created by history and culture. Although such problems could affect a property regime anywhere, Heller analyzes their consequences on the anticommons tragedy in Kobe, Japan. Kobe faces more than economic transaction costs in trying to overcome its tragedy; it also faces a set of historical and cultural constraints on local government intervention.<sup>66</sup> Japanese authorities frequently decline to seize property because of the nation’s “preference for harmony and consensus.”<sup>67</sup> The Kobe example shows that overcoming the tragedy often requires resolving more than economic issues.

Heller’s examples illustrate that, no matter how a tragedy of the anticommons came into existence, overcoming it proves difficult in practice. In Moscow’s storefronts and in Kobe’s streets, the tragedy lives on. Only in the kiosks did property owners overcome the tragedy and put their property to its most efficient use. Distinguishing

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59. *Id.*

60. *Id.*

61. *Id.* at 633, 642-47.

62. *Id.* at 642-43.

63. *Id.* at 643.

64. *Id.*

65. *See id.* at 654-58 (claiming that the five factors affecting transaction costs—namely the type of anticommons owner, the number of anticommons owners, the boundary of the anticommons, the spatial or legal nature of the anticommons, and the starting point in transition—are all at comparatively high levels among storefront owners).

66. *Id.* at 684-85.

67. *Id.* at 685 (quoting Jathon Sapsford, *Building Blocked: Quake-Hobbled Kobe Shows How Land Law Can Paralyze Japan*, WALL ST. J., Dec. 12, 1996, at A1).

between the examples in which the tragedy lingers and the one in which it was overcome will be critical when assessing the current situation in New Orleans.

*B. Kelo v. City of New London: Allowing the Government to Address the Tragedy*

The *Kelo* decision, rendered in August 2005, conferred significant power upon governments to take property by eminent domain.<sup>68</sup> This controversial decision, handed down just a month before Hurricane Katrina hit the Gulf Coast, gave governments the discretion to take private property and reassign it to an owner willing and able to put it to its “socially optimal” use.

1. The Factual Background

In 2000, the city of New London, Connecticut approved a development plan that it hoped would create more than 1,000 jobs, increase tax revenues, and boost its struggling economy.<sup>69</sup> Reports showed that New London was an “[economically] distressed municipality,” its unemployment rate was nearly double that of Connecticut as a whole, and its population was at its lowest point since 1920.<sup>70</sup> After buying much of the property required for the plan from willing sellers, the developer proposed that the government complete the plan by assembling land from unwilling sellers through eminent domain.<sup>71</sup> The city approved this proposal, allowing the New London Development Corporation (“NLDC”), a nonprofit entity established to plan economic development, to acquire property by exercising eminent domain in the city’s name.<sup>72</sup>

The area on which the economic developments were to take place included roughly 115 privately owned properties.<sup>73</sup> The nine plaintiffs, also known as the “unwilling sellers,” owned fifteen of the 115 parcels.<sup>74</sup> The plaintiffs’ properties were condemned only because they were situated in the development area—not because they were in poor condition.<sup>75</sup> Once acquired, the NLDC planned to convert the

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68. *Kelo v. City of New London*, 545 U.S. 469, 488-90 (2005).

69. *Id.* at 472.

70. *Id.* at 473; see also Avi Salzman, *Homeowners Shown the Door*, N.Y. TIMES, July 3, 2005, at 14CN (“[T]he city is poor. . . . [It] was declared a ‘distressed municipality’ in 1990.”).

71. *Kelo*, 545 U.S. at 472.

72. *Id.* at 472-75.

73. *Id.* at 474.

74. *Id.* at 475.

75. *Id.*

properties into restaurants, shops, businesses, residences, and a museum by leasing them to private developers in exchange for their agreement to use the land according to the terms of the development plan.<sup>76</sup>

## 2. Stevens' Majority Opinion

In the majority opinion, Justice Stevens stated that a government cannot take property from one private party and give it to another private party if the government's only reason for doing so is the transfer itself; however, a government can mandate such a transfer if it does so for future "use by the public."<sup>77</sup> In looking at the facts, Stevens first noted that the government did not take the properties only to benefit the private parties to whom it intended to transfer them.<sup>78</sup> He admitted, however, that the intended future use of these properties could not be considered "use by the public" because they would not be entirely open to the public.<sup>79</sup>

To resolve the tension between these observations, Stevens concluded that the Court had abandoned the "use by the public" test in favor of the more liberal "public purpose" test, which exudes deference to local and state governments.<sup>80</sup> The Court observed that "[t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including . . . new jobs and increased tax revenue."<sup>81</sup> These benefits constituted a "public purpose," and as such, the NLDC's taking of private property under the city's eminent domain power did not violate the Fifth Amendment.<sup>82</sup> Noting that economic development is a critical function of government and that the achievement of public good often coincides with the benefit of private parties, the Court

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76. *Id.* at 474, 476 n.4.

77. *Id.* at 477.

78. *Id.* at 477-78.

79. *Id.*

80. *See id.* at 479-80 ("[W]hen this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'" (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896))); *see also* Michael McKnight, *Don't Know What the Slide Rule is For: The Need for a Precise Definition of Public Purpose in North Carolina in the Wake of Kelo v. City of New London*, 28 CAMPBELL L. REV. 291, 305 (2006) ("The Court in *Kelo* rejected any judicial standard or definition of [public purpose or public use] in favor of complete legislative discretion."); G. David Mathues, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653, 1695 (2006) ("*Kelo* did not open the door to a Brave New World of unlimited eminent domain powers. At worst, it alerted the public to the breadth of an existing power. At best, it affirmed settled precedent.").

81. *Kelo*, 545 U.S. at 483.

82. *Id.* at 484.

rejected the plaintiffs' argument that economic development did not constitute a public use and blurred the line between public and private takings.<sup>83</sup>

### 3. O'Connor's Dissent

Justice O'Connor's dissent highlights the power that a liberal reading of the majority opinion confers upon state and local governments and, thus, *Kelo's* potential impact on the current situation in New Orleans. O'Connor claims that, following *Kelo*:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—*i.e.*, given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process.<sup>84</sup>

By claiming that the incidental public benefits that accompany the governmentally mandated transfer of property between private partes constitute a "public use," Justice O'Connor believed that the majority eliminated the Taking Clause's protections altogether.<sup>85</sup> Unlike previous cases where the Court upheld a private taking as constitutional, New London's takings did not directly achieve a public benefit because the plaintiffs' well-maintained homes did not cause any social harm.<sup>86</sup> Theoretically, under the majority opinion, a government could take any single-family dwelling and install a high-rise apartment complex in its place.<sup>87</sup> Indeed, virtually any use of real private property generates some incidental benefit to the public.<sup>88</sup> Justice O'Connor, like many other commentators, concluded that "the government now has license to transfer property from those with fewer resources to those with more."<sup>89</sup>

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83. *Id.* at 484-85, 486 n.14.

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

85. *Id.*; see Peter M. Agnetti, *Are You Still Master of Your Domain? Abuses of Economic Development Takings, and Michigan's Return to "Public Use" in County of Wayne v. Hathcock*, 79 ST. JOHN'S L. REV. 1259, 1261 (2005) ("As a result of *Kelo*, the states, through their own constitutional or statutory restraints, are now the sole protectors of private property owners from the threat of eminent domain exercised upon the rationale of economic development."); Haley W. Burton, Case Note, *Not So Fast: The Supreme Court's Overly Broad Public Use Ruling Condemns Private Property Rights with Surprising Results*, 6 WYO. L. REV. 255, 285 (2006) ("*Kelo* violated the property rights the government is meant to protect and gave the government nearly unlimited freedom of condemnation.").

86. *Kelo*, 545 U.S. at 519 (O'Connor, J., dissenting) (citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954)).

87. See *id.* at 501 ("[I]f predicted . . . positive side effects are enough to render transfer from one private party to another constitutional, then the words 'for public use' do not realistically exclude any takings, and thus do not exert any constraint on the eminent domain power.").

88. *Id.*

89. *Id.* at 505; see Kate Moran, *Amendment Limits Use of Expropriation Powers; Property Couldn't Be Taken for Developers*, TIMES-PICAYUNE (New Orleans), Sept. 27, 2006, at 1 ("The

*C. Louisiana's Response: Act No. 851*

In response to *Kelo*, Louisiana passed Act No. 851, an amendment to its state constitution, in the fall of 2006.<sup>90</sup> The amendment, an obvious attempt to cabin the wide authority granted by *Kelo*,<sup>91</sup> states that “property shall not be taken . . . by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.”<sup>92</sup> This language alone prohibits a sovereign from doing exactly what the local government did in *Kelo*. The amendment goes further, though, and expressly defines “public purpose” as used in § 4 of the Louisiana Constitution, which mirrors the Fifth Amendment to the federal Constitution.<sup>93</sup> Louisiana’s new definition of public purpose tracks the “public use” definition that Justice Stevens claimed was outdated, as the amendment limits public purpose to use for:

- (a) A general public right to a definite use of the property.
- (b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:
  - (i) Public buildings in which publicly funded services are administered, rendered, or provided.
  - (ii) Roads, bridges, waterways, access to public waters and lands, and other public transportation, access, and navigational systems available to the general public.
  - (iii) Drainage, flood control, levees, coastal and navigational protection and reclamation for the benefit of the public generally.
  - (iv) Parks, convention centers, museums, historical buildings and recreational facilities generally open to the public.
  - (v) Public utilities for the benefit of the public generally.
  - (vi) Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.
- (c) The removal of a threat to public health or safety caused by the existing use or disuse of the property.<sup>94</sup>

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*Kelo* ruling provoked a frenzy among property-rights advocates, who labeled it a watershed that left every homeowner vulnerable to the depredations of deep-pocketed developers.”); John Riley, *Land War Goes to High Court; Justices to Decide on Property Rights vs. Economic Development Issue*, ADVOCATE (Baton Rouge), May 15, 2005, at 6A (quoting petitioner *Kelo* as saying, “It has been a class issue from the start—we’re uneducated and poor, and it’s OK to do that to the poor.”).

90. LA. CONST. art. I, § 4 (amended 2006).

91. See Letter to Editor, *We Support Amendment 5*, ADVOCATE (Baton Rouge), Sept. 20, 2006, at B6 (“The proposed amendment . . . was written in response to the *Kelo* decision . . .”).

92. LA. CONST. art. II, § 4 (amended 2006).

93. U.S. CONST. amend. V; LA. CONST. art. I, § 4 (amended 2006).

94. LA. CONST. art. I, § 4 (amended 2006); *Kelo*, 545 U.S. at 479.

In a final attempt to limit the effects of *Kelo* in Louisiana, the amendment clarifies that “[n]either economic development, enhancement of tax revenue, or [sic] any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose . . . .”<sup>95</sup> Importantly, the specific arguments made by the New London government defending its taking in *Kelo* included economic development, enhancement of tax revenue, and other benefits that the dissent characterized as incidental.<sup>96</sup> The following section will show that, by responding in such a way to *Kelo*, Louisianans eliminated the possibility of government intervention to help New Orleans overcome its own tragedy of the anticommons.

### III. ANALYSIS

This section explores and synthesizes the relationships among the previously described anticommons theory, the *Kelo* case, and the Louisiana constitutional amendment and applies them to the post-hurricanes situation in New Orleans. More specifically, this section first explains why portions of New Orleans qualify as anticommons property. It then describes potential solutions to the city’s tragedy contemplated by Heller himself, including the outcome of *Kelo*. Finally, it clarifies the situation in Louisiana as it stands after the constitutional amendment.

#### *A. New Orleans as Anticommons Property*

Although there are notable differences between Heller’s anticommons examples and the New Orleans situation, the basic circumstances are the same. This section explains why parts of New Orleans meet Heller’s definition of anticommons property and then describes the uniqueness of the New Orleans situation, which in some ways clarifies Heller’s basic framework.

##### 1. New Orleans fits Heller’s Basic Definition of Anticommons Property

Parts of New Orleans qualify as anticommons property under Heller’s basic definition: a property regime in which multiple owners hold effective rights of exclusion in a scarce resource, causing the resource to be “underconsum[ed as] compared to the social

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95. LA. CONST. art. I, § 4 (amended 2006). The amendment makes other changes to § 4 of the Louisiana Constitution that are less relevant to this article. *Id.*

96. *Kelo*, 545 U.S. at 501 (O’Connor, J., dissenting).



optimum.”<sup>97</sup> A survey conducted in the fall of 2006 showed that New Orleans’s population remains roughly sixty percent lower than its pre-storm level.<sup>98</sup> An estimated 454,863 people lived in the city before the storm, whereas only 187,525 lived there in the fall of 2006.<sup>99</sup> Entrepreneurs have flocked to New Orleans to buy as much property as they can while demand and prices are low.<sup>100</sup> These individuals hope to develop their acquired property, encourage rebirth in the city, and sell after increasing the property’s value.<sup>101</sup> To promote this activity, the government demolished homes that were flooded beyond repair, hoping that clearing the land would incentivize new building thereon.<sup>102</sup> Nonetheless, redevelopment has been slow, at least in part because those who have the right to exclude these entrepreneurs from property have done so. Essentially, the immediate and unanticipated exodus of long-time residents from the city left some neighborhoods entirely vacant but still privately owned by former residents.<sup>103</sup> These landowners, though absent, possess exclusionary rights and can

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97. Heller, *supra* note 2, at 668, 677.

98. Adam Nossiter, *New Orleans Population is Reduced Nearly 60%*, N.Y. TIMES, Oct. 7, 2006, at A9.

99. *Id.*

100. See Karen Turni Bazile, *Recovery Forum Held in St. Bernard: Residents Blast Lack of Key Home Advice*, TIMES-PICAYUNE (New Orleans), Feb. 24, 2006, at 1 (describing the St. Bernard Citizens Recovery Committee’s plan to encourage growth by buying out destroyed homes and providing new house construction); Michelle Krupa, *Corps Offers Buyouts in Lakeview; Land Near Breach Used for Protection*, TIMES-PICAYUNE (New Orleans), May 28, 2006, at 1 (describing the outrage of homeowners whose land the Army Corps of Engineers targeted to buy and then use to provide more flood protection to the city); Allen Powell II, *Condo Project in the Works; Plan Also Features 204 Apartments*, TIMES-PICAYUNE (New Orleans), Feb. 25, 2006, at 1 (mentioning that Property One has accelerated its efforts to buy out Belle Promenade and redevelop it because it expects the housing market to “boom in the near future”); Editorial, *Redevelopment by Default?*, TIMES-PICAYUNE (New Orleans), June 11, 2006, at 6 (discussing the guidance needed by “people who’ve been bought out of flooded neighborhoods”); Molly Reid, *Filling in the Spaces: Developers Hope to Jumpstart Neighborhood Recovery By Building Multiple Homes*, TIMES-PICAYUNE (New Orleans), September 9, 2006, at 1 (claiming that the hope of making a profit is the driving force behind individual bargain-seekers, developers, and organizations who are buying up properties in New Orleans); Greg Thomas, *Home Prices Take Off After Katrina; Average Prices Up 21% Throughout N.O. Area*, TIMES-PICAYUNE (New Orleans), Feb. 19, 2006, at 1 (mentioning that investors are attempting to buy property that is ripe for rebuilding).

101. Kathleen M. Howley, *New Orleans House Flippers’ Reap Profit, Spur City’s Rebound*, June 22, 2006, <http://www.bloomberg.com/apps/news?pid=10000103&sid=aDJNcGOCW9rk&refer=us> (describing the thousands of homes in New Orleans that have already been “flipped,” i.e., bought cheaply after being damaged by the storm, repaired, and resold for a profit).

102. Michelle Krupa & Coleman Warner, *Across South, Displaced Chime In With Own Ideas for Rebuilding N.O.; But Residents Hesitate On the Tough Calls*, TIMES-PICAYUNE (New Orleans), December 3, 2006, at 1 (describing the city’s response to relocating those residents who have been bought out of their flooded-out neighborhoods as unorganized and ineffective).

103. William Douglas & Chris Adams, *President Accepts Blame in Big Easy: Bush Praises the City’s Progress and Pleads for its Previous Residents to Return*, ORLANDO SENTINEL, Aug. 30, 2006, at A10.

prevent entrepreneurs from buying their subplots and converting them into revenue-generating structures such as hotels, restaurants, and low-income housing.

Many neighborhoods in New Orleans meet Heller's definition of anticommons property because one property owner, often an evacuee, uses her exclusionary rights to prevent the entrepreneur who holds rights to the surrounding land from obtaining rights to the entire parcel and using the land to its full potential.<sup>104</sup> Similarly, just as evacuees prevent entrepreneurs from using the land, entrepreneurs exclude others from using the property by holding onto their accumulations in the hope of initiating a larger project once they secure the remaining parcels. As such, multiple owners, namely evacuees and entrepreneurs, possess exclusionary rights in the large parcel and prevent the use of the property.

In many respects, the situation in New Orleans is analogous to that in Kobe, Japan, where developers have not been able to obtain large enough parcels to use the property as they would like. Although the situation in Kobe involves smaller parcels than those at issue in New Orleans, the basic scenario is the same: owners exercise exclusionary rights to prevent others from using property, a scarce resource.<sup>105</sup>

Unlike in Heller's various examples in which the excluder exercised her rights because of express disagreement over how property should be used, the primary excluding property owner in New Orleans often uses this exclusionary right passively and sometimes unknowingly. Often the owner has relocated to a different city with no plans as to when or whether to return. Thus, a property owner who no longer lives in New Orleans and may never return can hamper the city's redevelopment and economic progress by being unavailable to sell, or agree to a use of, property. Hoping to gain control of the larger plot and initiate a grander money-making project, the party who owns the surrounding land must leave the already

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104. See Reid, *supra* note 100.

105. In some areas of New Orleans, plots are large enough to go to some use, such as a single residence, even if rights are not consolidated into an entrepreneur; in parts of New Orleans, however, such as the Ninth Ward, large parcels remain entirely deserted just as the smaller parcels did in Kobe. This note (and in particular its solutions) focuses on those deserted parcels that have been abandoned by evacuees. This distinction between Kobe and New Orleans is critical to analyzing the viability of the tax solutions offered later in this note. See *infra* text accompanying notes 146-50. While tax cuts or hikes would have no effect in Kobe because no owner has a large enough parcel to act unilaterally, that is not the case in New Orleans, where a scenario in which the law incentivizes multiple individuals to build on their smaller parcels would be welcome growth even if not as desirable as having a single owner control and build a larger structure.

acquired land undeveloped.<sup>106</sup> If a single owner could obtain a full bundle of rights to the entire property, that owner could put the property to its “socially optimal” use. Instead, several neighborhoods and whole portions of the city remain entirely deserted, and a tragedy of the anticommons persists.

## 2. Adapting Heller’s Theory to Apply it to New Orleans

It is necessary to adapt Heller’s definition of anticommons property to apply it to New Orleans because the New Orleans situation differs from his anticommons examples in three important ways. First, the potential rights bundlers in New Orleans have no rights in the smaller parcels currently owned by evacuees or holdouts. In Moscow and Kobe, several parties already possessed various rights in each of the smaller parcels going unused. In New Orleans, however, the entrepreneurs have rights only in those surrounding parcels they have already acquired. There is only one rights owner in the properties the entrepreneurs must acquire to put the larger parcel to its most efficient use. Therefore, the property in which multiple owners hold exclusionary rights is the larger parcel that the entrepreneur wants to buy, not the smaller, individual properties constituting that parcel. In this larger parcel, multiple owners, namely the entrepreneur and the evacuee, hold and exercise their exclusionary rights and prevent property from being used efficiently. Thus, although New Orleans is different from previous anticommons situations, it fits Heller’s basic definition of an anticommons.

Second, in New Orleans, unlike in Moscow and Kobe, individuals possess rights in parcels large enough to be put to some use even without the bundling of rights. It is possible for a holdout in New Orleans to use her individual plot of land in a socially desirable, if not socially optimal, way. In Moscow and Kobe, property goes wholly unused in the absence of bundling. The New Orleans situation nonetheless constitutes a tragedy of the anticommons because such an owner exercises exclusionary rights in the larger parcel and prevents an entrepreneur interested in constructing a revenue-generating structure on the plot from putting property to its most efficient use. Similarly, the entrepreneur excludes others from the larger plot in the hope that she will eventually use it in its entirety.

Third, in New Orleans, unlike in Moscow or Kobe, there is no clear majority view on how the property should be used; instead, the anticommons pits one owner’s interest against the interest of another owner or owners. The New Orleans situation proves that an

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106. *See supra* text accompanying note 104.

anticommons can be tragic even in the absence of a “majority” understanding of “socially optimal” use. In Heller’s examples, the majority of owners agree on a use for a piece of property, but a minority prevents the majority from putting the property to the use it desires.<sup>107</sup> Consider the Moscow storefronts, where several of the owners, such as the local and national government, might have an idea regarding the use of the storefront, but the individual owner of the store might disagree. The individual storeowner, even if in the minority, can block the majority from using the store as it desires. This would surely qualify as “tragic” because underconsumption occurs in the face of a widely desired use.<sup>108</sup>

Conversely, there is often no minority in New Orleans; instead, an evacuee or a holdout prevents an entrepreneur from using the property to its full potential.<sup>109</sup> This situation makes finding a workable solution more difficult than it would be in most anticommons situations because there is no “majority” for the law to favor. Taking a *Kelo*-like approach, the law could regard society as a whole as the majority, as it would like to see property put to its most economically beneficial use to encourage growth in the struggling city. Even this “society as a whole” approach is suspect, however, because putting the property to its most economically beneficial use would require ownership in the property to pass from one individual to another. This would require individuals still living in or contemplating returning to New Orleans, who have already endured indescribable hardship as a result of Hurricanes Katrina and Rita, to part with their property that survived the storms. It is at least arguable, based on the sanctity that our nation has given to property rights throughout its history, the inherently personal nature of property, and the irrationality of property holders,<sup>110</sup> that society would not favor this result. Indeed, it is little wonder that many property owners in New Orleans have refused to sell their property to developers who promise to use it for the benefit of society and equally unsurprising that such property owners have faced little pressure from society to do so.<sup>111</sup> Importantly,

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107. See generally Heller, *supra* note 2 (describing Moscow storefronts, the lands at issue in the Quaker Oats Big Inch Land Giveaway, post-earthquake Kobe, Japan, and certain Native American allotted lands as examples of the tragedy).

108. *Id.* at 639.

109. See *supra* text accompanying note 104.

110. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1484 (1998) (offering as an example of the “endowment effect”—how much more highly someone values an item once they own it—the fact that coffee mug owners on average demanded twice as much to sell a mug that they already owned as they admitted being willing to pay to get the same mug from someone else).

111. In fact, the constitutional amendment passed in Louisiana actually removed all pressure on citizens in such situations. See *infra* Part III.C.

even though there is no clear majority and minority, the New Orleans situation constitutes a *tragedy* of the anticommons because property is under-used to the detriment of society as a result of multiple parties exercising valid exclusionary rights.

*B. Kelo as a Solution to New Orleans's Tragedy of the Anticommons*

By giving the government latitude to seize property from private citizens and ensure that such property is used in the public interest, the *Kelo* decision offered a potential solution to the tragedy of the anticommons in New Orleans.<sup>112</sup> When Heller suggested that governments provided a possible solution to such tragedies, he had a *Kelo*-like scenario in mind.<sup>113</sup> Under the authority granted by *Kelo*, the government could take property from private individuals in New Orleans and give it to developers because doing so would serve the public purpose by rejuvenating the local economy. To many, including those in Louisiana who favored the amendment to the state constitution, this was a frightening prospect; it essentially gave the government unlimited authority to take what belonged to someone if doing so would benefit society. Under Heller's theory of the anticommons, however, *Kelo* produced a result that Louisiana residents should have embraced. *Kelo* provided governments with the power to overcome the tragedy of the anticommons by consolidating rights in the hands of a single individual who can put the property to its socially optimal use. At least in the abstract, *Kelo* should have enabled development in New Orleans, just as it did in New London, Connecticut.

The factual similarities between *Kelo* and the current situation in New Orleans are striking. As in New London, the New Orleans economy is struggling and property could be put to a more economically beneficial use if consolidated in the hands of a single owner.<sup>114</sup> Like the developers in *Kelo*, entrepreneurs in New Orleans wait in the wings with plans to rejuvenate the area.<sup>115</sup> Finally, as in *Kelo*, a few individuals have prevented these entrepreneurs and governments from achieving their goals by holding onto their property.<sup>116</sup> Importantly, in *Kelo*, the homeowners who refused to sell, and consequently had their property seized under eminent domain, lived on those parcels; in many of the areas at issue in New Orleans,

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112. See *supra* Part I.

113. Heller, *supra* note 2, at 640-41.

114. *Kelo v. City of New London*, 545 U.S. 469, 472-74 (2005).

115. *Id.* at 473-74.

116. *Id.* at 475.

those landowners who have not sold to developers neither live on their land nor plan to return to it.<sup>117</sup>

Given these factual similarities, it seems probable that, under *Kelo*, a government could use eminent domain to overcome the tragedy of the anticommons in New Orleans. Such takings would serve a public purpose by generating economic development in struggling areas of the city. So long as the government could show that it had some plan for transferring the taken properties into the hands of parties who could put them to a publicly beneficial use, the Fifth Amendment would be satisfied, the rights could be consolidated into a usable bundle for entrepreneurs, and the tragedy of the anticommons would be overcome as they put the property to use.<sup>118</sup>

### C. *The Current Situation in Louisiana*

Heller proposed two possible solutions to an existing tragedy of the anticommons: governments and markets.<sup>119</sup> However, neither governments nor markets acting alone can overcome the tragedy in New Orleans. The amendment to the state constitution ended any possibility that the government could involve itself directly in consolidating property rights. Markets never provided a realistic solution to the tragedy because, in a complex and mobile society where multiple parties possess exclusionary rights in land parcels, high transaction costs prevent efficient bargaining, which, in turn, prevents the consolidation of rights into a usable bundle. The reality of post-hurricane New Orleans ensures that neither of these solutions will succeed independently.

#### 1. Governments are No Longer a Solution to the Tragedy in Louisiana

The constitutional amendment adopted in Louisiana ended any hope of government using *Kelo*-granted authority to consolidate property rights into a usable bundle.<sup>120</sup> The quick and dramatic response of the Louisiana legislature and citizenry that eliminated this possible solution to the tragedy would not surprise Heller in the least; in fact, he predicted as much. He anticipated that governments would experience difficulty in overcoming the tragedy because of “the

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117. *Id.*

118. *Id.* at 483 (noting that the government’s exercise of eminent domain in *Kelo* satisfies the Fifth Amendment because “[t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including . . . new jobs and increased tax revenue”).

119. Heller, *supra* note 2, at 640.

120. LA. CONST. art. I, § 4 (amended 2006).

cost and administrative complexity of compensation and the fear of demoralizing potential investors by reforming property rights without compensation.”<sup>121</sup>

While Heller accurately predicted that government intervention would not succeed in solving the tragedy of the anticommons because of public resistance,<sup>122</sup> his assumption that property owners would act rationally<sup>123</sup> caused him to overlook a major reason for that resistance. Heller focused on compensation and future investors while ignoring the primary reason that people resist government use of eminent domain: the so-called “endowment effect.” The endowment effect occurs when sellers demand higher prices than they would be willing to pay to purchase the same item from someone else.<sup>124</sup>

Compensation is always an issue with government takings; however, the problem is especially complicated in New Orleans. With the endowment effect in mind, it is unlikely that landowners in New Orleans would willingly allow the government to take control of their property even in exchange for outrageously high compensation. The people of New Orleans have already lost so much because of the storm that they would likely refuse to give anything they can still call their own to the government, especially because many blame the government for bungling the post-hurricane relief efforts.<sup>125</sup> Similarly, those observing this situation from outside of New Orleans likely fear granting the government such broad eminent domain power because of its potential future impact on their lives—a problem exacerbated by the endowment effect. Put simply, the endowment effect transforms property owners into irrational actors.

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121. Heller, *supra* note 2, at 679.

122. “Once anticommons property is created, markets or governments may have difficulty in assembling rights into usable bundles. After initial entitlements are set, institutions and interests coalesce around them with the result that the path to private property may be blocked and scarce resources may be wasted.” *Id.* at 659.

123. “The tragedy [of the anticommons] is that rational individuals, acting separately, may collectively waste the resource by underconsuming it compared with a social optimum. *Id.* at 677.

124. Jolls et al., *supra* note 110, at 1484.

125. See David Brooks, Op-Ed., *The Best-Laid Plan; Too Bad It Flopped*, N.Y. TIMES, Sept. 11, 2005, at 414 (arguing that the “government managed to fail at every level” in response to Hurricane Katrina); Christopher Lee & Anushka Asthana, *Damage and Doubts Linger After Katrina; Study Cites Wide Skepticism of U.S. Readiness for This Year’s Hurricane Season*, WASH. POST, Aug. 21, 2006, at A13 (stating that seventy percent of those surveyed said most individuals still have not gotten the help they need with housing, health care and restoring their lives; fifty-six percent said that the federal government has not done enough to help state and local governments restore services in the affected areas; and fifty-three percent said that the government’s handling of the hurricane had a negative impact on their confidence in government overall); Adam Nossiter, *In the Trail of the Storm: Little Is Left But Stillness*, N.Y. TIMES, June 15, 2006, at A16 (quoting one Katrina victim’s experience of the devastation of the hurricanes: “I lost everything, man.”).

In December 2006, Susette Kelo, the named plaintiff in *Kelo*, sent holiday cards demonstrating that compensation is only one reason why people resist government takings by eminent domain. Although Kelo had recently accepted a \$442,155 settlement for her home, which was more than \$300,000 above its appraised value, she sent messages of ill will to city officials and members of New London's development agency.<sup>126</sup> One recipient of Kelo's card remarked, "It's amazing anyone could be so vindictive when they've made so much money."<sup>127</sup> That recipient, like Heller, held the apparently misguided belief that eminent domain holdouts care primarily about compensation. For Kelo and others, money does not alleviate the ill will the taking generates. Nonetheless, although he overlooked some of the reasons for it, Heller correctly predicted that citizens would resist a direct attempt by government to overcome the tragedy of the anticommons through the exercise of eminent domain.<sup>128</sup> This resistance became law in Louisiana through the amendment to its state constitution that negated the impact of *Kelo*.

## 2. Markets are Not a Solution to the Tragedy in Louisiana

Markets likely never offered a viable solution to the tragedy in Louisiana. Heller stated that a society trying to overcome an existing tragedy of the anticommons faces difficulties that usually preclude markets from serving as a solution, including high transaction costs.<sup>129</sup> In Heller's examples, the storefronts in Moscow continue to suffer because transaction costs prevent the private consolidation of property rights. Conversely, street kiosks overcame the tragedy through illegal markets because kiosk operators faced only minimal transaction costs.<sup>130</sup>

Although the street kiosk example proves that it is possible to overcome the tragedy of the anticommons through markets, the situation in New Orleans likely does not lend itself to this solution. The New Orleans situation more closely resembles the situation of the storefront owners than that of the kiosk operators. The kiosk operators overcame the tragedy by buying off the local mafia and a few

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126. *Woman's Christmas Wish: 'May You Rot in Hell,'* ORLANDO SENTINEL, Dec. 21, 2006, at A2 ("Susette Kelo's unmerry greeting features a snowy image of her pink house and a message that reads, in part: 'Your houses, your homes, your family, your friends. May they live in misery that never ends. I curse you all. May you rot in hell. To each of you I send this spell.'").

127. *Id.*

128. Heller, *supra* note 2, at 679.

129. *Id.*

130. *Id.* at 643.



local officials: all easily identifiable and locatable parties.<sup>131</sup> On the other hand, the storefront owners have not overcome the tragedy because consolidating rights through markets would require them to bargain with countless parties, both private and public, located throughout the country.<sup>132</sup> In New Orleans, identifying those with whom one must bargain to consolidate rights through the property records should be manageable.<sup>133</sup> Locating those individuals, however, will not be easy. Unlike the mafia and officials in the kiosk example, many of New Orleans's property owners no longer live on or near their property. Additionally, most of those displaced by the storm left unexpectedly and without planning, leaving no indication of their intended destinations. As with the storefront owners, those in New Orleans seeking to overcome the tragedy of the anticommons and put property to its full use must locate individuals who reside throughout the country. In many cases, the transaction costs involved in the location effort alone would be monumental. Add the costs of bargaining with an irrational owner over property that may be one of the only things the owner has left to her name, and it becomes evident that those looking to spark growth in New Orleans cannot rely on markets to overcome the tragedy of the anticommons.

In sum, Heller accurately forecasted many of the difficulties that prevent societies from overcoming an existing tragedy of the anticommons. Because New Orleans cannot overcome the tragedy by either of Heller's proposed methods, the city must resort to unexplored measures if it hopes to fulfill President Bush's promise of being "rebuilt . . . even better and stronger than before the storm."<sup>134</sup>

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131. *Id.*

132. *Id.* at 655.

133. See Fred A. Bernstein, *The New Orleans Market is Poised to Recover*, N.Y. TIMES, Nov. 13, 2005, at 9 (reporting that although property records were unavailable for months after the storm, they are once again available, and the real estate market in New Orleans has exploded over the past year); see also Steve Ritea, *Nearly 50 New Orleans Public Schools Devastated*, TIMES-PICAYUNE (New Orleans), Nov. 20, 2005, at 1 (describing the situation that has forced schools to go to City Hall and carefully scrutinize the property records, many of which incurred water damage during Katrina and were sent to Massachusetts to be freeze-dried); Greg Thomas, *Flooded Property Records Can Be Saved, Official Says; And They'll Be Moved From Court Basement*, TIMES-PICAYUNE (New Orleans), Sept. 13, 2005, at A3 ("Stored in the courthouse basement, which took on nearly a foot of water during Hurricane Katrina, moisture was the biggest enemy to property records. Abstractors, who conduct title searches before a real estate transaction closes, should have access to them within the next few weeks . . .").

134. Address to the Nation on Hurricane Katrina Recovery From New Orleans, Louisiana, 40 WEEKLY COMP. PRES. DOC. 1405, 1407 (Sept. 19, 2005).

## IV. PROPOSED SOLUTIONS

The previous section of this Note explained that, acting alone, neither governments nor markets offer a viable solution to New Orleans's tragedy of the anticommons. Governments are unable to overcome the tragedy through direct involvement (usually by exercising their eminent domain power) for a multitude of reasons, including public resistance.<sup>135</sup> Similarly, individuals struggle to overcome the tragedy through markets because transaction costs prevent efficient bargaining.<sup>136</sup>

Because neither governments nor individuals can overcome the tragedy acting alone, they must join forces to spark growth in New Orleans. While people may resist unilateral government action, it is less likely that they would resist indirect government involvement aimed at enabling private individuals to overcome the problem of under-used property. Nothing seems to prevent governments from enabling individuals to overcome the tragedy by mitigating the factors that deter individuals from acting voluntarily. If governments minimized the transaction costs that prevent efficient bargaining among individuals, New Orleans could successfully overcome the tragedy of the anticommons created by Hurricanes Katrina and Rita. Such an effort may well prove necessary to avoid further economic deterioration in the city. Three potential means that could be implemented independently or in some combination to overcome the tragedy are: shortening the statutory period required for adverse possession from thirty years to five or ten years, raising property taxes, or, conversely, lowering property taxes.

Importantly, the solutions offered in this Note facilitate the bundling of rights by consolidating property belonging only to those landowners who expressly agree to sell their property or have left New Orleans and have no intention of coming back in the near future. Although all anticommons result in the under-use of property, economic efficiency alone does not constitute a legitimate reason to oust people from their property. It is unreasonable to ask people who have suffered through the devastation accompanying these storms to sacrifice their homes and businesses for the benefit of society. Admittedly, these are desperate times in the suffering city; however, depriving people of the property on which they live and work ignores

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135. Heller, *supra* note 2, at 679.

136. *See id.* at 625-26 ("Neither [a commons nor an anticommons] would be tragic in a theoretical world of costless transactions, because people could trade their initial endowments until resources were put to their highest-valued uses. . . . [In practice], however, efficient bargains fail because transaction costs, strategic behaviors, and cognitive biases defeat informal negotiations, and communities of owners are not close-knit.").

many of our nation's core values. This is undoubtedly part of the reason that the government's attempt to oust people from their homes in *Kelo* met such resistance both locally and nationally. In an attempt to avoid such outrage and resistance, this Note offers solutions that would allow the tragedy to be overcome by enabling the consolidation of rights in abandoned properties and in properties that current residents are willing to sell.

#### *A. Adjusting the Adverse Possession Statutory Requirement*

Adjusting the time requirement for adverse possession is likely the most effective potential solution to the tragedy of the anticommons in New Orleans. Reducing the time requirement from thirty years<sup>137</sup> to five or ten years would make adverse possession easier for potential owners and would exclude properties on which people still lived and worked. Such a change would provide stronger incentives for developers to use abandoned properties and thus represents an example of indirect government involvement that enables individuals to overcome the tragedy. Because an adverse possessor acquires a full bundle of rights in the adversely possessed property, the former owner can no longer exclude her. Therefore, the adverse possessor can use her newly acquired property to its full potential. If the legislature is worried about implementing such a drastic change, it could include a sunset clause that would automatically revert Louisiana to the longer requirement after a sufficient amount of time had passed for New Orleans to regain economic momentum.

The common law allows an adverse possessor to gain title to land that belongs to another if that possessor maintains possession that is (1) actual and exclusive, (2) open and notorious, (3) hostile and adverse, (4) continuous, and (5) for the required statutory period.<sup>138</sup> Courts and scholars rationalize the doctrine of adverse possession as economically efficient by noting that it transfers property from an owner not using the property to one who has used it in its intended manner for an extended period of time.<sup>139</sup> This Note focuses on the "statutory period" requirement of adverse possession.<sup>140</sup> Because this

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137. LA. CIV. CODE ANN. art. 742 (2006). See *infra* text accompanying notes 141-44 for a full description of the adverse possession statute.

138. *E.g.*, *Chaplin v. Sanders*, 676 P.2d 431, 434 (Wash. 1984).

139. *E.g.*, *Devins v. Borough of Bogota*, 592 A.2d 199, 202 (N.J. 1991) ("[A]llowing adverse possession promotes active and efficient use of land." (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 70-71 (3d ed. 1986); Netter, Hersch & Manson, *An Economic Analysis of Adverse Possession Statutes*, 6 INT'L REV. OF L. & ECON. 217, 219 (1986))).

140. Courts treat the other factors differently, and a detailed analysis is irrelevant to and beyond the scope of this article. Briefly, the test for adverse possession is the following:

Note has analyzed the situation in New Orleans, this section contemplates potential changes to the adverse possession system as it currently exists in Louisiana.<sup>141</sup>

Civil Code Article 742 governs the statutory period in Louisiana.<sup>142</sup> To gain legal title to a piece of property, a possessor must meet the various adverse possession requirements for ten years if the she possessed in good faith, or for thirty years if otherwise.<sup>143</sup> Courts have held that a possessor possesses in good faith if the she has “just reason to believe h[er]self the master of the thing which [s]he possesses, although [s]he may not be in fact.”<sup>144</sup> Conversely, a “bad

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To establish title by adverse possession, [an adverse possessor] must usually prove that her possession was actual, hostile, open and notorious, exclusive, and continuous for the period of the statute of limitations. Color of title and payment of taxes can also be elements in some cases. The requirement that . . . possession be “actual” means that [an adverse possessor] must occupy or use the property as it would be used by a true or undisputed owner. “Hostile” possession means, at a minimum, that [an adverse possessor’s] possession is not derived from [the rightful owner’s], as it would be if, for example, [the adverse possessor] were [the rightful owner’s] tenant. . . . For possession to be “open and notorious,” [an adverse possessor’s] actions must be visible to others, either the neighbors or a diligent owner. For . . . possession to be “exclusive,” [an adverse possessor] cannot share possession with the true owner. Because one of the key attributes of ownership is the right to exclude others, [an adverse possessor] must act as a true owner would act, exercising the right to exclude when appropriate. [P]ossession is “continuous” if [an adverse possessor] does not abandon the land and no one else interrupts her possession. Occasional use may be continuous if a true owner would use the property in such a manner.

Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2423-24 (2001).

141. Louisiana law on adverse possession is similar to that of most other U.S. jurisdictions:

Most common law jurisdictions also provide for the acquisition of ownership of real estate by “adverse possession.” The acts of possession required by common law statutes are comparable to those acts required under Louisiana law. Possession must be adequate to notify the owner of the acts of dominion exercised over the property. Furthermore, as in Louisiana, the extent of the acts necessary to establish adverse possession is determined by the nature of the property. The duration of the possession required to acquire ownership by adverse possession depends upon the specific applicable legislative enactments. This period varies greatly between jurisdictions; it is generally between five and twenty years. Some states provide, as does Louisiana, for shorter periods of possession if the possessor holds the property under color of title. Regardless of the statutory period, possession must be adverse and continuous for the entire statutory period.

Andrew Rinker, Jr., *The Civil Code Articles on Establishment of Boundary*, 56 TUL. L. REV. 370, 386 (1981).

142. LA. CIV. CODE ANN. art. 742 (2006); see Warren M. Schultz, Jr., *Property—Possessory Action—Plaintiff Must Clearly Manifest Intent to Possess as Owner*, 49 TUL. L. REV. 1173, 1175 (“Louisiana courts have held that the possession necessary to support the possessory action is identical with that necessary for thirty-year acquisitive prescription.”).

143. LA. CIV. CODE ANN. art. 742.

144. *Bd. of Comm’rs v. S.D. Hunter Found.*, 354 So. 2d 156, 160 (La. 1977).

faith" possessor has "knowledge that [s]he ha[s] no title or that h[er] title is defective."<sup>145</sup>

Applying the relevant civil code articles to the current situation in New Orleans, a developer attempting to overcome the tragedy of the anticommons by consolidating property rights belonging to evacuees would likely never qualify as a good-faith possessor. As such, the thirty-year statutory period would govern. To overcome the tragedy of the anticommons in New Orleans under the law as it currently stands, an entrepreneur attempting to acquire property by adverse possession would have to meet the various adverse possession requirements for thirty years.

The current thirty-year statutory requirement makes it difficult for individuals to overcome the tragedy of the anticommons by adverse possession. The stringent common law requirements, such as continuous possession, are difficult to meet for thirty years. Allowing such a lengthy time period in which the current landowner can "break" the adverse possessor's possession makes it almost impossible for the possessor to obtain rights to the property. Instead, the current owner of the smaller parcel will maintain and exercise her exclusionary right, causing the larger plot to go under-used and, in New Orleans's case, undeveloped.

Additionally, even if the adverse possessor meets the common law requirements for thirty years, places like New Orleans will suffer from the tragedy for the three decades, during which time the owner of the smaller parcel maintains her exclusionary right. Thus, although individuals could overcome the tragedy of the anticommons by adverse possession as the doctrine currently stands, a solution that encouraged growth and development in the near future, rather than thirty years down the road, would better serve the afflicted areas. Shortening the statutory period would have positive effects on both adverse possessors and current landowners, and it would help the devastated city overcome the tragedy of the anticommons.

#### 1. Shortening the Statutory Period would have Positive Effects on Adverse Possessors

Shortening the statutory period would spark growth in the hurricane-ravaged areas of New Orleans by making it possible for individuals to consolidate rights without incurring overwhelmingly high transaction costs. As described in the previous section, the transaction costs facing private parties in New Orleans include those associated with identifying and locating absent landowners and

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145. *Id.*

engaging them in efficient bargaining. Allowing individuals to overcome the tragedy through adverse possession would eliminate all such transaction costs, as there would no longer be any need to identify, locate, or bargain with absent landowners. Admittedly, adverse possessors would incur a new transaction cost in some cases, as an adverse possessor often must seek a declaratory judgment regarding her title to the property; however, this cost pales in comparison to those associated with identification, location, and bargaining. Although some developers might hesitate to adversely possess property where it was uncertain whether the owner would return, making adverse possession more attractive would serve the city by allowing the consolidation of rights in clearly abandoned properties, such as portions of the Ninth Ward where houses remain both empty and uninhabitable.

Shortening the statutory period to five or ten years would have several positive effects on entrepreneurs, the potential adverse possessors in New Orleans. First, a shorter period would incentivize entrepreneurs to put the abandoned properties to use in the first place. Second, a shorter statutory requirement would allow adverse possessors to overcome the tragedy of the anticommons in a shorter period of time; thus, redevelopment could occur sooner.

## 2. Shortening the Statutory Period would have Positive Effects on Current Landowners

A shortened statutory period could also help overcome the ill-effects of the anticommons tragedy by positively affecting current landowners who have evacuated New Orleans. As it is, a landowner who has moved from the area and established herself in a new place has little incentive to consider her property in New Orleans.. Shortening the adverse possession statutory period would force such landowners to make property decisions much sooner than the current law requires.

If landowners then decided to sell, developers would not have to engage in the difficult process of identifying and locating the current owners, as the current owners would seek out developers willing to pay the highest price for their property. As such, individuals could overcome the tragedy of the anticommons without encountering at least two of the most significant transaction costs normally associated with the market solution: identification and location. A willing seller would also be much more likely to bargain efficiently with a buyer than would an ambivalent or uninterested seller.

Similarly, if landowners decided not to sell their property in New Orleans, a shorter statutory period would benefit the economy by

forcing those landowners either to move back to, or at least to visit occassionally, the area to ensure that their property was not being adversely possessed. Although neither of these outcomes would allow consolidation of rights in these properties, in either case pieces of property would not go wholly unused for as long as thirty years. At least in the short term, New Orleans will benefit from any potential economic boost, even such a minor one.

### *B. Other Partial Solutions*

Because altering the adverse possession statutes would eliminate almost all transaction costs, the solution represents the most effective way that governments can use their power to enable individuals to overcome the tragedy of the anticommons. Additionally, or alternatively, local and state governments could target transaction costs by other, more common measures. Unlike the adverse possession solution, these partial solutions mostly target holdouts still living in New Orleans, rather than evacuees who have not returned. As such, combining them with the adverse possession solution would give New Orleans its best chance to construct revenue-generating structures in its mostly deserted areas. These are "partial" solutions because they only reduce the transaction costs associated with individuals' attempts to overcome the tragedy without the help of governments. Besides, these solutions are most effective in a world of rational actors, whereas the preceding analysis has shown that property owners tend to act irrationally.<sup>146</sup> This Note offers two partial solutions: (1) raising property taxes or, alternatively, (2) lowering property taxes.<sup>147</sup> Much as with the adverse possession changes, the legislature could accompany either tax action with a sunset clause if it thought doing so would make its constituents more receptive. Throughout the city's history, New Orleans residents have been particularly aware of and sensitive to property tax rates.<sup>148</sup>

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146. See *supra* note 110 and accompanying text.

147. While the possibility of a tax cut or hike targeted at abandoned properties alone is, in theory, a plausible solution, the administrative burden of enforcing such a tax would be too overwhelming for a government to impose it.

148. See LLOYD VOGT, *NEW ORLEANS HOUSES: A HOUSE-WATCHER'S GUIDE* 23 (1985) (describing the camelback house, a popular home design in New Orleans, as a shotgun house with one story in the front and two in the rear that may have developed because taxes were levied on the basis of the height of the house along the streetfront, but not the rear).

### 1. Raising Property Taxes

In theory, by raising property taxes, governments would provide an incentive for current owners to use property or to sell it to entrepreneurs who would use it efficiently. San Francisco used this tactic to encourage growth following the earthquake of 1906.<sup>149</sup>

If they faced high property tax rates, rational property owners that have evacuated and have no plans to return would feel pressure to either sell or use their property.<sup>150</sup> Entrepreneurs, more willing to pay such taxes because they intend to put the property to use, are likely to acquire more property from willing sellers, avoiding the tragedy of the anticommons by bundling rights into fewer owners who can use the property to the social optimum. Alternatively, those landowners who decide to use their property at least do not allow the property to go completely forsaken. Additionally, in the short term, increased taxes would provide the city with much needed revenue that has been lost due to the tremendous decrease in residents.<sup>151</sup>

In practice, however, raising property taxes likely will not overcome the tragedy of the anticommons in New Orleans. First, consolidation of rights would only necessarily follow if the current landowners were rational actors motivated by monetary incentives—a questionable premise in light of the endowment effect.<sup>152</sup> Second, rational buyers would be less likely to offer as much for, and then buy, large parcels of property if the government forces them to pay higher taxes. Third, a government effort to raise taxes would have no effect on several of the transaction costs facing buyers described in the previous section, including the costs of identification and location of current owners.<sup>153</sup> At best, the tax increase would encourage efficient bargaining by penalizing those sellers who acted irrationally by holding onto their land when offered a fair price. Fourth, citizens would meet a government effort to further increase taxes in the economically depressed area with considerable resistance. Given the area's current financial difficulties, even finding a legislator to initiate such an effort would prove a challenging task. These various shortcomings imply that increasing taxes would likely be less effective

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149. See Mason Gaffney, *Repopulating New Orleans: How Did San Francisco Do What a Top Economist Says New Orleans Cannot?*, DOLLARS & SENSE, Mar./Apr. 2006, available at <http://www.dollarsandsense.org/archives/2006/0306gaffney.html> (last visited Sept. 24, 2007) (explaining that the increase of the property tax rate in San Francisco following the 1906 earthquake caused each landowner to use his land).

150. *Id.*

151. See *id.* ("Mayor Nagin of New Orleans tells the world that Katrina wiped out most of his tax base, so he is impotent.").

152. See *supra* text accompanying notes 124-27.

153. See *supra* Part III.C.2.



in enabling individuals to overcome the tragedy of the anticommons than would shortening the statutory requirement for adverse possession.

## 2. Lowering Property Taxes

A legislative effort to lower property taxes would in theory have the same positive effect of reducing the transaction costs associated with bargaining. Rational actors contemplating whether or not to buy a piece of property would willingly pay more on the front end to acquire the property if they knew that they would pay less on the back end in the way of property taxes. In theory, lowering taxes, much like raising taxes, would encourage efficient bargaining because a rational seller would be more likely to sell to a buyer who is willing to pay more. By encouraging sale, lowering property taxes increases the likelihood of efficient bargaining and thus the consolidation of rights into one party's control.

In practice, however, this solution shares many faults with raising property taxes and also would cause a different problem. First, positive results would only necessarily follow if both parties were rational actors, a premise that this Note discounts.<sup>154</sup> Second, some sellers would be less likely to sell pieces of property even if promised higher prices if they know that they will face lower taxes in the future. Essentially, lowering property taxes would prolong the tragedy by decreasing the penalty on holdouts for holding onto their property. Third, lowering taxes would have no effect on several of the more significant transaction costs facing buyers, as described above.<sup>155</sup> Additionally, although finding political support for such a movement would prove easier than finding it for an effort to raise taxes, this solution would deprive the government of much needed tax revenues, at least in the short term.

Because of the gravity of the situation in New Orleans and the uncertainty associated with both raising and lowering property taxes, governments trying to spark the economy would do best to shorten the adverse possession statutory period. Rather than leaving the fate of the city uncertain because of the irrationality of actors and the numerous unmitigated transaction costs that accompany tax adjustments, a decrease in the statutory period would almost certainly ensure at least a minimal positive effect on the economy. Perhaps the most effective solution involves combining a decrease in the statutory period with an increase or decrease in taxes. The former would allow

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154. See *supra* text accompanying notes 124-27.

155. See *supra* Part III.C.2.

consolidation of rights in abandoned properties, and the latter would make it possible for buyers to bargain more efficiently and consolidate rights in both abandoned properties and properties on which citizens still reside but wish to sell. Most importantly, because none of these solutions ousts people unwillingly from their homes, the citizenry is unlikely to protest.

## V. CONCLUSION

The disasters that befell New Orleans during the hurricane season of 2005 revealed the tragedy of the anticommons. Many areas of the city remain undeveloped two years after Hurricanes Katrina and Rita hit the coast. To date, homeowners' exclusionary rights have prevented entrepreneurs from putting a given piece of property to use. As with other anticommons tragedies, property continues to go under-used or completely unused in the afflicted areas of the city. Overcoming the tragedy requires a consolidation of property rights in the hands of one owner so that she can redevelop the land to a socially optimal level.

Because neither of Heller's proffered paths to consolidation is available to New Orleans, the city must resort to unexplored measures to overcome its tragedy. Transaction costs prevent individuals from bundling rights themselves, precluding a purely market-driven solution. *Kelo* gave government the power to eliminate exclusionary rights through eminent domain, and eminent domain was considered in areas such as the Ninth Ward in New Orleans,<sup>156</sup> but an amendment to the state constitution passed in the fall of 2006 ended any possibility of government using this power to bundle rights. Because putting abandoned property to use is a key step in sparking economic progress in New Orleans, the government must enable individuals to overcome the tragedy by attacking the transaction costs that individuals typically encounter in trying to consolidate rights by themselves. This Note offers several suggestions as to how government could do so. Although none is guaranteed to have the desired effect, shortening the statutory period for adverse possession appears to be New Orleans's best hope. Such indirect involvement by government likely would not result in the same public outrage as did the direct involvement at issue in *Kelo*. A general understanding of the often forgotten anticommons theory by legislators represents the key to the resurgence of the New Orleans economy.

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156. Shaheen Pasha, *Property Grabs and the Gulf*, CNN/MONEY, Oct. 5, 2005, [http://money.cnn.com/2005/10/05/news/economy/eminent\\_domain\\_katrina/index.htm](http://money.cnn.com/2005/10/05/news/economy/eminent_domain_katrina/index.htm).

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