New Orleans, Katrina and Kelo: American Cities in the Post-Kelo Era

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New Orleans, Katrina and Keo: American Cities in the Post-Keo Era

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* © 2008 John J. Costonis. Chancellor-Emeritus and Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Professor Costonis served as a consultant to the New Orleans Redevelopment Authority (NORA) in New Orleans Redevelopment Authority v. Johnson, No. 2007-3102 (La. Dist. Ct. Ori. May 9, 2008), which sustained NORA's authority to transfer expropriated blighted property to a private entity under Louisiana Constitution article I, section 4(B)(2)(c). At this writing, the matter is on appeal.
I. INTRODUCTION

This Article chronicles the perplexing asymmetry between New Orleans' devastation by Hurricanes Katrina and Rita and the state's subsequent adoption of constitutional amendments that threaten to cripple the eminent domain power as a pillar of New Orleans' post-hurricane recovery.


[F]or those with a sense of urban history, the tragedy of New Orleans is ... about a lost opportunity [for the welfare of the city's inhabitants]. All of the great challenges that confront the 21st-century city ... are crystallized in New Orleans.¹
How did this divergence occur? What does it tell us about *Kelo v. City of New London*, the United States Supreme Court decision to which the amendments are a response, about libertarian objections to the eminent domain power, and about the adequacy of redevelopment discourse as cities shift from an earlier era's focus on large-scale slum clearance to more modest and diversely targeted current goals?

The drama is national as well as local. Elements found in Louisiana's amendments were proposed by property rights groups and adopted elsewhere in a number of other states.

*Kelo* is conventionally portrayed as holding that the transfer to a private party of unblighted expropriated property in aid of New London's "economic development" satisfies the federal constitution's "public use" requirement. Oral argument before the Supreme Court defined "economic development" more precisely, however, as a process enabling government to favor one property owner (the transferee) over another (the condemnee) *solely* because the use to which the former proposes to put the property promises the city a greater tax yield.4

Conventional analysis also bottonis its assessment of the *Kelo* outcome on whether or not it comports with *Berman v. Parker*, the Court's leading eminent domain/urban renewal precedent. In doing so, however, it pursues a false scent because the two cases are misaligned in their facts and in their legal issues. Superficially, they appear factually similar because in neither instance were the litigated parcels blighted. Unlike *Kelo*, however, *Berman* featured a conventional slum redevelopment scenario that posed the narrow and, in retrospect, relatively uninteresting question of whether an unblighted property

4. This refinement occurred during the following exchange involving Justices Scalia and O'Connor and City of New London Attorney Wesley Horton:

JUSTICE SCALIA: I just want to take property from people who are paying less taxes and give it to people who are paying more taxes. That would be a public use, wouldn't it?

JUSTICE O'CONNOR: For example, Motel 6 and the city thinks, well, if we had a Ritz-Carlton, we would have higher taxes. Now, is that okay?

MR. HORTON: Yes, Your Honor. That would be okay.


located in a sea of blighted properties may be expropriated along with them.\(^6\)

The legal issues differed as well. In *Berman*, the question posed and affirmatively answered is whether a “public use” is served by eminent domain-based redevelopment undertaken to remedy a substantive urban planning problem—here slum creation and clearance—when one of the properties taken was not itself blighted. But in *Kelo*, the majority and concurring opinions, like the litigants themselves, untethered the power’s deployment from blight remediation or any other substantive planning concern, asking instead whether or not government’s assessment of its fiscal needs alone warrants denying a private property owner the autonomy over property that, in its current use, is otherwise unproblematic. Under this misguided perspective, eminent domain-based redevelopment is freed from the discipline demanded by a sound linkage to the resolution of substantive planning problems, and is transformed, in effect, into an auxiliary of the taxing power.

This disconnect triggered Justice O’Connor’s riposte—previewed in her questioning during oral argument—that, following *Kelo*, “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” Had New London linked its use of eminent domain to a

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\(^6\) The inclusion of relatively few properties that do not share the characteristic features of most of the properties within a district established upon the basis of the latter’s features is commonplace in American land use planning. Illustrative are properties that do not share the historic or architectural features defining most of an historic district’s structures. The former, however, are no less subject to the design regulations than the latter because the regulations address what the Louisiana courts have termed the “tout ensemble” of the district’s urban tissue. See *City of New Orleans v. Levy*, 64 So. 2d 798, 801-02 (La. 1953); *Maher v. City of New Orleans*, 222 So. 2d 608, 614 (La. App. 4 Cir. 1969). Similarly, many states expressly authorize localities to include nonblighted properties within larger redevelopment districts of mostly blighted properties when doing so is necessary or appropriate to secure the districts’ planned redevelopment goals. See, e.g., *Ohio Rev. Code Ann.* § 1.08(A) (LexisNexis Supp. 2008) (providing that nonblighted structures may be taken if seventy percent of area’s parcel’s are blighted); *26 Pa. Cons. Stat. Ann.* § 205(c)(i) (West Supp. 2008) (providing that nonblighted structures may be taken if majority of area’s structures are blighted or represent a majority of the area).

\(^7\) 545 U.S. at 503 (O’Connor, J., dissenting). In addition to inciting the assault on “economic development” found in virtually all post-*Kelo* measures, Justice O’Connor’s distress over the Court’s elimination of substantive planning concerns is widely shared by commentators, e.g., Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP CT. ECON. REV. 183, 191 (2007) (“[T]his rationale can be used to condemn virtually any property for transfer to a private commercial enterprise.”), and by judges, including those writing prior to the *Kelo* decision, e.g., *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004) (“[T]he ‘economic benefit’ rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity.”).
The Keio majority invited states troubled by its action to address the issue as a matter of state law. Nothing less than a national land use seminar followed in which virtually every state legislature visited the question, and at least forty-two enacted post-Keio measures of one kind or another.

Louisiana’s constitutional provision is one of these measures. It was adopted twenty-four months after the Keio decision, which preceded Hurricanes Katrina and Rita by only two months. Part II of this Article utilizes the storms’ devastation and the City of New Orleans’ recovery program to document the essential role assigned to eminent domain in the latter.

Part III moves from New Orleans to the national stage to review the states’ various post-Keio approaches. It highlights a pattern, the “anti-Keio format,” which tightens the eminent domain power’s ambit well beyond the limits proposed by Justice O’Connor. Louisiana’s constitutional amendments can plausibly be claimed to align with this approach. An assessment of the format’s structure, moreover, reveals its inadequacies when measured against the public need created by the nation’s largest natural disaster as well as by the less dramatic if equally necessary regular requirements of urban systems management.

Part IV returns to Louisiana to place the state’s post-Keio measure within the national context. It details why the measure will shut down eminent domain’s use as currently envisaged in New Orleans’ recovery program if Louisiana courts construe the measure as an anti-Keio format clone.

Part V offers four conclusions. The first is that Keio erred when it unlinked eminent domain from the solution of substantive urban system problems. This reasoning trivialized the power’s redevelopment role, needlessly triggered post-Keio outrage, and gave rise to the fantasy that the matter could be set aright by banning “economic development” as a “public use,” or, in Louisiana’s case, as a “public

8. The concern, in her view, could not fall short of an “affirmative harm.” Keio, 545 U.S. at 500 (O’Connor, J., dissenting).
9. Id.
10. Id. at 489 (majority opinion).
This Article advocates reestablishing the linkage as the central inquiry posed by the public-use criterion.12

The second is that the anti-Kelo format’s preference for a closed-ended, pre-twentieth-century definition of the eminent domain power’s scope is driven by considerations that aggressively ignore the public necessities disclosed by New Orleans’ faltering recovery efforts, and, more broadly, by the urban systems needs of America’s cities generally.

The third is that the initial wave of post-Kelo measures merely commences the states’ effort to wrestle with Kelo. A second wave awaits in which the courts will serve as co-authors of the many first-wave measures that, lacking authoritative construction, admit to an array of conflicting interpretations. I anticipate a third wave as well, as legislatures in other states revise their handiwork to avoid the qualms and misgivings of the kind now plaguing New Orleans’ stalled recovery program.

My final observation adopts Justice Brandeis’s metaphor that views each of the post-Kelo responses as the work of an individual state “laboratory” engaged in “novel social and economic experiments.”14 The coming years will provide an experiential basis for determining the wisdom and practicability for eminent domain-based redevelopment of the anti-Kelo format as contrasted with more flexible approaches that are no longer confined simply by the slum and blight clearance goals of the earlier Berman era.

II. KATRINA, RITA, AND THE NEW ORLEANS RECOVERY PROGRAM

Katrina and Rita pinpointed Louisiana and New Orleans as their Ground Zero. A few facts portray the storms’ ferocity. Deaths: 1527.15 Land area damaged: 90,000 square miles.16 Homes destroyed or made inhabitable: 300,000.17 Estimated economic loss: $125-150 billion.18

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12. For purposes of this Article, Louisiana Constitution article I, section 4(B)(1)’s phrase “public purpose” is interchangeable with the phrase “public use” found in the Fifth Amendment to the United States Constitution.
13. It also raises for another day a question of novel impression posed by Kelo’s facts but ignored by the Court and litigants: namely whether or not the criterion is satisfied if a city condemns property located in a project area in part or in whole to remedy an off-project planning problem. See infra note 139 and accompanying text.
16. id. This area is equivalent in size to the area of the United Kingdom.
17. id. In New Orleans, 108,731 households—fifty percent of the city’s population—lived in houses with over four feet of flood water. BRING NEW ORLEANS BACK COMM’N,
Post-storm 2005 unemployment rate: 12.5%.\textsuperscript{19} New Orleans’ post-storm population loss: roughly two-thirds.\textsuperscript{20} Estimated cost of restoring New Orleans’ public infrastructure: $14.4 billion.\textsuperscript{21}

The New Orleans Mayor’s Office of Recovery Management (ORM) directs the city’s recovery program in an effort that draws heavily from three prior plans, the most detailed of which is the Unified New Orleans Plan (UNOP), which received legislative approval in 2006.\textsuperscript{22} A necessarily brief review of these complex efforts illuminates the city’s post-Katrina strategies. It also reveals key components of the urban redevelopment enterprise that American cities routinely pursue, albeit under less harried circumstances. In addition to considerations bearing on “economic development” and private transfers of expropriated property, these components include government’s role as urban system manager, the respective contributions of government and the private sector in public/private redevelopment partnerships, and eminent domain’s place within this interaction.

A. Urban Redevelopment's Multiple Purposes and Sectors

New Orleans’ recovery planning seeks to prevent “uncoordinated, dysfunctional redevelopment; an ineffective infrastructure policy; and
... a greatly impaired urban fabric." UNOP projects a staged ten-year recovery program with a $14.4 billion estimated price tag. UNOP envisages allocation of the latter sum to ten recovery sectors: flood protection; infrastructure and utilities; transportation; economic development; healthcare; education; historic preservation and urban design; environment; and community services (including public safety, recreation and library, and municipal and cultural services). Note that only one of the ten sectors is termed "economic development," which UNOP identifies as restoration of the city's ports, tourist industry, and energy sector, and development of a downtown medical district.

On its face, UNOP conceives urban revitalization as encompassing a great deal more than "economic development," whether undertaken to cope with a natural disaster or, more routinely, to improve or stave off the decline of the city's urban systems. UNOP's community services component clarifies, moreover, that renewal efforts span social as well as physical development components.

B. Urban Redevelopment: The Public Side of the Public/Private Partnership

New Orleans is also a partner with the private sector. Reserving discussion of its use of eminent domain for the next section, the city's contributions to this public/private partnership are basically threefold. It sets the public agenda through the planning activities described earlier. It finances and provides the public infrastructure required to support an efficiently functioning private land market. Finally, it must insure that its land use regulatory framework correctly tracks the city's post-Katrina footprint.

Storm-compelled reductions or modifications in the desired levels and location of the city's pre-Katrina population insure that the city will not duplicate its pre-Katrina footprint. Like the other two

24. UNOP, supra note 21, §§ 1.1.3, 6.1.1.3.
25. Id. §§ 2.4-2.4.10.
26. Id. §§ 4.5-4.5.5.
27. The BNOB Plan speaks candidly to the necessity of rearranging the city's land use, population, and infrastructure footprints:

We must face the fact that there may have to be some consolidation of neighborhoods that have insufficient population to support the equitable and efficient delivery of services. ... We have no choice but to be responsible with use
plans, UNOP evaluates the city’s planning districts on the basis of their vulnerability to repeat flooding, and it coordinates the scope, timing, and capacity levels of new or rebuilt infrastructure with policies that seek to balance the equitable treatment of all city neighborhoods with a stated preference for the “densification” and “clustering” of development and population in areas of acceptable flood risk.28

C. Urban Redevelopment: Eminent Domain and the Private Side of the Public/Private Partnership

UNOP envisages government/private interaction as a symbiotic relationship. Government defines the development goals, finances public infrastructure, and provides a supportive regulatory structure. But it depends upon the private sector to finance and assume the private market risks of private construction.29

of limited City resources. We must provide public facilities and services where population is concentrated so these resources can be used in the most equitable and efficient manner possible.

BNOB Plan, supra note 17, at 12.

As of June 2008, New Orleans had regained only seventy-two percent of its 2005 pre-Katrina population (as measured by the number of households actively receiving mail). See BROOKINGS INST., THE NEW ORLEANS INDEX, ANNIVERSARY EDITION: THREE YEARS AFTER KATRINA 8 (2008), http://gnocdc.s3.amazonaws.com/NOLIndex/ESNewOrleansIndexAug08.pdf. New Orleans’ 2000 population of 485,000 was down some 165,00 from a city whose infrastructure had once served a city of 650,000. See Frank S. Alexander, Land Reform in the Storms’ Aftermath, 53 LOY. L. REV. 727, 731 (2007). Evidence that the city’s footprint is indeed changing appears in statistical updates showing that more than half of all active residences in New Orleans in June 2008 were located in the four planning districts least flooded by Katrina as compared with the thirty-nine percent of the city’s households that lived in these districts pre-Katrina. See BROOKINGS INST., supra, at 8. Other planning districts in January 2008 recorded population levels as low as nineteen percent of their pre-Katrina levels. Id. at 18.

28. UNOP, supra note 21, § 3.3.3 figs.3.4 & 3.5 (creating three “recovery policy areas” premised on degree of flood risk and likely repopulation rate). UNOP stresses the role of clustering and densification as agents of topographical shift in its observation that

[a] more clustered pattern of resettlement will help the City and other agencies focus investments and upgrade public services and infrastructure to attract residents and businesses to reside near one another. A more clustered pattern of resettlement will reduce the guesswork among residents and businesses about their neighborhood’s future viability, by restoring communities and reducing blight. It will also provide a guide to the City and other agencies to use in restoring infrastructure and services, and targeting investments to enhance infrastructure and services, and improve quality of life, which can stimulate additional investments.

Id. § 3.3.3.

29. Marc Mihaly observes that “cities or redevelopment agencies typically cannot accept market and development risk, and often cannot front high ‘predevelopment’ expenses, that is the costs of planners, economists, engineers, and attorneys necessary to work through the details of the project proposal; and they are ill suited to perform the vertical
Eminent domain tightens the public/private embrace because redevelopers, unlike energy or mining companies or landlocked property owners, are not traditional delegates of government’s eminent domain power. They must rely instead on government to acquire and transfer redevelopment parcels to them.

1. NORA and UNOP’s Five Eminent Domain-Based Charges

Under legislation approved one year prior to Katrina, the New Orleans Redevelopment Authority (NORA) was granted the power to condemn both individual blighted parcels30 and land assemblages within entire “community improvement area[s].”31 NORA may transfer expropriated property to other private parties in both cases.32 Blighted areas are defined in the traditional urban renewal/slum clearance mode,33 while an individual blighted property must be adjudicated to warrant that status on the basis of a prior administrative determination.34

In view of this statutory authority, New Orleans recovery planning assigns NORA five principal tasks in its role as the city’s lead property acquisition and transfer agency. The first35 is to serve as a depositary36 for parcels coming to it principally from the state’s Road Home Program,37 from the city’s tax adjudication program,38 and, most

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31. Id. § 33:4720.58(A).
32. Id. § 33:4720.59(A)-(B) (individual blighted properties), § 33:4720.60(A)(1) (properties within community improvement districts).
33. See id. § 33:4720.58(A). The provision’s language authorizing NORA to expropriate “any real property . . . which it may deem necessary for or in connection with a community improvement plan” enables NORA to acquire unblighted parcels, such as that litigated in Berman, in a district composed principally of blighted parcels.
34. See id. § 33:4720.59(B).
35. UNOP, supra note 21, § 5.4.4.3.
36. UNOP places this depositary function under NORA’s “land banking” authority. Id.
37. The Road Home Corporation (RHC) was established as a nonprofit corporation to acquire, hold, manage, and convey properties that it acquires from Louisiana homeowners who opt to sell their homes to it. See LA. REV. STAT. ANN. §§ 40:600.63, 40:600.66. RHC’s complex structure and functions are detailed in Alexander, supra note 27, at 735-37, and on
important, from NORAs own programs for the purchase or expropriation of blighted properties, which it anticipates will furnish most of the properties in its eventual inventory.\textsuperscript{39} In the early stages of recovery planning, New Orleans' mayor predicted that NORAs would become the "'depository' for swaths of wrecked residential property."\textsuperscript{40} His prediction was overtaken, however, by the doubts that Louisiana's pending constitutional amendments would soon pose for the effort.\textsuperscript{41}

NORAs second charge is to work with other city agencies to coordinate its acquisition-disposition program with their policies and responsibilities in the recovery effort.\textsuperscript{42} Its third is to employ eminent the Louisiana Recovery Authority's Web site located at http://www.lra.louisiana.gov/. For the purposes of this Article, RHC is significant because NORAs expects to have approximately 5000 RHC properties transferred to it by 2010. Telephone Interview with John J. Marshall, Staff Attorney, NORA, in New Orleans, La. (Sept. 17, 2008).

38. Properties in tax arrears may be put up for auction in Louisiana. See LA. REV. STAT. ANN. §§ 47:2186, 47:2251. If the properties fail to sell, they are transferred to pertinent parish or municipality. Acquisition of these properties in New Orleans is governed by id. § 47:2254. For a discussion of the program, including the serious title issues associated with tax adjudicated property, see Alexander, supra note 27, at 752-56. NORA has not been a successful bidder for tax adjudicated properties. Approximately 1500 such properties, however, have been transferred to NORA by other city agencies. Telephone Interview with John J. Marshall, supra note 37.


41. Frank Alexander acknowledges these burdens in his excellent account of NORAs land banking charge. See Alexander, supra note 27, at 755-57. Direct confirmation of the burdens from the chair of NORAs board, Herschel Abbott, appear in an e-mail exchange between Mr. Abbott and Professor David Marcello. Marcello had taken the position that the 2006 amendments allow NORA only to expropriate blighted property, not to transfer it to the private sector for redevelopment, and further restrict NORAs acquisitions to individual blighted properties that were virtual public nuisances, thereby disabling it from designating community improvement projects and assembling multiple parcels, blighted or otherwise. In consequence, Marcello states that "aggressive reliance [by NORA] on expropriation would be woefully ill-founded." David A. Marcello, Housing Redevelopment Strategies in the Wake of Katrina and Anti-Keio Constitutional Amendments: Mapping a Path Through the Landscape of Disaster, 53 LOY. L. REV. 763, 768 (2008). In his response, Mr. Abbott agreed with Professor Marcello—stating that NORA's eminent domain power would be used only "on a single house basis" "to get rid of crack houses and other public nuisances" and to acquire property that would "remain[] in public ownership." id. at 779 n.72. NORA subsequently has taken a somewhat more aggressive view of its power to transfer expropriated individual blighted properties, emboldened perhaps by its success at trial in New Orleans Redevelopment Authority v. Johnson, which sustained NORA's use of the power to transfer such property to Habitat for Humanity, a private entity. See infra notes 128-129 and accompanying text.

42. UNOP, supra note 21, § 5.4.4.3. To date, ORM has been its principal partner, and this charge has channeled virtually all of NORA's activities. NORA's acquisitions and dispositions are designed to support ORM's commitment to provide $1.1 billion in infrastructure and related projects to revitalize neighborhoods in seventeen target recovery districts. See Press Release, City of New Orleans Mayor's Office of Commc'ns, City
domain to unsnarl otherwise insuperable title problems that discourage investment in neighborhoods and areas that the marketplace has largely shunned. The fourth appears in UNOP's charge to NORA to "design the property transfer mechanisms necessary to implement the neighborhood cluster program." The last task is NORA's employment of eminent domain to resubdivide lots and blocks, when appropriate, to respond to the shifting footprint of the city's population, infrastructure capacity and location, and land uses.

2. NORA Private Sector Transfers of Expropriated Property

NORA cannot discharge these functions if it is unable to transfer expropriated properties to private entities. Without the funds it

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Announces First 17 Target Recovery Zones (Mar. 29, 2007), http://www.cityofno.com/portal.aspx?portal=1&load=/PortalModules/ViewPressRelease.ascx&itemid=3813; Telephone Interview with John J. Marshall, supra note 37. NORA's 2008 work program calls for the expropriation of approximately 1000 blighted properties strategically located in relation to anticipated ORM infrastructure improvements or projects or to redevelopment properties acquired by not-for-profit private redevelopers. NORA also anticipates transferring to the private sector another 5000 Road Home properties through 2010 as well as 1500 tax-adjudicated properties transferred to it by other city agencies. Telephone Interview with John J. Marshall, supra note 37.

43. The magnitude of this effort is detailed by Ariella Cohen, Hurdles to Heirship: Word of Mouth Inheritance Backs Some Siblings out of Family Homes (Aug. 4, 2008), http://www.appleseednetwork.org/Media/ApplesedintheNews/tabid/110/EntryID/203/Default.aspx. Frank Alexander observes that these title problems beset properties coming to NORA from various sources, including tax adjudication and code enforcement. See Alexander, supra note 27, at 733, 739-43. He notes title problems as well with so-called "heir property," which in many New Orleans inner city areas passes within the same family from generation to generation without probate or other process establishing the successor owners' identity and title. Id. at 732. He also worries that doubts concerning the city's condemnation powers raised by the state's 2006 constitutional amendments must be resolved in the city's favor before its power to transfer expropriated property to private parties is secured. Id. at 743. A final title issue is posed by obsolete paper subdivisions recorded decades ago that abound throughout the city's high risk areas. Telephone Interview with Stephen Villavaso, UNOP Co-Author, in New Orleans, La. (June 20, 2008).

44. One of the alternatives—parcel swaps—considered by the city under the fourth application was premised on two considerations: NORA's legal authority to become a depository of or to acquire a substantial inventory of properties and the expectation that the post-Katrina population and housing needs of higher risk, lower elevation areas would decrease while those of lower risk, higher elevation areas would stabilize or increase. Under the alternative, parcels in the former locations would be acquired principally by purchase although eminent domain might be used to acquire strategic "hold-out" parcels or those beset by title difficulties. The parcels' former owners who chose to return to or remain in the city would then be provided with parcels in NORA's inventory that meet the city's locational criteria for "clustering" and "densification." The program would seek to have the transferee, lower risk parcel positioned as close as possible to the transferor parcel to minimize or avoid social disruption within impacted neighborhoods. Interview with Ed Blakely, Director, Mayor's Office of Recovery Management, in New Orleans, La. (June 5, 2007).

45. See supra notes 27-28 and accompanying text.
receives from the properties' sale, it lacks the resources to reenter the market to purchase or expropriate additional properties. Requiring NORA to retain these parcels or transfer them only to other governmental agencies, moreover, also defeats the neighborhood revitalization goals it shares with ORM. Relatively few of these properties are needed for governmental facilities. The cost of maintaining them would overwhelm NORA's meager annual acquisition and maintenance budget. Most important, rejuvenation of the neighborhoods demands that these properties return to private ownership, initiative, and use. Renovation, new construction, calculation of investment risk and return, and most important, vitality and excitement for the restored neighborhood: these are private sector functions for which NORA may perhaps be the midwife, but not the parent.46

At this writing, the legal turbulence following adoption of the Louisiana constitutional amendments in late 2006 has contributed to New Orleans' failure to pursue either of the last two charges, to designate a single Community Improvement Project, or to establish a land bank of the scope anticipated by the city's mayor.47 Indeed, Part IV discloses that the state's 2006 amendments can plausibly be interpreted to preclude the city's transfer of any expropriated parcel—blighted or otherwise—to the private sector.

III. KELO, EMINENT DOMAIN, AND THE ANTI-KELO FORMAT

Conclusions regarding the principal patterns reflected in the states' post-Keio responses must remain tentative at this writing. None of them has been authoritatively construed by a state supreme court. Oversimplification threatens facile summary, moreover. To date, at least forty-two states have adopted measures, a number of which undertake complex revisions of constitutional property/takings clauses or of some combination of eminent domain, urban development, and civil procedure statutes.

It is clear, however, that most states tempered their initial distress with Keio as the learning process matured.48 Very few adopted what

46. Telephone Interview with John J. Marshall, supra note 37.
47. Telephone Interview with Ed Blakely, supra note 44.
48. Professor Somin's evaluation of the nation's post-Keio measures concludes with his statement that "much of the proposed legislation is likely to have little effect and may simply represent 'position-taking' intended to mollify public opinion." Somin, supra note 7, at 190. In a subsequent study, he specified that of thirty-six measures analyzed, "twenty-two ... are largely symbolic in nature, providing little or no protection for property owners," and "[s]everal of the remainder were enacted by states that had little or no history of condemning

this Article dubs anti-eminent domain “nuclear” options. A somewhat larger group imposed substantive constraints on eminent domain’s use for urban revitalization, principally by defining “blight” more restrictively. The largest group, however, favored an array of significant but less dramatic procedural and compensatory modifications. Part II features the first two groups because Louisiana’s 2006 amendments will likely be construed to place the state somewhere between them.

A. Some Preliminary Drafting Conundrums: “Economic Development” and Private Transfers

“Economic development” and government’s transfer of expropriated property to private entities are the bêtes noires of anti-Kelo sentiment. How might a post-Kelo measure be drafted to address each element?

There is no simple answer. Banning both outright as invalid public uses is not an option because each is firmly and favorably embedded in state constitutions, legislation, and practice.

Private transfers and the more imposing delegation of the eminent domain power to private entities have been commonplace since the nineteenth century. Unsurprisingly, therefore, post-Kelo measures restricting these transfers are replete with exemptions, qualifications, and escape clauses. Private entities to whom eminent domain property for economic development.” Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 MNN. L. REV. (forthcoming 2009) (manuscript at 3), available at http://ssrn.com/abstract_id=976298 (last visited Nov. 22, 2008).

49. These changes include more liberal attorneys’, mediators’, and appraisers’ fees and relocation payments to condemnees; elevated standards of just compensation with increases required for acquisition of residences and of property destined for a more lucrative use; heightened standards for accountability and documentation/justification of such agency actions as blight and redevelopment parcel and area boundary determinations; a related increase in judicial scrutiny and burden of proof required to justify these agency actions; imposition of supermajority voting requirements by elected officials for approval of agency actions; establishment of eminent domain “ombudsmen” to protect condemnee interests; avoidance of “planning blight” by requiring commencement of redevelopment projects within tightened deadlines; heightened burden on agencies to show “necessity” of parcel acquisition, especially for unblighted parcels and recourse to eminent domain rather than acquisition by voluntary transfer; and the vesting of various rights of first refusal in condemnees to preclude expropriated property’s transfer within stated time periods to other private parties or the property’s utilization for a purpose other than that supporting the agency’s eminent domain petition.

authority has been delegated\textsuperscript{51} or who function as common carriers or furnish public utilities\textsuperscript{52} may use or own expropriated private property. State legislatures may authorize these transfers by general law\textsuperscript{53} or on a case-by-case basis.\textsuperscript{54} Favored state agencies receive exemptions.\textsuperscript{55} Likewise exempted are grandfathered projects\textsuperscript{56} or those undertaken in areas defined by political jurisdiction or other classification.\textsuperscript{57}

Cabining "economic development" has proven to be a fool's errand. However problematic the phrase's treatment by the \textit{Kelo} majority, its presence as one of eminent domain's goals is confirmed by its traditional use to acquire land for roads, airports, seaports, public utilities, common carriers, and other vehicles of commerce. The power supports the many public-private partnerships that states now embrace for economic development through their spending, taxing and police powers in order to offset the loss of formerly generous federal funding for such vital state needs as transportation and highway construction.\textsuperscript{58} A categorical ban on economic development, moreover, would clash both with other constitutional or statutory provisions encouraging its pursuit and with the states' aggressive use of these powers to attract industry and other sources of economic growth.\textsuperscript{59}

To be truly effective, moreover, post-\textit{Kelo} measures must \textit{disallow} eminent domain-based economic development rather than merely \textit{discount} it as a factor that independently satisfies the public use

\begin{itemize}
\item \textsuperscript{53} \textit{Fla. Const. art. X, § 6(c).}
\item \textsuperscript{54} \textit{Alaska Stat.} § 09.55.240(1) (2006).
\item \textsuperscript{55} \textit{Tex. Gov't Code Ann.} § 2206.001(c)(2) (Vernon 2008) (port authorities and navigation and reclamation districts).
\item \textsuperscript{56} 2006 Minn. Laws ch. 214, § 22(b), \textit{included in Historical and Statutory Notes to Minn. Stat. Ann. 117.025 (West Supp. 2008)} (grandfathering all eminent domain actions commenced in tax increment financing districts on or prior to February 1, 2008).
\end{itemize}
requirement. The UNOP example demonstrates why: namely, redevelopment-based eminent domain serves an array of purposes, only one of which is economic development. Noneconomic development purposes that may be attended by economic consequences cannot be equated with economic development purposes if the latter terms are to have intelligible boundaries. But economic consequences are permissible under post-*Kelo* measures if the purpose of the measure giving rise to them is not itself solely or primarily economic development.

The point is confirmed by a few queries. Is San Francisco’s commitment to historic preservation motivated exclusively or even principally by economic development? What about New York City’s successful program to eliminate sex businesses and vice from its Times Square Broadway Theater district? Does New Orleans err in a UNOP Plan that equates only one of its ten planning sectors with “economic development”? Is NORA’s effort to reduce crime in blighted neighborhoods through targeted acquisition of troubled properties an exercise in economic development?

Eminent domain has been used in aid of each of the foregoing activities and, of course, an open-ended class of others. Each undoubtedly engages economic issues at one level or another and, if successfully undertaken, will indeed hike the host city’s tax receipts. But labeling these activities as “economic development” puts the cart before the horse. Their economic benefits are a significant but secondary consequence of the fulfillment of other human and social needs such as confirmation of community identity, the creation of a healthy and safe environment, or enjoyment of the fun and fantasy in the world’s most fabled entertainment district.60

60. For an extended assessment of the many legally recognized ways of experiencing and responding to urban space beyond its status as an economic good, see generally JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE (1989). Urban ecologist Walter Ffrey speaks to this point in rejecting the rigid perspective of those who “have made of spatial adaptation a strictly economic phenomenon. They have begun by regarding all social systems as purely economic units. They have then postulated that the only socially relevant quality of space is its costfulness as an economic good.” WALTER Ffrey, LAND USE IN CENTRAL BOSTON 19 (1947). In his evaluation of New London’s development plan, Professor Richard Brooks counters such reductionism by stressing that the plan’s focus on the city’s maritime character and history highlights a crucial element in New London’s identity, based upon its history, its surroundings, and this continuous effort to perpetuate that heritage. Every city has its identity and those who live, work, and visit that city can share in that identity. Without exaggeration, one might say that the development plan expressed New London’s collective memory and identity as a marine city continuing to seek sustainability in a changing economy. The sustainability as a maritime city means the presence of
Purpose and consequence have become confused in the post-
*Keo* dialogue. *Keo* started the ball rolling by trivializing eminent
domain-based urban redevelopment as merely government's entitle-
ment to favor the higher private taxpayer. Unlinking eminent domain
from substantive redevelopment goals and converting it into an adjunct
of the taxing power laid the conceptual basis for repositioning urban
redevelopment exclusively as a subcategory of economic development.
Anti-*Keo* proponents seized on Justice O'Connor's catchy "Motel 6
for Ritz-Carlton" phrasemaking to disregard redevelopment goals that
not only can't be equated with economic development, but that render
private sector investment feasible by securing such other, more
fundamental values as neighborhood safety or civic identity and pride.

The Court could and should have avoided this scenario. New
London's pervasive urban problems—many similar to those besett ing
New Orleans pre- and post-Katrina—afforded the Court ample
opportunity to confirm that eminent domain-based urban development
is an independent activity designed to serve a variety of land use goals,
many of which may indeed generate beneficial economic
consequences.61

By themselves, therefore, restrictions on "economic develop­
ment" do not advance the anti-*Keo* agenda. On the contrary, measures
most hostile to *Keo* ignore economic development altogether.62
Restrictions on the latter in other measures, it will be shown, do not
restrain eminent domain on the basis of economic development's
largely unspecified content but by linking the concept to other

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Richard O. Brooks, *Keo* and the "Whaling City": The Failure of the Supreme Court's
Opportunity to Articulate a Public Purpose of Sustainability, in *The Supreme Court and
Takings: Four Essays*, supra note 29, at 5, 8.

61. Richard Brooks observes:

The [New London Redevelopment] Plan was more than an economic
development plan. . . . The plan also proposed the environmental cleanup of more
than a century of marine-industrial activities as well as the protection and
restoration of important wetlands, improvements of the sewer system, and control
of odor pollution from the waste-water treatment facility in the area. In short, the
ninety-acre plan was, to all intents and purposes, a classic redevelopment plan
seeking to take advantage of some on-going public projects, but adding and
coordinating them with some new public and private initiatives. . . . [T]he
development plan represented a bold new effort to continue New London's
maritime heritage with access to the sea, water-related recreation, and a historical
reminder of what New London was all about.


62. See infra notes 78-81 and accompanying text.
elements, principal among which are closed-ended public use inventories, private transfers, and restrictions on eminent domain-based urban redevelopment. The case for economic development's efficacy as a self-contained restraint collapses altogether when even a staunch anti-Keelo academician complains that twenty-two post-Keelo measures utilizing this criterion provide "little or no real protection for property owners."64

B. The Anti-Keelo Format

Post-Keelo measures most hostile to eminent domain-based redevelopment display some combination of four elements in addition to economic development restrictions. Those less hostile either avoid these elements or substantially qualify their scope. The elements include a closed-ended inventory of public uses, outright or invasive bans on eminent domain's use for urban redevelopment, similar bans on private transfers, and enactment of the measure in constitutional form rather than—or in addition to—statutory form.

C. Open- versus Closed-Ended Public Use Inventories

One way of containing the eminent domain power is to restrict its functions strictly to activities expressly deemed to be "public uses." The federal and, until Keelo, state constitutions or eminent domain statutes rejected this closed-ended approach, leaving it to the judiciary to assess the phrase's scope in relation to the legislature's conception of imperative social and economic needs. But this reactive posture is opposed by those who fear that public officials may prove disrespectful of private property rights, or be predisposed to corrupt or otherwise pernicious relationships with the redevelopment system's private actors. For them, nothing short of "nuclear bans" on private

63. Any eminent domain-based activity that substantially serves a public use other than economic development is unsathed by provisions discounting consideration of the latter in the public use calculation. But the activity cannot proceed or will otherwise be hobbled if that use is not included in an inventory in a closed-ended state, see infra notes 65-73 and accompanying text; engages a category of property not included within a narrowly drawn blight definition, see infra notes 82-86 and accompanying text; or requires the participation of a private recipient or user in states that ban or restrict transfers for private use or ownership, see infra notes 95-102 and accompanying text.

64. See Somin, supra note 7, at 184.

65. See CASTLE COAL., supra note 11, at 233-41.
transfers and on eminent domain's redevelopment uses\(^{66}\) are truly satisfactory.

The closed-ended drafting option affords them a vehicle that features a litany of approved public uses, and rules out any eminent domain use not expressly approved in the inventory. Recurrent entries include publicly owned facilities and buildings; transportation facilities including highways, ports, navigation improvements, airports, and railroads; public and private utilities and common carriers; drainage and flood control networks and facilities; private uses incidental to the expropriated property's dominant public use; blight remediation and area redevelopment; and parks, convention centers, and recreational centers open to the public. Expressly disapproved as public uses are economic development and the transfer or use of expropriated property for the private benefit of private entities.\(^{67}\)

Open-ended inventories do not enumerate specific public use categories,\(^{68}\) although they may supplement the general concept with examples of activities deemed to fall within it. The generic "public use" concept remains vital, however, as a residual source of authority for the power's exercise.

The closed-ended option purchases apparent certainty and containment at a dubious cost. Government's purposes are not static, of course, as the last century's evolution of the police and eminent domain powers in land use law confirms.\(^{69}\)

What lies ahead for American cities, I believe, is almost certain to demand enlarged governmental engagement in urban systems

\(^{66}\) See infra notes 77-81 and accompanying text (ban on eminent domain-based development); infra notes 98-101 and accompanying text (ban on private transfers).

\(^{67}\) The format is exemplified by VA. CODE ANN. § 1-219.1(A) (2008) in its statement that "[t]he term 'public uses' ... is hereby defined as to embrace only the acquisition of property where [the exercise of eminent domain supports the purposes inventoried]" (emphasis added). For other closed-ended provisions, see, for example, KAN. STAT. ANN. § 26-501(b) (2001); N.H. REV. STAT. ANN. § 162-K.2(IX-a) (Supp. 2008).

\(^{68}\) ME. REV. STAT. ANN. tit. 1, § 816(4) (Supp. 2007) ("Nothing in this section ... prohibit[s] a ... governing body from exercising the power of eminent domain for purposes not otherwise prohibited by subsection 1."); MICH. CONST. art. X, § 2 (eliminating economic development as a public use and providing that "[p]rivate property otherwise may be taken for reasons of public use as that term is understood on the effective date of the amendment to this constitution that added this paragraph").

\(^{69}\) The Supreme Court approved zoning as a police power exercise, for example, as a response to land use needs created by the nation's increasing urbanization. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-97 (1926). The Court subsequently approved eminent domain-based slum clearance in response to the decline of many American cities in the early- and mid-twentieth-century period. See Berman v. Parker, 348 U.S. 26, 35-36 (1954).
management, including the use of eminent domain-based redevelopment initiatives.

But we need not ponder mega-trends to conclude that the closed-ended option can produce pernicious consequences. The risk of these consequences is written all over the New Orleans case study. Inexplicably, Louisiana, unlike Ohio and other states, does not include eminent domain's deployment to combat a natural disaster or public peril in its public purpose inventory. Compounding this failure of public policy, Louisiana's closed-ended provision is a constitutional measure, forcing its judiciary, legislature and local governments to ransack its impoverished text in search of language—any language—that might serve as a predicate for the power's use.

D. Banning or Restricting Eminent Domain's Use for Urban Redevelopment

*Kelo* did not call into question a municipality's power to employ eminent domain for substantive planning purposes. Even Justice O'Connor approved its use for blight removal, objecting instead to the majority's support of private transfers for "economic development." Her distinction between these two uses of the power, it bears emphasis, is echoed in the decisions of the many state courts that likewise oppose the power's use for economic development, but not for blight mitigation or area redevelopment.

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70. *See infra* note 150 and accompanying text.
71. *Ohio Rev. Code Ann.* § 1728.01(C)(2) (LexisNexis Supp. 2008) defines an "impacted city" as one that has been "declared a major disaster area, or part of a major disaster area, pursuant to the [federal] 'Disaster Relief Act of 1970,' . . . and has been extensively damaged or destroyed by a major disaster." Subsection (I) of this provision defines a "major disaster" as "any tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, fire, or other catastrophe." *Id.* § 1728.01(I). In their pathbreaking course book, *Disasters and the Law: Katrina and Beyond*, Daniel Farber and Jim Chen observe that a "disaster law" book is required because it "is hard to think of anything equally important that has received such little sustained attention from lawyers and law professors." FARBER & CHEN, *supra* note 15, at xix.
73. Significantly, NORAS founding statute does anticipate the possibility of eminent domain's use in redevelopment areas "as a result of an act of God, fire, bombing, riot, or other catastrophe" and permits the city's governing body to waive conditions relating to approvals of community improvement projects. *See La. Rev. Stat. Ann.* § 33:4720.57(I) (Supp. 2008). Because this statutory provision predates the Louisiana constitutional amendments, however, it is doubtful that it survives the amendments' closed-ended inventory.
74. *See supra* note 9 and accompanying text.
But the anti-*Keio* format is more radical because its supporters fear that economic development goals may be disguised in blight remediation garb. The format not only bans the former as an independent public use, but seeks to ban or severely shrink the power’s blight remediation function when used to acquire individual parcels and, even more determinedly, when used to assemble multiple properties in a project area. This effort often overlaps with provisions restricting private transfers, which are addressed independently in the following section.

1. The Nuclear Option: Banning Blight Takings

The post-*Keio* measures adopted by Florida and New Mexico illustrate the nuclear option because they flatly ban expropriation of private property for blight remediation or slum clearance. Florida cancels the power’s use “for the purpose of abating or eliminating a public nuisance,” or “for the purpose of preventing or eliminating slum or blight conditions,” and deems both activities a violation of the state constitution’s “public purpose” requirement. New Mexico follows suit by denying local governments authority to employ eminent domain to address metropolitan redevelopment concerns.

2. The Nonnuclear Options: Shrinking the Blight Concept

Shrinking the blight concept also impedes eminent domain’s use, particularly if the option is further linked to private transfer restrictions. Post-*Keio* measures manifest various degrees of shrinkage running from blight definitions that effectively reduce blight to its origins in public nuisance law to others of marginally lesser severity to a final group that leave largely intact the broader blight and slum clearance parameters developed in the mid-twentieth century.

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76. See *Castle Coal*, supra note 11, at 3-4; Somin, supra note 7, at 265-67.
77. The Florida and New Mexico provisions merit comparison with South Dakota’s somewhat less “nuclear” ban, which, unlike the former provisions, permits expropriation of blighted property if the property remains in public ownership. See 2006 S.D. H.B. 1080 (signed into law Feb. 27, 2006). As noted in notes 98-102 and accompanying text, infra, a categorical ban on transfer precludes use of public-private partnerships as a vehicle for urban redevelopment.
79. Id. § 73.014(2).
82. For a detailed state-by-state analysis of post-*Keio* measures running the gamut described in the text, see Somin, supra note 48, at 31-40.
Among the nuisance-type standards are those found in the New Hampshire,\textsuperscript{83} Virginia,\textsuperscript{84} and Oregon statutes.\textsuperscript{85} Somewhat less restrictive but still both severe and precise in their detailed standards are measures that enumerate multiple considerations that in one or more combinations warrant a blight determination.\textsuperscript{86}

Two additional restrictions may be imposed. The first, which allows government to expropriate but \textit{not} to transfer blighted property, undermines eminent domain's use in a public-private partnership mode by eliminating the private sector as a recipient of expropriated property.\textsuperscript{87} The second, which attacks the power's use to assemble and consolidate multiple strategic parcels, requires that each condemned parcel must be blighted.\textsuperscript{88} This provision conflicts with statutes permitting the inclusion of nonblighted properties in area-wide project designations\textsuperscript{89} and with \textcite{Bennan} holding that the acquisition of these properties does not violate the Fifth Amendment’s public use requirement.

From the opposite end of the spectrum are provisions that continue to define the urban redevelopment enterprise expansively by incorporating blight prevention goals such as “sound growth” and avoidance of “social and economic liability,”\textsuperscript{90} or by approving

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{83} See N.H. Rev. Stat Ann. § 162-K:2 IX-a(3) (Supp. 2008) (authorizing condemnation of “structures beyond repair, public nuisances, structures unfit for human habitation or use, and abandoned property when such structures or property constitute a menace to health and safety”).
  \item \textsuperscript{84} Va. Code Ann. § 1-219.1(B) (2008) (defining blighted property as property “that endangers the public health or safety . . . and is (i) a public nuisance or (ii) an individual . . . structure . . . that is beyond repair or unfit for human occupancy or use”).
  \item \textsuperscript{85} Or. Rev. Stat. § 35.015 (2)(a) (2007) (allowing that property may be expropriated that “constitutes a danger to the health or safety of the community by reason of contamination, dilapidated structures, improper or insufficient water or sanitary facilities, or any combination of these factors”).
  \item \textsuperscript{87} The obstacles created by the no-transfer language are addressed \textit{infra} note 128 and accompanying text. The expropriation but nontransfer option appears in the many post-
  \textcite{Kelo} measures that preclude expropriation “for the purpose” of transferring its ownership or use to another private party, assuming that courts construe this language to address the result
  rather than the purpose of the exercise. On the result/purpose distinction, see \textit{infra} note 127
  and accompanying text. Illustrative of these measures is N.D. Cent. Code § 32-15-01(2)
  (Supp. 2007), which bans expropriation “for the use of, or ownership by, any private
  individual or entity, unless that property is necessary for conducting a common carrier or
  utility business.”
  \item \textsuperscript{88} See, e.g., Ala. Code § 24-2-2(a)(1) (LexisNexis 2007); Ga. Code Ann. § 22-1-
  1(1).
  \item \textsuperscript{89} See statutes cited \textsuperscript{supra} note 6.
  \item \textsuperscript{90} The statutes are collected in Somin, \textsuperscript{supra} note 75, at 1933 nn.7-11.
\end{itemize}
\end{footnotesize}
economic development if the latter is one of the project’s “secondary impacts.”91 These measures may treat blight remediation as a category distinct from economic development,92 or exempt urban-renewal-based uses of the eminent domain power from private transfer bans,93 or both. Area-wide as well as parcel-by-parcel blight determinations may be made, moreover, subject to conditions supporting the reasonableness of including nonblighted property in the eventual project assemblage.84

E. Restricting Private Transfers

The difficulty of distinguishing economic development from other redevelopment purposes undoubtedly accounts for measures that opt to bar or restrict the transfer of expropriated property to other private entities. This blunt approach95 sidesteps the definitional problem in favor of the simpler task of exempting from its reach private transfers undertaken by public utilities96 or common carriers.97 A number of these measures also exempt blight remediation but mitigate the definitional challenge by shrinking blight’s scope under one of the alternatives described in the previous Part. This indiscriminate approach, like the latter, includes both nuclear and nonnuclear options.

1. Nuclear Option: A (Close to) Flat Ban on Private Transfers

A categorical ban on private transfers without more obliterates eminent domain’s use for urban renewal as a public/private undertaking by eliminating the private partner without whom urban redevelopment often cannot practicably proceed. Correlative constraints on economic development or blight removal are unnecessary although they often appear in measures alongside the nuclear option.

91. Texas’ measure, for example, permits eminent domain for economic development provided that the latter “is a secondary purpose resulting from . . . municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.” TEX. GOV’T CODE ANN. § 2206.001(b)(3) (Vernon 2008).
93. See TEx. GOV’T CODE ANN. § 2206.001(b)(3).
94. See statutes cited supra note 8.
95. Indiscriminate restrictions on private transfers substantially overshoot Justice O’Connor’s dissenting viewpoint, which finds them unobjectionable if the eminent domain-based measure remedies an affirmative harm. See supra notes 8–9 and accompanying text.
Earlier discussion clarifies that because none of the post-*Keel* measures is unqualified, none absolutely bans private transfers. But the amendments to the Florida, New Hampshire, and North Dakota constitutions and to South Dakota's redevelopment statute come close. Florida's provision is the most restrictive of the four because, as supplemented by statute, it bans both the expropriation and private transfer of redevelopment parcels, while the latter three states ban the parcel's private transfer, but not its expropriation.

2. Nonnuclear Options

A variety of less categorical options have also been devised. One bars expropriation or private transfers if the current use of the target property falls within a proscribed category. Another prevents local governments from executing private transfers for a specified number of years following the property's expropriation. South Dakota, for example, grants the former owner-condeminee a right of first refusal prior to the property's sale to other private entities within seven years of its taking. Should the former owner decline, the property must be sold on a competitive, open-bid basis.

The option linking a time delay to the former owner's right of first refusal could prove as potent in practice as the nuclear option. Public-private partnerships in the urban redevelopment setting require

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98. **FLA. CONST.** art. X, § 6(c) provides that "[p]rivate property taken by eminent domain . . . after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature."

99. **N.H. CONST.** art. 12-a provides that "[n]o part of a person's property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property."

100. **N.D. CONST.** art. I, § 16 provides that "[p]rivate property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business."

101. **S.D. CODIFIED LAWS** § 11-7-22.1 (Supp. 2008) forbids counties, municipalities and redevelopment commissions from expropriating private property "[f]or transfer to any private person, nongovernmental entity, or other public-private business entity."

102. **FLA. STAT. ANN.** § 73.014(1)-(2) (West 2008).

103. **KAN. STAT. ANN.** § 12-1773(a) (Supp. 2005) (conservation area); **L.A. CONST.** art. VI, § 21(D) (homestead).

104. **S.D. CODIFIED LAWS** § 11-7-22.2. A closely related but less potent option is conferring a right of first refusal on former owners if the property is not devoted to the use for which it was originally expropriated. See, e.g., **ALA. CODE** § 11-47-170(c) (LexisNexis Supp. 2007); **MONT. CODE ANN.** § 70-30-322 (2007).
an integrated acquisition-disposition process and a flexible public-private partner negotiation process, both of which the option denies.\textsuperscript{105}

\textbf{F: Constitutional versus Statutory or Combined Constitutional/Statutory Options}

At first blush, many observers would likely agree with the claim that incorporating post-\textit{Kelo} changes in a constitutional amendment is "unambiguously the most effective way"\textsuperscript{106} to address objections to the \textit{Kelo} holding. The claim is not without its appeal. As a foundational right, property merits protection in a foundational document. The change's durability, moreover, is better assured in a constitution, which is less easily amended than a statute. These considerations apparently proved persuasive to the seven states that, at this writing, have chosen this route.\textsuperscript{107}

But constitutionalizing post-\textit{Kelo} measures is not without its risks for \textit{Kelo} opponents. Abstract constitutional texts in general and property clauses in particular afford courts ample interpretative leeway: the terms "health and safety," "economic development," and transfers "for" such goals as "private use" or "private development" are anything but self-defining. Courts attuned to a community's redevelopment needs will be disposed to construe them to favor rather than undermine eminent domain's use when, as in the New Orleans case study, a contrary interpretation will effectively shut down eminent domain-based redevelopment.\textsuperscript{108}

Outcomes unhelpful to the anti-\textit{Kelo} format's intent can also be anticipated because constitutional property clauses cut a much broader swath than state eminent domain or urban redevelopment statutes—the two principal targets of nonconstitutional post-\textit{Kelo} measures. Redefining "public use," for example, implicates not only government's management of urban redevelopment, but its exercise of the spending, taxing, and police powers.\textsuperscript{109} Courts may choose to construe

\begin{footnotesize}
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\item \textsuperscript{105} This issue is revisited in subsequent discussion of La. Const. art. I, § 4(H). \textit{See infra} notes 130–132 and accompanying text.
\item \textsuperscript{106} \textit{Castle Coal.}, \textit{supra} note 11, at 44.
\item \textsuperscript{107} The seven states are New Hampshire, Florida, Georgia, Michigan, Louisiana, North Dakota, and South Carolina. Nevada has underway an initiative—Assembly Joint Resolution 3—that, if approved in 2009 by the state legislature and in 2010 by the state's voters, will assume constitutional form as well. \textit{See id.}
\item \textsuperscript{108} \textit{See infra} note 128 and accompanying text (discussing \textit{New Orleans Redevelopment Authority v. Johnson}).
\item \textsuperscript{109} In Louisiana, the phrase "public purpose," which is defined in La. Const. art. I, § 4(B)(3) to exclude economic development, also appears in six other constitutional provisions, each of which authorizes activities or governmental support for activities that
\end{itemize}
\end{footnotesize}
these reformulations very narrowly to avoid conflicts with settled understandings of these other powers.

IV. LOUISIANA'S CONSTITUTIONAL AMENDMENTS

Louisiana's post-\textit{Kelo} response incorporates a tail-chasing maze of bans, qualifications, and exemptions. Tedious and tentative as its detailed analysis most certainly is, the exercise affords a real-world scenario against which to evaluate both the \textit{Kelo} controversy's most perplexing challenges as well as to portray the dead end to which libertarian anti-\textit{Kelo} critique leads for American cities with pressing eminent domain redevelopment needs.

The exercise, moreover, is not an exercise in Louisiana exotica: many of the fundamental conflicts and ambiguities that it surfaces reappear in many of the forty-one other states' post-\textit{Kelo} measures. Tragic in itself, therefore, Katrina's decimation of New Orleans, an event that followed \textit{Kelo} and preceded Louisiana's post-\textit{Kelo} measure, serves as a laboratory in which the adequacy of the last two elements can be weighed against the public necessities created by the first.

A. \textit{Open- or Closed-Ended Inventory}

Louisiana's provision is closed-ended.\footnote{110} When combined with its failure to address public disasters as a public purpose and the possibility that the provision may also be construed to prevent private transfers,\footnote{111} its closed-ended feature could simply shut down \textit{any} eminent domain-based New Orleans' recovery strategy, including NORAh's five charges under UNOP.\footnote{112}

\begin{footnotesize}
\begin{enumerate}
\item clearly enhance community economic welfare. \textit{See} \textit{LA. CONST.} art. VI, § 17 (zoning and land use control), art. VI, § 23 (power of local governments to acquire property by any means, including eminent domain), art. VII, § 1 (taxing power), art. VII, § 10 (appropriation power), art. VII, § 14(B)(3) (pledges of public funds, credit, or property), art. VII, § 14(C) (government's power to enter into "cooperative arrangements" to implement public/private partnerships). Louisiana has compounded the likelihood of conflict between article I, section 4 and one or more of these other constitutional provisions by failing to supplement its constitutional measure with clarifying statutory amendments to its eminent domain or redevelopment codes.
\item Article I, section 4(B)(2) of the Louisiana Constitution approves as "public purposes" a general public right to a definite use of the property; continuous public ownership of property used for public buildings, land and maritime transportation systems, drainage, flood control and navigational protection, various recreational and cultural facilities, public utilities, and public ports and airports; and expropriation to remove threats to public health or safety. Section 4(B)(3) negates consideration of both economic development and enhancement of tax revenue as public purposes.
\item \textit{See infra} note 127 and accompanying text.
\item \textit{See supra} notes 30-45 and accompanying text.
\end{enumerate}
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B. Economic Development: An Insufficient Public Purpose

The Louisiana measure confirms the inefficacy of post-Kelo economic development clauses. It clearly distinguishes economic development from urban redevelopment. The latter, presented as authority to remove “threat[s] to public health or safety,” is included in an inventory of activities expressly approved as “public purposes.” Economic development surfaces in an independent clause disqualifying it for consideration as a public purpose.

Both this syntax and the measure’s legislative history insure that, by itself, the economic development clause will not bar NORA from utilizing its condemnation power in accordance with UNOP expectations. The nine UNOP elements earlier titled as serving goals other than economic development, moreover, would not appear to violate the clause. Whether or not NORA’s execution of its UNOP mandate survives the measure’s other clauses, however, is more problematic.

C. Urban Redevelopment: Banned, Welcomed, or Restricted in Louisiana?

The problems commence with the measure’s sole provision addressing the authority of Louisiana local governments to engage in eminent domain-based redevelopment. Article 1, section 4(B)(2)(c) qualifies as a “public purpose” the power’s use for “removal of a threat to public health or safety caused by the existing use or disuse of the property.” Does this language empower NORA to fulfill its UNOP-defined role?

The only certain response at this time is that the section does not impose either Florida’s or New Mexico’s nuclear ban on redevelopment. But neither does the section welcome this outcome. The difficult question for the Louisiana courts will be the extent to which the section impedes their achievement.

114. Section 4(B)(3), id, provides that “[n]either economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose.”
116. See supra notes 30-45 and accompanying text.
117. See supra note 25 and accompanying text.
Section 4(B)(2)(c) is open to an interpretation that activates two subordinate devices that may dictate this outcome. The first is shrinking the blight concept from its previously ample scope in Louisiana jurisprudence\(^\text{118}\) and statute law\(^\text{119}\) to one more attuned to a nineteenth-century regime of nuisance abatement or remediation. The second is limiting NORAs power to the acquisition of individual blighted parcels only, thereby barring NORAs assembly of multiple parcels, some of which may be unblighted, pursuant to its statutory power to designate community improvement projects.

Limitation of the power's use under the first device will be proportioned to judicial construction of the terms "health" and "safety." Anti-Keio proponents will advance the plausible claim that the absence of the phrase "general welfare" warrants a narrow construction. This interpretation would bar eminent domain's use to clear titles on heir property or unvacated subdivisions.\(^\text{120}\) It would also cast serious doubt on the power's use to support parcel swaps transferring ownership from properties in high risk locations to properties in favored, densification areas.\(^\text{121}\)

But a more ample reading is not out of the question. It is difficult, after all, to imagine two more open-ended terms than "health" and "safety." The point is amplified in this instance because the legislature has not detailed their content in an accompanying amendatory statute and has left in place generous statutory definitions of "blighted parcel" and "blighted area."\(^\text{122}\)

The amendment's legislative history, moreover, supports this outcome in two respects that I have detailed elsewhere.\(^\text{123}\) Legislative debate clearly favored Justice O'Connor's support of urban redevelopment, while stoutly opposing Kelo's holding that increasing the community's tax base independent of any substantive planning...
concern is a public use.\textsuperscript{124} The legislature also cautioned the measure's drafters to avoid adopting a provision that might undermine an eventual South Louisiana recovery program.\textsuperscript{125}

Barring NORA from assembling strategic tracts of parcels, some of which may not meet section 4(B)(2)(c)'s narrow blight definition, or from designating community improvement projects would be a foolish policy when, three years after Katrina, square mile after square mile of New Orleans remain devastated, inert, unsafe, and shunned by private markets. Hence, the crucial question: does section 4(B)(2)(c)'s use of the language "the property" require this outcome? Should this language be read in a collective sense—the "property" encompassing a redevelopment area—or as referencing a single lot—Ms. Jones's "property"?

A clear answer might have been available had Louisiana supplemented its constitutional measure with clarifying amendments to its eminent domain and redevelopment statutes. But the legislature chose not to do so, while leaving in place NORA's authority to condemn property throughout entire "community improvement projects."\textsuperscript{126} The survival of this authority in the face of the later-adopted constitutional measure, while doubtful, remains an open question as well.

\section*{D. Private Transfers: Nuclear and Nonnuclear Restrictions?}

Louisiana's measure could plausibly be construed to author one nuclear and two nonnuclear restrictions on private transfers. The former could be predicated on article 1, section 4(B)(1), which opposes the taking of property "for predominant use by" or "for transfer of ownership to any private person or entity." If the term "for" refers to the result of the taking, the ban is nuclear. But if it refers to the taking's purpose, private transfers are not barred so long as the project's private advantages are incidental to their public benefits.\textsuperscript{127}

The first nonnuclear restriction would arise from interpreting section 4(B)(2)(c) to authorize condemnation, but not private disposition of distressed property. This interpretation meshes with

\begin{footnotes}
\item[124.] \textit{Id.} at 403 nn.32-33 & 45.
\item[125.] \textit{Id.} at 403 n.35.
\item[126.] \textit{See} \textit{L.A. REV. STAT. ANN. § 33:4720.58(A)} (Supp. 2008).
\item[127.] The purpose-result distinction received the Louisiana Supreme Court's robust approval when it approved as a public use the link between expropriation and the lease of the formerly blighted property to private tenants in \textit{State v. Housing Authority of New Orleans}, 182 So. 725, 745-46 (La. 1938).
\end{footnotes}
what may be the nuclear ban construction of section 4(B)(1) and the additional restrictions, discussed below, on transfers imposed by section 4(H)(1).

But a contrary position has already been sustained in Louisiana at the trial level in a case foreshadowing what likely will be extensive litigation addressing the Louisiana measure's many uncertainties. At stake in *New Orleans Redevelopment Authority v. Johnson* is the validity under section 4(B)(2)(c) of NORA’s agreement to transfer an expropriated blighted property to Habitat for Humanity, a private entity. The court approved NORA’s position that the “removal” of threats to health and safety under that section includes both its condemnation and its transfer to a private party. In an oral statement made from the bench, the trial judge reasoned that a contrary outcome could not have been the Louisiana Legislature’s intent because the eminent domain-based component of New Orleans’ recovery program would fail if the city were required to retain ownership of its expropriated property.

A second nonnuclear restriction may plausibly be predicated on article 1, section 4(H)(1), which, like the South Dakota provision examined earlier, subjects the sale or lease of expropriated property for a thirty-year period to a right of first refusal in the former owner. If the right is declined, the property may be sold or leased only by open competitive bid.

But this constitutional text, too, admits to conflicting interpretations. *Kelo* opponents will argue with no little force that section 4(H)(1) overrides section 4(B)(2)(C) because property condemned under the latter section is not included in the exemptions enumerated in section 4(H)(1). Contrarily, the two provisions can be viewed as independent of one another, and, therefore, interpretation of the former’s term “removal” to cover both condemnation and disposition is

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130. S.D. *Codified Laws* § 11-7-22.2 (Supp 2008). This statute fixes a seven- rather than thirty-year right-of-refusal term.
131. *Article I, section 4(H)(1)* of the Louisiana Constitution provides:

> Except for leases or operation agreements for port facilities, highways, qualified transportation facilities or airports, the state or its political subdivisions shall not sell or lease property which has been expropriated and held for not more than thirty years without first offering the property to the original owner or his heir . . . at the current fair market value, after which the property can only be transferred by competitive bid open to the general public.
not cut down by section 4(H)(1)'s scythe. The latter argument prevailed at the trial level in *New Orleans Redevelopment Authority v. Johnson* and enjoys considerable support in the constitutional amendment's legislative history.\footnote{132. See Costonis, supra note 115, at 403 nn.32-35. As this Article went to press, Louisiana voters, on November 4, 2008, declined to rescind section 4(H) in a referendum rejecting Act 936-SB No. 295 (Reg. Sess. 2008) setting forth the text of constitutional amendment number 6. Were the same question posed following the November referendum, opposition to this position can be anticipated on the grounds, first, that amendment number 6 effectively concedes that section 4(H)(1) does apply to section 4(B)(2)(c) and, second, that the voter's rejection of amendment number 6 conclusively establishes this outcome. This argument will fail, however, if Louisiana's appellate courts affirm the position of the trial judge in *New Orleans Redevelopment Authority v. Johnson* that section 4(H)(1) is not applicable to section 4(B)(2)(c).}

E. *The Louisiana Measure as a Constitutional Amendment*

Louisiana cast its post-*Kelo* response solely as a constitutional measure. Earlier discussion questioned the supposed efficacy that *Kelo* opponents ascribe to this route in light of the text's vague language and the uncertain relationships both among the measure's various clauses and between those clauses and other constitutional or statutory provisions.\footnote{133. See supra notes 106-109 and accompanying text.}

The Louisiana case study confirms these observations. The amendments' employment of one open-ended term after another to define the condemnation power's scope leaves unresolved, among other fundamental questions, whether municipalities now face a nuclear ban on private transfers, a qualified thirty-year obstacle to redevelopment-based transfers, and a regressive shrinking or, contrarily, an expansion of expropriation's scope.

Unclear linkages among the amendments' various clauses compound these uncertainties. Does section 4(B)(2)(c)'s grant of power to "remove" threats to health and safety, for example, comprehend the condemnation-private disposition cycle essential to a public-private partnership? Or are private transfers ruled out by section 4(B)(1)'s hostility to the "private" use or ownership of expropriated property and hampered by section 4(H)(1)'s further thirty-year restriction on private transfers?

A third set of issues is posed by uncertainties in the relationship between the constitutional amendment and the continuing status of the public purpose concept in Louisiana's other constitutional clauses. As
already noted, six other Louisiana constitutional provisions employ the term “public purpose”; each authorizes activities serving enhanced economic development goals; and article VI, section 21 expressly approves the expropriation and transfer to private parties of industrial property on the basis of its “economic impact.” How, if at all, does article I, section 4’s closed-ended redefinition of “public purpose” and the further exclusion of “economic development” impact these provisions?

It is true that the difficulty of amending Louisiana’s constitutional provision affords a reasonable guarantee of its durability. But the state’s courts may find themselves inclined to interpret the measure cautiously, rather than robustly, precisely because of its longevity. When a measure is open to as many conflicting interpretations as Louisiana’s measure, moreover, the outcome may only be durable uncertainty. Discussions with officials of ORM and NORA confirm that these uncertainties have caused them to forego eminent domain-based redevelopment opportunities and have ignited an unresolved debate on how clarification of their authority might be obtained. In the meantime New Orleans must simply muddle through, using its eminent domain power fitfully while, as Nicolai Ouroussoff observes, “three full years after Hurricane Katrina devastated New Orleans, much of the city remains a wasteland.”

V. CONCLUSION

This Article assesses _Kelo_ and the first wave of post-Keo responses, including Louisiana’s constitutional amendments, against the backdrop of a hurricane-battered city’s recovery needs. Its point of

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134. See _supra_ note 109 and accompanying text.
135. Two examples from these clauses illustrate the interpretative challenge. First, does article VI, section 21’s “economic impact” provision survive these amendments? Section 4(B)(1) excludes these expropriations from its ostensible ban on private transfers. But section 4(H)(1) does not exclude them from its crippling thirty-year lease or sale restrictions. Does section 4(H)(1)’s failure to exempt industrial expropriations render them subject to its restrictions? Second, article I, section 4(B)(3) eliminates “economic development” as a public purpose without exempting article VI, section 21’s industrial property expropriations from its scope. Does the subsequently enacted article I, section 4(B)(3) override article VI, section 21’s approval of “economic impact” as a public purpose?
136. Telephone Interview with John J. Marshall, _supra_ note 37; Telephone Interview with Ed Blakely, _supra_ note 44. The option of pursuing the amendment of article I, section 4(H)(1) by rescinding the entirety of section 4(H), see _supra_ note 132 and accompanying text, met with the disagreement of those who feared that defeat of amendment number 6 could be viewed by a court as a concession that section 4(H)(1) does apply to section 4(B)(2)(c).
137. Ouroussoff, _supra_ note 1.
departure and return is the clash between New Orleans' recovery needs and the urban policies underlying an interpretation aligning Louisiana's constitutional amendments with the anti-Keio format. This Article's theme is that constitutional or policy reasoning that deprives New Orleans of an indispensable recovery tool in the wake of the nation's worst natural disaster affords the best evidence of its inadequacy.

A. Relinking Eminent Domain-Based Urban Renewal to Substantive Redevelopment Goals

One of this Article's three principal conclusions is that the Kejo court misconceived the issue before it by framing it as an economic development "higher taxpayer" question. In fact, the problems the project was designed to address, like those identified in the UNOP recovery program, engage not only "economic development" but a broad range of conventional urban planning problems that undeniably link the alleviation of these problems to New London's deployment of its eminent domain power.

A related issue should not be ignored although space limitations only allow its introduction in this Article. Rejuvenation of New London's Fort Trumbull project area was also intended to create a climate of confidence and citizen pride that would stimulate the solution of off-project physical and social planning issues associated with crime, education, housing abandonment, and other planning ills. May New London condemn property in the project area in part to resolve planning problems occurring elsewhere in the city if the project area is uniquely and favorably situated to contribute to the problems' resolution?

Under the police power, imposing burdens on an "innocent" parcel (and its owner) to solve a problem created by a separate "problem" property risks invalidation on due process or fairness grounds. But the eminent domain power allows expropriation as long as some public use warrants a parcel's acquisition, whether or not the basis for the public use derives from a defect of the target parcel itself. Would the vulnerability of New London's action under police power principles lessen or disappear because the owner of the condemned

138. See supra note 61 and accompanying text.
139. Berman is not helpful, of course, because the boundaries of the area afflicted with the planning problem—the Berman project area's status as a slum—were coextensive with the area within which the eminent domain power was exercised. See Berman v. Parker, 348 U.S. 26 (1954).
property receives just compensation, an element that is lacking under the police power?


This Article's second conclusion is that ideological or theoretical preconceptions insensitive to the stubborn public necessities associated with urban systems management are dubious sources for either constitutional prescriptions or urban planning policies. Professor Ilya Somin's various *Kelo* essays, for example, are iron-willed in their elevation of free markets over collective decision making in the redevelopment sphere and insistence that public officials who oversee this process will be "captured" by a cabal of realtors, private redevelopers, and others market actors. From these two self-selected propositions—each, not coincidentally, a staple of libertarian theorizing and property rights ideology—he urges a categorical ban not only on economically motivated projects but on true blight condemnations as well.

Somin candidly acknowledges that his argument "is based primarily on political and economic theory rather than on analysis of the history and text of federal and state public use clauses." He might have added that it likewise ignores urban planning theory and practice, spheres that however marginally illuminated by his ideologically driven theory, sternly resist colonization by it. His theoretical reasoning carries an especially daunting burden of persuasion because it would categorically bar New Orleans from expropriating and transferring to active private use a single one of its 71,000 blighted properties, thereby shutting down the eminent domain-based elements of the UNOP recovery plan.

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140. See Somin, supra note 48, at 74; Somin, supra note 7, at 183.
141. See Somin, supra note 75, at 1942-43.
142. Somin, supra note 7, at 187-88.
143. Somin advocates unequivocally for constitutionally based, categorical bans not only on what he describes as "economic development" takings, but for "true blight condemnations." Somin, supra note 7, at 186. "[M]arket mechanisms can ... accomplish the goals of economic development takings without the need for eminent domain," he argues; "[b]y contrast, private sector elimination of blight may sometimes be stymied by collective action problems requiring government intervention to overcome. My own view is that a ban on blight condemnations is probably desirable, even in spite of such concerns." Somin, supra note 75, at 1942. This view reappears in Somin, supra note 7, at 271.
Somin fails to meet this burden. His argument’s conclusions do little more than channel its dogmatic premises—the private market's superiority, even in the deeply hued collective action context of urban redevelopment, and the inability of public officials to resist special interest capture. When Somin's unyielding and ill-informed disdain of urban planning is piled atop these premises, his conclusions, of course, are inevitable. What is missing from his assessment is what this Article has undertaken to provide: an evaluation of the consequences of his abstractions in a real world context concretized in the Article by New Orleans’ recovery crisis.

144. Operating at Somin's level of sweeping generalization, one might be inclined to conclude with considerably greater confidence that the nation's current subprime mortgage and credit crises not only display the private market's self-destructive myopia, venality, and, perhaps, outright criminality, but have created the need for a massive infusion of public resources underwritten and suffered by the collective citizenry. Observing Wall Street and Detroit seeking—and obtaining—multibillion dollar subsidies, one winces at the irony of the private marketeers’ quarter-century celebration of Ronald Reagan's aphorism that the words “I am from the government, and I am here to help” are among the worst in the English language. Views in opposition to eminent domain similar to Somin's are broadcast by the Castle Coalition's publicists, albeit in a manner more fitting for Rush Limbaugh or Ann Coulter than for credible scholars. For them, eminent domain-based redevelopment is simplistically and repeatedly castigated as “eminent domain abuse” and as the unconstitutional invasion of “private property rights.” See CASTLE COAL., supra note 11, passim. Whether or not these labels apply is the question to be answered by appropriate empirical and legal analysis, of course, but neither issue is genuinely engaged by Castle Coalition. The property rights “invasion” is simply assumed, as though constitutions—state and federal—have not invariably spoken to government’s eminent domain power, alongside the police power, as an inherent limitation on private economic expectancies. The proffered “evidence” of eminent domain’s depredations featured in the Coalition’s 50 State Report Card, see supra note 11, is a selection of court cases and civic controversies in which public officials allegedly misused the eminent domain power. One might have as easily written a “50 State Report Card” that condemns zoning by cherry-picking similar instances of its actual or alleged misuse. In either case, no sensible observer would claim that these land use powers either are not vulnerable to abuse or have not been abused. Assuredly, however, few exercises of public power—land use or otherwise—would be deemed unconstitutional or impolitic solely on the basis of a “potential for abuse” test, as we are now rediscovering with the federal government's recapitalization of the nation’s private banking and credit system. Although clearly significant, risk of abuse is only one factor that must be engaged alongside other considerations including the actual incidence of abusive or beneficial uses of the context power; the heft of the community interests being addressed; the social, political, or economic consequences both of action and of inaction; and the political/electoral and judicial processes' capacity to monitor and remedy potential abuses. Sweeping generalizations in an area in which the nuance of specific facts and context necessarily impact assessment are, I believe, treacherous. Their spurious coherence is more likely than not to have been purchased by their derivation from prior ideological and dogmatically theoretical premises. New Orleans today, however, is where the rubber hits the road in Kelo's aftermath—hence, my decisions to formulate this Article as a case study and to resist sweeping generalizations that imperil the city's ability to wage its uphill struggle against an increasingly frightening future.

145. When empirical investigation is essential to support Professor Somin's argument, it is often cavalierly advanced, if attended to at all. For example, Somin advances a key
Absent such an assessment, it is unclear whether or not Somin believes that the private market will itself resolve New Orleans' recovery challenge. If he does, his private market bias has apparently blinded him to the reality that the market has been shunning entire New Orleans neighborhoods since Katrina hit while awaiting effective governmental leadership in line with UNOP's prescriptions. I suspect it more likely that Somin does not think markets will solve the problem, but would rather allow the problem and its evident human and social costs to fester than violate his ideological and supporting theoretical constructs.  

Argument in support of his call for a categorical ban on blight condemnation in the following terms:

[T]he fact that some centralized coercion may be desirable does not mean that the use of condemnation is the proper solution to the problem. Local governments have numerous other tools to deal with these sorts of problems, including the application of nuisance law, enforcement of housing codes, and the use of tax abatements or subsidies to encourage improvement of property. Somin, supra note 7, at 270. Characteristic of the similar absence of supporting investigation for other components of his argument, Somin advises that "[a] complete evaluation of these alternatives is beyond the scope of this Article." Id. In fact, his article provides no empirical investigation or evaluation of these techniques. Thoughtful observers of the urban development process who have examined the question empirically as it bears upon nuisance law and the enforcement of housing codes offer a distinctly pessimistic account of the effectiveness of both in the New Orleans context and, by implication, in other American cities. See Alexander, supra note 27, at 732-33, 739-43, 758; Marcello, supra note 41, at 767-68, 795-801.

146. Unpersuasively, Somin seeks to justify his advocacy for a categorical constitutional ban on the ground that "even in areas where there is 'real' blight—perhaps especially there—the condemnation process is likely to be abused for the benefit of private interests at the expense of the poor and politically weak." Somin, supra note 7, at 271. That reasoning as well as his principal sources and the case studies to which they refer, see id. at 268 n.143, address eminent domain usage and practices a half-century or more out of date. As to the present paper's case study, perhaps Somin is unaware that New Orleans, like a large number of America's other cities suffering urban distress, has been governed by African-American administrations for several decades now. For the failure of the Kelo bench and anti-Kelo academics like Somin to appreciate eminent domain's profound transformation over the last half century, see Marc B. Mihaly, Living in the Past: The Kelo Court and Public-Private Economic Development, 34 ECOLOGY L.Q. 1, 3-14 (2007). A more ironic version of Somin's position appears in testimony offered on behalf of Louisiana's anti-Kelo measure by Peppi Bruneau, one of its two principal co-sponsors who also served as its floor manager in the Louisiana House. Mr. Bruneau condemned those who opposed the Louisiana measures as unsupportive of New Orleans' recovery needs and as "vultures" who must be prevented "from profiting from the misery of our citizens." Broadcasts of the House of Representatives Floor Day 32, at 3:39 (May 23, 2006), http://houselouisiana.gov/H_Video/2006/May2006.htm (select "House Floor Day 32" under "May 23, 2006") (testimony of Rep. Peppi Bruneau). Eminent domain for any purpose—highway construction, redevelopment or otherwise—transforms government into "Big Brother sitting on top of you, eager to grind you into the dust." Id at 3:19. Despite his election from a Katrina-ravaged New Orleans legislative district, Mr. Bruneau asserted that recovery-based transfers of
Somin’s disappointment that many more states did not adopt post-Keio measures patterned on the anti-Keio format is acute. Compelled by ideology and theory to explain this outcome, he advances a two-part response. First, recalcitrant legislators refused the anti-Keio format because they are subject to “capture” or perhaps were captured by the foregoing real estate cabal, and hence are unable or unwilling to do their constituents’ bidding. Second, the latter are riven by “widespread political ignorance.”

Somin’s lead claim assumes that eminent domain-based redevelopment will almost surely be a feckless, if not pernicious, enterprise. This Article disagrees and offers a case study that suggests that legislators who disagree with Somin—as the overwhelming majority have done in refusing to enact post-Keio measures aligned with the anti-Keio format—may perhaps have a better appreciation than Somin of the marketplace’s limitations and of the benefits of public-private partnerships as stimulants to foundering neighborhoods and cities. Following Katrina and its destruction of their state’s coastal areas, for example, Mississippi legislators rejected the categorical bans so dear to Somin (and perhaps to Louisiana legislators) in order not to impede their state’s options in fashioning an effective recovery program. Should we conclude, as Somin’s logic dictates, that they are less virtuous than their Louisiana counterparts?

C. The Future of the Anti-Keio Format: Whither Louisiana and Florida

My final observation is that we are only at the beginning—not the end—of the post-Keio story. The structural and interpretative issues detailed in this Article reappear throughout the post-Keio measures of many other states. Interest groups from all sides of the question will undoubtedly litigate aggressively to secure favored outcomes. State judges, many of whom once served as local officials, will be prepared to assume the demanding interpretative responsibilities that the measures’ often vague or conflicting texts impose.

147. Somin, supra note 48, at 4.
148. Somin, supra note 7, at 184, 245.
149. Somin, supra note 48, at 4.
The question of greatest future interest to myself and perhaps to anti-
*Kelo* proponents as well is how the anti-*Kelo* format will fare for
those states that appear to have adopted it. Will Louisiana’s highest
court, for example, bail New Orleans out by a reading decidedly
sympathetic to the city despite the 2006 constitutional amendments’
facially harsh anti- eminent domain language? Or will the court shut
down eminent domain-based redevelopment altogether, leaving it to
the Louisiana Legislature to reenter the picture if it so chooses?

Florida’s future course may prove even more intriguing. Florida
will experience fierce tension between its nuclear eminent domain ban150
and its exposure to trends that could set the stage for eminent
domain’s more frequent use in this century. Recurrent Katrina-scale
natural disasters are predicted to accompany planetary global warming
and sea rise. Florida, which has already experienced many of the
nation’s most severe hurricanes, features one of the nation’s largest
riparian populations and a land mass particularly vulnerable to violent
Gulf weather. The subprime mortgage and credit crisis now upon the
nation will roil land markets and destabilize residential neighborhoods
for years. From the early twentieth century forward, Florida has
experienced legendary real estate booms and busts, and its real estate
markets are now among the nation’s most distressed. Energy shortages
and attendant price increases will increase already strong pressure to
reverse the patterns of suburban and exurban sprawl found throughout
Florida’s automobile-bound culture.

Recent immigration levels in Florida and other gateway states
rival those experienced nationwide during the 1875-1915 era, which
largely reshaped America’s cities over the next half-century.
Significant challenges will be associated with the nation’s effort to
reverse environmental overloading and contamination of its urban,
maritime land-based systems. The Everglades’ ruination only begins
to suggest the range of Florida’s land and water pollution and its
pending water shortages. Finally, Florida claims fourteen of the
nation’s 150 largest Metropolitan Statistical Areas, a number of which
are among the nation’s fastest growing regions. Cities within this
group such as Jacksonville, Tampa, and Miami will not only have to
deal with the urban reshaping consequences of the foregoing trends
but the more familiar redevelopment challenges of the current era.

150. Its constitutional provision permits the Florida legislature to waive the ban by
“general law.” See *supra* notes 78-80, 83-86 and accompanying text.
In Louisiana, Florida, and other apparently strong anti-\textit{Kelo} states, ideology and academic theory will be forced to contend with the practical, social and ethical demands of urban systems management that are largely ignored by Somin and others who agree with him. These states truly are the "laboratories" of which Justice Brandeis spoke, and their "novel social and economic experiments" will instruct us all.
§ 4. Right to Property

Section 4.

(A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

(2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "public purpose" shall be limited to the following:

(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.

(3) Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.

(4) Property shall not be taken or damaged by any private entity authorized by law to expropriate, except for a public and necessary purpose and with just compensation paid to the owner; in such proceedings, whether the purpose is public and necessary shall be a judicial question.

(5) In every expropriation or action to take property pursuant to the provisions of this Section, a party has the right to trial by jury to determine whether the compensation is just, and the owner shall be compensated to the full extent of his loss. Except as otherwise provided in this Constitution, the full extent of loss shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.

(6) No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction.

(C) Personal effects, other than contraband, shall never be taken.

(D) The following property may be forfeited and disposed of in a civil proceeding, as provided by law: contraband drugs; property derived in whole or in part from contraband drugs; property used in the distribution, transfer, sale, felony possession, manufacture, or transportation of contraband drugs; property furnished or intended to be furnished in exchange for contraband drugs; property used or intended to be used to facilitate any of the above conduct; or other property because the above-described property has been rendered unavailable.

(E) This Section shall not apply to appropriation of property necessary for levee and levee drainage purposes.

(F) Further, the legislature may place limitations on the extent of recovery for the taking of, or loss or damage to, property rights
affected by coastal wetlands conservation, management, preservation, enhancement, creation, or restoration activities.

(G) Compensation paid for the taking of, or loss or damage to, property rights for the construction, enlargement, improvement, or modification of federal or non-federal hurricane protection projects, including mitigation related thereto, shall not exceed the compensation required by the Fifth Amendment of the Constitution of the United States of America. However, this Paragraph shall not apply to compensation paid for a building or structure that was destroyed or damaged by an event for which a presidential declaration of major disaster or emergency was issued, if the taking occurs within three years of such event. The legislature by law may provide procedures and definitions for the provisions of this Paragraph.

(H) Except for leases or operation agreements for port facilities, highways, qualified transportation facilities or airports, the state or its political subdivisions shall not sell or lease property which has been expropriated and held for not more than thirty years without first offering the property to the original owner or his heir, or, if there is no heir, to the successor in title to the owner at the time of expropriation at the current fair market value, after which the property can only be transferred by competitive bid open to the general public. After thirty years have passed from the date the property was expropriated, the state or political subdivision may sell or otherwise transfer the property as provided by law.

(2) Within one year after the completion of the project for which the property was expropriated, the state or its political subdivision which expropriated the property shall identify all property which is not necessary for the public purpose of the project and declare the property as surplus property.

(3) All expropriated property identified as surplus property shall be offered for sale to the original owner or his heir, or, if there is no heir, to the successor in title to the owner at the time of expropriation at the current fair market value, within two years after completion of the project. If the original owner, heir, or other successor in title refuses or fails to purchase the surplus property within three years from completion of the project, then the surplus property may be offered for sale to the general public by competitive bid.
(4) After one year from the completion of the project for which property was expropriated, the original owner or his heir, or, if there is no heir, the successor in title to the owner at the time of expropriation may petition the state or its political subdivision which expropriated the property to have all or any portion of his property declared surplus. If the state or its political subdivision refuses or fails to identify all or any portion of the expropriated property as surplus, the original owner or the successor in title may petition any court of competent jurisdiction to have the property declared surplus.