

STRANDED AGAIN: THE INADEQUACY OF FEDERAL PLANS TO REBUILD AN AFFORDABLE NEW ORLEANS AFTER HURRICANE KATRINA

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Abstract: Hurricane Katrina was the most devastating hurricane to hit the United States in recorded history. The damage in New Orleans was most acutely felt by poor and African-American neighborhoods. One of the most pressing issues for poor residents of New Orleans in the future will be the availability of affordable housing. After the hurricane, Rep. Richard H. Baker (R-La.) proposed that the legislature create a government-run corporation with the mission of facilitating the rebuilding of Louisiana communities. His plan took into account community needs and prioritized affordable housing and well-planned development. Baker's Bill has been rejected by the Bush Administration, which favors a free-market solution enhanced with federal tax incentives for developers and business. During the last session of Congress, Baker's Bill never became law. Looking back at previous disasters and forward to new visions of the city, this Note concludes that Baker's proposal should be reintroduced and the House and Senate should adopt the Baker Bill as soon as possible to provide an innovative plan for rebuilding New Orleans.

INTRODUCTION

On August 29, 2005, Hurricane Katrina made landfall in New Orleans, Louisiana.¹ The power of the Category Five hurricane flattened homes and destroyed businesses while the storm surge breached the

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¹ Press Release, Fed. Emergency Mgmt. Agency, By the Numbers: FEMA Recovery Update in Louisiana (Feb. 28, 2006), <http://www.fema.gov/news/newsrelease.fema?id=23900>. In the wake of Hurricane Katrina, FEMA director Michael Brown resigned and Congress held hearings to look into the failures of the federal response. See Ted Barrett, *Former FEMA Director Brown to Testify at House Hearing*, Sept. 21, 2005, CNN.COM, <http://www.cnn.com/2005/POLITICS/09/21/katrina.hearings/index.html>. At least one commentator viewed the Congressional investigation as long overdue. See Shailagh Murray, *Storms Show a System out of Balance: GOP Congress Has Reduced Usual Diet of Agency Oversight*, WASH. POST, Oct. 5, 2005, at A21.

levees and flooded wide swaths of the city, which lies below sea level.² New Orleans residents fled their homes and neighborhoods and sought refuge where they could find it.³ Americans opened their doors and pockets to help the hurricane victims while the Federal Emergency Management Agency (FEMA) eventually took the reins of the federal relief effort.⁴

Just a week after the devastating hurricane hit, former first lady Barbara Bush gave an interview from the Houston Astrodome where a large number of evacuees, mostly African-American, were temporarily housed.⁵ She commented,

Almost everyone I've talked to says, "We're going to move to Houston." . . . What I'm hearing, which is sort of scary, is that they all want to move to Texas. Everyone is so overwhelmed by the hospitality. . . . And so many of the people in the arena here, you know, were underprivileged anyway, so this is working very well for them.⁶

Combined with local outrage that the federal government was slow to act following the hurricane, Mrs. Bush's statements led some commentators to conclude that the government generally was indifferent to the plight of certain residents of New Orleans.⁷ One African-American member of the House even indicated that poor African-

² See *Hurricane Katrina Timeline*, CBC NEWS ONLINE, Sept. 4, 2005, http://www.cbc.ca/news/background/katrina/katrina_timeline.html.

³ See Kate Moran, *Shrinking City: No One Disputes That Katrina Will Reduce Population of the New Orleans Area, but Just How Much Is Unclear*, TIMES-PICTAYUNE (New Orleans), Oct. 23, 2005, at 1 (noting that Hurricane Katrina will likely compound the population decline that was already occurring before the storm). During and after the storm, some New Orleans residents evacuated their homes and went to the New Orleans Superdome. *Hurricane Katrina Timeline*, *supra* note 2. Other evacuees went to the New Orleans Convention Center. *Id.* On August 31, 2005, the first busloads of evacuees were taken to the Houston Astrodome for temporary shelter. *Id.* Within a few days, New Orleans residents evacuated to both local and distant states. *Id.*

⁴ See *Hurricane Katrina Timeline*, *supra* note 2.

⁵ *Relocation 'Working Very Well' for Poor Evacuees, Barbara Bush Says*, DALLAS MORNING NEWS, Sept. 6, 2005, at 16A. "The remarks were part of a larger story about the impact of a mass influx on the city." *Id.*

⁶ *Id.*

⁷ See G. Robert Hillman & Todd J. Gillman, *Claims of Prejudice Taint Recovery: White House Defends Effort to Help All Races Affected by Katrina*, DALLAS MORNING NEWS, Sept. 17, 2005, at 21A.

Americans in New Orleans feared the hurricane would be an opportunity to rid the city of low-income inhabitants.⁸

President Bush, speaking for the first time after the disaster in a nationally televised speech from Jackson Square, acknowledged that perceived indifference had deep roots in New Orleans.⁹ President Bush referred to “some deep, persistent poverty in this region” and “a history of racial discrimination, which cut off generations from the opportunity of America.”¹⁰ He stated, “We have a duty to confront this poverty with bold action,” and listed minority-owned businesses, minority homeownership, and job training as parts of this proposed “bold action.”¹¹

Yet, as Katherine Boo of the *New Yorker* pointed out, “[t]wo weeks later, members of the Republican Party were using the [persistent poverty] of the evacuees as evidence that contemporary anti-poverty approaches were ineffectual.”¹² Ironically, these proposals would reduce the funds that many poor New Orleans citizens rely upon for health care and other social programs in order to rebuild a city seeking to combat poverty.¹³ Reduction in funding for social programs followed the administration’s efforts to curtail or eliminate funding for some of the most widely used federal social programs that help provide affordable housing to poor Americans.¹⁴

In addition to restoring basic services to the city and surrounding areas, federal and local governments are also beginning to formulate a plan for the future.¹⁵ However, at least one commentator has remarked that various groups’ ideas seem to be a “reversion to form, as opposed to engagement with the problem.”¹⁶ Political action groups and partisan politicians, rather than taking a hard look at the specific issues in

⁸ See *id.* Rep. Eddie Bernice Johnson (D-Tx.) was quoted as saying, “The fear now is that it will all be gentrification where they just throw the poor people out.” *Id.*

⁹ Press Release, White House, President Discusses Hurricane Relief in Address to the Nation (Sept. 15, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/20050915-8.html> [hereinafter White House, President Discusses Hurricane Relief].

¹⁰ *Id.*

¹¹ See *id.*

¹² Katherine Boo, *Shelter and the Storm: When Katrina’s Victims Came to Town*, NEW YORKER, Nov. 28, 2005, at 86.

¹³ See *id.* (observing that the congressional debate centered on cutting Medicaid and other social programs to offset the reconstruction of New Orleans).

¹⁴ Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 URB. LAW. 475, 475–76 (2004).

¹⁵ See Nicholas Lemann, Comment, *Rebuilding*, NEW YORKER, Oct. 10, 2005, at 32.

¹⁶ See *id.* at 31. Lemann notes that groups like The Heritage Foundation, The American Enterprise Institute, and MoveOn.org seem to be using the disaster to advance their pre-established political agendas. See *id.* He says, “A sense of political opportunity in Washington, rather than urgent need in Louisiana, pervades the discussion.” *Id.* at 31–32.

New Orleans, prefer to see the disaster as a means to push established policy issues such as deregulation or criticism of the current administration.¹⁷ Bucking that trend is one Republican lawmaker from suburban Baton Rouge, Rep. Richard H. Baker (R-La.).¹⁸ Though he “derides Democrats for not being sufficiently free-market,” Baker’s proposed recovery plan “would spend as much as \$80 billion to pay off lenders, restore public works, buy huge ruined chunks of the city, clean them up and then sell them back to developers.”¹⁹ Unfortunately, though Baker initially thought the White House supported his plan, the Bush Administration recently stated that it opposed the Baker plan and thought the funds already earmarked for the Gulf would be sufficient.²⁰ Furthermore, in the last legislative session, Baker’s proposal never garnered enough support to pass the the House Financial Services Committee and was cleared from the books at the end of the session.²¹

However, the legislative appropriations already passed by Congress are insufficient to address the rebuilding needs of New Orleans.²² Specifically, the federal government’s response to Katrina contains no plan for improving housing affordability and quality for the poor in New Orleans who felt abandoned by their government.²³ Even before Hurricane Katrina, Professor Peter W. Salsich, Jr. examined what the federal government’s role in affordable housing should be in the United States and concluded that existing programs could be improved and adapted to make them more amenable to local conditions.²⁴ He argued that despite the positive news that existing programs have some measure of success, federal programs have never

¹⁷ See *id.*

¹⁸ See Adam Nossiter, *A Big Government Fix-It Plan for New Orleans*, N.Y. TIMES, Jan. 5, 2006, at A1.

¹⁹ *Id.*

²⁰ Bill Walsh, *White House Against Baker Bailout Bill: Bush Point Man Says Block Grants Enough*, TIMES-PICAYUNE (New Orleans), Jan. 25, 2006, at 1 (stating that the White House’s estimate of flood-damaged homes eligible for Federal assistance is far below the estimate of 77,340 by the Louisiana Recovery Authority).

²¹ See GovTrack.us, H.R. 4100 [109th]: Louisiana Recovery Corp. Act, <http://www.govtrack.us/congress/bill.xpd?bill=h109-4100> (last visited Jan. 30, 2007) [hereinafter GovTrack.us, H.R. 4200]. GovTrack.us is a website that compiles information about legislation from a variety of governmental sources and is independent, meaning it is not affiliated with the government or any other group. GovTrack.us, homepage, <http://www.govtrack.us> (last visited Jan. 30, 2007).

²² See *id.*

²³ See *id.*

²⁴ Salsich, *supra* note 14, at 510.

had a level of funding that reflects the severity of the problem facing poor citizens in many American cities.²⁵

The lack of affordable housing is an issue that impacts every part of the United States, not just New Orleans, and nationwide affordability appears to be getting worse over time.²⁶ Recent studies indicate that “an increasing number of full-time workers, as well as unemployed or part-time workers, cannot afford to purchase a home; fully employed people making minimum wage cannot afford rental housing without substantial governmental assistance; and homelessness remains a serious problem for individuals with families, even those with jobs.”²⁷ The National Low Income Housing Coalition estimates that “about 95 million Americans have serious affordable-housing problems—either they live in dilapidated housing or they must pay more than 30 percent of their income for housing.”²⁸

In New Orleans, public-housing residents were displaced from the city at a rate of nearly ninety percent after Hurricane Katrina.²⁹ About the same percentage of the more than 9000 Section 8 voucher holders have not obtained housing again in New Orleans.³⁰ The lack of funding for affordable housing commensurate with the need will be especially severe in New Orleans, where much of the affordable stock that existed before the storm is utterly destroyed or uninhabitable and demand problems are acute.³¹

Underscoring the need for a response that will successfully meet the needs of New Orleans’s African-American and poor residents is President Bush’s reference to “a history of racial discrimination.”³² By placing discrimination issues in the past, President Bush risks minimizing the omnipresent issue of race which has pervaded the African-

²⁵ *See id.*

²⁶ *See id.* at 476.

²⁷ *Id.*

²⁸ *Id.*

²⁹ James Perry, Op-Ed., *Business Moves in on Homes*, TIMES-PICAYUNE (New Orleans), Jan. 23, 2006, at 4. James Perry is the Executive Director of GNO Fair Housing Action Center, Inc., New Orleans. *Id.*

³⁰ *See id.* Very low-income families are allowed to choose rental housing under the Section 8 Rental Voucher Program, which increases affordable housing choices. U.S. Dept. of Hous. & Urban Dev., Section 8 Rental Voucher Program (May 13, 2004), <http://www.hud.gov/progdsc/voucher.cfm>. The renters pay thirty percent of their household income while the HUD pays the remainder up to eighty to one-hundred percent of fair market value. *Id.* The renters have the option to rent a unit either above or below the fair market rental value in their city, and can either pay or keep the difference, respectively. *Id.*

³¹ *See Salsich, supra* note 14, at 510.

³² *See Walsh, supra* note 20.

American perception of any government response.³³ Kalamu ya Salaam is the best-known writer to originate from the Ninth Ward in New Orleans, a poor African-American community that suffered some of the worst flood damage after Hurricane Katrina.³⁴ In an interview with the *New Yorker*, Kalamu recalled the following example of past racism:

[I]n 1927, in the midst of the worst flooding of the Mississippi River in recorded history, the white city fathers of New Orleans—the men of the Louisiana Club, the Boston Club, and the Pickwick Club—won permission from the federal government to dynamite the Caernarvon levee, downriver from the city, to keep their interests dry. But destroying the levee also insured that the surrounding poorer St. Bernard and Plaquemines Parishes would flood. Thousands of the trappers who lived there lost their homes and their livelihoods.³⁵

In another well-known incident in 1912, the *New York Times* reported that when a levee in Washington County, Mississippi was breached during a flood, the engineers who ran out of sandbags “ordered . . . several hundred negroes . . . to lie on top of the levee and as close together as possible.”³⁶ African-Americans in New Orleans are accustomed to being marginalized and ignored by their leaders and by the federal government.³⁷ A plan for the future of New Orleans would chart a new and innovative course toward poverty reduction using existing federal programs and new ideas like the Baker Bill.³⁸

This Note argues that the current focus on free-market solutions in the form of tax breaks and opportunity zones is not sufficient to create adequate affordable-housing opportunities as New Orleans rebuilds. Truly “bold action” would set the goal of creating more affordable housing and sustainable communities than existed before the hurricane. The current legislative solution is unlikely to create new

³³ Hillman & Gillman, *supra* note 7.

³⁴ David Remnick, *How Presidents and Citizens React to Disaster*, NEW YORKER, Oct. 3, 2005, at 56.

³⁵ *Id.*

³⁶ *Id.* “Patricia Turner at the University of California . . . has written extensively on the role of rumor and conspiracy theory in the African-American community, especially among the poor . . . and [has made] a convincing case that these counter-narratives emerge from decades of institutional racism and from particular episodes in American history.” *Id.*

³⁷ *See id.*

³⁸ *See* Nossiter, *supra* note 18.

opportunities for affordable housing because it ignores recovery successes in previous disaster areas, and refuses to support Rep. Baker's buyout plan in New Orleans. Baker's plan was a good compromise between free-market principles and progressive ideals about adapting institutions to address poverty, and deserves reconsideration. Part I of this Note chronicles a brief history of trends in federal affordable-housing involvement that evolved into the free-market approach favored by the current Bush Administration. Part II discusses the Baker Bill and ways in which it addressed both free-market considerations and presented new ideas for future neighborhood development in New Orleans. Part III examines reconstruction efforts following two previous natural disasters that should inform rebuilding plans in New Orleans, comparing some of their successes to the Baker Bill's provisions. Part IV addresses a recent scholarly work that proposes a new way to think about poverty after Katrina and adopts a more pragmatic framework, one that refuses to accept that our institutions function properly as long as poverty exists.

I. LEGISLATIVE ACTION AND AFFORDABLE HOUSING

Any rebuilding effort in New Orleans will have a profound effect on African-American and poor residents because of where the damage from the hurricane was most severe.³⁹ A recent study by Dr. John R. Logan of Brown University found that, "[o]f the 354,000 people who lived in New Orleans neighborhoods where the subsequent damage was moderate to severe, 75 percent were black, 29 percent lived below the poverty line, more than 10 percent were unemployed, and more than half were renters."⁴⁰ Flooding damage was most severe in low-lying areas mostly populated by poor, African-American residents.⁴¹ As a result, affordable housing should be the priority in any proposed rebuilding plan.⁴²

A. Federal Involvement in Affordable Housing Generally

Federal ideals regarding funding of affordable housing peaked in the 1940s when Congress stated in the Housing Act of 1949 that the federal government "should provide a decent home and suitable living

³⁹ See James Dao, *Study Says 80% of New Orleans Blacks May Not Return*, N.Y. TIMES, Jan. 26, 2006, at A18.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See *id.*

environment for every American family.”⁴³ Much of the stock of public housing, constructed to house America’s neediest citizens, was built as a result of federal largesse.⁴⁴ Unfortunately, many of the housing projects built during that time became “dystopian superblocks” invested with crime and concentrated poverty.⁴⁵ In one housing project in Washington, DC, when the project was finally shut down in the 1990s, the median income was only \$7765 and more than eighty percent of the residents had no jobs.⁴⁶

Over the past fifty years, federal affordable-housing programs have evolved from direct federal construction projects to incentives provided to free-market developers to build affordable housing.⁴⁷ During the Nixon Administration, the federal government started issuing rental vouchers for the poor to live in private housing instead of building new projects.⁴⁸ Since 1976, the share of new federal spending on subsidized housing has fallen eighty percent; in 2006 there was virtually no new housing production for low-income Americans.⁴⁹ It comes as no surprise that the problem of affordability appears to be getting worse.⁵⁰

When the federal government stepped out of the home-building business, local organizations filled in to develop grassroots solutions to community housing issues.⁵¹ In response, local communities created an innovative new model for affordable housing—mixed-income communities that no longer look like public-housing projects and cannot be distinguished from the surrounding neighborhoods.⁵² Cit-

⁴³ *Id.*

⁴⁴ See Dan Nnamdi Mbulu, *Affordable Housing: How Effective Are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U. J. GENDER SOC. POL’Y & L. 387, 393 (2000).

⁴⁵ See Andrew Rice, *The Suburban Solution*, N.Y. TIMES MAG., Mar. 5, 2006, at 114.

⁴⁶ *Id.*

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Rice, *supra* note 45, at 114.

⁵¹ See *id.*; see also Mbulu, *supra* note 44, at 393. Rice’s article notes that Reagan ran for president in 1980 on the idea that communities would be better off if the federal government stayed away from local issues and left the decisions to those who lived in the area. Rice, *supra* note 45, at 114.

⁵² See Rice, *supra* note 45, at 114. The following depiction of a mixed-income development is common in its laudatory language and encouraging description:

A new \$103 million mixed-income housing development has added new life to the Boyle Heights community here. Pueblo Del Sol, which replaced a dilapidated, crime-ridden housing project known as Aliso Village, is the largest public housing revitalization to take place in California, providing resi-

ies can combine federal grants intended to replace outdated and unsafe public housing with private investment.⁵³ Then, the city or developer will create new housing in which some residents who are below the poverty line rent apartments and other low-income families have the opportunity to buy at reduced rates.⁵⁴ Some cities will even pass "inclusionary zoning" ordinances that require builders of large new developments to set aside a certain percentage of the units for buyers or renters with low to moderate incomes.⁵⁵ The result is less concentrated poverty and more attractive, livable housing.⁵⁶ However, destroying old buildings in favor of mixed-income housing results in a net loss of available housing units, contributing to increases in demand.⁵⁷ In addition, many of the mixed-income units benefit those living at the higher-income end of the poverty scale, leaving some of the poorest Americans behind.⁵⁸

It is rare to find anyone who prefers the horrible housing projects of the 1940s.⁵⁹ Rather, the more recent locally controlled, mixed-income model is immensely popular with both liberals and conservatives and seems to be a successful development.⁶⁰ But helping only the

dents with 470 units of much-needed affordable housing and various community and social services.

The development was created through a unique public/private partnership between the Housing Authority of the City of Los Angeles, The Related Cos. of California, McCormack Baron Salazar, SunAmerica Affordable Housing Partners and the Los Angeles Unified School District (LAUSD). Private equity totaling \$52 million was raised through the sale of Low Income Housing Tax Credits that were syndicated by SunAmerica and sold to Fannie Mae.

Built under HUD's Hope VI program, Pueblo Del Sol boasts a sustainable living environment, incorporating mixed-income housing (rental and for-sale) with educational and recreational facilities; community supportive facilities, such as two community centers with an exercise room and pool, as well as a park with new play equipment; and services such as job training, after-school programs, computer training classes and general social services. Moreover, the existing LAUSD Utah Elementary School is located in the center of the development.

A \$103M Mixed-Income Development Breathes New Life into L.A. Neighborhood, MULTI-HOUSING NEWS, Oct. 16, 2003, available at http://www.multihousingnews.com/multihousing/headlines/article_display.jsp?vnu_content_id=2005340.

⁵³ See *infra* Part I.B.1.

⁵⁴ Rice, *supra* note 45, at 114.

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See Rice, *supra* note 45, at 114.

⁶⁰ See *id.*; RENÉE LEWIS GLOVER, ATLANTA HOUS. AUTH., MAKING A CASE FOR MIXED-USE, MIXED-INCOME COMMUNITIES TO ADDRESS AMERICA'S AFFORDABLE HOUSING NEEDS

least poor of low-income Americans is not enough.⁶¹ In many places, mixed-income development is not occurring at all because of staunch opposition to undesirable low-income housing from settled residents.⁶² Hurricane Katrina presents a completely different environment for affordable-housing experimentation.⁶³ Some neighborhoods are almost a blank slate for new development, and the federal government should not squander a chance to provide recently displaced and homeless New Orleans residents with the decent home and community every American deserves.⁶⁴

B. Community Development Block Grant Financing

1. Background

The Community Development Block Grant (CDBG) Program was passed under the Housing and Community Development Act of 1974.⁶⁵ Under the CDBG program, Housing and Urban Development (HUD) funding moved away from a rigid federal administrative system to one that allowed more flexibility to meet local needs.⁶⁶ Federal funds are no longer administered directly to specific types of projects in the form of grants, but given to cities and states to use according to their needs.⁶⁷ Over the years, the CDBG program has increasingly restricted the use of funds to ensure that the funds are used in a way that creates economic opportunities for low and moderate income residents.⁶⁸ CDBG program funds may be used for twenty-five separate eligible activities,

(PRESENTATION TO THE CENTER FOR AMERICAN PROGRESS) 1 (2005), available at <http://www.americanprogress.org/kf/glover.pdf>. Glover says that mixed-income communities discourage segregation, which is an added benefit. See GLOVER, *supra*, at 6.

⁶¹ See Rice, *supra* note 45, at 114.

⁶² See *id.*

⁶³ See Meghan Gordon, *Quick Sell: As Home Sales Zoom in St. Tammany, Potential Buyers Need to Act Fast—and They Must Come Ready to Make a High Offer with Checkbook in Hand*, TIMES-PICAYUNE (New Orleans), Dec. 1, 2005, at 1.

⁶⁴ See *id.*

⁶⁵ Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 116, 88 Stat. 633, 652 (codified as amended at 42 U.S.C. § 5316 (2004)).

⁶⁶ See Salsich, *supra* note 14, at 484; see also Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 479 (2004) (arguing the need for a national, affordable housing policy with a clearly defined mission that is accountable to multiple and varying interests).

⁶⁷ See 42 U.S.C. § 5303 (2004); Salsich, *supra* note 14, at 484.

⁶⁸ See 42 U.S.C. § 5301(c); Salsich, *supra* note 14, at 484.

among them rehabilitating existing affordable-housing units and building new units altogether.⁶⁹

One academic has written that the CDBG program “is best understood as a gap-filling incentive” to “provide lump sums to states and cities to enable them to plug holes in financing plans for major developments and/or to provide some or all of the public infrastructure, such as streets and utility lines, for such developments.”⁷⁰ CDBG program funds were not intended to fund new capital improvement projects.⁷¹ In the 2005 budget, CDBG appropriation levels had reached about \$5 billion nationwide.⁷²

2. CDBG Appropriations in Response to Hurricane Katrina

CDBG program funds have not generally been viewed by the local governments in the Gulf as simple gap-filling incentives, but rather as crucial federal funding for the rebuilding effort.⁷³ At the end of its term last year, Congress approved a hurricane aid package that included up to \$6.2 billion in grant money for Louisiana and \$5.3 billion for Mississippi, the two states hardest hit by Hurricane Katrina.⁷⁴ But Louisiana officials say that the \$6.2 billion “is nowhere near enough for the level of damage to homes, schools, hospitals and businesses, which they say far overshadows the destruction in Mississippi and the other Gulf Coast states.”⁷⁵ Both Louisiana and Mississippi plan to use the CDBG program earmarks to reimburse homeowners against uninsured losses.⁷⁶ However, the grants are also earmarked to repair schools and hospitals, so some of the money will likely go for that purpose according to the traditional infrastructure-building uses allowed under the CDBG program.⁷⁷

⁶⁹ See 42 U.S.C. § 5305(a); see also Salsich, *supra* note 14, at 484 (noting that, originally, CDBG program funds could not be used to create new housing, but “as federal support for housing production has declined, limitations on the use of CDBG funds to support new construction have been relaxed”).

⁷⁰ Salsich, *supra* note 14, at 484–86.

⁷¹ *Id.* at 485.

⁷² *Id.* at 487. The program “has been an important but relatively small component of the total federal effort in housing and community development.” *Id.* at 486.

⁷³ See *id.* at 484–85; Nossiter, *supra* note 18.

⁷⁴ Bill Walsh, *Louisiana Feeling Shortchanged: Mississippi’s Clout Gives Its Residents an Edge*, TIMES-PICAYUNE (New Orleans), Jan. 20, 2006, at 1.

⁷⁵ *Id.*

⁷⁶ See *id.*

⁷⁷ See *id.*; Salsich, *supra* note 14, at 484–86.

Both Mississippi and the Louisiana Recovery Authority plan to focus CDBG program funds on reimbursing homeowners "who lacked insurance and whose property lies outside the federally designated flood plain."⁷⁸ These homeowners are perceived as the hardest hit by losses because they did not anticipate that their homes would flood, and therefore were not required to purchase insurance against that type of disaster.⁷⁹ However, Louisiana estimates that 77,000 homeowners fall into this category, compared with 35,000 in Mississippi.⁸⁰ The Louisiana Recovery Authority estimates it would take over \$9 billion in CDBG program funds to match Mississippi's per-household payout.⁸¹ Many people in Louisiana are frustrated by the inequality and have linked it to the power of Mississippi Republican Sen. Thad Cochran, the influential Senate Appropriations Committee chairman who was instrumental in securing the overall bailout package.⁸²

Though the White House has said that the \$6.2 billion given to Louisiana would be sufficient to reimburse the hardest-hit homeowners, it seems that many in New Orleans expect more CDBG assistance for housing or other funding to be absolutely necessary to fully rebuild New Orleans.⁸³

C. Other Appropriations

The remaining appropriations have gone to various purposes, namely immediate, temporary-housing assistance for displaced residents; levee repair; and reimbursements to organizations that took in displaced persons.⁸⁴ President Bush says a total of \$85 billion in fed-

⁷⁸ Walsh, *supra* note 74.

⁷⁹ Walsh, *supra* note 20.

⁸⁰ Walsh, *supra* note 74. The Louisiana Recovery Authority estimates that 77,340 homes would fall into this hardest-hit category, but the Bush Administration's estimate is much lower, at 20,000. Walsh, *supra* note 20. "But, significantly, [the Bush Administration's] figures do not include rental property, only owner-occupied dwellings[;] . . . [the Administration feels] those homeowners are the most deserving of financial aid." *Id.* By restricting appropriations to only owner-occupied housing, the redevelopment of rental properties used by low-income residents would become a lower priority. *See id.*

⁸¹ *See* Walsh, *supra* note 74.

⁸² *Id.* Louisiana residents are careful not to be too critical of Cochran because his assistance will be crucial in future appropriations. *See id.*

⁸³ *See* Walsh, *supra* note 20.

⁸⁴ *See* Bruce Alpert, *Katrina Relief Package Close to Passage: Homeowner Losses, Levees May Be Funded*, TIMES-PICTAYUNE (New Orleans), Dec. 18, 2005, at 1; *see also* Eric Lipton, *Leaders in Congress Agree on Aid for Gulf Recovery*, N.Y. TIMES, Dec. 18, 2005, at A29 (reporting on congressional appropriations related to recovery as opposed to relief). The first legislative appropriation was for immediate relief and amounted to \$62 billion. Alpert, *supra*; Lipton, *supra*. On December 18, 2005, a second appropriations bill reallocated \$29 billion of the

eral assistance has been designated to assist with the recovery and rebuilding of Hurricane Katrina.⁸⁵ Included in that \$85 billion total is an almost \$8 billion appropriation for tax credits to businesses and homeowners in the gulf region through the Katrina Emergency Tax Relief Act of 2005.⁸⁶ This resulting "Gulf Opportunity Zone" is the cornerstone of President Bush's rebuilding effort and combines an existing federal program with the White House's initial plan offered after the hurricane.⁸⁷

The recent Gulf Opportunity Zone owes its roots to an "Enterprise Zone" program in Great Britain from the late 1970s designed "to stimulate industrial activity in London's vacant docklands district through a drastic reduction of taxes and regulation."⁸⁸ Reagan supported the idea in the 1980s but the program never received sufficient funding.⁸⁹ Congress funded a version of the Enterprise Zone program in 1993 during the Clinton Administration, calling it the Empowerment Zone and Enterprise Community program.⁹⁰ The 1993 version modified the free-market approach to empower local communities to create solutions to their housing and neighborhood needs.⁹¹

President Bush's "Opportunity Zone" returns to the original British and Reagan model, offering \$8 billion in tax incentives that are mostly targeted at encouraging businesses to open in the gulf region.⁹² The housing-related provisions of President Bush's New Markets Tax Credit allow a state to receive up to \$1 billion in tax credits to build low-income housing and encourage businesses to relocate to low-income

original \$62 billion. Alpert, *supra*; Lipton, *supra*. The CDBG program funds were allocated as a result of this December appropriation bill. See Alpert, *supra*; Lipton, *supra*.

⁸⁵ Dao, *supra* note 39.

⁸⁶ Bill Walsh, *\$8 Billion Tax Break Approved: House, Senate Pass Plan for Gulf Coast*, TIMES-PICAYUNE (New Orleans), Dec. 17, 2005, at 1; Press Release, Internal Revenue Serv., Information for Taxpayers Affected by Hurricanes Katrina, Rita, and Wilma (Jan. 2006), available at <http://www.irs.gov/pub/irs-pdf/p4492.pdf>; Press Release, White House, President Signs "Flexibility for Displaced Workers Act" and "Katrina Emergency Tax Relief Act of 2005" (Sept. 23, 2005), available at <http://www.whitehouse.gov/news/releases/2005/09/print/20050923-1.html>.

⁸⁷ See Mbulu, *supra* note 44, at 404–06; White House, President Discusses Hurricane Relief, *supra* note 9.

⁸⁸ Mbulu, *supra* note 44, at 404 (quoting Audrey G. McFarlane, *Empowerment Zones: Urban Revitalization Through Collaborative Enterprise*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 36–37 (1995)).

⁸⁹ *Id.*

⁹⁰ *Id.* at 403–04.

⁹¹ *Id.* at 405.

⁹² See Walsh, *supra* note 86.

neighborhoods.⁹³ Though the tax breaks were passed by the House and Senate unanimously, some legislators argued that the tax credits were a “giveaway to special interests” and that businesses would relocate in the area anyway.⁹⁴ What is clear is that the tax incentive package allocates only a very small amount of tax benefits that relate to the production of new affordable housing.⁹⁵

II. THE BAKER BUYOUT PROPOSAL

On October 20, 2005, Louisiana congressman Richard H. Baker introduced legislation detailing his proposed rebuilding plan for Louisiana, known as the Baker Bill.⁹⁶ Richard Baker is a Republican who has spent considerable time in office trying to impose restrictions on governmental lenders Fannie Mae and Freddie Mac.⁹⁷ Baker, a professed free-market supporter, toured neighborhoods soon after Katrina and announced that traditional recovery methods would be inadequate since this “was a problem way beyond the capacity of private enterprise.”⁹⁸ The Baker Bill he drafted in response to the hurricane’s devas-

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *id.* One academic has argued that the Low-Income Housing Tax Credit, such as the one that this recent tax incentive further funded, should be subject to stricter regulation and give preference to non-profit developers because of the special role those types of organizations play in the creation of affordable-housing opportunities. Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit & Nonprofit Developers for Low-Income Housing Tax Credits*, 55 HASTINGS L.J. 211, 243–44 (2003).

⁹⁶ Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005); Press Release, House Comm. on Fin. Servs., Committee Approves Baker’s Louisiana Recovery Corporation Act (Dec. 15, 2005), *available at* <http://financialservices.house.gov/news.asp> [hereinafter House Comm. on Fin. Servs., Committee Approves Corporation].

⁹⁷ See Nossiter, *supra* note 18. Baker’s Sixth Congressional District is made up of Baton Rouge and the surrounding suburbs. Rep. Richard H. Baker, Louisiana and the 6th District, <http://baker.house.gov/html/district.cfm> (last visited Oct. 15, 2006). The district is mostly white and suburban in makeup. See Nossiter, *supra* note 18. The area is also “relatively prosperous by Louisiana standards and historically resentful of the once-larger city of the east.” *Id.* Yet, as Nossiter points out, the most likely beneficiaries of his proposed bill are African-American New Orleans residents. *Id.*

⁹⁸ See Nossiter, *supra* note 18. Rep. Baker joins other congressional Republicans who have made unfortunate comments about hurricane victims. Posting of John Mercurio to CNN.com’s The Situation Report: The Morning Grind, <http://www.cnn.com/2005/POLITICS/09/09/sr.fri/> (Sept. 9, 2005, 08:50 EST). The *Wall Street Journal*’s “Washington Wire” reported that Baker said to lobbyists: “We finally cleaned up public housing in New Orleans. We couldn’t do it, but God did.” *Id.* Baker explained later that he did not intend flippancy, but has long wanted to “improve” low-income housing in New Orleans. *Id.*

tation was a detailed, well-considered rebuilding plan and should be reintroduced during the current legislative session.⁹⁹

A. *Structure of the Corporation*

The Baker Bill proposed the creation of a federal agency called the Louisiana Recovery Corporation (the “Corporation”), which would have been independently established in the executive branch.¹⁰⁰ Six separate divisions of the Corporation were to include: environment and land use management; economic development; property acquisition; property management; property disposition; and urban homesteading and community and faith-based organizations.¹⁰¹ The Corporation would have had a board of seven directors, appointed by the President, with qualifications related to the aforementioned divisions.¹⁰² Three of the seven directors, to be appointed by the President, would have been nominated by the Governor of Louisiana.¹⁰³ The board was to be non-partisan, with no more than four members of the Board from the same political party.¹⁰⁴ None of the appointees could have been current public employees, nor could they have been stockholders or employed by any institution that is a contract party with the Corporation during the time of their service.¹⁰⁵

B. *Local-Development Plans*

Baker’s Bill allowed for local input from a variety of sources, as well as accountability through public hearings.¹⁰⁶ Each Louisiana parish in which the Corporation operates would have established a “local advisory council” consisting of locally elected officials, community groups, and other “interested, qualified groups as the Corporation may determine to be appropriate.”¹⁰⁷ The Corporation was to consult with the

⁹⁹ See generally H.R. 4100.

¹⁰⁰ H.R. 4100 § 102(a), (b).

¹⁰¹ *Id.* § 102(d). “Management of each division shall be vested in an executive vice president who shall be appointed by the Board of Directors.” *Id.* § 102(d) (2).

¹⁰² *Id.* § 103(a) (1). The proposed terms of appointment are unclear; the Baker Bill proposed five-year terms in general, and at the same time suggests staggered terms of two to five years based on the source of the appointee’s nomination. See *id.* § 103(c) (1)–(2).

¹⁰³ *Id.* § 103(a) (2). The elected chairperson cannot be one of the appointees nominated by the Louisiana Governor, but the vice chairperson must be one of the three. *Id.* § 103(b) (1)–(2).

¹⁰⁴ *Id.* § 103(a) (3).

¹⁰⁵ H.R. 4100 § 103(e) (1)–(2).

¹⁰⁶ *Id.* § 103(g).

¹⁰⁷ *Id.* § 103(g) (1) (A)–(B).

members of the local advisory council and hold public meetings before major decisions were made.¹⁰⁸ In addition, any actions taken by the Corporation would have to conform to existing local redevelopment plans.¹⁰⁹ Deference to local planning was explicit, as the Corporation does not allow solicitation of bids that conflict with a local government's existing redevelopment plan.¹¹⁰

C. *Funding the Corporation*

In 2006, the Baker Bill would have allocated \$100 million of already-appropriated federal Katrina disaster-relief funds toward start-up costs for the Corporation.¹¹¹ Thereafter, the federal government would have assigned at most \$30 billion in stock to the Corporation which was to be bought through a public debt transaction.¹¹² Thus, the federal government would have financed the corporation through bonds issued by the Treasury.¹¹³ The Corporation was to be held accountable for its finances through a quarterly and annual reporting system that operates very much like a private company's, with emphasis on public disclosure and accountability.¹¹⁴

D. *The Corporation's Objectives*

The Corporation would have had a very general mission of economic stabilization and redevelopment of areas of Louisiana "devastated or significantly distressed" by Hurricane Katrina.¹¹⁵ Homeowners with mortgages were mostly given only a ninety-day forbearance period by their banks to delay their mortgage obligations.¹¹⁶ Many New Orleans residents are unsure whether they will be able to rebuild because they must continue mortgage payments or must fight insurers for dam-

¹⁰⁸ *Id.* § 103(g)(1)(C).

¹⁰⁹ *Id.* § 103(g)(2)(A)–(B).

¹¹⁰ H.R. 4100 § 103(g)(2)(B).

¹¹¹ *Id.* § 104(g).

¹¹² *Id.* § 104(a)–(c). Baker chose the amount of \$30 billion funding for the program as an initial number because it was the maximum amount of the funding provided for the Tennessee Valley Authority. James Varney, *President Avoids Endorsing Baker Bill: Bush Cites Progress in Recovery, Remains Coy on Category 5 Levees*, TIMES-PICAYUNE (New Orleans), Jan. 13, 2006, at 1.

¹¹³ H.R. 4100 § 104(a)–(c); House Comm. on Fin. Servs., Committee Approves Corporation, *supra* note 96.

¹¹⁴ See H.R. 4100 § 104(d)(1)–(2).

¹¹⁵ *Id.* § 105(a).

¹¹⁶ House Comm. on Fin. Servs., Committee Approves Corporation, *supra* note 96.

age reimbursement.¹¹⁷ The Baker Bill proposed paying up to \$500,000 per homeowner to relieve the owner of his or her required mortgage payments, erasing the homeowner's debt on questionably valued property and transferring title to the Corporation.¹¹⁸ In addition, the Corporation would have paid owners of flood-damaged property at least sixty percent of the equity in their homes.¹¹⁹ Once the Corporation acquired a number of properties in the same area, the properties were to be packaged together and the Corporation would have made necessary infrastructure repairs.¹²⁰ The refurbished property would have then been sold to developers through a competitive-bidding process for redevelopment of structures and neighborhoods.¹²¹

Through a revision of the bill undertaken a month after he proposed it, Baker added provisions to protect individual property rights.¹²² Under the revised bill, current property owners could have contracted with the Corporation to retain a right of first refusal to buy a similarly sized and situated piece of land after the infrastructure was repaired.¹²³ In addition, current property owners could have contracted to retain interest in a similarly sized and situated piece of land.¹²⁴ These provisions seemed to provide a mechanism for current owners to attempt to return to newly rebuilt neighborhoods if they could muster the resources.¹²⁵ As an added bonus, the Corporation may even have been able to turn a profit by selling the renovated land to developers for more than the mortgage payoff amount.¹²⁶

E. *Competitive-Bidding Process and Affordable Housing*

The Corporation's function, though highly similar to a private company, diverged from a private land-development company in the criteria enumerated for the competitive-bidding process.¹²⁷ Rather

¹¹⁷ *Id.*

¹¹⁸ *Id.* Some properties in New Orleans are difficult to value because of uncertainty about how and when neighborhoods will be rebuilt. *See id.*

¹¹⁹ *See* Walsh, *supra* note 20.

¹²⁰ H.R. 4100 § 105(c) (1)–(2).

¹²¹ *Id.* § 105(c) (3).

¹²² Press Release, Rep. Richard H. Baker, Baker Announces Modifications to Louisiana Recovery Corporation Bill (Nov. 17, 2005), *available at* http://www.vote-smart.org/speech_detail.php?speech_id=148696&keyword=&phrase=&contain=.

¹²³ H.R. 4100 § 106(d).

¹²⁴ *Id.* § 106(e).

¹²⁵ *See id.* § 106(d)–(e).

¹²⁶ *Id.* § 105(c) (3).

¹²⁷ *See id.* § 107(a).

than selling the refurbished land to the highest bidder, the Corporation's bidding process would have been a more subjective one, taking into consideration a variety of issues.¹²⁸ According to the Baker Bill,

[p]urchasers are selected based on an ability to meet select criteria established by the Corporation, which shall include the following:

- (1) Capacity to oversee major development projects through a community-based collaborative process.
- (2) Commitment of private capital.
- (3) Effective deployment of Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, Federal home loan bank, and other Federal or State resources (such as low-income housing tax credits, new markets tax credits, the HOPE IV program, enterprise zones, and the Historically Underutilized Business Zones or section 8(a) Programs of the Small Business Administration) to ensure construction of affordable housing.
- (4) Use of private contractors and subcontractors.
- (5) Use of local corporations and local employees.
- (6) Use of small, disadvantaged business enterprise contractors or subcontractors.
- (7) Scale of development and job creation.
- (8) Increased homeownership.¹²⁹

Thus, the Corporation would not have been able to dispense with land without first considering the total impact on the housing and job market of the neighborhood and parish.¹³⁰ Baker's plan also explicitly stated that the use of federal tax incentives to ensure construction of affordable housing was third on the list of bidding considerations, after only community input and financing.¹³¹

The second part of the Baker Bill complemented the buyout plan by calling for allocation of federal funds to existing affordable-housing programs to supplement the Corporation.¹³² Had the Baker Bill passed in Congress, the rebuilding effort would have been aided by funds allocated to:

¹²⁸ See H.R. 4100 § 107(a).

¹²⁹ *Id.*

¹³⁰ See *id.* § 103(g)(1)(C).

¹³¹ See *id.* § 107(a)(1)-(3).

¹³² *Id.* §§ 201-205.

- Section 9 (providing funds for capital improvements to public housing);
- Hope VI (providing funds for demolition of aging and ineffective existing public housing to construct newer public housing);
- HOME Investment Partnerships Program (providing funding to communities in connection with nonprofit groups to build or rehabilitate affordable housing for rental or purchase);
- CDBG grants (providing discretionary grant money to localities); and
- Section 8 (providing rental assistance vouchers to low-income persons).¹³³

Finally, the bill was to use leftover funds to provide housing counseling to those still in temporary housing.¹³⁴

Together, the two parts of the Baker Bill provided a comprehensive rebuilding plan for the future of New Orleans.¹³⁵ While this plan included the creation of a new government agency involved in the real estate development business, it also used existing federal housing programs to supplement the efforts of the Corporation.¹³⁶ Most importantly, the Baker Bill would have allocated \$30 billion in federal funding and mandated community involvement to the rebuilding process.¹³⁷

¹³³ H.R. 4100 §§ 201–207; *see also* U.S. DEPT. OF HEALTH AND HUMAN SERVS., DELIVERING ON THE PROMISE, *available at* <http://www.hhs.gov/newfreedom/final/pdf/hud.pdf> (last visited Oct. 15, 2006) (summarizing existing Federal housing programs). Allocation amounts proposed by the Baker Bill are as follows:

- Section 9—\$100 million;
- HOPE VI—\$100 million;
- HOME Investment Partnership Program—\$1.5 billion;
- CDBG—\$13 billion;
- Section 8—\$2.5 billion.

H.R. 4100 §§ 201–205. HOME provides grants to state and local governments, often in collaboration with nonprofit groups to build, buy, and rehabilitate affordable housing, both for rental and ownership. U.S. Dept. of Hous. & Urban Dev., HOME Investment Partnerships Program, <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm> (last visited Oct. 15, 2006).

¹³⁴ H.R. 4100 § 207.

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *See id.* §§ 104(a)–(c), 107(a).

F. Arguments for and Against the Baker Bill

On January 24, 2006, the White House officially came out against the Baker Bill, stating that the already-allocated CDBG financing would be sufficient to compensate those homeowners hardest hit by the hurricane.¹³⁸ However, a coherent plan for rebuilding is missing from the existing funding.¹³⁹ The White House seems content to allow state and local officials to formulate their own plans for rebuilding, but state and local officials believe that much more money will be needed in order to rebuild effectively.¹⁴⁰

In the absence of a mortgage-buyout program like Baker's, private entities, through the free market, may go ahead and step in to bail out homeowners and refurbish the land on their own, later selling the land or developing it as an investment.¹⁴¹ However, the difference is that a private developer's priorities are not likely to include affordable housing, but rather will focus on making as much money as possible.¹⁴² The Baker Bill had specific requirements for bidding on land that took into account the needs and demands of the community, more funding, and a built-in accountability mechanism akin to a private corporation's.¹⁴³

Local and state officials also liked the Baker Bill because of its potential to avoid a "jack-o'-lantern effect" during the rebuilding process.¹⁴⁴ This describes a situation where some people who have the financial ability to rebuild will do so, but surrounding areas are not rebuilt and become blighted.¹⁴⁵ The results are pockets of rebuilding and pockets of decay, like the gap-filled smile of a jack-o'-lantern.¹⁴⁶

Another concern for the rebuilding effort is the possibility that many residents will not be able to rebuild in low-lying areas because these areas are so likely to flood in the future that they are considered unsafe for future redevelopment.¹⁴⁷ Supporters of the Baker Bill claimed that some sort of buy-out program "is a crucial component of plans to help homeowners who are willing to move to higher ground

¹³⁸ Walsh, *supra* note 20.

¹³⁹ *See id.*; Nossiter, *supra* note 18.

¹⁴⁰ Walsh, *supra* note 20.

¹⁴¹ *See* H.R. 4100.

¹⁴² *See id.* § 107(a).

¹⁴³ *See id.*

¹⁴⁴ Walsh, *supra* note 20.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *See id.*

but otherwise would be forced to renovate their flooded properties where they sit, or walk away and face foreclosure because of their flood insurance payouts.”¹⁴⁸ If homeowners had assistance through the Baker Bill’s rights of first refusal and retaining interest in a similar piece of property, the goal of a more densely populated New Orleans would be more easily achieved.¹⁴⁹

Opponents of the Baker Bill were uncomfortable with creating a massive government bureaucracy instead of leaving recovery up to the market.¹⁵⁰ Despite an early lack of White House support, Baker vowed to take the issue to the legislature.¹⁵¹ On December 15, 2005, the House Committee on Financial Services approved the Baker Bill by a vote of fifty to nine, sending the legislation to the full House of Representatives.¹⁵² However, after that the Baker Bill stalled in the Committee, and with the expiration of the last legislative session, the bill was cleared from the books.¹⁵³ In order to be reconsidered, the Baker Bill first must be reintroduced in the current legislative session.¹⁵⁴

III. WHAT CAN BE LEARNED FROM PREVIOUS DISASTERS?

A. *The Grand Forks, North Dakota Flood and Its Local Buyback Program*

Commentators in New Orleans have pointed out that the rebuilding challenges facing the city are different than after past hurricanes because of the scale and nature of the damage.¹⁵⁵ The devastation in New Orleans after Katrina was in large part caused by flooding after the breach of the levees, not by direct damage from hurricane-force winds and rain.¹⁵⁶ Thus, it is most valuable to look at previous floods instead of hurricanes to see what lessons the federal government should take from past disaster relief efforts.¹⁵⁷

¹⁴⁸ *Id.*

¹⁴⁹ See Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005); see also Walsh, *supra* note 20 (implying that having a more densely populated city would improve the city’s tax base and help ease recovery).

¹⁵⁰ Walsh, *supra* note 20.

¹⁵¹ *Id.*

¹⁵² House Comm. on Fin. Servs., Committee Approves Corporation, *supra* note 96.

¹⁵³ See GovTrack.us, H.R. 4100, *supra* note 21.

¹⁵⁴ See *id.*

¹⁵⁵ See Gordon Russell, *Rising from the Tide*, TIMES-PICAYUNE (New Orleans), Dec. 11, 2005, at 1.

¹⁵⁶ See *id.*; *Hurricane Katrina Timeline*, *supra* note 2.

¹⁵⁷ *Hurricane Katrina Timeline*, *supra* note 2.

1. The 1997 Grand Forks Flood

In April 1997, 52,000 residents of Grand Forks, North Dakota were awakened in the middle of the night and told to evacuate their homes.¹⁵⁸ The nearby Red River had flooded its banks, resulting in flooding in ninety percent of the city and fires in eleven downtown buildings.¹⁵⁹ In all, 8600 homes, or seventy-five percent of single-family units, were flooded, 1600 of 15,000 apartments had flood damage, and the entire downtown was affected.¹⁶⁰ Though the area has just a little more than one-tenth of the population of New Orleans, Grand Forks faced challenges that are very similar to those confronting New Orleans.¹⁶¹ It is most important to look at the rebuilding effort in Grand Forks because it is generally considered to be a success story in rebuilding management.¹⁶² After an initial dip in population of ten percent, the population of the area is the same now as it was before the 1997 flood.¹⁶³ Most importantly, residents and city leaders usually say the city is better than before.¹⁶⁴

2. Federal and Local Responses in Grand Forks

In contrast to the response to Hurricane Katrina, the immediate federal response to the Grand Forks flood was generally perceived as excellent.¹⁶⁵ FEMA director James Witt even visited the town before the flood arrived.¹⁶⁶ In Grand Forks, Witt is revered among residents for his swift action during the crisis.¹⁶⁷

Federal funding was likewise rapidly forthcoming.¹⁶⁸ Congress approved \$5.6 billion appropriations bill for the area that designated money for buyouts, business loans, new infrastructure, and other

¹⁵⁸ FED. EMERGENCY MGMT. AGENCY & N.D. DIV. OF EMERGENCY MGMT., JOURNEYS: NORTH DAKOTA'S TRAIL TOWARDS DISASTER RESISTANCE 7 (2001) [hereinafter FEMA, DISASTER RESISTANCE].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See Russell, *supra* note 155.

¹⁶² See *id.*; see also FEMA, DISASTER RESISTANCE, *supra* note 158, at 5 (recounting the North Dakota flood as an example of a time when "taking steps before, during and after disaster strikes *can* make a difference for the future").

¹⁶³ Russell, *supra* note 155.

¹⁶⁴ See *id.*

¹⁶⁵ *Id.*

¹⁶⁶ See *id.*

¹⁶⁷ *Id.*

¹⁶⁸ Russell, *supra* note 155.

needs.¹⁶⁹ If that amount were to be compared to the amount appropriated so far in New Orleans on a per-capita basis, it would equal about \$100 million for New Orleans alone.¹⁷⁰ This is a great deal more per person than the \$82 million President Bush has appropriated so far, much in tax credits, to the *entire* Gulf region.¹⁷¹

Grand Forks's rebuilding effort was spearheaded by a city buyback program funded with FEMA grants, money from the State of North Dakota, and CDBG grants from HUD.¹⁷² The buyback program removed damaged structures from areas that were especially vulnerable to future flooding and created open space in the structure's place.¹⁷³ Residents could voluntarily participate in the buyback and received a price based on the pre-flood assessment of the home and assistance in relocating to brand new neighborhoods built outside the floodplain.¹⁷⁴ Though the displacement was upsetting to many of the residents, the success of the rebuilding process has led many of the displaced to praise the program in retrospect.¹⁷⁵ By holding firm to a policy that refused to relax local floodplain building ordinances in order to assist people with rebuilding efforts, the city took the harder route of enforcing those restrictions and building a safer city in the long run.¹⁷⁶

3. Lessons from Grand Forks

Applying a rebuilding plan in Grand Forks was eased by the small population and size of the community, unlike New Orleans which is much larger, and has far more diverse people and needs.¹⁷⁷ Yet the infighting and bitterness that remains among some residents of Grand Forks indicates that no rebuilding effort will be easy.¹⁷⁸ One of the local

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See Dao, *supra* note 39. Of course, the political and economic climate in April 1997 was significantly different than the current one. See Russell, *supra* note 155. Residents of Grand Forks credit slow news days and a lack of scandals in Congress as helping to bring their plight to the attention of the public. *Id.* It is also fair to say that the scale of the disaster contributed to the ability of the federal government to fully fund the recovery, as did a strengthening U.S. economy that was not at war. See *id.*

¹⁷² FEMA, DISASTER RESISTANCE, *supra* note 158, at 8.

¹⁷³ *Id.*

¹⁷⁴ See *id.*; Russell, *supra* note 155.

¹⁷⁵ FEMA, DISASTER RESISTANCE, *supra* note 158, at 12; Russell, *supra* note 155.

¹⁷⁶ FEMA, DISASTER RESISTANCE, *supra* note 158, at 8.

¹⁷⁷ See *id.* at 7 (noting that the population of Grand Forks is about 52,000).

¹⁷⁸ Russell, *supra* note 155. Some Grand Forks residents refuse to visit the rebuilt downtown because they object to its urban feel. *Id.* Those who object wanted the city to remain more suburban in character. *Id.*

officials selected to lead the rebuilding effort with the Mayor said, "The leadership style you need to direct a recovery is not always a leadership style that makes everyone happy. . . . [I]f you try to do a recovery by consensus, nobody will agree and nothing will happen. So you do what's right, and it may not be popular."¹⁷⁹ New Orleans is likely to face the same infighting on the local level as various plans and proposals come forward.¹⁸⁰ If reintroduced, the Baker Bill, by providing a federal mechanism for oversight and regulation of a buyout program, would centralize decision making regarding housing issues.¹⁸¹ However, the Baker Bill would maintain the link to vital input on the local level, and prioritize local needs in the competitive-bidding process.¹⁸² Furthermore, appointed leaders of Baker's proposed Corporation would not have to face elections, and thus could focus on their duties without worrying excessively about the popularity of their decisions.¹⁸³

A vital lesson that the federal government should take from the flood in Grand Forks is that its current appropriation levels are insufficient to fully rebuild a major American city.¹⁸⁴ There is some argument that the problem of insufficient funding may be more endemic than characteristic of policy choices.¹⁸⁵ Joseph Singer, a noted property law scholar, has recently written that Americans after Katrina wanted the federal government to act, despite a strong American distrust of big government.¹⁸⁶ Unfortunately, the demand for action has not been strong enough to be sufficient because although Americans saw that the needs in New Orleans were acute, there was no recognition that meeting those needs would require an increase in taxes and governmental regulation.¹⁸⁷

Finally, the most encouraging lesson to learn from Grand Forks is that rebuilding is possible, and that the city can come back better than

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *See generally* Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005) (creating a new federal agency charged with rebuilding Louisiana).

¹⁸² *See id.* § 105(c)(3).

¹⁸³ *See id.* § 103(b). Appointees would be held accountable for performance through the public quarterly and annual reports to the federal government. *Id.* § 104(d)(1)-(2).

¹⁸⁴ *See* Russell, *supra* note 155.

¹⁸⁵ *See* Joseph William Singer, *After the Flood: Equality & Humanity in Property Regimes*, 52 LOYOLA L. REV. (forthcoming 2006) (manuscript at 9, on file with author) [hereinafter Singer, *After the Flood*]; Joseph William Singer, Professor, Harvard Law School, Lecture to Boston College Law Students (Feb. 16, 2006) [hereinafter Singer, *Lecture*].

¹⁸⁶ *See* Singer, *After the Flood*, *supra* note 185, at 9; Singer, *Lecture*, *supra* note 185.

¹⁸⁷ *See* Singer, *After the Flood*, *supra* note 185, at 5.

ever.¹⁸⁸ Achieving this result in New Orleans will require a coherent plan supported by sufficient federal funding.¹⁸⁹ Grand Forks used federal funds to implement their own local buyback program, which was very successful.¹⁹⁰ The Baker Bill proposal was more complicated because the goal was more than small-scale relocation and clearing of floodplains.¹⁹¹ More ambitiously, the Baker Bill proposed rebuilding existing neighborhoods with an eye to accommodating the specific needs of the area.¹⁹² Though the White House has claimed that the already-appropriated funds will be sufficient, this is simply not the case.¹⁹³ In addition, the already-appropriated funds may be sufficient to assist the hardest-hit residents, but it may not be enough to fully rebuild the city in a way that improves on some serious affordability problems that existed before the storm.¹⁹⁴

B. *Hurricane Andrew as the Model for Private-Sector Involvement*

Residents of Homestead, Florida, where Hurricane Andrew made landfall in 1992, credit much of the recovery after that devastating hurricane to the private sector.¹⁹⁵ Although the damage caused by Andrew was similar in scale to the damage in New Orleans, there is one significant difference between the two disasters—New Orleans cannot rely only on private solutions if it is to recover from Hurricane Katrina.¹⁹⁶ Though the private sector will be a necessary component in the recovery effort, success will be dependent upon the involvement of the federal government.¹⁹⁷

¹⁸⁸ See Russell, *supra* note 155.

¹⁸⁹ See *id.*; Congressman Richard H. Baker, Louisiana Recovery Corporation, <http://baker.house.gov/html/content.cfm?id=550> (last visited Oct. 15, 2006).

¹⁹⁰ See Russell, *supra* note 155.

¹⁹¹ See *id.*; Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005).

¹⁹² See H.R. 4100 § 107(a).

¹⁹³ See Walsh, *supra* note 20.

¹⁹⁴ See *id.*

¹⁹⁵ James Varney, *Rising from Rubble*, TIMES-PICTAYUNE (New Orleans), Dec. 9, 2005, at 1.

¹⁹⁶ See *id.*

¹⁹⁷ Cf. Varney, *supra* note 195 (implying that private efforts to recovery are alone inadequate to satisfy the immense needs of New Orleans and its residents following Katrina).

1. The Hurricane Andrew Disaster

Prior to Hurricane Katrina, Hurricane Andrew was the most destructive hurricane in the United States on record.¹⁹⁸ Andrew made landfall in Homestead, Florida on August 24, 1992 with wind readings establishing it as the third most powerful recorded hurricane to date.¹⁹⁹ Homestead, located thirty-eight miles south of Miami, suffered crippling wind damage while the storm sideswiped the city of Miami itself.²⁰⁰ Andrew produced a seventeen foot storm surge near the landfall point in Homestead, caused twenty-three U.S. deaths, and resulted in \$26.5 billion in damage in the United States.²⁰¹ All but \$1 billion of that damage was in south Florida and the vast majority of the damage in Florida was caused by winds.²⁰²

Prior to Hurricane Andrew, Homestead was a city of about 26,000 people in a mostly rural area.²⁰³ The local economy consisted of agriculture and a dying Air Force base, both of which were decimated by the hurricane.²⁰⁴ Migrant and permanent agricultural workers who lived in mobile homes were especially affected and many were left with nothing after Andrew.²⁰⁵

2. Federal and Local Responses to Hurricane Andrew

Residents of Homestead, Florida probably experienced *déjà vu* when they watched the lackluster federal response to Hurricane Katrina unfold on their television screens.²⁰⁶ On April 19, 1993, residents of that town gathered with Sen. Bob Graham at a hearing entitled *Lessons Learned from Hurricane Andrew*.²⁰⁷ The chief complaint was a lack of adequate federal response to the residents' needs.²⁰⁸ Many Homestead residents were still trying to clear hurricane debris a year and a

¹⁹⁸ Nat'l Weather Serv., Nat'l Hurricane Ctr., Hurricane History, http://www.nhc.noaa.gov/HAW2/english/history_printer.shtml (last visited Oct. 15, 2006) [hereinafter NWS, Hurricane History].

¹⁹⁹ *Id.*

²⁰⁰ See Varney, *supra* note 195.

²⁰¹ NWS, Hurricane History, *supra* note 198.

²⁰² *Id.*

²⁰³ See Varney, *supra* note 195.

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See *id.* (citing Homestead residents' complaints about the inadequacy of FEMA's response to Hurricane Andrew relief).

²⁰⁷ *Id.*

²⁰⁸ See Varney, *supra* note 195.

half after the hurricane hit.²⁰⁹ In the absence of federal action, those affected by Andrew turned to the private sector, where a private non-profit organization stepped up to “lobby for government aid to generate, leverage and spend the outpouring of private contributions” that came in after the disaster.²¹⁰

The nonprofit organization, called We Will Rebuild, was founded by Alvah Chapman, the head of Knight-Ridder, a massive newspaper-publishing company.²¹¹ In the first week after the storm, Chapman called Bob Epling, the president of Community Bank in Homestead, and several other local businessmen to bring them together to take action.²¹² Eventually, We Will Rebuild had a board of seventy-seven directors with specialized subcommittees devoted to issues like agriculture, health, the Air Force base, domestic violence, and communications with federal authorities.²¹³ Chapman was chairman and Epling was one of two vice-chairmen.²¹⁴

We Will Rebuild combined private infrastructure and personnel with public funding to push the recovery efforts in Homestead forward.²¹⁵ Some financial resources for the group came from private donations, but nearly nine-tenths of the total funds the group allocated came from federal recovery dollars.²¹⁶ Using this mostly federal funding, the nonprofit financed professional recovery plans for twenty-eight neighborhoods.²¹⁷ Committee heads from the private sector worked with local politicians to keep money and focus on south Florida.²¹⁸

²⁰⁹ *Id.*

²¹⁰ *See id.*

²¹¹ *See id.* Knight Ridder, which owned the Miami Herald, was the second-largest newspaper company in the United States. *Id.*; Katharine Q. Seelye & Andrew Ross Sorkin, *Newspaper Chain Agrees to a Sale for \$4.5 Billion*, N.Y. TIMES, Mar. 13, 2006, at A1. Before being acquired in March of 2006 by the McClatchy Company, a smaller newspaper publisher, Knight Ridder owned thirty-two daily newspapers in twenty-nine U.S. markets. Seelye & Sorkin, *supra*. In April of 2006, the McClatchy Company sold four of Knight Ridder's newspapers for \$1 billion to the MediaNews newspaper chain. Katherine Q. Seelye, *Papers To Be Sold for \$1 Billion*, N.Y. TIMES, Apr. 27, 2006, at C1.

²¹² Varney, *supra* note 195. When Chapman called Epling, he was living out of the bank with a bag of dirty clothes and a gun because his home had been destroyed by Hurricane Andrew. *Id.* Epling was well known immediately after Andrew because he handed out \$100 bills to Homestead residents who approached him for help. *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* We Will Rebuild received about \$28 million in private donations, which it leveraged into \$1 billion and added to \$8.5 million in federal recovery allocations. *Id.*

²¹⁷ Varney, *supra* note 195.

²¹⁸ *See id.*

In Homestead, We Will Rebuild converted private donations, federal relief money, and benefits from existing federal programs into new developments that would best serve the community in the future.²¹⁹ One We Will Rebuild project used a Department of Agriculture land-use program that allowed the nonprofit to acquire a 108-acre land parcel adjacent to farm land.²²⁰ We Will Rebuild then united with the nonprofit Everglades Community Association, a group dedicated to building and improving farmworker housing.²²¹ In the place of temporary migrant and poor farm worker housing destroyed by Andrew, the combined groups helped to build a permanent and appealing new community for the mostly Mexican-American farmworkers.²²² The result was the Everglades Farmworker Villages, which consist of 443 attractive apartments for nearly 4000 people connected to local agriculture.²²³ In addition, the Villages boast 10,000 square feet of retail space and a ten-acre park.²²⁴ Today the residents of the Everglades Farm-

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*; Fannie Mae Foundation, Round Ten Casebook (1998): Everglades Community Association, Inc., <http://www.fanniemaefoundation.org/grants/casebook10/ccai-abs.shtml> (last visited Oct. 15, 2006) [hereinafter FME, Round Ten Casebook]. Fannie Mae's website describes this remarkable project and its impact on the community as an example for future low-income projects:

Farmworkers, who are among the lowest-paid, hardest-working laborers in the nation, often have no choice but to live in shoddy temporary housing for which they pay a hefty part of their earnings. Typical was a south Dade County, Florida, "temporary" labor camp, notorious for its crime and squalid conditions, where for over 20 years farmworkers lived in trailers the county had bought secondhand from another state. When Hurricane Andrew blew the trailers away in 1992, the emergency put the need for farmworker housing high on the agenda of public officials and growers. The nonprofit Everglades Community Association, which had been managing farmworker housing and building new units on a steady but inadequate scale, seized the opportunity.

Everglades Farmworker Villages, the largest farm labor housing project ever built in the U.S., marks a turning point for more than 400 farmworker families, most of them Mexican Americans. It is not a housing complex but a community: a place where fathers come out to watch their children on the basketball courts, where families can be good neighbors, and where day care, health care, a grocery store, and a town center are all within a short walk. Farmworkers can put down roots and escape the unstable life of temporary housing. It is a safe and strong community that replaces the crime and dilapidation of trailer parks.

FME, Round Ten Casebook, *supra*.

²²² Varney, *supra* note 195.

²²³ *Id.*

²²⁴ *Id.*

worker Villages have real homes with access to laundry, a day care center, and a free clinic.²²⁵ At least one current resident said that while the new housing arrangement is “way different,” it is also “way better.”²²⁶ The nonprofits united with the help of federal money and programs to create an innovative solution to a persistent problem in south Florida, with remarkably successful results.²²⁷

3. Lessons from Hurricane Andrew

The reconstruction of Homestead, Florida provides a real success story for private involvement in recovery efforts.²²⁸ We Will Rebuild utilized existing federal programs like the ones that the Bush Administration has funded to assist with Katrina recovery.²²⁹ While the involvement of the private sector in Homestead and the rest of south Florida worked after Hurricane Andrew, there are some notable differences between the aftermath of Andrew versus the aftermath of Katrina that make reliance on a purely private solution untenable.²³⁰

First, the damage wrought by Andrew was mostly caused by hurricane-force winds as opposed to flooding or storm surge.²³¹ As a result, insurance companies that covered the area generally honored the replacement clause in homeowner insurance policies.²³² Those owners who lost their homes to wind damage were able to recover a great deal of the value of their damaged homes.²³³ In New Orleans, where much of the damage was caused by flooding, the flood policies paid by the federal government do not contain the same replacement clauses.²³⁴ Additionally, the payouts from the insurance companies after Andrew were “extremely generous,” according to a fellow at the International Hurricane Research Center.²³⁵ In all, after Andrew, approximately \$20 billion in insurance payouts went to “a very concentrated area.”²³⁶

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See Varney, *supra* note 195.

²²⁸ See *id.*

²²⁹ See *id.*; *supra* Part I.

²³⁰ See Varney, *supra* note 195.

²³¹ See *id.*

²³² *Id.*

²³³ *Id.*

²³⁴ See *id.*

²³⁵ Varney, *supra* note 195. The fellow, Shahid Hamid, stated that the payouts were so generous because the insurance industry had not yet devised methods to limit their risk with regard to hurricanes. See *id.* Indeed,

After Andrew, the insurance industry instituted reforms that sought to limit their risk in a future disaster, in some cases specifically limiting reimbursement for flood damage even if it was proximately caused by the covered hurricane winds.²³⁷ It remains to be seen whether the insurance industry's reforms will stand up in court, but insurers do not appear eager to pay out on claims of flood damage.²³⁸ Much of the money already allocated by the federal government for Katrina relief has been earmarked to reimburse homeowners who suffered losses but were not required to buy federal insurance policies because their homes were outside the floodplain.²³⁹ Those who lost homes to Andrew were more likely to be compensated by their insurance companies, thereby freeing up federal money for innovative projects like the Everglades Farmworker Villages.²⁴⁰

If reintroduced, the Baker Bill's additional funding and plan to implement cohesive development in the wake of destruction would have the potential to create innovative communities for low-income residents like the Everglades Farmworker Villages.²⁴¹ Since insurance companies limited their risk on policies after the losses from Andrew and subsequent hurricanes, the federal government must step in with additional sources of funding if New Orleans has any hope of correcting its glaring problems of inequality and affordability.²⁴² Although the recovery of Homestead after Andrew was seen as a triumph for private investment, the money for the privately motivated projects overwhelm-

[r]eeling from the unexpectedly high cost of Hurricane Andrew in 1992—\$20 billion in today's money—the insurance industry and the state of Florida instituted reforms to limit insurers' risk in future disasters. Those range from changing how homeowners' insurance is priced—which affects policyholders even in Central Illinois—to creating a privately funded catastrophe reinsurance fund that essentially insures the insurers.

Roger Miller, *Reforms Buffer Insurers' Losses: Hurricane Lessons Have Come into Play Since Andrew in '92*, THE PANTAGRAPH (Bloomington, Ill.), Oct. 10, 2004, at F1.

²³⁶ See Varney, *supra* note 195. As Hamid noted, "Some people even made a lot of money." *Id.*

²³⁷ See Miller, *supra* note 235; SETH A. TUCKER & ANN-KELLEY KEMPER, COVINGTON & BURLING, HURRICANE KATRINA—INSURANCE COVERAGE ISSUES 3 (2005), <http://www.cov.com/publications/download/oid27267/570.pdf>.

²³⁸ See TUCKER & KEMPER, *supra* note 237, at 3–4.

²³⁹ See Nossiter, *supra* note 18.

²⁴⁰ See Varney, *supra* note 195.

²⁴¹ See *id.*; Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005).

²⁴² See Varney, *supra* note 195.

ingly came from federal relief funds.²⁴³ Adequate federal funding is imperative as a catalyst to private action.²⁴⁴

A second point of departure between the Andrew and Katrina disasters is the number of political leaders whose constituents have a stake in recovery.²⁴⁵ We Will Rebuild received credit for bringing “unity and clarity” to Homestead’s recovery.²⁴⁶ Because the area hit by Andrew was about seventy-five percent unincorporated land, the number of local political districts affected was relatively small.²⁴⁷ One local leader involved in the Andrew recovery remarked, “You could get all the politicians affected into one room.”²⁴⁸ The lack of political involvement created a void that the private sector filled after Andrew.²⁴⁹ We Will Rebuild shaped much of the recovery, running their group like a business whose goal was to take existing programs, then focus and supplement them.²⁵⁰

In contrast, New Orleans has many local and state leaders vying for a piece of federal funding.²⁵¹ Those political leaders represent parishes that have disparate needs and that vary widely in economic and racial makeup.²⁵² While the Bush Administration’s effort to shore up existing programs is a good start, without some sort of organization designated to motivate cohesive rebuilding, any progress could become mired in political infighting.²⁵³ The Baker Bill’s corporate-like, non-partisan structure would help sort out and prioritize the competing needs of the diverse communities of New Orleans.²⁵⁴

Another significant difference between south Florida and New Orleans is the population density in the areas hit by each storm and the

²⁴³ *See id.*

²⁴⁴ *See id.*

²⁴⁵ *See id.*

²⁴⁶ *Id.*

²⁴⁷ *See* Varney, *supra* note 195. Unincorporated land is “land located outside a municipality.” Univ. of Minn. Extension Serv., Glossary, Choices for Change: A Guide to Local Government Cooperation and Restructuring in Minnesota, http://www.extension.umn.edu/distribution/citizenship/components/6541_07.html (last visited Oct. 15, 2006).

²⁴⁸ Varney, *supra* note 195.

²⁴⁹ *See id.* Eventually, the local government was useful in passing new, stricter local building ordinances. *Id.* In addition, the Florida Legislature created the Hurricane Andrew Recovery/Rebuilding Trust Fund, which shifted \$500 million in sales tax revenue from all over the state to the hardest hit areas during the first two years after the disaster. *Id.*

²⁵⁰ *See id.*

²⁵¹ *See* Stephen Kaufman, *New Orleans a City Characterized by Its Diversity*, Sept. 7, 2005, <http://usinfo.state.gov/gi/Archive/2005/Sep/08-59804.html>.

²⁵² *See* Varney, *supra* note 195; Kaufman, *supra* note 251.

²⁵³ *See* Varney, *supra* note 195; Kaufman, *supra* note 251; *supra* Part I.C.

²⁵⁴ *See* Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005); Varney, *supra* note 195.

ensuing scale of damages.²⁵⁵ Andrew merely sideswiped Miami, while Katrina hit several heavily populated Gulf cities with full force.²⁵⁶ As a result, the damage to the primary city's infrastructure was much more severe in Louisiana.²⁵⁷ After Andrew, most of Miami's basic infrastructure survived the storm, which helped harder-hit outlying communities get back on their feet.²⁵⁸ In New Orleans, the failure of the levies and loss of many basic utilities has led many to rethink the layout of New Orleans entirely, with mayoral and state commissions proposing a more densely populated city in areas outside the federally designated floodplain.²⁵⁹ Regardless of the approach eventually adopted, any rebuilding plan that seeks to improve the city of New Orleans will require a more ambitious federal strategy that involves more than simple tax incentives.²⁶⁰

IV. A PRAGMATIC APPROACH TO POVERTY

In discussing the public and governmental response to Hurricane Katrina, Joseph Singer observed that Katrina "changed our national conversation," focusing politicians and the media on issues of poverty.²⁶¹ Yet instead of thinking anew about poverty issues, Singer claims that Americans and the politicians who represented them expressed predictable responses immediately after the hurricane.²⁶² Conservatives decried the big government bureaucracy that made New Orleans the mess it is and sought to ease the way for market forces.²⁶³ Liberals tried to argue that lack of government oversight and involvement was what caused the failure of the levees in the first place.²⁶⁴

²⁵⁵ See Varney, *supra* note 195.

²⁵⁶ See *id.*

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See Walsh, *supra* note 20.

²⁶⁰ See *id.*

²⁶¹ See Singer, *After the Flood*, *supra* note 185, at 4; Singer, Lecture, *supra* note 185.

²⁶² Singer, *After the Flood*, *supra* note 185, at 10.

²⁶³ *Id.*

²⁶⁴ *Id.* To demonstrate this political side taking, Singer uses the example of President Bush's attempt to protect federal contractors rebuilding in New Orleans from having to comply with environmental laws and pay workers the "prevailing wage." *Id.* President Bush repealed the Depression-era Davis-Bacon Act, which ensured that public works projects would employ workers at the local prevailing wage. *Id.* President Bush argued that repeal was necessary to provide more opportunities for small businesses that could not afford the prevailing wage to compete for government contracts. Rick Klein, *Rebuilding Plan Paving Way for Conservative Goals*, BOSTON GLOBE, Sept. 25, 2005, at A1. Another Republican senator proposed a repeal of the Clean Air Act, which relates to the reduction of smog and atmospheric pollutants, after Katrina. *Id.* These actions by Republican lawmakers led many

Singer argues that progressives need new rhetoric to “explain and justify their worldview.”²⁶⁵ Because the public demand for governmental response to the disaster has been nearly unanimous, liberals and conservatives need a way to discuss poverty in ways that do not place them at extremes of a government versus no government debate.²⁶⁶ Singer says that after a disaster where everyone agrees government is necessary, relying on this type of discourse does not give elected officials of either ideology the tools to support the types of taxation and regulation that both sides desire.²⁶⁷ Specifically, liberals need a way of expressing their goals of promoting equality and security by checking the excesses of the marketplace.²⁶⁸ Conservatives counter liberal ideas by playing to the fear of taxation and regulation.²⁶⁹ Liberals need new language to express their ideas without reverting to couching them in conservative rhetoric.²⁷⁰

If the “common view” after Katrina was that the government should do more to respond to poverty, Singer asks, how can the ideas of conservatives and liberals about the role of government be expressed to reflect that?²⁷¹ Singer abandons a conservative versus liberal, deregulation versus regulation formula in favor of an institutional versus pragmatic balance.²⁷² The ideas associated more with conservatives are institutionalist ideas.²⁷³ Singer says institutionalists want to create the right institutions, consisting of limited government and laws that support a market economy, then let individuals operate freely within the world framed by those institutions.²⁷⁴ Thus, the regulations that are needed are rules that define property rights, enforce contracts, and punish those who cause unreasonable harm to others.²⁷⁵ If the proper institutions exist and everyone is given equal access, the institutionalist believes that every person

Democratic politicians to wonder if Republicans were using the Katrina tragedy to further their prior political goals. *Id.*

²⁶⁵ Singer, *After the Flood*, *supra* note 185, at 7.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 4, 7.

²⁶⁸ *Id.* at 10.

²⁶⁹ *Id.* at 10–11.

²⁷⁰ Singer, *After the Flood*, *supra* note 185, at 11.

²⁷¹ *Id.* at 9, 12.

²⁷² *Id.* at 12. Singer is emphatic that the divide between institutionalists and pragmatics does not neatly fit the lines drawn by conservatives and liberals. Singer, Lecture, *supra* note 185. Rather, liberals can be institutionalists and conservatives can be pragmatists. *Id.*

²⁷³ Singer, *After the Flood*, *supra* note 185, at 12. Singer traces the institutionalist worldview to John Locke and Robert Nozick. *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

will have the ability to bring herself out of poverty.²⁷⁶ The result is that institutionalists accept that if poverty exists even after we create the “right” institutions, there is a certain level of poverty that will never go away.²⁷⁷ If individuals are uncomfortable with this resulting poverty baseline, the appropriate way to address it is through private charity.²⁷⁸

On the other hand, Singer describes the pragmatists as associated to some degree with liberal ideas of poverty.²⁷⁹ A pragmatist takes the view that the best institutions are ones that result in no poverty.²⁸⁰ Pragmatists will not be satisfied until poverty is eradicated and will work to change the institutions to achieve that goal.²⁸¹ Those who subscribe to pragmatism “are never done judging the acceptability of our institutions,” and thus are more skeptical of the ability of the market to function in a way that will reduce poverty.²⁸²

These two frameworks for addressing poverty both acknowledge heavy involvement from the federal government.²⁸³ Singer goes on to discuss how government regulation is the very thing that defines property rights.²⁸⁴ Thus, how that government regulation is deployed has a serious impact on the resulting property regime.²⁸⁵ So far, the Bush Administration’s response has been to express confidence in existing institutions.²⁸⁶ Money for immediate relief went to FEMA to be distributed to hurricane victims despite the failure of that body to respond properly in the aftermath of the storm.²⁸⁷ Billions of dollars were earmarked for business and development tax incentives in the Gulf Opportunity Zone without addressing some serious efficiency and utiliza-

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 13.

²⁷⁸ Singer, *After the Flood*, *supra* note 185, at 13. Singer says that under the institutionalist model, addressing poverty in any other way “harms the institutions that generate wealth and creates perverse incentives for poor people and thus only hurts the people we are trying to help.” *Id.*

²⁷⁹ *Id.* at 14.

²⁸⁰ *Id.* Singer traces the origin of pragmatism to John Rawls and the idea that “if poverty exists, then by definition, our institutions have failed and more work needs to be done.” *Id.*

²⁸¹ *Id.*

²⁸² *Id.* at 16.

²⁸³ Singer, *After the Flood*, *supra* note 185, at 18.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ See Walsh, *supra* note 20.

²⁸⁷ See Barrett, *supra* note 1.

tion problems.²⁸⁸ Sadly, the smallest piece of federal appropriations went to CDBG grant funding, the federal program that actually has the most potential to impact the future of New Orleans's residents.²⁸⁹ The federal reaction to Katrina did not take time to rethink the existing programs or consider bigger ideas for the future of New Orleans.²⁹⁰ Instead, conservatives attacked the existing institutions as failures, took funding away from social welfare programs, and left nothing in the void.²⁹¹ Perhaps the current administration's institutionalist worldview leads it to believe that the existing institutions, or stripped-down versions of those institutions, are the best ones and that any resulting poverty must be tolerated.²⁹²

The Baker Bill was an innovative proposal because it had elements that satisfy both the institutionalist and the pragmatist.²⁹³ On the one hand, the Baker Bill's structure used the free market to stimulate redevelopment.²⁹⁴ On the other hand, the Baker Bill dared to challenge the acceptability of existing institutions, in fact proposing a brand new institution to address the serious problems that lie ahead in rebuilding New Orleans.²⁹⁵ Most importantly, the Baker Bill's redevelopment plan took into account the needs of the community and affordable housing.²⁹⁶ This is a truly pragmatic idea because it aims to improve low-income communities to reduce poverty.²⁹⁷ The injustices exposed by Hurricane Katrina demonstrate that the pragmatic idea of a critical re-evaluation of our existing institutions is needed more than ever.²⁹⁸

CONCLUSION

Hurricane Katrina dealt a crippling blow to the poor population of New Orleans. Abandoned in the Superdome and at the New Orleans Convention Center, American citizens were like refugees in their own

²⁸⁸ JOHN ALEXANDER BURTON, CTR. FOR AM. PROGRESS, *THE GO ZONE WON'T GO: LESSONS FOR GULF OPPORTUNITY ZONES 1* (2005), available at http://www.americanprogress.org/kf/go_zone.pdf (last visited Oct. 15, 2006).

²⁸⁹ See Salsich, *supra* note 14, at 484–85; Walsh, *supra* note 20.

²⁹⁰ See Walsh, *supra* note 20.

²⁹¹ Boo, *supra* note 12, at 86.

²⁹² See Walsh, *supra* note 20; Singer, *After the Flood*, *supra* note 185, at 12–13.

²⁹³ See Louisiana Recovery Corporation Act, H.R. 4100, 119th Cong. (as reported by H. Comm. on Fin. Servs., Dec. 15, 2005).

²⁹⁴ See Singer, *After the Flood*, *supra* note 185, at 12, 14; see generally H.R. 4100.

²⁹⁵ See Singer, *After the Flood*, *supra* note 185, at 12; see generally H.R. 4100.

²⁹⁶ See Singer, *After the Flood*, *supra* note 185, at 14; see generally H.R. 4100.

²⁹⁷ See Singer, *After the Flood*, *supra* note 185, at 14; see generally H.R. 4100.

²⁹⁸ See Singer, *After the Flood*, *supra* note 185, at 14; see generally H.R. 4100.

country. They sought asylum from a government that has continuously ignored their basic needs by slashing the budgets of federal-housing programs that help the neediest Americans. In response to New Orleans's cries for help, President Bush approved a massive spending bill that would go primarily to corporations and short-term solutions, passing an insufficient amount to local communities.

Though Rep. Baker offered a bold idea for reconstruction, it was ignored as an expansion of government bureaucracy. Baker's vow to take his bill through the House and Senate failed the first time, but his plan is worth a second look. The buyback program he proposed resembles a similar, successful local buyback plan implemented on a smaller scale in Grand Forks, North Dakota after a massive flood. Its corporate structure would both reduce political maneuvering for federal dollars and centralize decision-making power for more efficient and successful future development. In addition, Baker's idea attempted to recoup the federal dollars allocated to his idea, and to preserve the vital community input that decides which projects will work. Though the current administration believes that private investment will take on the task of rebuilding as *We Will Rebuild* did after Hurricane Andrew, there are unique challenges after Katrina. Infrastructure was destroyed in New Orleans. Insurance companies are reluctant to pay their share. More people are fighting for a stake in the future of the city than they did in south Florida.

If the market is left to its own devices, is it entirely possible that New Orleans will be adequately rebuilt. But it is time to embrace a more pragmatic vision and attempt to rebuild New Orleans in an innovative and forward-thinking way. To do this, the federal government needs to reintroduce and reconsider the Baker Bill, which would provide more federal funding to the area in a way that is not a handout, but an investment in a future without poverty.