

WHAT TO DO WHEN PEOPLE DON'T MOVE: ENDING THE "CONDEMNATION BLIGHT" VALUE RULE FOR FORCED RETREAT RESULTING FROM SEA LEVEL RISE

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I. OVERVIEW

Global climate change, caused by the manmade release of greenhouse gases, is causing the oceans to rise.¹ This is called sea level rise (“SLR”) - it threatens humans who live in coastal regions because the ocean will erode and flood these areas and the effects are monumental on the global scale depending on the projections for SLR.² The New York City region in particular, due to its density and coastal nature, is threatened.³ Unless greenhouse gas emission can be curbed drastically, SLR will continue.⁴

New York City and the surrounding counties must address this coming tide. Governments can choose to lessen the chances of flooding, by building barriers and other infrastructure, a tactic known as adaptation.⁵ If adaptation is not successful in protecting property, then the government would need to set a plan to move people away from living in flood-risk areas. This displacement of people is known as retreat.⁶ If people do not voluntarily move away, then governments can choose to make them move, involuntarily, through forced retreat.

¹ *Sea Level*, NAT’L AERONAUTICS AND SPACE ADMIN., <https://climate.nasa.gov/vital-signs/sea-level/> (last visited Dec. 21, 2020).

² *Sea Level Rise*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/sea-level-rise/> (last visited Oct. 11, 2021).

³ *Climate Impacts in New York City: Sea Level Rise and Coastal Floods*, NAT’L AERONAUTICS AND SPACE ADMIN., <https://icp.giss.nasa.gov/research/ppa/2002/impacts/introduction.html> (last visited Sep. 30, 2020).

⁴ *Sea level rise could reshape the United States, trigger migration inland: AI shows climate change-driven sea-level rise could trigger mass migration to cities inland*, SCIENCE DAILY (22 January 2020), www.sciencedaily.com/releases/2020/01/200122150021.htm.

⁵ U.S. ENVTL. PROT. AGENCY, PLAN EJ 2014: LEGAL TOOLS (2011), <https://www.epa.gov/sites/production/files/2016-07/documents/ej-legal-tools.pdf>; *Florida Adaptation Planning Guidebook*, FLA. DEP’T OF ENVTL. PROT. (June 2018), https://floridadep.gov/sites/default/files/Adaptation_Planning_Guidebook_0.pdf

⁶ Anne Siders, *Managed Coastal Retreat: A Handbook of Tools, Case Studies, and Lessons Learned*, COLUM. CTR. FOR CLIMATE CHANGE, COLUM. L. SCH. (2013), https://scholar.harvard.edu/files/siders/files/siders_managedcoastalretreathandbook_2013.pdf.

Forced retreat relies on eminent domain power – the government’s power to take property from private owners. This power is limited by the Fifth Amendment Takings Clause’ two requirements: “public use” of the property taken and “just compensation” to the private owner for the property.⁷ The issue is that local and state governments may not have the budget to adequately compensate property owners for these at-risk properties when attempting forced retreat, because the Supreme Court has said that “just compensation” means the fair market value (“FMV”) at the time the property is taken.⁸ Thus, forced retreat can only occur when the amount of money the government has for compensation is equal to the financial valuation of the properties. The lack of funds to buyout homes may remove forced retreat as an option for governments to help move people prior to flooding, because the government could only afford to compensate owners once properties have low FMV due to flooding or risk of flooding.

To solve this, I argue two changes to New York’s eminent domain laws when the government acquires properties in response to SLR. First, New York courts should allow for alternative lower valuation mechanisms when determining FMV for properties in danger by SLR. Guided by the principle of equity, which is fundamental to “just compensation” according to the Supreme Court, and under the precedent of the Government not paying traditional FMV during times of war, this lower valuation for FMV could be constitutional because it is equitable and due to emergency. Second, in response to this change, I argue for an addition to New York’s Eminent Domain Procedure Law which would require further community oversight over the government’s use of eminent domain power to ensure it is used equitably for addressing SLR.

II. SEA LEVEL RISE AND THE POTENTIAL NEED FOR FORCED RETREAT

A. THE IMPACTS OF SEA LEVEL RISE (“SLR”)

The reality of climate change is now known by the general populace.⁹ However, for the past few decades scientists and activists have been sounding

⁷ U.S. CONST. amend. V.

⁸ *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979).

⁹ Brady Dennis, Steven Mufson & Scott Clement, *Americans increasingly see climate change as a crisis, poll shows*, WASH. POST (Sep. 13, 2019), https://www.washingtonpost.com/climate-environment/americans-increasingly-see-climate-change-as-a-crisis-poll-shows/2019/09/12/74234db0-cd2a-11e9-87fa-8501a456c003_story.html (“The poll finds that a strong majority of Americans — about 8 in 10 — say that human activity is fueling climate change, and roughly half believe action is urgently needed within the next decade if humanity is to avert its worst effects.”); Cary Funk & Meg Hefferon, *U.S. Public Views on Climate and Energy*, PEW RSCH. CTR. (Nov. 25, 2019), <https://www.pewresearch.org/science/2019/11/25/u-s-public-views-on-climate-and-energy/> (“About

the alarm on the increase in greenhouse gas emissions which have resulted in high levels of carbon dioxide concentrations in the atmosphere. This has created global warming, which has wide-ranging and astonishing impacts on the weather, climate and habitats of the planet.¹⁰ No matter the awareness that there may be, the level of greenhouse gas emissions continues to rise, and the impacts of climate change are increasing.¹¹

Global climate change is causing irrefutable changes to the natural systems of our planet.¹² Climate change affects weather patterns, increases the global mean temperature, increases the temperature of the oceans, increases destructive weather catastrophes, and increases desertification, which all alter the living conditions for humans and animals.¹³ It is causing the destruction of habitats that are necessary for many species, but also, in part, destroying the habitat for humans.¹⁴ It is contributing to a scarcity in arable, farmable land for humans,¹⁵ and causing sea level rise (“SLR”) which threatens coastal regions throughout the globe.¹⁶

SLR is specifically the result of melting ice caps and the expansion of water from heat.¹⁷ The ice caps are melting due to higher temperatures in the poles, causing the frozen water to become liquid, increasing the volume of water in the oceans.¹⁸ Additionally, as the global air temperature rises, some of the heat is trapped by the oceans, warming the water and causing it to expand.¹⁹ SLR is slow but persistent, and incredibly impactful. It will degrade and swallow low-lying coastal lands, aided in part by the increased magnitude and frequency of storms.²⁰ The impacts are global and

two-thirds of U.S. adults (67%) say the federal government is doing too little to reduce the effects of climate change...”).

¹⁰ Christina Nunez, *What is global warming, explained*, NAT’L GEOGRAPHIC (Jan. 22, 2019), <https://www.nationalgeographic.com/environment/article/global-warming-overview>.

¹¹ *Global Greenhouse Gas Emissions Data*, ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data> (last visited Sep. 30, 2020).

¹² *Climate Change: How Do We Know*, NAT’L AERONAUTICS AND SPACE ADMIN., <https://climate.naasa.gov/evidence/> (last visited Feb. 21, 2021).

¹³ *What is Climate Change*, U.N., <https://www.un.org/en/climatechange/what-is-climate-change/> (last visited Feb. 21, 2021).

¹⁴ *Effects of Climate Change: Overview*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/threats/effects-of-climate-change> (last visited Feb. 21, 2021).

¹⁵ *Climate Change – 5 Ways It Will Affect You: Crop Changes*, NAT’L GEOGRAPHIC, <https://www.nationalgeographic.com/climate-change/how-to-live-with-it/crops.html> (last visited Feb. 21, 2021).

¹⁶ *Sea Level Rise*, *supra* note 2.

¹⁷ *Sea Level*, *supra* note 1.

¹⁸ *Id.* (“Sea level rise is caused primarily by two factors related to global warming: the added water from melting ice sheets and glaciers and the expansion of seawater as it warms.”).

¹⁹ *Id.* (“Sea level rise is caused primarily by two factors related to global warming: the added water from melting ice sheets and glaciers and the expansion of seawater as it warms.”).

²⁰ *Global Warming and Hurricanes*, GEOPHYSICAL FLUID DYNAMICS LAB’Y, <https://www.gfdl.noaa.gov/global-warming-and-hurricanes/> (last revised Sep. 23, 2020).

devastating: it will affect small island nations, which are already being displaced by inundation by the oceans, and large international cities, which are home to millions of people who are threatened by SLR in the coming decades.²¹

According to some estimates, thousands of square miles and several major cities are at risk of submersion from SLR.²² In total, between 1.3 million to 7.8 million people may be displaced by 2100.²³ In the United States, up to 13 million people could be forced to move from inundated coast areas, and thus critical efforts are needed to help those living in these areas.²⁴ This exodus from low-level coastal regions necessitates solutions for new housing, but displacement will also have secondary effects such as “more competition for jobs, increased housing prices, and more pressure on infrastructure networks.”²⁵

New York City is particularly set to be harmed by SLR. New York City is the United States’ largest city because of its geographic location on the eastern seaboard. It has been built up over centuries on multiple islands. New York City’s prominence as a port city and manufacturing hub has given rise to economic might: it makes up nearly 8 percent of the United States GDP.²⁶ The region’s infrastructure, which enables transportation and thus contributes to the the economy of the city, is closely tied to water and the coast. Thus, SLR and flooding jeopardizes many major highways, subways, and neighborhoods, potentially causing billions of dollars in damage.²⁷

By the numbers, projections show that 400,000 people in the New York City region are at risk from SLR because they live in the 100-year-

²¹ *Rising seas give island nation a stark choice: relocate or elevate*, NAT’L GEOGRAPHIC <https://www.nationalgeographic.com/environment/article/rising-seas-force-marshall-islands-relocate-elevate-artificial-islands> (last visited Feb. 21, 2021); Robert Muggah, *The World’s Coastal Cities are Going Under. Here’s How Some are Fighting Back*, WORLD ECON. FORUM, <https://www.weforum.org/agenda/2019/01/the-world-s-coastal-cities-are-going-under-here-is-how-some-are-fighting-back/> (last visited Feb. 21, 2021).

²² Neumann et al., *Sea-Level Rise & Global Climate Change: A Review of Impacts to U.S. Coasts*, PEW CTR. ON GLOBAL CLIMATE CHANGE 14 (2000) (https://www.c2es.org/wp-content/uploads/2000/02/env_sealevel.pdf).

²³ *Sea Level Rise and Population Impact*, CLIMATE CENTRAL, (July 8, 2013), <https://www.climatecentral.org/gallery/graphics/sea-level-rise-and-population-impact>

²⁴ *Sea level rise could reshape the United States, trigger migration inland: AI shows climate change-driven sea-level rise could trigger mass migration to cities inland*, SCIENCE DAILY (Jan. 22, 2020), www.sciencedaily.com/releases/2020/01/200122150021.htm.

²⁵ *Id.*

²⁶ Laura McCamy, *11 mind-blowing facts about New York’s economy*, MARKETS INSIDER (Apr. 24, 2019), <https://markets.businessinsider.com/news/stocks/11-mind-blowing-facts-about-new-yorks-economy-2019-4-1028134328#:~:text=New%20York%20makes%20up%20just%201%25%20of%20the,area%20but%20produces%208%25%20of%20the%20nation%27s%20GDP.>

²⁷ *Climate Impacts in New York City: Sea Level Rise and Coastal Floods*, *supra* note 3.

floodplain.²⁸ Presently in New York City, “approximately 131,934 properties are already at risk” from flooding, and in another 30 years, “about 175,279 will be at risk.”²⁹ Coastal erosion and flooding may jeopardize over 600 miles of the city’s coastline.³⁰

SLR puts coastal property owners at risk: rich and poor homeowners, and renters, will all be impacted along the city’s vast coastline. The impending crisis of SLR may require rehousing vast numbers of city residents, while there is already scarce affordable housing resources.³¹ Outside of the city, in three counties located on Long Island (Suffolk, Nassau, and Queens), nearly 15,000 homes with a value of \$7.7 billion, housing 40,000 people, are at risk of chronic inundation.³² The displacement of people by SLR is economically difficult, but it will also cause cascading effects: the emotional turmoil of displacement, the loss of commercial property and jobs, and the threat of physical endangerment from flooding.³³

B. RESPONSES TO SLR: MITIGATION, ADAPTATION AND RETREAT

MITIGATION

The most apparent tool to fight climate change is to stop the cause by regulating greenhouse gases – thus mitigating the harms of carbon emissions. Some international entities and treaties exist to help address climate change. The UN Intergovernmental Panel on Climate Change (IPCC) exists to provide scientific reports on greenhouse gas levels in the atmosphere and to make estimates of the impacts of climate change.³⁴ Further, the United Nations Framework Convention on Climate Change has near universal membership by UN member states, and the Kyoto Protocol and Paris Agreement are two treaty-like cooperative documents which setup frameworks for nations to reduce their emissions of greenhouse gases.³⁵ Notably however, the countries which are the largest producers of carbon

²⁸ Garner et al., *Impact of climate change on New York City’s coastal flood hazard: Increasing flood heights from the preindustrial to 2300 CE*, PROCEEDINGS OF THE NAT’L ACADEMY OF SCIENCES (Oct. 13, 2017), <https://www.pnas.org/content/114/45/11861>.

²⁹ *Flood risk overview for New York*, FLOOD FACTOR, https://floodfactor.com/city/new-york-newyork/3651000_fsid (last visited Oct. 11, 2021).

³⁰ *Climate Impacts in New York City: Sea Level Rise and Coastal Floods*, *supra* note 3.

³¹ *Our current affordable housing crisis: Affordable Housing for Every New Yorker*, CITY OF NEW YORK HOUSING, <https://www1.nyc.gov/site/housing/problem/problem.page> (last visited Dec. 21, 2020).

³² *Underwater: Rising Seas, Chronic Floods, and the Implications for US Coastal Real Estate*, UNION OF CONCERNED SCIENTISTS 8 (2018) (<https://www.ucsusa.org/sites/default/files/attach/2018/06/underwater-analysis-full-report.pdf>).

³³ *Id.* at 3-13.

³⁴ *Climate Change*, U.N., <https://www.un.org/en/global-issues/climate-change> (last visited Feb. 21, 2021).

³⁵ *Id.*

dioxide emissions have failed to implement or commit to the necessary reduction in emissions which would stop the increase of atmospheric carbon dioxide which causes climate change.³⁶ Political action on climate change seems difficult to achieve on a global level due to a lack of international consensus and cohesion, and the particular complexities of addressing greenhouse gas emissions because of the economic consequences for reducing emissions.³⁷

In the United States, a political divide on climate change is apparent – in 2019, approximate sixty-seven percent of Democrats and only twenty-one percent of Republicans believed that dealing with climate change should be a top priority for the President and Congress.³⁸ In 2019, when asked “What do you think is the most important problem facing this country today?” only three percent of respondents mentioned climate change or the environment.³⁹ This shows a broader lack of concern or action on climate change in the United States. The necessary consequence of this inaction in the United States and globally is that policies must be put in place to combat the effects of climate change and sea level rise.

ADAPTATION

A range of adaptation exist to combat the effects of SLR that may be used by federal, state and local governments.⁴⁰ These tools combat the effects of SLR by protecting land and people through the construction of physical barriers or by providing economic relief.⁴¹ Historically, the United States has managed floods and SLR by allowing people to remain in at-risk areas and constructing physical barriers to stop the water.⁴² This has included stopping floods with walls and levees, adding sand to prevent beach erosion, and elevating homes to avoid rising tides and storms.⁴³ A notable example is the

³⁶ Chris Mooney & Brady Dennis, *The world has just over a decade to get climate change under control, U.N. scientists say*, WASH. POST (Oct. 7, 2018), <https://www.washingtonpost.com/energy-environment/2018/10/08/world-has-only-years-get-climate-change-under-control-un-scientists-say/>.

³⁷ Amy Harder, *Why climate change is so hard to tackle: The global problem*, AXIOS MEDIA (Aug. 19, 2019), <https://www.axios.com/why-climate-change-is-so-hard-to-tackle-the-global-problem-5035a6ec-2d92-4cf9-9926-f763d4481bb4.html>.

³⁸ Elaine Kamarck, *The challenging politics of climate change*, BROOKINGS INST. (Sep. 23, 2019), <https://www.brookings.edu/research/the-challenging-politics-of-climate-change/>.

³⁹ *Id.*

⁴⁰ A.R. Siders, *Managed Retreat in the United States*, 1 ONE EARTH 216 (Oct. 25, 2019), <https://www.sciencedirect.com/science/article/pii/S2590332219300806#sec1>; Sarah J. Adams-Schoen, *Beyond Localism: Harnessing State Adaptation Lawmaking to Facilitate Local Climate Resilience*, 8 MICH. J. ENVTL. & ADMIN. L. 185 (2018); PLAN EJ 2014: LEGAL TOOLS, *supra* note 5; FLA. DEP’T OF ENV’T PROT., *supra* note 5.

⁴¹ Siders, *supra* note 6, at 22.

⁴² *Id.*

⁴³ *Id.* at 64.

construction of the levees surrounding New Orleans which were built to keep the city protected from the waters of the ocean, the river, and the lake that all surround it.⁴⁴ When Hurricane Katrina hit the city of New Orleans, the levees failed in more than 50 locations, allowing flooding to cause power outages and disable roads throughout the city, making the emergency response to the storm more difficult.⁴⁵

The federal government also runs the National Flood Insurance Plan (NFIP) to provide flood relief to property owners, renters and businesses, but this has also been a failure.⁴⁶ The tax-dollar funded NFIP has been bankrupt for many years because the program is not economically viable - not enough of the at-risk property owners participate to spread the risk, and those who do participate have artificially discounted premiums, so they do not pay the full cost of living in risk-prone areas.⁴⁷

States have acted more specifically to conditions by implementing “rolling easements, building moratoria in the coastal zones, perpetual easements, and other land use-based approaches” to protect people living in these regions and discouraging further occupation.⁴⁸ This more narrow need for targeted SLR control reflects the “regional nature of climate change impacts” which makes state or local government the “most appropriate levels of government” to implement “plans, incentives, standards, and regulations to address climate change mitigation and adaptation.”⁴⁹

New York City has a history of adaptation measures to protect the city from SLR and the impacts of flooding from hurricanes.⁵⁰ Plans have included: (1) retractable gates and barriers on buildings; (2) seawalls, bulkheads and revetments; (3) “Soft edges” around coastlines to help absorb waves; (4) Raising the elevation of land; (5) Dikes, levees and storm-surge barriers; (6) Breakwaters, groins and jetties to reduce impact waves; and (7) Restoring and constructive protective wetlands, beaches, barrier islands and

⁴⁴ U.S. ARMY CORPS OF ENGINEERS, EM 1110-2-1913, U.S. ARMY CORPS OF ENGINEERS, DESIGN AND CONSTRUCTION OF LEVEES - ENGINEER MANUAL (2000); Sarah Pruitt, *How Levee Failures Made Hurricane Katrina a Bigger Disaster*, HISTORY.COM (Aug. 27, 2020) <https://www.history.com/news/hurricane-katrina-levee-failures>.

⁴⁵ Pruitt, *supra* note 44.

⁴⁶ Siders, *supra* note 6, at 9-13; FEDERAL EMERGENCY MANAGEMENT AGENCY (last updated Jan. 8, 2021), <https://www.fema.gov/flood-insurance>.

⁴⁷ Siders, *supra* note 6, at 10.

⁴⁸ Robin Kundis Craig, *Of Sea Level Rise and Superstorms: The Public Health Police Power as a Means of Defending Against “Takings” Challenges to Coastal Regulation*, 22 B.U. J. SCI. & TECH. L. 84 (2014).

⁴⁹ AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON PLANNING & CLIMATE CHANGE (Updated Apr. 11, 2011), https://acwi.gov/climate_wkg/APA_climate_change_policy_guide-final.pdf.

⁵⁰ DEP’T OF CITY PLANNING - CITY OF N.Y., VISION 2020: NEW YORK CITY COMPREHENSIVE WATERFRONT PLAN 106 (March 2011), https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/vision-2020-cwp/vision2020/vision2020_nyc_cwp.pdf.

reefs.⁵¹ The City is also forming much more substantial plans to avoid the harms of SLR and impacts from hurricanes like Hurricane Sandy. The City is choosing between proposals considered by the United States Army Corps of Engineers (USACE) for a project to create barriers to protect the city, with the estimated costs ranging from \$14.8 billion to \$118.8 billion.⁵² Not only are these proposals expensive, but they also pose massive threats to New York City's waterways and riparian habitats.⁵³

RETREAT

However, if adaptation and mitigation are too costly, ineffective, or not implemented in time, then the people living in threatened coastal areas must be moved or displaced – this is called “retreat.” Retreat is extremely detrimental to people's financial and emotional stability, as it means people must abandon their homes, but it may be the only way to protect people from the physical and economic harms of rising sea level. Retreat takes two forms: voluntary retreat moves people away with consent through planning and aid; forced retreat occurs when governments use eminent domain power to acquire property to force people to leave.⁵⁴ Though forced retreat is the option-of-last resort because it displaces individuals who do not want to move, it may be necessary if adaptation and voluntary retreat fail.

1) MANAGED RETREAT

Managed retreat occurs when homeowners move willingly, likely incentivized by a governmental program which enables them to move. In summary, it is the “the planned, purposeful, coordinated movement of people and assets away from risk.”⁵⁵ In the United States, managed retreat occurs mostly through property acquisition programs that are federally funded.⁵⁶ Only a small amount of managed retreat has occurred. The US Federal Emergency Management Agency (FEMA) has implemented managed retreat in over 1,100 counties in nearly every state.⁵⁷ It acquired more than 40,000 properties, but this only a small portion of the estimated 49 million housing units that are at risk in coastal regions.⁵⁸

⁵¹ *Id.* at 110.

⁵² Nathan Kensinger, *Surveying the 'Existential Threat' Posed by New York's Massive Storm Surge Barrier*, CURBED N.Y. (June 13, 2019), <https://ny.curbed.com/2019/6/13/18677063/new-york-usace-barrier-climate-change-photos>.

⁵³ *Id.*

⁵⁴ Siders, *supra* note 6, at 36.

⁵⁵ Siders, *supra* note 40, at 216.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

As retreat is necessary because of SLR, managed retreat offers benefits over unmanaged retreat, when people are forced to move without assistance. Managed retreat provides funding to people who want to leave but cannot afford to do so and can help convert at risk coastal areas into beneficial use such as public parks or restoring wetlands.⁵⁹ For example, after Hurricane Sandy in 2012, New York State and New York City worked to buy out about 800 homes that were “deemed unsuitable for future development due to flood risk” using a combination of city, state and federal funds.⁶⁰ In addition, the City’s “Buy It Back” program helped homeowners rebuild and to fund resiliency projects in impacted neighborhoods.⁶¹ However, these efforts have been criticized for being “piecemeal,” rather than comprehensive, and the lack of funding for buyout programs is problematic.

This process however, is believed to be unlikely to be able to scale to meet the necessities of addressing climate change in the future.⁶² For many reasons, managed retreat will be difficult to implement in the United States.⁶³ There are psychological, institutional, practical and other barriers to managed retreat.⁶⁴ Psychologically, many people who live in at-risk areas do not want to retreat and will avoid retreat because they do not want to give up their homes. Institutionally, those local governments who control at risk areas, who can shape land use and zoning, rely on the property taxes from properties in these areas, so they resist retreat.⁶⁵ Practically, managed retreat remains difficult to apply because of logistics and equities, and there is a lack of utilization of past experience, in part because of a lack of data and comprehensive evaluations of prior managed retreat plans.⁶⁶ In addition, property rights are provided strong constitutional protections, the federally subsidized flood insurance program is bankrupt, and the dense economies and development in coastal cities have prevented discussion and implementation of managed retreat.⁶⁷ Given these limitations, managed retreat may not be effective in moving people away from at-risk coastal regions.

⁵⁹ *Id.* at 218.

⁶⁰ Ilana Cohen, *In New York City, ‘Managed Retreat’ Has Become a Grim Reality*, INSIDE CLIMATE NEWS (July 4, 2020), <https://insideclimatenews.org/news/04072020/new-york-city-managed-retreat-sea-level-rise/>.

⁶¹ *Id.*

⁶² Siders, *supra* note 40, at 216.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 218.

⁶⁶ *Id.* at 220-21.

⁶⁷ *Id.* at 216.

2) FORCED RETREAT

If managed retreat is unsuccessful at getting people to move voluntarily, then the government can use forced retreat. This may occur because residents have chosen not to move or cannot move due to financial constraints. Forced retreat (or “enforced retreat”) occurs when homeowners are ordered to move by the government, likely because the risks of occupying the property have become too severe.⁶⁸ Forced retreat is enabled through the government’s powers of eminent domain, its police powers, or under the public trust doctrine.⁶⁹ Forced retreat is not often used because it is so severe - political and financial constraints have often restricted its use in the past.⁷⁰ Even so, the limitations and reluctance to optional retreat may make forced retreat an inevitable last resort, especially since “[f]ailing to retreat in certain areas could increase the risks of loss of life from climate disaster.”⁷¹

Coastal cities are increasingly likely to rely on managed retreat, and even forced retreat, as the problems of SLR and other natural disasters threaten more people living in at-risk areas.⁷² In March of 2020, the Trump administration, to aid the Army Corps of Engineers in disaster prevention, urged local and state governments to force residents to move or else forfeit federal funds for flood zone displacement.⁷³ For example, in New Jersey, the state is grappling with the issue of underwhelming elective buyouts for flood-prone properties that the state is attempting to buy from private homeowners (a form of “managed retreat”) and whether to use eminent domain to force retreat as new homes continue to be built in areas that are expected to flood once a year by 2050.⁷⁴

Similarly, city and county governments are likely to face a reckoning whereby forced retreat is necessary and these governments, acting under New York State’s eminent domain power, must take private coastal property.⁷⁵ In light of the high economic and environmental costs of adaptation plans,⁷⁶ the City may choose to supplement mitigation with a voluntary retreat plan, but

⁶⁸ *Id.* at 221.

⁶⁹ *Id.*

⁷⁰ *Id.* at 221.

⁷¹ Cohen, *supra* note 60.

⁷² Siders, *supra* note 40, at 219.

⁷³ Christopher Flavelle, *Trump Administration Presses Cities to Evict Homeowners From Flood Zones*, N.Y. TIMES (March 12, 2020), <https://www.nytimes.com/2020/03/11/climate/government-land- eviction-floods.html>.

⁷⁴ Jon Hurdle, *Should NJ Use Eminent Domain to Take Coastal Properties Threatened by Sea-Level Rise?*, NJ SPOTLIGHT NEWS (March 16, 2020), <https://www.njspotlight.com/2020/03/should-nj-use- eminent-domain-to-take-coastal-properties-threatened-by-sea-level-rise/>.

⁷⁵ Matthew Gibson, Jamie T. Mullins & Alison Hill, *Climate risk and beliefs: Evidence from New York Floodplains* (Williams College Dep’t of Econ., Working Paper, Feb. 2019).

⁷⁶ Estimated costs ranging from \$14.8 billion to \$118.8 billion. Kensinger, *supra* note 52.

if that plan is ineffective at getting people to move, then the City and county governments may need to consider forced retreat to force people to move. Note however, that retreat in dense cities like New York City is considered “expensive to implement” and would “displace residents and neighborhood institutions.”⁷⁷

III. THE PROBLEMS WITH FORCED RETREAT

Both state and federal governments have the inherent power to take private property without consent.⁷⁸ This power is assumed in the Fifth Amendment, by stating: “nor shall private property be taken for public use, without just compensation.”⁷⁹ It authorizes eminent domain power under the “public use” and “just compensation” requirements. This means that acquisition of private property must be for the “public use,” and that the government must provide the original owner of the property with “just compensation.” States also have inherent eminent domain power they may authorize the use of to state agencies, and to county or local governments and agencies.⁸⁰

The New York State Constitution parallels the U.S. Constitution by requiring public use and just compensation in eminent domain cases.⁸¹ Additionally, the New York Eminent Domain Procedure Law, which grants municipalities eminent domain power, also creates appropriate judicial mechanisms for public hearings and challenges to the state’s use of its eminent domain power.⁸²

A. FORCED RETREAT MAY NOT BE “PUBLIC USE”

Under the public use requirement, the legislature or governmental body wielding eminent domain power must prove some broad public benefit from taking private property.⁸³ Federal and state courts limit this power through

⁷⁷ DEP’T OF CITY PLANNING, *supra* note 50, at 109.

⁷⁸ *Clark v. Nash*, 198 U.S. 361 (1905); U.S. Const. amend. V.

⁷⁹ U.S. Const. amend. V.

⁸⁰ NICHOLS ON EMINENT DOMAIN, § 3.03: *The United States Congress and Individual State Legislatures May Authorize Others to Use Eminent Domain Power* (David Schultz et. al eds., 3rd ed. 2021).

⁸¹ U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”); N.Y. CONST. art. I, § 7 (“Private property shall not be taken for public use without just compensation”); *Kohlasch v New York State Thruway Authority*, 482 F. Supp. 721, 1980 U.S. Dist. LEXIS 9809 (S.D.N.Y. 1980).

⁸² N.Y. EM. DOM. PROC. §§ 101-514. (Consol., Lexis Advance through 2020 released Chapters 1-56, 58-169); *FAQs About the NYS Eminent Domain Procedure Law*, N.Y. ATTORNEY GEN. REAL PROP. BUREAU RES. CTR., <https://ag.ny.gov/real-property/faqs-about-nys-eminent-domain-procedure-law> (last visited: Sep 30, 2020).

⁸³ *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

judicial review under an arbitrary and unreasonable standard.⁸⁴ This standard which gives deference to the body using the eminent domain power but ensures that governmental must have a rational reason to believe the acquisition is for the public good.⁸⁵

i. FEDERAL CONSTITUTIONAL PUBLIC USE REQUIREMENT

The limitation on “public use” has changed over time, expanding past the traditional notions of “public use” that established public parks and buildings.⁸⁶ The Supreme Court’s current standard appears to be rather broad in defining what constitutes a “public use.” In *Kelo v. City of New London*, the Court articulated a broad economic view on “public use” such that any acquisition which furthers economic development, even when the property is granted to a private entity, is permissible.⁸⁷ This broad view of “public use” has been highly criticized and created a backlash in many states, which then enacted more stringent “public use” requirement in order to appease those who feared government overreach in taking properties from private individuals under this expansive economic public use reasoning.⁸⁸

ii. NEW YORK STATE PUBLIC USE REQUIREMENT IS THE SAME AS FEDERAL

The New York courts, interpreting the state constitution, have determined that the state eminent domain power is limited in the same fashion as the federal eminent domain power.⁸⁹ New York does not seem to have set further “public use” requirements than those set by the Supreme Court’s interpretation of “public use” in *Kelo*.⁹⁰

In New York, the eminent domain power may be used to create public projects, the “classical uses” of eminent domain.⁹¹ These are development actions by cities, municipalities, and other condemnation planning agencies to create streets and highways, expand railroads, construction or expansion

⁸⁴ *Purposes For Which Takings May Be Made*, USLEGAL, <https://eminentdomain.uslegal.com/purposes-for-which-takings-may-be-made/#:~:text=Purpose%20For%20Which%20Takings%20May%20Be%20Made%20Every,governme nt%20have%20the%20inherent%20power%20of%20eminent%20domain> (last visited Sep. 30, 2020).

⁸⁵ *Id.*

⁸⁶ Nasim Farjad, Note, *Condemnation Friendly or Land Use Wise? A Broad Interpretation of the Public Use Requirement Works Well for New York City*, 76 *FORDHAM L. REV.* 1121, 1127 (2007).

⁸⁷ *Kelo*, 545 U.S. at 484.

⁸⁸ Ilya Somin, *The political and judicial reaction to Kelo*, *THE WASHINGTON POST* (June 4, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/>.

⁸⁹ *Matter of Nat’l Fuel Gas Supply Corp. v. Schueckler*, 35 N.Y.3d 297, 327-28 (2020).

⁹⁰ *Id.*

⁹¹ Farjad, *supra* note 86, at 1127.

of parkland.⁹² Additionally, the “public use” requirement has been interpreted broadly by the state courts so as “to encompass any use that which contributes to the health, safety, general welfare, convenience or prosperity of the community.”⁹³

Eminent domain power expanded over the years as New York courts have upheld condemnation of areas that are deemed blighted in the broad sense of the word - areas that are “economically stagnant” by not producing the greatest economic benefits they could.⁹⁴ Eminent domain power continues to be used to reinforce both public and private development in New York City and to remove what is considered “blight” even when that definition is expansive enough to include neighborhoods still full of residents.⁹⁵ Thus, condemnation due to blight has been used as a tool to revitalize neighborhoods, even when the area does not display slum conditions.⁹⁶ In fact, New York stands out as having some of the most “condemnation friendly” courts and a legislature which refuses to limit the broad interpretation of “public use.”⁹⁷ Under New York Laws there are some procedural components that must be complied with, but New York courts have generally allowed nearly any use of eminent domain that would yield economic benefits.⁹⁸

New York has controversially accepted that economic development by a private entity constitutes “public use,” following the Supreme Court’s decision in *Kelo*.⁹⁹ In the widespread aftermath of *Kelo*, when many states changed their eminent domain laws to curtail the power away from private economic development, the New York legislature failed to enact any of the bills would have limited eminent domain power.¹⁰⁰ Thus, New York does not restrict the public use requirement farther than the Supreme Court’s articulated standard on public economic development.¹⁰¹

However, New York City’s use of eminent domain power has been controversial. Infamously, Robert Moses was a New York City planner who helped construct many of New York City’s bridges, parks and highways by wielding incredible influence over the mayor and consolidating a number of

⁹² *Id.* at 1125-1126.

⁹³ *Byrne ex rel. Pine Grove Beach Ass’n v. N.Y. State Office of Parks, Recreation & Historic Pres.*, 476 N.Y.S.2d 42, 42 (App. Div. 1984).

⁹⁴ Farjad, *supra* note 86, at 1127-1128, 1152.

⁹⁵ *Id.* at 1125-1126.

⁹⁶ *Id.* at 1127.

⁹⁷ *Id.* at 1122.

⁹⁸ *Id.* at 1125-26.

⁹⁹ *Id.* at 1122; See *supra* PART II-E.

¹⁰⁰ *Somin, supra* note 88; Farjad, *supra* note 86, at 1127-1128, 1143, 1152.

¹⁰¹ Farjad, *supra* note 86, at 1125-1126.

city agencies.¹⁰² He helped create highways and parks at the detriment of communities who lived on the land Moses wanted to use.¹⁰³ In this context, the City's eminent domain power enabled Moses to connect and expand New York City in monumental ways,¹⁰⁴ but the use of this power became disfavored by communities, particular poor communities of color, who were disenfranchised and moved out of their homes by Moses.¹⁰⁵ Thus, eminent domain has been seen negatively as governmental overreach favoring moneyed interests and crushing communities in order to spur economic growth.¹⁰⁶ But, this type of eminent domain usage led to what can also be seen as much "public good" in the form of public parks and net positive financial impacts.¹⁰⁷

B. FORCED RETREAT IS TOO EXPENSIVE UNDER "JUST COMPENSATION"

i. FEDERAL CONSTITUTIONAL JUST COMPENSATION

(a) THE PRINCIPLES OF TRADITIONAL FAIR MARKET VALUE

Beginning in 1893, the Supreme Court has interpreted "just compensation" under the federal constitution to mean "compensation must be a full and perfect equivalent for the property taken."¹⁰⁸ In 1934, the Supreme Court clarified that equivalent compensation was the fair market value of the property condemned at the time of the government's taking of the property.¹⁰⁹ Fair market value, however, is "nothing but a hypothetical concept" that must be found by a court when determining compensation.¹¹⁰

This means that there are varying mechanisms to determine fair market value,¹¹¹ but the most common and most endorsed by the Court is the amount a willing buyer would pay in cash to a seller at the time of the taking.¹¹² Some scholars have argued that the Supreme Court has declared that it "has never

¹⁰² Paul Goldberger, *Eminent Domain – Rethinking the legacy of Robert Moses*, THE NEW YORKER (Jan. 28, 2007), <https://www.newyorker.com/magazine/2007/02/05/eminent-dominion>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Farjad, *supra* note 86, at 1152, 1156.

¹⁰⁷ *Id.* at 1158, 1170.

¹⁰⁸ *Mononghela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

¹⁰⁹ *Olson v. United States* 292 U.S. 246, 253 (1934).

¹¹⁰ *United States ex rel. Tenn. Valley Auth. v. Powelson* 138 F.2d 343, 345 (1943).

¹¹¹ *United States v. Miller*, 317 U.S. 369, 374 (1943). *See also* *United States v. New River Collieries Co.*, 262 U.S. 341 (1923); *Olson*, 292 U.S. at 264; *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *564.54 Acres of Land*, 441 U.S. 506.

¹¹² *Miller*, 317 U.S. at 374; *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 275 (1943).

deviated from its conclusion that compensation is just so long as it reflects the fair market value of the property on the date the property is taken.”¹¹³ The Court has suggested that whenever market value is ascertainable that this must be the measure for just compensation, rather than the cost of a substitute.¹¹⁴

However, ascertaining fair market value, or when it is unascertainable, determining just compensation, is to be guided by certain principles inherent in “just compensation.” First, the purpose is to provide full indemnification to the owner, giving them “the full monetary equivalent of the property taken,”¹¹⁵ and restoring them to the “same position monetarily” as they were before the taking.¹¹⁶ This idea incorporates principles of justice, ensuring protection to private owners from governmental abuse.¹¹⁷ Second, the Court has stated that valuation methods should be motivated by “basic equitable principles of fairness” alongside the “technical concepts of property law.”¹¹⁸ The concepts of justice and fairness were emphasized by the Court in *Armstrong v. United States*,¹¹⁹ *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*¹²⁰ and Justice O’Connor’s concurring opinion in *Palazzolo v. Rhode Island*.¹²¹ Justice O’Connor states that fairness and justice necessitates that courts avoid a pre-determined formula in determining when “economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”¹²²

(b) *ALTERNATIVES TO TRADITIONAL FAIR MARKET VALUE*

Under these principles, the Supreme Court has rarely deviated from its buyer-based fair market value, but for when this fair market value standard “would result in manifest injustice to owner or public.”¹²³ When that occurs, courts have fashioned and applied other standards. For instance, in times of war, fair market value is an unfair measure of just compensation due to disruptions in the market conditions.¹²⁴ Thus, when the government acquired

¹¹³ Rachel D. Godsil and David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 *FORDHAM L. REV.* 949, 976 (citing *Kirby Forest Indus. v. United States*, 467 U.S. 1, 10 (1984)).

¹¹⁴ *564.54 Acres of Land*, 441 U.S. at 506; *United States v. 50 Acres of Land*, 469 U.S. 24, 26 (1984)).

¹¹⁵ *United States v. Reynolds*, 397 U.S. 14, 16 (1970).

¹¹⁶ *Id.*

¹¹⁷ *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 229, 304-306.

¹¹⁸ *United States v. Fuller*, 409 U.S. 488, 490 (1973).

¹¹⁹ *Armstrong v. United States*, 364 U.S. 40, 80-82 (1960).

¹²⁰ *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

¹²¹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (Justice O’Connor’s concurring opinion).

¹²² *Id.*

¹²³ *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

¹²⁴ *United States v. John J. Felin & Co.*, 334 U.S. 624 (1948); *Commodities*, 339 U.S. at 124.

commodities from owners, it was required to pay to them just the ceiling price for the commodities, despite the replacement cost and retention value of the commodities exceeding the ceiling price.¹²⁵

This showed that when necessary, the government could impose a market value by creating price ceilings which skew the market, to set how much it would compensate owners.¹²⁶ Similarly, the government was not required to pay the market value of a tugboat when the value had been enhanced due to the government's urgent needs during wartime,¹²⁷ or for the increased value of properties that were slated for use in a government railroad relocation project.¹²⁸ In dire circumstances, compensation lower than fair market value has been allowed by the Court in order to avoid "manifest injustice" to the government.¹²⁹

In applying fairness and justice, federal courts have also used discretion to determine how to measure fair market value, with the Federal Circuit emphasizing that it is "unwilling to restrict the trial courts to any single basis for determining fair market value".¹³⁰ Federal trial courts have been given "considerable discretion to select the method of valuation that is most appropriate in the light of the facts of the particular case."¹³¹ These valuation methods have included "comparable sales, reproduction costs, capitalization of net income or an interaction of these determinants."¹³² The court has the power to determine which of the facts presented about the value of the property and the market conditions which affect price.¹³³ In same fashion, state courts, as in New York and Connecticut, have also utilized discretion when choosing a valuation method because circumstances surrounding property and the underlying market may vary.¹³⁴ This has given rise to what one scholar says are at least nine different interpretations or measures of value.¹³⁵

¹²⁵ *Felin & Co.*, 334 U.S. at 641; *Commodities*, 339 U.S. at 126.

¹²⁶ *Felin & Co.*, 334 U.S. at 641; *Commodities*, 339 U.S. at 126.

¹²⁷ *United States v. Cors*, 337 U.S. 325 (1949)

¹²⁸ *Miller*, 317 U.S. at 374 (owner not entitled to compensation for enhanced value where value of property has increased solely due to the Government's commitment to condemn).

¹²⁹ *Commodities*, 339 U.S. at 123.

¹³⁰ *Seravalli v. United States*, 845 F.2d 1571, 1575 (Fed. Cir. 1988); *Barrett Refining Corp. v. United States*, 242 F.3d 1055, 1061 (Fed. Cir. 2001); *Cane Tenn., Inc. v. U.S.*, 71 Fed. Cl. 432, 439-440 (Fed. Cl. 2005).

¹³¹ *Seravalli*, 845 F.2d at 1575.

¹³² *United States v. 179.26 Acres of Land*, 644 F.2d 367, 372 (10th Cir. 1981).

¹³³ *Seravalli*, 845 F.2d at 1575.

¹³⁴ *Port Auth. Trans-Hudson Corp. v. Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457, 468 (1967) (the New York Court of Appeals states that it does not adhere to any rigid rule for just compensation); *City of Bristol v. Tilcon Materials, Inc.*, 284 Conn. 55 (2007).

¹³⁵ Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, *Nw. U.L. REV.* 677, 685-86 (2005) ("Courts all agree that takings are to be compensated by the fair market

Additionally, in some cases, the value put forth by each party differs greatly because “fair market value” can reflect differing values and a number of different valuation mechanisms.¹³⁶ The purpose of the “just compensation” requirement is to uphold the notion of private property rights against government overreach, thus setting a limit on eminent domain power by ensuring that governments internalize the costs and burdens of taking private property from individuals.¹³⁷

(c) *CONDEMNATION BLIGHT VALUE RULE*

One of the issues surrounding fair market value that courts have used their discretion to address is the problem of “condemnation blight.” This occurs when the government’s intent to acquire private property, also known as “condemnation,” lowers the property’s value prior to the time of taking.¹³⁸ By setting a definite time for acquisition, the property’s use and value on the market suffers, because buyers are now aware that the land will be taken by the government.¹³⁹ This effect can extend not just to the individual property that will be taken, but to surrounding properties, which may be used to determine fair market value.¹⁴⁰ This poses an issue because it unjustly allows the government to manipulate the market value of property by delaying eminent domain acquisition after revealing a condemnation action.¹⁴¹

The Supreme Court’s “condemnation blight” value rule says that compensation should be based on what the prior value of the property was before a decrease in value caused by the announcement of an eminent domain acquisition since the government action has decreased the value of the property taken.¹⁴² This means that valuation should not consider the “prospect of governmental appropriation” and the value of the property “must be neither enhanced nor diminished by the special need which the Government had for it.”¹⁴³ Thus, the Supreme Court has articulated that in the event of “condemnation blight,” fair market value is set at the value of the property prior to any announcement of condemnation, excluding the

value of the property taken. But a closer look at cases addressing how to measure fair market value reveals deep confusion and contradictory approaches.”).

¹³⁶ *Bassett v. United States*, 55 Fed. Cl. 63, 77-78 (2002) (comparing plaintiffs’ appraisal of property at 92,806,000 with defendant’s appraisal at \$34,600).

¹³⁷ Serkin, *supra* note 135 at 686, 704.

¹³⁸ Serkin, *supra* note 135 at 696 (the fifth valuation mechanism is “timing of the valuation”).

¹³⁹ See generally 8A Nichols on Eminent Domain § G18 (Matthew Bender, 3d ed. 2020) (providing an overview on the topic of condemnation blight); Serkin, *supra* note 135 at 696.

¹⁴⁰ See Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 775 (1973) (criticizing comparative sales method because of condemnation’s effect on nearby properties).

¹⁴¹ 8A Nichols on Eminent Domain § G18.02.

¹⁴² *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 635 (1961).

¹⁴³ *Va. Elec. & Power Co.*, 365 U.S. at 636 (citing *Cors*, 337 U.S. at 332-334; *Miller*, 317 U.S. at 374; *Olson*, 292 U.S. at 261; *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 76).

“depreciation in value caused by the prospective taking.”¹⁴⁴ The Court notes that fairness and justice should not allow the government to take advantage of the lowered value of property caused by threatening acquisition of the property.¹⁴⁵

In applying the Supreme Court’s broad guidance on the “condemnation blight” value rule, federal and state courts have often held that the effects of announcements of future acquisition of property on the value of those properties will not be considered as part of the “just compensation” fair market value.¹⁴⁶ However, there have been three ways in which courts have addressed the issue “condemnation blight” valuation: (1) No compensation for loss of value; (2) Compensation only from the loss of value due to the condemnation action; (3) Compensation including loss of value from other external sources than the condemnation action.¹⁴⁷ Additionally, it can be argued that the “condemnation blight” compensation rule that prohibits decreased values should not be absolute but applied equitably where the “rationale lose[s] force.”¹⁴⁸

(ii) NEW YORK STATE JUST COMPENSATION

In New York the “just compensation” requirement follows the federal standard of “fair market value” at the time of the Taking.¹⁴⁹ Additionally, the New York Court of Appeals appears to follow the second view of “condemnation blight” valuation articulated above, that compensation is only allowed for the loss of value due to the condemnation action.¹⁵⁰ Thus, in New

¹⁴⁴ *Va. Elec. & Power Co.*, 365 U.S. at 636.

¹⁴⁵ *Va. Elec. & Power Co.*, 365 U.S. at 636 (citing LEWIS ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN 447 (2d ed. 1953); Cong. Sch. of Aeronautics v. State Roads Comm’n, 146 A.2d 558, 565 (Md. 1958)).

¹⁴⁶ *United States v. 9.345 Acres of Land*, No. 11–00803-JWD-EWD, 2018 U.S. Dist. LEXIS 68664, at *13–14, *27 (M.D. La. Apr. 24, 2018); *United States v. 10.082 Acres*, No. CV05–00363-PHX-NVW, 2007 U.S. Dist. LEXIS 22604, at *33–34 (D. Ariz. Mar. 27, 2007); *Lipinski v. Lynn Redevel. Auth.*, 246 N.E.2d 429, 432 (Mass. 1969); *Mich. DOT v. Haggerty Corridor Partners Ltd. P’ship*, 700 N.W.2d 380, 384–85 (Mich. 2005); *Twp. of W. Windsor v. Nierenberg*, 695 A.2d 1344, 1345–46, 1354 (1997).

¹⁴⁷ Serkin, *supra* note 135 at 696 (citations omitted).

¹⁴⁸ Timothy Lyons, *Inverting the Scope-of-the-Project Rule: Determining When Government Pre-Condemnation Announcements Should Change the Default Rule for Just Compensation*, THE PROCEEDINGS OF THE NYU MOOT COURT BOARD (Oct. 20, 2020), <https://proceedings.nyumootcourt.org/2020/10/inverting-the-scope-of-the-project-rule-determining-when-government-pre-condemnation-announcements-should-change-the-default-rule-for-just-compensation/> (citing *Reynolds*, 397 U.S. at 21 (“As with any test that deals in probabilities, [the scope-of-the-project rule’s] application to any particular set of facts requires discriminating judgment.”)).

¹⁴⁹ *In re Bd. of Water Supply*, 14 N.E.2d 789, 791 (N.Y. 1938); *City of N.Y. v. Mobil Oil Corp.*, 783 N.Y.S.2d 75, 78 (App. Div. 2d Dep’t 2004).

¹⁵⁰ *City of Buffalo v. J.W. Clement Co.*, 321 N.Y.S.2d 345, 359–60 (1971) (“In such cases where true condemnation blight is present, the claimant may introduce evidence of value prior to the onslaught of the ‘affirmative value-depressing acts’ of the authority and compensation shall be based on the value of the

York, when the government reveals a plan for condemnation it is not a de facto Taking, but will trigger “condemnation blight” wherein compensation is granted for the resulting loss of market value which is due to the “threat of condemnation.” In other words, compensation shall be based on the value of the property at the time of the taking, as if it had not been adversely affected by the threat of condemnation.¹⁵¹

(iii) THIS MAKES FORCED RETREAT DIFFICULT DUE TO THE
VALUE OF COASTAL PROPERTIES PRIOR TO FLOODING

As described in Part II(D), governments may need to rely on forced retreat to displace people from their homes if coastal areas that may be flooded from SLR are still occupied.¹⁵² If the city puts in place a forced retreat plan it will rely on its eminent domain power to acquire of the property that is endangered, and this will be a Taking triggering the “public use” and “just compensation” requirement. The “just compensation” requirement would require the government to provide compensation based on the buyer-based market value.¹⁵³ Governments are unlikely to choose to use its eminent domain power in this situation due to the high cost of fair market value of coastal properties in the city prior to inundation. For example, at present, the “fair market value” of the 15,000 homes in Suffolk, Nassau, and Queens that are considered at risk of chronic inundation due to SLR is presently \$7.7 billion.¹⁵⁴

At present or future fair market value, the state or local governments where these homes are likely unable to pay to displace these people. However, some loss in the market value of these coastal properties has already occurred, and this loss in value is expected to increase in the future as they become increasingly threatened by inundation.¹⁵⁵ New York City has

property as it would have been at the time of the de jure taking, but for the debilitating threat of condemnation. This, in turn, requires only that there be present some proof of affirmative acts causing a decrease in value and difficulty in arriving at a value using traditional methods.”).

¹⁵¹ *City of Buffalo*, 321 N.Y.S.2d at 360 (“Thus, when damages are assessed on the claim for the *de jure* appropriation, the claimant’s property should be evaluated not on its diminished worth caused by the condemnor’s action, but on its value except for such “affirmative value-depressing acts” of the appropriating sovereign.”).

¹⁵² See *supra* Part II-D.

¹⁵³ *Commodities*, 339 U.S. at 123.

¹⁵⁴ Patrick Sisson, *Coming crisis of coastal flooding: \$1 trillion of real estate at risk by 2100*, CURBED (Jun 18, 2018), <https://archive.curbed.com/2018/6/18/17474076/real-estate-climate-change-coastal-flooding-sea-level>.

¹⁵⁵ Francesca Ortega & Suleyman Taspinar, *Why housing values in New York’s flood zones have stayed down after Hurricane Sandy*, PBS NEWS HOUR (May 11, 2018), <https://www.pbs.org/newshour/economy/making-sense/why-housing-values-in-new-yorks-flood-zones-have-stayed-down-after-hurricane-sandy>; Asaf Bernstein, Matthew Gustafson, & Ryan Lewis, *Disaster on the Horizon: The Price Effect of Sea Level Rise*, 134 J. FIN. ECON. 253 (2019) (“Homes exposed to sea level rise (SLR) sell for approximately 7% less than observably equivalent unexposed properties equidistant from the beach”).

seen a decline in flood-prone home values of 8% as a result of Hurricane Sandy that lasted at least 5 years, as of 2018.¹⁵⁶ But, the value of these properties may not drop fast enough to enable governments to acquire them via eminent domain prior to the properties becoming at-risk of flooding. In fact, in some instances, there has been a notable return in market value after a value loss caused by flooding from hurricanes.¹⁵⁷ In such a predicament, forced retreat is no longer viable and the economic and physical well-being of occupants could be jeopardized.

IV. PROPOSAL – MAKING FORCED RETREAT LAWFUL AND VIABLE: TWO CHANGES TO NEW YORK’S EMINENT DOMAIN POWER

A. FORCED RETREAT SATISFIES THE FEDERAL AND STATE “PUBLIC USE” PRONG

Given that New York sets no additional limits on the federal standards of “public use” and “just compensation,”¹⁵⁸ forced retreat can be viable and lawful by comports with the Supreme Court’s ruling on these two prongs. First, forced retreat comports with the “public use” prong by creating public parks and habitat, aiding economic development, and aiding public health. Second, forced retreat which provides less than traditional fair market value can comport with “just compensation.” Guided by equity and the principles of fairness and justice inherent in the “just compensation,”¹⁵⁹ I argue that lowered valuation when eminent domain power is used to take property in the event of inevitable sea level rise can be constitutional. In similar fashion to the Supreme Court rejecting traditional fair market value in the event of war,¹⁶⁰ in the event of natural disaster on this scale, lowered valuation remains equitable since the government does not have to act to protect these properties. Any choice by the government to aid at-risk property owners by providing preemptive funds prior to inundation would be protectionary by the government and spreading out the harm from SLR to the public, rather than just imposing the harm to these coastal property owners.

Overcoming the “public use” limitation to eminent domain is likely not an issue in this instance. As explained previously, the “public use” prong of the eminent domain power requires that it be used in a “manner advantageous

¹⁵⁶ Ortega & Taspinar, *supra* note 155.

¹⁵⁷ Okmung Bin & Craig E. Landry, *Changes in implicit flood risk premiums: Empirical evidence from the housing market*, 65 J. ENTL. ECON. MGMT. 361 (2013).

¹⁵⁸ *Water Supply*, 14 N.E.2d at 791; *Mobil Oil Corp.*, 783 N.Y.S.2d at 78.

¹⁵⁹ *Fuller*, 409 U.S. at 490; *Armstrong*, 364 U.S. at 80-82; *Tahoe-Sierra*, 535 U.S. at 302; *Palazzolo*, 533 U.S. at 633.

¹⁶⁰ *Commodities*, 339 U.S. at 123, 125.

to a general community”¹⁶¹ and not a class of individuals.¹⁶² This includes public benefits derived from economic development by projects done by the government and private developers,¹⁶³ and public benefits derived from the protection of public health by ensuring safe and habitable housing developments.¹⁶⁴ The limitation created by the “public use” requirement is to ensure that public benefits are not incidental, so that the main purpose cannot be personal advantage.¹⁶⁵ In such instances, where personal advantage is the purpose, and the public benefit is minimal, the Taking has an unconstitutional private purpose.¹⁶⁶ Forced retreat comports with the Supreme Court’s notions of “public use” by creating a public good (public parks and habitat), by aiding public economic development, and by promoting public health.

i. FORCED RETREAT CREATING PUBLIC PARKS AND HABITAT

Public purpose means any purpose that creates a public good, such as a public park or building, or serves a governmental or community need, including a private development plan which will help economic development generally.¹⁶⁷ Here, the taken lands could be converted into coastal parks or used to preserve wetlands in coastal regions. Thus, this would constitute a “public use” for such lands that could be used for these purposes.

ii. FORCED RETREAT AIDS PUBLIC ECONOMIC DEVELOPMENT

Additionally, the promotion of economic development is a traditional and long accepted governmental function, even though “pursuit of a public purpose will often benefit individual private parties.”¹⁶⁸ Here, stopping the economic drain from the necessary upkeep of development in flooding coastal regions should fall under the public economic development rationale of “public use” in *Kelo*.¹⁶⁹ In *Kelo*, even though the property was acquired by the government and given to another private developer, the majority held that the resulting development would provide economic benefits to the public under a specific development plan, noting that “the government’s pursuit of a public purpose will often benefit individual private parties.”¹⁷⁰ Since the private development was to occur “pursuant to a carefully considered development plan” which did not solely aid a “particular class of identifiable

¹⁶¹ *Purposes For Which Takings May Be Made*, *supra* note 84.

¹⁶² *Kelo*, 545 U.S. at 472, 478.

¹⁶³ *Kelo*, 545 U.S. at 485-86.

¹⁶⁴ *Berman v. Parker*, 348 U.S. 26, 28 (1954).

¹⁶⁵ *See Purposes For Which Takings May Be Made*, *supra* note 84.

¹⁶⁶ *Purposes For Which Takings May Be Made*, *supra* note 84.

¹⁶⁷ *Kelo*, 545 U.S. at 472, 493.

¹⁶⁸ *Id.* at 485.

¹⁶⁹ *See Kelo*, 545 U.S. 469.

¹⁷⁰ *Kelo*, 545 U.S. at 485.

individuals,” it was considered a public benefit constituting a “public use.”¹⁷¹ Furthermore, the Court clarified that “public use” need not mean that the property should be able to be used, occupied or accessible to the public.¹⁷²

The use of eminent domain to aid public economic development is also supported by New York’s history of using eminent domain power for public development and to eradicate “blight.”¹⁷³ In 2009 and 2010, the Court of Appeals examined “public use” and stated that blight condemnation was a public use in any area where there is “economic underdevelopment” or “stagnation.”¹⁷⁴ More specifically, blight condemnation is allowable only when there are “substandard and insanitary areas.”¹⁷⁵ These cases have been criticized as being too expansive, since “almost any property can be described as underdeveloped relative to some other potential use of the land,” but the decision was “roughly in line with many other states that define blight expansively.”¹⁷⁶

This expansive notion of blight can be applied to threatened coastal areas which become stagnant due to a lack of investment in them due to impending SLR, or to coastal properties that are beginning to flood, causing “substandard and insanitary areas.” Although in this instance the land is being taken to avoid development, it has a similar goal of reducing public economic harm which would occur from the continued economic investment in vulnerable properties that are at risk. The government could also preemptively demolish any structures on these lands before they are inundated with water and become debris in the ocean that would need to be cleaned up. This would allow the condemnation of these properties to be a public use.

iii. FORCED RETREAT AIDS THE PUBLIC HEALTH

Additionally, displacing homeowners who continue to occupy vulnerable property and providing compensation to them, along with condemning these properties and stopping future occupation aids individual health and safety, thus making it a public health benefit. “Public use” does not have to be for the benefit of a large number of people and the use can be for a community of people or residents within a designated area.¹⁷⁷ It has

¹⁷¹ *Kelo*, 545 U.S. at 478, 485.

¹⁷² *Kelo*, 545 U.S. at 479-81 (citing *Hous. Auth. v. Midkiff*, 467 U.S. 229, 232 (1984)).

¹⁷³ Farjad, *supra* note 86, at 1125-1126.

¹⁷⁴ *Kaur v. New York State Urb. Dev. Corp.*, 933 N.E.2d 721, 724-25 (N.Y. 2010); *Goldstein v. New York State Urb. Dev. Corp.*, 921 N.E.2d 164, 166, 172 (N.Y. 2009) (citation omitted).

¹⁷⁵ N.Y. CONST. art. XVIII, §§ 1, 9.

¹⁷⁶ Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur*, 38 *FORDHAM URB. L.J.* 1193, 1194-95 (2011).

¹⁷⁷ *Purposes For Which Takings May Be Made*, *supra* note 84.

been argued that if coastal states “framed” their regulatory takings (when regulations cause a loss in value or use of property) which target coastal flooding as “public health regulation” they would gain an advantage against constitutional challenges.¹⁷⁸ This same proposition would also apply to property acquisition under forced retreat, since the end is the same - to stop “the public health threats posed by coastal inundation—both slow sea level rise and catastrophic storms.”¹⁷⁹

*B. FORCED RETREAT CAN SATISFY THE FEDERAL AND STATE
“JUST COMPENSATION” PRONG WITH AN ALTERNATIVE
VALUATION MECHANISM*

In order to solve this problem of governments being unable to use forced retreat to protect and move people from dangerous coastal areas because of a lack of funds, I argue that acquisitions of property at-risk of SLR should be given an exception to the application of the “condemnation blight” value rule. This would effectively give the government the ability to pay less than the typical “fair market value” of the properties by announcing a forced retreat plan which would collapse the market value. Courts, when reviewing these eminent domain actions, could use their discretion to weigh the valuation mechanisms which best fit the dire predicament of SLR and use mechanisms which incorporate the positive impact of displacement prior to inundation.¹⁸⁰

In response to giving the government power to manipulate FMV, there should be restraints imposed on the government’s ability to do so. This could be implemented through a change to the New York Eminent Domain Procedure Law integrating further community control over the government’s ability to use eminent domain power to ensure equity and justice.

(1) NO “CONDEMNATION BLIGHT” VALUE RULE: FLEXIBLE
COMPENSATION IS JUSTIFIED UNDER (1) THE EQUITIES OF JUST
COMPENSATION; (2) EMERGENCY

Such lowered FMV compensation could comport with the Supreme Court’s “just compensation” rulings because: (1) it is equitable under the circumstances,¹⁸¹ and (2) is a manipulation of market value due to emergency (as in times of war).

¹⁷⁸ Craig, *supra* note 48, at 88.

¹⁷⁹ *Id.*

¹⁸⁰ *Barrett Refining Corp.*, 242 F.3d at 1061; *Cane Tennessee, Inc.*, 71 Fed. Cl. At 439-440; *Seravalli*, 845 F.2d at 1575; *179.26 Acres of Land*, 644 F.2d at 372.

¹⁸¹ *Fuller*, 409 U.S. at 490 (citation omitted); *Armstrong*, 364 U.S. at 80-82; *Tahoe-Sierra*, 535 U.S. at 302; *Palazzolo*, 533 U.S. at 633.

The unprecedented nature of global climate change and SLR necessitates changes in how we structure society and thus a reexamination of traditional property law and the limits of eminent domain power. One scholar has argued that there should be a reframing of land-use regulation of coastal areas as public health regulations to incorporate new interpretations of coastal inundation and vulnerability and ward off regulatory takings challenges.¹⁸² There is a need for new dynamic regulations incorporating a temporal component which will provide environmental and social protections and minimize harm to property owners in the future.¹⁸³ Similarly here, compensation for property acquisitions for SLR forced retreat necessitates a change in “just compensation” valuation rules because of the changing impact of the laws to this new situation.

Under the Supreme Court’s articulated principles of fairness and justice for “just compensation,”¹⁸⁴ lowered valuation for at-risk coastal properties is reasonable. Allowing the government to institute forced retreat will preemptively protect people from living in properties that are flooded and ensure that the government still provides some form of compensation when ordering people to move. In this sense, the harm from SLR to a certain subset of properties can be seen as “economic injuries caused by public action” – that being the continued release of carbon emissions.¹⁸⁵ In providing compensation while ensuring people are displaced in time, the harm would be disbursed more broadly to the public, “rather than remain disproportionately concentrated on a few persons.”¹⁸⁶

Fairness and justice are promoted by lowering values of coastal properties because the eminent domain power is also being used out of necessity. Under the courts allowed discretion in determining compensation,¹⁸⁷ it could weigh the fact that the government is not obligated to aid these property owners since it could allow the flooding to occur and provide no compensation. The government could simply wait until the sea line changes and the land becomes occupied under the Public Trust Doctrine.¹⁸⁸ In such a situation, the government may still need to pay just compensation for its inactive acquisition of the coastal areas, but the value of

¹⁸² Craig, *supra* note 48, at 88, 98 (2014).

¹⁸³ J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 72-73 (2012).

¹⁸⁴ *Fuller*, 409 U.S. at 490 (citation omitted); *Armstrong*, 364 U.S. at 80-82; *Tahoe-Sierra*, 535 U.S. at 302; *Palazzolo*, 533 U.S. at 633.

¹⁸⁵ *Palazzolo*, 533 U.S. at 633 (concurring opinion of Justice O’Connor).

¹⁸⁶ *Id.*

¹⁸⁷ *Barrett Refining Corp.*, 242 F.3d at 1061; *Cane Tennessee, Inc.*, 71 Fed. Cl. at 439-440.

¹⁸⁸ Michael A. Hiatt, Note, *Come Hell or High Water: Reexamining the Takings Clause in a Climate Changed Future*, DUKE ENVTL. L. & POL’Y F. 371, 371 (2008).

these properties would be significantly reduced due to sea level inundation.¹⁸⁹ However, governments should take care to ensure the economic well-being and physical safety of coastal residents, in particular those residents who do not have multiple homes or the financial means to move elsewhere. Additionally, some homeowners may not have chosen to own property there, they may have been owners to coastal land by inheritance rather than choice. This means that any action to help displacement by the government is voluntary and can be seen as protectionary and in good faith, equities that allow for lowered compensation.

Furthermore, courts have been shown to be more accepting of lower compensation when the government acts in good faith.¹⁹⁰ In such situations, the court will choose the appropriate valuation mechanism which allows for some deference to the actions of the government.¹⁹¹ For example, the Ninth Circuit upheld the County of Sonoma's valuation of a property when there was a regulatory takings claim against it for denying a thirty-two unit land-use development.¹⁹² The court agreed that the proposal was impermissible under the county's general plan, but the county had still violated procedures by making a key land use decision without allowing the property owners to participate.¹⁹³ Nevertheless, the court believed the County was attempting to act properly when it had declined the proposal, and thus the court declined to reward the property owner's the highest possible compensation.¹⁹⁴

Though rarely deviating from the notion of traditional FMV, the Supreme Court has articulated that FMV may be flexibly applied when it would "result in manifest injustice to owner or public" and allowed courts apply varying standards.¹⁹⁵ The Court emphasizes that it does not "prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases."¹⁹⁶ For example, when the government set a price ceiling for commodities during war, this governmentally controlled FMV could still be "just compensation" even though it was manipulating what would have been a higher value due to the wartime market.¹⁹⁷ Forcing the government to compensate owners above this value would go against the "ideas of 'fairness' and 'equity'" which the "Fifth Amendment evokes" and which guided the Emergency Price Control Act that set the price ceilings.¹⁹⁸

¹⁸⁹ *Id.* at 395.

¹⁹⁰ *Herrington v. Cty. of Sonoma*, 790 F. Supp. 909, 911, 924 (N.D. Cal. 1991); Serkin, *supra* note 135, at 732-733.

¹⁹¹ Serkin, *supra* note 135, at 732-733.

¹⁹² *Herrington*, 790 F. Supp. at 911.

¹⁹³ *Herrington v. Cty. of Sonoma*, 790 F. Supp. 909, 911 (N.D. Cal. 1991).

¹⁹⁴ *Herrington*, 790 F. Supp. at 911.

¹⁹⁵ *Commodities*, 339 U.S. at 123.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 124.

Similarly, the government was not required to pay the wartime FMV of a tugboat when the value was enhanced by the government's urgent need for tugboats,¹⁹⁹ or for the increased value of properties that were slated for use in a government railroad relocation project.²⁰⁰

Here, in the event of forced retreat property acquisitions resulting from SLR, the government should be allowed to pay a lowered FMV because it is acting to protect against an emergency – imminent flooding of property. As in times of war, the urgent need to acquire the property for public benefit (as described above) should allow for the government to compensate at a lower value. During wartime it was unfair for the government to have to pay an inflated market value when the government needed property in the emergency of war.²⁰¹ Similarly, when flooding is imminent, but the government cannot afford to move people because it cannot match the FMV created by the market, lowered compensation is “just” because it necessary.

C. REFORM THE NEW YORK EMINENT DOMAIN PROCEDURE LAW TO HEIGHTEN COMMUNITY PROTECTIONS

There should be a reform to New York's Eminent Domain Procedure Law (“EDPL”) to increase community oversight, control, and input over the government's use of its eminent domain power during the times in which the government provides lowered compensation under the exception to the “condemnation blight” value rule. This can be seen as reinforcing the “public use” requirement by enabling the public to have more control to stop eminent domain acquisitions which may be abused due to the reduced limitation of the “just compensation” requirement. This would ensure that communities effected by SLR have input into when, how and at what value their properties would be acquired so that a forced retreat plan remains equitable even when lowering payments to property owners.

1) THE CURRENT EDPL

The current EDPL allows for a number of community oversight mechanisms for property owners subject to the eminent domain power. First, the condemner must hold public hearings to inform the public and review the public use to be served by the proposed project and clarify the environmental and personal impacts to nearby residents.²⁰² Citizens are given a reasonable

¹⁹⁹ *Cors*, 337 U.S. at 332-24.

²⁰⁰ *Miller*, 317 U.S. at 374 (owner not entitled to compensation for enhanced value where value of property has increased solely due to the Government's commitment to condemn).

²⁰¹ *Cors*, 337 U.S. at 332-24; *Miller*, 317 U.S. at 374.

²⁰² N.Y. Em. Dom. Proc. §§ 201, 203 (Consol., Lexis Advance through 2020 released Chapters 1-56, 58-169).

opportunity to state verbally or write statements in response.²⁰³ Within 90 days after the public hearing, the condemner must make its determination and findings of fact on the proposed public project and publish a synopsis.²⁰⁴

Additionally, a person effect by the condemnation action can challenge the action on two bases. First, the government's determination that the property was necessary for public use.²⁰⁵ The supreme court will review to determine: (1) whether or not the hearing complied with all provisions of law, and (2) whether or not a public use, benefit or purpose will be served by the proposed acquisition.²⁰⁶ Second, the government's valuation of the property.²⁰⁷ The supreme court will review to determine if the government followed the proper procedure for compensation under NY EDPL §§ 501-514 and what damages may be due as a result of the acquisition.²⁰⁸

2) RECOMMENDED ADDITIONS TO THE EDPL

Under the reduced valuation mechanisms argued for above, including the removal of the "condemnation blight" value rule for SLR forced retreat, some form of community oversight should be included in an amended EDPL. Presently, there are public hearings where community members can bring up grievances, and procedural mechanisms to challenge a government's decision to use eminent domain to take ones property and the government's compensation for the Taking.²⁰⁹ A community member is thus given two instances, in a public hearing and in court, to allege why the Taking and its value is improper, but is offered no greater control over the use of eminent domain but for arguing the application of the limitations imposed by statute or precedent in New York.²¹⁰ As discussed, these limitations are weak in New York, which allows a broad definition of public use.²¹¹ For this reason, the EDPL should be amended to include further community-based controls over eminent domain.

²⁰³ N.Y. Em. Dom. Proc. § 203; *FAQs About the NYS Eminent Domain Procedure Law*, *supra* note 82.

²⁰⁴ N.Y. Em. Dom. Proc. § 204 (Consol., Lexis Advance through 2020 released Chapters 1-56, 58-169); *FAQs About the NYS Eminent Domain Procedure Law*, *supra* note 82.

²⁰⁵ N.Y. Em. Dom. Proc. § 207 (Consol., Lexis Advance through 2020 released Chapters 1-56, 58-169).

²⁰⁶ *Id.*

²⁰⁷ N.Y. Em. Dom. Proc. § 512 (Consol., Lexis Advance through 2020 released Chapters 1-56, 58-169).

²⁰⁸ N.Y. Em. Dom. Proc. §§ 501-514 (Consol., Lexis Advance through 2020 released Chapters 1-56, 58-169).

²⁰⁹ N.Y. Em. Dom. Proc. § 203; *FAQs About the NYS Eminent Domain Procedure Law*, *supra* note 82.

²¹⁰ *Id.*

²¹¹ See *supra* Part III-B.

These controls could consist of a community board which would be given input, oversight, or final approval for any government eminent domain acquisitions that are given the lower-value exception. This is rare, but not unheard of. For example, the Dudley Street Neighborhood Initiative (DSNI), a community-based organization representing a low-income neighborhood in Boston, was the first organization of its kind to be granted eminent domain authority.²¹² Under provisions of Massachusetts law and Boston City ordinances, community-based redevelopment entities may be granted eminent domain powers.²¹³ In this instance, DSNI was given the power to acquire land by eminent domain and create a community-led plan.²¹⁴ This plan included local-oriented democratic decisions, which ensured that residents were not displaced, and showed that eminent domain power could be used to increase housing and improve quality of life in low-income communities.²¹⁵ Another similar example is the use of Community Benefit Agreements (“CBA’s”), which establish processes for developers to include community objectives as part of their developments and which take the form of legally binding contracts between developers and CBA coalitions (community groups).²¹⁶

These changes would supplement the other community-based oversight mechanism that exists to reign in the eminent domain power – elections. People can vote out elected officials who enable abuse of the eminent domain power. Allowing community boards to be more closely involved or have full control over eminent domain would reduce the likelihood of political fallout from the expansion of eminent domain power resulting from allowing lower value compensation for property. The use of eminent domain can spur public backlash and political fallout, as was seen in the reaction to *Kelo*.²¹⁷ Citizens from both parties and a range of political viewpoints were outraged at the expansive “public use” interpretation the Supreme Court endorsed.²¹⁸ A number of states changed their state eminent domain laws to curtail the expansive interpretation of “public use” the Supreme Court had just supported.²¹⁹ These changes occurred either because politicians were attempting to avoid fallout and the possibility of losing votes, or because they

²¹² *Eminent Domain in the Hands of the Community*, CTR. FOR URB. RES. AND LEARNING CTR., <https://www.luc.edu/eminent-domain/siteessays/bostonma/>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Thomas A. Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 44 URB. LAW. 827 (2012).

²¹⁷ Farjad, *supra* note 86, at 1143; Somin, *supra* note 88.

²¹⁸ Somin, *supra* note 88.

²¹⁹ Somin, *supra* note 88.

were actually pressured into changing their states' laws.²²⁰ Forty-five states made changes to their eminent domain laws following *Kelo*, but New York made no such change indicating that the state embraces more expansive eminent domain power.²²¹

V. CONCLUSION

The potential necessity of forced retreat to displace people at risk due to SLR creates an economic predicament whereby the government may be unable to help those who choose not to leave, or cannot afford to leave, their homes. The traditional limits of eminent domain are such that the government must pay “fair market value” for any property it takes, but under the principle of equity that is fundamental to “just compensation” Supreme Court rulings, and exceptions to traditional FMV during war, lowered FMV may be constitutional. Given the public benefit that would derive from eminent domain acquisitions for properties that will be flooded, New York courts should use their discretion in reviewing FMV valuation mechanisms to set aside the “condemnation blight” value rule for these properties. This would allow the government to control FMV ahead of flooding, to displace people who are at-risk. In turn, the New York Eminent Domain Procedure Law should include greater community oversight for governmental use of eminent domain in these situations to ensure fairness when there is reduced compensation.

²²⁰ Somin, *supra* note 88.

²²¹ Somin, *supra* note 88.