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Taking Away the Tightrope

FIXING THE NATIONAL FLOOD INSURANCE PROGRAM CIRCUS VIA EMINENT DOMAIN

INTRODUCTION

Bringing thirteen named storms—with seven classified as hurricanes, and four of those classified as major hurricanes—“the 2017 Atlantic hurricane season [was] unusually active.”¹ As these major storms made landfall in the United States and the Caribbean, they gripped the collective attention of the world and once again reminded us of the devastating effects that natural disasters can have on our communities.² And while many of the most severe physical effects are felt on the local level, the profound damage caused by natural disasters is often felt on the national level as well. The damage caused by hurricanes Harvey and Irma alone is expected to cost a combined \$290 billion—1.5 percent of the nation’s GDP.³ These tremendous estimates do not include the damage caused by Hurricane Maria, whose floods destroyed Puerto Rico’s electrical power infrastructure and left the territory in “very, very, very perilous shape.”⁴

What’s more, disasters like these are not going away; climate scientists have estimated that as many as thirteen million homes in the United States are at risk of inundation by the year 2100 due to the combined effects of sea level rise,

¹ Maggie Astor, *The 2017 Hurricane Season Really Is More Intense Than Normal*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/us/hurricanes-irma-harvey-maria.html> [<https://perma.cc/GX2U-NQAV>].

² See, e.g., *Hurricane Maria Updates: In Puerto Rico, the Storm ‘Destroyed Us,’* N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/hurricane-maria-puerto-rico.html> [<https://perma.cc/H6XY-88FG>] [hereinafter *Hurricane Maria Updates*] (providing frequent textual and photographic updates on the status of Puerto Rico in the immediate aftermath of Hurricane Maria).

³ See *AccuWeather Predicts Economic Cost of Harvey, Irma to Be \$290 billion*, (Sept. 11, 2017, 11:06 AM), <https://www.accuweather.com/en/weather-news/accu-weather-predicts-economic-cost-of-harvey-irma-to-be-290-billion/70002686> [perma.cc/L7PU-GYUH].

⁴ See *Hurricane Maria Updates*, *supra* note 2.

extreme weather, and climate change.⁵ Natural disasters like those experienced in the 2017 hurricane season serve as a not-so-gentle reminder that as individuals and as a society, we must find ways to protect ourselves and each other from the inevitable consequences of living in the natural world.⁶

This increased awareness of extreme weather comes at an auspicious time, as Congress considers the reform and reauthorization of the National Flood Insurance Program (NFIP).⁷ Created by the National Flood Insurance Act of 1968,⁸ the federal program aims to reduce individual exposure to the damage of potential flooding and to deter future development in flood-prone areas.⁹ To those ends, the program makes flood insurance “available to homeowners and businesses in communities that have adopted and enforce appropriate floodplain management measures.”¹⁰ By 2017, the NFIP was comprised of approximately “5.1 million policies in more than 22,200 communities with approximately \$1.25 trillion of insurance in force.”¹¹ Despite Congress’s good intentions in enacting it, the NFIP remains a controversial program that in many cases does more harm than good.¹²

Of the five million policyholders covered by the NFIP, a significant number pay subsidized premiums that do not reflect the actual risk of flooding that property owners face.¹³ Subsidies

⁵ See Lucas Eastman, *Flood, Rebuild, Repeat: The Need for Flood Insurance Reforms*, NAT. RES. DEF. COUNCIL: NAT. EXPERTS BLOG (Aug. 11, 2016), <https://www.nrdc.org/experts/rob-moore/flood-rebuild-repeat-need-flood-insurance-reforms> [https://perma.cc/9MCU-BQY5].

⁶ See David Conrad & Larry Larson, *We Already Knew How to Reduce Damage from Floods. We Just Didn't Do It*, WASH. POST: OUTLOOK (Sept. 1, 2017), https://www.washingtonpost.com/outlook/we-already-knew-how-to-reduce-damage-from-floods-we-just-didnt-do-it/2017/09/01/cc6c4174-8f2a-11e7-8df5-c2e5cf46c1e2_story.html?utm_term=.8330be70968a [https://perma.cc/5ZYA-HPNA].

⁷ 42 U.S.C. §§ 4001–4131 (2012 & Supp. II 2014); 44 C.F.R. §§ 59.1–80.21 (2017); see also *National Flood Insurance Program: Reauthorization Guidance*, FED. EMERGENCY MGMT. AGENCY, (last updated Mar. 23, 2018), <https://www.fema.gov/national-flood-insurance-program/national-flood-insurance-program-reauthorization-guidance> [https://perma.cc/3VX7-EH5W]; Mary Williams Walsh, *A Broke, and Broken, Flood Insurance Program*, N.Y. TIMES: BUS. DAY (Nov. 4, 2017), <https://nyti.ms/2hFpQsW> [https://perma.cc/WK59-UG8X].

⁸ National Flood Insurance Act of 1968, Pub. L. No. 90–448, 82 Stat. 572 (codified as amended at 42 U.S.C. §§ 4001–4131 (2012 & Supp. II 2014)).

⁹ See 42 U.S.C. § 4001 (2012); see also Charles T. Griffith, *The National Flood Insurance Program: Unattained Purposes, Liability in Contract, and Takings*, 35 WM. & MARY L. REV. 727, 728 (1994).

¹⁰ DEP’T OF HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY, PRESIDENT’S BUDGET FY 2018 530 (2018).

¹¹ *Id.*

¹² See *infra* Part II.

¹³ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-317, REPORT TO CONGRESSIONAL COMMITTEES HIGH-RISK SERIES: PROGRESS ON MANY HIGH-RISK

were initially instituted at the program's inception, as private insurers had long since pulled out of the flood insurance market and data was therefore unavailable to put an accurate rate structure in place.¹⁴ Subsidized rates were expected to be replaced by "actuarially sound" rates after the first twenty-five years of the program.¹⁵ Despite this plan, fifty years later many policyholders continue to pay discounted rates that do not reflect their true risk levels.¹⁶

These subsidies impose substantial burdens on taxpayers generally and on the homeowners that appear at first glance to exclusively benefit from the program. Most directly, subsidies contribute to the financial insolvency of the program.¹⁷ Since the NFIP "collects less in premiums and surcharges than it shells out in claims and other expenses," the program is currently \$24.6 billion in debt to the U.S. Department of the Treasury.¹⁸ More indirectly, and perhaps more importantly, subsidized premiums disguise the actual risk that homeowners face—encouraging rather than discouraging floodplain development.¹⁹ The illusion that coastal and riverfront properties are safe to develop upon "ensures that there will be greater dislocation when—not if—that safety is revealed as illusory."²⁰ This illusion also requires the government and taxpayers to bear the risk of inevitable loss. "As a result of its substantial financial exposure and management and operations challenges, the program has been on [the Government Accountability Office] High-Risk List since 2006."²¹

Recognizing these problems, Congress undertook efforts to remove subsidies and bring the program back into solvency with the Biggert-Waters Flood Insurance Reform Act of 2012 (Biggert-

AREAS, WHILE SUBSTANTIAL EFFORTS NEEDED ON OTHERS 619 (Feb. 2017) [hereinafter GAO-17-317], <https://www.gao.gov/assets/690/682765.pdf> [<https://perma.cc/QG45-B5EK>]; see also Alexander Lemann, *Rolling Back the Tide: Toward an Individual Mandate for Flood Insurance*, 26 FORDHAM ENVTL. L. REV. 166, 168 (2015).

¹⁴ See Adam F. Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Insurance*, 26 MISS. C. L. REV. 3, 15–16 (2007).

¹⁵ See Aparna Kirknel Majmudar, *The National Flood Insurance Program: Maintaining Its Head Above Water*, 16 U. MIAMI INT'L & COMP. L. REV. 183, 195–96 (2009).

¹⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-425, FLOOD INSURANCE: COMPREHENSIVE REFORM COULD IMPROVE SOLVENCY AND ENHANCE RESILIENCE 6 (Apr. 2017) [hereinafter GAO-17-425], <http://www.gao.gov/assets/690/684354.pdf> [<https://perma.cc/2YVR-S8GC>].

¹⁷ See Ernest B. Abbott, *Flood Insurance and Climate Change: Rising Sea Levels Challenge the NFIP*, 26 FORDHAM ENVTL. L. REV. 10, 34–35 (2014).

¹⁸ Michelle Cottle, *Can Congress Bring the National Flood Insurance Program Above Water?*, ATLANTIC (Aug. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/08/congress-flood-insurance/535731/> [<https://perma.cc/HZC4-GKBT>].

¹⁹ See Scales, *supra* note 14, at 6.

²⁰ *Id.*

²¹ GAO-17-317, *supra* note 13, at 619.

Waters).²² Biggert-Waters “eliminated subsidized premiums and adjusted premium rates to reflect actual flood risk.”²³ This fiscally responsible solution was, however, met with opposition from homeowners who were upset that they were required to pay higher premiums.²⁴ Under political pressure, Congress quickly reinstated many of the subsidies within just two years by enacting the Homeowner Flood Insurance Affordability Act of 2014.²⁵

Another result of the political pressure to provide a safety net to homeowners in flood-prone areas is the continued coverage of repetitive loss properties.²⁶ Although all fifty states must tolerate some repetitive loss properties, “five states—Texas, Louisiana, Florida, New York and New Jersey—have 10,000 or more properties that frequently flood.”²⁷ Such properties include a house in Baton Rouge, Louisiana that is worth close to \$56,000, has flooded over forty times, and has “accumulated almost \$430,000 in flood insurance claims.”²⁸ Another home in “Houston, Texas with an assessed value of \$72,400 . . . has frequently flooded and received over \$1 million in flood insurance payouts.”²⁹ These are just a few shocking examples of what appears to be a more than anecdotal waste problem: of the five million properties insured by the NFIP, just 30,000 (.60 percent) “[s]evere [r]epetitive [l]oss [p]roperties” “have received 10.6 [percent] (\$5.5 billion dollars) of all flood insurance claims since 1978.”³⁰ Nearly half of these property owners have received insurance benefits exceeding the value of their home.³¹

²² Biggert-Waters Flood Ins. Reform Act of 2012, Pub. L. No. 112–141, 126 Stat. 916 (codified as amended at scattered sections of 42 U.S.C. (2012)); *see also* Abbott, *supra* note 17, at 13.

²³ Sarah Fox, *This Is Adaptation: The Elimination of Subsidies Under the National Flood Insurance Program*, 39 COLUM. J. ENVTL. L. 205, 208–09 (2014).

²⁴ *See* Abbott, *supra* note 17, at 13–14.

²⁵ *See id.*; *see also* Homeowner Flood Insurance Affordability Act of 2014, Pub. L. No. 113–89, 128 Stat. 1020 (codified as amended at scattered sections of 42 U.S.C. (2012 & Supp. II 2014)).

²⁶ 42 U.S.C. § 4121(a)(7) (2012) (“[T]he term ‘repetitive loss structure’ means a structure covered by a contract for flood insurance that—(A) has incurred flood-related damage on [two] occasions, in which the cost of repair, on the average, equaled or exceeded 25 percent of the value of the structure at the time of each such flood event; and (B) at the time of the second incidence of flood-related damage, the contract for flood insurance contains increased cost of compliance coverage.”).

²⁷ Alice C. Hill & Craig Fugate, *The Same Houses Flood Every Year and We Keep Paying For Them*, HILL (July 31, 2017, 1:40 PM), <http://thehill.com/blogs/pundits-blog/energy-environment/344607-the-same-houses-flood-every-year-and-we-keep-paying-for> [<https://perma.cc/E4D7-9FRR>].

²⁸ *Id.*

²⁹ *Id.*

³⁰ Eastman, *supra* note 5.

³¹ *See id.*

Even more alarming than these statistics is the fact that owners of severe repetitive loss properties “face no limit on the total value of payments they may receive or on the number of claims made.”³² How long can taxpayers be expected to hold up and reweave a safety net before they take away the tightrope altogether?

This note argues that if NFIP subsidies are here to stay, then at least in the case of severe repetitive loss properties, the best course of action is to do just that—give governments the tools they need to exercise their existing authority to condemn severe repetitive loss properties and convert them into open space without relying on voluntary-buyout programs.³³ This approach would achieve the key objectives of the NFIP that advocates of reform seek. Condemnation³⁴ of severe repetitive loss properties would preclude development on those properties, with an added benefit of discouraging floodplain development in general—a primary goal since the creation of the NFIP.³⁵ This would not only improve the program’s own financial standing by reducing the number of claims paid out, but would fulfill Congress’s objective to “alleviate the economic hardships caused by unforeseen flood disasters” among individual property owners.³⁶ Converting these properties into open spaces would also promote environmental sustainability by enabling the creation of a buffer zone between storms and the communities.³⁷ Finally, condemnation would promote a better allocation of risk onto property owners instead of taxpayers.³⁸

Part I of this note provides insight into how the NFIP operates to mitigate flood damage and defines key terms. Part II dives into the problems that led private insurers to leave the market and how those problems persist within the NFIP. Part III introduces the current system of “voluntary buyouts”—permissible under the current statute—and assesses some of the issues that the volitional requirement raises in successfully protecting the public and the environment from flood hazards.

³² Hill & Fugate, *supra* note 27.

³³ Currently, municipalities are not permitted to acquire property using Hazard Mitigation grants and federal NFIP-related funds unless the property owner agrees to participate voluntarily. 44 C.F.R. § 80.11(a) (2017).

³⁴ “The determination and declaration that certain property (esp. land) is assigned to public use, subject to reasonable compensation; the exercise of eminent domain by a governmental entity.” *Condemnation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

³⁵ See 42 U.S.C. § 4001(e) (2012).

³⁶ Powers v. United States, 996 F.2d 1121, 1126 (11th Cir. 1993).

³⁷ See, e.g., *Buyout and Acquisition Programs*, N.Y. GOVERNOR’S OFF. OF STORM RECOVERY (GOSR), <https://stormrecovery.ny.gov/housing/buyout-acquisition-programs> [<https://perma.cc/Y8PB-49CJ>] (describing the “natural coastal buffer” created by converting high-risk property to open space).

³⁸ See Majmudar, *supra* note 15, at 198.

Analyzing the Takings Clause of the Fifth Amendment, Part IV introduces a promising solution to the severe repetitive loss problem—a new plan of forced removal or “involuntary buyouts,” implemented by local governments with assistance from federal hazard mitigation grants. This Part also explores the legal implications and possible limitations that the plan would face; namely, how such a plan will balance public purposes against individual property rights, and how “involuntary buyouts” will be achieved given the “just compensation” requirement.

I. A TECHNICAL OVERVIEW OF THE NATIONAL FLOOD INSURANCE PROGRAM AND DEFINITIONS OF KEY TERMS

The administrator of the Federal Emergency Management Agency (FEMA) is charged with managing the NFIP,³⁹ which includes, *inter alia*, setting premium rates,⁴⁰ identifying flood-prone areas, and disseminating up-to-date information to the public regarding the program.⁴¹ These activities are largely dependent upon the administrator’s preparation of two types of maps—Flood Insurance Rate Maps (FIRMs) and the Flood Hazard Boundary Maps (FHBMs).⁴² These maps identify “special flood hazard areas” in which “the land in the flood plain within a community [is] subject to a 1 percent or greater chance of flooding in any given year.”⁴³ They delineate the various hazards to be expected at different elevations within these areas, more commonly known as “100-year floodplains.”⁴⁴

Under the NFIP, FEMA offers to insure property owners within the 100-year floodplain, provided that their community actively chooses to participate in the program and is able to meet all of the program’s requirements for floodplain management.⁴⁵

³⁹ 42 U.S.C. § 4011(a).

⁴⁰ *Id.* § 4015(a).

⁴¹ *Id.* §§ 4101(a), 4020.

⁴² 44 C.F.R. § 64.3(a) (2017).

⁴³ *Id.* § 59.1.

⁴⁴ Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 331–32 (2003). The term “100-year floodplain” often results in confusion, as it leads most average citizens to believe “that once there has already been such a flood in his area, he is safe for the next ninety-nine years.” Scales, *supra* note 14, at 9. This confusion causes many to underestimate the actual risk of flooding and subsequently results in failure to purchase flood insurance. *Id.*

⁴⁵ See 42 U.S.C. § 4014; Barnhizer, *supra* note 44, at 331–32; see also 42 U.S.C. § 4012; 44 C.F.R. §§ 59.22, 60.3; John R. Nolon, *Land Use and Climate Change: Lawyers Negotiating Above Regulation*, 78 BROOK. L. REV. 521, 560 (2013) (FEMA “limits the availability of flood insurance to property owners who build in accordance with local

The actual sale of NFIP flood insurance policies is operated through a public-private partnership known as the “Write-Your-Own (WYO) program,” whereby private property insurers act as “agents of the federal insurance scheme.”⁴⁶ Thus, FEMA’s primary function is to create the aforementioned maps, which determine the premium rates for properties within the floodplain, and communicate risk to property owners.⁴⁷ Despite the vital nature of this responsibility and the support FEMA receives in carrying out other aspects of the program, most of FEMA’s maps remain “woefully outdated.”⁴⁸ For example, the data contained in flood maps available after Hurricane Sandy hit New York in 2012 were nearly thirty years out of date.⁴⁹ FEMA’s failure to reliably update essential maps has imposed another burden on the NFIP, leading to misrepresentations of the true risks of living in the floodplain, and contributing to the “continual development and redevelopment in risky flood-prone areas.”⁵⁰

Finally, FEMA specifically defines a repetitive loss property as “[a]n NFIP-insured structure that has had at least [two] paid flood losses of more than \$1,000 each in any [ten]-year period since 1978.”⁵¹ These properties face no limit on the number or value of flood insurance claims they may submit,⁵² and roughly “[one] in [ten] homes . . . have cumulative . . . claims that have exceeded the value of the house.”⁵³ A “Severe Repetitive Loss Building” is a building that is covered under an NFIP policy that:

Has incurred flood damage for which: a. [four] or more separate claim payments have been made . . . with the amount of each such claim exceeding \$5,000, and with the cumulative amount of such claims

zoning prescriptions that regulate development in Special Flood Hazard Areas designated by FEMA Flood Insurance Rate Maps.”).

⁴⁶ Scales, *supra* note 14, at 14. The name WYO is a misnomer: “the insurance contract is written by the NFIP and published in the Federal Register. No deviations are permitted . . . Insurance companies retain 30% of premiums as a commission . . . [and] are responsible for enrolling policyholders, collecting premiums, and administering claims.” *Id.*

⁴⁷ See Becky Hayat & Robert Moore, *Addressing Affordability and Long-Term Resiliency Through the National Flood Insurance Program*, 45 ENVTL. L. REP. 10338, 10341 (2015).

⁴⁸ *Id.*

⁴⁹ *Id.* at 10338, 10341 (“[A]t the time Hurricane Sandy hit, the data used to generate flood maps for New York City had not been updated since they were first issued in 1983.”).

⁵⁰ *Id.* at 10341.

⁵¹ *Definitions*, FED. EMERGENCY MGMT. AGENCY (Nov. 30, 2017, 12:11 PM), <https://www.fema.gov/national-flood-insurance-program/definitions#R> [<https://perma.cc/W8YJ-RD45>].

⁵² Hill & Fugate, *supra* note 27.

⁵³ RAWLE O. KING, R42850, CONG. RESEARCH SERV., THE NATIONAL FLOOD INSURANCE PROGRAM: STATUS AND REMAINING ISSUES FOR CONGRESS 20 (2013), <https://fas.org/sgp/crs/misc/R42850.pdf> [<https://perma.cc/Y379-XVAS>].

payments exceeding \$20,000; or b. at least [two] separate claims payments have been made . . . with the cumulative amount of such claim payments exceed[ing] the fair market value of the insured building on the day before each loss.⁵⁴

The particularly risk-inclined properties that fit these descriptions, given their rising prevalence and the heavy financial burden that they impose on the NFIP, are ideal candidates for a system of “involuntary buyouts.”⁵⁵

II. HOW PRIVATE MARKET PROBLEMS BECAME TAXPAYER PROBLEMS

At one time, homeowners were able to easily obtain coverage for flooding within the private insurance market.⁵⁶ Flooding was frequently covered as an additional risk under fire insurance policies—the dominant form of personal property insurance until the rise of the modern homeowners’ policy in the 1950s—and could also be covered by more general accident policies.⁵⁷ Some features inherent to flood risks, however, made it an “unattractive [product] for private insurers.”⁵⁸ In fact, the issues facing private insurers in providing flood insurance led the insurers to discontinue such coverage altogether by the mid-twentieth century.⁵⁹ Specifically, problems related to correlated losses, adverse selection, and moral hazard, led to the demise of private flood insurance, and despite the best efforts of the federal government, continue to plague the NFIP.⁶⁰

A. *Correlated Losses*

Perhaps the most destabilizing factor for private insurers’ ability to cover flooding and other catastrophic risk was the problem of correlated losses.⁶¹ Unlike casualty losses such as

⁵⁴ *Definitions*, FED. EMERGENCY MGMT. AGENCY (last updated Nov. 20, 2017), <https://www.fema.gov/national-flood-insurance-program/definitions#S> [<https://perma.cc/JS2X-YUXM>]. The term “Severe Repetitive Loss Property” also refers to “a severe repetitive loss building or the contents within a severe repetitive loss building, or both.” *Id.*; see also 44 C.F.R. § 79.2(h).

⁵⁵ See Eastman, *supra* note 5.

⁵⁶ See Scales, *supra* note 14, at 7.

⁵⁷ See *id.* at 7, n.14 (2007).

⁵⁸ *Id.* at 7.

⁵⁹ See Lemann, *supra* note 13, at 179.

⁶⁰ See Scales, *supra* note 14, at 8–11.

⁶¹ See James Ming Chen, *Correlation, Coverage, and Catastrophe: The Contours of Financial Preparedness for Disaster*, 26 FORDHAM ENVTL. L. REV. 56, 65 (2014). “Highly correlated catastrophic risks inflict numerous losses . . . simultaneously from a single event.” *Id.* at 66 (omission in original) (quoting Michael J. Trebilcock &

car accidents or fires, “losses due to flood[ing] . . . tend to be highly correlated within geographic areas.”⁶² Even where the risk of flooding in a given year is low, when one property is inundated, it is exceedingly likely that thousands of others in the same area will be similarly affected.⁶³ The prospect of paying out large amounts in insurance benefits to a large, narrow distribution of insureds leads insurers to seek additional capital to protect themselves financially.⁶⁴ Finding it difficult to spread risk evenly among policyholders, private insurers instead made the collective decision to stop providing flood insurance altogether.⁶⁵

The government occupies a unique position to mitigate the costs of correlated losses. Unlike a typical private insurer, the government does not have to rely exclusively on premium dollars to cover losses.⁶⁶ For example, the authorizing statute includes provisions establishing the possibility of reinsurance by the private insurance industry.⁶⁷ Moreover, the statute established a National Flood Insurance Fund, allowing the NFIP to borrow taxpayer funds directly from the Treasury to cover flood losses.⁶⁸ Having greater potential sources of funding does not, however, change the concentration of losses incurred. Despite the ability to access taxpayer funds to cover losses, the NFIP’s community buy-in and local floodplain management requirements⁶⁹ encourage development rather than abandonment, and cause further concentration and correlation of losses rather than wider distribution.⁷⁰

B. *Adverse Selection*

Another factor that led to the private insurance industry’s collective decision to leave the flood insurance market

Ronald J. Daniels, *Rationales and Instruments for Government Intervention in Natural Disasters*, in *ON RISK AND DISASTER: LESSONS FROM HURRICANE KATRINA* 89, 93 (Ronald J. Daniels et al. eds., 2006).

⁶² Scales, *supra* note 14, at 10–11.

⁶³ See Lemann, *supra* note 13, at 178.

⁶⁴ See Howard C. Kunreuther & Erwann O. Michel-Kerjan, *Climate Change, Insurability of Large-Scale Disasters, and the Emerging Liability Challenge*, 155 U. PA. L. REV. 1795, 1825 (2007).

⁶⁵ See Lemann, *supra* note 13, at 179.

⁶⁶ See Saul Jay Singer, *Flooding the Fifth Amendment: The National Flood Insurance Program and the “Takings” Clause*, 17 B.C. ENVTL. AFF. L. REV. 323, 328 (1990).

⁶⁷ 42 U.S.C. § 4051(a)(2) (2012).

⁶⁸ 42 U.S.C. § 4017(a) (2012 & Supp. II 2014).

⁶⁹ See 42 U.S.C. §§ 4012(c), 4022 (2012) (discussing the NFIP’s statutory community buy-in and floodplain management requirements); see also 44 C.F.R. § 59.22 (2017) (discussing NFIP community eligibility requirements adopted by FEMA).

⁷⁰ See Scales, *supra* note 14, at 13.

was a problem known as adverse selection.⁷¹ It occurs when those purchasing insurance “have more accurate information on the probability of a loss than the firms selling coverage.”⁷² In the flood insurance context, it occurs when “[t]he people most likely to buy insurance against flood losses are also the most likely to suffer [flood losses].”⁷³ Insurers believe that such adverse selection leads to “death spirals”—situations in which insurance pools attract riskier customers (who get a good deal covering likely risk), and deter less risky customers (who choose not to overpay).⁷⁴ When these pools overflow with a homogenous block of high-risk customers who cannot afford actuarially sound premiums, the insurance pools collapse.⁷⁵ The risk of adverse selection initially discouraged the insurance industry from providing private flood insurance, and has kept them out of the market since the government entered.⁷⁶

The NFIP aims to avoid issues of adverse selection in part by mandating coverage for properties within 100-year floodplains.⁷⁷ Yet this mandate is limited in scope.⁷⁸ Mandatory coverage applies only to properties within the 100-year floodplain in participating communities that are acquired or developed with the assistance of a mortgage from a federally regulated lending institution.⁷⁹ Further, even though these institutions have both a statutory and a rational incentive to require the lender mandate, “enforcement is often lax.”⁸⁰ The lender mandate may incrementally widen the risk pool and proportionally decrease the likelihood of a “death spiral,” but it does not do much to expand participation to residents beyond the already risky 100-year floodplain.⁸¹ Even with the lender mandate in place, the NFIP continues to suffer an adverse selection problem, in which “[t]he low rate of market penetration strongly suggests that primarily the highest-risk property

⁷¹ See *id.* at 8.

⁷² Kunreuther & Michel-Kerjan, *supra* note 64, at 1824; see also Scales, *supra* note 14, at 8 (“Adverse selection occurs when insureds know more about their risk profiles than their insurers.”).

⁷³ Scales, *supra* note 14, at 8.

⁷⁴ See *id.* at 8–9.

⁷⁵ *Id.*

⁷⁶ See *id.* at 9.

⁷⁷ 42 U.S.C. § 4012a (2012 & Supp. II 2014); see also Barnhizer, *supra* note 44, at 335.

⁷⁸ See Lemann, *supra* note 13, at 198.

⁷⁹ See 42 U.S.C. § 4012a; Lemann, *supra* note 13, at 197.

⁸⁰ Lemann, *supra* note 13, at 198. This is partially due to mortgage originator’s ability to quickly receive credit and to pass risk on to the secondary mortgage market. See Scales, *supra* note 14, at 18–19.

⁸¹ Lemann, *supra* note 13, at 199 (“[O]utside the 100-year flood zone, the NFIP’s market penetration is estimated to be only about 1 percent.”).

owners opt in and stay in the program.”⁸² While adverse selection is a problematic factor that leads to high-risk pools of insureds, it is not the only one that leads to this result.

C. *Moral Hazard*

Closely related to adverse selection, moral hazard also concerns “the asymmetry of information.”⁸³ The term refers to “the notion that individuals will engage in cost-increasing behavior if they are able to shift some of the cost away from themselves.”⁸⁴ Simply stated, if an insurance company has agreed to pay for the consequences, then the insured party has a much higher incentive to “engage in risky behavior.”⁸⁵ Reduction of moral hazard depends upon the insurer’s ability to share costs with the insured (frequently through co-pays and deductibles) and to monitor the insured’s behavior.⁸⁶

In the context of flood insurance, moral hazard issues are raised where individuals choose to store possessions and construct or maintain homes in more risky ways, knowing that potential losses will be covered by insurance.⁸⁷ Frequently, “the NFIP stokes moral hazard by underpricing insurance, encouraging over development in flood-prone areas.”⁸⁸ “[T]he extent of repetitive loss . . . as well as the concentration of coverage in high-risk areas” further suggests that policyholders “strategically engage in less careful behavior”—epitomizing the NFIP’s moral hazard problem.⁸⁹ The issue of moral hazard is one that private insurers refused to tolerate, but continues to plague the government program.⁹⁰

⁸² Barnhizer, *supra* note 44, at 333–34.

⁸³ Kunreuther & Michel-Kerjan, *supra* note 64, at 1822.

⁸⁴ Charlene Luke & Aviva Abramovsky, *Managing the Next Deluge: A Tax System Approach to Flood Insurance*, 18 CONN. INS. L.J. 1, 27 (2011); *see also* Wausau Underwriters Ins. v. United Plastics Grp., 512 F.3d 953, 959 (7th Cir. 2008).

⁸⁵ *See* Chen, *supra* note 61, at 64.

⁸⁶ *See* Luke & Abramovsky, *supra* note 84, at 27–28.

⁸⁷ *See id.* at 28–29.

⁸⁸ Ike Brannon & Ari Blask, *Reforming the National Flood Insurance Program: Toward Private Flood Insurance*, 817 POLY ANALYSIS 1, 1 (2017), <https://www.cato.org/publications/policy-analysis/reforming-national-flood-insurance-program-toward-private-flood> [<https://perma.cc/M2V4-DBB5>]; *see also* Patrick E. Tolan, Jr., *The Flurry of Tax Law Changes Following the 2005 Hurricanes: A Strategy for More Predictable and Equitable Tax Treatment of Victims*, 72 BROOK. L. REV. 799, 807 (2007).

⁸⁹ Luke & Abramovsky, *supra* note 84, at 30; *see also* LastWeekTonight, *Floods: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Oct. 29, 2017), <https://www.youtube.com/watch?v=pf1t7cs9dkc> [<https://perma.cc/G98G-HPQT>] (discussing instances of individuals choosing to purchase or build beach houses in risky areas because a “federal program guaranteed [the] investment”).

⁹⁰ *See* Scales, *supra* note 14, at 13.

III. VOLUNTARY-BUYOUT PROGRAMS

Government acquisition of high-risk land is the most effective way that a community can decrease the likelihood of exacerbating the inevitably high premiums and frequent flood losses that accompany correlated loss, adverse selection, and moral hazard. High-risk land acquisition also ensures that properties in particularly hazardous areas are used in ways that reasonably comport with the nature of disaster risk.⁹¹ To carry on such acquisition efforts, FEMA provides state and local governments with funding opportunities targeted at property acquisition for flood hazard mitigation purposes.⁹² More specifically, FEMA's Hazard Mitigation Assistance Program provides federal funds to states to share the cost of property acquisition projects which will "substantially reduce the risk of future damage, hardship, loss or suffering resulting from a major disaster."⁹³

States may also receive assistance from the Department of Housing and Urban Development's Community Development Block Grant Disaster Recovery Program.⁹⁴ It is left to state and local governments to identify eligible properties, prepare grant applications, and submit them to FEMA on behalf of willing homeowners.⁹⁵ "If FEMA approves, it can provide up to 75 [percent] of the funding needed by the state or local government to purchase the damaged property, and the state or municipal government must fund the remaining 25 [percent]. The damaged property will be purchased at its pre-disaster fair market value."⁹⁶ After the transaction is fulfilled, the local government entity takes title and razes the land.⁹⁷

Flood-prone properties acquired with hazard mitigation funds are subjected to various restrictive covenants limiting the scope of governmental and public activities permitted on the land. These covenants are essential to furthering the program's public policy goals of reducing property damage and loss after

⁹¹ See Anna K. Schwab & David J. Brower, *Increasing Resilience to Natural Hazards: Obstacles and Opportunities for Local Governments Under the Disaster Mitigation Act of 2000*, in DANIEL A. FARBER ET AL., *DISASTER LAW AND POLICY* 404, 406 (Wolters Kluwer ed., 3d ed., 2015) [hereinafter *DISASTER LAW AND POLICY*].

⁹² See 44 C.F.R. §§ 80.1, 206.434 (2017) (describing the requirements for property acquisition under the NFIP and eligibility requirements for Hazard Mitigation Program Grants).

⁹³ *Id.* § 206.434(c)(5); see also *id.* § 206.432.

⁹⁴ See Hayat & Moore, *supra* note 47, at 10343.

⁹⁵ See *id.* at 10343–44.

⁹⁶ *Id.* at 10344.

⁹⁷ *Id.*

major disasters.⁹⁸ The most important of these requirements is that the property must remain “dedicated and maintained in perpetuity for uses compatible with open space, recreational, or wetlands management practices.”⁹⁹

These “[v]oluntary buyout programs—in which local governments purchase flood-damaged homes located in high-risk areas and then subsidize the residents’ relocation to safer grounds—have been conducted across the country.”¹⁰⁰ One particularly ambitious and successful program of this nature is New York’s Buyout and Acquisitions Program,¹⁰¹ which is considered “the largest residential buyout scheme ever attempted in the United States.”¹⁰² Created in the wake of Superstorm Sandy, Hurricane Irene, and Tropical Storm Lee, the New York State program takes a “ground-up approach,” working in conjunction with individual homeowners, as well as county and local government officials to convert those areas “that regularly put homes, residents and emergency responders at high risk due to repeated flooding,” into “natural coastal buffer[s] to safeguard against future storms.”¹⁰³ Just one example of the program’s success can be found in the Oakwood Beach neighborhood of Staten Island. There, the state purchased nearly 300 dilapidated homes for \$122 million, has already demolished nearly two-thirds of that inventory, and in the process has “[left] behind a haven for foraging mammals, birds, insects and plants, with no apex predators in sight.”¹⁰⁴

But these buyout programs are not limited only to densely populated, metropolitan areas like New York City. For example, “the village of Gays Mills, [Wisconsin,] with a population of approximately 500 people,” used a combination of various funding sources “to pull together and relocate [businesses and private residences in] their community out of a floodplain . . . [a]fter two 500-year flood events within [ten]

⁹⁸ 44 C.F.R. § 206.434(e)(1)(i)–(iii).

⁹⁹ *Id.* § 206.434(e)(1)(i).

¹⁰⁰ Hayat & Moore, *supra* note 47, at 10343.

¹⁰¹ *See id.*; *Buyout and Acquisition Programs*, *supra* note 37.

¹⁰² DISASTER LAW AND POLICY, *supra* note 91, at 444.

¹⁰³ *Buyout and Acquisition Programs*, *supra* note 37.

¹⁰⁴ Nathan Kensinger, *Four Years After Sandy, Staten Island’s Shoreline is Transformed*, CURBED N.Y. (Oct. 27, 2016, 12:57 PM), <https://ny.curbed.com/2016/10/27/13431288/hurricane-sandy-staten-island-wetlands-climate-change> [https://perma.cc/3GHB-MML3].

months.”¹⁰⁵ Clearly, buyouts are considered a viable solution to the prospect of flooding in large and small communities alike.

Despite the relative success of programs in Oakwood Beach and Gays Mills, however, the hard data reveals that only a small percentage of eligible owners choose to relocate after suffering significant flood losses.¹⁰⁶ Indeed, “[p]articipation rates in buyout programs have historically been very low.”¹⁰⁷ One reason that so few individuals buy-in to buyouts is the slow pace of the transaction.¹⁰⁸ Typically lasting three to four years, the buyout process requires property owners to overcome numerous and time-consuming administrative hurdles during the application process, and prices out participants without the financial capacity to complete the lengthy transaction.¹⁰⁹ This leaves frustrated applicants buried in paperwork long after applications are sent and houses are re-flooded.¹¹⁰

Another contributor to the relative infrequency of buyouts is the federal government’s muted enthusiasm for investing in such programs.¹¹¹ Federal funding allocated toward all “strategies for reducing the consequences of flooding (which include [voluntary buyouts]) was [only] about 5 [percent] of total disaster relief funds between 2004 and 2012.”¹¹² In addition to low participation rates and minimal federal assistance, Hazard Mitigation Grants—sources of funding provided by FEMA to state and local governmental entities after a disaster declaration to reduce the impact of future catastrophic events—is available only to those projects in which property owners participate voluntarily.¹¹³ States are explicitly restricted from using eminent domain powers to acquire property using Hazard Mitigation Grants.¹¹⁴ Thus, state and local efforts to acquire property

¹⁰⁵ Robert R.M. Verchick & Lynsey R. Johnson, *When Retreat Is the Best Option: Flood Insurance After Biggert-Waters and Other Climate Change Puzzles*, 47 J. MARSHALL L. REV. 695, 702 (2013).

¹⁰⁶ Hayat & Moore, *supra* note 47, at 10343 (“It is estimated that only 10–15 [percent] of the 11,300 qualifying homeowners will ultimately accept a buyout offer. Contrast these numbers with the approximately 161,000 NFIP claims filed as a result of Superstorm Sandy in 2012 and Hurricane Irene and Tropical Storm Lee in 2011, and one can see just how few residents relocate in the wake of a flood.” (citations omitted)).

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at 10343–44.

¹¹⁰ *See* Walsh, *supra* note 7.

¹¹¹ *See* Hayat & Moore, *supra* note 47, at 10343.

¹¹² *Id.* (citations omitted).

¹¹³ *See Hazard Mitigation Grant Program Overview*, FED. EMERGENCY MGMT. AGENCY (last updated June 8, 2017), <https://www.fema.gov/hazard-mitigation-grant-program> [<https://perma.cc/K5KZ-CBAF>]; *see also* 44 C.F.R. § 80.11(a) (2017).

¹¹⁴ 44 C.F.R. § 80.11(a).

through requisite voluntary transactions can therefore be frustrated by “holdout problems” and situations where the owners of property cannot be located.¹¹⁵

Further, while forming partnerships and working cooperatively with landowners are theoretically ideal, in practice those strategies can be difficult to rely upon when dealing with the uncertain nature of flood risk mitigation policy.¹¹⁶ Indeed, as has been revealed by the enormity of the repetitive loss problem, property owners in even the riskiest areas often choose to rebuild rather than relocate.¹¹⁷ Why take a buyout when you can comfortably rebuild as many times as you would like?

IV. EXERCISING EMINENT DOMAIN TO ACQUIRE FLOOD-PRONE PROPERTIES IN A SYSTEM OF “INVOLUNTARY BUYOUTS”

Governments are more likely to use voluntary buyouts and other “arms-length transactions” for hazard mitigation-related land acquisition than other methods because they are frequently faster and “more politically acceptable.”¹¹⁸ Nevertheless, if the federal government extended funding toward programs that acquire flood-prone property by eminent domain in a system of “involuntary buyouts,” state and local governments would be better equipped to solve the problems associated with repetitive loss properties and to achieve the policy goals of the NFIP.

A. *The Fifth Amendment Provides Broad Constitutional Authority for the Institution of “Involuntary Buyouts”*

The Fifth Amendment of the Constitution provides that private property shall not “be taken for public use without just compensation.”¹¹⁹ “[C]ommonly referred to as the ‘Takings Clause,’ ‘Eminent Domain Clause,’ and the ‘Just Compensation Clause,’”¹²⁰ the amendment, at its most fundamental level, stands for the proposition that “[w]hen the government

¹¹⁵ DISASTER LAW AND POLICY, *supra* note 91, at 413.

¹¹⁶ See Blake Hudson, *Coastal Land Loss and the Mitigation-Adaptation Dilemma: Between Scylla and Charybdis*, 73 LA. L. REV. 31, 62 (2012).

¹¹⁷ Hill & Fugate, *supra* note 27.

¹¹⁸ DISASTER LAW AND POLICY, *supra* note 91, at 413.

¹¹⁹ U.S. CONST. amend. V. The Fifth Amendment provisions regarding takings are applied to the states via the Fourteenth amendment. See *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226, 241 (1897).

¹²⁰ Daryn McBeth, *Public Need and Private Greed—Environmental Protection and Property Rights*, 1 DRAKE J. AGRIC. L. 112, 112 n.1 (1996).

physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”¹²¹ Such a taking occurs when the government physically occupies a property permanently¹²² or when a regulation requires the owner of a property to permanently sacrifice all of the “economically beneficial uses of his or her land.”¹²³

Through its takings jurisprudence, the Supreme Court has granted significant legal authority to the government to take property for public purposes, provided that it deliver “just compensation” for the taking.¹²⁴ This broad legal authority is enabled by the Court’s expansive definition of the term “public purpose,” and its deference to legislative judgments in determining which purposes justify the exercise of eminent domain.¹²⁵ For example, in *Kelo v. City of New London, Conn.*, the Court deferred to legislative judgment in upholding economic development as a valid public purpose justifying the use of eminent domain.¹²⁶ The Court’s decision permitted the City of New London, after purchasing land from willing sellers to promote economic development, to acquire the remaining tracts of land from “unwilling owners” in the area through eminent domain in exchange for just compensation.¹²⁷ Indeed, this taking was considered permissible despite the fact that private individuals would benefit from the taking.¹²⁸ *Kelo* is a quintessential example of the government’s broad constitutional authority to take private property against the wishes of the owner, so long as the government provides just compensation.¹²⁹

¹²¹ *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012) (alteration in original) (quoting *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002)).

¹²² *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 426 (1982) (“A permanent physical occupation authorized by government is a taking, without regard to the public interests it may serve.”).

¹²³ *Arkansas Game & Fish Comm’n*, 568 U.S. at 32 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).

¹²⁴ *See, e.g.*, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (“Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”).

¹²⁵ *See Kelo v. City of New London*, 545 U.S. 469, 480–83 (2005).

¹²⁶ *Id.* at 480–85.

¹²⁷ *Id.* at 472.

¹²⁸ *See id.* at 486.

¹²⁹ Despite this broad power, rising political opposition in the wake of *Kelo* has led to state level limitations on the exercise of eminent domain power, especially in cases where private parties inure a benefit from government takings. DISASTER LAW AND POLICY, *supra* note 91, at 421. Some argue that these state level restrictions wind up reducing economic-development takings, in addition to slowing recovery efforts after natural disasters. *Id.* (citing Frank S. Alexander, *Louisiana Land Reform in the Storm’s Aftermath*, 53 LOY. L. REV. 727 (2007)).

Given this broad authority to determine public purposes, Congress can use its power under the Takings Clause to address the problems caused by severe repetitive loss properties. “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹³⁰ In cases of repetitive and severe repetitive loss properties, the reverse occurs—the wholly private burden of flood damage is unfairly borne by the public as a whole, over and over again.¹³¹ By condemning private, high-risk properties using the power of eminent domain, effectively initiating an “involuntary buyout,” government actors on the federal, state, and local level can prevent redevelopment to mitigate inevitable flood damage, avoid the persistent problems of correlated loss, adverse selection, and moral hazard, and properly allocate the burdens of flood damage.

First, as is the case under voluntary-buyout programs, property acquisition through eminent domain would provide governments with another tool to transform hazardous properties “into wetlands, open space, or storm-water management systems, creating a natural . . . buffer to safeguard against future storms.”¹³² Such buffers would improve the physical resiliency of the land itself in the wake of disaster,¹³³ and would reduce the concentration of flood-prone properties that leads to correlated losses.¹³⁴ Further, an increased ability to acquire flood-prone land through eminent domain would provide a disincentive to the redevelopment of repetitive loss properties, and would ensure that there will be less dislocation of individuals and families when the next storm inevitably comes.¹³⁵ Indeed, the threat alone of possible takings might more adequately discourage floodplain redevelopment than current efforts and help to reduce the correlated loss problem.¹³⁶

Adverse selection can lead to a “death-spiral,” “in which those who perceive themselves to face lower flood risk drop out of the program, leaving behind an ever-riskier pool of

¹³⁰ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

¹³¹ *See Eastman, supra note 5; Hill & Fugate, supra note 27.*

¹³² *Buyout and Acquisition Programs, supra note 37.*

¹³³ *See id.*

¹³⁴ *See Scales, supra note 14, at 6.*

¹³⁵ *See id.* (“By creating the illusion that alluvial and coastal plains can be made safe for development, government policy ensures that there will be greater dislocation when—not if—that safety is revealed as illusory.”).

¹³⁶ *Id.* at 42–43.

policyholders.”¹³⁷ Under an “involuntary buyout” program for repetitive loss properties, however, the riskiest properties would be those leaving the program, rather than the less risky. By acquiring parcels via eminent domain, razing them, and prohibiting their redevelopment, state and local governments would remove those properties from the NFIP’s risk pool. Removing those properties from the risk pool, and creating a coastal buffer in their place to reduce the risk to nearby properties, could drive down the actuarial rate of premiums, in turn improving the financial stability of the program as a whole and providing affordable coverage for those who still face some marginal risk.

Finally, providing greater opportunities for states to advance “involuntary buyouts” of repetitive loss properties would give the government greater ability to discourage the intolerable moral hazard typified by repetitive loss properties.¹³⁸ Rather than continue a repetitive loss-owner’s expectation of continual bailouts and taxpayer-funded redevelopment in the wake of disaster, a strong system of involuntary buyouts would incentivize owners to self-protect or relocate.¹³⁹ Holdouts who choose to stay in previously designated repetitive loss properties under such a system would be bought out at post-disaster prices. Knowing the consequences of living and redeveloping on such a risky parcel, those property owners would thereby properly bear the burdens on such redevelopment, and would receive less compensation than those who relocated at initial signs of danger. Further, such a system would permit the government to end the frustrating cycle of inevitable destruction and subsidized redevelopment with a single exercise of eminent domain.

B. Balancing Private Property Interests with Public Concerns

Extending the use of eminent domain and funding “involuntary buyouts” would help to mitigate the effects of natural disasters themselves, as well as many of the sources of the NFIP’s financial and moral problems. Given the sacrosanct status that private property rights have frequently enjoyed throughout the history of the United States, the decision to embrace eminent domain in the name of flood mitigation will, however, likely be met

¹³⁷ Lemann, *supra* note 13, at 205.

¹³⁸ See Scales, *supra* note 14, at 12.

¹³⁹ See Abbott, *supra* note 17, at 27.

with political opposition.¹⁴⁰ Nevertheless, an examination of the Supreme Court's takings jurisprudence shows that while revered, private property rights are not absolute.¹⁴¹

The right to own property is considered by many as a fundamental human right, that is “essential to individual liberty and . . . a birthright of every American.”¹⁴² The ability to freely own land was important for the early settlement [of] the American colonies,¹⁴³ and was later deemed essential by the framers of the United States, who viewed property ownership as a crucial aspect of personal liberty and security.¹⁴⁴ In light of this revered position, restrictions placed on private property rights have long been viewed as controversial and unfair violations of owners' constitutional rights.¹⁴⁵ For example, critics of the NFIP have said that “[i]t would be hard to find a program which cuts against more fundamental grains: freedom to choose where to live and build, freedom from government restriction (the federal government, at that), and freedom to maximize a profit from the land, buyer beware.”¹⁴⁶ Of course, the program has invoked the ire of disgruntled private property owners and property rights enthusiasts, and has faced (though nevertheless survived) legal challenges alleging that the program is itself a regulatory taking.¹⁴⁷ It stands to reason that a move toward expanding the forced relocation of repetitive loss property owners only further cuts against those “fundamental grains,”¹⁴⁸ and would invite more claims of government overreach.

Despite the reverence that the Framers had—that the nation continues to have—for private property rights, owners of property do not receive “unfettered discretion” when they obtain

¹⁴⁰ See Jonathan Jorissen, Note, *Katrina's House: The Constitutionality of the Forced Removal of Citizens from Their Homes in the Wake of Natural Disasters*, 5 AVE MARIA L. REV. 587, 605 (2007) (“From the very beginning of this country, private property has been revered.”).

¹⁴¹ See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (noting that “the right of the owner to use his land is not absolute”); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992)).

¹⁴² Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77, 78 (2002).

¹⁴³ See *id.* at 82.

¹⁴⁴ See *id.* at 83–84.

¹⁴⁵ See Mark W. Cordes, *Property Rights and Land Use Controls: Balancing Private and Public Interest*, 19 N. ILL. U. L. REV. 629 (1999).

¹⁴⁶ Oliver A. Houck, *Rising Water: The National Flood Insurance Program and Louisiana*, 60 TUL. L. REV. 61, 159 (1985).

¹⁴⁷ See *Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1031 (D.D.C. 1978), *aff'd*, 598 F.2d 311 (D.C. Cir. 1979).

¹⁴⁸ Houck, *supra* note 146, at 159.

title to land; instead, “the rights are subordinate to the good of society.”¹⁴⁹ Indeed, “[o]ur nation . . . has long recognized that private property interests are limited by public needs.”¹⁵⁰ State governments are able to determine “the good of society” and “public needs” by exercising “valid police power” to provide for “the best interest of the health, morals, safety, and welfare of the public.”¹⁵¹

States can and frequently do exercise police power by passing land-use regulations that “substantially advance legitimate state interests.”¹⁵² Such valid state actions are not considered regulatory takings.¹⁵³ The proposed system of involuntary buyouts, however, would entail categorical takings—the government physically occupying property, requiring just compensation.¹⁵⁴ Nevertheless, courts have determined that “the right to use land should be carefully measured against the environment’s capacity to tolerate such a use and the extent of harm which the proposed use would impose upon the established and proper use of neighboring lands.”¹⁵⁵ While the relationship between public and private interests in land is rife with tension, the law does not recognize an absolute power of one over the other.¹⁵⁶

In the case of repetitive loss properties, the government has a particularly strong interest in reversing the negative environmental and economic impact that these properties have had on their respective communities.¹⁵⁷ The benefits of converting these properties from known physical risks and drains on the financial stability of the flood insurance program into open space barriers that protect the surrounding community, outweigh the abstract interest in liberty and personal security.¹⁵⁸ Indeed, forced retreat from repetitive loss

¹⁴⁹ *McBeth*, *supra* note 120, at 116.

¹⁵⁰ *Cordes*, *supra* note 145, at 643.

¹⁵¹ *Id.*; *McBeth*, *supra* note 120, at 117; *see also* *Mayor, Aldermen & Commonalty of the City of N.Y. v. Miln*, 36 U.S. 102, 103 (1837) (holding that “[a]ll those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and consequently, in relation to these the authority of a state is complete, unqualified, and exclusive.”).

¹⁵² *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see* *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 485 (1987).

¹⁵³ *See* *Keystone Bituminous Coal Ass’n*, 480 U.S. at 471.

¹⁵⁴ *See* *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002).

¹⁵⁵ *Usdin v. State, Dep’t of Envtl. Prot., Div. of Water Res.*, 414 A.2d 280, 289 (N.J. Super. Ct. Law Div. 1980), *aff’d*, 430 A.2d 949 (N.J. Super. Ct. App. Div. 1981).

¹⁵⁶ *See* *Cordes*, *supra* note 145, at 638.

¹⁵⁷ *See* *supra* Section IV.A; *see also* *Kensinger*, *supra* note 104 (discussing the positive environmental impacts of buyouts and retreat).

¹⁵⁸ *See* *Eagle*, *supra* note 142, at 83–84.

properties would improve the security of owners by removing them from known flood risks.¹⁵⁹ Further, while the fundamental liberty interests of property owners are in part broken by forced removal, the government is able to provide owners with opportunities to move elsewhere and make owners whole by providing just compensation.

C. *Just Compensation in the Wake of Disaster: Affording Involuntary Buyouts*

Understanding how the government will afford to provide “just compensation” as required by the Takings Clause is essential to any adoption of an “involuntary buyouts” system.¹⁶⁰ Under the current system, FEMA is permitted to provide up to 75 percent of the funds required to purchase flood-damaged property in voluntary transactions, with other government entities contributing the remainder.¹⁶¹ In New York, “the state agrees to purchase homes in areas of ‘highest risk’ for 100 percent of pre-storm fair market value For eligible homes in areas of lower risk, the state will pay the *post*-storm [fair market value] with added incentives.”¹⁶² In order to expand the buyout system to include eminent domain acquisitions, state and local governments must consider any possible discounts that might make the program more affordable, as well as the external economic effects that the program will have on the state.

The recognition of “government givings” and the implementation of a “givings recapture mechanism” would make it easier for the government to provide just compensation to property owners.¹⁶³ The concept of “givings” contemplates an inverse of conventional takings, which occurs when government acts enhance the value of private property.¹⁶⁴ Givings are effected through a multitude of government programs, ranging from the complex farm subsidy programs and homeowner’s mortgage tax deductions, to the relatively simple programs, such as paving of roads and providing municipal sewer systems.¹⁶⁵ Regardless of how they take shape, judicial recognition of

¹⁵⁹ See Verchick & Johnson, *supra* note 105, at 698.

¹⁶⁰ U.S. CONST. amend. V.

¹⁶¹ See Hayat & Moore, *supra* note 47, at 10344.

¹⁶² DISASTER LAW AND POLICY, *supra* note 91, at 444 (emphasis in original) (citations omitted).

¹⁶³ Barnhizer, *supra* note 44, at 298 (emphasis omitted).

¹⁶⁴ McBeth, *supra* note 120, at 131 n.100 (citing 141 Cong. Rec. H2497 (daily ed. Mar. 2, 1995) (statement of Rep. Schroeder)).

¹⁶⁵ See Cordes, *supra* note 145, at 647; see also McBeth, *supra* note 120, at 130.

givings would ensure that taxpayers do not pay twice in takings cases.¹⁶⁶ Most relevant is that substantial government givings can be recognized in the NFIP's provision of subsidized flood insurance rates.¹⁶⁷ In his proposal for a "givings recapture mechanism" for properties improved by the implementation of the NFIP, Professor Daniel Barnhizer relies on the Court's interpretation of the "just compensation clause."¹⁶⁸ The clause, Barnhizer notes, "permits the government to offset or avoid compensating landowners for value increments created directly by government action."¹⁶⁹ According to Barnhizer:

Rather than continuing to provide flood insurance at below-market rates, the NFIP should be amended to recognize explicitly the value of its rate subsidies to individual insureds and treat that amount as a credit to offset the cost of the federal government's future purchase of redevelopment rights or other property rights from those insureds. This givings recapture mechanism would permit coastal landowners to maximize use of their properties until they suffer catastrophic flood losses, would compensate landowners fully for their property upon condemnation or purchase by the government, and could sidestep political opposition to restrictive regulation of coastal floodplain land use.¹⁷⁰

By accounting for givings, Barnhizer's plan could stretch the value of Hazard Mitigation Grants and enable the government to initiate more buyouts. Application of such a "givings recapture mechanism" under the current statute would likely be similarly limited to voluntary buyouts.¹⁷¹ Further, since the federal government is the actor providing subsidized insurance and thus effectuating the giving, such a mechanism might not grant much independence to state and local governments in acquiring risky properties. Thus, an expansion of the current statute to provide federal dollars for state and local takings would help to guarantee the fruitful application of a "givings recapture mechanism."

Even if the statute is not expanded to grant federal money to states, there is still some room for state and local independence in applying such a mechanism. For example, states and local communities provide some of the givings

¹⁶⁶ See *McBeth*, *supra* note 120, at 131 n.100 (citing 141 Cong. Rec. H2497).

¹⁶⁷ See *Barnhizer*, *supra* note 44, at 298.

¹⁶⁸ *Id.*; see also *United States v. Miller* 317 U.S. 369, 376–77 (1943) (holding that property owners are not entitled to enhanced compensation for the value of their condemned property that is directly attributable to Government activities).

¹⁶⁹ *Barnhizer*, *supra* note 44, at 298.

¹⁷⁰ *Id.*

¹⁷¹ See 44 C.F.R. § 80.11(a) (2017).

discussed above such as roads and sewers, which might be accounted for in affording just compensation.¹⁷² Further, NFIP communities under the current system frequently elect to implement additional flood mitigation measures beyond the bare minimum, in a subsection of the program known as the Community Rating System (CRS).¹⁷³ While the CRS is generally intended to generate discounted NFIP-premium rates within participating communities,¹⁷⁴ those heightened floodplain management practices implemented on the local level might also be considered as community givings, thus permitting proportionally less expensive takings. If implemented, many communities would be able to take advantage of such a system, since CRS has been adopted by 1,200 communities, comprising “approximately 67 percent of [all] policyholders.”¹⁷⁵ Regardless of the entity that provides the giving, the use of a “givings recapture mechanism” would likely help governments a great deal in affording and implementing the systematic condemnation of repetitive loss properties.

The economic impact on the community within which the government exercises the “involuntary buyout” system is critical to any cost considerations of such program. The current system of post-flood buyouts often leads to the relocation of entire neighborhoods, resulting in “lost property tax revenue and disruption of previous assumptions about community infrastructure investments.”¹⁷⁶ In the eyes of some, buyouts “turn off the economic engine” of the community, which can have broad economic impacts on the whole state.¹⁷⁷ For example, the decision to offer and accept buyouts on the Jersey Shore in the wake of Hurricane Sandy was necessarily evaluated with an eye toward its renowned summer tourism industry, the associated tax revenues, and their effects on the state economy as a whole.¹⁷⁸

To mitigate the negative tax implications of buyout programs, some scholars emphasize the benefits of securing buyout and relocation agreements in advance of the next major flood event.¹⁷⁹ By arranging the buyout before disaster strikes,

¹⁷² See *McBeth*, *supra* note 120, at 130; *Cordes*, *supra* note 145, at 647.

¹⁷³ 42 U.S.C. § 4022(b) (2012); *see also* *Lemann*, *supra* note 13, at 185–86.

¹⁷⁴ *See* *Lemann*, *supra* note 13, at 185–86.

¹⁷⁵ *Id.* at 187.

¹⁷⁶ *Hayat & Moore*, *supra* note 47, at 10346.

¹⁷⁷ *Shawn Boburg, Retreat v. Retreat: Christie and Cuomo Offer Contrasting Plans in Wake of Sandy*, RECORD (BERGEN CTY.), Mar. 15, 2013, in *DISASTER LAW AND POLICY*, *supra* note 91, at 442–44.

¹⁷⁸ *Id.*

¹⁷⁹ *See* *Hayat & Moore*, *supra* note 47, at 10346.

“the local community can assess well in advance how many properties are going to be taken off the property tax rolls and the resulting level of demand for municipal services that it will need to provide post-disaster.”¹⁸⁰ In such a situation, though a loss of revenue may eventually occur, the community has an opportunity to prepare.¹⁸¹ Another method of mitigating the negative tax consequences currently utilized is the inclusion of “incentives for owners who agree to . . . relocate within the county.”¹⁸² For example, New York offers “a 5 percent bonus on closing if [homeowners] could prove that they would use the money to purchase another home within the county.”¹⁸³ Such a strategy not only promotes the state’s interest in retaining its tax base, but enhances a homeowners’ opportunity to remain in the neighborhoods in which they have established themselves, and reduces the feeling of dislocation that may occur in the wake of a buyout.

Although these methods have only been employed in instances of voluntary buyouts, and the former method occurs pre-disaster, both provide insight into how the negative economic consequences of involuntary buyouts may be mitigated. For example, local governments carrying out involuntary buyouts may, like New York, provide additional compensation to property owners that agree to relocate within the same tax area.¹⁸⁴ Such advance agreements to cede property voluntarily and to relocate within a specified geographic area admittedly may run into enforcement problems.¹⁸⁵ Nevertheless, “in most cases, it is less expensive to buy out [repetitive loss properties] than it is to cover the cost of repairing and rebuilding after ever-more-common floods.”¹⁸⁶ Indeed, the potential value of such a system is easy to imagine in the context of those most problematic properties in risky areas, which continue to receive coverage and benefits far in excess of the property’s value.¹⁸⁷

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² DISASTER LAW AND POLICY, *supra* note 91, at 444.

¹⁸³ Elizabeth Rush, *Harvey and Irma Are the New Normal. It’s Time to Move Away from the Coast*, WASH. POST: OUTLOOK (Sept. 15, 2017), https://www.washingtonpost.com/outlook/irma-and-harvey-are-the-new-normal-its-time-to-move-away-from-the-coasts/2017/09/15/4ff2a61e-9971-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.0b12354ea68c [https://perma.cc/R3L9-8DRN].

¹⁸⁴ *See* DISASTER LAW AND POLICY, *supra* note 91, at 444.

¹⁸⁵ *See* Hayat & Moore, *supra* note 47, at 10347.

¹⁸⁶ Rush, *supra* note 183.

¹⁸⁷ *See supra* notes 27–32 and accompanying text.

CONCLUSION

Flooding and its damage in the wake of natural disasters is a national problem that continues to worsen as a result of climate change and sea-level rise.¹⁸⁸ As more and more properties suffer flooding with greater frequency, the number of severe repetitive loss properties will continue to swell; the current system will only ensure that those properties are rebuilt to flood another day.¹⁸⁹ State and local governments already have broad constitutional authority to replace repetitive losses with natural wetlands and coastal barriers, and to mitigate the effects of natural disasters using eminent domain.¹⁹⁰ What's more, the federal government would play a crucial role in replacing the current system of limitless claims and gross moral hazard by granting increased funding toward a system of involuntary buyouts.

It is essential for the federal government to step in and use the power that it is granted by the Constitution on a local level to protect the environment and the families living on the coast. As many commentators are beginning to recognize, “[i]f we’re going to adapt to climate change without loss of life and unnecessary financial hardship in Harvey- and Irma-like storms, federal, state and local governments need to start financing and encouraging relocation.”¹⁹¹ Although it may be difficult politically and financially to afford such a sweeping program that cuts against the fundamental private property rights of citizens, it is clear from the dangerous and expensive cycle of flooding and redevelopment that as individuals and as a nation, we cannot afford not to.

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¹⁸⁸ See NAT. RES. DEF. COUNCIL, ISSUE BRIEF 17-07-A, SEEKING HIGHER GROUND: HOW TO BREAK THE CYCLE OF REPEATED FLOODING WITH CLIMATE-SMART FLOOD INSURANCE REFORMS 5 (2017), <https://assets.nrdc.org/sites/default/files/climate-smart-flood-insurance-ib.pdf> [<https://perma.cc/6CG9-3GTH>].

¹⁸⁹ See *id.*

¹⁹⁰ See *supra* Section IV.A.

¹⁹¹ Rush, *supra* note 183.

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