CHAPTER 8

A Primer of Laws, Legal Concepts, and Tools That Structure Relocation and Novel Ways of Utilizing the Law

> Most of the laws you see written lack respect, and the biggest thing they lack is love. (Chief Shirell Parfait-Dardar)

> We have to ask how someone can say an entire community is not feasible or the cost-benefit ratio is not large enough to protect? I truly believe this is what colonialism and capitalism really give us, a means to judge a community's worth. (Chantel Cormardelle)

Throughout this book, we suggest that understanding the law, particularly the law as it pertains to property, is important for pursuing justice within the context of relocation planning linked to climate change. As described in the previous chapters, communities inevitably confront and work within legal structures that frame relocation processes. These engagements with the law can be "successful" in carrying out physical relocation, but they can also be divisive, tiring, obfuscating, and lead to unsatisfactory and inequitable outcomes. All relocations are informed by community histories and interactions with government and legal structures. In the case of the Isle de Jean Charles resettlement, Jean Charles Choctaw Nation leaders were pushed out of planning processes in part through legal justifications of particular notions of Indigeneity and fairness, planners' drifting operationalization of community, and the state's imposition of individual property ownership structures at the expense of Tribal development. In Alaska, legal definitions of just compensation have

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limited options for buyouts and resettlement. In the case of Kinston, North Carolina, it is unclear whether hazard mitigation options, like elevation, could have prevented relocation and would have been preferable to residents. All of these scenarios are created and conditioned by the interplay of laws, legal tools, regulations, and the interpretation and use of these structures by the many actors involved.

This chapter explores and explains some of what we view as the most critical legal structures that frame relocation possibilities and some underexplored legal possibilities that may give rise to increased options for relocating communities. While we see many academics and practitioners entering discussions of relocation, few have a working understanding of all these legal structures that shape or could shape relocation and resettlement discussions and processes. This is understandable. In fact, relocations and resettlements implicate an almost inexhaustible set of legal structures; including property law, administrative law, Indian law, corporate law, torts, environmental law, and tax law, among others. Addressing all of these is impossible. There are also key concepts in property law itself that are barely explored in this chapter, such as squatter rights or laws related to lessors that merit further exploration. Despite these limitations, there are areas of the law which have a particular relevance for relocation and resettlement and the property transactions that occur therein. There is growing support among those working on relocation as adaptation for the recreation of a New Deal-style federal resettlement agency that would coordinate resources, most importantly financial but also including legal knowledge, to support communities who are planning their relocations. On its own, such an agency is not enough if it must still operate within existing regulatory boundaries. Ultimately, though, those of us working with communities facing or embracing resettlement must also learn what is currently possible, so this is an effort to contribute to a broad ongoing query as to whether existing law and policy can be utilized in support of communities facing increasing disaster risks and relocation.

Land Use, Building Codes, and Zoning as Hazard Mitigation

The suffering felt in communities around the country each year as a result of erosion, sea level rise, and increased flooding in coastal and riverine areas demands regional-scale risk reduction measures. One way to reduce risk of infrastructure flooding is by broadly regulating land use.

Land use regulations are primarily a local function, stemming from police power that is held by states and enforced locally. Land use management and regulation can be achieved through a broad suite of mechanisms, but three of the most used and relevant for relocation and resettlement are: (1) the enforcement of stricter building codes, such as requiring a minimum lowest floor elevation, which can drive relocation but also increase the safety of new communities; (2) blight ordinances, that can drive redevelopment; or (3) zoning regulations, such as limiting development in risk-prone areas or create setbacks. Generally, land use planning and building codes are seen as critical tools for hazard mitigation to disasters that stem from climate change (Berke et al., 2014; FEMA, 2021).

Hazard mitigation via zoning and building code regulations rearrange risk and safety on the coast. They can exacerbate inequity under certain conditions, and create the areas that look economically efficient to "buy out." For example, when local jurisdictions want to implement higher standards via building codes, such as higher elevation requirements, those higher standards are applied to either new construction, or are required to permit construction on existing structures that will be substantially improved or are substantially damaged. These latter designations mean that either a structure is being improved to over 50% of the home's value (substantially improved), or the damage to the home that needs repair totaled over 50% of its value (substantially damaged).

Elevating infrastructure is expensive and not everyone can afford the cost. Local jurisdictions can offer subsidies toward the cost of retrofitting current structures to meet new building codes, utilizing elevation grants via hazard mitigation funding. This can happen either in advance of a disaster or following a disaster. Hazard mitigation grants through FEMA are primarily available via annual appropriations to programs such as BRIC (Building Resilient Infrastructure and Communities) or following a disaster, through programs such as HMGP (Hazard Mitigation Grant Program). Local jurisdictions can apply to FEMA for money to aid homeowners in elevating their homes, provided that eligibility criteria are met and that grants are available. In practice, this means that local governments set criteria that identify which homes and homeowners to reach out to for elevation grants, and whether elevation or another strategy, such as buyouts, make sense within their jurisdictions. In some cases, particular neighborhoods or families actively seek such grants; but it is more frequently local officials who begin these processes. When funding

is available, mitigation grants are competitive among jurisdictions and applicants must demonstrate to the federal government that projects are cost-beneficial. If there is insufficient grant funding, it is not enough to meet a basic cost–benefit threshold (every dollar spent on the risk reduction measure prevents one dollar of losses in the future), but it is also necessary to be even more cost-beneficial than other projects. Older structures, often in areas where there has been a disinvestment in infrastructure and a reduction in population, are less suited to cost–benefit calculations (Frank, 2022a), leaving these areas further neglected. The outcome may be that low-income neighborhoods are ineligible for hazard mitigation, such as elevation or armorment, and in turn they are more exposed to flooding and subsequently seem like neighborhoods that should be bought out.

In addition, hazard mitigation grants from the federal government often require a local match of 10 or 25% that is borne either by the local jurisdiction or by the individual homeowners. If municipalities are dependent on property taxes to meet match requirements for federal mitigation grants, it may be impossible for a municipality to apply for federal aid if/when property values (and therefore property taxes) are low because they may be unable to fund the match. Additionally, reduced property taxes after a buyout can have negative impacts on the provision of municipal services. Frequently, homeowners must pay the price of matching requirements themselves, predisposing wealthier communities to be able to make this investment, which is heavily subsidized by federal aid. Wealthier and larger communities may also have an advantage over less wealthy and smaller communities in terms of staff capacity to manage grants, as was described in Chapter 7 for Akiak, Alaska. As a result of these socio-economic constraints, local jurisdictions make decisions regarding where to focus mitigation efforts. Those decisions are rife with socio-political and economic considerations. Hazard mitigation, therefore, is not deployed as a risk reduction strategy to high water and ecological conditions alone. Subsequent socio-political and market-driven flooding, therefore, makes neighborhoods that failed to elevate seem like likely candidates for relocation. Wealthier neighborhoods supported through mitigation subsidies can thus withstand flooding and may not become candidates for relocation.

The poor, and communities of color, may be more likely targeted by local jurisdictions for buyouts. As described in previous chapters, race and class has long structured land use planning in the United States

and relocation and buyouts are intimately tied to longer trends in local or regional forms of social exclusion, built environment, and regional planning. This includes how zoning and land use structure risk. An analysis by A. R. Siders and Jesse Keenan found that while risk exposure to flooding was linked to all methods of hazard mitigation among risk-prone neighborhoods in North Carolina, socio-economic features were inversely correlated to which mitigation strategies were implemented. In their analysis, "median home value correlates positively with shoreline armoring and negatively with the occurrence of buyouts." More expensive homes were armored via hazard mitigation, less expensive homes were bought out. Likewise, "the percent of the population that identifies as people of color correlates positively with buyouts and negatively with shoreline armoring" (Siders & Keenan, 2020). Similarly, a recent analysis of FEMA's home elevation grants found that in many states grants had the unintended effect of turning wealthier and more white areas into more resilient neighborhoods with rising property values. In fact, many recipients of elevation grants benefited from reductions in insurance costs and increased property values, in some cases selling their newly elevated homes at a substantial profit (Frank, 2022a). In twelve of the states analyzed by Frank, over half of the elevation grants had gone to wealthy and/or mostly white communities. Two exceptions were North Carolina and Virginia, both of which had met match requirements for homeowners and therefore eliminated a tremendous impediment for lower-income grant recipients (Frank, 2022a). This illustrates the ways in which purposeful consideration of these barriers, coupled with government action, can in fact render these programs more equitable.

Zoning ordinances are discussed contemporarily as a promising hazard mitigation solution to climate change, such as permitting or not-permitting development in the floodplain or requiring minimum elevation levels. Often left unmentioned in these narratives is that the concept of zoning has a violent history. Zoning emerged from intellectual conceptualizations of the best economic use of a property, and has ties to the eugenics movement and scientific racism (Freund, 2007). Urban historian David Freund has argued that zoning and racial covenants originally shared a similar rationale (2007). Between 1910 and 1948, as many as 85% of new developments had racial covenants, legally contractual prohibitions on use, purchase, or occupancy by Black Americans. These racial covenants were later replaced with zoning regulations, such as minimum lot size, single-family housing requirements, or expensive

building codes that ostensibly had the same exclusionary intent and effect. Racial zoning was ruled illegal in the 1917 Buchanan v. Warley ruling and racial covenants were eventually deemed unenforceable in 1948; but, in practice, socio-economic exclusion continued to be legal. Following the 1926 Supreme Court holding in Euclid v. Ambler, municipal zoning was considered valid if designed to promote "general welfare," which functionally replaced racial covenants, though they accomplished similar ends. The federal district court opinion that preceded the Supreme Court holding in 1926 and was overturned, had directly expressed concern that the zoning ordinance discriminated against renters and people of modest income, classifying and segregating people based on race, wealth, and housing status (Freund, 2007).

Relocation after climate change-fueled extreme weather can also be seen as a form of forced displacement of people who cannot afford to meet new building codes. Zoning also continues to be used as a means of attempting to delimit the users of property. As discussed in Chapter 6, after Hurricane Katrina made landfall in 2005 and the subsequent floods due to levee failure, a proposed St. Bernard Parish regulation prohibited renters that were not family members as a means of preventing an influx of African American renters, was struck down due to a Civil Rights complaint (Rodriguez-Dod & Duhart, 2007). Over the last two decades, costs associated with federal and local elevation requirements may be segregating the coast along these same socio-economic and racialized lines. Those who are able to meet the requirements and maintain flood insurance are better able to rebuild after storms, others move in the aftermath and sell land to those who can rebuild above minimum flood requirements.

In 2021, FEMA released a guidance document called the "Guide to Expanding Mitigation: Making the Connection to Codes and Standards" (FEMA, 2021). In it, FEMA explicitly calls for stricter building codes and zoning regulations as a measure of promoting disaster mitigation. The guide makes the claim that "such codes can provide insurance benefits for residents and improve a community's applications for federal mitigation grant funding." The 11-page guide to implementing codes and land use standards, including zoning, does not explicitly refer to the racialized histories outlined above; or the difficulties in benefit/cost, federal-cost matches, or competition that may accompany "applications for federal mitigation grant funding." However, it does state that, "At its worst, code enforcement gives privilege to those who make complaints, sends

more resources to those with the loudest voices, and neglects those with the most need" (FEMA, 2021). The solution to this "worst scenario" is to develop regular procedures and mechanisms that ensure that those with the loudest voices (or racist voices) are not given as much or more standing in urban governance as the poor. While true, this is unenforceable advice. Some practical solutions are that municipal governments could offer owners who need them low-interest loans or, better yet, grants for mitigation. It is not clear the extent to which municipalities have these mechanisms or the funding to promote equity in hazard mitigation—or if FEMA is monitoring these outcomes.

Using and Better Understanding Land Use, Building Codes, and Zoning

We believe that land use zoning and higher building standards can and should be utilized to ensure greater safety of housing, including for renters; and to limit irresponsible development. However, extreme care is needed to avoid simply displacing those who cannot afford to meet a higher standard. And even more care is needed to prevent the unequal application of hazard mitigation in favor of those who have greater resources and ability to navigate the resulting regulatory systems. A more robust understanding of who benefits from stricter building codes is critical. Frank's analysis of elevation grants demonstrates that when matching requirements are met by the state, greater equity in hazard mitigation follows. An approach to hazard mitigation that has been called for by several community allies is for the federal government to eliminate the cost match in hazard mitigation grants for rural and impoverished communities, or for individuals who meet identified economic thresholds. The 10–25% matching requirement of a buyout, elevation project, community protection, or other hazard investment is unable to be met by some portion of the population, and by many municipal governments. This results in inequities in the distribution of adaptation and mitigation resources, but also creates an inability to remain in compliance with increased codes and standards that are intended to provide protection. Property owners inequitably affected and injured by land management, zoning, and other hazard mitigation strategies. Because FEMA has certain civil rights obligations, it would be interesting to see if inequitable grant

distribution may incur liability. However, the courts accord great deference to agency decisions, and it can be quite difficult to hold an agency accountable in court.

The National Flood Insurance Program (NFIP) and ongoing proposed changes to the program (Teirstein, 2022) will also have an impact on land management in floodplains, including the current administration's proposals to not issue flood insurance to businesses in the floodplain or to new construction. Efforts at using flood insurance pricing to drive individual decisions regarding investments in hazard mitigation, or relocation, through efforts such as Risk Rating 2.0 seek to eliminate the false market signals that subsidized rates offer. It is clear to us that this will disproportionately injure those who cannot afford the substantially higher premiums and also cannot afford to, or do not want to, leave the floodplain. Increasing insurance costs can simply result in even further reduced levels of insurance coverage and greater impacts to communities and families after a flood. A substantial drop in insurance coverage has already been occurring following rising rates under Risk Rating 2.0 (Frank, 2022b). Although we realize that flood insurance has been a driver of unsafe development, we also recognize that many of the communities most impacted by rising rates are individuals who were either inadequately informed of their risk or whose presence predates the NFIP and the current levels of flood risk. Again, a robust impact analysis of these decisions is necessary. While it is beyond the scope of this book to analyze the NFIP, a continuing concern is that hazard mitigation will essentially lead to gentrification of the coast, and that the burden of past policy decisions is being placed upon families and not upon the larger systemic actors that drive risk. Current policy proposals fail to differentiate between those who willingly take on risk and those upon whom flood risk has been imposed. They also fail to differentiate between those who may be unwilling to take on the burden of higher premiums and those who are unable to do so. After all, the federal government itself owns many properties in the floodplain, and state actors continue to directly permit and encourage floodplain development when it suits their economic interests.

Restricting Development

Although land use and zoning can be used to restrict development, and are discussed above, it is worthwhile to separately discuss the role that restricting development can play and the challenges that such efforts face.

There is a tension between developing coastal properties, which are seen as valuable—and emptying coastal areas that are seen as vulnerable. Land use management reflects a tension between requiring or encouraging land to be left in its "natural" undeveloped condition as a mitigation decision, and permitting development as an economic decision. Broadly, this tension has been "solved" through a property regime that privileges economic utilization of land (Platt, 1999a; Sprankling, 1996). For example, the right of property owners to develop their land for economic gain is consistently privileged above a collective right to safety. In the "Guide to Expanding Mitigation" mentioned above, FEMA explicitly addresses the issue of when codes are seen as obstructive, not to current residents—which we find likely to be injured by such codes—but to *development*. The document states, "Many communities avoid adopting current codes or choose to adopt older versions because people think more strict requirements may limit development and increase building costs" (FEMA, 2021). This argument continues to focus on the needs and desires of developers and not on the concerns of existing residents, and highlights the same misalignments Isle de Jean Charles residents faced when confronting state logics of economic development.

Again, in coastal Louisiana, in the town of Dulac, Chief Shirell Parfait-Dardar of the Grand Caillou Band of Biloxi-Chitimacha-Choctaw, consistently sees tribal members be unable to rebuild following a disaster due to the high cost of home elevation, the limited availability of federal grants that can be used to offset the costs of meeting rebuilding requirements, and the barriers of matching requirements (Chief Shirell interview). Developers take advantage of this situation, purchasing property at low cost from residents (who often cannot afford property elsewhere), and then subdividing the property to develop for recreational users. The presence of recreational users, who bring political clout, higher home values, and the increase in income for municipal governments, can lead local governments to invest in protection mechanisms that were previously not considered cost-beneficial. This subdividing can be perceived as an overall net-benefit in economic terms; while investing government funds in damaged houses without insurance can be understood as "wasting" government funds on people who "need to relocate," or whose neighborhoods, "shouldn't have been there in the first place." These conditions have led tribal leaders like Chief Parfait-Dardar to point out, "So you couldn't assist the community residents that live their entire lives and are stewards of that land. But now you can make exceptions for anybody that

wants to move in there that has money and wants to turn it into camps?" A 2020 complaint to the United Nations, submitted on behalf of five Tribes in Alaska and Louisiana references this dynamic as leading to the forced economic displacement of Grand Caillou Dulac Band of Biloxi-Chitimacha-Choctaw citizens and discusses the catastrophic consequences such displacement has for social relations, culture, and livelihoods (Alaska Institute for Justice, 2020).

While rarely used, there are mechanisms available to address the economic interest of current land holders while not sacrificing the safety of future owners. Two mechanisms are worth a brief discussion: Transferable Development Rights (TDRs) and Conservation Easements. TDRs are a mechanism by which there is a payment for the extinguishment (or transfer to an inland area) of development rights (Georgetown, 2020). Could a community that already wishes to maintain its property in an undeveloped state, sell these rights to support its conservation, or relocation, efforts? Several scholars and policymakers have looked toward transfer of development rights (TDR) mechanisms as a possible way in which to defray the economic impacts of restrictions on economic development (Dyca et al., 2020; Robb et al., 2020). A TDR treats the right to develop as only one stick in the bundle, and allows it to be severed and traded (Siders, 2013). Of course, the success of such a mechanism depends upon the existence of a marketplace in which such rights can be traded. While controversial, the carbon market does provide an example for which climate mitigation is funded by swapping use and voluntary disuse. Attempts have also been made to create markets for urban drainage rights. Could climate adaptation via a TDR mechanism be another such market?

Another tool that could potentially fund a lack of development is a conservation easement, which gives power to either a land trust or a government entity to limit development on a particular parcel. The sale of this right becomes attached to the land and impacts even future owners. Here, a landowner is also compensated for the loss of development rights. Conservation easements have been used successfully to protect ecosystem services, watersheds, and promote long-term recreational uses (Wuerthner, 2020). Although there are also criticisms of their use, we ask if there could be compensation given to people who self-select to not rebuild following a storm, or to give up development rights. For our purposes, we also wonder if these existing mechanisms could provide funding for communities to advance a dignified and locally-led relocation.

Takings Jurisprudence

As authors concerned with the scope of issues related to climate justice, we are particularly curious about how development along the coasts can co-occur with some neighborhoods and families feeling regulatory and economic pressures to abandon or relocate from the coast. In other words, as schools close in the bayous of Louisiana (Setyawan, 2021) and mandatory buyouts are implemented in Harris County (Project Recovery, 2023), how does new development simultaneously come into existence in nearly these same spaces? Regulating land use and limiting development, as we've seen, is a strategy for hazard mitigation; but this strategy has multiple obstacles. Most simply, municipal governments sense future losses in tax revenues on potential development, and are hesitant to limit this development. This can happen simultaneously to buyouts and resettlement because of the hazard mitigation and risk creation outlined above. More challenging to limiting development, structurally, is that limiting development as a hazard mitigation strategy is complicated by the widespread interpretation of property rights championed among conservative and libertarian advocates that call for unrestricted freedom of property owners to make their development decisions unencumbered by the government (Douglas & Lord, 2017). Mentioned in Chapter 2, property rights are linked to Takings Jurisprudence, which is derived from the Fifth Amendment and guarantees an owner the right to just compensation if property is taken for public use. A conservative interpretation of property law can mean that by "downzoning" an area from developable, to less developable, a municipal government can be threatened with a "per se taking," meaning the municipal government may be threatened by having to pay the property owner the value *potentially* lost by not developing due to changes in regulations. In this case, changes in regulations would be interpreted as a taking of use rights (in the property bundle) from the owner, for the public. Although the specter of takings is raised far more often than may be merited, takings jurisprudence is unsettled, meaning that there is a fluctuating set of parameters utilized by courts over time. Those parameters are likely to be continually challenged as coastlines face repetitive floods and potentially incur additional development restrictions.

Despite the challenges of adequately summarizing an unsettled and changing area of the law, some legal scholars have attempted to create a typology of takings jurisprudence. One such attempt at summarizing

case law was completed by Robin Kundis Craig who suggested that the Supreme Court has recognized three categories of takings: physical takings, partial takings where there is the loss of some uses or value, and regulatory takings, including per se takings (Craig, 2011). Physical takings occur when the land is literally taken from the owner, such as when highways were built in the 1950s, and neighborhoods demolished for urban renewal. These types of takings always require compensation and are the easiest to prove, at least when the land is taken from an owner recognized under U.S. law.[1] Physical takings are legally carried out via eminent domain, which we explore later in this chapter. Partial takings arise when the government only needs to expropriate a portion of a property for a public use, such as when a transportation project requires the use of a portion of a larger lot.[2]

Per se regulatory takings occur when the owner has been deprived of all possible economic uses by changes in regulation or law. This concept stems from a 1922 Supreme Court Case, *Pennsylvania Coal Co v. Mahon*, in which the court found that regulations, if they go "too far" in limiting possible uses of a property, can constitute a taking. Because per se takings can mean local governments are culpable for economic loss of potential development, they are a worrisome area of the law when trying to regulate development as hazard mitigation; but how "worrisome" is unsettled. The concept of "too far," for example, has been described as a nearly impossible bar to reach, as regulations rarely deprive owners of any and all uses. Furthermore, the owner has to have had a reasonable expectation of those uses, and there is no taking when the rights that are being claimed were never part of the owner's title as understood by the confines of state law (Craig, 2011; Meltz, 2007). This is one of several examples of where state constitutions and laws are critical and making comparisons between states can be challenging.

Courts have also found governmental actions which take away essential elements of property ownership, such as the right to exclude others from

[1] This law does not apply to loss of Indigenous lands since the Supreme Court in its Tee-Hit-Ton decision (1955), held that Aboriginal title, title based on status as the first and original inhabitants of the land is not property within the meaning of the Fifth Amendment (Shoemaker, 2020).

[2] These types of takings can create many different challenges for government and the courts, including the question of how exactly to assess the value of the expropriated portion when the reduction in lot size may decrease the value of the property as a whole or may even leave it unusable (Bell & Parchomovsky, 2017).

your property, to be a takings in some cases (Ely, 2008). For example, requirements that a recreational walking trail be permitted have been found to impinge upon property owners' rights and thus constitute a taking. In cases like these, litigation usually focuses on whether or not compensation should be provided, and less on whether the regulation itself is permissible (Fitzpatrick, 2006). If municipalities incur compensation burdens for taking essential elements from property as a zoning strategy, for example requiring a setback from the water that limits access, it may limit what is financially feasible as hazard mitigation.

Cases in which the courts have found that there was *not* a per se regulatory taking also have implications for resettlement, relocation, and development in the floodplain. In 1978, the Supreme Court held in *Penn Central Transportation Co. v. City of New York* that the state could exclude persons from developing the air space above the Grand Central Terminal into a multistory office building without incurring an obligation to pay compensation. In its holding, the court provided a three-part test that looked at the economic impacts of the regulation, the existence of investment-backed expectations, and the character of the regulation and found that there was no taking. This is consistent with other cases that demonstrate when zoning regulations serve a beneficial public interest, a takings has not occurred and no compensation is warranted.

In a similar case, but with the opposite outcome, Supreme Court Case, *Lucas v. South Carolina Coastal Council*, in 1992, the Supreme Court noted that the *Mahon* ruling had left ambiguity about what would constitute "too far." In this case, the landowner had purchased empty lots two years prior to the passage of a law which prohibited development on that site. The Supreme Court found that Lucas had been deprived of all economically beneficial uses, that there had been a taking,[3] and the owner was owed compensation. It is worth pointing out, however, that the Court did note that: "…the property owner necessarily expects the uses of his property to be restricted, from time to time…" (Lucas, 1027). It is also worth noting that the economic value of the lots in question was

[3] The court provided an analysis for whether a total taking had occurred which looked at: (1) the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, (2) the social value of the claimant's activities and their suitability to the locality in question, and (3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners).

not a product of a free market, but of governmental interventions such as flood insurance that subsidize and even promote at-risk development (Connolly, 2003). However, the court did not question the free market that it allegedly was protecting (Connolly, 2003).

Another case which is frequently cited as an example of takings law impeding regulations is *Dolan v. City of Tigard*, in 1999, in which the plaintiff sued the City after being told that they would need to dedicate a portion of their property to the city to be used for a bike path in order to enlarge their store. The portion of the property in question was in the floodplain, and the City was not offering compensation. The Court held that there must be "rough proportionality" between the burden placed on the property owner and the harm to be avoided (Platt, 1999a, 1999b). According to Platt's analysis, this act was held to be a taking because the land was going to be used for an amenity and not just to reduce harm: "Harmful hazards can be regulated without compensation through the police power, while public benefits, such as parks, or open space, must be acquired through governmental purchase or condemnation" (Platt, 1999a, 1999b, 158). In essence, the legal challenge was not due to the floodplain element, but to the use to which the property would be put.

These cases help outline when zoning can limit development without being a takings and when zoning will incur compensation burdens.[4] These legal boundaries remain unsettled; but are critically important. Municipal governments already lose potential tax revenue when limiting development; if they must also pay compensation to land owners, the bar for hazard mitigation through regulation becomes very high. With compensation, governments may impose restrictions on development or physically take private property, but both actions must, at least theoretically, serve legitimate public interests. The definition of "public interest" has been fluid and contested over time; but was broadened in the *Kelo v. City of New London* (2005) ruling. Here, in a controversial decision, the Supreme Court concluded that private property could be taken to promote economic development, which it considered in the public interest. Many legal scholars and planners have theorized about the implications of the *Kelo* ruling, as it appears to open the door to wholesale efforts at turning over land use from lower-income residential properties

[4] The cases described are only a subset of the cases that relate to property rights and the Fifth Amendment. There is also substantial jurisprudence related to due process that is beyond the scope of this manuscript.

to larger-scale commercial properties. However, its application has thus far been limited.[5] There is possible concern here for climate resettlement, however, if lower-valued homes were purchased and owners relocated to protect commercial or higher value properties, this could legally be considered in the public interest.

Novel Uses of Takings Jurisprudence

One question that we had is whether takings law could support communities who need to relocate. As described above, the specter of takings is more commonly used to prevent regulations that would limit development, and not in support of climate adaptation or hazard mitigation. However, the long history of takings jurisprudence has done much to define the extent of property rights, the components of the metaphorical bundle, and the ways in which property rights can be threatened by state actions. Is this a space where the law can address the needs of relocating communities by drilling down into their rights as property owners?

One potential strategy to support resettlement, may be to consider the possibility of passive takings. Christopher Serkin has suggested that takings liability might apply in cases of regulatory *inaction* by government that exacerbates risk or might be thought of as neglect (Serkin, 2014). Serkin notes that the Constitution is "typically thought to create only negative rights—rights that constrain the government from acting in certain prescribed ways" (Serkin, 2014, 346). Thus, regulatory takings are typically conceived of as compensation that is owed when regulations or policies limit property development or use. However, Serkin argues that because the government is already so enmeshed in regulating coastal areas and because local and state jurisdictions can purposefully avoid taking action due to liability concerns, it is possible to use the

[5] One test for the existence of a legitimate public interest is whether or not the burden on the owner, from the regulation, is proportional to the public benefit, and whether the regulatory burden serves the same purpose that simply denying a permit would serve (Fitzpatrick, 2006). For example, the public benefits of an amenity that only serves a small number of persons are different than those accrued through the construction of a facility such as a hospital with public health implications. A regulation that provides a blanket exclusion might also be more likely to be treated as a taking, rather than a process in which permits are denied or provided based upon a more nuanced understanding of the particulars.

same legal theory to argue that *inaction* by the government to regulate development or protect property may constitute Takings liability. In this case, inaction is seen as negligence in a government that is already acting within the context of development regulations and disaster mitigation. Serkins takes the example from tort law concerning the difference between negligence in the case of a passerby who neglects to throw a rope to a drowning person (who is not liable), versus a driver who neglects to turn the wheel when a person is in the road (who may be liable). "While both involve *inaction*, there is a critical difference: the driver, by getting into the car, has created the conditions giving rise to the ultimate injury" (Serkin, 2014: 348). Claiming the state is already involved in coastal regulation, Serkin likens government liability to be more akin to the driver, rather than the passerby. This thinking goes beyond most legal theorists' interpretations of liability, but these speculative claims on the role of government to protect property may continue to be tested in courts.

At this point in time, there is little case law to support the possibility of a passive taking (CLF, 2018), and there is often a wide gulf between the speculation of legal scholars and the decisions that take place within courts. For example, in a 1982 case, Allain-Lebreton Co. v. Dept. of Army, etc. the Court of Appeals found that the decision by the USACE to not locate a levee on property owner's lands was not a taking. The Court indicated in its decision that simply leaving property alone did not constitute a taking, and that the sovereign must only pay for what it takes and not for lost opportunities. However, one case in which the Fifth District held that a governmental inaction in the face of an affirmative duty to act could constitute inverse condemnation. *Jordan v. St. John's County*, involved a road that the county had ceased maintenance upon. The court stated that the County could follow its formal abandonment procedures; but could not just stop maintaining the road, and therefore limiting the access of property owners. It could, however, go through the appropriate public process leading to the same result without abandoning its duties in the interim. On appeal, the Appellate Court held that the trial court should be left to determine what constitutes an appropriate level of maintenance, leaving this question of whether inaction could constitute a takings, unsettled.

Eminent Domain

The previous section asked when a regulation could be considered a taking, but a more direct example of takings is the exercise of eminent domain. When the government exercises its right to take property from a private owner in order to serve the public good, with compensation, it is exercising its right to eminent domain. There is a long history of urban renewal policies disproportionately taking homes from racialized minorities and leading to a net loss of low-income housing as well as the decimation of thriving African American neighborhoods (Rothstein, 2017). Likewise, the use of eminent domain as a response to blight has been used in some cities to penalize owners who could not afford to maintain properties and to accelerate gentrification. The Uniform Relocation Act, described in Chapter 6 was created, in part, as a response to this history of displacement.

Therefore, it may be justified to be concerned when eminent domain begins to be a tool of forcing buyouts and resettlement. Currently in Harris County primarily Latinx communities are in the middle of a "mandatory buyout" sponsored by HUD after FEMA voluntary buyouts did not remove a substantial portion of homeowners out of the floodplain (Ahmed, 2022). While the program appears to be attempting to ensure buyout participants a comparable home outside of the floodplain, some unknown portion of the population is also upset by the policy (Ahmed, 2022). In addition to the HUD funded mandatory buyouts, the U.S. Army Corps of Engineers also formally "acknowledges the requirement for a complete plan includes retaining the use of eminent domain, if necessary, for acquisition, relocation, and permanent evacuation of the floodplain" (USACE, 2018). In other words, the USACE is requiring local and state jurisdictions to agree to using eminent domain, "if necessary" if large-scale relocations are part of hazard mitigation planning. Most acquisition programs done as a flood mitigations strategy, to date, have been voluntary, but this recent shift in USACE policy, and the use of mandatory buyouts in Houston, has been seen as a cause for alarm by some local jurisdictions (and causes concern among the author team). It's too early to tell what the scale of mandatory buyouts will be; and whom these plans will target. It is also worth inquiring whether the guarantee of a comparable home might not have been sufficient for many homeowners.

Eminent domain and blight ordinances have historically been weaponized against Indigenous and marginalized populations, but recent

perceptions of and opportunities within eminent domain may not be as overwhelmingly negative as many legal theorists have speculated. A study on the use of eminent domain in Philadelphia found that residents expected the government to protect property as an investment, and were only opposed to the use of eminent domain when the property was in active use. The use of eminent domain when a property was abandoned, or otherwise seemingly outside of active use, did not engender opposition (Becher, 2014). When properties are in active use, eminent domain also triggers the Uniform Relocation Act, possibly allowing for moving costs associated with relocation. In other words, unlike voluntary buyouts, use of eminent domain could trigger additional financial and administrative support for relocating individuals, families, and communities.

In a more novel approach to eminent domain, we consider what happens to properties that have been previously taken and are now owned by local government. Municipalities across the United States have acquired vacant properties, as a result of blight ordinances, abandonment related to previous housing crises, etc., and in some cases have left them unused in the hopes of a future sale and profit. This in essence creates unaccounted for surplus capital within municipal systems. Sheila Foster has argued that land which has become the property of the state should be considered a public property and therefore subject to the public trust (2022). If so, at least in some states, being part of the public trust might put limits on the transfer or sale of that land for purposes outside of the public good. She has questioned whether the state has a responsibility to place these properties into productive use, such as allowing neighbors to use land for food production, or simply utilizing them to house residents who lack basic housing. According to her analysis of state laws, some have used the public trust doctrine to prevent the sale of public parks or streets, for example (Foster, 2022). Adopting such an approach to publicly held lands could create a source of land within and around receiving communities which could be utilized to house relocating communities. One key challenge faced by communities trying to relocate together is not only the high cost of lands further inland, but also the increases in prices that result when landowners become aware that a large tract of land is being sought. Putting previously seized blighted lands into use as receiving parcels seems to us like a gracious legal response to people in difficult situations.

The use of eminent domain in relocation and resettlement scenarios, to date, remains worrisome to the author team. As we've discussed throughout this book, forced relocation is part of some of the worst

episodes of U.S. history. Most importantly we urge climate activists and policymakers not to consider forced relocation out of an at-risk area as climate adaptation. We feel compelled to point out, however, that use of eminent domain does ensure compensation. Compensation is mostly equated to fair market value, which we have discussed extensively in Chapter 7. We point out again here that appraisals may be the outcome of racialized and cultural bias. For example, there is indication that appraisers may select lower value comps when appraising a property owned by a black family (Kamin, 2022). This problem has risen to national interest, and the Biden administration has created a Task Force on Property Appraisal and Valuation Equity, in order to evaluate the causes of appraisal bias. Even without bias, prices frequently hold historical legacies of disinvestment in communities or racialized housing practices. Environmental justice advocates, such as Rachel Godsil, have suggested that damage awards for nuisance claims for pollution in minority communities need to set the replacement cost of a home to that of a similar home, in a nearby non-segregated community and not to fair market value (2005). Similarly, in Chapter 7, we argue for replacement cost to replace fair market value in some instances of buyouts or when eminent domain is used in cases of relocation as an outcome of flooding risk or hazard mitigation.

While we worry about the use of eminent domain in relocation scenarios, and the problems with fair market value and appraisal, we also worry about abandonment. If no mechanism for resettlement exists, and environmental degradation renders continued habitation impossible, there may be no requirement for the government to compensate those persons with no recourse other than to leave. Abandonment and/or property seizure may be defended by the government using the doctrines of public trust and public necessity.

Public Trust and Public Necessity

Two commonly used defenses that can be applicable to a physical, partial, or per se takings claim, are the public trust doctrine and public necessity, both of which may come to bear on resettlement. The public trust doctrine, which varies slightly from state to state, is intended to protect submerged and submersible lands for the purpose of navigation, fishing, and recreation (Moore & Acker, 2018). It dates back to Roman law, and was brought to the colonies and later codified via state and national legislation, such as the 1953 United States Submerged Lands Act. The

doctrine holds that waters of the state are a public resource, held in trust, which should be managed on behalf of the public and to which all citizens should have access (Siders, 2013). A recent case, *Murr v. Wisconsin*, decided in 2017 by the Supreme Court, noted that when the challenged land use limitations are inherent in background principles of state law, then there cannot be a taking (Murr v. Wisconsin, 2017). In other words, this delimits the holding in *Lucas* to cases where the proposed regulation is not directly related to state law. This allows the public trust, as defined by the state, to play a larger role in the decisions regarding what constitutes a taking.

The public trust doctrine allows the state to defeat a takings claim when the infringement on another's property was for the purpose of protecting coastal and tidal waters, including their usage (Craig, 2011). As a result, the Public Trust doctrine is often used as a defense for coastal regulation and protection activities that impinge on property rights (Craig, 2011). This is the case with regard to larger infrastructure projects, for example. There is some variability from state to state regarding how expansively the public trust is imagined. For example, there is a great deal of variability regarding the definition of submerged lands, with some states using a high water mark, while others use the mean low water or even the first line of vegetation (Peloso & Caldwell, 2011) The state's role with regulating submerged lands is an important consideration in the face of sea level rise, because the rights that property owners have within an at-risk community may change as it becomes submerged. In many states, ownership can actually be lost when lands meet the classification of water due to repeat submerging, or changes in tides. It is unclear what this means for communities that are becoming submerged. Peloso and Caldwell have speculated that the public trust might actually require limiting development in order to protect future interests and prevent waste (2011). Full understanding of this doctrine, therefore, becomes critical as sea levels rise.

Public necessity is a defense which the government may invoke in times of emergency. Like the public trust doctrine, public necessity depends upon the state statutes and constitution, including how they define an emergency. Although the origins of public necessity focused more on immediate emergencies, such as urban fire, there have been more recent expansions of the concept. In Louisiana, for example, coastal protection is included under the umbrella of public necessity and the destruction of

oyster leases for coastal restoration has not been found to be a taking (Craig, 2011).

Public use doctrine and public necessity may be legal tools that can limit development without incurring compensation for owners who are denied future development costs. However, in the context of resettlement, a state could also lean on public use as a means to avoid compensating property owners for the loss of their property. In essence, this creates a particular set of circumstances where uncompensated takings of property can be legal. This is a frightening possibility, as protections for homeowners who wish to remain in place may potentially be lost as the land erodes away; if the state decides it is necessary due to emergency or comes under state jurisdiction as submerged land.

Alternatives to Individual Property Exchange as a Relocation Solution

Existing Communal Relocation Mechanisms

One of the main questions we had as authors is whether legal mechanisms existed that would allow a community to act, and be funded, collectively, as opposed to individually, when planning for relocation. This could include how to organize collectively to recreate a community in a different location, and how to leverage state or federal funds to develop new community-based infrastructure as well as homes. These questions become particularly relevant for tribes, racialized minorities (Phillips et al., 2012, 410), and communities with strong social ties, and may apply to communities who wish to recreate community-centric or livelihood continuity after relocation events.

Articulating options for collective organization and action may provide some protective bargaining power against a state that has its own goals. Given the problematic history of how eminent domain was used to disrupt Black and BIPOC communities for highway development, and the challenges that may accompany coercive migration as a result of land management and zoning, we were interested in national and international examples of collective property decision-making structures and legal co-ownership organization. The creation of collective property rights can also increase community stability, create wealth, and even slow gentrification (Lamb et al., 2022). There are many forms of community associations across the United States, including condominiums, cooperatives,

and homeowners associations (Foundation for Community Association Research, 2021). In 2021, 29% of the U.S. population occupied a housing unit in such a community association (Foundation for Community Association Research, 2021). Many of these associations are very limited in purpose, restricting certain types of development or paying for a shared amenity such as a community center. In and of themselves, they don't serve the desired purposes articulated here, but they do show that communal ownership is more common than most might assume. This is in addition to land trusts and other mechanisms described below.

It is worth interrogating whether communities who wish to collectively relocate could, working with trusted partners, utilize under-exploited existing legal mechanisms in order to serve their needs. This may or may not occur in conjunction with state enabling legislation and support from regulatory agencies. This section is not a set of recommendations—but rather a series of thought experiments in identifying options that, so far as we know, have not been thoroughly explored as possibilities for relocation adaptation strategies. These possibilities each have drawbacks and will differ based on the local context in which they are being implemented and who is implementing them. The detrimental aspects should be considered along with the hopeful. We also recognize that there are additional alternatives not considered here, and that many more possibilities might be imagined.

Community Land Trusts

The first potential mechanism that we think could be used by retreating communities is the property institution known as the Community Land Trust (or CLT). The first CLTs in the United States emerged in marginalized rural communities in the late 1960s and 1970s to combat depopulation and absentee land ownership and to give poor rural people a chance to own their own homes (Lovett, 2020a, 2020b). CLTs spread to urban communities in the 1980s as a tool to promote resiliency and create more affordable housing options in communities hit hard by deindustrialization or facing threats of gentrification (Lovett, 2020a, 2020b).

Although the CLT model can be adapted to any community's particular context and goals, five key design features typically distinguish a CLT. First, a CLT will usually be housed in a non-profit entity that owns land or buildings and manages that property in the long-term interest of a community (Davis, 2010). Although the size of the geographic or social

community served by the non-profit entity can vary widely, the non-profit management structure of the CLT helps guarantee that a CLT's managing board will act in a "trusteeship" or "stewardship" capacity, with its focus on long-term sustainability rather than short-term economic gain (Lovett, 2020a, 2020b; Stein, 2010). The second fundamental feature of a CLT is separation of ownership established through the legal device of a ground lease. Usually, the non-profit entity that establishes the CLT will own land itself or a large building that potentially houses multiple housing units. The CLT will then lease parcels of land or particular units in a large building to individuals, families, businesses, or other persons who then own the improvements constructed on the land or unit, and who acquire a right of exclusive use and control of the improvements (Lovett, 2020a, 2020b). The third and fourth design features of a CLT focus respectively on entrance and exit restrictions. Most CLTs limit who can become a lessee-owner to certain income-qualified households (Davis, 2010). The organizers of a CLT will typically impose these income restrictions voluntarily at the commencement of the CLT in the ground lease. Some states, however, mandate income restrictions for a CLT by statute. In cases of planned resettlement, where the community includes a range of incomes, this may need to be revised.

When an individual or family wants to depart from a CLT community by selling their leasehold interest, the fourth key design feature kicks in—a preemptive right (a right of first refusal) declared in the ground lease itself. This preemptive right will give the CLT the right either to (a) purchase the unit owned by the lessee-resident if it is put on the market, or (b) require the leaseholder to sell the leasehold interest to another income-qualified buyer selected and approved by the CLT (Lovett, 2020a, 2020b). Furthermore, the purchase price that the existing individual or family can realize from the sale of their leasehold interest will be prescribed by a resale formula established in the ground lease. Although there is considerably variety in how CLT resale formulas can be structured, the essential goal of the resale restriction is to allow the departing individual to keep some portion of the increased equity attributable to their contribution to the community, and the physical asset itself, but reserve the remaining portion of the increased market value of the property for the community as a whole (Lovett, 2020a, 2020b). In other words, resale restrictions in a CLT separate the commodity value of an asset from the use value of the asset. The great advantage of these resale restrictions is that they allow the CLT to offer the house or apartment

unit to a prospective new owner at a substantial discount from the actual "fair market value" of the property. This helps assure that a new generation of potential residents has access to housing and property ownership at an affordable price and extends the utility of any initial subsidy that may have been granted to the CLT by a government or non-profit funder. The final typical design feature of a CLT relates to the structure of the non-profit entity that establishes and oversees the CLT. Most CLT organizational documents mandate that the board of directors or board of trustees charged with ultimate responsibility for oversight of the CLT be composed of a number of lessee-residents, non-lessee residents of the community, and independent representatives of the broader community or public at large. This diversified, broadly constituted form of community control reinforces the stewardship mission of the CLT and its focus on long-term viability (Lovett, 2020a, 2020b).

What benefits could a CLT model bring? First, the CLT organizational form could reduce the upfront costs to individuals and families who want to relocate along with other community members in a new location. The resale restrictions simultaneously could help preserve affordability for future generations of the relocating community and thus preserve existing social capital and collective efficacy. Second, the reliance on a non-profit, community-led organization that actually owns the underlying land or major improvements in a new location could build trust within the community, as opposed to relying on state actors to organize internal dynamics. Third, the CLT structure could be used, not just as a tool for organizing property ownership and resources in the new location, but also to control land and natural resources left at the site of the discontinued community. In combination with conservation easements, discussed below, a CLT structure could thus help assure guaranteed access to the grounds of the former community if a complete transfer of ownership is not required upon departure. Finally, the inherent flexibility of the CLT structure allows for other economic and social development projects. Some land and resources owned by the CLT might be reserved for non-residential uses and dedicated to other uses, such as agriculture or aquaculture, forestry, environmentally sustainable industries, or recreational or cultural activities. In these cases, one critical feature of a CLT is that highest and best use can be subverted or reinterpreted by community members and the Board of Directors to achieve ends other than greatest overall economic profit.

Land Trusts have been successfully utilized in anti-displacement campaigns (DeFilippis et al., 2019; Jane Place Neighborhood Sustainability Initiative, n.d) and in Land Back and Rematriation struggles by tribes, such as the Ohlone who created the Sogorea Te' Land Trust in what is now known as Oakland, California (Sogorea Te' Land Trust, 2023). The Land Trust is led by Ohlone women and takes an intertribal and multicultural approach focused on the restoration of reciprocal relationships with the land. There is currently no housing on the Land Trust, but it has served as a model for creating communal spaces, as well as a model for funding possibilities as some funding comes directly from donors who wish to make reparations.

Community Development Corporations and Community Housing Development Organizations

The second mechanism that we think could be a model for some retreating communities to achieve community-based goals is the creation of a Community Development Corporation (CDC). A CDC is a non-profit real estate development organization controlled by a community and focused upon the revitalization of a community. CDCs have been successful in redeveloping neighborhoods in a number of urban areas in the United States but, to the best of our knowledge, have yet to be utilized in any climate retreat, relocation, and resettlement initiative. CDCs are supported by several national and regional organizations that can help communities seeking to form a CDC with funding and technical assistance. Although CDCs have traditionally focused on revitalization of an existing community in its current place, the CDC structure could be utilized for a planned community resettlement project if the geographic bounds of an existing community are expanded to include areas further inland with a lesser risk profile; or, if a CDC is created specifically to encompass the land at the new location.

A community that wishes to resettle in another location without a formal designation as an entity may find its efforts hindered because the state has historically interacted with individual homeowners as the decision-makers during buyout processes. By organizing as a CDC, and thus incorporating as a non-profit entity that can interact directly with government agencies and funders, a community composed of individuals

and households with a shared community identity, can acquire a recognized legal status to engage with other private, non-governmental, and governmental entities.

A Community Housing Development Organization (CHDO) represents another kind of organizational structure that might assist a community engaged in planned retreat. The Cranston-Gonzalez 1990 National Affordable Housing Act created the HOME Investment Partnership Act to expand the supply of affordable housing. The HOME Act primarily focuses on rental housing for low-income families, but it can also be used for new construction and acquisitions. The HOME Act includes a 15% set aside for CHDOs which are defined as non-profit organizations that (1) include the provision of housing for low-income families as a primary purpose, (2) demonstrate capacity for this kind of work, (3) have a history of serving the community; and (4) have a formal process for community input and control, including a governing board consisting of at least one-third residents of the low-income community. Many CDCs qualify easily as CHDOs, although a CHDO does not have to be a CDC.

Given the fact that so many at-risk communities are also low-income communities, a community engaged in planned retreat could form a CHDO both to attain a recognized legal entity structure and to access a funding pool via the HOME Act. One potential limitation of HOME Act funds, however, is that CHDO must coordinate with local political jurisdictions or the state, and a local jurisdiction may not wish to expend funds for development outside of its juridical boundaries. Thus, the CHDO mechanism may be most useful when a community seeks to resettle close to its current location or at least within its current local government's jurisdictional boundaries.

Community Right-to-Buy

The United States is not alone in grappling with issues surrounding property, communal rights, and what constitutes the best use of land. Although there is limited transferability from nation to nation, some property scholars do look to other national experiments with property and seek to learn from their success or failure. The scope of this manuscript is generally restricted to the U.S. context, but we also recognize that similar conversations are happening in other spaces. As a result, we next turn to a novel legal institution outside the United States for inspiration in equipping communities seeking to engage in planned retreat. The

institution is the community right-to-buy established under two innovative pieces of legislation passed by the Scottish Parliament in 2015 and 2016 (Lovett, 2020a, 2020b). Although Scotland's parliament had already given communities a right to register what is a called a "preemptive right" to buy land (a right of first refusal) if a landowner attempted to sell the land, the 2015 and 2016 legislation strengthened the ability of "community bodies," in the words of the Scottish legislation, to actually force landowners to sell land for the purpose of promoting sustainable community development (Lovett, 2020a, 2020b). In particular, the 2015 legislation gives a properly constituted community body the right to force a sale of land that is abandoned, neglected, or causing environmental harm to the community. The 2016 legislation goes further and gives a properly constituted community body the right to force a sale of land for the sole purpose of furthering sustainable development. Both tools also feature prominently in the Scottish government's plans to accomplish one of the principal objectives of its "Land Rights and Responsibilities Statement"—enabling more local communities to own, lease, or use buildings and land to contribute to their well-being and future development. This is a far different approach to that taken in the United States via blight ordinances and other legal mechanisms to address properties that are considered neglected.

While a detailed assessment of all the features of the new community right-to-buy in Scotland is beyond the scope of this book, several community right-to-buy mechanisms could be adapted to aid U.S. communities seeking to accomplish a planned retreat. First, the Scottish legislation allows a *community body*, the legal entity that will undertake to acquire ministerial consent for a forced sale of eligible land, to consist of a wide variety of non-profit organizations, as long as the entity has at least ten members, three quarters of whom are members of the represented community, and as long as these community based members "have control" of the entity (Scottish Government, 2016). For now, the community that is represented by the community body must be a community of place, that is, a community defined by some identifiable geographic boundary, although other Scottish legislation will allow a "community of interest" to request that land or assets owned by the State or some public entity be transferred to a representative community body (Scottish Government, 2016). Like the CDC or CHDO form, a Scottish style "community body" could be a useful organizational model for forming a legal entity with the capacity to act on behalf of a community planning

retreat. Such a mechanism permits for a much wider range of communal entities and provides legal visibility.

Next, the new Scottish community right-to-buy legislation addresses the important question of what land is *eligible* for a community right to buy acquisition. Although the Scottish legislation treats this subject in considerable detail, at a basic level, the legislation makes two broad categories of land "eligible" for a compulsory community acquisition. The first category consists of any land, rural or urban, that is "wholly or mainly abandoned or neglected" or any land whose current use or management is causing, directly or indirectly, "harm to the environmental well-being of a relevant community." American readers might instinctively equate this category with what state legislation in the United States often refers to as "blighted" property, a label that some U.S.-based scholars have criticized as being too vague and subject to manipulation by municipal redevelopment agencies eager to acquire private land for urban redevelopment projects likely to benefit private, for-profit developers or wealthy, nonprofit organizations like major private universities (Somin, 2011). The Scottish legislation wisely limits these problems, however, by specifying that the environmental harm must be *more than* "negligible," although that concept still leaves room for discretion. Meanwhile, accompanying regulations also limits the scope of abandoned, neglected, or detrimental land to property in some physical state of deterioration that is causing immediate health and safety threats (Lovett, 2020a, 2020b).

The second broad bucket of land "eligible" for a community acquisition to promote sustainable development also includes both rural and urban land and is otherwise unlimited in scope except that the legislation carves out land featuring a building or structure that serves as an individual's home. This exclusion for homes should avoid the kind of controversy sometimes seen in the Unites States when eminent domain is used to acquire residential property for economic development purposes despite the important dignity interests associated with homes and the difficulties that inherently surface when governments or courts are faced with the problem of accounting for the subjective value of residences to homeowners and tenants in just compensation awards (Underkuffler, 2006).

After a community body is formed and eligible land is identified for a potential community acquisition, the community body will then apply to the government (to "Scottish Ministers" in the language of the legislation) for consent to acquire the land (Lovett, 2020a, 2020b). If the

ministers grant consent, the landowners must sell the land at a price determined by the ministers, after consultation with third-party appraisers (Lovett, 2020a, 2020b). Once again, the details of the Scottish legislation on this point are well beyond the scope of this book, but the crucial criteria in both pieces of legislation attempt to limit the compulsory, involuntary nature of such acquisitions to make sure that this extraordinary community and governmental power is limited to cases in which there is essentially no other practical or market-based alternative to the proposed involuntary acquisition. In the case of the 2015 legislation focused on abandoned, neglected, or detrimental land, the relevant criteria require the government ministers to determine that the proposed community acquisition is the only way to avert blight or environmental harm. In the case of the 2016 legislation designed to implement community acquisitions for sustainable development, the key criteria focus not just on the likelihood that the particular proposed acquisition will further sustainable development, but also whether it is "in the public interest," "is likely to result in significant benefit to the community," and "is the only practicable, or the most practicable, way of achieving that benefit," and that not granting consent to the proposed acquisition "is likely to result in harm to the community." Although these are inevitably open-textured standards, they do attempt to narrow governmental discretion and require community bodies to prove that they have made significant efforts to achieve their sustainable development goals by first seeking cooperation from landowners or first seeking to acquire land and property on the open market.

Another intriguing feature of the Scottish community right-to-buy legislation is the requirement that before a community acquisition can proceed to the actual transfer stage, a community body must conduct a "community ballot," with at least half of the community members voting, to determine if there is sufficient community support in favor of the proposed acquisition.

Finally, any community acquisition of land for a climate retreat initiative must confront the question of funding. The Scottish community right to buy legislation addresses this question in instructive ways. First, the legislation provides if a community shows that it has tried but is unable to obtain funds on its own the Scottish government can supply to support the community acquisition. Most community acquisitions in Scotland have so far been funded with public grants from the Scottish Land Fund, which in turn is funded directly from the Scottish government and by

proceeds from the sale of public lottery tickets. Further, the 2016 Scottish legislation also allows a community body to form a partnership with a "third-party purchaser," which could be either a non-profit funder or a non-profit development entity or perhaps a for-profit private development entity. Although the Scottish legislation provides little guidance on how such partnerships will work, the legislation's allowance of such partnerships is probably a realistic acknowledgment that many community bodies seeking to achieve a community acquisition will need not only technical assistance but also financial support to accomplish their goals. We do not mean to suggest that the Scottish community right-to-buy legislation could simply be copied and transplanted onto American soil wholesale. However, many of its individual features, including its use as an organizational tool against outside developers, could well be adapted and transformed into a workable community-scale relocation mechanism (CSRM) and thus help vulnerable U.S. communities seeking to accomplish a community-wide relocation.

Hazard Mitigation, Adaptation, and Resilience Grant Funding

A great deal has been written about the existing funding mechanisms for hazard mitigation and climate adaptation, including their limitations and biases (citations). Although mechanisms such as the Hazard Mitigation Grant Program (HMGP) have been utilized for community relocation efforts, as is the case in Newtok, Alaska, the limitations of these programs have not permitted the kind of community-led efforts that we describe here. An analysis of the potential changes to be made to these granting mechanisms is beyond the scope of this manuscript, but some key areas of concern include: local match requirements and benefit–cost analysis requirements (which we discussed at the beginning of this chapter) as well as allocation of funds by Congress and state level emergency management agencies, disparate access to resources for grant writing and administration, and the inability to directly fund community-level entities.

Conclusion: Considering Repair as a Legal Solution

Aside from describing the laws, legal concepts, and legal tools that frame relocation, this chapter has suggested uses of present law to further community-led relocations and resettlements. We would like to point

out that these uses are speculative. Each community is embedded in socio-historical contexts that we do not know and cannot hypothetically imagine. The author team is not convinced that single track, scalable solutions are the paths toward justice—and we have seen efforts at one-size-fits all solutions cause harm. We are convinced that local contexts and community-desires matter, will differ, and that these specificities are critical to successful climate adaptation.

There are clearly times when the law will fail to provide just solutions, as we have seen occur in the past. Many communities facing relocation today are part of historically overburdened groups that have already borne the burdens of industrialization and racist policies. As we've shown, these previous failures of the law to promote justice are "baked in" to contemporary risk creation (such as when hazard mitigation privileges wealthier communities) and legal solutions to relocation (such as fair market value for houses). Under these conditions, it is necessary to consider reparative solutions as possible legal remedies. Reparations consist of a series of tools that societies can use to provide redress, or relief for past harms, such as mass violence or other forms of historic injustice (Sanders, 2013). Material reparations include financial compensation, such as the direct payment to victims or their immediate descendants; restitution, which includes the return of rights and property; and rehabilitation, such as providing health care or other services.

In the previous section, we highlighted Kinston, North Carolina, Isle de Jean Charles, Louisiana, and rural Indigenous Alaska. In all of these cases, socio-historical circumstances are such that reparative solutions are applicable. If more than market value was available to Kinston residents as a mechanism to repair the harm of segregation and lack of access to less risky land due to racist policies, then perhaps the relocation would not have registered as coercive to some residents. If tribal sovereignty was respected and funding was made available specifically to reconstitute a tribal community that fled to lower bayou landscapes as a retreat from Indian removal and subsequent racism, then perhaps tribal leadership would be satisfied with the outcome. If funding was available for Alaska Native Communities to reconstitute flexibility to fluctuating coastlines as a reparative strategy for colonial intrusion, then new, Arctic-specific infrastructure would not be so challenging to develop and implement.

Climate reparations are politically divisive, as are most reparations claims. In these cases, we argue, the Constitutional Amendment that

frames takings, buyouts, and eminent domain—all applicable to relocation scenarios—do allow for just compensation. A feasible interpretation of this clause could mean that justice can come through compensation; and justice in these communities includes repairing historical harm. This decision, as in so many other applications and interpretations of the laws we have laid out in this chapter—is dependent on the discretion of people, at multiple levels of government, interpreting, deciding, and carrying out their idea of the law.

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