

A COMPARATIVE PERSPECTIVE OF EMINENT DOMAIN  
LAWS IN THE UNITED STATES & CHINA

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### *Abstract*

*In the United States and China alike, eminent domain proceedings have uprooted and displaced millions of citizens over the years as to facilitate and hasten economic development. Both nations' constitutions share similar texts regarding the limitations of eminent domain proceedings – the scope of which has historically been broadened and manipulated as to ensure the quick redevelopment of requisitioned land for economic development purposes. Specifically, both constitutions require that the eminent domain takings be for “public purpose/use” and that “compensation” in some form or another be provided to those uprooted. Historically, both nations have applied a broad reading to “public purpose” and “public use,” thereby precipitating a pattern of economic development takings, which, in China have heavily burdened the rural farming class. This paper will not only analyze both nations' interpretations of “public use” and “public purpose” side-by-side, but also how “compensation,” and “just compensation” standards are interpreted and enforced by each nation's government agents and judiciary. Additionally, this article will evaluate the due process and constitutional enforcement mechanisms that the United States and China each have in place to address issues arising from inequitable eminent domain proceedings.*

### I. INTRODUCTION

Leading up to the 2008 Beijing Olympics, the Chinese Government forcibly displaced approximately 1.25 million people from their homes in order to facilitate construction.<sup>1</sup> Over the past forty years, the Chinese government has evicted approximately forty million rural farmers from their homes.<sup>2</sup> Most of these evictions

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<sup>1</sup> See Scott Conroy, *Group: Olympics Force Mass Evictions*, CBS NEWS (June 5, 2007), <https://www.cbsnews.com/news/group-olympics-force-mass-evictions>.

<sup>2</sup> Ilya Somin, *The Conflict over Takings and Property Rights in China and Its Parallels with That in the United States*, THE WASHINGTON POST (Aug. 8, 2014), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/the-conflict-over-takings-and-property-rights-in-china/?utm\\_term=.6829822b5488](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/08/the-conflict-over-takings-and-property-rights-in-china/?utm_term=.6829822b5488).

emanated from government requisitions of privately owned rural land for economic development projects.<sup>3</sup> These victimized landowners, often farmers with little to no political or legal recourse, are pushed into unfamiliar housing markets with largely inadequate compensation from the government to show for their troubles.<sup>4</sup> According to Cheng Jie, Associate Professor of Law at Tsinghua University, both individuals and collective organizations in rural areas often “fail to resist expropriation requests from the State.”<sup>5</sup>

Chinese “requisitions,” the Chinese form of eminent domain, are constitutionally permitted as necessary for the “public interest,” and if “compensation” is provided.<sup>6</sup> Chinese property laws, however, have only just recently explicitly defined what constitutes “public interest,” or “compensation.”<sup>7</sup> Historically, no such definition was ever provided for by the Chinese government; however, the 2019 Amendment of the Land Administration Law of the People’s Republic of China spells out rather detailed guidelines, guaranteeing farmers and those displaced greater financial security.<sup>8</sup> But, whether Chinese officials will heed such instructions remains to be seen, considering that, historically, constitutional restraints on government eminent domain (i.e. requisition) powers rarely, if ever, precluded local Chinese governments from requisitioning rural land for economic development projects, with landowners denied any semblance of compensation as constitutionally mandated.<sup>9</sup>

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<sup>3</sup> For the remainder of this paper, government condemnations of private property (i.e. eminent domain proceedings), for the purposes of economic development projects will be referred to as “economic development takings.”

<sup>4</sup> *See id.*

<sup>5</sup> Cheng Jie, *Enforcing Takings Clauses in China*, 7 *TSINGHUA CHINA L. REV.* 191, 192 (2015).

<sup>6</sup> This paper will refer to the “public use” and “public interest” requirements of U.S. and Chinese constitutional eminent domain laws as the “Public Use Doctrine” and the “Public Interest Doctrine,” respectfully.

<sup>7</sup> “In order to strike a balance between economic development and private property protection, Chinese lawmakers passed several laws to regulate government takings: (1) Article 13 of the Constitution; (2) Regulations on Urban Housing Demolition and Relocations, 2001 (“Regulations”); and (3) Urgent Notice on Diligently Carrying out Urban Housing Demolition and Relocation, and Maintaining Social Stability (“Notice”).” Chenglin Liu, *The Chinese Takings Law from a Comparative Perspective*, 26 *WASH. U. J. L. & POL’Y* 301 (2008), [http://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol26/iss1/13](http://openscholarship.wustl.edu/law_journal_law_policy/vol26/iss1/13).

<sup>8</sup> *See* Tudi Guanli Fa (土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Jun. 25, 1986, effective Jan. 1, 1980) (2019) (Chinalawinfo).

<sup>9</sup> *See generally* Shintong Qiao & Frank Upham, *The Evolution of Relational Property Rights: A Case of Chinese Rural Land Reform*, 100 *IOWA L. REV.* 2479 (2015).

Similarly, in the United States, the government has the constitutional authority to exercise eminent domain power if two conditions are met: (1) if the taking is for “public use,” and (2) if “just compensation” is provided.<sup>10</sup> In its entirety, Article 5 of the United States Constitution, commonly referred to as the “Takings Clause,” mandates that “private property [shall not] be taken for public use, without just compensation.”<sup>11</sup> While the United States judiciary, Congress, and state legislatures consistently construe “just compensation” to mean the market value of the property as determined by a third-party appraisal, the definition and scope of “public use” has sparked enormous on-going public and political discourse.<sup>12</sup> The United States Supreme Court refuses to provide an official definition.<sup>13</sup> Instead, the Court has historically deferred judgment on the matter to the legislature, using the rational basis review test<sup>14</sup> – thereby cultivating growing unrest and confusion between the public and states.<sup>15</sup>

Thus, although the United States and Chinese Constitutions share similar language and restrictions on eminent domain powers, both nations’ practices have been subject to heightened public backlash and criticism in recent years – largely resulting from the perceived government misconstruction of “public use” and “public interest.”<sup>16</sup> The Chinese populace, additionally, faces issues arising from a lack of procedural safeguards in place; most victims of eminent domain are often violently displaced, with unjust compensation, and insufficient political or legal redress.<sup>17</sup> In this context, citizens of both nations, increasingly susceptible to economic development takings, seek immediate reform.

Consequently, this paper will address how both the United States and China (with similar constitutional restraints on eminent domain proceedings) have evolved towards a model in which economic development takings are increasingly common and routine, in

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<sup>10</sup> U.S. Const. amend. V.

<sup>11</sup> *Id.*

<sup>12</sup> See Simon K. Zhen, *Eminent Domain in the United States and China: Comparing the Practice Across Countries*, INQUIRIES JOURNAL (2017), <http://www.inquiriesjournal.com/articles/1703/eminent-domain-in-the-united-states-and-china-comparing-the-practice-across-countries>.

<sup>13</sup> See *id.*

<sup>14</sup> See *infra* Part V.

<sup>15</sup> See *infra* Part V.

<sup>16</sup> See *infra* Part V.

<sup>17</sup> See *infra* Part V.

practice. In Section II, this paper will survey how the “public use” and “public interest” standards, in the U.S. and China, respectively, have espoused a broader reading and application in both systems – pinpointing the societal and cultural influences guiding these changes. Next, in understanding the public policy and enforcement mechanisms that both nations have in place to address constitutional restraints on eminent domain powers, Section III will address the following issues: (1) how “compensation,” and “just compensation” standards are interpreted and enforced by each nation’s government agents and judiciary. Next, in Sections IV, V, and VI, this paper will evaluate the due process and constitutional enforcement mechanisms that the United States and China each have in place to address issues arising from inequitable eminent domain proceedings. Lastly, in Section VII, this paper will attempt to weigh the fairness and efficacy of eminent domain laws and applications in both the U.S. and China – in doing so, providing recommendations on how to improve both systems going forward.

## II. EVOLUTION OF “PUBLIC INTEREST” AND “PUBLIC USE” STANDARDS

### A. Introduction

President Barack Obama, in his “More Perfect Union” address, weighed in on the intrinsic value of private property rights to the American psyche, noting that the United States Constitution “. . . places the ownership of private property at the very heart of [the U.S.] system of liberty.”<sup>18</sup> To President Obama’s point, home ownership is generally thought of as a prerequisite to fulfilling the American Dream; in China, on the other hand, citizens lack absolute legal rights to land.<sup>19</sup> Accordingly, issues of unfair compensation

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<sup>18</sup> *A More Perfect Union: A Virtual Exhibit of Barack Obama’s Race Speech at the Constitution Center on March 18, 2008*, NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/amoreperfectunion/> (last visited Dec. 18, 2019).

<sup>19</sup> More specifically, “. . . as a post-communist state, China has developed a dual land ownership program: urban land is state owned, and rural land is collectively owned by the village, which the government oversees. According to the Chinese Constitution, citizens obtain use rights to rural land by signing a fixed thirty-year contract where they promise not to alter the agricultural use of the land. This, along with other provisions of the Constitution aimed at preserving agricultural land and preventing “construction,” render the private transfer of rural land-use rights legally impossible. The Constitution stipulates that land conversion can only occur through “requisition,” China’s version of eminent domain.” Zhen, *supra* note 12. Article 63 of the new Land Administration Law (with amendments in 2019), however, provides that the collective-owned use rights to rural land could be transferred directly

and a lack of procedural due process arising from land requisitions are far less prominent, on average, in the United States than in China.

Regardless of these differences, however, citizens of both nations have grown more and more vexed by the current state of eminent domain laws and proceedings.<sup>20</sup> In the United States, public and political debates surrounding eminent domain reform specifically revolve around whether (a) “public use,” as written in the context of the 5<sup>th</sup> Amendment, should be subject to a narrower interpretation, and (b) whether the legislature’s power to define that standard should be subject to “tight, judicially enforceable limits.”<sup>21</sup>

Some scholars such as Simon K. Zhen argue that, much of the debate over eminent domain proceedings instead concentrates on local government officials’ tendency to broadly construe the vague “public interest” requirement.<sup>22</sup> By broadening the scope of “public interest,” and allowing for economic development takings, local (and indirectly, central) Chinese government officials pave the way for eviction crews to uproot citizens from their homes.<sup>23</sup>

### *B. China’s Public Interest Doctrine*

*“In reality, the government deems every [eminent domain] action as being for a public purpose in China.”<sup>24</sup>*

In some cases, local government officials and eviction crews conduct private takings hastily as to redevelop rural land as quickly and efficiently as possible.<sup>25</sup> Although procedural due process rights, with respect to ‘requisition’ takings, exist as a matter of law, the rapid, widespread urbanization of China in the past few decades has meant that the constitutional limitations and property laws of China are relaxed to some extent, and in some extreme cases are ignored.<sup>26</sup> Because Chinese law, up until 2019, failed to explicitly define “public interest”, local government officials frequently broaden its scope to facilitate the requisitioning of rural land for

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to private entities in the future. Moreover, this revision indicates, at least superficially, that requisition by the State will not be the only means of land conversation of China going forward.

<sup>20</sup> *Id.*

<sup>21</sup> See ILYA SOMIN, *THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN* 35 (University of Chicago Press, 2015).

<sup>22</sup> See Zhen, *supra* note 12.

<sup>23</sup> See Zhen, *supra* note 12.

<sup>24</sup> Liu, *supra* note 7, at 318.

<sup>25</sup> See Liu, *supra* note 7, at 318.

<sup>26</sup> Qiao, *supra* note 9, at 120-121.

industrial or commercial development.<sup>27</sup> Specifically, “public interest” is often construed to “encompass an array of economic, cultural, and national defense construction projects.”<sup>28</sup> Dr. Fang Ye, a partner at Albright Law Offices in Shanghai, argues that for local governments, eminent domain and economic development takings, in particular, are nothing more than an every-day “internal administrative act . . . that need not be publicly disclosed or scrutinized.”<sup>29</sup> Local officials also often have the final say in eminent domain proceedings, owing to a not so independent judiciary system, and a misaligned incentive structure between themselves and their superiors.<sup>30</sup>

### C. The United States’ Public Use Doctrine

Looking to the U.S. Constitution, interpreting “public use” from an originalist perspective<sup>31</sup> seems to be a relatively simple and unambiguous task. The Takings Clause is widely recognized as the “personal creation” of James Madison, who had a notoriously strong commitment to private property rights, as well as an especially strong suspicious of legislatures.<sup>32</sup> Most other founding fathers shared these same views, strongly suggesting that the Public Use Doctrine intended for a relatively narrow interpretation of “public use.”<sup>33</sup> To that point, although Madison was not particularly averse to some level of property regulation, “[he] was particularly

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<sup>27</sup> Qiao, *supra* note 9, at 120-121. Important to note in this context are the goals set forth by the Chinese Constitution as to press forward self-reliantly to modernize the nation’s industry, agriculture, science and technology step-by-step, and in doing so promote the coordinated development of material and ecological civilizations to further build China. See Preamble of the Chinese Constitution.

<sup>28</sup> *Id.*

<sup>29</sup> Dr. Fang Ye, *Analysis of Chinese Law: Eminent Domain Powers Versus Real Property Rights*, LEXISNEXIS (July 23, 2013), <https://www.lexisnexis.com/legalnewsroom/international-law/b/international-law-blog/posts/an-analysis-of-the-conflict-in-chinese-property-law-eminent-domain-powers-versus-real-property-rights>.

<sup>30</sup> *Id.*

<sup>31</sup> Originalism is “. . . a theory of the interpretation of legal texts, including the text of the Constitution. Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. The original meaning of a constitutional text is an objective legal construct like the reasonable man standard in tort law, which judges a person’s actions based on whether an ordinary person would consider them reasonable, given the situation. It exists independently of the subjective “intentions” of those who wrote the text or of the “original expected applications” that the Framers of a constitutional text thought that it would have.” Steven G. Calabresi, *On Originalism in Constitutional Interpretation*, CONSTITUTIONAL CENTER (<https://constitutioncenter.org/interactive-constitution/white-pages/on-originalism-in-constitutional-interpretation>).

<sup>32</sup> Somin, *supra* note 21, at 36.

<sup>33</sup> Somin, *supra* note 21, at 36.

concerned about the danger of legislation intended to redistribute property from one individual or group to others”.<sup>34</sup>

Though the originalist perspective seems relatively straightforward, the debate over the Public Use Doctrine and its scope has endured for over two hundred years.<sup>35</sup> In the founding era and for most of the 19<sup>th</sup> century, the predominant view was that the judiciary may limit the scope of “public use” at its discretion.<sup>36</sup> However, in the early 20<sup>th</sup> century, the Supreme Court (later followed by the states) began to broaden the doctrine’s scope.<sup>37</sup> Gradually, narrow definitions of “public use” were replaced by a doctrine allowing for economic development takings, so long as some rationally conceivable potential benefit may be created in the property’s redevelopment.<sup>38</sup> In *Kelo v. City New London (“Kelo”)*, the Supreme Court articulated this exact view, thereby precipitating one of the most overwhelming public and political reactions to a Supreme Court decision in U.S. history.<sup>39</sup>

### 1. The *Kelo* Decision

In *Kelo*, the United States Supreme Court’s 5-4 ruling authorized the government to condemn one’s private property and transfer it to another private party, with the underlying goal of promoting “economic development.”<sup>40</sup> Thus, “for the first time, the Supreme Court upheld the condemnation of nonblighted<sup>41</sup> residential properties for transfer to private interest solely on the ground that the resulting transfer might increase economic development,” despite the

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<sup>34</sup> Somin, *supra* note 21, at 37.

<sup>35</sup> Somin, *supra* note 21, at 36.

<sup>36</sup> Somin, *supra* note 21, at 36.

<sup>37</sup> Somin, *supra* note 21, at 36.

<sup>38</sup> Somin, *supra* note 21, at 36.

<sup>39</sup> *Kelo v. City of New London, Conn.*, 545 U.S. 469, 125 S. Ct. 2655, 162 L.Ed. 2d 439, 60 Env’t Rep. Cas. (BNA) 1769, 35 Env’t. L. Rep. 20134, 10 A.L.R. Fed. 2d 733 (2005).

<sup>40</sup> Somin, *supra* note 21, at 2.

<sup>41</sup> The term “blighted” in the context of United States eminent domain law refers to “. . . areas where property values are decreasing; where buildings have become obsolete; where fundamental repairs are not being made; where high vacancies exist; where economic development has been substantially retarded or normal development frustrated; or, where taxes do not pay for public services.” Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 FORDHAM URB. L.J. 1119, 1119 (2011). “Although the *Kelo* case focused public attention on the dangers of pure ‘economic development’ takings, far more people have been harmed by blight condemnations, takings ostensibly intended to alleviate dangerous conditions and social pathologies that plague urban neighborhoods.” Moreover, the concept and scope of “blight” has been expanded over the years and has expanded so far that in many states “almost any area can be declared blighted and thereby open to condemnations.” Somin, *supra* note 21, at 84.

obvious fact that the Public Use Doctrine only permits takings for “public use.”<sup>42</sup> Specifically, the Court in *Kelo* allowed for the condemnation of fifteen non-blighted residential properties in New London, in order to facilitate a private development project.<sup>43</sup> Shortly after the case was decided, the development project failed,<sup>44</sup> raising important questions; for example, should courts take the project’s likelihood of success into consideration?

## 2. Aftermath of *Kelo*

“No other Supreme Court decision has ever led to such a broad legislative reaction,” says Ilya Somin, Professor of Law at George Mason University and author of *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*.<sup>45</sup> Legal scholar Richard Powell similarly recalls the public outrage following the Court’s 5-4 majority opinion in *Kelo*, categorizing it as “swift, intense, and unprecedented.”<sup>46</sup> Statistics strongly support Somin and Powell’s assertions; polls showed that over 80 percent of the American public disapproved the Supreme Court’s majority opinion.<sup>47</sup>

In the face of tremendous public backlash, state legislatures were pressured into passing new eminent domain laws – most of which narrowed the scope of the “public use” standard.<sup>48</sup> As a result, judges in different states began exercising tremendous authority in

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<sup>42</sup> Somin, *supra* note 21, at 113.

<sup>43</sup> See Ilya Somin, *The Story Behind Kelo v. City of New London – How an Obscure Takings Case Got to the Supreme Court and Shocked the Nation*, THE WASH. POST (May 29, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/?utm\\_term=.e5586815e4d5](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/?utm_term=.e5586815e4d5) (last visited Dec. 2, 2019).

<sup>44</sup> See Asha Alavi, *Kelo Six Years Later: State Responses, Ramifications, and Solutions for the Future*, 31 B. C. J. OF LAW & SOC. JUST. 311 (2011).

<sup>45</sup> Ilya Somin, *The Political and Judicial Reaction to Kelo*, THE WASH. POST (June 4, 2015), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/?utm\\_term=.f6a87ba371b6](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/04/the-political-and-judicial-reaction-to-kelo/?utm_term=.f6a87ba371b6) (last visited Dec. 2, 2019).

<sup>46</sup> “Within a little more than one year after the date on which the Court announced its holding, more than half of the states enacted eminent domain reform legislation. By the end of 2006, the states that had made it to the finish line were, in order, Delaware, Alabama, Texas, Ohio, South Dakota, Utah, Idaho, Indiana, Kentucky, Wisconsin, Georgia, West Virginia, Maine, Nebraska, Vermont, Pennsylvania, Florida, Kansas, Minnesota, Tennessee, Colorado, New Hampshire, Alaska, Missouri, Iowa, Illinois, North Carolina, Michigan, California, Louisiana, South Carolina, Arizona, and Oregon. In 2007, nine more states – Wyoming, New Mexico, Virginia, North Dakota, Washington, Maryland, Montana, Nevada, and Connecticut – joined the fold.” David McCord, *The Meaning of “Public Use” Has Changed Over Time*, 13 POWELL ON REAL PROP. § 79F.03.

<sup>47</sup> Somin, *supra* note 21, at 3.

<sup>48</sup> Zhen, *supra* note 12.

fact-finding, subsequently leading to inconsistent applications and interpretations of the Public Use Doctrine throughout the country.<sup>49</sup> For example, in the case of *Norwood, Ohio v. Horney*, the state court held that “an economic or financial benefit alone is insufficient to satisfy the public use requirement. . .” and that “the courts owe no deference to a legislative finding that the proposed taking will provide financial benefit to a community.”<sup>50</sup> As noted, most courts fell in line with the logic of the Ohio court.<sup>51</sup> Still, however, a multitude of state laws, instead, adopted the logic used by the majority’s opinion in *Kelo*, deferring any attempted definitions of “public use” to the state legislature.<sup>52</sup> Consider the language of the New York State court’s decision in *Goldstein v. NY State Urban*: “. . . any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the legislature, not the courts.”<sup>53</sup> Both decisions – *Norwood* and *Goldstein* – while inconsistent, are binding because the Supreme Court allows for states to independently determine the scope of the Public Use Doctrine.<sup>54</sup>

### III. COMPENSATORY STANDARDS

#### A. “Just Compensation” in the United States

The United States legislature and judiciary alike have, and continue to consistently interpret “just compensation” in the context of the 5th Amendment to mean the fair market value of a condemned property.<sup>55</sup> Independent appraisals by third-party professionals are effectuated to ensure a fair and impartial process.<sup>56</sup> Many developers reason that the “just compensation” standard applied by the United States is, in fact, a remarkable means for those subjected to eminent domain takings to actually build wealth.<sup>57</sup> According to President Donald Trump, in his previous role as both a commercial and

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<sup>49</sup> Zhen, *supra* note 12.

<sup>50</sup> Zhen, *supra* note 12.

<sup>51</sup> See McCord, *supra* note 46.

<sup>52</sup> Somin, *supra* note 21, at 3.

<sup>53</sup> Zhen, *supra* note 12.

<sup>54</sup> Zhen, *supra* note 12.

<sup>55</sup> *Just Compensation*, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/constitution-conan/amendment-5/just-compensation> (last viewed May 5, 2019).

<sup>56</sup> Somin, *supra* note 21, at x.

<sup>57</sup> Somin, *supra* note 21, at x.

residential real estate developer, the government condemnation of private property for private development should not be considered as “taking property,” because in fact, the developers are “paying a fortune for that property.”<sup>58</sup> Trump believes that, most often, “those [condemned property owners] can move two blocks away into a much nicer house.”<sup>59</sup>

However, some legal scholars like Ilya Somin, a law professor at George Mason University, argues that the reality of the situation, for private owners whose homes or businesses have been condemned for economic development, is much grimmer than President Trump surmises.<sup>60</sup> Somin, instead, argues, “. . . by destroying homes, small businesses, schools, and other pre-existing uses of land, and by undermining the security of property rights, economic development takings routinely destroy more economic value than they create.”<sup>61</sup> To Somin’s point, fair market value appraisals of a condemned piece of land fail to properly account for any associated nonmonetary costs.<sup>62</sup> Consider the following passage from American urban development activist, journalist and author Jane Jacobs in her book “*The Death and Life of Great American Cities*:

“[P]eople who get marked with the planners’ hex signs are pushed about, expropriated, and uprooted much as if they were the subjects of a conquering power. Thousands upon thousands of small businesses are destroyed . . . Whole communities are

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<sup>58</sup> Somin, *supra* note 21, at x.

<sup>59</sup> Somin, *supra* note 21, at x.

<sup>60</sup> Somin, *supra* note 21, at x.

<sup>61</sup> Somin, *supra* note 21, at x.

<sup>62</sup> “Scholars from a wide range of ideological perspectives have reinforced [Jane] Jacobs’s early conclusion that development condemnations inflict enormous social costs that go beyond their “economic” impact, narrowly defined.” *Id.* at 80; *see, e.g.*, MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* (New York: One World/Ballantine Books, 2004); HERBERT J. GANS, *THE URBAN VILLAGERS* 362–86 (New York: Free Press rev. ed. 1982); BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN INC: HOW AMERICA REBUILDS CITIES* 20–35 (Cambridge, MA: M.I.T. Press, 1989); Thomas W. Merrill, *The Economics of Public Use*, 72 *CORNELL L. REV.* 61, 82–85 (1986); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 *COLUM. L. REV.* 1667, 1689–91 (1988); David R.E. Aladjem, *Public Use and Treatment as an Equal: An Essay on Poletown Neighborhood Council v. City of Detroit and Hawaii Housing Authority v. Midkiff*, 15 *ECOLOGY L.Q.* 671, 673–74 (1988); Richard A. Epstein, *Property, Speech and the Politics of Distrust*, 59 *U. CHI. L. REV.* 41, 62 n. 60 (1992).

torn apart and sown to the winds, with a reaping of cynicism, resentment and despair that must be seen to be believed.”<sup>63</sup>

Unfortunately, no aggregate state or national data on eminent domain proceedings and the amounts given to those who have had their land taken exists in the United States.<sup>64</sup> With no statistical database to reference, all opinions on precisely how owner-friendly (or unfriendly) the “just compensation” requirement of the Takings Clause is today remain purely speculative and anecdotal.<sup>65</sup>

### B. “Compensation” in China

Up until 2011, Chinese property laws mandated that “compensation” for land requisitions should be determined through government-led (most often local government-led) price appraisals.<sup>66</sup> However, Zhen suggests that local governments in China rarely follow the appropriate procedures; consequently, rural landowners are often grossly underpaid, and in many instances, not paid at all.<sup>67</sup> Zhen seems to base his suggestion mainly on a paper published by Zhu Keliang in 2012. It can, therefore, not without further ado be stated that the practice in China has remained the same since 2012. Furthermore, it must be considered that new Chinese regulation on house expropriation was introduced in 2011 (hereinafter referred to as the “2011 Regulations”),<sup>68</sup> aiming to “put an end to forced demolitions in cities without . . . fair compensation,”<sup>69</sup> seeing as the Chinese Constitution “merely mentions compensation without any requirement that it be just.”<sup>70</sup>

The 2011 Regulations mandated that compensation for victims of private requisitions “should be no lower than the sum of the market

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<sup>63</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

<sup>64</sup> U.S. GOV’T ACCOUNTABILITY OFF. (GAO), *EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED* (Nov. 2006), <https://www.gao.gov/assets/260/253929.pdf>.

<sup>65</sup> *See id.*

<sup>66</sup> Zhen, *supra* note 12.

<sup>67</sup> Zhen, *supra* note 12.

<sup>68</sup> Leading up to the passage of the new housing expropriation laws, the Chinese government was facing tremendous public pressure to introduce meaningful eminent domain reform. This pressure mainly stemmed from (a) the international community, and (b) China’s own population, often in the form of mass-protests and/or suicides. *See* Liu, *supra* note 7.

<sup>69</sup> *China Issues New Regulations on House Expropriation*, CHINA DAILY (Jan. 22, 2011), [http://www.chinadaily.com.cn/china/2011-01/22/content\\_11900647.htm](http://www.chinadaily.com.cn/china/2011-01/22/content_11900647.htm).

<sup>70</sup> *Id.*

prices of similar properties at the time of the expropriation.”<sup>71</sup> Chenglin Liu, assistant law professor of St. Mary’s University School of Law, claims in his paper published 2008 (i.e., not considering the changes due to the 2011 Regulation) that local government officials often set the standard for compensation inadequately low in order to reduce the development costs. Liu further notes that private owners are generally unable to purchase comparable housing due to the low compensation standard. Therefore, Liu believes that many private owners are reluctant to choose a new property comparable in size and at a similar location as compensation.<sup>72</sup>

It is suggested by two scholars that land developers, not impeded by government officials, also play a role in depriving landowners of not only “just compensation,” but often compensation of any type.<sup>73</sup> For example, despite legal requirements that developers set aside funds for landowner compensation and resettlement, most developers often fail to do so and face no repercussions, owing to a lack of enforcement mechanisms in place.<sup>74</sup>

Liu finds that developers, wishing for a speedy redevelopment process, often promise condemned property owners much larger properties as compensation, hoping that the owner will accept the deal quickly and refrain from protest of any kind.<sup>75</sup> However, Liu states that the time to complete a project for re-housing may last several years, and in some instances, as long as a decade.<sup>76</sup> In that timespan, the re-housing project may have changed hands multiple times.<sup>77</sup> And, although the original landlord is required by law to honor his agreement with the condemned owner, in practice he often sets various hurdles for the condemned owner, making it impossible for them to move into the new house.<sup>78</sup> Adding to the egregiousness of the situation, Liu states that there were some cases involving the

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<sup>71</sup> *Id.*

<sup>72</sup> “It is difficult, however, for the affected residents to find accurate market information given the immaturity of the Chinese real estate market.” See Liu, *supra* note 7, at 321.

<sup>73</sup> Zhen, *supra* note 12. Against this backdrop, it is important to note that China has developed quite a bit in the past 10 or so years. These remarks may not correctly reflect current practices, as there is no evidence to demonstrate the current state of affairs.

<sup>74</sup> Liu, *supra* note 7, at 322.

<sup>75</sup> Liu, *supra* note 7, at 322.

<sup>76</sup> Liu, *supra* note 7, at 322.

<sup>77</sup> Liu, *supra* note 7, at 322.

<sup>78</sup> Liu, *supra* note 7, at 322.

developer putting what was supposed to be the condemned owner's "new house" on sale at current market price.<sup>79</sup>

Important to note, though, are the reforms to the "just compensation" standard set forth in the amendment of the Land Administration Law issued on June 28, 2019 and effective as of January 1, 2020. Article 48, in particular, sets forth that compensation must be "fair and reasonable" as well as listing various standards for compensation that were previously absent in Chinese requisition laws – standards that, if heeded, offer farmers and those displaced greater financial protection than ever before.

#### IV. DUE PROCESS

##### *A. Due Process in the United States*

The Chinese and United States Constitutions alike provide for procedural due process in eminent domain proceedings, however, each system provides for vastly different due process rights in practice.<sup>80</sup> The United States government, both in law and practice, affords a great deal of constitutional protection to citizens subject to eminent domain condemnations; United States citizens, afforded procedural due process by law, are "entitled to notice and an opportunity to be heard *before* the government can deprive them of property. . . ."<sup>81</sup> Moreover, "the notice must be reasonably calculated [as to] give interested parties adequate time and an opportunity to be heard before an impartial tribunal."<sup>82</sup> The United States government routinely affords these constitutional protections to those involved in eminent domain proceedings.<sup>83</sup>

##### *B. Evaluation of Due Process in China*

Liu suggests that Chinese government officials oftentimes deprive citizens the opportunity to receive even some variance of a hearing on the legality of a given requisition – whether before, *or*

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<sup>79</sup> Liu, *supra* note 7, at 322.

<sup>80</sup> Zhen, *supra* note 12.

<sup>81</sup> The 5th Amendment of the U.S. Constitution states that "no person may be deprived of life, liberty, or property without due process of law" by any act of the United States federal government. The 14<sup>th</sup> Amendment, moreover, extends this right to citizens in actions taken by the states. *See, generally, The Constitution of the United States: The Bill of Rights and All Amendments*, CONSTITUTION US, <https://constitutionus.com> (last viewed Dec. 13, 2019).

<sup>82</sup> *Id.*

<sup>83</sup> *See* Zhen, *supra* note 12.

after the taking commences.<sup>84</sup> Liu further believes that notices for private takings are not given very far in advance, either.<sup>85</sup> Absent any supporting evidence, the author believes that if afforded proper procedural due process, most condemned property owners in China would presumably challenge the government's actions, thereby delaying the requisition process, and undermining government objectives by way of time, money, and resources that would feed into litigation and other administrative costs.<sup>86</sup>

The Chinese government has put a lot of focus on stimulating economic development and urbanization, while at the same time – in the author's view – not always recognizing individual property and due process rights as recognized in the United States.<sup>87</sup> Against this backdrop, Eva Pils, law professor at Dickson Poon School of Law at King's College London, calls in her paper published 2005 (i.e., without considering effects of the 2011 Regulation) attention to the preordained futility of requisition victims seeking redress or fairness:

“People [in China] waste their lives seeking justice from state authorities, whose written or unwritten rules of operation sometimes seem designed to compound citizens' grievances rather than to help them redress them. Especially in cases of land requisitioning, the citizens' own livelihoods as well as those of their children may be lost.”<sup>88</sup>

Pils' description of the social climate in rural China describes a fractured and volatile culture. She describes the government mistreatment of rural civilians – who constitute a whopping 42 percent of the total Chinese population.<sup>89</sup> Again, prior to the establishment of the 2011 Regulations, Human Rights Watch found

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<sup>84</sup> See Liu, *supra* note 7, at 346.

<sup>85</sup> See Liu, *supra* note 7, at 346.

<sup>86</sup> See Liu, *supra* note 7, at 346.

<sup>87</sup> See Liu, *supra* note 7, at 346.

<sup>88</sup> Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235, 244-59 (2005).

<sup>89</sup> *Rural population (% of total population)*, THE WORLD BANK (2018), <https://data.worldbank.org/indicator/sp.rur.totl.zs>.

that most eviction proceedings are carried out in a fashion generally considered to be “savage” or “violent.”<sup>90</sup>

Central government authorities have historically afforded local officials a great deal of largely unchecked autonomy and power over the local population – power to confiscate and demolish rural properties in the name of “public purpose,” all the while denying condemned property owners due process.<sup>91</sup> Human Rights Watch believes that local government officials face no consequences or meaningful punishment from their superiors for their illegal and unconstitutional behavior. It is suggested that these officials are often rewarded for their abilities to confiscate and redevelop rural land as quickly as possible.<sup>92</sup> According to Human Rights Watch, local authorities prioritize quick and efficient redevelopment of land over the protection of individual values and due process rights.<sup>93</sup>

Important to note, however, is that Article 46 of the revised Land Administration Law requires that a hearing procedure take place before the requisition. If a majority of those affected by the requisition disagree with the government plan, the onus shifts to the local government to revise the said plan. As far as the general public is concerned, the process might have already changed under the 2011 Regulations, as the legislative branch is evidently making attempts to further improve procedural due process in requisitions, however the exact status quo is unknown by the general public, owing to a dearth of available relevant resources and information.

## V. CONSTITUTIONAL ENFORCEMENT MECHANISMS

### A. *Ubiquitous Jurisdiction of Local Chinese Government Officials*

In China, central government authorities appoint local government officials; in the United States, the people of each state elect their representatives.<sup>94</sup> Thus, in the United States, state and local officials are incentivized to work towards the approval of their constituents, as most representatives aim for re-election in the term

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<sup>90</sup> *Demolished: Forced Evictions and the Tenants' Rights Movement in China*, HUMAN RIGHTS WATCH (Mar. 24, 2004), <https://www.hrw.org/report/2004/03/24/demolished/forced-evictions-and-tenants-rights-movement-china>.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

to follow; Chinese local officials, on the other hand, are incentivized to please central government authorities, whose primary objectives are to promote swift and sweeping economic development and growth.<sup>95</sup> In this context, the Chinese government's primary emphasis on accelerated economic development (over the protection of individual rights) calls for expedited requisitions – which present local government officials the quickest path to career growth and promotion.<sup>96</sup>

Chinese central government authorities place a tremendous amount of stress on their subordinates (local government officials) to raise their local GDP.<sup>97</sup> Consider the following excerpt from Professor of Law at St. Mary's University, Chenglin Liu's piece, "*The Chinese Takings Law from a Comparative Perspective*," detailing how GDP factors into the political dynamic between local and central government authorities, influencing the rate of economic development takings:

“This frantic pursuit of high GDP [by local leaders] has resulted in many so-called “image” or “legacy” projects, by which leaders score high political credits needed for reappointment or promotion. Therefore, gigantic shopping malls, industrial parks, and skyscrapers, among others, are on the top agenda of new leaders. During their five-year tenure, local leaders make every effort to achieve high economic growth. The most efficient way to develop the economy is to sell the land-use rights of the best location in town to foreign or domestic commercial developers.”<sup>98</sup>

Some Chinese analysts estimate that local government administrations actually derive approximately half of their total revenues from land redevelopment projects – to some extent explaining local government officials' readiness to “turn a blind eye

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<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> “Gross Domestic Product (GDP) is a broad measurement of a nation's overall economic activity. GDP is the monetary value of all the finished goods and services produced within a country's borders in a specific time period.” Jim Chappelow, *Gross Domestic Product (GDP)*, INVESTOPEDIA (Apr. 11, 2019), <https://www.investopedia.com/terms/g/gdp.asp>.

<sup>98</sup> *See Liu, supra* note 7, at 318-19.

to the cruelty of eviction squads.”<sup>99</sup> In this complex dynamic, central government authorities urge local officials to push their eminent domain and police powers beyond constitutional boundaries – in the process, depriving those with the least political power and wealth of procedural or substantive due process.<sup>100</sup>

### *B. United States Judiciary’s Deferential Stance*

In the United States, local government officials similarly exert a tremendous amount of influence in shaping eminent domain laws; however, American officials often do so without skirting constitutional and/or other legal requirements.<sup>101</sup> Elected officials’ power to influence the scope of eminent domain laws arises from their ability to sway state laws; this is because the U.S. Supreme Court defers the right to define “public use” to the states.<sup>102</sup>

The Supreme Court maintains that a “. . . [condemnation] should be upheld as consistent with the “Public Use Clause” so long as it is “rationally related to a conceivable public purpose.”<sup>103</sup> In this context, the Court applies rational basis review, which is the normal standard of review that courts apply when considering constitutional questions.<sup>104</sup> In applying rational basis review to determine whether an eminent domain law is constitutional, the court must determine whether said law is “rationally related” to a “legitimate” government interest.<sup>105</sup> The “legitimate” government interest, with respect to laws aimed at narrowing or broadening the scope of the Public Use Doctrine, is whether the proposed development would result in a “public use.”

The Court’s application of the rational basis review test in this context has received criticism from many leading scholars in the field of property law, who call for a higher level of scrutiny when dealing with economic development takings. These critics cite that societal costs arising from economic development takings in the

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<sup>99</sup> J.M., *Redevelopment with a Human Face?* THE ECONOMIST (Jan 28, 2011), <https://www.economist.com/banyan/2011/01/28/redevelopment-with-a-human-face>.

<sup>100</sup> *See id.*

<sup>101</sup> Zhen, *supra* note 12.

<sup>102</sup> Zhen, *supra* note 12.

<sup>103</sup> *See Rational Basis Test*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) (last viewed May 4, 2019).

<sup>104</sup> *Id.*

<sup>105</sup> *See id.*

United States are far too severe for such a deferential standard.<sup>106</sup> The following section will survey the societal costs that accompany economic development takings in both the United States and China.

## VI. SOCIETAL COSTS

### A. *Societal Costs*<sup>107</sup> in the United States

The court's deference to the legislature in *Kelo* evoked significant public and political dissatisfaction and outrage.<sup>108</sup> By allowing for an ever-broadening definition of the Public Use Doctrine, many fear that those with the most political power and wealth will exploit those less advantaged and living in blighted areas – in short, abusing their leverage.<sup>109</sup> More specifically, many fear that an exceedingly broad reading of the Public Use Doctrine may allow for the condemnation of virtually any private property to a private commercial entity.<sup>110</sup> These fears are substantiated, considering that abuses of power arising from economic development takings often result in severe societal costs that are either difficult, or impossible to account for.

“Just compensation,” or fair market value, of a condemned property as determined by a third-party appraisal fails to account for the economic concept of “subjective value,” which explains that nothing, and no piece of land, has an inherent or universally agreed upon value.<sup>111</sup> Consider the following example in the context of a hypothetical economic development taking:

A small business owner, who has conducted her business in the same store for the entirety of her forty-year career, suddenly discovers that the state government is condemning her property as to make way for a new shopping mall. The business owner, an elderly woman, who rightfully accredits much of her business' success over the past forty years to its location, fears that her business may not survive in another neighborhood. She also accredits a great deal of her career success to her relationships with the specific clientele in

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<sup>106</sup> See generally Michael A. Lang, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. J., 449 (2006); See generally Corinne Calfee, *The More Things Stay the Same, the More They Change*, 33 ECOLOGY LAW QUARTERLY, 545 (2006).

<sup>107</sup> In this context, “societal costs” refers to costs imposed onto a nation's society resulting from eminent domain policies and/or laws.

<sup>108</sup> Somin, *supra* note 21, at 3.

<sup>109</sup> Somin, *supra* note 21, at 74.

<sup>110</sup> Somin, *supra* note 21, at 74.

<sup>111</sup> CARL MENGER, PRINCIPLES OF ECONOMICS 120 (1871).

that particular community— relationships she has spent a lifetime building.

When the government condemns her store and forces her out, she will have no choice but to move elsewhere; however, because much of her business' success depends on the specific clientele in the area (in which there is no available/affordable leasing space left) and the location of her store, she is likely to fail going forward. Yes, she will be compensated with the fair market value of the property, but this compensation does not account for (a) her emotional ties to the store; (b) the loss of future business and income, and; (c) the physical and mental toll of relocating on an elderly woman. She requires a sustainable future income, seeing as she has no additional support. If her business fails, she will eventually be unable to pay the mortgage for her home – either having to refinance her mortgage or default.

With respect to residential eminent domain proceedings, abuses of this kind are particularly severe in cases involving both (a) elderly persons, and (b) those that have lived in a certain community for a long period of time.<sup>112</sup> As noted previously, most economic development takings ultimately fail shortly after the requisition, but even if the new landowner's venture proves successful, the courts do not actually require the new owners to provide any of the economic benefits that justified the condemnation in the first place.<sup>113</sup> Thus, the legislature and courts' ability and perceived willingness to tear apart communities for what may ultimately result in *any* or *no* use at all, adversely affects the relationship between the government and its constituents.

Moreover, studies show that in areas where economic development takings are common, racial minorities constitute approximately 58 percent of the population – as compared to that of 30 percent in the United States as a whole.<sup>114</sup> Adults who never graduated from high school constitute 34 percent of the population in those areas, compared to 19 percent nationally.<sup>115</sup> In this context, real estate developers purposefully target poor, uneducated, and vulnerable communities and neighborhoods with the knowledge that residents in these areas are often unable to pay the legal fees required

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<sup>112</sup> Somin, *supra* note 21, at 81.

<sup>113</sup> Somin, *supra* note 21, at 81.

<sup>114</sup> Somin, *supra* note 21, at 81.

<sup>115</sup> Somin, *supra* note 21, at 81.

to fight eminent domain proceedings.<sup>116</sup> As a result, developers are usually able to redevelop land and squash any legal issues that may arise in these neighborhoods much more quickly than they would otherwise be able to in affluent areas.<sup>117</sup> If a developer decided to initiate an eminent domain proceeding against a wealthy resident in an affluent community, then the developer would certainly expect much more legal pushback and resistance on the part of the targeted resident. Accordingly, developers purposefully target lower-class citizens with significantly less political power and legal recourse.

### *B. Societal Costs in China*

The extent of pain and suffering that the Chinese government has, and continues to inflict on private property owners in the name of fast-tracked economic development and urbanization is ultimately unquantifiable. Of certainty, however, is that few issues have harbored more resentment in China than that of unconstitutional and illegal eminent domain proceedings and enforcement mechanisms.<sup>118</sup> Clearly, these takings have bred public distrust and resentment. The illegal behavior of police and government only seem to add fuel to the already blazing fire – i.e. violent protests and suicides,<sup>119</sup> an increasingly common response to unconstitutional proceedings.<sup>120</sup>

## VII. RECOMMENDATIONS

### *A. Introduction*

In the United States and China alike, constitutional constraints on government eminent domain powers seem exceptionally similar – at least in text.<sup>121</sup> However, in both systems, issues exist as to ambiguities that allow for abuses of power and textual misconstruction.<sup>122</sup> In China, the power to enforce eminent domain laws lay in the hands of local government officials, who could possibly obscure legal text, as to appease their central government

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<sup>116</sup> Somin, *supra* note 21, at 81.

<sup>117</sup> See Somin, *supra* note 21, at 81.

<sup>118</sup> See Somin, *supra* note 21, at 81.

<sup>119</sup> See Ian Johnson, *Picking Death of Eviction: As Chinese Farmers Fight for Homes, Suicide is Ultimate Protest*, THE NEW YORK TIMES (Sept. 9, 2013), <https://www.nytimes.com/2013/09/09/world/asia/as-chinese-farmers-fight-for-homes-suicide-is-ultimate-protest.html>.

<sup>120</sup> See *id.*

<sup>121</sup> See generally Liu, *supra* note 7.

<sup>122</sup> Zhen, *supra* note 12.

supervisors and to further accelerate economic development and urbanization.<sup>123</sup> In the United States, the Supreme Court's reluctance to enforce a specific definition of "public use" allows for a broad application of the 5th Amendment by the states, thereby legitimizing economic development takings and threatening to weaken the United States' historic premium on private ownership rights.<sup>124</sup> Thus, disagreement amongst the states, courts, and the general public as to what constitutes "public use" persists.<sup>125</sup>

The following section will analyze the strengths and weaknesses of both the United States and Chinese eminent domain systems, suggesting reforms and how the particular strengths of one system may be used to improve upon the weaknesses of the other.

### *B. Defining the Public Use Doctrine in the United States*

Thirteen years after the Court's decision in *Kelo*, Congress made significant headway in pushing for a narrower definition of the Public Use Doctrine by unanimously passing HR 1689, the Private Property Rights Protection Act.<sup>126</sup> The Bill specifically addressed the expanded definition of the Public Use Doctrine resulting from the Court's 5-4 decision in *Kelo*.<sup>127</sup> Wisconsin Representative Jim Sensenbrenner described the purpose and function of the Bill accordingly:

"To combat this expansion of power, H.R. 1689 would make any state or locality that uses the economic development justification for eminent domain ineligible from receiving federal economic development funds for two years. This creates a major incentive for governments to respect the private property rights of its citizens. Additionally, the legislation bars the federal government from exercising eminent domain powers for the purposes of economic development."<sup>128</sup>

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<sup>123</sup> Zhen, *supra* note 12.

<sup>124</sup> Somin, *supra* note 21.

<sup>125</sup> Somin, *supra* note 21.

<sup>126</sup> Private Property Rights Protection Act of 2017, CONGRESS (2017), <https://www.congress.gov/bill/115th-congress/house-bill/1689/text?format=txt>.

<sup>127</sup> *See id.*

<sup>128</sup> *Press Releases & Statements*, JIM SENSENBRENNER (July 23, 2018), <https://sensenbrenner.house.gov/press-releases-statements?ID=FF8AB153-A4BF-44CE-AE48-A355FE577ABA>.

Upon the Bill's passage, the United States Senate failed to act on it in a timely fashion – effectively killing H.R. 1689 and forcing Congress to start from scratch.<sup>129</sup> Moreover, experts in the field raise the following dilemma: even if the Senate were to approve the Bill, President Trump would unlikely sign it into law, considering his self-declared support for the current state of eminent domain laws in the United States. But, even if the Senate approved the Bill and the President signed it into law, would this version of immoderate eminent domain reform best suit the United States, in accordance with its guiding principles and virtues?<sup>130</sup>

By passing the Bill and essentially banning economic development takings, the government would be creating a path for private property rights to effectively usurp any value attached to economic and community development in the United States. A hardline stance – while beneficial to many lower-class property owners – overlooks the fact that economic development takings, in many cases, tend to bring forth considerable public benefits, such as an increase in jobs and tax revenues – which can eventually fund “public education, housing, and other government services, on which local residents, especially low-income residents, depend.”<sup>131</sup> Thus, instead of effectively implementing an outright ban on economic development takings, Congress should instead focus on adopting an approach that balances the interests of the government and its citizenry.

An alternate, more balanced approach, allows for economic development takings, but with heightened standards, such as: (a) the project's likelihood of success (specified accordingly, and with milestones) within a given timeframe; (b) non-monetary costs associated with the particular takings, and; (c) whether the stated “public use” may be accomplished by other, less intrusive, and less costly means. Additionally, courts should forbid developers from changing the use of the condemned land after title is transferred; instead, courts should mandate that developers utilize the land for

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<sup>129</sup> Ed Morrissey, *Finally: House Unanimously Passes Response to Kelo*, HOT AIR (July 24, 2018), <https://hotair.com/archives/2018/07/24/finally-house-unanimously-passes-response-keelo/>.

<sup>130</sup> *See id.*

<sup>131</sup> Elizabeth F. Gallagher, *Breaking New Ground: Using Eminent Domain for Economic Development*, 73 *FORDHAM L. REV.* 1837, 1854-55 (2005).

said public use or an alternative public use – within a specified time frame – or otherwise forfeit their right to develop the land.

Under the current administration, Congress and the Senate are unlikely to adopt this, or any comparable reforms, into law. Moreover, the states are equally unlikely to adopt corresponding eminent domain laws; each state entertains unique issues and values, and state governments are unlikely to legislate accordingly. Thus, the onus falls directly on the Supreme Court to finally define the Public Use Doctrine.

### *C. Balancing Fairness & Efficacy in China*

The Chinese government, meanwhile, continues to obscure any and all constitutional limitations on eminent domain takings. The government's failure to enact any *meaningful* eminent domain reform between the late 1990s (when the government privatized urban land) and 2019 (with the most recent amendment to the Land Administration Law) evidences the Chinese government's ambivalence towards a rapidly growing, and frustrated urban middle class. In the face of growing civil unrest, it would behoove the government to finally *enforce* meaningful private ownership protections against illegal requisitions. The Chinese central government understands that keeping property owners content is crucial to maintaining social stability – especially in the face of mass protests and suicides.<sup>132</sup> Chinese lawmakers, government officials, and judiciary, therefore, stand at a critical juncture, having to balance the primary goals of the state with those of its populace.

As noted, the Chinese government's goal-oriented unwillingness to enforce its own property laws bespeaks the government's prioritization of accelerated economic development and urbanization over that of individual rights. Consequently, the question concerning how to best reform Chinese eminent domain laws does not lie in how to make the laws fairer, or just; rather, the appropriate inquiry is how to continue stimulating economic growth and urbanization in China in a manner *least intrusive* to individual property and due process rights.

Clearly, at this point, legal reforms in place intended to provide Chinese citizens with legal redress and due process rights in private

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<sup>132</sup> See J.M., *supra* note 100.

land takings have proven ineffective thus far. Whether the most recent 2019 amendments to the Land Administration Law will prove meaningful and impactful remains uncertain and doubtful, especially when considering the results of prior land reform legislation intended to bring about change. Chinese central government officials must incentivize local government officials to behave lawfully. While a sudden shift in the government's attitude towards economic development takings is unlikely to result anytime soon, the Chinese government can act now in (a) reprimanding law-breaking officials, eviction/demolition crews, as well as developers who employ illegal tactics, and; (b) by amending the constitution's "compensation" standard – dictating an objective approach, more comparable to the United States' "just compensation" appraisal process.<sup>133</sup>

As it pertains to (a) the abolition of violence in eviction proceedings, the Chinese government must simply hold itself to a higher standard, and should hold local government officials and eviction squads accountable for the brutal violence that ensues during many eminent domain proceedings. If this issue persists, social stability may collapse – likely pinning the growing Chinese rural middle class against the local and central government officials.

The "compensation" standard, on the other hand, must both be reformed and refined by law, and through fairer practices, as to prevent the phrases "eminent domain" and "aggravated theft" from becoming synonymous with one another. "Fair market," however, is difficult to define, and an ongoing problem in Chinese eminent domain proceedings; the resolution of that issue, specifically, is beyond the purview of this paper.

Issues of substantial and procedural due process violations, or that of an exceedingly broad government reading and application of "public interest," does not arise in the aforementioned list of suggestions, which is not to say that these issues are unworthy of addressing or reforming. Ideally, the Chinese government will heed the new guidelines outlined in the 2019 version of the Land Administration Law, and local government officials will proceed with requisitions appropriately. However, in light of the premium

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<sup>133</sup> As noted earlier in this paper, the Chinese real estate market is relatively immature, and finding accurate market information can be rather difficult. Going forward, the Chinese central government may be able to ameliorate this issue, to an extent, by either creating, or utilizing/deploying an appraisal platform run by a neutral, third party service – comparable to *Zillow* in the United States.

that the Chinese government places on accelerated economic development and urbanization, the suggested reforms in this paper target short-term policy and procedural recommendations that the government will realistically enforce while still being able to utilize private land requisitions as a primary means of achieving fast-tracked economic growth (specifically as determined by GDP) – the Chinese government’s primary objective.

### VIII. CONCLUSION

Worlds-apart culturally and ideologically, the United States and China find themselves similarly situated. In particular, economic development takings have become increasingly prevalent in both systems, as top courts and government officials continue to broaden the scope of “public use” and “public interest,” in practice. Additionally, Chinese citizens grapple with issues of inadequate compensation, and an overall lack of procedural and substantive due process (in practice), through which they would otherwise be able to address the illegality of economic development takings, unfair compensation, and violent eviction proceedings.

In the United States, the Supreme Court defers its power to determine the scope of “public interest” to the legislative branch, while in China, local government officials effectively bypass any written eminent domain laws or constitutional restraints – unchecked by a weak judiciary and emboldened by their central government superiors to hasten economic growth and development, at seemingly all social costs.

Therefore, eminent domain reform is sorely needed in both nations, although to varying extents. In the United States, the Supreme Court would ideally provide a definite, unambiguous definition for the Public Use Doctrine – narrowing the precedent set by *Kelo*, and limiting the practice of economic development takings. In China, the government’s broad interpretation of “public interest” in the context of eminent domain proceedings has normalized economic development takings – as a result, rural citizens often fall victim to a variety of illegal and unconstitutional eminent domain abuses, most often at the hands of local government officials and tuggish eviction squads. Thus, because those carrying out laws are openly encouraged to disobey them, it seems as though the only effective reform in Chinese eminent domain practices can

realistically result from top-down enforcement and reprimand, stemming from central government officials. The new amendments to the Land Administration Law may likely prove ineffective. In this context, since the Chinese government will undoubtedly continue to place a premium on accelerated economic development and urbanization (specifically, over the rights of private property owners), the best options for short-term, realistic reform are for Chinese lawmakers and officials to (a) appropriately redefine the “compensation” standard, thereby effectuating timely and unbiased land appraisals, and; (b) hold unlawful government actors and contractors accountable for their actions.