

# EMINENT DOMAIN AND ECONOMIC DEVELOPMENT: THE PROTECTION OF PROPERTY FOUR WAYS

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<sup>1</sup> University of Arizona J.D. Candidate 2019. Special thanks to Dr. Faisal Chaudhry, faculty advisor, and to the Board of the Arizona Journal of International and Comparative Law.

## I. INTRODUCTION

Even in the most libertarian jurisdictions, property owners do not have absolute immunity from government power over their property; the power of the sovereign to appropriate land for public use is inalienable from sovereignty.<sup>2</sup> The justification for the power is that, inevitably, occasions will arise when the government must take control of property for the public good. Roads must be built somewhere. One variation on this justification is that the power is a necessary tool for economic development. Imagine a piece of valuable land is sitting unused, but the owner refuses to sell. A government might use the power of eminent domain either to use the land directly or to transfer it to parties that will use it valuably. In time, the more effectively used land will create growth and benefit the entire community.

While eminent domain is commonly controversial, in the United States, criticism of eminent domain for economic development purposes has raised in pitch in reaction to *Kelo v. City of New London*.<sup>3</sup> In 2000, the New London city council sought to acquire 115 private properties for redevelopment as part of a plan to revitalize the town.<sup>4</sup> Approval of the project closely coincided with the pharmaceutical company Pfizer's announcement that it would build a large research facility nearby, suggesting the project was planned to benefit Pfizer.<sup>5</sup> Most of the residents agreed to sell rather than challenge the use of eminent domain in court,

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<sup>2</sup> JULIUS L. SACKMAN ET AL., 1 NICHOLS ON EMINENT DOMAIN § 1.141 (3rd ed. 2017); see generally ILJOONG KIM ET AL., EMINENT DOMAIN: A COMPARATIVE PERSPECTIVE 1 (Iljoong Kim et al. eds., 2017) (quoting Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 311 (1795) ("eminent domain [is] 'a despotic power,' but also one that necessarily 'exists in every government.'")).

<sup>3</sup> See generally 545 U.S. 469 (2005) (where the Court held that the city's exercise of eminent domain power in furtherance of an economic development plan satisfied constitutional "public use" requirement); see, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006) (where the Ohio Supreme Court examined a taking intended to redevelop a "deteriorating area" and followed the reasoning of the dissent in *Kelo*); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. 183, 191 (2007) (criticizing the Court's decision in *Kelo* and defending a categorical ban on "economic development takings"); see generally Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491 (2006) (examining the doctrine of eminent domain in light of *Kelo* and arguing for banning economic development takings); see generally Gary Chatier, *Urban Redevelopment and Land Reform: Theorizing Eminent Domain After Kelo*, 11 L. THEORY 363 (2005) (examining *Kelo* in light of private property justifications and eminent domain theories); see generally Kirk. E. Harris, *Because We Can Doesn't Mean We Should and if We Do: Urban Communities, Social and Economic Justice, and Local Economic-Development-Driven Eminent Domain Practices*, 29 ECON. DEV. Q. 245 (2015) (examining the effect of large-scale takings and suggesting Community Benefit Agreements as a more successful and just alternative to *Kelo*-style eminent domain).

<sup>4</sup> *Kelo*, 545 U.S. at 474.

<sup>5</sup> *Id.* at 495 (O'Connor, J., dissenting).

but a few owners resisted.<sup>6</sup> The Supreme Court upheld the taking of the neighborhood, cementing a tradition of broad deference to legislatures regarding the Fifth Amendment's "public use" requirement.<sup>7</sup> While the holding and reasoning of the case were controversial, the project itself was a consummate failure. In 2009, Pfizer moved its research and development operations out of New London to Groton, Connecticut.<sup>8</sup> The area bought by New London was never developed as planned and is now only occupied by a colony of feral cats.<sup>9</sup>

Reactions to *Kelo* have tended to focus on the *category* of the taking, whether as an "economic development" taking or a so-called "private taking." The eminent domain power and its use for economic development are ubiquitous across the globe. This Note will dispute the apparent exceptionality of *Kelo* and warn against categorical prohibitions against economic development takings by comparing the eminent domain systems in four nations: the United States, Germany, South Korea, and India.

## II. EMINENT DOMAIN AND ECONOMIC DEVELOPMENT

### A. Economic Development, Private Value, and Public Interest

A public taking may directly promote economic development through infrastructure projects, like utilities, roads, or dams. The economic development rationale also includes private projects that are hoped to create jobs, encourage further investment, or increase tax revenues. The use of eminent domain in private takings is also justified by economists as indirectly promoting economic development by solving the "holdout problem."<sup>10</sup> For example, when a buyer is attempting to aggregate several parcels of land for a project, sellers are unduly advantaged in negotiations because each property is necessary for the whole project.<sup>11</sup> So the buyers are incentivized to drag out negotiations and drive a hard bargain, making large projects much less efficient, or even impossible.<sup>12</sup> Private takings solve this problem by creating a means to end negotiations and force the transfer.<sup>13</sup>

One common way to evaluate a proposed eminent domain project is by modeling the involved agents and their differing valuations of a property in a Pareto

<sup>6</sup> *Kelo*, 545 U.S. at 475; KIM ET AL., *supra* note 2, at 47.

<sup>7</sup> *Kelo*, 545 U.S. at 489–90.

<sup>8</sup> Subhash C. Ray, *On the Question of Land Acquisition for Private Development: Lessons from the United States, India, and China*, 1(1) Emerging Economy Studies 71, 78 (2015).

<sup>9</sup> KIM ET AL., *supra* note 2, at 50.

<sup>10</sup> See THOMAS J. MICELI, THE ECONOMIC THEORY OF EMINENT DOMAIN, 33 (2011).

<sup>11</sup> See *id.* at 29.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 28, 32.

efficiency analysis.<sup>14</sup> The Pareto efficient allocation of resources is the distribution in which there is no way to make all agents better off.<sup>15</sup> Generally, Pareto efficiency will come about naturally, since the agent with higher valuation of a property will purchase it from the agent for whom it is less valuable.<sup>16</sup> However, when there are multiple properties, the holdout problem will prevent an efficient transaction, and the system will never reach the distribution of maximum value.<sup>17</sup> One way to measure the public benefit of a taking is to compare the total value before and after an eminent domain project, and if there is a Pareto improvement, it is publicly beneficial.<sup>18</sup> The “public benefit” of a permissive takings rule is not just whatever direct benefits an individual project produces, but the lowering of transaction costs across all such projects and promoting efficient use of the land.

Whatever the theoretical benefits, economic development is not a universally convincing justification for eminent domain.<sup>19</sup> If merely putting the land to more valuable use is a valid justification for eminent domain, practically any exercise of eminent domain could theoretically be justified.<sup>20</sup> Even if the problem is not that extreme, many commentators believe that allowing economic development takings hurts property rights. Some argue it is fundamentally against the spirit of the Constitution;<sup>21</sup> others suggest liberal use of eminent domain undermines private investment and hampers long-term growth.<sup>22</sup> Some economic studies in the United States even argue that the economic development argument is simply empirically wrong.<sup>23</sup>

Most importantly, the economic development argument seems out of touch with the human realities of eminent domain. Economic models may attempt to account for the “subjective value” of property, but the term is insufficient. As the urban studies thinker Jane Jacobs stated in her *amicus curiae* brief in *Kelo*, “[e]conomic development condemnations routinely impose enormous social costs that greatly exceed their putative benefits . . . . [Urban renewal programs in the 1950’s and 60’s] uprooted thousands of people, destroyed numerous communities,

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<sup>14</sup> See KIM ET AL., *supra* note 2, at 156.

<sup>15</sup> *Id.*

<sup>16</sup> See *id.* at 159.

<sup>17</sup> *Id.* at 161.

<sup>18</sup> *Id.* at 162.

<sup>19</sup> See Somin, *supra* note 3, at 191.

<sup>20</sup> *Id.* (quoting *County of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004)).

<sup>21</sup> See, e.g., Michael A. Lang, *Taking Back Eminent Domain: Using Heightened Scrutiny to Stop Eminent Domain Abuse*, 39 IND. L. REV. 449 (2005) (“James Madison believed that, ‘Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.’”).

<sup>22</sup> See Dick M. Carpenter & John K. Ross, *Do Restrictions on Eminent Domain Harm Economic Growth?*, 24 ECON. DEV. Q. 337, 337 (2010).

<sup>23</sup> *Id.*; see generally Paul F. Byrne, *Have Post-Kelo Restrictions on Eminent Domain Influenced State Economic Development?*, 31 ECON. DEV. Q. 81 (2017).

and inflicted enormous economic costs, with few offsetting benefits.”<sup>24</sup> One study found that people displaced in the United States by the condemnation of their close-knit communities experienced “nothing less than a life crisis.”<sup>25</sup> Decades after bulldozers demolished the homes in Chavez Ravine (secured by eminent domain) to make way for Dodger Stadium, a gift of a Dodgers jersey made a father ostracize his son-in-law.<sup>26</sup> In India, farmers in the town of Singur killed themselves rather than leave their land.<sup>27</sup> The use of eminent domain can inflict “dignitary harm” to the people affected.<sup>28</sup> Property can be more than valuable—it can be so integral to someone’s life that it is “identity-constitutive.”<sup>29</sup>

## **B. Proposed Categorical Solutions to Eminent Domain Abuse**

Many commentators have concluded that “[a] categorical prohibition on the economic development rationale for condemnation is the best solution for the abuses it causes.”<sup>30</sup> In the 2006 case, *City of Norwood v. Horney*, the Ohio Supreme Court did just that, ruling that the economic benefit alone is not enough to satisfy the Ohio state constitution’s “public use” requirement.<sup>31</sup> State legislatures also acted: 41 legislatures passed laws in response to the *Kelo* ruling in the next two years; 20 of the laws prohibited or restricted eminent domain for the sole purpose of economic development.<sup>32</sup>

Proponents of categorical prohibition of economic development takings contend that other measures are simply not enough to prevent abuses.<sup>33</sup> However, this new public interest requirement could hamstring government efforts to promote growth and provide essential public services.<sup>34</sup> Miceli, in *The Economic Theory of Eminent Domain*, describes that while property rules (as opposed to liability rules) are effective at preventing unjust transactions, they are over-inclusive and prevent

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<sup>24</sup> Brief of Jane Jacobs as Amica Curiae in Support of Petitioners, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04–108), 2004 WL 2803191 at \*6.

<sup>25</sup> Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 109 (2006).

<sup>26</sup> Janice Llamoca, *The Battle Over Chavez Ravine*, LATINO USA, Nov. 3, 2017, <http://latinousa.org/2017/11/03/battle-chavez-ravine/>.

<sup>27</sup> Ray, *supra* note 8, at 73.

<sup>28</sup> Garnett, *supra* note 25.

<sup>29</sup> Gary Chatier, *Urban Redevelopment and Land Reform: Theorizing Eminent Domain After Kelo*, 11 L. THEORY 363, 366 (2005).

<sup>30</sup> Somin, *supra* note 3, at 271.

<sup>31</sup> *Horney*, 853 N.E.2d at 1123.

<sup>32</sup> Byrne, *supra* note 23, at 83.

<sup>33</sup> See Somin, *supra* note 3, at 210; Cohen, *supra* note 3, at 555.

<sup>34</sup> See Thomas W. Merrill, *The Misplaced Flight to Substance*, 19 PROB. & PROP., Mar.–Apr. 2005, at 18.

many efficient transfers from occurring.<sup>35</sup> A categorical prohibition on economic development takings would prevent some abuse, but would also prevent many transactions that would be in the public interest. A 2013 study of takings across the United States found that jurisdictions with denser and more fragmented urban areas were more likely to use eminent domain and less likely to limit it post-*Kelo*, suggesting eminent domain is an important tool for economic development in urban areas.<sup>36</sup>

As the overview of eminent domain systems below will show, these worries are not exclusive to the US context. The United States, Germany, South Korea, and India are each faced with the reality of eminent domain's costs and the threat of abuse, and each has arrived at different legal protections for property owners.

### III. FOUR SYSTEMS OF EMINENT DOMAIN

In *Eminent Domain: A Comparative Perspective*, Professors Iljoong Kim, Hojun Lee, and Ilya Somin identified six common aspects of takings law to compare the eminent domain systems of different jurisdictions.<sup>37</sup> These “Six Pillars” are: (1) the public interest criteria for takings; (2) what entities are authorized to take property; (3) just compensation; (4) due process or notice requirements; (5) the distribution of resultant profits or surplus; and (6) a system of dispute resolution.<sup>38</sup>

The overview of each system focuses on the public interest criteria, procedural requirements, and dispute resolution systems as the most relevant legal protections against improper takings. The public interest criteria in each system limits the purposes for which the government can condemn private property.<sup>39</sup> Some systems only consider how the land is intended to be used by the condemner, while others consider the government's justification for the taking, or how the land is currently being used.<sup>40</sup> These criteria differ by jurisdiction, and can be more restrictive or more permissive toward the condemner.<sup>41</sup>

Due process requirements are the procedural safeguards the condemner must observe to take property.<sup>42</sup> These procedural safeguards, like notice requirements or requirements to do social impact studies, are designed to enforce the public interest criteria and make sure property owners are treated fairly.<sup>43</sup>

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<sup>35</sup> MICELI, *supra* note 10, at 11.

<sup>36</sup> See generally Steven P. Lanza et al., *The Use of Eminent Domain for Economic Development in the Era of Kelo*, 27 ECON. DEV. Q. 352 (2013).

<sup>37</sup> KIM ET AL., *supra* note 2, at 2.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 3.

<sup>40</sup> See *infra* Part III, sections A–D.

<sup>41</sup> KIM ET AL., *supra* note 2, at 3.

<sup>42</sup> *Id.*

<sup>43</sup> See *infra* Part III, sections A–D

Beyond the bare minimum of procedure, the strength or weakness of procedural protection varies greatly between jurisdictions.<sup>44</sup>

Disputes inevitably arise between owners and condemners.<sup>45</sup> Different legal systems approach the resolution of these disputes in a variety of ways.<sup>46</sup> The resolutions available to owners also vary greatly, from minimal review of compensation to full injunction of the taking.<sup>47</sup>

## **A. Eminent Domain in the United States**

The United States inherited the doctrine of eminent domain from Great Britain. The Fifth Amendment of the US Constitution prohibits various government actions and declares: “nor shall private property be taken for public use, without just compensation.”<sup>48</sup> The Framers of the Constitution prioritized the protection of individual property rights, and the protection of the value is an American trope.<sup>49</sup> Despite the supposed sacrosanctity of property rights in the United States, the Fifth Amendment Takings Clause and its state constitution counterparts have often been interpreted broadly, leading to unfortunate applications of the power.<sup>50</sup> This section will explore the due process requirements for eminent domain, the substantive interpretations of the “public use” requirement, and appealing eminent domain decisions.

### **1. Eminent Domain Procedures**

The power of eminent domain in the United States rests with federal and state legislatures, and must be delegated for other bodies to use the power.<sup>51</sup> While states have an independent capacity to exercise eminent domain, all governments in the United States are constrained by the requirements of the Fifth Amendment Due Process Clause.<sup>52</sup> States, however, have the discretion to determine how to

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<sup>44</sup> KIM ET AL., *supra* note 2, at 3

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See infra* Part III.

<sup>48</sup> U.S. CONST. amend. V.

<sup>49</sup> *See* KIM ET AL., *supra* note 2, at 41; *Horney*, 853 N.E.2d at 1128 (“The rights related to property . . . are among the most revered in our law and traditions.”); Ray, *supra* note 8, at 75; Lubens, *infra* note 98, at 393.

<sup>50</sup> *See* KIM ET AL., *supra* note 2, at 45; Ray, *supra* note 8, at 75.

<sup>51</sup> SACKMAN ET AL., *supra* note 2, § 3.03 (citing *Daniels v. Area Planning Comm’n*, 306 F.3d 445, 460 (7th Cir. 2002); *East Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 821 (4th Cir. 2004); *Orsett/Columbia L.P. v. Superior Court*, 207 Ariz. 130, 132 (Ct. App. 2004)).

<sup>52</sup> SACKMAN ET AL., *supra* note 2, § 4.3.

meet due process requirements, and they have implemented procedures with widely varying degrees of protection for individuals.<sup>53</sup>

Some states provide full due process protections, including personal notice and pre-condemnation hearings, but a few still allow *ex parte* takings without notice or a hearing.<sup>54</sup> Typically, a condemner must initiate proceedings against the property in court to an administrative authority, and the property owner is given notice.<sup>55</sup> The condemner must then show that it has been authorized by a valid statute to exercise eminent domain, and that the requirements of the statute have been met, which the owner may contest.<sup>56</sup> However, many states allow for condemnation of property without prior notice or a hearing when specific circumstances are met.<sup>57</sup> For example, the Rhode Island Supreme Court upheld a law that allowed for a quasi-governmental body to exercise eminent domain by merely filing a declaration with a county court.<sup>58</sup>

## 2. The Substantive Requirements of “Public Use”

The Fifth Amendment’s “public use” clause has been interpreted as a requirement that takings be for public benefit.<sup>59</sup> While the Constitution requires the existence of a public use to justify a taking, the burden on the state is “remarkably light.”<sup>60</sup> As long as the exercise of eminent domain is “rationally related to a conceivable public purpose, the [Supreme] Court has never held a compensated taking to be proscribed by the Public Use Clause.”<sup>61</sup> Over time in the United States, the public interest requirements for eminent domain have relaxed, largely because of the Supreme Court’s deferential treatment of governments that broadly interpret the Takings Clause.

So-called “broad” and “narrow” interpretations of the public use requirement have competed over the course of US history.<sup>62</sup> The narrow view holds that only takings for government ownership and use or for entities like utilities that serve the whole public fulfill the public use requirement.<sup>63</sup> In contrast, the broad

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<sup>53</sup> See generally D. Zachary Hudson, *Eminent Domain Due Process*, 119 YALE L. J. 1280 (2010) (explaining what process is due, what the content and form of that process should be, and the likely effects of recognizing due process rights in the eminent domain context).

<sup>54</sup> *Id.* at 1286.

<sup>55</sup> SACKMAN ET AL., *supra* note 2, § 4.101; see Hudson, *supra* note 53, at 1287.

<sup>56</sup> SACKMAN ET AL., *supra* note 2, § 4.101.

<sup>57</sup> Hudson, *supra* note 53, at 1288. As of 2010, Washington D.C. and 21 States allowed takings without prior notice or hearing. *Id.*

<sup>58</sup> *Id.* at 1284; see R.I. Econ. Dev. Corp. v. Parking Co., 892 A.2d 87, 108 (R.I. 2006).

<sup>59</sup> KIM ET AL., *supra* note 2, at 40.

<sup>60</sup> *Daniels*, 306 F.3d at 460.

<sup>61</sup> *Id.* (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984)).

<sup>62</sup> KIM ET AL., *supra* note 2, at 41.

<sup>63</sup> *Id.*

view is that any taking that would benefit the public meets the standard.<sup>64</sup> The narrow view was widely accepted until the beginning of the 20th century, but the broad view now dominates in most jurisdictions.<sup>65</sup>

Through the Great Depression and the Second World War, the jurisprudence on the public use requirement began to accept the broad view as judicial scrutiny of economic and commercial policy passed out of favor.<sup>66</sup> This shift toward the broad view culminated in the Supreme Court's ruling in *Berman v. Parker*.<sup>67</sup> In *Berman*, Congress sought to condemn a dilapidated Washington, D.C. neighborhood, but a store whose building was in excellent repair resisted the buyout.<sup>68</sup> The Court held that "[t]he role of the judiciary in determining whether [eminent domain] is being exercised for a public purpose is an extremely narrow one," and upheld the taking.<sup>69</sup> The project ultimately displaced about 5,000 African-American D.C. residents, whose land was transferred to private developers.<sup>70</sup> State supreme courts also embraced transfer of condemned property to private parties for economic development.<sup>71</sup> In *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court upheld a taking that displaced 4,000 people for the construction of a General Motors plant (GM).<sup>72</sup> GM and the City of Detroit estimated the proposed plant would create 6,150 jobs.<sup>73</sup> At peak employment, almost two decades after the condemnations, the GM plant employed only 3,600 people.<sup>74</sup> Ultimately, the *Poletown* project destroyed 600 businesses and 1,400 residential properties, cost taxpayers \$250 million, and likely did more economic harm than good.<sup>75</sup>

The latest major interpretation of the public use requirement came in the controversial 5–4 decision in *Kelo*.<sup>76</sup> In upholding the taking, the Supreme Court reiterated the broad view of *Berman* and *Poletown* and held that "economic development" was a valid purpose for transferring private property to a new private owner.<sup>77</sup> Legislative reaction to the *Kelo* ruling was strong: 45 states enacted some sort of legislation intended to restrict eminent domain after *Kelo*.<sup>78</sup> While some of

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<sup>64</sup> KIM ET AL., *supra* note 2, at 41.

<sup>65</sup> *Id.* at 42–43.

<sup>66</sup> *Id.* at 44; *cf.* U.S. v. Carolene Products Co., 304 U.S. 144 (1938) (establishing the rational basis test for legislative action under the Commerce Clause).

<sup>67</sup> *See* 348 U.S. 26, 33 (1954).

<sup>68</sup> Ray, *supra* note 8, at 75.

<sup>69</sup> KIM ET AL., *supra* note 2, at 44.

<sup>70</sup> *Id.* at 45.

<sup>71</sup> *Id.* at 45–46.

<sup>72</sup> *Id.* at 46; *see generally* 304 N.W.2d 455 (Mich. 1981).

<sup>73</sup> Somin, *supra* note 3, at 194.

<sup>74</sup> *Id.* at 195.

<sup>75</sup> *Id.* at 198–99.

<sup>76</sup> *See* 545 U.S. 469 (2005).

<sup>77</sup> KIM ET AL., *supra* note 2, at 47.

<sup>78</sup> *Id.* at 50.

this legislation substantially protects property owners, most states passed largely symbolic laws.<sup>79</sup> Surveying the legislation, one study found 80% of the laws passed after *Kelo* still allowed private economic development takings.<sup>80</sup>

State courts received *Kelo* with mixed reactions.<sup>81</sup> In the 2006 case *City of Norwood v. Horney*, the Ohio Supreme Court explicitly rejected the reasoning in *Kelo* and curtailed municipal power to condemn for resale to a developer.<sup>82</sup> However, New York courts have adopted *Kelo* and delivered a series of decisions that caused one judge to declare that “recent rulings of the [New York] Court of Appeals have made plain that there is no longer any judicial oversight of eminent domain proceedings.”<sup>83</sup> The Minnesota Court of Appeals<sup>84</sup> and Pennsylvania courts<sup>85</sup> have also followed the *Kelo* rule.

### 3. Right to Dispute and Eminent Domain

Many states require community notice and public hearings during the planning stages of major projects that could require the use of eminent domain.<sup>86</sup> An affected owner may object to the legality or constitutionality of a taking; at the federal level, such an objection would be filed with the answer, before the actual taking.<sup>87</sup> In *Daniels v. Area Planning Comm’n*, the Seventh Circuit held that a § 1983 civil rights claim was an appropriate vehicle to challenge a taking under the Fifth Amendment.<sup>88</sup> However, given the low level of judicial scrutiny, a finding of unconstitutionality is rare.<sup>89</sup> If a property owner has been given a full and complete

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<sup>79</sup> KIM ET AL., *supra* note 2, at 47.

<sup>80</sup> Amanda M. Olejarski, Irrelevance of “Public Use” in State Eminent Domain Reforms, 0 *Am. Rev. Pub. Admin.* 1, 1 (2017).

<sup>81</sup> See SACKMAN ET AL., *supra* note 2, § 7.12

<sup>82</sup> See *Horney*, 853 N.E.2d at 1141 (“We find that the analysis by . . . the dissenting justices of the United States Supreme Court in *Kelo* are better models for interpreting Section 19, Article I of Ohio’s Constitution.”); see Dick M. Carpenter & John K. Ross, *Do Restrictions on Eminent Domain Harm Economic Development?*, 24 *ECON. DEV. Q.*, 337, 338 (2010).

<sup>83</sup> *Uptown Holdings, LLC v. City of New York*, 908 N.Y.S.2d 657, 661 (App. Div. 2010) (Catterson, J., concurring); see STEVEN J. EAGLE, *Urban Revitalization and Eminent Domain: Misinterpreting Jane Jacobs*, 4 *ALB. GOV’T L. REV.* 106, 144 (2011) (discussing the Public Use Clause in New York State law).

<sup>84</sup> See *City of Granite Falls v. Soo Line R.R.*, 742 N.W.2d 690, 698 (2007).

<sup>85</sup> See *In re Condemnation by the Redevelopment Auth. of Lawrence Cnty.*, 962 A.2d 1257, 1263 (2008).

<sup>86</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-07-28, *EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED* 20 (2006).

<sup>87</sup> SACKMAN ET AL., *supra* note 2, § 27.09.

<sup>88</sup> Hudson, *supra* note 53, at 1298.

<sup>89</sup> See *id.* at 1320–21.

hearing on a possible condemnation, there is no constitutional guarantee of appellate review.<sup>90</sup>

US courts cannot evaluate whether a taking was in fact necessary for a given public use, but can only examine the condemning government's conduct to assure it acted in good faith.<sup>91</sup> In a small minority of jurisdictions, like Michigan, a positive judicial finding of necessity is required for eminent domain.<sup>92</sup> Other states also have a higher level of scrutiny, as in Massachusetts, where eminent domain is permissible "whenever the public exigencies require" appropriation.<sup>93</sup>

## **B. Eminent Domain in Germany**

In Germany, property rights and the government power to expropriate are based in Article 14 of the Basic Law (*Grundgesetz*).<sup>94</sup> Section 3 states that "[e]xpropriation shall only be permissible for the public good."<sup>95</sup> While the Basic Law protects the right to property, the right's "content and limits shall be defined by the laws."<sup>96</sup> German courts have upheld various statutes limiting the property right, thereby authorizing actions that might otherwise be considered takings.<sup>97</sup> However, the Federal Constitutional Court has recognized various property interests as constitutionally protected rights, taking complete discretion over the definition of property away from legislatures.<sup>98</sup>

The *Grundgesetz* came into force in Western Germany on May 23, 1949.<sup>99</sup> The constitution was influenced by the governments of the Occupying Powers—notably the United States and Great Britain—creating a federalist republic, a parliamentary legislature, and an independent judiciary, in addition to containing a

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<sup>90</sup> SACKMAN ET AL., *supra* note 2, § 4.108

<sup>91</sup> *See id.* § 4.11.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> SACKMAN ET AL., *supra* note 2, § 1B.02. As a member of the European Union, Germany has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has implications for property rights and eminent domain. *See id.* § 1B.01.

<sup>95</sup> Grundgesetz [GG][BASIC LAW] art. 14, § 3, *translation at* [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) [hereinafter *Grundgesetz*].

<sup>96</sup> *Id.* § 1.

<sup>97</sup> *See* SACKMAN ET AL., *supra* note 2, § 1B.02[1][b]. Courts have upheld "content regulations" for the uncompensated destruction of diseased cattle, zoning laws, pollution control laws, and even land development.

<sup>98</sup> *Id.*; *see* Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 ARIZ. J. INT'L & COMP L. 389, 421 (2007).

<sup>99</sup> *Germany: Government and Society—Constitutional Framework*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Germany/Government-and-society> (last visited Feb. 20, 2019) [hereinafter *Germany: Government and Society*].

formal declaration of human rights.<sup>100</sup> A notable difference between the US and German constitutional property schemes is found in Article 14 § 2 of the *Grundgesetz*: “Property entails obligations. Its use shall also serve the public good.”<sup>101</sup> To the US ear, this might suggest weaker property rights; but while the *Grundgesetz* has permitted redistributive action by the government, it may well be better at protecting the property of the most vulnerable populations than the US Constitution.<sup>102</sup> This section of the Note explores the procedural and substantive requirements for eminent domain in Germany, and the rights individuals have to protest the taking.

### 1. Procedural Requirements for Expropriation

If a party (e.g., municipality, state government, or private company) cannot purchase property, it may apply for compulsory purchase with a specially designated agency.<sup>103</sup> In most cases, this is a regional expropriation authority created by a state legislature.<sup>104</sup> The exact procedures vary from state to state, but typically before expropriation proceedings can occur, the applicant must show it made reasonable offers to the owner, and the expropriation authority must make serious efforts to mediate a sale.<sup>105</sup> If these efforts fail, the authority engages in fact-finding and determines whether the proposed taking has statutory authorization and is necessary for the public good.<sup>106</sup> If the authority decides to proceed with expropriation, it also determines compensation.<sup>107</sup>

The Basic Law states that takings of private property “may only be ordered by or pursuant to a law that determines the nature and extent of compensation.”<sup>108</sup> This requires every taking to fall under a federal or state-level statute that authorizes expropriation for that purpose.<sup>109</sup> For example, under the German Federal Building Code, it is possible to expropriate land to expand public utilities, to take control of undeveloped plots in otherwise developed areas, to procure land to compensate for other takings, or to preserve a structure protected by statute.<sup>110</sup> Conversely, in the 1987 *Boxberg* case, BVerfGE 74, 264, the Federal Constitutional Court ruled that

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<sup>100</sup> *Germany: Government and Society*, *supra* note 99.

<sup>101</sup> *Grundgesetz* art. 14, § 2.

<sup>102</sup> See GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 111 (2006).

<sup>103</sup> SACKMAN ET AL., *supra* note 2, § 1B.02[6].

<sup>104</sup> Winrich Voss, *Compulsory Purchase in Poland, Norway and Germany – Part Germany*, XXIV FIG Congress 2010, 9; SACKMAN ET AL., *supra* note 2, 1B.02[6].

<sup>105</sup> SACKMAN ET AL., *supra* note 2, § 1B.02[6]; KIM ET AL., *supra* note 2, at 32.

<sup>106</sup> SACKMAN ET AL., *supra* note 2, § 1B.02[6].

<sup>107</sup> *Id.*

<sup>108</sup> *Grundgesetz* art. 14, § 3; SACKMAN ET AL., *supra* note 2, § 1B.01[1].

<sup>109</sup> See KIM ET AL., *supra* note 2 at 27, 29.

<sup>110</sup> Voss, *supra* note 104, at 9.

the state of Baden-Württemberg had violated the Basic Law when it expropriated farmland for the construction of a Mercedes-Benz test track.<sup>111</sup> While the expropriation had been carried out under a municipal zoning law, no state law allowed this type of expropriation for job creation.<sup>112</sup>

## 2. Substantive Requirements for Expropriation

In German law, a taking must meet two broad public interest criteria. First, the Basic Law requires that a taking be for a public purpose.<sup>113</sup> Only sufficiently serious purposes are valid,<sup>114</sup> but a range of purposes can fulfill the “public good” requirement, like transportation or energy projects, natural conservation, the protection of monuments, or urban development.<sup>115</sup> German courts have also upheld takings for the selling of land to a construction company to create employment, or for the expansion of a private business to create employment.<sup>116</sup> A taking for purely private purposes is unconstitutional.<sup>117</sup> The state must show that the private party benefiting from a taking is committed to the public purpose, often by contracting or taking collateral.<sup>118</sup> Takings for purely financial reasons, like increasing tax revenue, are not constitutionally permitted.<sup>119</sup>

Second, the taking must adhere to the German legal principle of proportionality.<sup>120</sup> The principle of proportionality (*Grundsatz der Verhältnismäßigkeit*) is an uncodified legal construct based on the idea that a liberal democracy should only tread upon constitutional rights to the extent absolutely necessary.<sup>121</sup> In the context of eminent domain, this requires that the taking is the mildest possible infringement on a right, and that the involved government expropriate only as much property as the public purpose requires.<sup>122</sup> If the objective could be served by using pre-existing public land, or by negotiating a reasonable

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<sup>111</sup> KIM ET AL., *supra* note 2, at 27.

<sup>112</sup> *Id.*

<sup>113</sup> SACKMAN ET AL., *supra* note 2, § 1B.02[1][c].

<sup>114</sup> See BVerfG, 1 BvR 3139/08, Dec. 17, 2013, [http://www.bverfg.de/e/rs20131217\\_1bvr313908.html](http://www.bverfg.de/e/rs20131217_1bvr313908.html).

<sup>115</sup> Voss, *supra* note 104, at 3.

<sup>116</sup> SACKMAN ET AL., *supra* note 2, § 1B.02[1][c], [1][e][iii]. In BVerfGE 56, 249 – *Gondelbahn*, the court held an expropriation to allow a business to construct a gondola lift was constitutional. The lift goes to the Teufelstein rock formation at the highest point in the Fischbacher Alps. *Id.*; see *Teufelstein*, WIKIPEDIA, <https://de.wikipedia.org/wiki/Teufelstein> (last visited Mar. 18, 2019).

<sup>117</sup> SACKMAN ET AL., *supra* note 2, § 1B.02[1][c].

<sup>118</sup> KIM ET AL., *supra* note 2, at 31.

<sup>119</sup> *Id.* at 27–28 n. 33.

<sup>120</sup> SACKMAN ET AL., *supra* note 2 at § 1B.02[4].

<sup>121</sup> *Id.* § 1B.02[1][e][i]

<sup>122</sup> KIM ET AL., *supra* note 2, at 28.

voluntary purchase, expropriation would be unnecessary and improper.<sup>123</sup> In analyzing if a particular taking is necessary, the government does not have to show that no other location for the project exists, but only that the property to be expropriated is indispensable to the proposed project.<sup>124</sup>

Proportionality not only requires that the infringement on property rights be necessary to the public purpose, but also that the net public benefit in the expropriation outweigh the owner's private interest in the property.<sup>125</sup> For example, in 1 BvR 3139/08, the Federal Constitutional Court considered the expropriation of a residential property for a coal mine.<sup>126</sup> The Court held that the proper analysis would balance: (1) the public interest in the production of raw materials, and the mine operator's interest in selling the materials; against (2) the owner's interest, including his fundamental property rights; (3) and the public's interests, such as resource and water management, protection of the landscape, and possible costs in resettlement.<sup>127</sup> The Court determined the mine was in the public interest, given the importance of coal to energy production and predictions that the mine would be plentiful until 2045.<sup>128</sup>

### 3. The Appeal Right in Expropriation Cases

After refusing offers to purchase and losing an expropriation case to the administrative expropriation authority, an owner may appeal to the courts.<sup>129</sup> Article 19 § 4 of the German Basic Law guarantees that anyone whose rights have been violated has recourse to the judiciary.<sup>130</sup> Courts mostly review appeals on issues of compensation.<sup>131</sup> However, owners are entitled to judicial review of various substantive issues.

Expropriation-affected persons are entitled to judicial review to determine if the proposed expropriation meets the requirements of the statute that it pursues.<sup>132</sup> Courts also must review the constitutionality of the expropriation, particularly whether the purpose of the taking is valid and if the taking meets the standards of proportionality.<sup>133</sup>

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<sup>123</sup> KIM ET AL., *supra* note 2, at 28.

<sup>124</sup> *Id.*; 1 BvR 3139/08, at 183–84.

<sup>125</sup> SACKMAN ET AL., *supra* note 2, § 1B.02[1][e][ii][E]; *see* Voss, *supra* note 104, at 6; 1 BvR 3139/08, at 1.

<sup>126</sup> 1 BvR 3139/08.

<sup>127</sup> *Id.* ¶ 216.

<sup>128</sup> *Id.* ¶¶ 326–27.

<sup>129</sup> Voss, *supra* note 104, at 12.

<sup>130</sup> Grundgesetz art. 19 § 4; 1 BvR 3139/08, at 190–91.

<sup>131</sup> Voss, *supra* note 104, at 12.

<sup>132</sup> 1 BvR 3139/08, at 190.

<sup>133</sup> *Id.* at 190, 217.

The multiple substantive grounds for appeal in German law incentivize owners to appeal unfair takings and encourage governments to carefully follow expropriation law.<sup>134</sup> Owners also typically remain in possession of the land until legal proceedings end.<sup>135</sup> This preliminary injunctive relief also encourages owners to fight the substantive decision to expropriate, rather than merely push for higher compensation.<sup>136</sup>

The complex procedural and appeals system surrounding eminent domain projects greatly increases the time it takes to plan and begin projects.<sup>137</sup> In fact, the lengthy procedures involved in expropriation have been blamed for stagnation in the German economy.<sup>138</sup> Despite criticisms, it seems that Germany has chosen to prioritize rights rather than streamline every proposed project.

### **C. Eminent Domain in South Korea**

Article 23 of the Constitution of the Republic of Korea states that, “[e]xpropriation, use or restriction of private property from public necessity and compensation therefor shall be governed by Act: *Provided*, [t]hat in such a case, just compensation shall be paid.”<sup>139</sup> The Constitution was enacted in 1948, when Korea’s economy was still largely agrarian and dependent on foreign aid.<sup>140</sup> From the 1960s to the 1990s, the South Korean economy grew at an average annual rate of nearly nine percent, fueled by industrialization, population growth, and rapid urbanization.<sup>141</sup> South Korea’s explosive growth and ambitious developmental policy has likely influenced the interpretation of the “public necessity” requirement of the Constitution.

#### **1. Procedure and Due Process in Korean Takings**

The Korea Land Takings and Compensation Act (KLTC) is the main law regulating eminent domain in South Korea.<sup>142</sup> It allows various parties: the central government, local governments, and even private parties, like development firms,

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<sup>134</sup> KIM ET AL., *supra* note 2, at 32.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 34.

<sup>137</sup> *Id.* at 32, 34.

<sup>138</sup> *Id.* at 34.

<sup>139</sup> Daehanminkuk Hunbeob [Hunbeob] [Constitution] art. 23, § 3 (S. Kor.).

<sup>140</sup> See *South Korea: History – Economic and social developments*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/place/South-Korea/Economic-and-social-developments> (last updated Feb. 21, 2019).

<sup>141</sup> *Id.*

<sup>142</sup> KIM ET AL., *supra* note 2, at 166.

to exercise the power of eminent domain.<sup>143</sup> The KLTC outlines a basic process for land acquisition, including initial approval for the project by the appropriate government, a bargain phase, appraisal of the land, and finally compulsory purchase if necessary.<sup>144</sup> However, the KLTC states that “other laws also can designate lands to be taken.”<sup>145</sup> These laws, which can expropriate land to private parties, can bypass some of the normal process for determining public necessity.<sup>146</sup>

There are two phases in the procedure allowing for compulsory purchase under the KLTC. First, in the “permission of public project” phase, the Ministry of Land, Infrastructure, and Transportation (MOLIT) reviews a project to determine if it meets the public necessity requirement and grants or denies the power of eminent domain to the project manager.<sup>147</sup> After receiving an application, the Minister consults with the appropriate governor or mayor, and hears the opinion of the Central Land Tribunal and concerned persons before granting or denying permission.<sup>148</sup> Second, in the “decision of taking” phase, the Central Land Tribunal reviews the specific takings and the legal effect occurs.<sup>149</sup> While the two steps are separate, because of rulings by the Korean Supreme Court, MOLIT’s permission of public project is the exclusive procedure for verifying the public necessity of a project.<sup>150</sup>

However, most projects do not go through the full KLTC procedure: in 2014 only 15 projects received permission from MOLIT, but over 3,100 large projects used the power of compulsory purchase.<sup>151</sup> These other projects were instead authorized by individual laws as permitted by the KLTC; a procedure which is typically more generous to project managers than the KLTC process.<sup>152</sup> As many as 100 such individual acts exist, each with its own requirement for “quasi-permission of public project.”<sup>153</sup>

## 2. The Substance of the Public Necessity Requirement

<sup>143</sup> KIM ET AL., *supra* note 2, at 177. While private parties exercising the eminent domain power is technically possible in several of the jurisdictions in this Note, it is especially common in South Korea. *See id.* at 177–78.

<sup>144</sup> *Id.* at 167.

<sup>145</sup> *Id.* at 178.

<sup>146</sup> *Id.* at 178.

<sup>147</sup> KIM ET AL., *supra* note 2, at 230, 235.

<sup>148</sup> *Id.* at 235.

<sup>149</sup> *Id.* at 233.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 237–38 & Table 9.2 (Public permissions granted per annum compared to projects with over 1 billion KRW, roughly 1 million USD, in compensation paid per annum).

<sup>152</sup> KIM ET AL., *supra* note 2, at 239.

<sup>153</sup> *Id.* at 240. The Constitutional Court of Korea has ruled that this quasi-permission process is constitutional. *Id.* at 241.

The KLTC does not give explicit criteria for determining public necessity, and approval depends largely upon the discretion of MOLIT.<sup>154</sup> The KLTC instead lists seven broad project types that meet the public necessity requirement, covering a broad array of permissible uses: everything from arboretums and airports to slaughterhouses and waterworks.<sup>155</sup> The verification of public purpose, according to the KLTC, involves investigation into the public interest that can be achieved by the project and a comparison of that public interest to the private interest at stake.<sup>156</sup>

While the full procedure is not an entirely robust one, the quasi-permission system is less adequate.<sup>157</sup> The procedures required for quasi-permission are typically shorter and involve less investigation.<sup>158</sup> This greatly increases the incentives of project managers to attempt to abuse the process and the risk that unjustified takings will be approved.<sup>159</sup>

### 3. Right to Appeal

Apart from lobbying to MOLIT during the permission of public project phase, there is no mechanism for challenging the public necessity of a taking.<sup>160</sup> After permission of a public project is granted and the Central Land Tribunal makes compulsory purchase of the land, the former owner has the right to appeal on the issue of compensation.<sup>161</sup> The initial appeal is again to the Central Land Tribunal, but a second appeal can be made into the Administrative Court System.<sup>162</sup> Since the 2000's, the Central Land Tribunal has increasingly resorted to compulsory purchase rather than negotiation, and has also spent less time considering initial appeals.<sup>163</sup> This has increased the rate of appeals on compensation to the administrative courts.<sup>164</sup>

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<sup>154</sup> KIM ET AL., *supra* note 2, at 168.

<sup>155</sup> *Id.* at 233 n. 8.

<sup>156</sup> *Id.* at 235.

<sup>157</sup> *Id.* at 247.

<sup>158</sup> *Id.* at 248.

<sup>159</sup> *See* KIM ET AL., *supra* note 2, at 247–49.

<sup>160</sup> *See id.* at 167.

<sup>161</sup> *Id.* at 289.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 293.

<sup>164</sup> KIM ET AL., *supra* note 2, at 295.

### **D. Eminent Domain in India**

Until 2013, eminent domain in India was governed by doctrine set forth in the Land Acquisition Act 1894 (LAA), a regulation enacted under the British Raj.<sup>165</sup> Land acquisition law in colonial India was initially implemented in *Regulation I* to facilitate the material exploitation of the region (namely salt production) by the East India Company; it enabled the colonial authorities to acquire land at a “fair price,” for “roads, canals, or other public purposes.”<sup>166</sup> Various colonial regulations of land acquisition were consolidated into the LAA.<sup>167</sup> After winning independence, the Constituent Assembly hotly debated both property rights and eminent domain while drafting the new Constitution.<sup>168</sup> Despite this attention—or because of the complex disagreements—the LAA remained in effect after independence.<sup>169</sup>

While the new Constitution contained protections for property and the right to compensation, pressure for land reform and development eroded these assurances.<sup>170</sup> After several steps back, the constitutional right to property was repealed outright in 1978, allowing for application of the LAA with only minimum protection.<sup>171</sup> In 1984, the LAA was amended to allow expropriation for transfer to private parties and a process for expedited expropriation in cases of “urgency.”<sup>172</sup> The “public purpose” standard of the LAA, after interpretation by the Indian Supreme Court, was “in effect, any purpose the government of the day [chose] to use the land for.”<sup>173</sup>

Combined with India’s explosive growth, the result of this policy has been a widespread and abusive use of eminent domain.<sup>174</sup> Mass displacement was regarded as inevitable under the LAA;<sup>175</sup> perhaps even as a part of India’s model of

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<sup>165</sup> See KIM ET AL., *supra* note 2, at 126.

<sup>166</sup> See Priya S. Gupta, *The Peculiar Circumstances of Eminent Domain in India*, 49 OSGOOD HALL L. J. 445, 452 (2012).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 460. Debate turned on tensions between capitalist and socialist factions of the new government, and the conflicting desires for strong property rights and land reform. See *id.*

<sup>169</sup> *Id.* at 455 (“[A]ccording to Article 372 of the Constitution, all colonial laws remained in force unless explicitly repealed.”).

<sup>170</sup> *Id.* at 461–62.

<sup>171</sup> Gupta, *supra* note 166, at 463.

<sup>172</sup> *Id.* at 487.

<sup>173</sup> Sebastian Morris & Ajay Pandey, *Towards Reform of Land Acquisition Framework in India*, 42.22 ECON. & POL. WKLY 2083, 2086 (2007).

<sup>174</sup> See Gupta, *supra* note 166, at 468; Usha Ramanathan, *A Word on Eminent Domain*, in LYLA MEHTA, *DISPLACED BY DEVELOPMENT: CONFRONTING MARGINALIZATION AND GENDER INJUSTICE* (2009).

<sup>175</sup> Ramanathan, *supra* note 174, at 141.

development.<sup>176</sup> While the LAA guaranteed compensation for titleholders, it made no provision for agrarian communities occupying land without title.<sup>177</sup> Displaced populations are sometimes promised land for land, but courts did not enforce rehabilitation schemes and even declared them unconstitutional.<sup>178</sup> Many Indians were left in a cycle of displacement and disenfranchisement as rural mass eviction forced them to relocate to urban slums, where they again held no title.<sup>179</sup>

Rural occupants protested takings both peacefully and violently.<sup>180</sup> From 2006 to 2008, 13,000 people were displaced for a 997-acre automobile plant in Singur.<sup>181</sup> Protests were bitter and violent, including several suicides by displaced farmers.<sup>182</sup> The Singur automobile plant project ultimately failed. Eventually, the car company moved the factory to another state, leaving the plot fenced off and the factory unfinished.<sup>183</sup> One study found that if the plant had been built, the outsized subsidies offered to the manufacturer meant the state would have likely spent more maintaining the infrastructure around the plant than it would have received in taxes.<sup>184</sup>

In 2011, farmers from Bhatta-Parsaul kidnapped three surveyors working on a highway project through their land, leading to two deaths, wide protests, and the deployment of 2,000 riot police to the farming village.<sup>185</sup> Across India, “[g]overnment acquisition has led to millions of dollars’ worth of litigation, protests, kidnapping, murder, arson, and police crackdowns of the kind experienced in Bhatta-Parsaul.”<sup>186</sup>

Pointing to the deep dysfunction under the LAA, some commentators argue that the institution of eminent domain itself is “ill-fitted for a postcolonial and democratic India.”<sup>187</sup> It is unclear whether eminent domain has been habilitated under the young Right to Fair Compensation and Transparency in Land Acquisition,

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<sup>176</sup> See generally Amit Bhaduri, Professor Emeritus, JNU, New Delhi Honorary Fellow CDS, Fourth Foundation Day Lecture: A Model of Development by Dispossession (Dec. 7, 2015), <http://cds.edu/wp-content/uploads/2015/12/4FoundationLecture.pdf>.

<sup>177</sup> Gupta, *supra* note 166, at 472.

<sup>178</sup> Ramanathan, *supra* note 174, at 142–43.

<sup>179</sup> Gupta, *supra* note 166, at 472–73.

<sup>180</sup> See Casey Downing, *Eminent Domain in 21st Century India: What New Delhi Can Learn from New London*, 46 N.Y.U. J. INT’L L. & POL. 207, 208–11 (2013).

<sup>181</sup> *Nano Wars*, THE ECONOMIST (Aug. 28, 2008), <http://www.economist.com/node/12010079#>.

<sup>182</sup> Ray, *supra* note 8, at 73.

<sup>183</sup> *Id.*

<sup>184</sup> See Nirmal Kumar Chandra, *Tata Motors in Singur: a Step Towards Industrialisation or Pauperism?*, ECON. & POL. WKLY., Dec. 13, 2008, at 37.

<sup>185</sup> Downing, *supra* note 180, at 208.

<sup>186</sup> *Id.* at 246.

<sup>187</sup> Gupta, *supra* note 166, at 449. “Can an institution crafted specifically to take resources and land from subjects for the benefit of the Crown and its corporate associates ever be modified to serve a public purpose? I argue that, given the historical development of eminent domain in India, the answer is ‘no.’” *Id.* at 451.

Rehabilitation and Resettlement Act, 2013 (LARR Act). The LARR Act's preamble states it is meant to ensure "a humane, participative, informed and transparent process for land acquisition."<sup>188</sup> However, in 2014, the newly-elected National Democratic Alliance government promulgated an ordinance amending and weakening the Act (LARR Ordinance 2014), but legislation permanently enacting the changes stalled in the upper parliamentary house.<sup>189</sup> The ordinance was re-promulgated twice, but has since lapsed.<sup>190</sup> The following sections will outline the procedural and substantive requirements for land acquisition under both the LARR Act and the Act as amended by the Ordinance, and the related rights to appeal.

### 1. Procedural Requirements

The LARR Act established several remarkably progressive procedural requirements for land acquisition.<sup>191</sup> First, if the land is being taken for the use of a private entity, there is a consent requirement.<sup>192</sup> For an acquisition for a public-private partnership, where land is used by private companies but owned by the state, 70% of property-owning families must consent to the acquisition.<sup>193</sup> For an acquisition for a private entity, 80% of property-owning families must consent.<sup>194</sup>

Second, before an acquisition, the Government (Central or State) must conduct a study of the likely social impact of the acquisition with the cooperation of the relevant local government and a panel of experts.<sup>195</sup> The Social Impact Assessment must consider whether the proposed taking serves the public purpose, an estimate of the private and communal properties that would be affected by the project, how the taking would affect the local population, a comparison of the benefits of the project against the social and economic costs, and a list of ameliorative measures to be taken during the project.<sup>196</sup> The Assessment must be

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<sup>188</sup> The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, No. 30 of 2013, <http://indiacode.nic.in/acts-in-pdf/302013.pdf> [hereinafter "LARR Act, 2013"].

<sup>189</sup> See generally Santosh Verma, *Subverting the Land Acquisition Act, 2013*, *ECON. & POL. WKLY.*, Sept. 12, 2015. In India, the president may promulgate an ordinance, legislation in effect for a six-month period. Mohit Singh, *Land Acquisition Ordinance re-promulgated as Amendment Bill lies with Joint Parl Committee*, 1, *L. St.* (June 1, 2015), <http://onelawstreet.com/land-acquisition-ordinance-re-promulgated-as-amendment-bill-lies-with-joint-parl-committee>.

<sup>190</sup> Verma, *supra* note 189.

<sup>191</sup> KIM ET AL., *supra* note 2, at 126.

<sup>192</sup> *Id.*

<sup>193</sup> LARR Act, 2013, § 2(2).

<sup>194</sup> *Id.*

<sup>195</sup> LARR Act, 2013, §§ 2(2), 4.

<sup>196</sup> LARR Act, 2013, §§ 4(4)–4(6). The Assessment must also be evaluated by an "independent multi-disciplinary Expert Group," whose report must also be published to the affected area. *Id.* § 7.

distributed to the local population in an appropriate language, it must be published online, and a public hearing must be held in the area.<sup>197</sup> While the Social Impact Assessment may prevent some abuses, and may create enhanced transparency and political accountability, it is legally toothless. If a government decides to continue with land acquisition against the recommendation of the Assessment, it must merely put its reasons in writing.<sup>198</sup>

Last among the major protections, after the above procedure, the involved Government must publish an official notice both publicly and to the affected families.<sup>199</sup> The notice must include a statement of a bona fide public purpose, an assertion that the potential benefits outweigh the social costs, and a finding that only as much land as necessary for the project is being taken.<sup>200</sup>

Section 40 of the LARR Act creates an “urgency” exception whereby a government may acquire land without the social impact assessment procedure.<sup>201</sup> The LARR Ordinance 2014, while in effect, also exempted acquisitions for defense, rural infrastructure, housing, industrial corridors, and social infrastructure from the consent and social impact assessment requirements,<sup>202</sup> leading some commentators to characterize the Ordinance as “nullifying” the LARR Act, rather than amending it.<sup>203</sup>

## 2. Substantive Requirements for Acquisition

The LARR Act requires any acquisition, whether public or private, to be for a “public purpose.”<sup>204</sup> The Act enumerates various public purposes, including strategic or military purposes, infrastructure projects (such as industrial corridors, mining, public education institutions, and projects for sports, health care, or tourism), projects for the benefit of project-affected families, other low-income or rehabilitation housing, and urban development projects.<sup>205</sup> This wide array of purposes allows acquisition for various private uses and expects continued use of eminent domain for industrialization and development.<sup>206</sup> The LARR Act does not

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<sup>197</sup> LARR Act, 2013, § 5.

<sup>198</sup> *See id.* § 7(4).

<sup>199</sup> *Id.* § 11.

<sup>200</sup> *Id.* §§ 8, 11.

<sup>201</sup> *Id.* §§ 9, 40.

<sup>202</sup> Sukhpal Singh, *Land Acquisition in India: An Examination of the 2013 Act and Options*, 4 J. LAND & RURAL STUD. 66, 67 (2016).

<sup>203</sup> Verma, *supra* note 189.

<sup>204</sup> LARR Act, 2013, § 2.

<sup>205</sup> *Id.* § 2(1).

<sup>206</sup> *See* Amlanjyoti Goswami, *Land Acquisition, Rehabilitation and Resettlement: Law, Politics and the Elusive Search for Balance*, 4 J. LAND & RURAL STUD. 3, 12 (2016).

substantively change the “public purpose” requirements of land acquisition from the LAA period, but rather enshrines them.<sup>207</sup>

### 3. Right to Dispute the Decision to Take

The procedural requirements of the LARR Act do give affected individuals an initial opportunity to dispute a taking. Anyone may offer objections at initial public hearings, which are incorporated into the Social Impact Assessment.<sup>208</sup> After preliminary notice, any interested individual may also file an objection with the taking government regarding the area of the proposed acquisition, the suitability of the land, the public purpose justification, or the findings of the Social Impact Assessment.<sup>209</sup> All objecting parties have the right to be heard by the Collector (the overseer of land acquisition, compensation, and rehabilitation in a jurisdiction), but a government’s decision on all objections is final.<sup>210</sup>

The LARR Act mandates that each jurisdiction create a special tribunal (a Land Acquisition, Rehabilitation and Resettlement Authority) with exclusive jurisdiction over disputes relating to land acquisition.<sup>211</sup> Any affected person who has not accepted an award may apply to have their objection heard by the Authority.<sup>212</sup> However, the language of the Act suggests the Authority only reviews questions of compensation. Section 64 lists “the measurement of the land, the amount of compensation, the person to whom it is payable, the rights of Rehabilitation and Resettlement . . . or the apportionment of the compensation” as possible objections referred to the Authority, and requires that the “application shall state the grounds on which objection *to the award* is taken. . . .”<sup>213</sup> The Act makes no mention of the Authority reviewing the public purpose of the acquisition or compliance with the LARR Act.<sup>214</sup> Thus, the Act apparently makes no provision for legally challenging a government’s decision to take or a finding of public purpose.

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<sup>207</sup> Goswami, *supra* note 206. Goswami notes that in the years prior to the enactment of the LARR Act, the Supreme Court of India had indicated it may read constitutional language about economic and social justice into the public purpose requirement of the LAA; the enumeration of public purposes may make such judicial activism more difficult. *See id.* at 9 (quoting *Radhey Shyam v. The State of Uttar Pradesh*, 5 SCC 553 (2011)).

<sup>208</sup> LARR Act, 2013, § 5.

<sup>209</sup> *Id.* § 15(1).

<sup>210</sup> *Id.* §§ 15(2)–(3).

<sup>211</sup> *See id.* §§ 51, 60, 63, 64.

<sup>212</sup> LARR Act, 2013, § 64.

<sup>213</sup> *Id.* (emphasis added).

<sup>214</sup> *See id.* §§ 51–74.

#### IV. THE POSSIBILITY OF REFORM

This exploration of eminent domain in the United States, Germany, South Korea, and India disavows the exceptionalist reactions to *Kelo*. Eminent domain is routinely used for economic development in countries like South Korea and India. Even in Germany, which of the surveyed countries arguably has the strongest protections against eminent domain, expropriation has been allowed for coal mining and development of tourism infrastructure.<sup>215</sup> Indeed, *Kelo* is not a true departure from the long US tradition of eminent domain's use to replace blight with new development.<sup>216</sup>

Moreover, the United States is not alone in its struggles with abusive and unjust uses of eminent domain. In the *Boxberg* case, a German state attempted to acquire private land for a Mercedes-Benz test track.<sup>217</sup> Thousands of uses of eminent domain have proceeded through the quasi-permission system in South Korea without receiving independent scrutiny.<sup>218</sup> In India, eminent domain has led to the displacement of tens of thousands of people living on land they did not own. The abuse has led to failed projects, civil unrest, and rural citizens forced to find refuge in the slums of India's burgeoning cities.

##### A. The Four Systems' Attempts to Prevent Abuse

The four countries have different safeguards in place to protect against these abuses. Except for cases of obvious abuse, the United States and South Korea have left regulation of eminent domain to the political process. In the Korean quasi-permission system, the KLTC provides a specific loophole for regional legislatures to pass laws stipulating the public interest of a particular project.<sup>219</sup> The *Kelo* opinion explicitly vocalized deference to the City of New London.<sup>220</sup> In the wake of post-*Kelo* reform, it is more likely that an owner will have more legal protection from eminent domain, but the primary constraints on the power are political pressures against eminent domain. While politicians will theoretically face ramifications for unjust uses of eminent domain, the complexity and years-long timeframe involved in economic development projects undermine the system of political accountability. In Germany, a combination of procedural and substantive safeguards exists to create a robust protection from eminent domain, notably the requirement that a state-level act must empower the taking and the constitutional principle of proportionality. In India, the LARR Act created a new set of procedures

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<sup>215</sup> See SACKMAN ET AL., *supra* note 2, § 1B.02[1]; 1 BvR 3139/08; BVerfGE 56, 249–*Gondelbahn*.

<sup>216</sup> See generally Ray, *supra* note 8.

<sup>217</sup> See KIM ET AL., *supra* note 2, at 27.

<sup>218</sup> *Id.* at 239.

<sup>219</sup> *Id.* at 238.

<sup>220</sup> *Kelo*, 545 U.S. at 483.

intended to increase the transparency and equity of the eminent domain process. However, most of the substantive requirements remain unchanged or can be overridden by the condemning authority. While these four countries have tried to curtail abuse, it is clear there is still room for improvement.

## **B. The Ability to Dispute a Public Interest Finding as Reform**

Eminent domain reform must balance the very real potential harms and the necessity of economic development. Notably, categorical prohibitions of “economic development” takings would not prevent some of the most egregious abuses.<sup>221</sup> Both *Berman* and other egregious abuses of eminent domain were rationalized as removing “urban blight.”<sup>222</sup> Giving persons potentially affected by a taking the right to dispute the public interest finding before a neutral tribunal with the power to grant injunctive relief would not only protect against unjust takings, but would still allow for most publicly beneficial transfers to occur.

There are various ways in which an injunctive system would improve the difficulties surrounding eminent domain. First, condemners are less likely to pursue projects in legal systems that grant injunctive relief for failure to meet the public interest requirement.<sup>223</sup> Faced with the potential for increased court costs or outright failure of projects, governments and developers are less likely to pursue eminent domain action when there is a real question of whether a project meets the public interest requirement.<sup>224</sup> Moreover, the fact-finding process and publicity of a judicial proceeding on the public benefits of an eminent domain project will increase transparency and political accountability. Projects that are pursued in an injunctive system are more likely to be demonstrably in the public interest.

Second, the possibility of actual injunctive relief incentivizes individuals to resist unjust takings and thereby enforce the requirements for eminent domain. Some eminent domain systems (as explained below) require that condemners regulate themselves, even though condemners have incentives to approve their own projects. Affected individuals are much more likely to resist unlawful conduct, but if there is no real chance of relief, individuals are more likely to take the offered compensation and move on. The possibility of injunctive relief increases the chance that eminent domain laws will be enforced.

Third, an injunctive system still helps solve the holdout problem. “Holdouts” are not motivated by a bona fide desire to keep their property, but by the opportunity to maximize the value of their position. Disputing the public interest requirement is unlikely to result in increased compensation and will only

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<sup>221</sup> See Somin, *supra* note 3, at 270.

<sup>222</sup> *Id.* at 224; see Ilya Somin, *Let There Be Blight: Blight Condemnation After Goldstein and Kaur*, 38 *FORDHAM URB. L. J.* 1193 (2011).

<sup>223</sup> These are “injunctive systems” for convenience.

<sup>224</sup> *C.f.* KIM ET AL., *supra* note 2, at 247. The author notes the opposite phenomenon in South Korea; lax review of the Public Interest criteria creates incentives for developers to pursue unconstitutional or corrupt projects.

increase the holdout's legal costs. Ultimately, allowing individuals to dispute the public interest finding solves several problems in eminent domain abuse while still allowing eminent domain to fulfill its policy function.

The four systems of eminent domain examined above each give affected persons varying ability to challenge the public interest finding. In the United States, affected parties can object to the public interest finding in a judicial proceeding, but in some jurisdictions, they are not notified until after the taking. Moreover, the United States tends to be very deferential to condemners, so injunctive relief is unlikely in most cases. In Germany, affected persons have recourse to normal civil courts, and, thanks to the Principle of Proportionality, their objections will receive serious consideration. In India, procedural safeguards allow for political pressure against takings, but there is no mechanism for individuals to be heard in a neutral tribunal on objections to the public interest finding. In South Korea, there is little recourse for property owners to challenge the administrative finding of public purpose, especially considering the prolific use of the quasi-permission system. The United States, South Korea, and India could all benefit from allowing for injunctive relief based on the challenge of the public interest finding. This reform would involve both procedural and substantive changes to current law.

In the United States, it would require legislation ensuring both the procedural availability of a challenge to the public interest finding and a substantive requirement that the condemner positively meets the public use requirement. The categorical prohibitions passed in the wake of *Kelo* do not increase scrutiny where the condemner can point to some rationale beyond economic development. Many of the post-*Kelo* laws would not even effectively protect against economic development takings.<sup>225</sup> Moreover, the jurisdictions most likely to use eminent domain are the least likely to have implemented effective post-*Kelo* reform.<sup>226</sup>

In South Korea, reform would have to involve that availability of judicial review of takings. The current system, requiring only permission by MOLIT or quasi-permission given by the passage of a special law, finalizes the public interest finding before owners can dispute the taking. Under the normal procedure, there is no possibility of injunctive relief.<sup>227</sup> Changing the eminent domain procedure to allow for review of the constitutionality of the taking would drastically change the system in South Korea and would likely curtail a great deal of abuse.

Implementation of such a system in India is immanently possible. Creating a cause of action for breaches of the LARR Act could go far to improve the current state of eminent domain. Such a cause of action would create a clear mechanism for enforcing the law beyond administrative oversight. The constitutional protections of property were removed from the Indian Constitution in 1978.<sup>228</sup> Reinstating constitutional protections could lead to a system where eminent domain decisions could be reviewed judicially. Reforms would have to

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<sup>225</sup> KIM ET AL., *supra* note 2, at 49.

<sup>226</sup> See Lanza et al., *supra* note 36.

<sup>227</sup> See KIM ET AL., *supra* note 2, at 167.

<sup>228</sup> Gupta, *supra* note 166, at 463.

consider the communities living on land without title and empower them to dispute public interest findings.

## V. CONCLUSION

In his opinion in *Kelo*, Justice John Paul Stevens astutely pointed out that there is “no principled way of distinguishing economic development from the other public purposes” the court had recognized as valid.<sup>229</sup> If the economic development rationale makes any taking permissible,<sup>230</sup> then a bright line rule against takings for economic development might make all takings impermissible. Apart from perhaps specific instances involving monuments and historic locations, all uses of eminent domain involve economic incentives.

The problem of eminent domain’s necessity and cost is not unique to the United States, and there are lessons to be learned from jurisdictions across the world. Germany has approached the problem by allowing for more judicial scrutiny of the decision to take and the extent of takings, along with imposing legal obligations on beneficiaries of expropriation. South Korea has decided to emphasize compensation as the primary means of protecting property owners, with lackluster results. India is struggling to establish a system of substantive and procedural guards, coupled with a system of resettling affected persons. The United States would do well to remember the necessity of eminent domain for urban development, and to remember the numerous strategies for protecting property beyond categorical prohibitions. One possible reform is to empower owners and displaced individuals to appeal to a neutral tribunal to review whether a taking meets public interest standards. This reform would create better incentives for potential condemners, increase transparency, and ultimately make eminent domain a more humane system.



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<sup>229</sup> *Kelo*, 545 U.S. at 484.

<sup>230</sup> *Id.* at 486–87.