

EMINENT DOMAIN IN 21ST CENTURY INDIA:
WHAT NEW DELHI CAN LEARN
FROM NEW LONDON

CASEY DOWNING*

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I. INTRODUCTION

In May 2011, the Uttar Pradesh State Road Transport Corporation, a government agency run by the Indian state of Uttar Pradesh, sent three officers to survey land the state hoped to acquire for construction of a new highway.¹ The highway was meant to run from New Delhi, India's bustling capital city, to Agra, the home of the Taj Mahal. Developers hoped the

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1. Jason Overdorf, *India: the Story of a Highway*, GLOBAL POST (Sept. 5, 2012), <http://www.globalpost.com/dispatch/news/regions/asia-pacific/india/120904/yamuna-expressway-economy-infrastructure?page=0,0>.

new highway would spur development of the area, attracting tourism, business investment, and housing projects along the highway. In addition to the land for the roadway, the government planned to acquire land on both sides of the highway to later auction to private companies for hotels, shops, and other commercial activities.²

On May 6, angry farmers from the nearby village of Bhatta-Parsaul kidnapped the three surveyors, hoping to thwart the government's plan.³ The following day, the Uttar Pradesh state police moved in to rescue the hostages. A gun battle erupted between police and local villagers, leaving two officers and two villagers dead. As the violence swelled, the state sent roughly 2,000 riot police into the village. Officers set houses on fire and beat protesters in the streets, including women and children, until the riots were contained.⁴

Such violence is not uncommon in India. Outbreaks like that in Uttar Pradesh have also occurred in West Bengal,⁵ Madhya Pradesh,⁶ and other states.⁷ In each of these instances, the violence resulted from government attempts to acquire land from farmers who felt they were being treated unfairly.

Government acquisition of land in India is not a recent phenomenon. Its roots go back to the colonial era, when the British authorities acquired land for the building of projects such as railroads⁸ and dams. Even so, land acquisition through the government's use of eminent domain has always been contentious.

2. *Id.*

3. *Id.*

4. *Id.*; Rajesh Joshi, *India: Scorched Village in Farmer 'Atrocity' Row*, BBC NEWS (May 19, 2011), <http://www.bbc.co.uk/news/world-south-asia-13451219>.

5. *India Nirman*, THE INDIAN EXPRESS (Mar. 15, 2007), <http://www.indianexpress.com/news/india-nirman/25736/>.

6. *India, Farmer Dies During Mobilisation Against Land Acquisition*, LA VIA CAMPESINA (June 16, 2012), <http://viacampesina.org/en/index.php/main-issues-mainmenu-27/agrarian-reform-mainmenu-36/1258-india-farmer-dies-during-mobilisation-against-land-acquisition>.

7. *Riots Flare Up in India; 20 Wounded*, THE NATION (Apr. 20, 2011), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/international/20-Apr-2011/Riots-flare-up-in-India-20-wounded>.

8. Smritikumar Sarkar, *Land Acquisition for the Railways in Bengal, 1850–62: Probing a Contemporary Problem*, 26 STUD. IN HIST. 103, 115 (2010).

Conflicts such as those described above are fueled by a number of factors. In India, as in many agrarian societies, people who work the land are deeply tied to it.⁹ However, the past two decades have seen unprecedented economic change in India. In 2010, India's gross domestic product was roughly five times greater than it was in 1990.¹⁰ This degree of economic growth requires heavy investment in infrastructure projects, including the building of roads, hydroelectric dams, housing projects, and industrial complexes.¹¹ At present, roughly half of the roads in India are paved, but the quality of these roads is substandard, even when compared to other BRIC countries.¹² Roughly 90% of the roads are so plagued with potholes and obstacles that they are not navigable by large trucks needed to transport goods.¹³ India's power infrastructure is similarly outdated and unable to meet the needs of the citizenry.¹⁴ Given these circumstances, it is easy to observe why land conflicts have emerged. The Indian central and state governments are urgently trying to invest in infrastructure updates, but those who would be displaced by such projects are unlikely to leave without a fight. This may be especially true when the acquired land is not made open to the public generally, but instead handed to a private company in the name of economic development.¹⁵

Acquisition of private land by governments is often contentious, and such conflicts are certainly not confined to India. Indeed, eminent domain practice in India has closely paral-

9. Priya S. Gupta, *The Peculiar Circumstances of Eminent Domain in India*, 49 OSGOODE HALL L.J. 445, 475 (2012).

10. *India GDP*, INDEX MUNDI http://www.indexmundi.com/india/gdp_%28official_exchange_rate%29.html (last visited Jan. 1, 2011).

11. See MCKINSEY & CO., BUILDING INDIA: FINANCING AND INVESTING IN INFRASTRUCTURE 11–12 (2009) (describing the opportunities for foreign financiers to invest in India's power, roads, and ports sectors).

12. *Id.*

13. See *id.* (explaining that 90% of India's highways are structurally inadequate to support the load that trucks are allowed to carry).

14. *Id.* at 11.

15. See William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 949 (2004). Fischel notes that in some cases, those displaced would not react so strongly if their land was taken for public use, but private transfers tend to cause more outrage. See *infra* note 202 and accompanying text.

leled the development of the doctrine in another former English colony: the United States. For starters, the framing of the debate has been similar in both countries. On one side stand those who favor strong property rights and believe that property owners should not have their land forcibly taken from them regardless of the government's need.¹⁶ On the other side are those who argue that eminent domain is necessary for important infrastructure projects and economic development.¹⁷ This Note seeks to bridge this divide. I argue that at certain periods during a country's development, liberal power of eminent domain is necessary to maximize the efficiency of land use, transferring it from lower to higher valued uses. However, eventually a country will cross a threshold at which point secure property rights become an important factor in economic development, and government seizure of land for development projects may actually have an adverse effect on economic growth. I show this threshold by examining property rights regimes, and eminent domain practices in particular, in the United States as it transitioned in the nineteenth century from a developing country to one that is fully developed by today's standards. India is, in this sense, a reflection of an earlier America. Still, I argue that even though India has continuing development needs, it has already crossed the aforementioned threshold, such that many forms of eminent domain use, particularly those forms that transfer property from one private party to another, do not spur economic development and may instead result in a net economic loss.

Part II of this Note traces the history of eminent domain law in India from the colonial era to its present form, expressed in the Land Acquisition Act, 1894. Part III outlines the economic theory of property rights as they relate to eminent domain. In this section I further argue that at a certain time in a country's development, the ability of a government to acquire land and transfer it to higher valued uses—be they transfers for public use or to private parties—is highly beneficial for overall economic growth. To demonstrate the point, I ex-

16. See, e.g., Gupta, *supra* note 9 (noting that agitation over forcible land acquisition can reflect the view that local land should be controlled by the community and not the State).

17. See, e.g., Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 478–79 (1976) (arguing that without eminent domain, governments may not be able to assemble land because of holdouts).

amine the history of land reform and eminent domain use in the United States.

Part IV applies the lessons learned from the early United States to the Indian context. In so doing, I examine the land reform laws that took place in India following independence, and trace the consequences of these reforms. Part V posits that India may have crossed an economic threshold, such that using eminent domain to effectuate purely private transfers of land is no longer a necessity, and may lead to inefficient land use and slow economic growth. It does so by inferring conclusions based on several prominent American eminent domain cases. Finally, this Note offers a few general recommendations, based upon observations of eminent domain use in the United States, for how India should amend the Land Acquisition Act, which at the time of writing was being tabled in Parliament.¹⁸

II. EARLY HISTORY OF EMINENT DOMAIN IN INDIA

At present, land acquisition in India is governed by the Land Acquisition Act, 1894 (LAA). The number in the title refers not to its location in the legislative code, but to the year it was actually drafted, meaning it is roughly 120 years old. The LAA was originally written by the British to harmonize the various laws regulating government acquisition of land in India. Like the Fifth Amendment to the U.S. Constitution,¹⁹ the LAA provides that if land is going to be taken by the government, it must be taken for a “public purpose” and that “compensation” must be paid to the original owner.²⁰ As the United States and other countries with similar provisions have discovered, defining just what constitutes a public purpose, and what sort of compensation is sufficient, are extremely complicated questions.²¹ For the moment it is sufficient to say that the contin-

18. See *House to Take Up Land Bill Tomorrow*, THE INDIAN EXPRESS (Aug. 12, 2013), <http://www.indianexpress.com/news/house-to-take-up-land-bill-to-morrow/1154179/>.

19. The Fifth Amendment to the U.S. Constitution provides, “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.

20. The Land Acquisition Act, No. 1 of 1894, INDIA CODE (1993).

21. Canada, Germany, the United Kingdom, and Australia are among the countries that have grappled with the issue of takings and what constitutes taking for public purpose. See KEVIN E. MCCARTHY, OFFICE OF LEGISLATIVE RESEARCH, CONNECTICUT GENERAL ASSEMBLY, EMINENT DOMAIN: OLR RE-

ued use of the LAA establishes that eminent domain has long been recognized as a legitimate power of the Indian government.²² It will be seen, though, that the historical thread linking today's use of the LAA to its use at its inception is not necessarily continuous.

The concept of eminent domain has ancient roots. The term comes from the Latin *dominium eminens* (translated "supreme lordship"), and may be traced back to the seventeenth century Dutch jurist Hugo Grotius, who wrote:

[T]he property of subjects is under the *eminent domain* of the state; so that the state, or he who acts for it may use, and even alienate and destroy such property . . . for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added, that when this is done, the state is bound to make good the loss to those who lose their property.²³

Even to Grotius, the concept was not novel, as protections from arbitrary government seizure of land were among those guaranteed by the Magna Carta in 1215.²⁴ By the time England emerged as a colonial power, the concept had developed in English law such that Parliament was able to acquire land for public purposes, such as the building of roads and

SEARCH REPORT (2005), available at <http://www.cga.ct.gov/2005/rpt/2005-r-0321.htm>, for an overview of these countries' eminent domain laws.

22. Much of this paper draws on the writings of and conversations with Professor Priya S. Gupta of Southwestern Law School. Professor Gupta has argued that eminent domain as an institution is inherited from the European mind, and has no place in modern India. See, e.g., Gupta, *supra* note 9, at 447–48 (arguing that eminent domain was inherited from the British and is inappropriate in India given how property rights are exercised there). The aims of this paper are considerably more modest. I will not engage in the balancing act that pits individual or constitutional rights against economic development. That exercise will be left to others. Rather, I examine the value to a country's economic health of eminent domain practices, and whether the consequences of these practices change as the country develops.

23. HUGO GROTIUS, *DE JURE BELLI ET PACIS* (1625) (as cited in *BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA* 1008 (8th ed. 1914)) (emphasis added).

24. *MAGNA CARTA* art. XXIX ("No Freeman shall be taken, or imprisoned, or be disseized of his Freehold . . . but by lawful Judgment of his Peers, or by the Law of the Land.") (emphasis added).

bridges, and it was customary—though not required—that compensation be paid to the owner.²⁵ In the United States, the power of eminent domain, and limitations on this power, were included in the Fifth Amendment, which provides that “private property [shall not] be taken for public use, without just compensation.”²⁶ Other former commonwealth constitutions, such as that of Australia, also contain similar provisions.²⁷

In India, laws pertaining to eminent domain may be traced to the period of British rule, long before the Indian Constitution. Prior to English colonization, land in India was held by various systems of tenure depending on the location and the cultural heritage.²⁸ However, much of the land, particularly in northern India, was administered by a group of people referred to as *zamindars*.²⁹ Though the zamindari systems varied greatly by region, it was generally the case that those working the land did not own it, but merely served as tenant farmers.³⁰

The British, however, approached the administration of the land the way one would in a nation-state, even though India was nothing of the sort at the time.³¹ To this end, the British focused their attention on land acquisition for the building of infrastructure projects, and passed the first law to this end in 1824.³² The resulting law was Regulation I of the Bengal Code,³³ which allowed for the acquisition of land at “fair

25. See Bruce L. Benson, *The Evolution of Eminent Domain: A Remedy for Market Failure or an Effort to Limit Government Power and Government Failure?*, 12 INDEP. REV. 423, 427–28 (2008) (outlining the history of Parliament’s power to seize property).

26. U.S. CONST. amend. V.

27. MCCARTHY, *supra* note 21.

28. Gupta, *supra* note 9, at 452.

29. The term ‘zamindar’ came to be adopted by the state of India after independence to encompass all landholding systems using intermediaries who administered the land but did not technically own it. In reality, there were various terms used, and the specifics of each system varied by region. However, for the purpose of this Note, the term zamindar will encompass all feudal-like landholding systems.

30. GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE 73 n.10 (2000).

31. See *id.* (explaining how the British began collecting land revenue for the Mughal emperor and awarded zamindars rights and titles to the land).

32. Gupta, *supra* note 9, at 452.

33. No. 1 of 1824, BENGAL CODE.

value” for “roads, canals, or other public purposes.”³⁴ This regulation was extended in 1850 to include land acquired for railways to fall within the definition of “public purposes.”³⁵ Though these regulations pertained only to the colonies near Calcutta in what is now West Bengal, similar regulations followed soon after in Bombay and Madras.³⁶ These acts were in turn repealed and replaced by Act VI of 1857, which aimed to unify the various laws under one common land acquisition scheme. Act VI was the first legislation to apply to all territories under the governance of the East India Company, the governing power in India at the time.³⁷

In 1857 a number of Indian provinces rebelled against the rule of the British East India Company, and the British military intervened and brutally put down the rebellion.³⁸ In response to the rebellion, the East India Company was dissolved and all administrative powers over India were transferred to the Crown, creating the British Raj.³⁹ The British, fearing future rebellions and desiring to capitalize on their Indian colony, made the expansion of administrative power in India a priority.⁴⁰ The post rebellion period saw various amendments to Act VI, which provided for civil courts to determine just compensation in cases of conflict.⁴¹ In 1894, the Land Acquisition Act (LAA) was passed, which further amended and unified all land acquisition laws pertaining to British India.⁴²

34. *Id.*

35. SHRI ASHOK KUMAR SEN, LAW COMM’N OF INDIA, TENTH REPORT: LAW OF ACQUISITION AND REQUISITION OF LAND 1 (1958).

36. *Id.* at 1–2.

37. *Id.* at 2.

38. BARBARA D. METCALF & THOMAS R. METCALF, A CONCISE HISTORY OF MODERN INDIA 103 (2006).

39. *Id.*

40. See Amlanjyoti Goswami, *Land Acquisition, Rehabilitation and Resettlement: Law and Politics 2* (IIHS Working Paper 2012) (discussing colonial administration in India after the events of 1857).

41. See *id.* (noting the passage of various laws to facilitate the easy appropriation of lands for roads, canals, and other public purposes, and for compensation to be determined by special arbitrators).

42. Not all of India was directly under British control at the time. The British classified two separate kinds of states: colonial states, which were under their direct control, and “native states,” which were governed by various local administrators, emperors, or “princes,” though some have argued that the English conception of these states was vastly oversimplified. See BAR-

By the time India became independent in 1947, a good deal of legal structures governing the division and administration of land had already been put in place by the British. Rather than starting anew, the founders of the new state chose to leave much of the British colonial structures in place. In so doing, the country was influenced not only by a colonial set of rules and regulations, but also by the larger European conception of political thought, including state sovereignty.⁴³ The colonial administrative system was replaced by the local and national governments, but all land was still ultimately the property of the state and subject to seizure in the interest of the public good.⁴⁴ Many of the actual British regulations, including the LAA, were specifically incorporated into the new Indian legal code via Article 372 of the Indian Constitution.⁴⁵

In considering land rights moving forward, the drafters of the Indian Constitution faced a dilemma. At the time the Constitution was being written, as much as forty-three percent of the land in India was owned by the zamindar landholders mentioned above.⁴⁶ The zamindari system had preceded the British by hundreds of years. The system actually traced its roots back to the Mughal Empire beginning in the sixteenth century.⁴⁷ The Mughals exercised central power over much of the subcontinent and used zamindars as local administrators and tax collectors for the absent Mughal rulers. Over time, and as the Mughal power waned, the zamindars exercised more authority over the land they administrated, such that the

BARA N. RAMUSACK, *THE INDIAN PRINCES AND THEIR STATES 2* (2004) (discussing native states).

43. Dipesh Chackrabarty has argued that Indian political thought cannot be understood without understanding the ways it has been influenced by European thought, though an analysis of the European influence alone is also inadequate in helping us to understand Indian political thought. See DIPESH CHACKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 6 (2000) (“European thought . . . is both indispensable and inadequate in helping us to think through the various life practices that constitute the political and the historical in India.”).

44. See Gupta, *supra* note 9, at 454–55 (discussing how the definition of eminent domain has remained the same from colonial times).

45. “[A]ll the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.” INDIA CONST. art. 372.

46. Gupta, *supra* note 9, at 456.

47. AUSTIN, *supra* note 30.

British, having arrived with a European conception of ownership and property rights,⁴⁸ mistook the zamindars for the true owners of the land.⁴⁹ The British dealt almost exclusively with the zamindars, who were sometimes called ‘intermediaries’ because they were the link that connected the British rulers to those actually living and working on the land.⁵⁰ By the time the British left India, the zamindars held ownership of vast tracts of land throughout India, most of which were worked and occupied by tenant farmers.⁵¹

After independence, the drafters of the new constitution were confronted by the problem of zamindari land ownership. Imbuing the new constitution with strong rights to private property ran the risk of entrenching zamindari interests and protracting the plight of the impoverished, merely replacing the English elite with an Indian elite. On the other hand, Indians, like the Americans before them, had been taught by years of colonial rule to be wary of giving government the right to arbitrarily deprive people of their property. Keeping property rights completely out of the new constitution, it was argued, might help dismantle the zamindari system in the short term, but it could also harm farmers in the long term.⁵²

The opposing factions in the debate were led by the two most prominent Indian politicians at the time: Jawaharlal Nehru, who would become India’s first Prime Minister, and Sardar Vallabhbhai Patel.⁵³ Nehru was a proponent of socialism and redistribution, believing such policies to be the antithesis of colonialism.⁵⁴ Patel, on the other hand, was a strong

48. See Gupta, *supra* note 9, at 457 (“The British, accustomed under their own legal system to having an ‘owner’ of a particular piece of land, no matter what other interests might exist, treated these people as proprietors. Others were added to their ranks in exchange for various services or through their connection to the government. While the particular unfolding of this consolidation of power, land, and various interests varied across states and localities, the general result was that vast lands were eventually subjected to ownership interests through the administration of tax revenue and through colonial favour.”) (internal citations omitted).

49. *Id.*

50. AUSTIN, *supra* note 30.

51. *Id.*; Gupta, *supra* note 9, at 456–57.

52. Gupta, *supra* note 9, at 461.

53. See Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 28 (2009).

54. *Id.*

believer in laissez faire economics and believed in state protection of individual property rights.⁵⁵ Both believed in the state's power of eminent domain, but they disagreed on whether zamindars and other landholders should be compensated if their land was taken. Nehru believed that no compensation should be paid for property seized by the government; Patel believed that landholders should be fully compensated.⁵⁶

The resulting compromise produced two provisions regarding rights to property, both included in the fundamental rights section of the Constitution.⁵⁷ Article 19(1)(f) guaranteed citizens the right to "acquire, hold and dispose of property."⁵⁸ Article 31 further provided that:

(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable . . . shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.⁵⁹

In 1947, Nehru became India's first Prime Minister. Several years later, in 1950, Patel passed away. With his chief opponent no longer a barrier, Nehru led the charge to pass several amendments to the new Constitution.⁶⁰ The most important of these were Articles 31A and 31B, which immunized actions of state governments that abolished zamindar holdings from judicial review.⁶¹ The passing of these amendments triggered a battle between Parliament and the Supreme Court that would last almost thirty years, with Parliament attempting

55. *Id.*

56. Gupta, *supra* note 9, at 457–58.

57. *Id.* at 461–62.

58. INDIA CONST. art. 19(1)(f), *omitted*.

59. INDIA CONST. art. 31, *amended by* The Constitution (Forty-fourth Amendment) Act, 1978.

60. Gupta, *supra* note 9, at 462.

61. *See* Robinson, *supra* note 53, at 29–30 (discussing how Articles 31A and 31B shielded certain government actions from judicial review).

to limit the Court's power of review, and the Court striking down laws and amendments that they perceived as violating fundamental rights.⁶² In 1972, the Court ruled that it was within Parliament's power to amend the fundamental rights listed in the Constitution, but not to change the "basic structure" of the Constitution.⁶³ Free to alter the fundamental rights section of the Constitution, Parliament erased the articles regarding property and replaced them with the vaguely worded Article 300-A, which states: "No person shall be deprived of his property save by authority of law."⁶⁴ This meant that the right to property was no longer a fundamental right, though it was still a legal right—which meant it would be governed by statutory law. This led to the revival of the, at the time, almost 90-year-old Land Acquisition Act of 1894, and with it, the important questions: What does public purpose mean in the context of land acquisition? And what sort of compensation for those whose land is taken is necessary?

III. ECONOMICS AND PROPERTY RIGHTS

A. *Institutions and Economic Development*

As seen in Part II, the development of infrastructure was a primary motivating factor for British use of eminent domain. This desire also motivates much of the recent Indian national and local governments' push to acquire land.⁶⁵ That land is at the center of the push for economic development is unsurprising, as land use and reforms are often at the center of economic development literature.⁶⁶ This section of the Note will discuss economic development theory as it relates to land use and land reform, and will use the United States as an illustra-

62. See *I.C. Golak Nath v. Punjab*, (1967) 2 S.C.R. 762, 819 (India); Robinson, *supra* note 53, at 30 (delineating the history of the Court's attempts to salvage its review power).

63. *Kesavananda Bharati Sripadagalvaru v. Kerala*, A.I.R. 1973 S.C. 1, 43 (India).

64. INDIA CONST. art. 300-A.

65. See, e.g., MCKINSEY & CO., *supra* note 11 (describing the economic problems that lack of infrastructure may cause).

66. See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (describing how the lack of private property rights leads to the "tragedy of the commons" in which resources are used inefficiently because of the structure of incentives that common ownership creates).

tion of how land reform may be used to spur economic development.

Any discussion of economic development theory must begin with institutions. Economist Douglass North provides a useful description of institutions, defining them as “the rules of the game of society, or, more formally . . . the humanly devised constraints that structure human interaction.”⁶⁷ Institutions may include social behavioral norms, religious norms, or more formal rules such as government regulations or laws. These institutions serve to regulate the behavior of individuals and organizations, both as they act for themselves and as they relate to one another. It is not uncommon for such institutions to change over a period of time.

Mancur Olson, another development economist, also emphasizes the importance of institutions for development. In a comparative analysis of wealthy and poor countries, Olson concludes that all other things being equal, it is the quality of a country’s institutions that will further, or impede, its economic development.⁶⁸ He notes that economic performance of a nation is largely defined by the “structure of incentives” created by its institutions,⁶⁹ an argument that is based on “direct evidence of the linkage between better economic policies and institutions and better economic performance.”⁷⁰ Thus, if laws and norms are conducive to the correct kinds of incentives, the collective populations of nations may maximize wealth creation.

This Note is primarily concerned with the institution of property rights, specifically how formal property institutions (laws or regulations) and informal property institutions (behavioral norms, religious norms, etc.) may be structured in order to maximize incentives for wealth creation. Both the United States and India have a vast network of formal and informal property rights institutions, and as will be seen below, the way these institutions have been structured over time has had an important effect on the economic growth of each

67. Douglass North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 17, 23 (John Harris et al. eds., 1995).

68. Mancur Olson, Jr., *Big Bills Left on the Sidewalk: Why Some Nations are Rich, and Others Poor*, 10 *J. ECON. PERSP.* 3, 20 (1996).

69. *Id.* at 22.

70. *Id.*

country. In fact, I suggest that as a country develops, the relative importance of different institutions to economic prosperity may also change. At certain stages of development, eminent domain is an excellent tool for promoting growth, while at other times, it may actually harm economic growth. However, before going further, it is important to examine some of the fundamental principles of property rights and their relationship to economic development.

B. *Property Rights and Transitional Institutions*

That property rights are integral to economic development is fairly settled economics,⁷¹ and a push to reinforce strong property rights as a tool for growth has been at the heart of the World Bank's development work. A report published in 1996 summarizes the Bank's argument:

Property rights are at the heart of the incentive structure of market economies. They determine who bears risk and who gains or loses from transactions. In so doing they spur worldwide investment, encourage careful monitoring and supervision, promote work effort, and create a constituency for enforceable contracts. In short, fully specified property rights reward effort and good judgment, thereby assisting economic growth and wealth creation.⁷²

This stance reflects the principles that underlie North and Olson's work. If property rights can be structured correctly, a country will be in a better position to create incentives for investment and labor, which will in turn produce capital and growth. Essential to the World Bank's model is the notion that property rights are worthless unless they are enforced. Ibrahim Shihata, General Counsel for the World Bank, argues that in order to have strong property rights, nations must commit to enforce those rights and thus protect the investments of prop-

71. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 62–65 (2000) (discussing the link between a legal property system and the creation of capital).

72. Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 557 (2009) (citing WORLD BANK, *FROM PLAN TO MARKET: WORLD DEVELOPMENT REPORT* 48–49 (1996)).

erty owners. Countries that fail to adequately protect these rights, Shihata notes, will fail to develop:

Reforms cannot be effective in the absence of a system which translates them into workable rules and makes sure they are complied with. Such a system assumes that: a) there is a set of rules which are known in advance, b) such rules are actually in force, c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures, d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body and e) there are known procedures for amending the rules when they no longer serve their purpose.⁷³

The key idea underlying this statement is investor security. If people are not secure in their property, they will not invest in improving it (i.e., farming it to its capacity, building upon it, etc.). They will also be less likely to sell it. Security is key to efficient use of land (and other property) and for the development of markets. Institutional economists place the impetus on countries to develop by recognizing the property rights of their citizens and creating government institutions to defend those rights.

But there is a problem: The realities do not necessarily bear out the theory. This problem is illustrated by the distinction between what Chinese economist Yingyi Qian refers to as “best practices institutions” and “transition institutions.”⁷⁴ Where the World Bank errs, argues Qian, is not in its assessment of the successes that developed countries’ institutions have achieved, but in its insistence that developing countries must simply adopt similar institutions and they will achieve growth.⁷⁵ “It is not enough,” he argues, “to study the forms of

73. Frank K. Upham, *Mythmaking in the Rule of Law Orthodoxy* 9 (Democracy and Rule of Law Project, Working Paper No. 30, 2002) (citing Ibrahim F. Shihata, *The World Bank and “Governance” Issues in Its Borrowing Members*, in *I THE WORLD BANK IN A CHANGING WORLD* 85 (Franziska Tschöfen & Antonio R. Parra eds., 1991)).

74. Yingyi Qian, *How Reform Worked in China*, in *IN SEARCH OF PROSPERITY: ANALYTIC NARRATIVES ON ECONOMIC GROWTH* 297, 304 (Dani Rodrik ed., 2003).

75. *See id.* (arguing that the processes of transition must also be studied).

institutions found in the most developed economies as a desirable goal; it is also essential to study the myriad forms of institutions that are still in transition.”⁷⁶ This “broadened perspective” on institutions, then:

takes a dynamic, not static, view of institutions. It recognizes that the real challenge of reform facing transition and developing countries is not so much knowing where to end up, but searching for a feasible path toward the goal The challenge is not the study of the peak, but the search for a feasible path toward it.⁷⁷

To Qian, the point is not that the World Bank’s theory behind “best-practice institutions” is necessarily wrong, but that it applies differently to countries in different stages of development. A country such as China cannot simply torpedo their existing property rights institutions and adopt an American model wholesale. Indeed, this was attempted in Russia after the break up of the Soviet Union, and it is widely thought to have been a failure.⁷⁸ Rather, a country may look to the United States and other developed countries as a model of secure property rights institutions, but must also acknowledge that transitioning economies may require a different model based on the underlying realities of the country.

However, taking this argument one step further, this Note contends that a set of secure property rights institutions such as those found in the United States may indeed be detrimental to a country that is transitioning from developing to developed. This is because the needs of a society change as it develops, and as a result, property rights, rather than being secure or “fully specified,” need flexibility to accommodate the needs of the growing economy.

To illustrate this point, the United States itself may serve as an example. Professor Frank Upham, Director of the U.S.-Asia Law Institute, argues that the United States was able to grow into a nation with an advanced economy precisely be-

76. *Id.*

77. *Id.*

78. See James K. Galbraith, *Shock Without Therapy*, THE AMERICAN PROSPECT, Aug. 26, 2002 (discussing the failure of Western-style forms of property rights in Russia).

cause property rights were malleable.⁷⁹ Throughout much of the eighteenth and nineteenth centuries, the United States resembled what we would now describe as a developing country. The country had a largely agrarian economy, corruption was rife, and lawlessness abounded.⁸⁰ The independence of the judiciary and the institutional rule of law that Shihata so admires were rare.⁸¹

By the late nineteenth century the United States began to change. The economy slowly transformed from agrarian to industrial, and the city, not the farm, became the main driver of the American economy.⁸² It was around this time that an important legal institution in Pennsylvania changed dramatically, when the state's Supreme Court issued a ruling regarding a small house bought by Mrs. Eliza Sanderson.⁸³ Alongside the house was a small stream running into a pond that Mrs. Sanderson intended to use for fish and ice. Roughly three miles upstream of Mrs. Sanderson's home, the Pennsylvania Coal Company opened a new mine, the operation of which polluted the brook for miles downstream and made it completely unusable for Mrs. Sanderson.

According to the law in Pennsylvania at the time, the so-called *natural flow doctrine*, Mrs. Sanderson was entitled to the use of the stream running through her land, and also the right to receive the water in its natural state. This doctrine had been inherited from the English common law and applied in American courts. As such, Mrs. Sanderson sued the Pennsylvania Coal Company. In a remarkable series of events, the case stretched over eight years and six trials, going up and down the Pennsylvania courts until the Supreme Court of Pennsylvania reached a conclusion. In a credulity-straining opinion, Judge Silas Clark wrote that the Pennsylvania Coal Company's use of the land was indeed "natural" and as such Mrs. Sanderson was not entitled to any relief.⁸⁴

79. Upham, *supra* note 73, at 7.

80. DE SOTO, *supra* note 71, at 107–08.

81. *See id.* (explaining how extralegal activity and dissatisfaction with an antiquated legal system were prevalent in the United States during this time).

82. Upham, *supra* note 72, at 599.

83. *See* Upham, *supra* note 73, at 5 (discussing the decision in *Pennsylvania Coal Co. v. Sanderson*, 6 A. 453 (Pa. 1885)).

84. *Pennsylvania Coal Co. v. Sanderson*, 6 A. 453 (Pa. 1885).

The *Pennsylvania Coal* decision is a textbook example of a court feigning judicial modesty while imposing sweeping change. Though the court gestured toward the established common law natural flow doctrine, which protected Mrs. Sanderson's property rights, it fundamentally altered the relationships between adjacent property owners in Pennsylvania. Why would the court do such a thing? The answer is simple: economic development. Judge Clark, in a moment of honesty, admitted that recognizing Mrs. Sanderson's claim would have dire consequences for the Pennsylvania mining industry and would destroy an important source of "population, wealth and improvements" in the region.⁸⁵ Judge Clark recognized that a failure to change the system of property rights in Pennsylvania would jeopardize the transition from an agrarian to industrial economy.

As Upham points out, this is adverse to the approach that Shihata and the World Bank advocate. In reversing existing law, the Pennsylvania court *created* the uncertainty that generates investor insecurity and destroys incentive to invest in property. But, here, the reversal actually helped spur economic growth. This creates something of a conundrum for development economists, because, as Upham concludes:

[t]o insist on developing countries installing a legal system that would have decided for Mrs. Sanderson on the ground of fidelity to law may be attractive in the abstract, but it would be the height of folly if it prevented the very growth that those advocating the rule of law development model would want.⁸⁶

Pennsylvania Coal is one of many examples of transitional institutions at work in the United States.⁸⁷ An integral part of the property rights institution in the United States as it transitioned was a liberal use of eminent domain, allowing land to be acquired by the government for infrastructure projects, but also for transfers from one private owner to another. This last use is, again, contrary to the model advocated by Shihata and Olson, for it undermines security in property and improperly structures investment. However, as I will argue, their theory

85. Upham, *supra* note 73, at 5.

86. *Id.* at 21.

87. Section B of Part III of this Note will discuss further examples given by Hernando de Soto.

holds true for a country that has reached a certain level of development, as has the United States, but not until that development level has been reached.

C. *Eminent Domain as a Development Tool
for Industrializing Economies*

Mrs. Sanderson's case is an illustration of transitional property rights created by the judiciary. However, much of the insecurity in property rights in early America resulted from legislative action and free use of eminent domain. Though the Takings Clause was enshrined in the Fifth Amendment as the United States came into being, the federal and state governments generally had total discretion in their use of eminent domain for much of the nineteenth century. In fact, it was not until 1897 that the Takings Clause was incorporated into the Fourteenth Amendment and began to apply to the state governments.⁸⁸

But eminent domain existed in the United States long before it was a country. In colonial America, government takings were commonplace, particularly for the building of bridges, roads, and dams.⁸⁹ In many cases, it made little difference whether the government or a private party later maintained the property, because infrastructure improvements were seen as benefiting the public good.⁹⁰ As time went on, such norms were codified in statutory form, the most familiar of which were schemes known as the Mill Acts.⁹¹ The effect of these acts was to limit the remedies of upstream landowners whose lands were flooded by the construction of mills downstream. In effect, these statutes gave private mill owners the

88. See *Chicago Burlington and Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) ("In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.").

89. 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, 500 (2006).

90. *Id.* at 500–01.

91. *Id.*

right to flood, and thus condemn, the property of their neighbors upstream—affecting a transfer of land rights from one private owner to another⁹² (perhaps Justice Clark would call the flooding “natural”). However, though the mills were essentially private property, they were heavily regulated by local governments and were required to serve any paying customer. In this way, they effectively served as public utilities at the time.⁹³ Other colonial statutes similarly showed no qualms with using eminent domain to effect purely private transfers of land; owners of land without access to roads were allowed to condemn the property of their neighbors in order to create paths.⁹⁴ Other colonies passed laws allowing the transfer of property from one private party to another if the owner of the land was not using it in a productive way.⁹⁵

Underlying many of these laws was the notion that it was in the public interest to transfer land in these ways. Such notions began to be codified into local laws, and were eventually included in the Fifth Amendment.⁹⁶ In 1789, the Supreme Court announced in *Calder v. Bull* that it is “against all reason and justice, for a people to entrust a Legislature with” the power to enact “a law that takes property from A. and gives it to B.”⁹⁷ This statement established the baseline principle for when eminent domain should not be allowed: to effect a purely private transfer of property. Still, legislatures and courts, throughout the course of the eighteenth and nineteenth century, found ample justifications for eminent domain laws that affected purely private transfers as long as there was the slimmest reed of a public purpose upon which to stand.⁹⁸ The use of eminent domain remained popular for the construction of roads and dams, but even the transfer of land to

92. *Id.* at 501.

93. *Id.* at 501–02.

94. *Id.* at 502.

95. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1282–83 (1996).

96. See U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

97. *Calder v. Bull*, 3 U.S. 386, 388 (1789).

98. Cohen, *supra* note 89, at 506.

create more efficient exploitation of natural resources was deemed a sufficient public purpose.⁹⁹

The second half of the nineteenth century saw the use of eminent domain balloon as the country's needs for a more developed infrastructure grew. As discussed above, the United States was rapidly changing to an industrial power, and the law was forced to adapt if the country was to reach its economic potential. State legislatures granted eminent domain to private companies in order to foster the growth of roads, bridges, and canals. Courts upheld these expansions of the law on the theory that these private companies were "common carriers" that acted for profit but also conferred a public benefit.¹⁰⁰ The Mill Acts were also expanded to include mills producing cotton, lumber, or fiber used for textiles. Despite the declaration of *Calder* and a growing movement to limit eminent domain to projects that were actually to be used by the public, many states proceeded to use eminent domain as a tool to give land to those deemed to use it in the way that would best effectuate economic development.¹⁰¹

The period between the mid-nineteenth century and the mid-twentieth century saw the American economy transition from rural to urban. This transformation was allowed largely because of what Qian referred to as "institutions in transition," that is, property rights that are not ideal in the secure sense that Shihata advocates, but rather are flexible enough to accommodate the changing needs of the modernizing society. By the second half of the twentieth century, the United States had a modern infrastructure, and most of the land laws in the country had been "regularized."¹⁰² It was only then, when America's infrastructure was firmly in place and its transition

99. See Hart, *supra* note 95, at 1265 (discussing Connecticut's authorization of taking of property already devoted to mining when not being used as efficiently as it could have been).

100. See *Kelo v. City of New London*, 545 U.S. 469, 512 (2005) (Thomas, J., dissenting) (discussing the "Mill Acts" and how they fell under the "common carrier" exception).

101. For an overview of state use of eminent domain in this period, see Bruce L. Benson, *The Mythology of Holdout as a Justification for Eminent Domain and the Public Provision of Roads*, 10 INDEP. REV. 165, 175–76 (2005).

102. The term 'regularization' refers to the legal incorporation of various extralegal land arrangements. An account of this process will follow in subsection D.

to an industrial economy completed, that a tipping point was reached, and strong property rights institutions based on predictability and stability became ideal.

D. *Hernando de Soto and Land Regularization*

The use of eminent domain to both build infrastructure projects and transfer land to higher value uses was just a part of the land reforms that happened in the United States as it transitioned from a developing to developed country. Development economist Hernando de Soto has written at length about the key role of land reform in the economic transition of the United States.¹⁰³ The basic thrust of de Soto's argument is that in many countries there exist parallel legal and extralegal economies. These extralegal economies consist of those who are living on land that, for a number of possible reasons, they do not own. In many developing countries, extralegality is the norm. De Soto notes that, for example, in Russia in 1995, only about "280,000 farmers out of 10 million own their own land."¹⁰⁴ The problem with this state of affairs is that it results in what de Soto refers to as "dead capital."¹⁰⁵ If people do not own the rights to their land, they will not be properly incentivized to invest in the land, knowing that the true owner could evict them at any time.¹⁰⁶ This leads to inefficient land use. Furthermore, land cannot be put up as collateral, or converted to any other form of capital unless it enters the formal legal economy.¹⁰⁷ This results in a tremendous amount of wasted capital.

De Soto argues that there is still hope for developing countries that wish to bring their extralegal property arrangements into the formal sector. That hope lies in the fact that the United States successfully did that very thing in the nine-

103. DE SOTO, *supra* note 71.

104. *Id.* at 29.

105. *Id.* at 6.

106. The parallel between insecure property rights that Kaufmann and Olson are concerned about and the extralegal property institutions discussed by de Soto should be obvious. However, transitioning from a system of extralegal property rights to legal ones, so-called 'land regularization' involves just the sort of land transfer and insecure property rights feared by Olson and Kaufmann.

107. *See* DE SOTO, *supra* note 71, at 47 (arguing that capital is born in the formal property system).

teenth century. Tracing the history of land use in the continental United States over the past 200 years, de Soto describes an America that would seem strikingly familiar to those presently living in developing countries. Despite laws to the contrary, many Americans began settling on public or privately owned land that was undeveloped, and cultivated it for their own use. These settlers were squatting illegally, but in the early part of the nineteenth century, state legislatures began to recognize that allowing people to feel secure in their possession of the land where they lived would promote its cultivation and efficient use.¹⁰⁸ Kentucky led the charge to allow title to pass to settlers who lived adversely on the land of another for a certain period of time, effecting private transfers of land from absent landowners to the farmers who actually lived on their land.¹⁰⁹ When the Supreme Court entered the fray in a *Calder*-like attempt to protect the rights of existing owners,¹¹⁰ Kentucky state judges, in a move echoing that of Judge Clark, circumvented the Supreme Court's decision so that those living on the land could continue to develop it and produce economic benefits.¹¹¹

By 1866, Congress was forced to act after the discovery of gold in California and Colorado prompted a great migration west. In the absence of formal property laws in the West, miners had set up a complex network of extralegal, informal property mechanisms for those mining on western land, most of which was formally owned by the United States government.¹¹² The new legislation incorporated much of the informal mining laws and provided that those who had cultivated and worked land were entitled to the benefits of their work.¹¹³ This legislation followed the highly celebrated Homestead Act, which gave 160 acres to any settler willing to live on and develop the land for five years.¹¹⁴ By the time the twentieth century arrived, most of the extralegal property systems had been integrated into the formal property institution. This process

108. *See id.* at 130 (discussing how politicians became champions of extralegal rights when they expanded occupancy rights).

109. *Id.*

110. *Green v. Biddle*, 21 U.S. 1 (1823); DE SOTO, *supra* note 71, at 131.

111. DE SOTO, *supra* note 71, at 133.

112. *Id.* at 140–41.

113. *Id.* at 145–46.

114. *Id.* at 147.

involved a variety of land reform methods, but generally involved regularizing land use such that those who most stood to benefit from cultivating land would be able to actually receive the fruits of their labor. This process involved overhauling existing property rights and transferring land from one private owner to another, typically transferring land from its actual owner to a squatter living on and using the land. Sometimes eminent domain was used in this process, sometimes judicial activism, and sometimes legislative action.

In the above discussion, the key insight is that while the United States was in transition, secure property rights were not necessary for economic development, and in many cases it was the flexible nature of property institutions that allowed the United States to grow. Land was taken from property owners for any number of reasons and by many different means as various land systems went through the process of land regularization. However, as will be seen below, once land has been regularized and those living on and working the land stand to benefit directly from its cultivation, the arguments of Kaufmann and Olson begin to take effect and security in land ownership becomes key for economic development.

IV. INDIAN LAND REFORMS IN THE 20TH CENTURY

By the time the United States had emerged in the post-war era as an economic giant, India was just beginning to settle into its new statehood. As discussed, the first Indian Parliament was immediately confronted with the problem of land use. With the zamindars owning and maintaining much of the land, the government sought ways to abolish their holdings and redistribute the land among the Indian people. The solution was to amend the Constitution to limit zamindari remedies when their land was taken.¹¹⁵ With the institution of these amendments, state governments were free to create laws to abolish zamindari holdings and redistribute their land. The goals of these reforms were twofold: to ensure economic development and to redistribute the land holdings from elite landholders to those who actually worked the land. This latter justi-

115. Robinson, *supra* note 53, at 29.

fication stemmed less from economic theory and more from the socialist/anticolonial ideology of many of the founders.¹¹⁶

Of the land reforms attempted over the next forty years, four main types were the most prevalent. The first of these was tenancy reform. These consisted of states' attempts to regulate the conditions of tenancy contracts as well as attempts to abolish tenancy outright and to give land to the tenants. The second kind of reform involved the abolition of intermediary tax collectors who collected rent from the tenants on behalf of the landowners, and who reputedly used these positions to collect some rents for themselves, inflating the overall costs to tenants.¹¹⁷ Third were attempts to limit landholding by the elite by establishing ceilings on the amount of land a party could own. Fourth, there were attempts by a number of states to consolidate disparate landholdings by a single holder.¹¹⁸

Among the most powerful tools used by the government for the redistribution of land was eminent domain. Various states created laws in which the state government would expropriate zamindari land and redistribute it to Indian farmers. One of the first, and most comprehensive, of the state's laws to this effect was the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.¹¹⁹ The preamble to the Act reads:

Whereas it is expedient;

- a) to provide for the abolition of the zamindari system which involved intermediaries between the tiller of the soil and the State of Uttar Pradesh and
- b) for the acquisition of their rights, titles and interests, and
- c) to reform the law relating to land tenure consequent on such abolition and acquisition and

116. See Gupta, *supra* note 9, at 457–58 (noting Jawaharlal Nehru's socialist views for property redistribution).

117. In some cases intermediaries were zamindars themselves, in other cases they were tax collectors who served on behalf of the zamindars.

118. Timothy Besley & Robin Burgess, *Land Reform, Poverty Reduction and Growth: Evidence from India*, 115 Q.J. ECON. 389, 392 (2000).

119. Uttar Pradesh Zamindari Abolition and Land Reforms Act, No. 1 of 1951.

d) to make provision for other matters connected therewith.¹²⁰

This law was challenged vigorously by zamindars who would have their lands taken.¹²¹ Specifically, zamindars argued that, while the nationalization of land might have served some public purpose, there was no public purpose in merely taking land from one person and giving it to another.¹²² The government countered that taking land from the wealthy to give to the poor was its own satisfaction of public purpose.¹²³ In the words of Pramod Kumar Agrawal, the law was intended to destroy “the inferiority complex in a large number of citizens of the estate and [give] them a status of equality with their former lords.”¹²⁴ Furthermore, the government argued, the law would prevent “the accumulation of big tracts of land in the hands of a few individuals, which is contrary to the expressed intentions of the Constitution.”¹²⁵ The newly created Supreme Court of India rejected all of the zamindar’s claims and affirmed the right of the government to use eminent domain to redistribute their land.¹²⁶

The theory behind land reform laws was both pragmatic and ideological. First, the zamindar system was not efficient.¹²⁷ Under the zamindar system, those who worked the land occupied a position not unlike feudal vassals or sharecroppers, in which they worked the land and their landlords or intermediaries collected their rents in cash or in kind.¹²⁸ Such a system did not reward production, as those who worked the land were not entitled to any of the profits from surplus yield, and thus were not incentivized to invest extra time or effort in the enterprise. Reforms that were instituted were of various

120. *Id.* pmb1.; PRAMAD KUMAR AGRAWAL, *LAND REFORMS IN INDIA: CONSTITUTIONAL AND LEGAL APPROACH* 69 (1993).

121. *See id.* at 37–38 (citing *Raja Surya Pal Singh v. U.P.* (1951) 1975 A.I.R. 1083 (India); *Bihar v. Maharajadhiraja Sir Kameshwar* (1952) 1 S.C.R. 889 (India)).

122. *Id.* at 38.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Manpreet Sethi, *Land Reform in India: Issues and Challenges*, in *PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM* 73, 73–74 (Peter Rosset et al. eds., 2006).

128. *Id.* at 73.

kinds, but generally aspired to give farmers more direct control of their rights to the land, either by increasing their bargaining power with landowners, giving them more security against eviction, or directly distributing land to workers. These reforms resembled those instituted in the United States a century earlier to strengthen the land rights of squatters who occupied land on the American frontier.

Studies in West Bengal confirmed the theory driving these reforms. Land reforms there called “Operation Barge,” which gave tenants security from eviction by landlords—though not full ownership of the land—resulted in a full twenty-eight percent increase in agricultural production for the region.¹²⁹

The close of the twentieth century and the beginning of the twenty-first have seen several developments. First, even though the zamindari systems have been largely abolished, the state governments have continued to use eminent domain as a tool for the transfer of land. However, with the abolition of the zamindari system, the socialist/anticolonial justification for redistribution of land has largely faded, and economic development has emerged as the leading justification for the takings.¹³⁰ This has seen the rise of a new powerful actor in the eminent domain context: private enterprise. Increasingly, land is being transferred from farmers and small landholders to large private companies for development projects.¹³¹ Such transfers have generally been allowed by Indian courts, citing anticipated economic growth as justifying the “public purpose” prong of the LAA.¹³²

However, though extralegal land arrangements certainly still exist in India, particularly in the form of slums that surround large cities, the land reform acts of the latter half of the

129. Abhijit V. Banerjee, Paul Gertler & Maitreesh Ghatak, *Empowerment and Efficiency: Tenancy Reform in West Bengal*, 110 J. POL. ECON. 239, 278 (2002).

130. See *Goswami*, *supra* note 40, at 5 (discussing the Land Acquisition Rehabilitation and Resettlement Bill’s aspirations).

131. See Muhammad A. Khan, *Laying Down the Ground Rules*, TIMES OF INDIA (Jul. 23, 2012), http://articles.timesofindia.indiatimes.com/2012-07-23/edit-page/32789230_1_land-acquisition-committee-on-rural-development-eminant-domain (discussing a new law where the state is omitted as a party from the process of acquisition).

132. Colin Gonsalves, *Judicial Failure on Land Acquisitions for Corporations*, 45 ECON. & POL. WKLY. 37, 41 (2010).

twentieth century have largely succeeded in creating regularized parcels of land.¹³³ This is by no means a completed process; as Gupta notes, the state of land recording in India is still out of date and wholly inadequate for the needs of the country.¹³⁴ Even so, the conception of ownership for the Indian people, at present, largely represents the idea that those who work and live on the land are its owners and entitled to the benefits of their work.¹³⁵

V. ACROSS THE PROPERTY RIGHTS THRESHOLD

A. *Eminent Domain and Economic Growth in Post-regularized United States*

Given the state of land use and regularization in India, it will again be helpful to examine the use of eminent domain in the United States, particularly after land ownership was regularized. Though liberal interpretation of public purpose served the country well during the regularization years, it serves the interests of economic development poorly in a post-regularization context.

Throughout the development of the United States, eminent domain was used in two specific and distinct ways. The first, as seen in cases such as the Mill Acts, were laws allowing land to be transferred because the transferee would engage in some sort of public service. Eminent domain has been used in this sense to acquire land for bridges, dams, railroads, and similar infrastructure developments. Such uses, even when the transferee is a private citizen or company—such as in the case of a railroad—seem to uncontroversially meet the Constitution's requirement of a public purpose. The second form of transfer has been to redistribute land, or to move it from so-

133. A more in depth discussion of this point will follow in the Conclusion of this Note.

134. Gupta, *supra* note 9, at 466–67.

135. Professor Gupta cites the work of Caro Upadhya in Jharkand, who would routinely ask landholders for evidence of title and would receive “crumbling” but “revered” papers in response, many of which were out of date. *Id.* at 466. Gupta notes that in many cases, the formality of these titles is out of date, and accurate records are impossible to find. This, she notes, makes determining the amount of compensation to be paid a difficult task. However, among those working the land, it is generally understood that those who are working the land are doing so legitimately, in accordance with custom and their understanding of the land as it was redistributed.

called lower uses to higher uses.¹³⁶ The Homestead Act and zamindari abolition laws are examples of this use of eminent domain. Acquiring and transferring land in this manner generally falls into the category of what economists refers to as “land regularization.”¹³⁷ As mentioned above, these twin uses of eminent domain in the nineteenth and early twentieth centuries in the United States helped the country grow from an undeveloped, agrarian society to the advanced industrial economy seen today.

However, several eminent domain cases from the latter half of the twentieth century and beginning of the twenty-first century demonstrate that once a country has reached a certain level of development, the second form of transfer, a purely private transfer, may no longer promote economic growth.¹³⁸ It is my argument that after regularization has taken place, Shihata’s theory begins to take effect, and secure property rights prove more effective as a tool for economic growth than liberal use of eminent domain and government intervention.

The two cases discussed below involve situations in which local governments were interested in using eminent domain to effectuate economic development. In both cases, the court found this goal sufficient to satisfy the public purpose standard of the Takings Clause. Ironically, given that the takings took place in a post-regularized United States, the taking of land from one private party to another private party resulted in an economic loss.

136. The transfer of a farm from an absent owner to a squatter who is farming it is a classic example of transfer of land to higher use. Because the new owner may claim the benefits of any extra labor and investment for themselves, this creates incentives to work harder and to use the land in a more efficient way, since greater output would result in greater wealth for the owner. When aggregated, the result of transitioning land from low valued uses to high valued ones generates capital that may be reinvested and further economic prosperity.

137. See, e.g., Edesio Fernandes, *The Influence of De Soto’s The Mystery of Capital*, 14 *LAND LINES* (Lincoln Inst. for Land Policy, Cambridge, Mass.), Jan. 2002, at 5 (explaining land tenure regularization).

138. It should be noted that the first kind, when eminent domain is used for public purposes such as building infrastructure projects, is still widely used in the United States and is usually still conducive to economic growth. It is also this variety of economic domain that continues to be needed to modernize the country’s infrastructure, and to combat many of the problems noted in the introduction.

The first case examined is *Poletown v. the City of Detroit*.¹³⁹ In *Poletown*, the Michigan legislature had passed the Economic Development Corporations Act in an attempt to revitalize cities in the state that were in decline. Detroit had seen unprecedented growth during the boom years of American industrialization, but was in decline as the American economy transitioned from a manufacturing to a service-based economy.¹⁴⁰ Under the Act, the City of Detroit moved to condemn certain private lands and to convey the land to General Motors (GM).¹⁴¹ The public use justification, even though this was clearly a private transfer, was that the new GM plant would bring with it manufacturing jobs, increasing revenue for the area that could be used for redevelopment and would improve the general economic welfare.¹⁴² For reasons that will be discussed below, the plan did not have the intended result.

The second case, *Kelo v. the City of New London*, is one of the most famous—or infamous—Supreme Court cases of the twenty-first century. Though the facts of the case are quite similar to those of *Poletown*, and its legal justification similar, it was much more widely reported.¹⁴³ In fact, the *Kelo* decision sent a shockwave through American property law that has yet to subside.¹⁴⁴ The City of New London was once a commercial center in Connecticut, but several decades of economic decline had left the city in a poor economic state by the 1990s. In an effort to reverse the decline, state and local officials initiated a plan to revitalize the area by attracting outside businesses and developing the waterfront properties on the

139. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

140. See Marie Michael, *Detroit at 300: New Seeds of Hope for a Troubled City?*, DOLLARS AND SENSE, July/Aug. 2001, at 24, 24–25 (discussing Detroit's transformation).

141. *Poletown*, 304 N.W.2d at 457.

142. *Id.* at 458.

143. *Kelo v. City of New London*, 545 U.S. 469 (2005). Westlaw lists 816 citations for *Poletown*. It contains nearly 4,000 citations for *Kelo*. It should be noted that *Kelo* was a U.S. Supreme Court ruling that interpreted the U.S. Constitution, whereas *Poletown* was a Michigan case that interpreted the Michigan Constitution.

144. See Edward J. López, R. Todd Jewell & Noel D. Campbell, *Pass a Law, Any Law, Fast! State Legislative Responses to the Kelo Backlash*, 5 REV. L. & ECON. 101, 102 (2009) (discussing the aftermath in the states of the *Kelo* decision).

Thames River for commercial purposes.¹⁴⁵ The development plan would include a “small urban village” with restaurants and shopping, office space, a pedestrian walkway along the river, and more. These developments were meant to improve upon the building of a new Pfizer plant immediately adjacent to the development area.¹⁴⁶ The New London Development Corporation (NLDC), the government agency created to implement the plan, successfully negotiated to buy much of the land that lay in the development area, but negotiations broke down with several landowners. The city then moved to use its power of eminent domain to condemn the properties.¹⁴⁷ The owners of the properties filed suit, and the case eventually was appealed all the way to the Supreme Court.

In a now famous opinion by Justice Stevens, the Court upheld the state’s action by a vote of 5-4. Stevens stated that “there is no basis for exempting economic development from [the] traditionally broad understanding of public purpose.”¹⁴⁸ It was not the place of the Court to pass upon the wisdom or the rationale behind the taking, Stevens argued. If the legislature was acting within the scope of its authority, the “purpose is legitimate and the means are not irrational,”¹⁴⁹ and therefore the Court would not enjoin the action.

Kelo stands as the final word on eminent domain in the United States at present. Though the opinion left the option open for states to impose tighter statutory restrictions on local governments’ use of eminent domain, the case established the federal baseline that legislatures are in control when defining whether the acquisition of property will serve some public purpose. Even if, contrary to the maxim of *Calder*, the taking is purely private, as was the case in *Kelo* and *Poletown*, the legislature is within its authority to take the land and distribute it as long as there is some conceivable public purpose and compensation is paid.

145. *Kelo*, 545 U.S. at 473.

146. *Id.* at 474.

147. *Id.* at 475.

148. *Id.* at 485.

149. *Kelo v. City of New London*, 545 U.S. 469, 488 (2005) (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984)).

B. Poletown, Kelo, and Post-regularization Transfers of Land

In arguing in favor of deference toward local government action, Justice Stevens stated in *Kelo*, “debates over the wisdom of [takings] . . . are not to be carried out in the federal courts,”¹⁵⁰ signaling that the actions of the NLDC were legal, though not necessarily wise. And since the courts will not pass judgment on the wisdom of such decisions, this Note will take up the call. Though there were differing opinions at the time as to how the New London and Poletown projects would turn out, the subsequent years have vindicated the detractors. The Poletown and New London projects can be considered nothing if not dismal failures. This is so because they effectuated purely private transfers of land in a post-regularized nation.

Once the Michigan Supreme Court cleared the way, the bulldozers began to roll into Poletown. The creation of a new automobile manufacturing plant in the middle of a Detroit neighborhood required the clearing of 465 acres in the center of the city.¹⁵¹ The area cleared included 1,400 homes, 600 small and mid-sized businesses, sixteen churches, a school, and a hospital.¹⁵² Due to continued costs of removing and relocating businesses and residents, the plant opened two years later than originally planned, and cost four times its projected budget to build.¹⁵³ The City of Detroit and General Motors had sold the development plan on the promise that it would employ more than 6,000 workers, yet the actual numbers fell far short of this estimate. By 1988, seven years after the *Poletown* decision, there were approximately 2,500 workers at the plant.¹⁵⁴ In fact, the plant actually resulted in a net loss of jobs for Detroit due in part to the costs associated with relocation of small businesses or the decisions of such businesses to

150. *Id.* at 488 (citing *Hawaii Hous. Auth.*, 467 U.S. at 242–43).

151. George Corsetti, *Poletown Revisited*, COUNTER PUNCH (Sept. 18, 2004), <http://www.counterpunch.org/2004/09/18/poletown-revisited/>.

152. *Id.*; Ilya Somin, *Overcoming Poletown: County of Wayne v. Hathcock, Economic Takings and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1017 (2004).

153. Michael, *supra* note 140, at 25.

154. *Id.*

simply close.¹⁵⁵ Thirty years later, the area surrounding Poletown has not seen any significant economic growth.¹⁵⁶

New London has seen similar results. After the decision, the remaining houses in the development area were razed to make room for a new hotel, office buildings, and tourist attractions. Pfizer, in return for settling on nearby land and lending inertia to the development project, received eighty percent abatement on tax payments for the next ten years.¹⁵⁷ But as the national outcry against the Court's decision became louder, Pfizer backed off its commitment to help fund the hotel.¹⁵⁸ Outside investors and businessmen were also slow to purchase the land that had been made available by the Court's ruling. In 2009, all of the development area still lay vacant.¹⁵⁹ Finally, Pfizer, finding the new plant to be unprofitable, decided to pull the plug, and removed 1,400 jobs from the plant in New London to a nearby plant in Groton, Connecticut.¹⁶⁰ In the end, the development project was detrimental to the city of New London, which lost ten years of valuable property taxes due to the subsidies given to Pfizer. The parcels of land that were seized still lay vacant at the time of this writing.

Why were the results of the Poletown and New London projects so different from the distribution of land undertaken in the United States in the nineteenth century? The answer lies in the fact that the earlier redistribution schemes were part

155. See Somin, *supra* note 152 (arguing that if the eliminated businesses employed a modest average of slightly more than four workers, the number of lost jobs is equal to or greater than the 2,500 jobs created by the GM town).

156. See *id.* at 1018 (stating that the *Poletown* decision did the people of Detroit more harm than good).

157. INST. FOR JUSTICE, FIVE YEARS AFTER KELO: THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST DESPISED DECISIONS (2010), available at <http://www.ij.org/five-years-after-kelo-the-sweeping-backlash-against-one-of-the-supreme-courts-most-despised-decisions>.

158. William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. TIMES (Nov. 21, 2005), http://query.nytimes.com/gst/fullpage.html?res=9E04E1DC1F3EF932A15752C1A9639C8B63&sec=&spon=&page_wanted=all.

159. John Carney, *The Famous 'Kelo House' Property is Now a Vacant Lot*, BUSINESS INSIDER (Nov. 10, 2009), <http://www.businessinsider.com/the-famous-kelo-house-property-is-now-a-vacant-lot-2009-11>.

160. Patrick McGeehan, *Pfizer to Leave City that Won Land-Use Case*, N.Y. TIMES (Nov. 12, 2009), http://www.nytimes.com/2009/11/13/nyregion/13/pfizer.html?_r=0.

of land regularization, whereas the schemes in *Poletown* and *Kelo* took place after land ownership had been regularized. Put another way, using eminent domain to effect purely private transfers of land is an effective strategy for economic development only when a country is in the process of regularizing its land laws. Once land regularization has occurred, eminent domain affecting purely private transfers of land—as opposed to public use acquisition—is a poor tool for development.

This is because of the distinction between public and private goods. Economists distinguish public from private goods in that a public good is non-rival and non-excludable. This means that one person's use of a public good does not diminish another person's ability to use that public good.¹⁶¹ The classic example is a bridge. One person driving over a bridge does not make the bridge go away, nor does it inhibit the person behind him from driving over the bridge.¹⁶² On the other hand, a private good, like an apple, is rival and excludable. One person's consumption of the apple precludes anyone else from consuming it.

In many cases, private developers do not have any incentive to create public goods, because the marginal cost for each new user of the good will be zero, which indicates a market value of zero.¹⁶³ Stated plainly, private companies will not make public goods, because there is no money in it. The alternative for private companies is often to make a semi-public good (such as a toll bridge) that is excludable unless a price is paid. However, even in these cases, the cost for developers of

161. See, e.g., Thomas A. Garrett & Paul Rothstein, *The Taking of Prosperity? Kelo v. New London and the Economics of Eminent Domain*, THE REGIONAL ECONOMIST (FED. RESERVE BANK OF ST. LOUIS, ST. LOUIS, MO.) Jan. 2007, available at <http://www.stlouisfed.org/publications/re/articles/?id=42> (discussing the difference between private and public goods).

162. Some goods, such as a toll bridge or privately owned railroad, exhibit traits of both a public and private good. In these cases, the good is excludable (they may charge a fee for use, and you are excluded from use unless you pay the fee) but are not rival (one person paying a fee and driving over the bridge does not restrict another person from doing likewise). Historically, eminent domain has been used widely to provide for the construction of such projects, notably railroads. These kinds of projects generally fall on the public goods side of the private/public divide. However, in the case of something that is both rival and excludable, like a factory, once the land is in use by one party, it cannot be used by another.

163. Garret & Rothstein, *supra* note 161.

assembling the land might outweigh the profits from the good; this would not create incentives for private companies or persons to invest in the creation of public goods.¹⁶⁴ The result is that many needed infrastructure improvements would not be built. In order to remedy this problem, the government may either take charge of building the public good for itself, or they may subsidize a private company to build the good.¹⁶⁵ In either case, there is a net economic gain because the land has been transferred from rival use to non-rival use. It is this dynamic that causes eminent domain to be necessary when a public good is being created. The market failure that results from non-excludable goods will under-incentivize people to build them.¹⁶⁶

But this is not the case with private goods, which include regularized parcels of land. Generally, the most efficient way to allocate private, excludable resources, such as regularized land parcels, is through the market, absent government inter-

164. This may also be the case when private companies are trying to acquire land. Certain kinds of costs associated with trying to assemble parcels of land for large projects may be categorized as transaction costs in the Coasian sense. If these costs are too high (for example, if a landowner holds out for a higher price) then they will be prohibitive and the transaction will not take place. The problem is that it is hard to know when high transaction costs are a result of market failure, such as holdouts, or when the costs are simply high because existing owners of land subjectively value their land at more than its going market rate. In these cases, Coasian analysis suggests that the existing owners should be able to keep their land until the offeror makes a proposal equal to or greater than the value at which the owner holds the piece of property. If such an offer cannot be made, the property should stay in the hands of the current owner, who values it more highly. See Ronald Coase, *On the Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (suggesting that property will end up in the hands of the party that values it the most, regardless of which had the initial entitlement, in a world absent transaction costs).

165. This was the case with the Mill Acts, as discussed *infra* Part I.

166. For a description of the economics of eminent domain use when land is being acquired for a public good, see Marc Scribner, *This Land Ain't Your Land; This Land is My Land: A Primer on Eminent Domain, Redevelopment and Entrepreneurship*, ONPOINT (Competitive Enter. Inst.) (Mar. 3, 2010), <http://cei.org/studies-point/land-ain%E2%80%99t-your-land-land-my-land>. Scribner recites the conventional wisdom regarding why eminent domain may be necessary for land acquisition for public use, but how it may be possible for private companies to assemble land for private use without it, citing the example of Disneyworld in Florida, which was able to assemble land using third-party purchasers.

vention.¹⁶⁷ Numerous economists have argued for a stricter public use requirement for eminent domain in the United States based on the likelihood of private takings resulting in economic inefficiencies. Professor Bruce L. Benson has identified several of the inefficiencies.¹⁶⁸ First, when private owners' acquisition of land is subsidized, this "leads to inefficient overuse of the subsidized input relative to other inputs,"¹⁶⁹ which results in less overall production given the lost opportunity costs of over-investment. Second, when companies invest resources in projects in which they will receive government-subsidized land in return for building in a certain locale (both Pfizer and General Motors received generous benefits from the local governments), they expend significant opportunity costs in the process. This "rent seeking" behavior has been identified elsewhere as resulting in waste.¹⁷⁰ Finally, and perhaps most importantly, Benson argues that:

Use of the takings power . . . undermines the security of private property rights, and insecure private-property rights result in "tragedies" like those that arise in a common pool: rapid use and under maintenance of resources relative to the efficient level of conservation. The more frequent and arbitrary transfers are expected to be, the more significant these costs become."¹⁷¹

Benson's words recall the arguments of Olson and Shihata. His argument, in effect, is that in the present state of land ownership in the United States, unconstrained use of eminent

167. Garrett & Rothstein, *supra* note 161 ("When governments interfere in the private market, whether it be a market for apples, cars or property, the likely result is greater economic inefficiency and less economic growth. The reason is that even the most well-intentioned policymaker cannot comprehend or replicate the complex interactions of buyers and sellers that occur in free markets.").

168. *See id.* (discussing inefficiencies that may result from government transfers).

169. Benson, *supra* note 101, at 186. Benson cites a case, similar to *Poletown*, in which the state of Mississippi acquired private land to sell to a Nissan plant. The Supreme Court of Mississippi noted that the plant had probably acquired more land than it needed, and would not have done so if simply left to purchase the land itself. *Id.* at 179 n. 16.

170. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224, 224-32 (1967).

171. Benson, *supra* note 101, at 188 (internal citations omitted).

domain runs the risk of creating investor insecurity in land. Given that land in the United States has been regularized, this would have the opposite effect that insecure property rights had a century ago. The efficiencies that were created by regularization are undermined if the landowners now fear displacement by government intervention.

There is one further reason that use of eminent domain to effect private transfers can harm property rights: political backlash. As mentioned in the introduction to this Note, government takings often result in angry reprisals by those who feel their land is being stolen. Even when the backlash is non-violent, it can result in economic contraction. After the Court's decision in *Kelo*, the public outcry against the land seizure created a chilling effect, and private companies were slow to move into the seized area.¹⁷² This partially accounts for the land having never been developed, though the answer may also be that it was never profitable for businesses to relocate to New London. It is likely that Pfizer would never have built there in the first place had they not received generous government benefits in the form of tax breaks and cheap land.¹⁷³

The public response to *Kelo* did not stop at preventing business investment in New London. As Justice Steven's opinion stated, "nothing in [this] opinion precludes any State from placing further restrictions on its exercise of the takings power."¹⁷⁴ States, fueled by a popular backlash, took his invocation seriously, and forty-one states passed some sort of limitation on the power of eminent domain after *Kelo*.¹⁷⁵ Thirty-seven state legislatures passed and enacted laws restricting the power of eminent domain, and six of those states further enacted restrictions via voter initiative.¹⁷⁶ Four more states passed restrictions by popular vote.¹⁷⁷ Proponents of eminent domain as a means of economic development warned that such backlash was shortsighted. They argued that the power to condemn and transfer land to private companies was one of

172. Yardley, *supra* note 158.

173. See McGeehan, *supra* note 160 (discussing how economic development officials enticed Pfizer to develop in New London).

174. *Kelo v. City of New London*, 545 U.S. 469, 489.

175. Lopez, Jewell & Campbell, *supra* note 144, at 102.

176. *Id.*

177. *Id.*

the most powerful tools for stimulating growth.¹⁷⁸ However, a prominent study on the matter showed that the implementation of these laws had little to no negative effect on economic development in the states that passed eminent domain restrictions.¹⁷⁹ Using the three dependent variables of changes in construction jobs, building permits, and property taxes—which are often used as indicators for economic health—over a period before and after restrictions on eminent domain were enacted, the study found no significant decline among these factors.¹⁸⁰ Whatever the limitations on eminent domain have done in the United States, they have not negatively impacted economic growth.

C. *Post-regularization Eminent Domain in India*

The experience of the United States can prove instructive for countries seeking to follow its lead. Throughout much of the history of the United States, eminent domain was a powerful tool for both developing infrastructure and regularizing land use. Throughout this process, property rights in the United States were highly flexible, reflecting what Qian calls “transitional institutions.” However, once land in the United States became sufficiently regularized, purely private transfers became less about land regularization and more about legislatures’ predictions about how best to use land in order to bring about economic development. While the use of eminent domain for public-use infrastructure projects remains important to counteract market failure, purely private transfers of land that do not result in the creation of public goods have been shown to produce no net economic gain, and in some places have produced loss.

What does this mean for India? India, like the United States, is a large common law country with deep infrastructure needs. Economic development is, and should continue to be, an important policy priority for the Indian government. The question that remains is, has land been sufficiently regularized in India such that eminent domain for private transfers is no longer a viable tool for economic development? The current

178. Dick M. Carpenter II & John K. Ross, *Do Restrictions on Eminent Domain Harm Economic Development?*, 24 *ECON. DEV. Q.* 337, 338 (2010).

179. *Id.* at 343.

180. *Id.* at 341, 343.

state of eminent domain in India suggests that the answer is yes.

As outlined in Part II, since the Indian Parliament did away with a constitutional right to land, eminent domain has been governed by the LAA. The LAA, like the U.S. Constitution, provides that land may be acquired by the government “for a public purpose” and only if “compensation” is paid.¹⁸¹ As mentioned above, this second prong did not apply to the land of zamindars. Apart from zamindars’ land, the government has relied on the LAA to acquire land for a variety of projects, both public and private. In the middle part of the twentieth century, the Indian Supreme Court struggled to define a “sufficient public purpose.”¹⁸² However, by the end of the century, the Court had made a string of rulings in favor of transfer of land by eminent domain from farmers to manufacturing plants.¹⁸³ In one recent case, the Indian Supreme Court read “public purpose” to include “any purpose wherein even a fraction of the community may be interested or by which it may be benefitted.”¹⁸⁴ Presently, there does not seem to be any conceivable limit to what purposes will be deemed to be in the best interest of the public by the acquiring governments.

“Compensation” under the LAA is a similarly ambiguous term. Though the LAA calls for the consideration of “market value,” the government’s official Law Commission, which reviewed the LAA in 1958, found that determining a fair value would be left to judges.¹⁸⁵ This has resulted in a massive un-

181. The Land Acquisition Act, No. 1 of 1894, INDIA CODE (1993).

182. In the 1962 case of *R.L. Arora v. U.P.*, A.I.R. 1962 S.C. 764 (India), land was acquired from farmers in order to build a private textile parts factory. The India Supreme Court struck down the acquisition, holding that there was not sufficient public benefit for such an acquisition. However, the next year the Supreme Court approved the acquisition of land from farmers for the construction of a factory on the grounds that the government had also subsidized the factory, and this made it akin to a public use. See *Smt Somavantis v. Punjab*, A.I.R. 1963 S.C. 151 (India) (determining whether acquisition of land by a private company can serve a public purpose).

183. See *Gonsalves*, *supra* note 132, at 41 (discussing relevant eminent domain cases).

184. *Sooraram Pratap Reddy v. District Collector* (2008) 9 S.C.C. 552 (India).

185. *SEN*, *supra* note 35, at 21; *Gupta*, *supra* note 9, at 470–71.

dervaluing of acquired land.¹⁸⁶ In some cases, the government undervalues the land so they may resell it for a profit.¹⁸⁷ In other cases, even if the government is acting in good faith, the knowledge of impending acquisition will depress property values in the area, and the government will be able to buy the land at a fraction of its former value.¹⁸⁸

Acquisitions of this kind are becoming commonplace all across India.¹⁸⁹ Land is being taken for next to nothing and sold cheaply to private developers.¹⁹⁰ This state of affairs has led to widespread unrest. Government acquisition has led to millions of dollars' worth of litigation, protests, kidnapping, murder, arson, and police crackdowns of the kind experienced in Bhatta-Parsaul.¹⁹¹ This unrest has led to underdevelopment of land, as corporations do not invest while awaiting the outcome of litigation, or are afraid to evict current owners for fear of violent reprisal.¹⁹²

In addition, there are often economic reasons that the land stays undeveloped. Many of the problems seen in New London have been replicated in the Indian countryside. Local governments, seeking to stimulate their economies, offer cut-rate deals to corporations if they will come in and build on the land.¹⁹³ But such land may actually be ill-suited to the needs of

186. Praful Bidwai, *A Nadigram Near Nagpur?*, KHALEEJ TIMES (Feb. 9, 2008), http://www.khaleejtimes.com/DisplayArticleNew.asp?col=§ion=opinion&xfile=data/opinion/2008/February/opinion_February32.xml.

187. *Id.*

188. Gupta, *supra* note 9, at 471.

189. See Aseem Shrivastava, *SEZs: The Problem*, COUNTERCURRENTS.ORG (Feb. 19, 2008), <http://www.countercurrents.org/shrivastava190208.htm> (discussing the huge premiums given to Indian private companies that participate in special economic zones).

190. *Id.*

191. See *supra* Part I.

192. See Gupta, *supra* note 9, at 482 (discussing how the inhabitants of Badkhalsa have managed to maintain control over the land).

193. Professor Gupta provides an example of such transfers, in which a government intervention resulted in a net loss:

Nagpur is an expanding city that officials had hoped would become a commercial hub in the mid-2000s. Plans were made for two new airport runways, the second of which required takings of nearby land. After the expropriations were executed, air traffic decreased significantly because of changes in development patterns. Currently, the capacity of the existing runway is expected to be sufficient for another thirty years, meaning that the land taken for the

the corporations, and if left to acquire the land on their own, they might well have chosen to do so elsewhere.¹⁹⁴ In such cases, as in New London, the companies find that their newly acquired land is not worth developing, a decision they are free to make since they paid so little for the land in the first place. In some cases, those whose land was taken, upon discovering that the purchasers have no intention of building on the land, have simply moved back onto the land and resumed living and farming there as illegal squatters.¹⁹⁵ This situation is particularly troubling because these residents, while still able to make productive use of their land, are not able to sell the land, use it as collateral, or invest too deeply in its use due to fear that the government may reclaim it.¹⁹⁶ This is precisely the state of affairs that Benson, Shihata, and Olson warn about—land ownership being so tenuous that people are unable to use it efficiently.

Such situations would be comically ironic were they not so sad. The very same laws employed to take land from zamindars and distribute it to the actual tillers of the land are now being employed to take land back from the farmers and give it to corporate interests. These corporate interests do not use the land, so the farmers just move back onto the land and farm it as squatters—approximating the state of affairs as it was under the zamindars. As one activist recently said, “[t]he situation is very bad. Corporates have become the new zamindars and a

second new runway will not be needed for a significant period of time. Unfortunately for the inhabitants of the land taken for the second runway, their land *title* remains in the hands of the government, despite extensive protests, court claims, and some media coverage. That said, while the title has been transferred, at least some of the claimants have been asserting their rights to their land by continuing to occupy it.

Id. at 470.

194. See, e.g., Prabhu Ghatge, *Dubai on Ground or Pie in Sky?*, LIVE MINT (Mar. 27, 2008), <http://www.livemint.com/Opinion/Jzo4twcGAdv6ISCeEwv rSP/Dubai-on-ground-or-pie-in-sky.html> (discussing how the corporation purchasing land for the Nagpur airport did not need to consider its true cost and economic value since it was acquired compulsorily by the state government at below market rates).

195. Gupta, *supra* note 9, at 482.

196. *Id.*

few people are accumulating all the land.”¹⁹⁷ If this process continues, it may completely reverse any successful land reforms that have taken place in the six decades since Indian independence. Property rights were necessarily flexible in a time when it was essential to transfer land to those who actually lived on it and were set to gain from its use. Now, this land is in the hands of owners who are set to gain from working it. Transferring land from one private party to another threatens to undermine the very growth that India needs and so desperately seeks. New London stands as a stark warning. New Delhi should heed it.

VI. CONCLUSION

The foregoing discussion has attempted to illustrate the problems that result from purely private transfers of land via government use of eminent domain. Given the complexity of development economics and the variety of factors upon which it is based, evidence of the economic impact of eminent domain cannot be comprehensive and is necessarily anecdotal. One may look at Poletown and New London, just as one may look at many of the current development projects underway in India, and observe economic waste and failure. Even so, India continues to use eminent domain liberally and continues to grow, and readers may take such data to suggest that perhaps India has not yet reached the threshold where purely private transfers of land via eminent domain are harmful.¹⁹⁸ Readers may even suggest that *Kelo* and *Poletown* are outliers, and that

197. Anjali Ojha, *Corporates Are the New Zamindars of India: Land Reforms Activist*, YAHOO! NEWS INDIA (Oct. 14, 2012), <http://in.news.yahoo.com/corporates-zamindars-india-land-reforms-activist-045934839.html>.

198. This is actually true to the extent that no country, even the United States or Great Britain, has fully regularized all of its land. Extra-legal living arrangements still exist in these countries, as they do in India, which, in particular, still contains large slums that surround large metropolitan areas. However, the land use and ownership of slums resemble the extralegal living arrangements that existed before the land reforms discussed above. In such cases, liberal use of eminent domain may still be appropriate to take land from absent landowners, and to distribute it to those actually living on the land. In this way, eminent domain would be used as a tool pursuing regularization, as it has been used in the past. This state of affairs is entirely distinct from what is happening with much of the Indian farmland, which has already been regularized. In the cases mentioned in Part V, *supra*, land is being taken from one private party, who is actually using it, and given to an-

liberal eminent domain can and does still promote economic growth. This second argument is addressed by the observations of Benson and others; the first requires a bit more explanation.

In countering the first argument, it may suffice to say that the issues surrounding land acquisition in India have been widespread and overwhelmingly negative.¹⁹⁹ Violent responses to land acquisition are growing, and such responses have increasingly derailed development projects.²⁰⁰ As of 2011, as much as \$100 billion dollars is being held up due to disputed land acquisition for projects.²⁰¹ If nothing else, such widespread public outrage imposes incredibly high transaction costs, which may render the projects economically inefficient. It is difficult to argue that development projects lead to growth if they are never actually built.

Bear in mind, the above argument applies only to purely private transfers of the kind seen in *Kelo* and *Poletown*. It is in such cases, and only after land use has been regularized, that economic loss, or at least economic gridlock, occurs. In the case of public projects, such as dams and railroads, eminent domain continues to be vitally necessary in India.²⁰² This does not mean that land cannot or should not be sold to private

other private party. This situation is more like *Poletown* than it is like early America, and like *Poletown*, it has resulted in economic loss and waste.

199. See, e.g., NIRANJAN SAHOO, OBSERVER RESEARCH FOUNDATION, OCCASIONAL PAPER NO. 28, IN SEARCH OF A MODEL LAND LEGISLATION: THE NEW LAND ACQUISITION BILL AND ITS CHALLENGES 2 (2011) (discussing problems surrounding land acquisition).

200. *Id.*

201. *Id.* at 34 n.2.

202. Economist William A. Fischel, in writing about *Poletown*, describes the different psychological effect that land acquisition for public use has on the displaced than land acquisition for private transfer. He notes:

In watching the proudly one-sided film, “*Poletown Lives!*” I was struck by the number of times people had said that it would have been okay to take their home or business for a traditional public use like a highway or a school or a railroad. The economist who would impatiently exclaim, “but you’ve lost your home in either case!” misses the extra cost that arises from a novel use of the government’s power. Expansion of eminent domain’s scope raises the anxiety that even more uses will soon be found, and no one’s property will be safe. Tradition also suggests to victims that people like themselves in the past have made a similar sacrifice, so that the persistence of similar uses of eminent domain is not so upsetting.

developers, or that such sales would amount to economic loss. Rather, it means that if such transfers are to affect economic gain, they should be done through traditional means, and the standard Coasian rules apply.²⁰³ Private companies have been able to successfully assemble large, contiguous parcels of land in the United States over the past few decades, employing such techniques as using straw purchasers, secretly assembling land, considering simultaneous sites for development, or only announcing the sale after all of the necessary parcels have been assembled.²⁰⁴ Such methods are both perfectly legal and avoid problems of holdout or strategic bargaining. Because private companies are able to act quietly and quickly, as opposed to legislative action which is public and often slow, private companies often have much less trouble acquiring land through private sales than governments do through eminent domain.²⁰⁵ Basic Coasian analysis shows that, absent government intervention, firms that have a sufficient incentive to assemble parcels of land for development projects will be able to do so through private negotiation. If, on the other hand, the firm is unable to assemble the necessary land through private negotiation, then it is currently at a higher value use than it would be if acquired by a corporation, and a transfer should not take place.²⁰⁶ That corporations in India are not actually using the

Fischel, *supra* note 15, at 949. The lessons from Poletown are applicable to India as well, as much of the outrage has centered upon the taking of land not for public use projects but to give to corporations. *See, e.g.,* Ajoy Ashirwad Mahaprashasta, *Standing Up to the State*, FRONTLINE, June 2011, available at <http://www.frontline.in/navigation/?type=static&page=flonnet&rdurl=fl2812/stories/20110617281200900.htm> (discussing widespread discontent in cases of expropriation, including many in which the land was given to private companies).

203. *See generally* Coase, *supra* note 164 (arguing that in a world absent transaction costs, property will end up in the hands of the party that values it the most, regardless of which party had the initial entitlement).

204. *See* Benson, *supra* note 101, at 171–73 (discussing combinatorial auctions).

205. *Id.* at 170–71.

206. Proponents of liberal use of eminent domain argue that, even in the context of private transfers, assembling many contiguous parcels of land involves transaction costs that are so high that they will prevent what would otherwise have been an efficient transfer of land. However, as Benson has argued, the techniques that private companies may employ to purchase the land, including those listed above, generally limit transaction costs such that those who stand to benefit from purchasing land are able to do so. *See id.* at

land the government acquires for them, and that farmers are subsequently moving back onto the transferred land, bears out the truth of this proposition.

Detractors may further point to the obvious differences between India and the United States. The United States is a fully developed country, and India, as demonstrated by the McKinsey report, has pressing developmental needs. This is certainly true. But none of the projects mentioned in the McKinsey report requires private transfers. They are, almost entirely, public goods, and acquisition of land for such projects falls squarely into recognized definitions of public purpose.²⁰⁷

This Note does not dispute the use of eminent domain for public ends. Rather, I merely suggest that current practices of eminent domain in India, at least in parts where land has been successfully regularized, may result in net economic loss.

There is, however, a relatively simple solution. At present, the Indian Parliament is considering legislation that would replace the LAA with an updated version. At present, the new bill, titled the Land Acquisition, Rehabilitation and Resettlement Bill, concerns not only how land will be acquired through the use of eminent domain, but also how those who are displaced will be compensated and resettled on new land. The most pressing issue left over from the LAA, though, has yet to be addressed—the meaning of public purpose. If the legislature limits public purpose to transfers that actually fall under the economic definition of public goods, the amount of inefficient transfers that are currently taking place across India would be radically reduced. The country could still meet its infrastructure needs by assembling land necessary for roads and other public projects, but the inefficient transfer of land from farmers to corporations would be brought to an end. The highway in Uttar Pradesh can and should be built as planned, but if corporations want the land adjacent to the highway, it is likely they could find a price that would satisfy the current owners. If they could not, there might be fewer stores along the highway, but also fewer villages burned to the ground.

171–72 (considering strategies whereby buyers can successfully overcome holdout problems that arise when multiple pieces of land must be purchased and information regarding the plan has been discovered).

207. MCKINSEY & CO., *supra* note 11.