

# TAKINGS FOR GRANTED: THE CONVERGENCE AND NON-CONVERGENCE OF PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA AND THE UNITED STATES

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"My own view is that the leftist voices that have emerged are not going to disappear because we have a property law."<sup>1</sup>

## INTRODUCTION

Of the myriad of new laws and regulations promulgated by the National People's Congress of the People's Republic of China ("China") in March 2007, one captured the watchful eye of Western media sources: China's new property law ("Property Law").<sup>2</sup> One report described the law as "an important step away from Communist collective ownership and towards a market economy" that will "undoubtedly increase protection for home owners and prevent land seizures."<sup>3</sup> *Time Magazine* was similarly optimistic, emphasizing that "reforming the old socialist system is exactly the point of the law, individual property rights being a core tenet of a functioning capitalist economy."<sup>4</sup> As these examples illustrate, Western news coverage has essentially depicted the law as representative of a major convergence

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1. Joseph Kahn, *China Approves Property Law, Strengthening Its Middle Class*, N.Y. TIMES, Mar. 16, 2007, at A1, available at <http://www.nytimes.com/2007/03/16/world/asia/16-china.html> (quoting Zhu Xueqin, a Chinese historian and government expert).

2. Property Rights Law (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), translated in [http://www.lehmanlaw.com/fileadmin/lehmanlaw\\_com/laws\\_regulations/Propoerty\\_Rights\\_Law\\_of\\_the\\_PRC\\_LLX\\_03162007.pdf](http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws_regulations/Propoerty_Rights_Law_of_the_PRC_LLX_03162007.pdf) (last visited Oct. 13, 2008) (P.R.C.) [hereinafter *China's New Property Law*]. This is the unofficial translation of the full law as provided by Chinese law firm Lehman, Lee, & Xu. An official translation is not yet available.

3. *China Passes New Law on Property*, BBC NEWS, Mar. 16, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6456959.stm>.

4. Simon Elegant, *China Gets a Property Rights Law*, TIME, Mar. 16, 2007, <http://www.time.com/time/world/article/0,8599,1599932,00.html>.

of Chinese property law with the standards of laws embraced by free-market economies like the United States.

Of course, given the complexity of property laws, vast differences remain between the property laws of many Western free-market states, let alone between the property laws of China and those of the countries commonly associated with the Western legal tradition. There is one area in particular, however, in which convergence is apparent between Chinese and U.S. property law: the law of takings.

While the United States and China have reached similar solutions to takings law questions, close study of the evolution of this law in each country suggests that these solutions, while startlingly similar, are based on different ideological principles and address radically different problems. This note proceeds to examine how and to what extent U.S. and Chinese laws have converged in these areas. Part I sets forth a basic overview of the roots of the law of takings in the United States and China. Part II examines two recent cases involving challenges to government takings in the United States and China to illustrate that the legal solutions to takings law questions have converged in both jurisdictions. Finally, Part III considers the institutional, economic, and social forces that have driven this evolution in both systems.

Ultimately, this note concludes that the convergence upon similar standards and solutions in takings law is a deceptive unity. If anything, close study of this legal evolution demonstrates that, while the United States and China have adopted similar solutions and are now faced with common problems and questions, this practical policy convergence has not been accompanied by a convergence of ideologies or purpose. As such, observers would be wise to look beyond the common language currently embraced by both jurisdictions and more closely examine the ideological drivers of the legal evolution to predict how property law in both jurisdictions is likely to evolve in the future.

## I. U.S. TAKINGS LAW & TAKINGS LAW WITH CHINESE CHARACTERISTICS

While the convergence of property law in China and the United States may be noted in several areas, the most striking example involves takings law, or the law that governs when local, state, or federal governments are allowed to take private property. In the

United States, takings law is rooted in the U.S. Constitution's Fifth Amendment,<sup>5</sup> which states "nor shall private property be taken for public use, without just compensation."<sup>6</sup> This clause allows for public takings of private property under U.S. law while also setting limitations on those takings; any property taken must be for "public use" and accompanied by "just compensation"—terms that have guided takings law and have been the source of challenges to it since the Amendment's passage.<sup>7</sup> With amendments to the Chinese Constitution in 2004 and the recent passage of China's new Property Law, China has developed a similar takings law.

Government takings are nothing new to China. With the establishment of the People's Republic of China in 1949, the Chinese government established in law its right to take private property, confiscating much of the private property held within the Chinese mainland.<sup>8</sup> Indeed, until 2004 the nation's constitution still recognized the state's right to take private land in the public interest without compensation. According to Article 10 of the Chinese Constitution, "[t]he State may, in the public interest, requisition land for its use in accordance with the law."<sup>9</sup> At the same time, the absence of any mention of compensation in the Chinese text gave the word "taking" a more literal meaning.<sup>10</sup> Widespread abuse of this power by local authorities led the National People's Congress to amend Article 10 to read "[t]he State may, in the public interest and in accordance with law, expropriate or requisition land for its use and make compensation for the land expropriated or requisitioned."<sup>11</sup> At the time, since this guarantee did not provide more guidance, widespread

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5. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1093 (5th ed. 2002).

6. U.S. CONST. amend. V.

7. See DUKEMINIER & KRIER, *supra* note 5, at 1093.

8. See CAO PEI, REAL ESTATE LAW IN CHINA 12 (1998).

9. Amendment to the Constitution (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 2004), art. 20, *translated in* [http://www.npc.cn/englishnpc/Constitution/node\\_2826.htm](http://www.npc.cn/englishnpc/Constitution/node_2826.htm) (last visited Oct. 4, 2008) (P.R.C.) (containing the original text of Article 10 within the amending text of Article 20) [hereinafter Amendment to the Constitution].

10. See, e.g., *Ownership with Chinese Characteristics: Private Prop. Rights and Land Reform in the P.R.C.: Roundtable before the Cong.-Executive Comm'n on China*, 108th Cong. 28-29 (2003) (statement of Patrick A. Randolph, Jr., Professor of Law, Univ. of Mo. at Kan. City), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108\\_house\\_hearings&docid=f86630.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f86630.pdf) [hereinafter *Overview*] (noting that land could be taken by "government fiat").

11. Amendment to the Constitution, *supra* note 9, art. 20.

evictions and seizures continued, along with growing protests against those seizures.<sup>12</sup>

In response, key parts of the new Property Law passed in March 2007 go beyond guarantees of compensation for takings to further define exactly what compensation is due.<sup>13</sup> In fact, the Property Law, officially "an important component part of the civil code,"<sup>14</sup> goes into such depth that its Chinese version contains 247 articles across 40 pages.<sup>15</sup> While there is no equivalent federal law defining the contours of the Fifth Amendment's Takings Clause, the Chinese law can readily be compared with the contours as defined by over two centuries of Fifth Amendment jurisprudence.<sup>16</sup>

Through such a comparison, a case can be made that Western media sources are correct: the Property Law, along with its formal explanation, presents a convergence with U.S. takings jurisprudence. This is particularly the case considering recent takings jurisprudence, as exemplified by a comparison of the "Nail House" case in China with the U.S. Supreme Court's 2005 decision in *Kelo v. City of New London*.<sup>17</sup>

## II. PARADIGMATIC CASES: FROM "NAIL HOUSE" TO NEW LONDON

Prior to the passage of the new Chinese Property Law, one case had risen to fame throughout the Chinese media as a national symbol of the struggle of ordinary people against the evictions and expropriations that had become widespread across China over the last decade.<sup>18</sup> This case, dubbed the "Nail House," involved a husband and wife in the city of Chongqing who were determined to save their

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12. Howard W. French, *Land of 74,000 Protests (But Little Is Ever Fixed)*, N.Y. TIMES, Aug. 24, 2005, at A4, available at <http://www.nytimes.com/2005/08/24/international/asia/24letter.html?oref=login>.

13. Explanation on Draft Property Law, 5th Nat'l People's Cong. 10 (2007) (statement of Wang Zhaoguo, vice-chairman of the Standing Comm. Of the Nat'l People's Cong.), available at <http://www.10thnpc.org.cn/english/government/202091.htm> [hereinafter Wang Zhaoguo].

14. See *id.* at § 3(1).

15. Charles Hutzler, *China Introduces Landmark Property Law*, CINCINNATI POST, Mar. 8, 2007, at A13, available at 2007 WLNR 4466275.

16. See, e.g., Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 423-27 (1967) (discussing how civil and common law systems can be compared as a matter of functional equivalence, as well as some inherent problems in making such comparisons).

17. 545 U.S. 469 (2005).

18. See *Lessons from 'Nail House'*, CHINA DAILY, Apr. 4, 2007, [http://www.chinadaily.com.cn/opinion/2007-04/04/content\\_843001.htm](http://www.chinadaily.com.cn/opinion/2007-04/04/content_843001.htm) [hereinafter *Lessons*].

home from expropriation without adequate compensation.<sup>19</sup> Out of 280 residents, they were alone in resisting the eviction order.<sup>20</sup> Their two-year legal battle to save their property might have gone unnoticed in China if not for the photographs of their home that emerged in online sources, which made the building look like a nail that could not be pulled out of the construction site.<sup>21</sup> Its defiant image captured the admiration of many.<sup>22</sup>

Ultimately, the Nail House plaintiffs won their fight for increased compensation through a court-approved settlement after the passage of the new Property Law.<sup>23</sup> Even though the new Property Law did not technically take effect until October 1, 2007, within a week of the law's passage the Chinese media had already connected the two.<sup>24</sup> As soon as the National People's Congress made it clear that private individuals have a right to adequate compensation for resettlement, the developers got the message and decided it was in their interest to quickly settle—a move that was seen by many as a major milestone in Chinese private property protection.<sup>25</sup> A former Nail House neighbor summarized this change with a brief observation: "In the past they would have just knocked [the house] down."<sup>26</sup>

Just as Nail House is seen as a landmark case for takings law in China, *Kelo v. City of New London*,<sup>27</sup> a Supreme Court case decided in 2005, is seen as a landmark case for takings law in the United States. *Kelo* resulted in a "firestorm of public resentment" from angry critics who "bemoaned 'the death of private property.'"<sup>28</sup> At issue in *Kelo* was whether the economically "distressed municipality" of New London, Connecticut, could condemn and seize fifteen non-blighted homes as part of an economic redevelopment plan provided that just

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19. *£260,000 Brings China's Best-Known House Down*, TIMES ONLINE, Apr. 3, 2007, <http://www.timesonline.co.uk/tol/news/world/asia/article1608437.ece> [hereinafter *House Down*].

20. *Id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *See, e.g.*, Zhang Rui, *First Test Case for Newly Approved Property Law?*, CHINA.ORG.CN, Mar. 23, 2007, <http://www.china.org.cn/english/China/204173.htm>.

25. *See* Howard W. French, *Homeowner Stares Down Wreckers, at Least for a While*, N.Y. TIMES, Mar. 27, 2007, available at [http://www.nytimes.com/2007/03/27/world/asia/27china.html?\\_r=1&ref=asia&oref=slogin](http://www.nytimes.com/2007/03/27/world/asia/27china.html?_r=1&ref=asia&oref=slogin) [hereinafter *Chongqing Journal*].

26. *Id.*

27. 545 U.S. 469 (2005).

28. Judy Coleman, *The Powers of a Few, the Anger of the Many*, WASH. POST, Oct. 9, 2005, at B2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/07/AR-2005100702335.html>.

compensation was paid to property owners.<sup>29</sup> The Court ultimately found this to be an acceptable public purpose within the meaning of the Takings Clause.<sup>30</sup>

Ironically, while Nail House represents a rebirth of private property protection to many in China and *Kelo* represents the death of private property to some in the United States, the rule that emerges from both is surprisingly similar. Indeed, both cases raise three issues in particular that deserve discussion. First, both raise the question of what constitutes "public interest" or "public use," and they arrive at a remarkably similar, albeit controversial, answer. Second, both raise the question of how to define just compensation. Third, both involve controversial takings of homes, raising the issue of what special place homes may have in relation to other properties. Each of these issues shall be discussed in turn.

#### A. "Public Interest" and "Public Use"

When asked for the basis of their challenge against the eviction order authorizing the taking of their house, Wu Ping, the wife of the property owner, directly questioned the alleged "public interest" behind the taking, declaring that:

The Constitution and the latest Property Law protect private property ownership. They said they were going to demolish our house because it is in the public interest. But they are going to build a shopping center, which has nothing to do with the public interest! It is a business move, and what the [order] protects are the developers' interests!<sup>31</sup>

These comments hit upon a key question in both the United States and China: when can property be taken from one private party and given to another in the name of "public use," "public interest," or "public purpose"?

Much of the majority opinion in *Kelo* is dedicated to addressing this question in U.S. law. As Justice Stevens wrote for the majority:

[I]t has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to

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29. *Kelo*, 545 U.S. at 473, 475, 477.

30. *Id.* at 484.

31. Rui, *supra* note 24.

another if future "use by the public" is the purpose of the taking . . . .<sup>32</sup>

While Stevens readily admits that this explanation does not answer the more complex issues raised by *Kelo*, it might perhaps suffice to answer the questions raised in the Nail House case. After all, while the Wu property was being transferred to private developers, it was known at the time that a "shopping mall will be built where their house now stands, each floor covering 5,000 square meters."<sup>33</sup> Since a large shopping center would likely qualify as an establishment for use by the public under U.S. law as Stevens describes above,<sup>34</sup> this would make the Nail House case less problematic for U.S. law.

If the exact use of the Nail House property was not known, however, matters would be more complicated. This was the case in *Kelo*, which was "not a case in which the City [was] planning to open the condemned land—at least not in its entirety—to use by the general public."<sup>35</sup> In *Kelo*, some of the properties taken would not offer services to the public at large.<sup>36</sup> Nonetheless, Stevens upheld the taking, noting that the meaning of "public use" in the Fifth Amendment has long since recognized that the term need not mean literal "public use" and that a mere "public purpose" would suffice.<sup>37</sup> Accordingly, while residents of New London believed that the Constitution's terms meant that "cities have no right to take their land except for projects with a clear public use, such as roads or schools, or to revitalize blighted areas,"<sup>38</sup> Justice Stevens expressed the Court's opinion to the contrary. Similarly, while Wu Ping felt that building a shopping center was not in the "public interest," city officials clearly disagreed.<sup>39</sup>

Ultimately, Justice Stevens's majority opinion in *Kelo* held that the "public use" requirement is met where a city "has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no

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32. *Kelo*, 545 U.S. at 477.

33. Rui, *supra* note 24.

34. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (holding that a shopping center is open for use by the public at large).

35. *Kelo*, 545 U.S. at 478.

36. See *id.*

37. *Id.* at 480.

38. *Homes May Be 'Taken' for Private Projects*, MSNBC, June 23, 2005, <http://www.msnbc.msn.com/id/8331097/> [hereinafter *Homes May Be 'Taken'*].

39. See *House Down*, *supra* note 19.

means limited to—new jobs and increased tax revenue."<sup>40</sup> Similarly, the National People's Congress has also, since 1995, required that all expropriations in the public interest "must comply with land utilization master plans"<sup>41</sup> and "be subject to strict urban planning, overall planning, rational distribution, [and] comprehensive development . . . on the basis of the principle of combining economic, social and environmental benefits."<sup>42</sup> Given this language, it would seem inapposite whether Nail House was going to be replaced by a shopping mall open to all or by some other business less open to the public, as long as it is being taken as part of a plan. Similarly, the Supreme Court held that full public use of the land was not required for the takings in *New London, Connecticut*.<sup>43</sup> Instead, comprehensive plans are paramount to the legality of takings in both countries, whether those plans involve building conference hotels and marinas in New London<sup>44</sup> or "broad avenues" and "big shopping malls" in Chongqing.<sup>45</sup>

That is not to say that this is without controversy in either country. Just as Wu Ping became a hero<sup>46</sup> among "Dingzihu" (those who resist government seizures for developers without adequate compensation) for her fight against the conflation of the term "public interest" with developers' interests,<sup>47</sup> Justice Sandra Day O'Connor's stinging dissent to the *Kelo* opinion, joined by Justices Rehnquist, Scalia, and Thomas, has been used by property rights advocates for making the same point.<sup>48</sup> O'Connor charged that,

[T]he fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those

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40. *Kelo*, 545 U.S. at 483.

41. Administration of Urban Real Property Law (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), art. 9, *translated in* 5 THE PRC PROPERTY SERIES 5, 6 (Asia Law and Practice Ltd. ed., 1995) (P.R.C.) [hereinafter *Administration of Urban Real Property Law*].

42. *Id.* art. 24.

43. *See Kelo*, 545 U.S. at 484.

44. *Id.* at 474.

45. *Chongqing Journal*, *supra* note 25.

46. *House Down*, *supra* note 19.

47. Rui, *supra* note 24.

48. *Homes May Be 'Taken'*, *supra* note 38.



with more. The Founders cannot have intended this perverse result.<sup>49</sup>

While the concerns expressed by Wu Ping and Justice O'Connor have not been enough to stop these takings, substantial agreement with their concerns in both the United States and the People's Republic of China suggest that the controversy over how to define "public interest" and "public use" will continue as the law continues to develop.

#### B. When is Compensation "Just"?

In addition to raising questions about what constitutes a "public interest," both the Nail House and *Kelo* cases raise questions about whether compensation is "just." In China, what surprised local housing official Ren Zhongping most with Nail House was that Wu Ping would not accept the same compensation taken by 280 other property owners and determined reasonable by an official appraisal agency.<sup>50</sup> As he noted, "[s]he has the value of her house in her heart, but what she has in mind is not practical."<sup>51</sup> These comments refer to her desire, for instance, to "be compensated with a same-sized apartment" in the same location with the "same exposure to the sun."<sup>52</sup> This irked developers and city officials alike, who called the demands unrealistic.<sup>53</sup> Yet these concerns are similar to those of the New London residents who challenged the taking of their homes, fighting the condemnation of their properties because of their attachment to things like waterfront views.<sup>54</sup>

Addressing these concerns, Justice Thomas' dissent noted that "[s]o-called 'urban renewal' programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced."<sup>55</sup> Yet this is nothing new to U.S. law. Since *United States v. Miller*<sup>56</sup> in 1943, the U.S. Supreme Court has rejected the idea of compensating

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49. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting).

50. *Chongqing Journal*, *supra* note 25.

51. *Id.*

52. Rui, *supra* note 24.

53. *Id.*

54. See Charles Lane, *Justices Affirm Property Seizures*, WASH. POST, June 24, 2005, at A1, available at [http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062300783\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/23/AR2005062300783_pf.html).

55. *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

56. 317 U.S. 369 (1943).

individuals for the personal value of their property, holding that the government must only pay fair market value to compensate for taking a property,<sup>57</sup> or "what a willing buyer would pay in cash to a willing seller."<sup>58</sup> Housing official Ren Zhongping seemed to believe that this type of compensation is all that is required by Chinese law as well, arguing that Wu Ping's demand for compensation beyond a professional appraisal of market value was "more than what is reasonable by law."<sup>59</sup>

The text of China's new property law, however, suggests that Wu Ping's demands, while likely unreasonable in the United States according to five of nine *Kelo* justices, are more in line with the spirit of the new Chinese law than Chongqing's officials may think. Article 42 of the new law provides, for instance, that "where [an] individual residential house is expropriated, the residential conditions of the expropriated shall be guaranteed" along with "compensations for demolition and resettlement."<sup>60</sup> Of course, this provision turns on what "residential conditions" means; if apartment size and sun exposure qualify as "residential conditions," then Wu Ping could be well within her rights to demand that these conditions are guaranteed. The official explanation further cites the protection of "living conditions" as well, including resettlement costs<sup>61</sup>—neither of which would be required of U.S. developers seeking to displace tenants. Instead,

[I]n the United States, residential tenants sometimes get sketchy relocation assistance when urban renewal comes but hardly ever are provided with a new home. Their landlords typically get most of the cash, as the lease contracts either are terminated before the condemnation or provide that condemnation will terminate the lease rights automatically.<sup>62</sup>

While the United States primarily grants compensation to the person who owns the land in fee simple absolute, such a solution would make little sense in China given that most Chinese tenants received only a permanent right to residence rather than outright ownership of their

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57. *See id.* at 374-75.

58. *Id.* at 374. *See also* DUKEMINIER & KRIER, *supra* note 5, .at 1114.

59. Rui, *supra* note 24.

60. *China's New Property Law*, *supra* note 2.

61. Wang Zhaoguo, *supra* note 13, § 3(6).

62. Patrick A. Randolph Jr., *The New Chinese Property Law*, PROB. & PROP. 14, 20 (Sept.-Oct. 2007).

homes under the privatizations of the 1990s.<sup>63</sup> Accordingly, in the absence of any well-defined right to ownership, the value of the property to most Chinese tenants is much more tied to the right of residency itself.

While the Chinese text might go further in some ways than current U.S. law to compensate tenants who lose their homes to takings, it remains to be seen whether this difference will exist in practice. This is particularly the case if the Nail House settlement is any indication of how the law will be enforced. After all, Wu Ping, while receiving greater financial compensation than she was initially offered, did not ultimately obtain the other conditions she originally demanded.<sup>64</sup> And even though the new property law now provides a legal basis to challenge compensation in court, it is unclear whether the majority of Chinese property owners, whose cases are not subject to as much publicity as Nail House, would be able to wage a successful case against inadequate compensation. These problems are further compounded by the lack of a truly independent Chinese judiciary.<sup>65</sup> There may be a reason, after all, that Wu Ping, while believing the new law was on her side, ultimately decided to settle.

Others, however, may be more willing to test the law in the near future. Already, there have been reports of "many 'nail houses' that have sprung up over China . . . since the introduction of a property law last year."<sup>66</sup> Though inspired by Wu Ping's battle to sustain her own fight, some claim that they will not follow her example in accepting less than replacement costs. Choi Chu-cheung, for example, is a property owner in the city of Shenzhen whose "nail house" is the last obstacle blocking the construction of a new eighty-

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63. *See id.* at 159.

64. *See House Down*, *supra* note 19.

65. *See, e.g.,* Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 539 (2007). *See also* Alex Pasternack, *Old Beijing Tries to Avoid Wrecking Ball*, CHRISTIAN SCI. MONITOR, Aug. 14, 2008, available at <http://features.csmonitor.com/olympics08/2008/08/14/old-beijing-tries-to-avoid-wrecking-ball/> (noting that legal expert Su Nan recommended against bringing takings challenges to the courts "not least because judges are often influenced by the government").

66. Michael Bristow, *Stand-off at Beijing 'Nail House'*, BBC NEWS, July 16, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7509614.stm>. *See also* *Land Can Still Be Seized, Says Legal Expert*, S. CHINA MORNING POST, Dec. 28, 2007, at 4, available at 2007 WLNR 25521767 (noting that, though it is an uphill battle for landowners, "there have been sporadic successes in disgruntled landowners' fights against property developers" since the new Property Law was passed).

eight story tower.<sup>67</sup> While Wu Ping ultimately accepted less than replacement cost, Choi Chu-cheung has claimed that he will hold out until he receives fair compensation or "land of equal value."<sup>68</sup> How such replacement costs would differ from fair market value, and how successful citizens are in obtaining those replacement costs, remains to be seen. What is clear is that, as in the United States, "the real fight [in China] . . . will be over compensation . . . ."<sup>69</sup>

### C. Home is Where the Heart is

Both the U.S. and Chinese national constitutions separate homes from other properties as worthy of special mention and protection. The Fourth Amendment of the U.S. constitution, for instance, guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," specifically singling out houses as protected from unreasonable search and seizure along with papers and other unnamed effects.<sup>70</sup> This Amendment reflects the common law principle that an individual's home is his or her castle.<sup>71</sup> Yet this is not a purely common law concept; the Chinese constitution of 1982 has a similar provision which states that "[t]he residences of citizens of the People's Republic of China are inviolable. Unlawful search of, or intrusion into, a citizen's residence is prohibited."<sup>72</sup> With these provisions, one might ask whether homes have a significant place in Chinese and U.S. takings law as well. Given that the two most recent prominent cases in takings law in the United States and China, the *Nail House* case and *Kelo*, involved takings of homes, these cases present a good opportunity to question whether the taking of homes raises additional problems for government takings.

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67. See Stephanie Wong, *Home Holdout Is New Test of China Property Law*, YAHOO FIN., Apr. 15, 2007, available at <http://uk.biz.yahoo.com/15042007/323/home-holdout-new-test-china-property-law.html>.

68. See *id.*; see also Zhuang Pinghui, 'Nail house' Blogger Is Homeowners' Hope, S. CHINA MORNING POST, Apr. 29, 2007, at 6, available at 2007 WLNR 8070764 (indicating Choi Chu-cheung's insistence on fair compensation).

69. Randolph, *supra* note 62, at 19. See also Pinghui, *supra* note 68 (reporting several other instances of disputes over compensation).

70. U.S. CONST. amend. IV.

71. See, e.g., *Maryland v. Buie*, 494 U.S. 325, 329 (1990) (quoting *Buie v. State*, 531 A.2d 1290, 1297 (Md. Ct. Spec. App. 1987)).

72. XIAN FA [Constitution] art. 39 (2004) (P.R.C.), translated in [http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content\\_1372964.htm](http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm) (last visited Oct. 4, 2008) [hereinafter XIAN FA].

The taking of homes, while currently allowed by the law of both countries, is more controversial than other takings and probably more likely to result in successful legal challenges. Justice Thomas' dissent in *Kelo*, for instance, speaks adamantly against "the indignity inflicted by uprooting [individuals] from their homes."<sup>73</sup> What Thomas does not mention in his opinion, however, is that five of the fifteen properties involved in *Kelo* were not homes of those challenging the taking, but rather, properties held as business investments.<sup>74</sup> Thomas chooses to focus on those properties that are individual homes, though, as a particularly egregious form of taking. Likewise, American news articles focus on the taking of homes, also setting aside the question of the investment properties altogether.<sup>75</sup>

Similarly, the Chinese media focused heavily in their coverage of Nail House on the fact that Wu Ping and her husband were seeking to protect their home, with only passing mention of the fact that the "family used to run a restaurant business from home."<sup>76</sup> Rarely was it mentioned that a major reason that Wu Ping turned down previous compensation offers was because "she wanted lower levels in the new building so she could run her restaurant."<sup>77</sup> Yet what sparked national interest was Wu Ping's fight to keep her home.

The idea that homes deserve special protection under takings law has not been confined to dissenting opinions or media reports; instead, U.S. and Chinese law has, at times, been specifically drafted to offer special protection to homes in recognition of the idea that the taking of homes is more serious than other takings. One famous example in U.S. law is the house of Margaret Scattergood, which the government tried to take in 1961 because its 32.5 acres "jutted like an iceberg into the tract where the CIA planned its compound" in Langley, Virginia.<sup>78</sup> Since the use of land for a government agency headquarters was clearly a public use, President Eisenhower and CIA Director Allen Dulles were well within their authority when they authorized the government to take the property and pay compensation amounting to \$54,189.<sup>79</sup> Not deterred by the President's

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73. *Kelo v. City of New London*, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting).

74. *Id.* at 475 (Stevens, J., majority).

75. See, e.g., *Homes May Be 'Taken'*, *supra* note 38.

76. Rui, *supra* note 24.

77. Clifford Coonan, *A Chinese Man's Home Is His Castle*, INDEP. (U.K.), Mar. 31, 2007, at 42.

78. RONALD KESSLER, *INSIDE THE CIA* 178 (1992).

79. See *id.* at 178-79.

authority, Scattergood lobbied Congress to save her home, and her story was so compelling to Congressmen that her effort resulted in an individual law passed by Congress allowing her the right to remain in her house until her death a good twenty-five years later.<sup>80</sup>

While an extraordinary event, the Scattergood case demonstrates a natural reluctance among American policymakers to remove somebody from his or her home, even for good reason. Chinese policymakers from 1949 to 1979 did not have such qualms; during this period the People's Republic of China confiscated hundreds of thousands of homes across the country through a series of different initiatives that were part of its socialist transformation.<sup>81</sup> By 1979, seventy-four percent of all urban buildings were state-owned housing units that had been confiscated.<sup>82</sup>

Far from guaranteeing fair housing as intended, these policies, by the 1980s, had led to overcrowding and poor maintenance of public housing along with an "enormous financial burden on the state."<sup>83</sup> Since individuals were guaranteed low-cost public housing, they had no incentive to invest in or build housing for themselves – resulting in a massive housing shortage.<sup>84</sup> To address that housing shortage, localities began to experiment with privatizing housing to encourage people to build and invest in their own residences, and "several years of investigation and experience" led to full-fledged urban housing reform and privatization as a way to reduce the burdens on the public housing system.<sup>85</sup> As a result of the success of this system in raising standards of living, the National People's Congress included specific protections of private housing in the Property Law to further encourage people to invest in their homes.<sup>86</sup> While these provisions were based on considerations of practical efficiency rather than a natural reluctance to remove people from their homes, they provide a legal text that can now be used before a court as an additional reason to challenge government takings that involve private homes.

That said, their status as private homes, while gaining more attention in the media, did not ultimately protect Nail House or the homes in New London from being taken by local governments for

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80. *See id.* at 178-80.

81. PEI, *supra* note 8, at 4-7.

82. *Id.* at 7.

83. *Id.* at 36.

84. *Id.*

85. *See id.* at 36-49.

86. Wang Zhaoguo, *supra* note 13, § 3(5).

local development projects. Accordingly, while both societies may single out homes as worthy of additional protection, this "special consideration" has distinct limitations.

D. A Common Solution: The Lessons from Nail House and *Kelo v. New London*

Taken together, the Nail House case and *Kelo* represent a convergence in principles of Takings Law between the People's Republic of China and the United States. Both legal systems now allow for private property to be taken only if it is for public use and if the taking is accompanied by just compensation. In addition, both systems accept the notion that economic development or redevelopment by private developers is a "public use" justifying takings provided that economic development is being pursued according to a comprehensive community development plan. At the same time, two common problems have emerged: (1) how to define just compensation; and (2) whether takings of homes should be treated differently from other takings and subject to greater scrutiny.

As for the first problem, while the text of China's new Property Law suggests that Chinese compensation for takings should cover replacement costs of taken property, rather than the American solution of compensating with fair market value, this potentially more expansive language has yet to translate to more than fair market value in practice. As for the second problem, whether the takings of homes should be subject to greater scrutiny, the most controversial Takings Law cases in the United States and China in recent years, *Kelo* and Nail House, have involved takings of private homes for economic development projects. This suggests that there is something about taking homes that is seen as more controversial than takings of other types of property in both societies, although it is unclear exactly what effect this really has, if any, on the outcome of these cases.

Once this overall convergence in Takings Law principles is established, and the emergence of common related questions noted, a critical question emerges: what is behind this convergence?

### III. DIFFERENT DRIVERS, SAME DESTINATION

In comparative law, the appearance of common solutions and principles in different legal systems often reflects common underlying problems that those legal systems sought to address. As shall be discussed in the following sections, this is not the case when it comes to the development of similar solutions for takings law adopted by

both the United States and the China. Instead, prior to the recent convergence of law in this area these countries had remarkably different legal systems and property-law traditions, which led to radically different property-law problems. Furthermore, these nations had very different ideologies for addressing these problems. Each of these shall be addressed in turn.

#### A. Distinguishing Constitutional Structures

When China's new Property Law was passed, Western media heralded it as China's "first law to protect private property explicitly."<sup>87</sup> The material presented so far in this paper, as well as a reading of the Chinese constitution as amended in 2004, would suggest that these reports are mistaken. After all, in 2004 the Chinese Constitution was amended so that Article 13 reads that "[c]itizens' lawful private property is inviolable."<sup>88</sup> Furthermore, the amendment added that "[t]he State, in accordance with law, protects the rights of citizens to private property and to its inheritance" and that "[t]he State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and make compensation for the private property expropriated or requisitioned."<sup>89</sup> These provisions certainly seem to amount to a recognition of private property rights as early as March 2004, three years before the passage of the new Property Law. So was the *New York Times*, along with other Western media sources, negligent in its research and reporting?

Not entirely. The key to understanding the contradiction between these reports and the Chinese Constitution's provisions lies in the differing purposes of the U.S. and Chinese constitutions and the different weight that is accordingly attached to each in their respective legal systems. After all, the Constitution of the United States is explicitly "the Supreme Law of the Land," a position that the document has held in the American legal system for more than two centuries.<sup>90</sup> By contrast, China does not have the same type of constitutional tradition. While China has had a formal constitution since its formation in 1949, the government has replaced that

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87. Kahn, *supra* note 1.

88. Amendment to the Constitution, *supra* note 9, art. 22.

89. *See id.*

90. U.S. CONST. art. VI, cl. 2.



constitution four times.<sup>91</sup> China's first constitution was based on the 1936 Constitution of the Soviet Union and, while "generally considered as a very positive constitutional document," it "hardly played an active role."<sup>92</sup> While the ongoing disregard for the Chinese constitutions can in part be blamed on Soviet advisers or the repeated political upheavals of the Mao era, it is also instructive to note that the document that preceded it was a political programme passed in September 1949 that set forward the new nation's systemic goals.<sup>93</sup>

In some ways, the Constitution of China today has retained its nature as a political document and agenda, with a long political preamble setting forth the current governing ideology that serves as a testament to its political nature.<sup>94</sup> Furthermore, unlike the U.S. Constitution, which has only been amended twice in the last three and a half decades,<sup>95</sup> the Chinese constitution has been regularly amended by the National People's Congress in recent years as "the political and economic situations in China have been changing in a frequent and rapid way," resulting in changes in party policy that then are adopted into constitutional provisions.<sup>96</sup>

Setting aside the Chinese constitution's nature as more aspirational than the regulatory U.S. constitution, the exact placement of the property rights protections that were added to the constitution in 2004 further indicate that these provisions are unlikely to support a private right of action. After all, while the Chinese Constitution has an entire section (Chapter II) that defines "The Fundamental Rights and Duties of Citizens" akin to the Bill of Rights in the U.S. Constitution, the property rights protections related to takings are not found within this section.<sup>97</sup> Instead, these property rights are found within a separate section entitled "General Principles" which includes lofty statements (e.g., "All power in the People's Republic of China belongs to the people") rather than the more specific listing of personal rights guaranteed in the fundamental rights section.<sup>98</sup>

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91. Chu Guobin, *Constitutional Law and State Structure*, in CHINESE LAW 23, 29 (Wang Guiguo & John Mo eds., 1999).

92. *Id.* at 30.

93. *Id.* at 29.

94. XIAN FA, *supra* note 72, pmbl.

95. U.S. CONST. amend. XXVI; U.S. CONST. amend. XXVII.

96. *See* Guobin, *supra* note 91, at 33.

97. *See* XIAN FA, *supra* note 72, ch. II (2004) (P.R.C.).

98. *See id.* ch. I.

For these reasons, while the 2004 amendments were a step forward in recognizing property rights, these amendments did little to change the practical treatment of property law in the absence of concrete provisions in China's developing Civil Code that more clearly define private ownership and the contours of those broad principles of private property protection embraced in the 2004 constitutional amendments.<sup>99</sup> In short, the 2004 amendments to the constitution were akin to the provisions of a non-self-executing treaty: until they were translated into further implementing legislation, they had little effect in practice.

#### B. Common Law versus "Civil Law in Development"

The new Property Law passed in March 2007 was intended to implement the 2004 amendments to the constitution and, as such, was seen as "an important component part of the civil code."<sup>100</sup> It is perhaps instructive that virtually all developments in Chinese takings law come in the form of legislation, whereas most developments in U.S. takings law come in the form of opinions from the U.S. Supreme Court. Accordingly, it is worth exploring how China's developing civil law system and U.S. common law traditions require different institutional drivers of reform.

Key to the difference between U.S. and Chinese legal systems is the role of the judiciary. China, by adopting a civil law tradition, also "adopts the principle of legislative interpretation" and "entrusts the NPC Standing Committee with the power to interpret the Constitution and laws."<sup>101</sup> Officially, Chinese courts have "the power to implement (not to interpret) the law,"<sup>102</sup> much like civil law courts in the West are expected to apply, rather than interpret, the provisions of the civil code. Yet it is exceedingly hard for courts to implement general principles without some judicial interpretation, so that "the more detailed an interpretation . . . is given by the legislature, the easier it becomes for the court to implement."<sup>103</sup> This contrasts sharply with the common law tradition of the United States,

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99. See ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW 83 (2006). See also Pasternack, *supra* note 65 (quoting a legal expert who explains that "[o]fficials generally follow administrative rules in demolition cases that do not conform to constitutional property rights").

100. See Wang Zhaoguo, *supra* note 13, § 1.

101. Wang Guiguo, *The Legal System of China*, in CHINESE LAW, *supra* note 91, at 1, 19.

102. *Id.*

103. *Id.*

which often relies on judicial interpretations to settle the meaning of the law when challenges arise – and which often results in the evolution of the law over time.<sup>104</sup>

That is not to say that Chinese law does not "evolve" over time, but rather that it can only formally evolve through the activity of the political branches of the Chinese government. Accordingly, the political pressure resulting from the vast changes sweeping Chinese society led the National People's Congress to issue a string of laws relating to property and land use over the past decade to provide the courts with laws and interpretations to implement.<sup>105</sup> Yet even before the new Property Law formally took effect, the National People's Congress announced that it would begin deliberation over a new urban and rural planning law to further reform the planning process that results in the comprehensive development plans used to justify takings.<sup>106</sup> So while U.S. litigants continue to challenge the principles involved in takings law following *Kelo*, the National People's Congress continues to refine its version of takings law through its own deliberations.

### C. The Role of the Media in Encouraging Reform

Given the fact that Chinese property law primarily evolves through its political rather than judicial branches, one cannot understate the importance of political pressure to further encourage reforms of Chinese property laws. One also cannot understate the significance of the Chinese media in creating that pressure for change. This significance may seem strange to those familiar with the degree to which the Chinese media is controlled by the Chinese government; the Chinese government often suppresses media stories that could potentially cause a negative reaction against its policies, as exemplified by the Chinese government's attempt to force its "mainstream media . . . to abandon coverage of the 'nail house'" in Chongqing.<sup>107</sup> Thanks to a determined group of bloggers and "citizen journalists," however, the story remained in the national spotlight

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104. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 202-27 (1973) (describing the evolution of property law in the United States).

105. See generally *Administration of Urban Real Property Law*, *supra* note 41 (publishing translations of a number of these laws and regulations relating to property).

106. NPC to Deliberate Draft Urban, Rural Planning Law, CHINACOURT, Apr. 14, 2007, <http://en.chinacourt.org/public/detail.php?id=4177>.

107. Pinghui, *supra* note 68.

leading up to and pressuring the passage of the new Property Law.<sup>108</sup> Ultimately, the news coverage even led the developers and local officials to give in to the building pressure before the new law even came into effect.<sup>109</sup> Some Chinese activists, like Shenzhen property rights advocate Zou Tao, believe that this media attention will not "ultimately lead to a solution for ordinary citizens."<sup>110</sup> As he argues, "[n]o other similar land disputes will receive that much attention again. The couple were [sic] rich and could afford to fight the developer. Most ordinary citizens don't have that many resources."<sup>111</sup>

What Zou Tao ignores is that the Nail House case "has caused a major stir in academic and civic circles."<sup>112</sup> As *China Daily* noted in a commentary on lessons learned from the case, Nail House added to a growing awareness among Chinese citizens of their rights and "unquestionably set an example of [people] standing up for their rights."<sup>113</sup> Indeed, since the developers in Chongqing credit not only Wu Ping's media coverage but also her knowledge of the law for her victory, it is possible that, through her example and others like it, other citizens will start to understand the law and to challenge the Chinese government and developers further.<sup>114</sup>

Furthermore, while the Chinese property activist Zou Tao points out that Nail House is unique because the couple involved is "rich and could afford to fight the developer,"<sup>115</sup> the same factors come into play in challenges to takings in U.S. law. While the U.S. system on its face allows anyone to challenge government takings, the U.S. appeals process is expensive and therefore practical realities dictate that only those who are wealthy enough to afford a potentially protracted legal battle can effectively mount a challenge to takings of their property. Of course, even having enough money to mount a challenge to the taking of their properties and plenty of media attention did not help the residents of New London keep their properties.<sup>116</sup> However, the

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108. *Id.* See generally Dan Southerland, *China's Media Controls: Could Bloggers Make a Difference?*, CHINA BRIEF, Apr. 18, 2007, [http://jamestown.org/terrorism/news/uploads/cb\\_007\\_008.pdf](http://jamestown.org/terrorism/news/uploads/cb_007_008.pdf) (discussing the role of bloggers and "citizen journalists" in modern China).

109. See Pinghui, *supra* note 68.

110. *Id.*

111. *Id.*

112. Rui, *supra* note 24.

113. *Lessons*, *supra* note 18.

114. See Rui, *supra* note 24.

115. See Pinghui, *supra* note 68.

116. See *Kelo v. City of New London*, 545 U.S. 469, 484 (2005).

media attention, as in China, did create enormous political pressure.<sup>117</sup> As a result,

Members of Congress have expressed their disapproval and 30 state legislatures have taken action on bills and constitutional amendments proposing limits on the power of eminent domain. Governors in three states have declared moratoriums on property seizures.<sup>118</sup>

Accordingly, while media pressure was not enough to influence the Court's decision in *Kelo*, the media responses to the Court's ruling have sparked a political and academic debate across the country much like Nail House has sparked a debate across China, and the products of that national debate may very well influence how the Court approaches the issue in the future.

#### D. Differing Traditional and Historical Roots of Property Law

Once one understands what processes have been behind the evolution of the property laws of the United States and China over the last few decades, it is important to look at the traditional and historical roots of property law in each country to understand what problems the law has been evolving to address. As an overall examination of these histories and traditions shows, by the late 1980s the United States and China faced very different problems in property law. Yet these different historical and traditional roots, as different as they are, set the path for their legal convergence.

As comparative real estate law expert Patrick A. Randolph, Jr., asserted before the U.S. Congress in 2002, "Until 1988, there was one simple law of real estate in China—the government owns everything... there were no individual rights in land and any arrangements that had been made could be undone by government fiat."<sup>119</sup> This was no secret; the 1982 Constitution specifically stated that all urban land belonged to the state, "merely confirming an existing situation which had developed gradually since 1956."<sup>120</sup> This ability of the state to take control of land without compensation was standard process for a quarter of a century. By contrast, for nearly two centuries American property law rested on the "[b]asic building block of... perpetual and relatively comprehensive [private]

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117. Coleman, *supra* note 28.

118. *Id.*

119. Overview, *supra* note 10, at 28.

120. PEI, *supra* note 8, at 8.

ownership" known as the "fee simple absolute."<sup>121</sup> Essentially, this is a legal fiction that assumes that complete title of ownership dates back to antiquity and stretches forward to the present, resulting in complicated local property recording systems that track the sale of property from one owner to another going back, in some cases, to before the nation's founding.<sup>122</sup> As one would expect, the Chinese government, with its history of land takings and redistribution, does not espouse any similar claim of perpetual ownership.<sup>123</sup>

As mentioned above, the U.S. tradition of fee simple absolute is based in part on fiction. After all, while the United States has had two centuries of property-law protections for its citizens, the United States, as a relatively young nation, can hardly trace its established property rights back to ancient times as can, perhaps, its English common law parent. Instead, the land of the United States was acquired in its own series of takings from Native Americans before and after the nation's founding. This is exemplified by the 1823 Supreme Court case of *Johnson v. M'Intosh*,<sup>124</sup> which involved two competing land claims in the State of Illinois.<sup>125</sup> The plaintiffs had purchased title to the land from the chiefs of Native American tribes in the area who, according to the Court, "were in rightful possession of the land they sold," while the defendants, by contrast, had later purchased the same properties from the United States government.<sup>126</sup> Despite the usual American rule that an earlier purchase from a legitimate property-holder should be the more valid title, the Court in *Johnson* ruled in favor of the defendants, declaring that "[c]onquest gives a title which the Courts of the conqueror cannot deny."<sup>127</sup>

With this basic history in mind, the current privatization of China's land after more than 26 years of "conquest" and seizures by the Chinese government may not be that different from America's own property foundations. As Gerald Korngold, a professor at New York Law School and former dean of Case Western University School of Law, summarizes,

Resolution of undocumented and imperfect land claims in favor of ordinary American settlers at the dawn of the

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121. *Overview*, *supra* note 10, at 29.

122. *Id.*

123. *See, e.g., Overview*, *supra* note 10, at 28; PEI, *supra* note 8, at 8.

124. 21 U.S. 543 (1823).

125. *Id.* at 543.

126. *Id.* at 572.

127. *Id.* at 588.

American Republic was a necessary predicate to social and political stability . . . [T]he American government's validation of these land claims created property rights in average Americans that financed economic development and growth. While there are clear historical, economic and cultural differences with China, the lesson of the American experience is worth remembering as the Chinese address issues of land ownership and government action.<sup>128</sup>

While China's past seizures and current privatization may have parallels with the state of American property law at the nation's founding, by the late 1980s the United States and China had legal traditions that looked very different from each other, and these differences were evident in the problems each nation faced.

By the 1980s, after 26 years of nationalization of property, the inefficiencies in the centrally-planned economy's land allocation and utilization were quite apparent to the Chinese leadership.<sup>129</sup> With all land in the state's hands, individual Chinese citizens had little incentive to invest in developing that land, leaving huge burdens on the state that could not be met.<sup>130</sup> Accordingly, the Chinese government began to experiment with land privatizations to provide incentives to people to more efficiently develop the land. Wang Zhaoguo of the Standing Committee of the National People's Congress explained that since "the people's living standards ha[d] continued to improve" under these initiatives, the National People's Congress subsequently passed the new Property Law to further stimulate the "people's initiative to create and accumulate wealth and to promote social harmony."<sup>131</sup>

The United States, by contrast, hardly lacked clear property protections. Instead, the problems the United States faced in the 1980s were those of distressed municipalities like New London whose attempted plans for economic redevelopment and rejuvenation were often stymied by a few private property owners that refused to sell the land needed for redevelopment. What happened in New London is a good example of this problem; while the city won the right to take the properties of the several remaining holdouts in the end, by the time the city was able to defeat the challenges to the taking, "builders

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128. Gerald Korngold, Letter to the Editor, *China's Land Seizures*, N.Y. TIMES, Jan. 24, 2006, at A20, available at <http://www.nytimes.com/2006/01/24/opinion/124china.html>.

129. See PEI, *supra* note 8, at vii.

130. *Id.* at 36.

131. Wang Zhaoguo, *supra* note 13, § 3(5).

who once considered projects [had] moved on, deterred by the controversy," leaving a "site [that] is now a flat expanse of dusty, rock-strewn soil dotted by the few remaining houses."<sup>132</sup> With *Kelo* established, however, local governments can now be more sure that they will be able to secure the land they need for economic redevelopment, even if that comes at the expense of private U.S. property owners having a little less security in the perpetual nature of their titles.

In short, the United States and the People's Republic of China by the late 1980s had nearly polar opposite property law systems, as well as nearly opposite problems. China had no institution of property protection and was learning that having some would stimulate economic prosperity, while the United States had a deeply-rooted institution of strong property protection and was moving toward reducing those protections for the sake of economic prosperity. Somehow, however, these distinct problems resulted in convergence upon a very similar Takings Law solution.

#### IV. THE NON-CONVERGENCE OF GOVERNING IDEOLOGIES: A DECEPTIVE UNITY

Given the convergence of some property-law standards between the People's Republic of China and the United States, it is easy to assume that there has been convergence in ideology as well. A cursory glance at the changing political statements of China's top leaders might support such a view.

After all, on July 31, 1951, Mao Tse-Tung proclaimed before a group of assembled party leaders that "We are now carrying out a revolution . . . in the social system, the change from private to public ownership . . ."<sup>133</sup> This, of course, was not unique to Mao: as Karl Marx wrote over a century earlier in 1848, "the theory of the Communists may be summed up in the single sentence: Abolition of private property."<sup>134</sup> Yet in March 2007, half a century after Mao declared the beginning of his campaign to eliminate all private property, the National People's Congress passed a law firmly protecting private property in the People's Republic. As Wang

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132. Lane, *supra* note 54.

133. QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG 26 (Foreign Language Press, 1st eng. ed. 1966).

134. KARL MARX AND FREDERICK ENGELS, THE COMMUNIST MANIFESTO 18 (David McLellan ed., Samuel Moore trans., Oxford University Press 1992) (1848).



Zhaoguo, vice-chairman of the Standing Committee of the National People's Congress, explained on the floor of the National People's Congress at the time, "[e]ffective protection of private property of citizens is not only . . . what the Party stands for, but also the general aspiration and urgent demand of the people."<sup>135</sup> From these statements, it would seem that the Chinese Communist Party has abandoned communism in its embrace of private property and adopted the values of the capitalist West. Yet looks can be deceiving.

If China's Constitution is any guide to the political aspirations of the country's leadership,<sup>136</sup> its sizable Preamble declaring that "the Chinese people . . . will continue to adhere to the people's democratic dictatorship and the socialist road" and that "class struggle will continue to exist within certain bounds for a long time to come" should not be ignored.<sup>137</sup> Reconciling the two sets of statements is fairly easy: while the Chinese Communist Party recognizes the important gains that privatization has brought and seeks to encourage those gains as its people's living standards improve, its goal of a socialist, classless state has not changed. China may have introduced a new law protecting private property, but the Chinese name of its ruling party, literally translated as "the public-property party," has not changed.<sup>138</sup>

While on the surface it may seem like "the party [only] pretends fealty" to the principle of public ownership,<sup>139</sup> it is entirely possible for the Chinese Communist Party to "balance[] the principles of a socialist government with the necessity of providing for private ownership as an engine for economic growth."<sup>140</sup> Similarly, there are few that would claim that the U.S. has abandoned its ideological attachment to protecting private property rights by endorsing eminent domain as part of development plans.

Indeed, the facts dictate that public property remains strongly entrenched in Chinese society, where most farmland has remained under collective ownership since the Cultural Revolution and farmers

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135. Wang Zhaoguo, *supra* note 13.

136. As it almost exclusively is. See discussion *supra* Part III.A.

137. XIAN FA, *supra* note 72, pmb1.

138. See *Property rights in China: China's Next Revolution*, ECONOMIST, Mar. 10-16, 2007, at 9 [hereinafter *China's Next Revolution*].

139. See *id.*

140. Dennis M. Horn & Kai Yang, *Riding the Chinese Juggernaut: Rewards and Risks*, PROB. & PROP., Sept.-Oct. 2007, at 9, 12.

only hold short term leases on their land.<sup>141</sup> Even if the Property Law dictates that such leases will be automatically renewed when they expire, the law does not specify for how long or at what price.<sup>142</sup> Moreover, "even outside agriculture it is often unclear whether a 'private' enterprise is really owned by individuals or by a local government or party unit,"<sup>143</sup> just as urban tenants, though given permanent occupancy rights in the 1990s, have never been given actual ownership rights over their apartments or the land that they are built upon.<sup>144</sup> As such, public ownership is still dominant in many ways in modern China.

Clearly, the People's Republic of China has not adopted the American legal fiction and ideology that property is a natural and perpetual right worthy of government protection, as was proposed by English theorists like John Locke. Instead, the Chinese Communist Party has merely decided to protect private property rights as a practical solution to past failings in centrally-planned investment. As such, while "the Property Law embraces concepts that are similar to familiar American concepts,"<sup>145</sup> these concepts should not be confused with ideological goals. Similarly, the United States, in embracing eminent domain as a method of economic rejuvenation, has not embraced the idea of the general welfare above the protection of individual property rights, an idea still embraced by the Chinese Constitution. Instead, the U.S. Supreme Court has merely chosen to expand over time its conception of what types of "public use" justify takings as a means of addressing the practical problems faced by its own distressed municipalities.

Although faced with vastly different legal systems, historical and traditional backgrounds, and social and economic problems, the United States and China converged upon a common solution in takings law, partially obscuring the world of differences it took to get to that solution. While both countries may have reached a common solution to takings law questions, however, it is important to remember how they reached those solutions, what forces led to this convergence of standards, and what forces remain opposed to these changes. In recent years, the United States and China have distinctly

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141. *See China's Next Revolution*, *supra* note 138.

142. Gregory M. Stein, *The Chinese Land Use Right: Is It Property?*, PROB. & PROP., Sept.-Oct. 2007, at 22, 25.

143. *China's Next Revolution*, *supra* note 138.

144. Randolph, *supra* note 62, at 19.

145. *See Horn & Yang*, *supra* note 140, at 10.

taken a step closer toward reconciling very different systems of property. That said, anyone assuming that this convergence is complete, continuing, or irreversible would do well to reconsider that assumption.