EMINENT DOMAIN AND EXPROPIACIÓN: A COMPARISON BETWEEN FIFTH AMENDMENT PRECEDENT AND LATIN AMERICAN LAND REDISTRIBUTION

INTRODUCTION

Land ownership is fundamental, at the center of life, and often the source of conflict.[1] The Takings Clause of the Fifth Amendment to the United States Constitution protects private ownership of land and permits the government to take land only for public use and with just compensation.[2] It was within this structure that, in 2005, the United States Supreme Court issued its controversial opinion in *Kelo v. City of New London*, in which the Court permitted a taking from private citizens for purposes of economic development.[3] *Kelo* generated a public outcry and prompted several states to enact legislation to protect private property rights.[4] Though controversial, *Kelo* was the next step in the progression of eminent domain jurisprudence since the Court's 1954 decision in *Berman v. Parker*.[5] Further, the United States was not the first country to permit takings for economic development. Latin American countries had been permitting governmental takings in the name of economic development for years.[6]

Land in Latin America has played an integral and often divisive role in the political sphere.[7] Land issues have frequently been at the center of the rise and fall of Latin American governments.[8] The permissibility of taking land in the name of economic development may

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[1] Land is integral to food production, but also central to border disputes. *See, e.g.,* Zach Dyer, *Border Conflict Escalates as Costa Rica Accuses Nicaragua of Excavating Two More Canals in Isla Portillos*, TICO TIMES (Sept. 16, 2013), http://www.ticotimes.net/2013/09/17/border-conflict-escalates-as-costa-rica-accuses-nicaragua-of-excavating-two-more-canals-in-isla-portillos (describing political and legal conflict over the dredging of a river between Costa Rica and Nicaragua).

[2] U.S. CONST. amend. V.

[3] *See* 545 U.S. 469, 484, 489–90 (2005); Elisabeth Sperow, *The* Kelo *Legacy: Political Accountability, Not Legislation, is the Cure*, 38 MCGEORGE L. REV. 405, 405 (2007) (noting that *Kelo* was "denigrated by some as the death of property and hailed by others as the word of God").

[4] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2109, 2115–16 (2009).

[5] 348 U.S. 26, 36 (1954).

[6] *See infra* Parts II.B–D.

[7] *See* Thomas T. Ankersen & Thomas Ruppert, Tierra y Libertad*: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 70 (2006) (describing the history of land disputes in the Amazon rain forest and Venezuelan-Mexican disputes over ranch land in Latin America).

[8] *See, e.g., infra* notes 243–47 and accompanying text.

have been a surprise in the United States after *Kelo*, but to those familiar with Latin America, taking land in the name of economic development was very familiar.

This Note compares and contrasts modern American eminent domain jurisprudence with historical Latin American expropriation laws.[9] This Note uses current American eminent domain jurisprudence to "go back in time" to take snapshot evaluations of expropriation laws in Latin America, specifically in the countries of Mexico, Guatemala, and Chile. The purpose is to provide a comparative analysis of governmental takings between these countries as well as a global context and understanding of *Kelo* and the exercise of eminent domain.

Part One discusses United States eminent domain jurisprudence by detailing *Kelo* and its predecessors as well as providing comparison points to be utilized in Part Two. Part Two details the Agrarian Code of 1934 in Mexico, Decreto 900 of 1952 in Guatemala, and Law 16640 of 1967 in Chile. Because these countries are founded on the civil law, an overview of the history of both indigenous and colonial land systems and a brief history of each country and its legal foundation for each law will be given. Part Two also discusses the implementation of the Latin American laws noted above, focusing on their results and aftermath. Part Two concludes with a comparison and evaluation of the three Latin American laws and American eminent domain cases.

I. THE UNITED STATES

With regard to property owned by non-nationals, the United States has recognized "'the right [under international law] of a sovereign state to expropriate property for public purposes'" with a duty of compensation and nondiscrimination in the choice of land seized.[10] Compensation may be controversial because "what the expropriated individual will consider just in the circumstances is not necessarily what the seizing nation will consider just."[11] Nonetheless, American jurisprudence determines the appropriateness of foreign expropriation.[12] Valid expropriation must

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[9] *Expropriation*, or *expropriación* in Spanish, is defined as "[a] governmental taking or modification of an individual's property rights, esp[ecially] by eminent domain." *Expropriation*, BLACK'S LAW DICTIONARY (7th ed. 1999). This term will be used generally when referring to governmental takings within Latin American countries, but specifically to refer to property taken from non-nationals in the United States, whereas *eminent domain* is used to refer to domestic governmental takings and its relevant jurisprudence in the United States.

[10] Note, *Foreign Seizure of Investments: Remedies and Protection*, 12 STAN. L. REV. 606, 608 (1960).

[11] *Id.* at 610.

[12] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmts. c–d, g (AM. LAW INST. 1987) (stating that the basis for expropriation,

have a legitimate public purpose accompanied by just compensation.[13] Legitimate public purposes include improving health and aesthetics,[14] reducing land concentration,[15] and revitalizing economic development plans.[16] Such public purposes do not need to guarantee results, but may be improper if an identifiable class of individuals is solely benefited.[17]

With regard to property owned by citizens in the United States, the validity of governmental takings starts with the text of the Fifth Amendment, which permits the taking of private property only for "public use" and with "just compensation."[18] The Supreme Court has interpreted just compensation as the fair market value of "'what a willing buyer would pay in cash to a willing seller' at the time of the taking."[19]

The early Court strictly construed the public use requirement as the limit on the government's ability to take private property.[20] Although what constituted a public use varied with the facts,[21] under a strict construction, a taking would not be proper unless the public actually used the land.[22] Public use was not a property interest; the public was not given a property right, but the government committed to the public use of the property.[23] Proper eminent domain was the right of the state "to take private property for its own public uses, and not for those of another."[24] The necessity of that right would be lost if a state were to take land for another's private use.[25]

The modern understanding of what constitutes public use evolved in three cases: *Berman v. Parker*,[26] *Hawaii Housing Authority v. Midkiff*,[27] and *Kelo v. City of New London*.[28] These three cases will be

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just compensation, and standard compensation are based on principles in the U.S. Constitution).

13 *Id.* § 712.

14 *See* discussion *infra* Part I.A.

15 *See* discussion *infra* Part I.B.

16 *See* discussion *infra* Part I.C.

17 *See infra* note 58 and accompanying text.

18 U.S. CONST. amend. V.

19 United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) (quoting United States v. Miller, 317 U.S. 369, 374 (1943)).

20 Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896).

21 *See id.* at 159–60 (finding a public use in water for irrigation based on a right to a proportional share of water).

22 *See* Mo. Pac. Ry. Co. v. Nebraska, 164 U.S. 403, 416 (1896) (defining public use as broader than a group of "private individuals, voluntarily associated together for their own benefit").

23 Wilson v. New, 243 U.S. 332, 385 (1917) (Pitney, J., dissenting).

24 Kohl v. United States, 91 U.S. 367, 373–74 (1875).

25 *Id.* at 374.

26 348 U.S. 26 (1954).

27 467 U.S. 229 (1984).

analyzed chronologically in the following subsections. Under these cases, public use has been used synonymously with public purpose, a term which is defined broadly.[29]

A. Berman v. Parker

The 1954 case of *Berman v. Parker* is the foundation for modern American eminent domain jurisprudence.[30] The Court evaluated the constitutionality of an act that Congress passed to address blight in the District of Colombia.[31] The District of Columbia Redevelopment Act of 1945 declared blighted areas were "'injurious to the public health, safety, morals, and welfare'" and the taking of property was "necessary to eliminate" blight.[32] The challenged Act was passed in 1945 to address poverty, slums, and alley dwelling, which had been problematic in D.C. for decades.[33] The Act was designed to re-plan and redevelop the entire city.[34] In one area of the city, surveys revealed, among other deficiencies, that approximately sixty-five percent of homes were beyond repair, fifty-eight percent had outside toilets, and eighty-four percent had no central heating.[35] Although the plan included some low- to middle-income housing, urban renewal was a major focus to encourage economic growth.[36] By 1950, a plan was developed and ready for implementation.[37] Max Morris, the appellant in *Berman*, owned a department store in the targeted area and challenged the constitutionality of the Act as applied to his property.[38] His store was commercial property that would be placed under control of a private agency for redevelopment and private use.[39]

The Court held that the property could be properly taken in accordance with the Fifth Amendment as long as just compensation was received.[40] The Court viewed the exercise of eminent domain as a

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[28] 545 U.S. 469 (2005).

[29] William Baude, *Takings Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 444, 446 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

[30] Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423, 423 (2010).

[31] *Berman*, 348 U.S. at 28.

[32] *Id.* (quoting the District of Columbia Redevelopment Act of 1945, 60 Stat. 790, § 2 (codified at D.C. CODE §§ 5-701 to -719 (1951))).

[33] Lavine, *supra* note 30, at 434–35, 443.

[34] *Berman*, 348 U.S. at 29; Lavine, *supra* note 30, at 443.

[35] *Berman*, 348 U.S. at 30.

[36] *See* Lavine, *supra* note 30, at 448–49 (describing the intent to build a highway through an urban area to increase assessment values of the land plots).

[37] *Berman*, 348 U.S. at 30.

[38] *Id.* at 31; Lavine, *supra* note 30, at 451–52.

[39] *Berman*, 348 U.S. at 31.

[40] *Id.* at 35–36.

legitimate and authoritative means to achieve the public purpose of improving the beauty and health of the city.[41] Allowing property owners to object because their "property was not being used against the public interest" would undermine integrated redevelopment plans.[42] The Court viewed the redevelopment plan as targeting the areas that produce slums in addition to the slums themselves.[43] This purpose permitted the taking of property even if it was not classified as blighted.[44]

Thus, the Court allowed the taking of Morris's store and deferred to a broad understanding of redevelopment within the public purpose standard.[45] The Court did not consider the success and effect of the redevelopment plan when assessing the legitimacy of the taking.[46] The Court no longer strictly construed or required a public use, but rather a public purpose that permitted a taking from one private party to another if the goal was an appropriate public benefit, such as improving health and welfare.[47]

B. Hawaii Housing Authority v. Midkiff

In 1984, the Court again considered the public-use prong of the Takings Clause in *Hawaii Housing Authority v. Midkiff*.[48] In *Midkiff*, the Court evaluated the constitutionality of legislation that transferred title from owners to lessees in an effort to decrease the concentration of land ownership.[49]

Hawaii had a feudal land system that did not include widespread private ownership of land.[50] Despite several previous attempts to redistribute land, property "remained in the hands of a few."[51] By the 1960s, the federal and state governments owned forty-nine percent of the land and seventy-two families owned another forty-seven percent.[52] This concentration of land ownership altered the market, "inflating land prices, and injuring the public tranquility and welfare."[53] The Land Reform Act of 1967 authorized land redistribution by condemning

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41 *Id.* at 33–34.
42 *Id.* at 35.
43 *Id.*
44 *Id.*
45 Lavine, *supra* note 30, at 459.
46 *Id.* at 461.
47 Sperow, *supra* note 3, at 410.
48 467 U.S. 229, 231 (1984).
49 *Id.* at 231–32.
50 *Id.* at 232.
51 *Id.*
52 *Id.*
53 *Id.*

residential property and transferring title to the current tenants.[54] Under the Act, tenants of "single-family residential lots within developmental tracts at least five acres in size" were entitled to ask for condemnation.[55] Owners would receive the fair market value of their interest.[56] When negotiations for sale failed, the owners defied arbitration orders and filed suit, seeking to have the Act declared unconstitutional.[57]

The Court upheld the Act, finding that an "attack [on] certain perceived evils of concentrated property ownership" was a legitimate public purpose because it did not "benefit a particular class of identifiable individuals."[58] The Court reasoned that when "the exercise of the eminent domain power is rationally related to a conceivable public purpose," then a compensated taking is not prohibited.[59] "[T]he perceived social and economic evils of a land oligopoly" were subject to regulation under the state's police power because the police power is interconnected with the public use requirement.[60] To satisfy the takings analysis, the legislature only needed to rationally believe the Act would promote the objective and did not have to show it would actually do so.[61] Thus, the Court deferred to the legislature's determination of what public purposes justified takings.[62]

After *Midkiff*, the government only needed to articulate a reason rationally related to a conceivable public purpose to justify the taking.[63] Thus, "a public use can still be served even if the property ends up in the hands of private individuals."[64] Also, the conceivable public purpose is limited only by the scope of the state's police powers.[65] These principles were further developed in the next public use case.

C. Kelo v. City of New London

The Court's most recent evaluation of the definition of public purpose occurred in 2005 in *Kelo v. City of New London*.[66] In *Kelo*, the

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[54] *Id.* at 233. *Midkiff* demonstrates that land concentration and redistribution is not solely a Latin American phenomenon. *See infra* Parts II.A–C.

[55] *Midkiff*, 467 U.S. at 233.

[56] *Id.* at 234 n.2.

[57] *Id.* at 234–35.

[58] *Id.* at 245.

[59] *Id.* at 241.

[60] *Id.* at 241–42.

[61] *Id.* at 242.

[62] *Id.* at 244.

[63] *Id.* at 241.

[64] Sperow, *supra* note 3, at 411.

[65] *Midkiff*, 467 U.S. at 242.

[66] 545 U.S. 469, 477 (2005).

Court evaluated the constitutionality of a city's taking pursuant to a redevelopment plan to encourage economic growth.[67]

The City of New London had experienced "[d]ecades of economic decline" and was classified as a "distressed municipality."[68] In response, city officials began to target areas for economic renewal.[69] With the announcement of a Pfizer, Inc. pharmaceutical facility being built nearby, the Fort Trumbull area was targeted for redevelopment to "creat[e] jobs, generat[e] tax revenue," and help revitalize the downtown.[70] The proposed redevelopment "plan was also designed to make the City more attractive and to create leisure and recreational opportunities."[71] The City had been authorized to purchase properties or exercise eminent domain when sale negotiations failed, and this suit resulted when nine homeowners refused to sell their land.[72] Unlike the dilapidation D.C. addressed in *Berman*, none of these properties were blighted, but they "happen[ed] to be located in the development area."[73] The taken land would be sold and developed under the New London Development Corporation ("NLDC"), which would implement the City's development plan.[74]

The Court held the City could legitimately exercise eminent domain to take the individuals' property.[75] The Court reaffirmed "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."[76] The Court distinguished the City's taking from private purposes and pretext public purposes, because the takings were part of a "'carefully considered' development plan."[77] The purpose of the plan was not to benefit a class of individuals, but rather to "revitalize the local economy."[78] In the use of eminent domain, the Court deferred to legislative assessment of social needs.[79] The City of New London authorized the "use of eminent domain to promote economic

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[67] *Id.* at 472–73.

[68] *Id.* at 473.

[69] *Id.*

[70] *Id.* at 474.

[71] *Id.* at 474–75.

[72] *Id.* at 475.

[73] *Id.*

[74] *Id.* at 473–75.

[75] *Id.* at 489.

[76] *Id.* at 477.

[77] *Id.* at 478 (quoting Kelo v. City of New London, 843 A.2d 500, 536 (Conn. 2004)).

[78] *Id.* at 478 n.6 (quoting *Kelo*, 843 A.2d at 595 (Zarella, J., concurring in part and dissenting in part)).

[79] *Id.* at 482.

development," which "unquestionably serves a public purpose."[80] The Court upheld the taking of private property as part of "an integrated development plan."[81] The Court also affirmed that the City was not required to guarantee the results of the development plan.[82]

Kelo established economic development as a valid public purpose.[83] The takings on behalf of the City of New London were authorized because the development plan did not benefit a particular class of individuals, and the Court deferred to legislative assessment of a local public need. Further, the locality did not have to guarantee the results of economic development.[84]

Although the text of the Fifth Amendment requires that a taking be for a public use, the Court in *Berman*, *Midkiff*, and *Kelo* facilitated land redevelopment by defining public use to include broad public purposes.

II. LATIN AMERICA

A. Background

The cultural and historical role of property in Latin America reveals a conceptualization of property distinguishable from that in the United States. Due to the vast inequality in the distribution of land that has existed since colonial times, Latin American countries view property as a source of social and economic disparity that may be remedied through governmental intervention.[85]

1. Indigenous and Colonial History

Although there were aspects of private ownership, communal land holding was a common feature of the precolonial indigenous land systems in Latin America.[86] For the Aztecs in modern day Mexico, the land system was complex because there were several types of land ownership that were treated like private ownership. At the lower end of the hierarchal legal system, commoners may have used and inherited

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[80] *Id.* at 484.

[81] *Id.* at 486–87.

[82] *Id.* at 487–88.

[83] *See id.* at 485 ("[T]here is no basis for exempting economic development from our traditionally broad understanding of public purpose.").

[84] States and citizens reacted strongly to *Kelo*'s holding, "probably result[ing] in more new state legislation than any other Supreme Court decision in history." Somin, *supra* note 4, at 2102. The public widely condemned *Kelo*, and forty-one states initiated some reform in response. *Id.* at 2109, 2115.

[85] Ankersen & Ruppert, *supra* note 7, at 71.

[86] *See* M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTION IN SPANISH AMERICA 4 (2004) (describing the routine practice of land possession in Texcoco, which included communal ownership).

land with little political review.[87] Though treated like private property, these lands were essentially communally owned.[88] Nobles either owned land that was freely alienable or land attached to their political position, which was inalienable.[89] Land also could be owned for a particular purpose; two such purposes included palace lands or war.[90] The Inca land system, in modern day Peru, featured more communal ownership than the Aztecs. Either the government or the indigenous religion owned the Inca land, which the people worked collectively.[91] There was a functional exception, as certain political offices held land, which was inheritable given the "hereditary nature of the office."[92] Thus, the ability to inherit land depended on the type of land and the status of the owner.[93]

Spanish colonialism supplanted these complex indigenous land systems and centralized control of "[a]ll aspects of personal property, inheritance, landholding, and commercial activities" under peninsular control.[94] Land was claimed for and thus owned by the Crown, which granted land to individuals.[95] The culture of conquest meant private land titles in the colonial era came with conditions: land was granted to individuals, but the claim "often only matured on completing enumerated activities for a period of time on the property."[96] "[T]he [Catholic] [C]hurch was an important actor in the holding, distributing, and financing of land."[97] The Spanish land system "encourage[d] conquest and reward[ed] favorites of the Crown or those empowered by the Crown to give grants," which fostered unequal land distribution.[98] Powerful individuals seized unused, unclaimed, or Indian land to collect large swaths of land.[99] Despite royal regulations and prohibitions, private ownership often exceeded the limitations.[100] The Catholic Church also held large quantities of land despite royal prohibitions against church land ownership.[101] Although there were many royal prohibitions

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87 *Id.* at 4–5.
88 *Id.* at 5.
89 *Id.*
90 *Id.*
91 *Id.* at 6.
92 *Id.*
93 *Id.*
94 *Id.* at 11.
95 *Id.* at 63.
96 *Id.* at 61.
97 *Id.* at 66.
98 Ankersen & Ruppert, *supra* note 7, at 80.
99 MIROW, *supra* note 86, at 63.
100 *Id.*
101 *Id.* at 65–66.

and regulations on land, the Catholic Church and colonizers circumvented or avoided them, with enforcement an ocean away.[102] The prohibitions also went unenforced as the Crown compromised with the landed elite to maintain their allegiance.[103] Thus, the amassing of land during colonialism "served to extract land from precolonial users and to create a wage labor force out of peasant and subsistence producers."[104] The Crown unsuccessfully tried to reform the colonial land system, but it began "a legacy of state intervention in land tenure and property rights that continued through independence to present day."[105]

2. Theories of Property in Independence

Following independence from Spain, land in Latin America became further concentrated in the hands of the wealthy as the limited colonial regulations completely dissipated.[106] The concentration came from sale or the spoils of war.[107] The collection of "farm after farm and estate after estate," called a *latifundio*,[108] gave "individuals ownership and authority over vast regions."[109] By the twentieth century, "Latin America already had a long and troubled history of state efforts to manipulate property rights to alleviate the conflicts and problems inhering in concentration of land."[110]

The inequity of the *latifundio* system provided fertile ground for the rooting of the social function of property doctrine.[111] The social function of property "challenge[s] the classical liberal [property] conception" in the common law system as "incomplete or unjust."[112] Leon Duguit, a French jurist, first articulated this theory in 1911.[113] The social function of property poses three challenges to the liberal property concept: (1)

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[102] *Id.* at 61, 66–67 (stating that colonizers and the Church honored some native land rights, while also taking some land for themselves).

[103] *See* Ankersen & Ruppert, *supra* note 7, at 82–83 (describing how the land policy of the Spanish Crown led to inequitable distribution).

[104] Sally Engle Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 891 (1991).

[105] Ankersen & Ruppert, *supra* note 7, at 82–83.

[106] MIROW, *supra* note 86, at 150.

[107] *Id.* (noting that chiefs and soldiers of the Venezuelan Republic were granted property formerly owned by royalists).

[108] A *latifundio* is a "[l]arge expanse of land, usually unproductive, in the hands of a single family." HENRY SAINT DAHL, DAHL'S LAW DICTIONARY/DICCIONARIO JURÍDICO DAHL 305 (4th ed. 2006).

[109] MIROW, *supra* note 86, at 150.

[110] Ankersen & Ruppert, *supra* note 7, at 87.

[111] *See id.* at 88 (describing how the rhetoric of revolutionaries led the way for social reform to take root in state ownership of property).

[112] Sheila R. Foster & Daniel Bonilla, *Introduction*, 80 FORDHAM L. REV. 1003, 1004 (2011).

[113] *Id.*

individuals are interdependent, not isolated; (2) interdependence affects property rights; and (3) property rights can serve more than just individual interests.[114]

The social function of property respects an almost absolute individual property right as long as the individual makes the land productive.[115] Should the individual fail his social obligation, the state may intervene with instruments like taxation and expropriation.[116] It permits state action to affect social change through property.[117] The theory focuses on the interdependence and solidarity of society to dictate that the wealth generated by the individual's productivity should be used to serve the community and make the community productive.[118] Although this theory reflects the influence of Socialism, it is distinguishable because the social function of property is not justified by class struggle or state ownership.[119] It refuses to allow "land appropriate for agricultural production to remain idle while willing laborers have no place to invest their labor."[120]

Upon independence, the social function of property was incorporated into the constitutions of many Latin American countries.[121] The general standard for expropriation is a "failure to effectively utilize the property for the benefit of society."[122] Some Latin American constitutions tie this standard to a public purpose standard like that articulated by the United States Supreme Court in its trilogy of public use cases, although the scope of expropriation in Latin American countries is different.[123] Thus, the social function of property is tied to and considered a public purpose.

Latifundios were not just large estates; they "govern[ed] the life of those attached to [them] from the cradle to the grave, and greatly influence[d] all of the rest of the country. It [was] economics, politics, education, social structure and industrial development."[124] In Latin America, large landowners were "the richest and most influential

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[114] *Id.* at 1006–07.

[115] *Id.* at 1005–06.

[116] *Id.* at 1005.

[117] Ankersen & Ruppert, *supra* note 7, at 88.

[118] Foster & Bonilla, *supra* note 112, at 1005, 1007.

[119] *Id.* at 1007.

[120] Ankersen & Ruppert, *supra* note 7, at 96 (comparing the social function of property to Locke's labor theory of property).

[121] Foster & Bonilla, *supra* note 112, at 1008.

[122] Ankersen & Ruppert, *supra* note 7, at 95.

[123] *Id.* at 97.

[124] F. Tannenbaum, *Toward an Appreciation of Latin America*, *in* THE UNITED STATES AND LATIN AMERICA (H. Matthews ed., 2d ed. 1963), *reprinted in* LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK, at 247 (Kenneth L. Karst & Keith S. Rosenn eds., 1975).

members of their communities," with key roles both nationally and locally.[125] "Their status and income [were] assured through traditional tenure institutions because they control[led] most of the land . . . [and] command[ed] the other resources necessary for efficient production such as water and credit."[126]

Land and its distribution have therefore been important to the political and economic stability of Latin America.[127] The legacy of land concentration has created social, political, and economic chasms between landholders and the semi-serfdom of workers, who depended on the landholders.[128] The social function of property offered the state "a philosophical and juridical basis" to interfere in property rights.[129]

This backdrop of history and theory provides a point of reference and understanding for analyzing the circumstances and laws of Mexico, Guatemala, and Chile. The following analysis is presented in chronological order based on the date of each country's expropriation laws: Mexico and the Agrarian Code of 1934,[130] Guatemala and Decreto 900 of 1952,[131] and Chile and Law 16640 of 1967.[132]

B. Mexico

1. Historical Context

Land reform has had a prominent role in Mexican history as a tool for economic development and increasing political power.[133] Prior to 1910, the Porfiriato dictatorship, named after its head, Porfirio Díaz, governed Mexico and benefited and enriched foreigners at the expense of the indigenous people.[134] However, 1910 brought revolution fueled by

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[125] S. Barraclough & A. Domike, *Agrarian Structure in Seven Latin American Countries*, 42 LAND ECON. 391 (1966), *reprinted in* LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 253.

[126] *Id.* Though not exclusively, these large landholders were often foreigners who had acquired the land during dictatorships that favored foreign influence. *See* RODERIC AI CAMP, MEXICO: WHAT EVERYONE NEEDS TO KNOW 78 (2011) (discussing the Porfiriato in Mexico, whose land policies benefited wealthy foreigners).

[127] *See* SUSAN A. BERGER, POLITICAL AND AGRARIAN DEVELOPMENT IN GUATEMALA 1 (1992) (describing how land distribution and Guatemalan agrarian policies were intended to promote modernization and enhance the nation's political power).

[128] Robert J. Alexander, *Agrarian Reform in Latin America*, FOREIGN AFF., Oct. 1962, at 191, 191–92, http://www.foreignaffairs.com/articles/23466/robert-j-alexander/agrarian-reform-in-latin-america.

[129] Ankersen & Ruppert, *supra* note 7, at 87–88.

[130] Código Agrario [CAgr], Diario Oficial de la Federación [DOF] 28-12-1933 (Mex.).

[131] Ley de Reforma Agraria, Decreto 900, 24-06-1952 (Guat.).

[132] Law No. 16640, Reforma Agraria, Julio 16, 1967, Diario Oficial [D.O.] (Chile).

[133] JOHN J. DWYER, THE AGRARIAN DISPUTE 17 (2008).

[134] AI CAMP, *supra* note 126, at 77–78.

several justifications, including agrarian reform.[135] As the dust of the Revolution began to settle, a new constitution was ratified in 1917.[136] This Constitution, which is still in force, became an essential component of the revolutionary rhetoric and legitimized several of its basic principles for the public.[137] The four most important principles of the new Constitution were its provisions on education, land ownership, labor rights, and the limitations on the Catholic Church.[138] Article 3 of the Constitution guaranteed an education provided by the state.[139] Article 123 laid out provisions on labor, such as mandating the maximum workday, forbidding child labor, and requiring a minimum wage.[140] The constitutional provisions on property in Article 27 were important because in 1917 approximately three percent of the population owned more than ninety percent of the arable land.[141]

Property rights and the principles of land reform are laid out in Article 27.[142] Individual liberties are protected by preventing the

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[135] *Id.* at 81–82. For example, land was the motivating factor for revolutionary hero Emiliano Zapata, an indigenous leader who fought for traditional communal ownership and issued and implemented his own agrarian reform during the Revolution. LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 278–79, 283. During the 1910 Revolution, Zapata issued the Plan of Ayala, which advocated for the *ejidos*—land communally owned by villages. *Id.* at 279. Zapata was not the only revolutionary leader to implement land reform. *See id.* at 280–83 (discussing the land reform efforts of General Venustiano Carranza).

[136] AI CAMP, *supra* note 126, at 92.

[137] *Id.* The Constitution established a federal republic similar to the United States, except that the Mexican state was semi-authoritarian with power predominantly residing in the President. *Id.* at 116–17. The centralized authoritative nature of the federal government limited the independence of Mexican states, especially since governors and the President were of the same party. *See infra* note 155. The government democratized over time due to economic issues in the 1980s and the increasing power of another legitimate political party. AI CAMP, *supra* note 126, at 120–21, 126.

[138] AI CAMP, *supra* note 126, at 93. During colonial times and until the Revolution, the Catholic Church was very economically powerful and previous attempts at land reform had challenged the Church's landholdings. *See id.* at 66 (explaining the reform of Church influence in property control and ownership during the political movements in Mexico during the 1850s); William D. Signet, *Grading a Revolution: 100 Years of Mexican Land Reform*, 16 LAW & BUS. REV. AMS. 481, 489 (2010) (describing the text of the Lerdo Law, which was targeted toward reform of communal organizations that held property under both civil and ecclesiastical corporations).

[139] Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 3, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.).

[140] *Id.* tit. VI, art. 123.

[141] E. Flores, *The Economics of Land Reform*, 92 INT'L LAB. REV. 30 (1965), *reprinted in* LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 262.

[142] Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.).

deprivation of "life, liberty, property, possessions, or rights."[143] Yet, interestingly, property originates with the state.[144] Still, land can only be expropriated for reasons of public utility and with indemnification.[145] The state has the right to impose formalities of the public interest upon private property, including the authority to break up *latifundios* and prevent environmental destruction.[146] Minerals and water were declared property of the state.[147] Only Mexicans, as defined by the Constitution, were allowed to acquire land, unless specially permitted by the state, and the Catholic Church was forbidden from acquiring land.[148] The Constitution also laid out principles for the redistribution of large landholdings.[149] The maximum amount of land ownership would be fixed by future laws, expropriation was authorized when holdings exceeded the fixed amount, and bonds would be issued as repayment.[150]

The 1910 Revolution birthed a spirit of nationalism among the political elites.[151] As contrasted with the previous dictatorship, the new government featured presidents who were very powerful for their term

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[143] *Id.* tit. I, ch. I, art. 14.

[144] *Id.* tit. I, ch. I, art. 27. A similar idea exists in United States state constitutions where the people, as a collective unit, possess the land. *See*, *e.g.*, S.C. CONST. art. XIV, § 3 ("The people of the State are declared to possess the ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail from defect of heirs shall revert or escheat to the people."); WIS. CONST. art. IX, § 3 ("The people of the state, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people.").

[145] Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.). *Utilidad* includes a legal meaning of "advantage, benefit, usefulness," DAHL, *supra* note 108, at 518, which is similar to the legal definition of *public purpose* as "[a]n action by or at the direction of a government for the benefit of the community as a whole," *Public Purpose*, BLACK'S LAW DICTIONARY (7th ed. 1999).

[146] Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.).

[147] *Id.*

[148] *Id.* The Constitution defined Mexicans as those individuals born within the territory and those born in a foreign country to at least one Mexican parent. *Id.* tit. I, ch. I, art. 30. It further provided that naturalized citizens included individuals that received a letter of naturalization from the Secretary of Foreign Relations or any woman married to a Mexican man with a domicile in the country. *Id.*

[149] *Id.* tit. I, ch. I, art. 27 (detailing provision for government allotment and division of land among inhabitants).

[150] *Id.* In preparation for his land reform, Cárdenas slightly modified this provision to include small agricultural property. *Las Transformaciones del Cardenismo*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 22, 2010), http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/las-transformaciones-del-cardenismo (last visited Jan. 21, 2016).

[151] DWYER, *supra* note 133, at 2.

and a "perpetual political organization" (the political party of the Revolution, which was later named the PRI) that held power indefinitely.[152] This was a legacy due in part to the fact that the first leaders under the new Constitution had led the Revolution.[153]

In 1934, Lazaro Cárdenas was elected president, and though he was only meant to be a puppet, Cárdenas was his own man.[154] He built the foundation for a centralized and powerful authoritarian state by establishing a corporatist structure between the political party and organizations of labor, peasants, and some professionals.[155] In following the legacy and importance of land reform in the country, he implemented a new agrarian code in 1934;[156] land distribution remained a problem, with large landed estates accounting for almost eighty-four percent of rural farmland.[157] Cárdenas's agrarian reform was a campaign promise in response to rural discontent over land distribution.[158]

2. The 1934 Agrarian Code

The 1934 comprehensive Agrarian Code contained ten titles.[159] It was believed that land reform undertaken under this Code would be the basis of economic growth because it "would redistribute national wealth, reduce rural underemployment, improve the material conditions and living standards for the nation's majority, and free the peasantry from its dependence on the rural elite."[160] The Code established a right and means of restitution for the lands nationalized by Article 27 of the Constitution.[161] Lands owned by one individual that bordered population centers were subject to expropriation in proportion to the number of individuals in the village.[162] There were limits on the quantity of people in the population centers that would exclude the lands from being

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[152] AI CAMP, *supra* note 126, at 96–97.

[153] *See id.* at 95–97 (describing the respective regimes of General Álvaro Obregón, General Plutarco Elías Calles, and General Lázaro Cárdenas, all of whom were generals in the Mexican Revolution).

[154] *Id.* at 96, 100. Cárdenas's former mentor, Calles, who had been elected in 1924, tried to be "the power behind the throne," but Cárdenas had him forcefully exiled soon after Cárdenas took office. *Id.*

[155] *Id.* at 100–01. Nominees of the National Party of the Revolution, which later became the PRI, won every gubernatorial election until 1989, most local and national legislative positions until the 1990s, and every presidential election until 2000. *Id.* at 96.

[156] *See infra* Part II.B.3.

[157] Signet, *supra* note 138, at 512. These statistics were taken in 1930. *Id.*

[158] DWYER, *supra* note 133, at 79.

[159] Código Agrario [CAgr], tit. I–X, Diario Oficial de la Federación [DOF] 28-12-1933 (Mex.).

[160] DWYER, *supra* note 133, at 80.

[161] CAgr, tit. II, cap. I, arts. 20–24.

[162] *Id.* tit. III, cap. I, arts. 34–39.

expropriated.[163] Individuals with families who worked in and were residents of the population center were given preference for these expropriated lands.[164] The ability to submit *ejido*[165] petitions was extended from peasants in villages to landless rural workers, the *peones acasillados*.[166] There were other exemptions from expropriation, including certain plantations and other limited forms of property.[167] A timeline for possession and dispute resolution was provided, with ultimate dispute resolution given to the President but transmitted by the lower governmental bodies.[168] Private lands could be expropriated without limit as population centers grew or expropriated automatically based on a decree by the Agricultural Department.[169] The Code distinguished between lands of individual ownership, which were worked, and communal ownership, which included natural resources.[170]

3. Implementation and Realities of the Code

The Code was very popular domestically. Expropriation fostered economic nationalism so that Mexicans, rather than foreigners, could profit from the land, making Cárdenas a very popular president.[171] The Code differed from earlier attempts by providing financial, educational, and technical assistance to those who received land.[172] From 1917 to 1965, 120 million acres of land were expropriated to some 2.2 million

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[163] *Id.* tit. III, cap. II, art. 42, sec. c.

[164] *Id.* tit. III, cap. III, art. 44, sec. a–c.

[165] In Mexico, *ejido* is a loaded word that

> refers to an agrarian community which has received and continues to hold land in accordance with the agrarian laws growing out of the Revolution of 1910. The lands may have been received as an outright grant from the government or as a restitution of lands that were previously possessed by the community and adjudged by the government to have been illegally appropriated by other individuals or groups; or the community may merely have received confirmation by the government of titles to land long in its possession. Ordinarily, the *ejido* consists of at least twenty individuals, usually heads of families (though not always), who were eligible to receive land in accordance with the rules of the Agrarian Code, together with the members of their immediate [families].

DAHL, *supra* note 108, at 188.

[166] CAgr, tit. III, cap. III, arts. 45–46; DWYER, *supra* note 133, at 22.

[167] CAgr, tit. III, cap. V, arts. 52, 54.

[168] *Id.* tit. IV, cap. II, art. 74; *id.* tit. IV, cap. III, arts. 75–77.

[169] *Id.* tit. VI, cap. I, art. 99; *id.* tit. X, cap. I, art. 173.

[170] *Id.* tit. VIII, cap. IV, art. 139. The inheritance of rights was even addressed. *See id.* tit. VIII, cap. IV, art. 140, sec. III (stating that the land purchaser must provide a list of people who will replace the purchaser as head of household upon the purchaser's death).

[171] DWYER, *supra* note 133, at 83. His decision to nationalize the Mexican oil industry in 1939 made him the most popular president of the twentieth century. AI CAMP, *supra* note 126, at 102–03.

[172] DWYER, *supra* note 133, at 81.

peasants.[173] Cárdenas gave expropriated land to the *ejidos*, which totaled approximately fifty percent of Mexico's agricultural production during the era.[174] Under the five biggest expropriations from 1936 to 1938, almost 77,000 *campesinos* received land.[175]

Restitution was an issue for the expropriated lands,[176] especially those taken from foreign individuals, though the government did pay foreign citizens $12.5 million for the lands taken during 1927–1940.[177] Vacant or unproductive lands were not the only targets of expropriation; productive lands were also redistributed, which further strained relations with the United States.[178] Relations were strained because foreign-owned lands were often expropriated and the weak Mexican economy made indemnification difficult.[179] However, many of the foreign claims were finally settled in the 1941 Global Settlement.[180]

The Agrarian Code successfully redistributed land, increasing the percentage of land owned by the majority population.[181] Cárdenas's program set a precedent that other Latin American countries followed.[182] After Cárdenas, successive Mexican presidents implemented versions of agrarian reform.[183]

Cárdenas's reforms radically changed the country's land structure.[184] Despite the success of his agrarian reform, Cárdenas is better known and praised for his nationalization of the petroleum industry in 1939.[185] Under Cárdenas, land reform in Mexico was at its apex; afterwards, land was redistributed with less frequency and

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[173] Flores, *supra* note 141, at 262.

[174] Signet, *supra* note 138, at 522.

[175] *Las Transformaciones del Cardenismo*, *supra* note 150. The Agrarian Code was subsequently amended in 1937 to capture Cárdenas's guidelines by requiring some form of industrialization and investment into the capacity of the new landowners in order to better the development of the community. *Id.*

[176] LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 284.

[177] E. Flores, *Tratado De Economia Agricola* (1961), *in* LAW AND DEVELOPMENT IN LATIN AMERICA, *supra* note 124, at 359; DWYER, *supra* note 133, at 209.

[178] DWYER, *supra* note 133, at 1, 81. Relations with the United States were strained when Cárdenas nationalized the railroads in 1937, but relations were especially difficult after the nationalization of oil in 1938. *Id.* at 3–4, 46.

[179] *Id.* at 209.

[180] *Id.* at 232.

[181] *See Las Transformaciones del Cardenismo*, *supra* note 150 (stating that more than eighteen million *hectares* were redistributed).

[182] DWYER, *supra* note 133, at 272.

[183] *See id.* at 267 (stating that successive Mexican officials have "allowed most remaining landowners to keep their holdings and have generally limited the expropriation of foreign-owned property [and] . . . welcomed investments by transnational corporations south of the border").

[184] *Las Transformaciones del Cardenismo*, *supra* note 150.

[185] AI CAMP, *supra* note 126, at 102–03.

intensity.[186] However, the Agrarian Code had created a new social class of property owners in rural areas.[187] The *ejidatarios*, those who had received redistributed land, were hit hard by the economic crisis of the 1980s.[188] During the 1990s, in an effort to deal with the different demographics, economics, and social life that resulted from previous land reforms, Article 27 of the Constitution was amended, effectively ending the 1910 Revolution's commitment to expropriation.[189] Given the influence of Cárdenas's agrarian reform within Mexico and Latin America, as well as subsequent agrarian developments in Mexico, the Code provides a good point of comparative analysis to United States eminent domain law.

4. Comparing the Code to Eminent Domain

Though popular in Mexico, Cárdenas's Agrarian Code of 1934 would likely not pass the United States eminent domain test. Like the purpose of land redistribution in *Midkiff*, the Code aimed to diminish the concentration of land ownership.[190] The Code also sought to improve the living conditions and standards of the people, which is similar to the public health and welfare purpose in *Berman*.[191] In addition, the Code sought to redistribute wealth, decrease peasantry dependency, and reduce employment, all of which could serve as a basis for economic growth,[192] similar to the redevelopment plan in *Kelo*.[193] A belief underlying the Code was that expropriation would encourage economic growth, which is arguably a legitimate public purpose.[194] However, the beneficiaries of expropriation were explicitly defined and targeted based on their location, which likely qualifies as benefiting an identifiable class

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[186] *Una Nueva Estrategia*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 22, 2011), http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/una-nueva-estrategia/ (last visited Jan. 17, 2016).

[187] *La Iniciativa*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 19, 2011), http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/la-iniciativa/ (last visited Jan. 17, 2016).

[188] *Efervescencia Agraria*, SECRETARÍA DE DESARROLLO AGRARIO, TERRITORIAL Y URBANO (Aug. 19, 2011), http://www.sedatu.gob.mx/sraweb/conoce-la-secretaria/historia/efervescencia-agraria/ (last visited Jan. 17, 2016).

[189] *La Iniciativia*, *supra* note 187. These changes did not go unchallenged. AI CAMP, *supra* note 126, at 131. In 1991, President Carlos Salinas modified the Constitution as part of his neo-liberal economic policies, which included the successful negotiation of NAFTA in 1994; however, the Zapatista National Liberation Army ("EZLN") responded by uprising the day the treaty went into effect. *Id.*

[190] *See supra* notes 49, 160 and accompanying text.

[191] *See supra* notes 41–42, 160 and accompanying text.

[192] *See supra* note 160 and accompanying text.

[193] *See supra* notes 66–67, 75–80 and accompanying text.

[194] See *supra* notes 76–80 and accompanying text.

of individuals.[195] These families and workers surrounding the population centers were the desired beneficiaries for the economic development and the reasons for expropriation.[196]

There are fundamental differences between Mexican and American conceptions of property that present problems for a comparison of these two systems. These differences facilitated the legality of the Code in Mexico, but would challenge its viability under the requirements of eminent domain. The fact that property rights in Mexico originate in the state and there are inherent limitations to property, not to mention the external limits on ownership,[197] reflects a unique history that is inconsistent with American property norms.

Although compensation is constitutionally required in Mexico, the amount compensated would likely be controversial, because payment would be based on what previous landowners declared on their taxes.[198]

For these reasons—specifying beneficiaries and conflicting views of private property—the Agrarian Code of 1934 would not withstand scrutiny under United States eminent domain jurisprudence.

C. Guatemala

1. Historical Context

Guatemala's story mirrors the regional trend of large tracts of land in the hands of a few, maintained by a classification of debt peonage.[199] In the twentieth century, Guatemalan political power was decentralized to the landed elites, who ruled through paternalism and repression until the 1931 government of Jorge Ubico.[200] Ubico's reign marked a change in the Guatemalan agricultural system. His dictatorship centralized power, modernized agricultural transport for exporting, and created business ties to the United States.[201] Guatemala was nonetheless characterized as underdeveloped, "which led to economic exploitation, cultural repression, and political oppression."[202] Ubico's authority waned and a revolution in 1944 ushered in a new government that desired to democratize the country.[203] The revolutionary leaders were liberal intellectuals from the

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195 *See supra* notes 76, 161–66 and accompanying text.

196 *See supra* notes 76, 161–66 and accompanying text.

197 *See supra* notes 143–45 and accompanying text.

198 Constitución Política de los Estados Unidos Mexicanos, CP, tit. I, ch. I, art. 27, Diario Oficial de la Federación [DOF] 31-01-1917, últimas reformas DOF 11-10-1966 (Mex.); Alexander, *supra* note 128, at 198.

199 BERGER, *supra* note 127, at 5.

200 *Id.* at 26.

201 *Id.* at 26–27.

202 RICHARD H. IMMERMAN, THE CIA IN GUATEMALA: THE FOREIGN POLICY OF INTERVENTION 20 (1982).

203 BERGER, *supra* note 127, at 16, 40–41, 43.

middle class.[204] The new government decentralized political power and the "legislature became a legitimate policymaking force."[205]

The 1945 constitutional framers desired to raise the population's standard of living and to establish equality between Guatemalan nationals and foreign entrepreneurs.[206] The 1945 Guatemalan Constitution protected individual rights such as "life, liberty, equality, and security of person, honor, and property."[207] The social function of property was evident, as the primary function of the state was to see "that the fruits of labor benefit preferably its producers and that wealth reaches the greatest number of inhabitants."[208] Although private property was recognized, it was classified as a social function with limitations "determined in the law for reasons of public necessity or utility or national interest."[209] Large landholdings were prohibited, and the law mandated their eventual disappearance, with the land subject to taxation in the meantime.[210] Expropriation was allowed "[f]or reasons of public utility or necessity or social interest legally proved" and required indemnification.[211]

The previous passage of agrarian reform laws was met with resistance from large foreign landholders, sparking internal political controversy and debate, and leaving the laws without force.[212] By the 1951 elections, it seemed a state-controlled agrarian reform was necessary to ensure the survival of the democratic state threatened by domestic and foreign landholders.[213] In 1950, less than one percent of landowners, who were mostly foreigners, owned forty-five percent of the total agricultural land.[214] Further, the rapidly growing population was poorly distributed, and feeding the population was difficult when not all of the arable land was being used for crops.[215] Two percent of the population held approximately seventy percent of Guatemala's land, and

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[204] IMMERMAN, *supra* note 202, at 37.

[205] BERGER, *supra* note 127, at 41.

[206] IMMERMAN, *supra* note 202, at 66.

[207] CONSTITUTIÓN DE LA REPÚBLICA DE GUATEMALA, tit. III, art. 23, 11-03-1945, *translated in* AMOS J. PEASLEE, 2 CONSTITUTIONS OF NATIONS 71–108 (1950). The Constitution established Guatemala as a democratic republic that sought to reestablish the Central American Union. *Id.* tit. I, arts. 1, 3.

[208] *Id.* tit. IV, art. 88.

[209] *Id.* tit. IV, art. 90.

[210] *Id.* tit. IV, art. 91.

[211] *Id.* tit. IV, art. 92.

[212] BERGER, *supra* note 127, at 43–47, 49–50.

[213] *Id.* at 52–53.

[214] Ross Pearson, *Land Reform, Guatemalan Style*, 22 AM. J. ECON. & SOC. 225, 225 (1963); *see also* IMMERMAN, *supra* note 202, at 30 (stating that foreigners owned a majority of the land).

[215] Pearson, *supra* note 214, at 226.

only a third of the land was arable, with only half of that utilized.[216] Thus, concentration of land ownership was a serious problem.

In 1951, Jacobo Arbenz was elected president.[217] Although he was accused of being a Communist, Arbenz was a liberal nationalist with a military background who had popular support.[218] He came to power seeking to establish Guatemalan autonomy from international political and economic structures.[219] He mostly maintained the democratic structure handed down to him, but to protect against the control of large landholders, government positions were filled with trusted individuals and local peasants were mobilized through national unions.[220] In 1952, Arbenz passed a radical land reform law, Decreto 900, which fulfilled his campaign promises and was intended to protect the state's autonomy.[221] Arbenz's agrarian reform law was passed under the authority of the 1945 Constitution.[222]

2. Decreto 900: Agrarian Reform Law of 1952

Decreto 900 was the result of careful government study and consultation with Latin American economists,[223] and was "intended to overcome the causes of Guatemala's underdevelopment and to restructure the hierarchical organization of society."[224] The Decreto itself declared that it was born of a need to change the role of property in society and a desire to improve the livelihood of Guatemalans.[225] It was seen as a compromise between private ownership and increasing cultivation,[226] with the express objective of developing the economy.[227] Expropriation under the law required indemnification based on the tax registry and was paid proportionally based on the land actually expropriated.[228] Many types of land were excluded from the land reform,

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[216] IMMERMAN, *supra* note 202, at 28.

[217] BERGER, *supra* note 127, at 17.

[218] IMMERMAN, *supra* note 202, at 44, 61.

[219] *Id.* at 62.

[220] BERGER, *supra* note 127, at 62.

[221] *Id.* at 52–53, 64.

[222] Arbenz enacted Decreto 900 in 1952, prior to the nullification of the 1945 Constitution after a 1954 coup. BERGER, *supra* note 127, at 64; Nara Milanich, *To Make All Children Equal is a Change in the Power Structures of Society: The Politics of Family Law in Twentieth Century Chile and Latin America*, 33 L. & HIST. REV. 767, 779–80 (2015) (stating that the Constitution of Guatemala was promulgated in 1945 and later superseded by the 1956 Constitution).

[223] IMMERMAN, *supra* note 202, at 64.

[224] *Id.* at 66.

[225] Ley de Reforma Agraria, Decreto 900, p. 3, 24-06-1952 (Guat.).

[226] IMMERMAN, *supra* note 202, at 64–65.

[227] Decreto 900, tit. I, art. 3.

[228] *Id.* tit. I, art. 6.

including lands used for productive purposes, like the cultivation of bananas.[229] The uncultivated portions of the large landholdings were subject to and targeted by expropriation.[230] These *latifundios* were subject to expropriation in order to benefit the nation in general, as well as the rural peasants and workers.[231] Only Guatemalans had the right to solicit expropriation, with the first claim belonging to the rural peasants and land workers.[232] With production as a goal, grants of expropriated land were conditional, as the *usufructuarios*[233] lost the land given to them under the expropriation if they had not begun to cultivate within two years.[234] They were also forbidden from giving their right to third parties.[235] There was a hierarchical system for resolving disputes, and the President had the final say.[236] There were also penalties for falsifications under, and impediment of, the reform.[237]

3. Implementation and Realities of the Decreto

Despite the stated purposes and form of Decreto 900, its implementation sparked controversy.[238] Arbenz believed it was the government's responsibility to prevent economic chaos so that Guatemalans could enjoy the benefits of the economic improvements.[239] In two years, Decreto 900 had dramatic results by granting land that would have otherwise remained idle to some 100,000 families, or about 500,000 individuals.[240] There was progress—food prices were down and buying power had increased—even though Guatemala would still be classified as underdeveloped.[241]

Arbenz and Decreto 900 faced an insurmountable challenge in the

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[229] *Id.* tit. II, cap. I, art. 10, sec. d.

[230] *Id.* tit. II, cap. IV, art. 32.

[231] *Id.*

[232] *Id.* tit. II, cap. III, art. 25; *id.* tit. II, cap. V, arts. 35–36. The Constitution laid out the requirements for citizenship and nationality. CONSTITUTIÓN DE LA REPÚBLICA DE GUATEMALA, tit. II, arts. 5–20, 11-03-1945, *translated in* PEASLEE, *supra* note 207, at 72–74.

[233] *Usufructuario* is a "[p]erson who uses and enjoys, [a] beneficiary of a usufruct." DAHL, *supra* note 108, at 517. A *usufruct*, or *usufructo*, is "the right to enjoy a thing owned by another person and to receive all the products, utilities and advantages produced thereby, under the obligation of preserving its form and substance." *Id.* at 513.

[234] Ley de Reforma Agraria, Decreto 900, tit. II, cap. VI, art. 38, 24-06-1952 (Guat.).

[235] *Id.* tit. II, cap. VI, art. 39. It was, however, possible for *usufructuarios* to lease their lands with permission from the National Agrarian Department. *Id.*

[236] *Id.* tit. IV, cap. III, art. 75.

[237] *Id.* tit. V, art. 84.

[238] Sasha Maldonado Jordison, *Guatemala on Trial—Rios Montt Genocide Trial: An Observer's Perspective*, 30 CONN. J. INT'L L. 53, 69 (2014).

[239] IMMERMAN, *supra* note 202, at 63.

[240] *Id.* at 65–66.

[241] *Id.* at 67.

U.S. State Department, which had classified Arbenz as a Communist and "confirmed" their suspicions when the lands of an American company, the United Fruit Company, began to be expropriated in 1952.[242] Though not specifically a target of Decreto 900, efforts "to bring about social and economic reforms sufficiently comprehensive to reach the two-thirds of the population that had for so long been poor, made a confrontation with the largest landholder inevitable."[243] United Fruit Company owned more than 500,000 acres of Guatemalan land, only fifteen percent of which was cultivated, with the rest left idle.[244] Unfortunately for Guatemala, Arbenz and the nationalist reform fell easily into the era's broad definition of Communism.[245] Thus, with the help of the CIA, a revolution overthrew the Arbenz government in 1954, ending land reform under Decreto 900.[246] But the revolution did not end the problems of land distribution or prevent subsequent attempts at land reform.[247]

In 1956, the regime of Castillo Armas, which replaced the Arbenz government, saw land redistribution as part of a larger development program and implemented a land reform program aimed at changing the agricultural situation slowly over time.[248] However, almost one hundred percent of the lands redistributed under Arbenz were returned to their original owners.[249] Land remained unequally distributed for the rest of the century, augmented by internal conflicts.[250] Today, there is ongoing political and economic tension between elites clinging to their interests and the impoverished Guatemalans grasping for basic subsistence.[251]

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[242] *Id.* at 68. The United States classified the expropriation negatively, viewing land as quickly and inadequately distributed. Pearson, *supra* note 214, at 227. Programs were criticized for lacking the proper financing to support new landholders and officials were denounced for not following the law. *Id.* at 228. The chaos of land reform in the rural areas aided the revolution's overthrow of Arbenz. *Id.* However, the authenticity of these perspectives and criticisms is questionable given United States involvement in the country.

[243] IMMERMAN, *supra* note 202, at 75–76.

[244] *Id.* at 80.

[245] *See id.* at 81 (defining Communism as "anyone who opposed United States interests").

[246] Pearson, *supra* note 214, at 228.

[247] *See id.* at 228–29, 234 (discussing the Rural Development Program, a land reform project undertaken by the regime that succeeded Arbenz).

[248] *See id.* at 228–29 ("The program was formulated on the principles that . . . any substantial improvement in Guatemalan agriculture would have to come through evolutionary rather than revolutionary processes . . . .").

[249] RODDY BRETT, SOCIAL MOVEMENTS, INDIGENOUS POLITICS AND DEMOCRATISATION IN GUATEMALA, 1985–1996, at 114 (Michiel Baud et al. eds., 2008).

[250] *Id.* at 113. During the Guatemalan Civil War in the 1970s and 1980s, land distribution was further disrupted, with peasants temporarily leaving lands because of the violence and scorched earth policies. *Id.* at 116–17.

[251] *Id.* at 114.

Presently, almost fifty-seven percent of Guatemala's cultivable land is held by two percent of the population.[252] Arbenz's Decreto 900 is viewed as "[t]he only attempt in Guatemala's history to address this situation,"[253] and the Decreto therefore provides the best, if not the only, law to compare to United States jurisprudence.

4. Comparing the Decreto to Eminent Domain

Decreto 900 would likely pass scrutiny under United States eminent domain jurisprudence. The Guatemalan Constitution recognized expropriation for reasons of public utility, necessity, or legally proven social interests, which is similar to, but more expansive than, the public purpose justification in American takings jurisprudence.[254] Expropriation was authorized in order to change the property structure and land concentration that had historically troubled the country, which is similar to the evils of land concentration that motivated the takings in *Midkiff*.[255] Similar to the economic development purposes expressed in *Berman*, *Midkiff*, and *Kelo*, the explicit purpose of Decreto 900 was to develop the economy.[256] This was to be accomplished by expropriating the uncultivated portions of land, which would then be cultivated under a new owner. The expropriation of only uncultivated lands was limited compared to the Act in *Berman* that authorized takings even if the property was being used for an economically viable purpose.[257] Although results do not need to be guaranteed, Decreto 900 made the granting of expropriated land conditional on cultivation.[258] The commitment to economic development is also seen in the exemption of profitable agrarian cultivations like banana plantations.[259] Although rural peasants and workers received the lands, the law did not redistribute land to specific individuals.[260] This classification is similar to the tenants in *Midkiff* who were to receive the titles of their landlords to break up the land oligarchy.[261]

The compensation under Decreto 900 is not explicitly the fair market value established in eminent domain jurisprudence, but is instead based on the amount listed on taxes.[262] Arguably, this amount

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[252] *Id.*

[253] *Id.*

[254] *See supra* notes 18, 211 and accompanying text.

[255] *See supra* notes 58–59, 223–25 and accompanying text.

[256] *See supra* notes 35, 61–64, 83, 226–27 and accompanying text.

[257] *See supra* notes 42–44, 230 and accompanying text.

[258] *See supra* note 234 and accompanying text.

[259] *See supra* note 229 and accompanying text.

[260] *See supra* notes 230–35 and accompanying text.

[261] *See supra* notes 57–58 and accompanying text.

[262] Ley de Reforma Agraria, Decreto 900, tit. 1, art. 6., 24-06-1952 (Guat.).

should be close to, if not the same as, the market value of the property, even if it is not the amount the owner actually listed.

For these reasons—the public purpose of economic development and adequate compensation—Decreto 900 would likely survive the standards of eminent domain jurisprudence.

D. Chile

1. Historical Context

The history of land in Chile echoes that of other Latin American countries, with most of the land being controlled by a few.[263] Large swaths of land lay fallow as owners with appreciable incomes lacked incentive to make the land productive, which "restrict[ed] the market for the country's urban industries, but also contribute[d] to chronic inflation by restricting agricultural output."[264]

Large landholders owned approximately sixty-eight percent of agricultural land.[265] Land reform undertaken in the 1950s and 1960s was designed to revitalize productivity and increase Chile's standing in the international economy, but was generally deferential to individual rights.[266] Like other Latin American countries, land reform aimed to change the disparity in landholdings.[267] The peasantry within Chile, the United States' Alliance for Progress, and other international organizations pressured land reform efforts.[268] Pressure from the United Nations and the United States reflected the belief that land reform would encourage economic growth and aid development.[269] Previous reform laws approved by the Chilean Congress were lauded but lacked clarity on the timing and circumstances of expropriation.[270] One, passed in 1962, struggled to be implemented due to issues over jurisdiction and compensation.[271] However, the 1962 law was a stepping-stone for further land reform efforts in Chile and elsewhere in Latin America.[272]

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[263] Joseph R. Thome, *Expropriation in Chile Under the Frei Agrarian Reform*, 19 AM. J. COMP. L. 489, 489 (1971).

[264] Alexander, *supra* note 128, at 192.

[265] Thome, *supra* note 263, at 489.

[266] *See* Jennifer M. Toolin, *Law and Development Theory: A Case Study of the Chilean Land Reform Efforts*, 8 FLETCHER F. 177, 177–78 (1984) (stating that Chilean society experienced an emergent movement that pushed for a greater redistribution of land).

[267] *Id.* at 181.

[268] *Id.* at 181–82.

[269] *Id.*

[270] *Id.* at 182.

[271] *Id.* at 182–83.

[272] *Id.* at 182, 184.

In 1964, a new president took the reins in Chile—Eduardo Frei.[273] Frei was elected on a populist program with a promise to implement more extensive reform.[274] During the campaign, Frei had "committed his future administration to a program[] of state-led land redistribution that would benefit the landless and rural poor households."[275] Frei's reforms were "radical in both scope and timing."[276] He implemented the first Chilean agrarian reform that challenged individual property rights.[277]

2. Property in the Constitution

Frei came to power under the Chilean Constitution of 1925.[278] In anticipation of the land reform law, Frei amended the Constitution to permit the expropriation of lands that did not meet the government's social function.[279] According to the Constitution, property rights were to be established by law, which dictated the means of acquiring, using, enjoying, and disposing of land, limited only by the land's social function and the accessibility of land for everyone.[280] The social function of property was defined to include the general interest of the nation, public utility and welfare, and the elevation of living conditions for inhabitants, though one could not be deprived of private property without a legal justification, including expropriation as authorized by public utility or social interest.[281] There was a right of indemnification after expropriation, which was determined based on the value of the property and could be paid in segments for up to thirty years.[282] A person's home was inviolable except for special motives determined by future laws that

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[273] *Id.* at 184.

[274] *Id.*

[275] Antonio Bellisario, *The Chilean Agrarian Transformation: Agrarian Reform and Capitalist 'Partial' Counter-Agrarian Reform, 1964–1980*, 7 J. AGRARIAN CHANGE 1, 8 (2007).

[276] Toolin, *supra* note 266, at 178.

[277] *Compare id.* at 180 (describing agrarian reform under Alessandri as "the first comprehensive, albeit cosmetic, agrarian reform program" that questioned "the sanctity of individual private property"), *with id.* at 186 (describing agrarian reform under Frei as "the clearest ideological break with the old land ownership regime").

[278] *See* M.C. Mirow, *Origins of the Social Function of Property in Chile*, 80 FORDHAM L. REV. 1183, 1186, 1213 (2011) (stating that a constitution was promulgated in 1925 and was the Constitution of Chile until 1980). The Constitution established a republic. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. I, art. 1, 18-09-1925, *translated in* GEN. SECRETARIAT, ORG. OF AM. STATES, CONSTITUTION OF THE REPUBLIC OF CHILE: 1925 (AS AMENDED) (1972).

[279] Law No. 16615 art. 1, Modifica La Constitución Política del Estado, Enero 20, 1967, DIARIO OFICIAL [D.O.] (Chile); Thome, *supra* note 263, at 499.

[280] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] ch. III, art. 10, sec. 10, 18-09-1925 (amended 1967), *translated in* GEN. SECRETARIAT, *supra* note 278.

[281] *Id.*

[282] *Id.*

would authorize an intrusion on that right.[283]

3. Law 16640: Agrarian Reform in 1967

Law 16640 seemed radical, as it clearly broke from the old land tenure system, but it passed with little opposition.[284] It was the result of attentive study and collaboration between important "agronomists, sociologists, economists, farmers, and lawyers."[285] The Law utilized "the legal, institutional, and political processes" of previous land reform attempts.[286] The Law is complex and long with several complementary statutes, and was designed to be the legal mechanism to end agricultural stagnation.[287] In instituting reform, Frei created new tribunals to address the procedural problems of elites avoiding expropriation, which had weakened the old program.[288] In Law 16640, there were several important factors of expropriation, including land size and cultivation, payment, as well as targeting those who had previously avoided expropriation by dividing their land among relatives.[289] Frei blamed the old land tenure system for the peasants' poor standard of living, including substandard housing and sanitation, undernourishment, and unemployment.[290] The goal set for expropriation was to benefit 100,000 peasants.[291]

The Law expressly reflects a social function of property and authorized the expropriation of certain lands for public utility.[292] Land subject to expropriation included large holdings of one owner as well as abandoned or underexploited lands.[293] There were exceptions to expropriation, including a declaration by the President.[294] Compensation for landowners was to come from government bonds, with prices based on at least seventy percent of the consumer price index.[295] New organizations, such as *el Consejo Nacional Agrario* (the National

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[283] *Id.* ch. III, art. 10, sec. 12.

[284] Toolin, *supra* note 266, at 186.

[285] Thome, *supra* note 263, at 497.

[286] Toolin, *supra* note 266, at 184.

[287] Thome, *supra* note 263, at 500. The Law provided the framework for land reform in Chile until 1980. Bellisario, *supra* note 275, at 8.

[288] Toolin, *supra* note 266, at 185–86. Under Alessandri's reform, landowners avoided expropriation by implementing their own reform, negotiating limited expropriations, and selling off capital. Bellisario, *supra* note 275, at 9.

[289] Toolin, *supra* note 266, at 186.

[290] *Id.* at 187.

[291] *Id.* at 188.

[292] Law No. 16640 tit. I, cap. I, art. 2, Reforma Agraria, Julio 16, 1967, DIARIO OFICIAL [D.O.] (Chile).

[293] *Id.* tit. I, cap. I, arts. 3–4.

[294] *Id.* tit. I, cap. III, arts. 22–23.

[295] *Id.* tit. II, cap. IV, art. 43; *id.* tit. IV, cap. IV, art. 89.

Agrarian Board) and additional agricultural tribunals, were created to implement the reform.[296] Further, the land was categorized to designate parcels subject to expropriation.[297] Under the Law, the sequence of expropriation would be the governmental taking followed by farm development, and then land redistribution.[298]

4. Implementation and Realities of the Law

Most large landholders in Chile were not as resistant to land reform as those in other Latin American countries.[299] Expropriation of inefficient lands allowed owners to maintain the best lands and reinvest in a system that encouraged capitalism in the countryside.[300] Under President Frei, owners commonly offered expropriated lands that had been abandoned or were in a "sorry state" to the government.[301] Landholders were also more accepting of expropriation, given a unique economic climate due to an unproductive and inefficient agrarian sector and preference for urban and industrial investments.[302] Despite the willing participation of some landowners, Frei only expropriated fifteen percent of the land made expropriable under the law, benefiting only twenty percent of the peasants in his original goal.[303]

Chile's next president, Salvador Allende, had to contend with the problems of Frei's reform, including the new power of midsize landholders.[304] Allende was democratically elected as a result of a compromise between the Socialist party that nominated him and Communists and Radicals.[305] Agrarian reform under Allende was comparably milder than under Frei, but was crippled by an economic blockade starting in 1971 by the United States, which feared further nationalization and expropriation.[306] It is possible that the United States feared Allende's intent to socialize Chile through democratic means and saw Allende's reform as implementing that process.[307]

Those affected by expropriation were the driving force behind the

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[296] *Id.* tit. VII, art. 135; *id.* tit. VIII, arts. 136–54.

[297] *Id.* tit. X, cap. III, art. 172.

[298] Bellisario, *supra* note 275, at 8.

[299] *Compare* Jordison, *supra* note 238, at 69 (stating that land reform efforts in Guatemala were internally divisive), *with* Toolin, *supra* note 266, at 186 (stating that land reform in Chile was generally accepted by all classes).

[300] Toolin, *supra* note 266, at 186.

[301] Bellisario, *supra* note 275, at 11.

[302] Toolin, *supra* note 266, at 186–87.

[303] *See id.* at 188 (explaining that while the original goal was to benefit 100,000 peasants, Frei's reform only benefited 20,000 peasants).

[304] *Id.* at 189–90.

[305] JOHN L. RECTOR, THE HISTORY OF CHILE 170 (2003).

[306] Toolin, *supra* note 266, at 178, 191.

[307] RECTOR, *supra* note 305, at 172.

overthrow of Allende's government.[308] After a coup in 1973, the military government partially redistributed the expropriated lands of previous governments.[309] The new government also restored the privileges of large landholders and restored the *latifundio* system.[310] They applied neoliberal principles to all facets of Chilean life, which meant privatizing the lands expropriated by the previous governments.[311] The military remained in power until 1990, when a new president was elected for the first time in seventeen years.[312] As Chile democratized into the twenty-first century, the percentage of peasant farmers decreased due to urbanization and a preference for larger competitive farms in the global market, which made small farms unprofitable.[313]

Given Chile's history after Law 16640, including Allende's milder reform, the military's undoing of distribution, and the reduction in the number of peasant farmers, Frei's agrarian reform represents a peak for expropriation in Chile. Therefore, the Law represents the best expropriation mechanism in Chile to compare with eminent domain.

5. Comparing the Law to Eminent Domain

Although Law 16640 would likely satisfy United States eminent domain requirements, the property provisions in the Chilean Constitution are broader than eminent domain standards.

Law 16640 was likely undertaken with a legitimate public purpose. The Constitution authorized expropriation for national interest, public welfare and utility, and betterment of living conditions, which are similar to, but more expansive than, the United States' public purpose standard.[314] The expansive limits on private property in Chile extend beyond Law 16640, which lists only public utility as a justification for expropriation.[315] Like Mexico and Guatemala, Chilean land reform and subsequent expropriation were undertaken to address the disproportionate holdings of land within the country, which is similar to the rationale behind *Midkiff*.[316] Further, the Law justified expropriation by blaming the old land system for the impoverished conditions of the countryside, which is analogous to the blight justifying the takings in *Berman*.[317] Further, Law 16640 was passed to end agricultural

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[308] Bellisario, *supra* note 275, at 2–3.

[309] *Id.* at 5.

[310] Toolin, *supra* note 266, at 177–78.

[311] RECTOR, *supra* note 305, at 186.

[312] *Id.* at 211.

[313] *Id.* at 230.

[314] *See supra* notes 18, 280–81 and accompanying text.

[315] *See supra* note 292 and accompanying text.

[316] *See supra* notes 58, 160, 225, 287, 290–91 and accompanying text.

[317] *See supra* notes 41–43, 287, 290 and accompanying text.

stagnation, which is similar to the economic revitalization purpose in *Kelo*.[318]

Compensation of at least seventy percent of market price was required for expropriation under Law 16640, which is likely sufficiently comparable to just compensation.[319]

Law 16640 as an independent law would likely pass the eminent domain test. However, the constitutional amendments that authorized the passage of Law 16640[320] created a broad justification of expropriation that is not reflected in eminent domain jurisprudence. Therefore, although the Law would be upheld under United States eminent domain standards, the Chilean Constitution envisions and authorizes expropriations that would not pass United States constitutional muster.

CONCLUSION

Latin American expropriation laws were generally enacted in response to the amassing of land in the hands of a few that began during colonialism. In Mexico, Guatemala, and Chile, land reform was enacted to address this problem and to encourage economic development. Based on a comparison to contemporary eminent domain jurisprudence, only Decreto 900 of Guatemala would pass the scrutiny required to establish a legitimate public purpose to encourage economic development with compensation for the expropriated lands.

Further, this conclusion provides context for the United States' response to expropriation within these countries. The strained United States-Mexico relations after the Agrarian Code of 1934 are understandable in light of takings that conflicted with eminent domain property norms. The United States economic blockade implemented shortly after Law 16640 of 1967 in Chile was reasonable given the questionable validity of the Law under eminent domain and subsequent developments in Chilean history. However, the United States responded to Guatemala's Decreto 900 by aiding in the overthrow of the government, even though Decreto 900 would likely survive the eminent domain test.

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[318] *See supra* notes 69, 287 and accompanying text.

[319] *See supra* notes 19, 295 and accompanying text.

[320] *See supra* note 279 and accompanying text.

This comparative analysis provides insight into the similarities, and perhaps more importantly, the differences between property rights and governmental takings in Latin America and the United States. The recognition of the role of these legal concepts in history as a global comparative understanding of governmental takings is important, especially given the impact of expropriation on the relations between the United States and Latin American countries.

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