

PROPERTY AND PROSPERITY, AN ILLIBERAL STORY

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Abstract

Commonsense wisdom holds that legal protection of private property rights is essential for economic growth. China presents a “puzzle” for commonsense wisdom. Scholars agree that China achieved tremendous growth in the past 40 years—without formal property law, and more specifically, without a legal system to recognize and protect private property rights.

This Article argues that such an observation is mistaken, and that China's economic transformation was a process guided by formal property law. Taking an instrumentalist view of the law, the Chinese state designed and redesigned property rules and relations to pursue evolving governance goals from maximal growth to equitable growth. An eminent domain system operationalized a sectoral transfer of land from farmers to entrepreneurs, enabling China's industrialization and urbanization while creating large-scale dispossession of ordinary residents. Zoning operationalized urban development at the expense of rural development; allocated development benefits and costs among competing groups; and allowed local governments to capture land rents to build urban infrastructure and amenities. Secure and freely alienable property rights were created for entrepreneurs, allowing them to develop or transact newly acquired land and pursue maximum wealth on a newly created urban real estate market. A social security model for rural land externalized the costs of social reproduction onto rural China and produced a cheap, abundant, and flexible labor force for urban-industrial China. After these institutions created massive social strife and inequality in the 1990s and 2000s, the Chinese state once again redesigned these institutions in the 2010s in an effort to induce more inclusive growth.

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INTRODUCTION

Economic development is fundamentally a property law story. Prominent thinkers—from Adam Smith and Jeremy Bentham, to Douglas North and Richard Posner—tell us that protection of private property rights is essential for economic growth and wealth accumulation.¹ Clear and freely

¹ ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 471, 473 (1776) (e.g. “A person who can acquire no property can have no other interest but to eat as much and to labo[ur] as little as possible. . . . Such tenants, being freemen, are capable of acquiring property, and having a certain proportion of the produce of the land, they have a plain interest that the whole produce should be as great as possible, in order that their own proportion may be so.”); JEREMY BENTHAM, THEORY OF LEGISLATION 116–19 (R. Hildreth trans., 1894) (secure property rights invite industry and prosperity; insecure property rights deaden industry and destroy prosperity); *see generally* DOUGLASS C. NORTH & ROBERT PAUL THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973) (the West became developed economies in large part because Western governments created secure

alienable property rights reduce transaction costs and allow private bargaining to produce efficient results.² Property rights allow owners to internalize the costs and benefits of their own behavior, reduce production costs, and encourage innovation.³ Secure property rights protect owners from arbitrary confiscation by the government, foster owner expectations, and facilitate investment, trade, and the development of financial markets.⁴ The idea that economic prosperity requires protection of private property is so entrenched in American thinking that it has become commonsense. It is cited in popular investment advising and in Supreme Court opinions.⁵ It is used to explain the West's success,⁶ and to safeguard that success from the assumed ruination by redistributive policy.⁷ Not surprisingly, ideals of secure and freely-alienable private property rights have been imposed upon developing nations who aspire to achieve prosperity too.⁸

But is this commonsense belief true? Can it explain the biggest economic development story of the past forty years, and one of the biggest in human history? In the past forty years, China has transformed from one of the poorest countries to the second largest economy in the world (in

and freely alienable property rights); Richard A Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK OBS. 1, 1 (1998) (“A modernizing nation’s economic prosperity requires at least a modest legal infrastructure centered on the protection of property and contract rights.”).

² Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 19 (1960).

³ See generally MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) (explaining the inefficiency problem when costs and benefits from private action cannot be fully internalized); Andrei Schleifer, *State versus Private Ownership*, 12 J. ECON. PERSPS. 137–39 (1998) (cost reduction and innovation).

⁴ See Douglass C. North & Barry Weingast, *Constitution and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 803 (1989); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 55–57 (2000).

⁵ See, e.g., Sean Ross, *How Are Capitalism and Private Property Related?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/040615/how-are-capitalism-and-private-property-related.asp> (last updated Aug. 27, 2021); *Texas Dep’t of Hous. and Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 533 (2015) (Anti-racist disparate impact liability under the Fair Housing Act should be limited so as not to jeopardize “a vibrant and dynamic free-enterprise system”).

⁶ NORTH & THOMAS, *supra* note 1; North & Weingast, *supra* note 4, at 816–17, 819–24.

⁷ See, e.g., *Inclusive Communities Project*, 576 U.S. at 533–34, 543–44.

⁸ THE WORLD BANK, *WORLD DEVELOPMENT REPORT* 65–70 (1985); Zvi Lerman et al., *Land Reform and Farm Restructuring in Ukraine*, WORLD BANK DISCUSSION PAPER 270, at 3–4, 11–12 (1994); THE WORLD BANK, *FROM PLAN TO MARKET: WORLD DEVELOPMENT REPORT* 48–50 (1996); DE SOTO, *supra* note 4, at 153–59.

For critiques of this belief and its application in developing countries, see J-PH PLATTEAU, *FORMALIZATION AND PRIVATIZATION OF LAND RIGHTS IN SUB-SAHARAN AFRICA: A CRITIQUE OF CURRENT ORTHODOXIES AND STRUCTURAL ADJUSTMENT PROGRAMMES* (1992); Celestine Nyamu Musembi, *De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights*, 28 THIRD WORLD Q. 1457, 1458, 1462, 1473 (2007); David W. Kennedy, *Some Caution about Property Rights as a Recipe for Economic Development*, 1 ACCT., ECON. & L. 1, 6–10 (2011); Sergio Latorre, *The Making of Land Ownership: Land Titling in Rural Colombia—A Reply to Hernando de Soto*, 36 THIRD WORLD Q. 1546 (2015); Mekonnen Firew Ayano, *Rural Land Registration in Ethiopia: Myths and Realities*, 52 L. & SOC’Y. REV. 1060, 1072–92 (2018).

purchasing power parity terms, China has been the world's largest economy since 2014).⁹ Between 1980 and 2020 China's per capita GDP multiplied by twenty-four times from \$431 to \$10,358, lifting the county to upper-middle income status.¹⁰ Projections of China overtaking the United States as the world's largest economy (in nominal GDP terms) in the coming decade have become plausible enough that President Biden vowed to defend America's leading status on his watch, and that senators, despite disagreeing on almost everything else along party lines, collaborated to pass laws to counter China's rise.¹¹

China's economic growth has been no secret to the West. Numerous scholars have sought to explain what has contributed to China's success.¹² Socio-political accounts focus on informal, often local, sociocultural or politico-administrative mechanisms, with law playing a marginal (if any) role.¹³ Legal accounts of property rights in China share starkly negative

⁹ China's GDP in 2021 was \$18 trillion, while the GDP of the United States in 2021 neared \$24 trillion. Frank Tang & Orange Wang, *China GDP Growth Beats Expectations, Narrows Gap with US, But Population Crisis, Covid-19 Cloud Outlook*, SOUTH CHINA MORNING POST (Jan. 18, 2022), <https://www.scmp.com/economy/china-economy/article/3163720/china-gdp-growth-2021-beats-expectations-narrowing-gap-us>; Press Release, U.S. Bureau of Economic Analysis, Gross Domestic Product, Fourth Quarter and Year 2021 (Advance Estimate) (Jan. 27, 2022), [https://www.bea.gov/news/2022/gross-domestic-product-fourth-quarter-and-year-2021-advance-estimate#:~:text=Current%2Ddollar%20GDP%20increased%2010.0,\(tables%201%20and%203\)](https://www.bea.gov/news/2022/gross-domestic-product-fourth-quarter-and-year-2021-advance-estimate#:~:text=Current%2Ddollar%20GDP%20increased%2010.0,(tables%201%20and%203);); Mike Bird, *China Just Overtook the U.S. as the World's Largest Economy*, INSIDER (Oct. 8, 2014, 5:08 AM), <https://www.businessinsider.com/china-overtakes-us-as-worlds-largest-economy-2014-10>.

¹⁰ WORLD BANK, *GDP per Capita (Constant 2015 US\$)* <https://data.worldbank.org/indicator/NY.GDP.PCAP.KD?locations=CN> (last visited Feb. 21, 2022); WORLD BANK, *The World Bank in China, Overview*, <https://www.worldbank.org/en/country/china/overview#1> (last updated Apr. 12, 2022).

¹¹ Evelyn Cheng & Yen Nee Lee, *New Chart Shows China Could Overtake the U.S. as the World's Largest Economy Earlier Than Expected*, CNBC (Jan. 31, 2021, 10:40 PM), <https://www.cnbc.com/2021/02/01/new-chart-shows-china-gdp-could-overtake-us-sooner-as-covid-took-its-toll.html>; Jenny Leonard & Justin Sink, *Biden Says China Won't Be Most Powerful Country on His Watch*, BLOOMBERG (Mar. 25, 2021, 3:47 PM), <https://www.bloomberg.com/news/articles/2021-03-25/biden-says-china-won-t-be-most-powerful-country-on-his-watch>; Thomas Franck, *Senate Passes \$250 Billion Bipartisan Tech and Manufacturing Bill Aimed at Countering China*, CNBC (Jun. 8, 2021, 6:36 PM), <https://www.cnbc.com/2021/06/08/senate-passes-bipartisan-tech-and-manufacturing-bill-aimed-at-china.html>; Catie Edmondson, *Senate Passes \$280 Billion Industrial Policy Bill to Counter China*, THE NEW YORK TIMES (Jul. 27, 2022), <https://www.nytimes.com/2022/07/27/us/politics/senate-chips-china.html>.

¹² See sources cited *infra* notes 13–27.

¹³ For literature with a sociocultural focus, see Dorothy J. Solinger, *Urban Reform and Relational Contracting in Post-Mao China: An Interpretation of the Transition from Plan to Market*, 22 *STUD. IN COMPAR. COMMUNISM* 171, 178–79 (1989); S. GORDON REDDING, *THE SPIRIT OF CHINESE CAPITALISM* 18–23 (1990); Josephine Smart & Alan Smart, *Personal Relations and Divergent Economies: A Case Study of Hong Kong Investment in South China*, 15 *INT'L J. URB. REGIONAL RSCH.* 216, 221–22 (1991); Carol A. G. Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 *SOC. & LEGAL STUD.* 195, 204 (1994); Martin L. Weitzman & Chenggang Xu, *Chinese Township-Village Enterprises as Vaguely Defined Cooperatives*, 18 *J. COMPAR. ECON.* 121, 126–27 (1994); David L. Wank, *The Institutional Process of Market Clientelism: Guanxi and Private Business in a South China City*, 147 *CHINA Q.* 820, 822–23 (1996); SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS,

observations. Before 2007 China was known as (1) having no formal property law to protect private property rights, and (2) having no independent judiciary to enforce these rights.¹⁴ Even after the Chinese legislature enacted Property Law in 2007, property relations were and in many cases still are governed by miscellaneous, and often conflicting, laws and regulations with uneven enforcement.¹⁵ English-language literature on Chinese land expropriations provides testimony after testimony of an unjust and oft-violent primitive accumulation: (1) tens of millions of farmers are dispossessed of land and displaced from their communities; and (2) the dispossession is committed or condoned by a predatory, authoritarian state (along with its corrupt officials) which seeks financial gains and corporate investments and which is aided by weak laws and courts.¹⁶ In a word, if one visualizes a rapidly developing China as a construction site, that site is also a site of massive property rights violation, and of property *lawlessness*.

CULTURE, AND THE CHANGING NATURE OF GUANXI 38–39 (Thomas Gold et al. eds., 2002); Mayfair Mei-hui Yang, *The Resilience of Guanxi and Its New Deployments: A Critique of Some New Guanxi Scholarship*, 170 CHINA Q. 459, 463–64 (2002); Kellee S. Tsai, *Adaptive Informal Institutions and Endogenous Institutional Change in China*, 59 WORLD POL. 116, 128–30 (2006); Symposium, *Bottom-Up Economic Development and the Role of the State: A Focus on China*, 9 SOCIOLOGICA 1, 5–8 (2010).

For literature with a politico-administrative focus, see Gabriela Montinola et al., *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50, 53–54 (1995); Jean Oi, *The Evolution of Local State Corporatism*, in ZOUPIPING IN TRANSITION: THE PROCESS OF REFORM IN RURAL NORTH CHINA 35–61 (Andrew G. Walder ed., 1998); JEAN OI, RURAL CHINA TAKES OFF: THE INSTITUTIONAL FOUNDATIONS OF ECONOMIC REFORM (1999); SUSAN WHITING, POWER AND WEALTH IN RURAL CHINA: THE POLITICAL ECONOMY OF INSTITUTIONAL CHANGE (2001); CHIH-JOU JAY CHEN, TRANSFORMING RURAL CHINA: HOW LOCAL INSTITUTIONS SHAPE PROPERTY RIGHTS IN CHINA (2004).

¹⁴Donald Clarke et al., *Law, Institutions, and Property Rights in China*, 129 Woodrow Wilson International Center for Scholars Asia Program Special Report 42, 42–43 (2005); KENNETH W. DAM, THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT 248–50 (2006); Randall Peerenboom, *Law and Development of Constitutional Democracy: Is China a Problem Case?*, 603 ANNALS AM. ACA. POL. SOC. SCI. 192, 192–95 (2006); Donald Clarke et al., *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION 393–94 (Thomas Rawski & Loren Brandt eds. 2008).

¹⁵See generally Xiaoqian Hu, “Put That Bucket Down!”: *Money, Politics, and Property Rights in Urbanizing China*, 44 VT. L. REV. 243 (2019); Shitong Qiao, *Rights Weakening Federalism*, 102 MINN. L. REV. 1671, 1675–76 (2018). See also Matthew S. Erie, *China's (Post-)Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 HONG KONG L.J. 919, 921–24, 942–44 (2007) (discussing the significance and limits of the 2007 Property Law).

¹⁶Xiaolin Guo, *Land Expropriation and Rural Conflicts in China*, 166 CHINA Q. 422, 424, 431 (2001); Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235, 240 (2005) [hereinafter *A Case from Sichuan*]; Alvin Y. So, *Peasant Conflict and the Local Predatory State in the Chinese Countryside*, 34 J. PEASANT STUD. 560, 570 (2007); Shijian Yang, *Land Expropriation and Constitutional Protection of Farmers' Rights*, 4 ASIAN AGRIC. RES. 38, 44 (2012); Chao Zhou & Dan Banik, *Access to Justice and Social Unrest in China's Countryside: Disputes on Land Acquisition and Compensation*, 6. HAGUE J. RULE L. 254, 258–59 (2014); Eva Pils, *Resisting Dignity Takings in China*, 41 LAW & SOC. INQUIRY 888, 889, 911 (2016).

Then, is China's economic story an anomaly?¹⁷ Or, more provocatively, is the commonsense belief wrong in that growth does not require protecting private property rights? Many scholars seek to bridge the disconnect between China's development story and the commonsense belief about private property and economic development. They argue that although China did not have court-enforced private property rights, it had *functional equivalents* to these rights.¹⁸ The success of township-and-village enterprises (TVEs) in the 1980s and 1990s was due to China's tax system and cadre evaluation system, which rewarded officials for developing the economy and increasing the tax base, thus incentivizing them to respect enterprises' property rights.¹⁹ Alternatively, TVEs were considered to have strong property rights because they were "creatures of the local government" and hence arbitrary confiscation was a non-issue.²⁰ Private enterprises, in these accounts, sought protection of their property by relying on both formal laws that regulated officials' behaviors and enterprise relations; and on local norms to check officials' excessive behavior, cultivate relationships with officials, and even bribe officials.²¹ Regarding urban development, China's urban land tenure is considered functionally equivalent to private ownership, despite the label of "state ownership of land."²²

A minority view holds that development is a process of systemic destruction of property rights of old (agrarian) users and redistribution of property rights to new (industrial) users.²³ Under this view, strong property rights can *hinder*, rather than *foster*, growth.²⁴ China is a case of "law and development without the law part," specifically without property law.²⁵ The

¹⁷ Donald C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in UNDERSTANDING CHINA'S LEGAL SYSTEM 93–121 (C. Stephen Hsu ed. 2003) (presenting the "China Puzzle").

¹⁸ See *infra* text accompanying notes 19–22.

¹⁹ WHITING, *supra* note 13; CHIH-JOU JAY CHEN, *supra* note 13.

²⁰ Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMPAR. L. 89, 104, 107–09 (2003).

²¹ Teemu Ruskola, *People, Inc.? Law, Economic Enterprise, and the Development of Inequality in China*, 67 AM. J. COMPAR. L. 383, 402–08 (2019) (formal law and informal norms regulating officials' behaviors); Weitseng Chen, *Arbitrage for Property Rights: How Foreign Investors Create Substitutes for Property Institutions in China*, 24 WASH. INT'L L.J. 47, 52 (2015) (law regulating enterprise contracts were important to China's success in attracting foreign direct investment); literature with a sociocultural focus in *supra* note 13 (patronage including bribery).

²² Donald Clarke, *Form and Function in China's Urban Land Regime: The Irrelevance of "Ownership"*, 79 LAND USE POL'Y 902 (2018).

²³ FRANK UPHAM, THE GREAT PROPERTY FALLACY: THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES 57 (2018). Frank Upham, *From Demsetz to Deng: Speculations on the Implementations of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 599 (2009).

²⁴ UPHAM, *supra* note 23, at 95; Upham, *supra* note 23, at 555–56.

²⁵ UPHAM, *supra* note 23, at 83. Despite this provocative, contrarian argument, Upham makes several clarifications that re-align himself with common scholarly observations. He explains that China's economic development was not a process of chaos and arbitrariness. He argues that "China created a

very lack of a formal property legal system made China's development cheaper, quicker, and easier.²⁶

Despite disagreeing on whether protection of property rights matters to economic growth, the majority and minority views both agree that China's development occurred without a formal property system.²⁷ More specifically, China grew without formal property law to recognize and protect private property rights.

This Article presents a different story. It shows that formal property law is *central* to China's economic development.²⁸ The country's success (and struggle) is accomplished *precisely through* the Chinese state designing and redesigning property institutions since the beginning of the economic reform. First, an eminent domain system operationalized a sectoral transfer of land from farmers to entrepreneurs, enabling China's industrialization and urbanization while creating large-scale dispossession of ordinary residents.²⁹ Second, zoning operationalized urban development at the expense of rural development, allocated development benefits and costs among competing groups, and allowed local governments to capture land rents to build urban infrastructure and amenities.³⁰ Third, secure and freely alienable property rights were created for entrepreneurs, allowing them to develop or transact newly acquired land and pursue maximum wealth on a newly created urban

bureaucratic and social order that supported investment and sustained markets," and "China's 'lawlessness' usually includes a degree of order and stability that can effectively play the role typically attributed to a robust legal system." *Id.* at 99, 89.

²⁶ *Id.* at 83. See also Shitong Qiao & Frank K. Upham, *China's Changing Property Law Landscape*, in *COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES* 311, 311–13, 319 (Michele Graziadei & Lionel Smith eds., 2017); Shitong Qiao, *supra* note 15, at 1693–94 (both articles explain how a lack of property rights protection for farmers made the transfer of land from farmers to industrialists cheaper and faster).

²⁷ There is a third camp. Scholars from this camp take a processual (transitional or coevolutionary) approach and argue that formal institutions change and evolve with different stages of economic development. For example, Hu Xiaobo finds that institutions regulating the early stage of China's development recognized ambiguous and informal private property rights, but the continued economic development created pressure to formalize these rights. HU XIAOBO, *PROBLEMS IN CHINA'S TRANSITIONAL ECONOMY: PROPERTY RIGHTS AND TRANSITIONAL MODES* 15–16, 28–30 (1998). In a rich and refreshing account of China's economic transformation, Yuen Yuen Ang argues that institutions that build markets are qualitatively different from institutions that preserve already existing markets. For example, clear and strong formal property rights is a market-preserving institution. Market-building institutions, on the other hand, are institutions that already exist in a society without markets and that may be useful for creating markets. These institutions may not resemble clear and strong formal property rights at all. YUEN YUEN ANG, *HOW CHINA ESCAPED THE POVERTY TRAP* 24, 42, 45–46 (2016). Neither author is a legal scholar and neither argues that formal property law was central to China's economic development.

²⁸ By "formal," this Article includes all laws, regulations, and institutions made by a properly authorized government agency.

²⁹ See *infra* Part I, Section B.

³⁰ See *infra* Part II, Section B.

real estate market.³¹ Fourth, a social security model for rural land externalized the costs of social reproduction onto rural China and produced a cheap, abundant, and flexible labor force for urban-industrial China.³² After these institutions created massive social strife and inequality in the 1990s and 2000s, the Chinese state once again redesigned these institutions in the 2010s in an effort to induce more inclusive growth.³³

In what follows, Part I traces the role eminent domain played in China’s urban and industrial development. Part II examines the use of zoning to operationalize economic development and the creation of new property rights for urban and industrial developers. Part III investigates how China’s rural property regime produced a cheap, abundant, and flexible labor force to power China’s urban-industrial development. Part IV analyzes the recent changes in Chinese property law to make development more equitable. Part V summarizes the findings, asks why existing scholarly accounts have missed the full role of property law in China’s transformation, and stresses the dangers for Americans to misconstrue China’s law and development story.

I. DESTROY AND REDISTRIBUTE

In 1981, eighty percent of the Chinese population or 794 million people lived in rural China; in 2018, only forty percent of the Chinese population or 564 million people lived in rural China.³⁴ In 1981, China’s urban construction land was 6,720.000 square kilometers; in 2018, China’s urban

³¹ See *infra* Part II, Section A.

³² See *infra* Part III.

³³ See *infra* Part IV. Three clarifications are in order. First, I do not argue that the Chinese state can arbitrarily reallocate property rights with impunity. Reallocations that cause dispossession without fair compensation or that create drastically inequitable access to wealth opportunities will lose social legitimacy among the very citizens on whose compliance property law depends for effective functioning. See Xiaoqian Hu, *supra* note 15, at 269–73. Second, I do not argue that formal law is always complied with or enforced or is an exogenous, independent manipulator of social, economic, or political relations. A socio-legal story of China’s economic development tells us that state and non-state actors apply, pull, push, bend, destroy or seek to create formal laws and informal norms, and which action they take at a particular time depends on their circumstances and on the content of the rules at issue. *Id.* at 269. Third, I do not argue that China has a “rule of law.” The socio-legal story of China’s development—that both state and non-state actors manipulate laws to pursue respective goals—makes doubtful the feasibility of a thin, procedural rule of law, where already-made laws are faithfully and consistently enforced, applied, or complied with. To make “rule of law” an effective institution, the laws must gain legitimacy among the very actors who are required to follow them; and legitimacy inevitably depends on the substance of the law too.

³⁴ China Rural Population 1960–2022, MACROTRENDS, <https://www.macrotrends.net/countries/CHN/china/rural-population> (last visited Sept. 11, 2022); National Bureau of Statistics of China, *Principal Aggregate Indicators on Nat’l Econ. and Soc. Dev. and Growth Rates*, CHINA STATISTICS YEARBOOK § 1-2 (2019), stats.gov.cn/tjsj/ndsj/2019/indexeh.htm.

construction land was 56,075.900 square kilometers.³⁵ Land is crucial to China's urban and industrial development. As Jeremy Waldron plainly remarks, "Everything that is done has to be done somewhere."³⁶ Industrialization and urbanization required that astronomical acres of land change hands from farmers in urban peripheries (peri-urban farmers) to industrialists and urban developers (or in economic terms, from existing lower-GDP-generating users to new higher-GDP-generating users).³⁷

In the United States, urban expansion and suburbanization primarily take the forms of direct sales from private landowners to private developers and the necessary changes in the local land use and zoning law to permit the new use. This model of "private sale + zoning change" would not work for 1980s China. The 1982 Chinese Constitution explicitly stipulated that urban land was owned by the State; suburban and rural land were owned by rural collective (unless for other reasons owned by the State); and no entities or individuals may appropriate (侵占), buy, sell, lease, or in other ways transfer land.³⁸

Against this background, property law was essential in legalizing, operationalizing, setting the pace and terms of, and legitimizing the sectoral reallocation of land in China. This sectoral transfer of land is conducted by and through the government under two property instruments: eminent domain and for-profit transfer of land use rights.³⁹ The government confiscates rural and agricultural land, turns it into urban state-owned land,⁴⁰ and transfers the right to use the newly acquired land to entrepreneurs for substantial fees.⁴¹ Zoning law, as in the United States, does the rest of work by planning and changing land uses to authorize the new industrial or urban use, mitigate use incompatibility, and, in the case of real estate development, help set profit margins.⁴²

³⁵ MINISTRY OF HOUSING AND URBAN-RURAL DEVELOPMENT, CHINA URBAN CONSTRUCTION STATISTICS YEARBOOK 2016 § 2 (2019). National Bureau of Statistics of China, *Statistics on City Construction by Region (2018)*, CHINA URBAN CONSTRUCTION STATISTICS YEARBOOK, <http://www.stats.gov.cn/tjsj/ndsj/2019/indexeh.htm> (last visited Nov. 3, 2022); *China Area of City Construction*, CEIC, <https://www.ceicdata.com/en/china/urban-area/area-of-city-construction> (last visited Sept. 11, 2022).

³⁶ Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991).

³⁷ The choice of GDP growth instead of productivity for benchmark is deliberate. Productivity in an unprejudiced sense includes all activities that generate economic, social, environmental, political, cultural, intellectual, emotional, and spiritual utility. GDP growth is a much narrower benchmark. It excludes all noneconomic benefits such as family togetherness, community cohesion, and environmental sustainability. It also excludes many types of economic benefits, such as subsistence production, women's work at home, and labor reproduction. Lastly, it does not deduct many types of harms that a GDP-generating activity may produce, such as wealth inequality, community disintegration, and environmental degradation. See Xiaoqian Hu, *supra* note 15, at 272.

³⁸ XIANFA art. 10, (1982).

³⁹ See *infra* Part I, Sections A-D and Part II, Section B.

⁴⁰ See *infra* Part I, Sections A-D.

⁴¹ See *infra* Part II, Section B.

⁴² See *infra* Part II, Section A.

A clarification is in order. By eminent domain, this Article includes three skeletal components. First, the purpose of the taking/expropriation is to serve the public, however broadly or narrowly “serving the public” is defined.⁴³ Second, the ownership of the property taken (land or housing) changes hands from a non-governmental party to the government.⁴⁴ Third, the government compensates the previous property owner (or leaseholder) for the taking, however the compensation is calculated.⁴⁵ Eminent domain could be a sham institution if “serving the public” was a pretext and bore no relation to the interest of the public on a system level, or if “compensation” was systematically so nominal that it was practically nonexistent. Between the sham-institution scenario and the ideal-institution scenario (if it exists in real life) lies a vast gray area where the institution is to varying degrees flawed.⁴⁶ This article regards eminent domain in this vast gray area as an institution in existence.

Part I examines the role eminent domain played in China’s urban-industrial development between 1980 and 2010. It refutes the official account that China did not have an eminent domain system (征收制度) until it was formally recognized in a Constitutional amendment in 2004. It explains that China began to establish an eminent domain system in as early as 1982, and by 1986 had established a rudimentary, albeit incomplete, eminent domain system. The system then underwent paradigmatic changes in the 1990s. These changes sacrificed the livelihood guarantees of displaced urban and rural residents to make land cheaper and faster to acquire for urban and industrial developers.

A. The 1980s: Eminent Domain, by Another Name

In 1982, the National People’s Congress adopted and promulgated the Constitution, Article 10, Paragraph 2 of which stipulated, “The state may, in the public interest, (为了公共利益的需要) requisition (征用) land for its use in accordance with the law.”⁴⁷ What is different between this clause and the

⁴³ Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 10 (2005).

⁴⁴ Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 965 (2008).

⁴⁵ *Id.* at 975.

⁴⁶ David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 880 (2013) (assessing noncompliance of various countries’ constitutions and identifying worst offenders or “sham constitutions”).

⁴⁷ XIANFA art. 10, para. 2 (1982). The Chinese text and English translation are available at *Constitution of the People’s Republic of China*, HONG KONG E-LEGISLATION, <https://www.elegislation.gov.hk/hk/A1!en-sc.assist.pdf> (last visited Oct. 24, 2022).

2004 amendment was that the 2004 amendment added that the State may “*expropriate*” (征收) land “*and make compensation*” (并给予补偿).”⁴⁸

The lack of a compensation requirement in the 1982 Constitution did not mean that land requisitions went uncompensated. Seven months before the passage of the Constitution, the Standing Committee of the National People’s Congress passed the Regulations on Land Requisition for State Construction (国家建设征用土地条例, hereinafter the 1982 Regulations).⁴⁹ The 1982 Regulations governed requisitions of rural collective-owned land for non-rural uses.⁵⁰ It required the new user of the land to negotiate with and compensate the old user and set guidelines regarding minimum and maximum financial compensation as well as options of in-kind relocation benefits.⁵¹

The 1982 Regulations tied financial compensation to the average annual productivity of the rural land being requisitioned; the compensation factor was five at the low end and ten at the high end.⁵² Crucially, the 1982 Regulations provided housing, employment, and livelihood guarantees for residents undergoing land requisition.⁵³ It required the new land user to finance, and the jurisdiction whose land had been requisitioned to build, replacement housing for those who had become houseless due to the requisition.⁵⁴ The 1982 Regulations also required the local county or municipal government to find jobs for the dispossessed rural residents who could not find alternative employment.⁵⁵ In cases where all the land of a rural collective was requisitioned, the residents could, upon the government’s approval, gain urban residency and enjoy the much superior socioeconomic entitlements provided by the urban welfare system.⁵⁶ These guarantees targeted the most devastating aspects of land requisition and made land requisition tolerable if not desirable to rural residents.⁵⁷

⁴⁸ XIANFA art. 10, para. 2 (1982, amend. 2004). An English translation of the text is available at *Constitution of the People’s Republic of China*, THE NATIONAL PEOPLE’S REPUBLIC OF CHINA, http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/2007-11/15/content_1372963.htm (last visited Oct. 24, 2022).

⁴⁹ Guo Fa (国家建设征用土地条例) [Regulations on Land Requisition for State Construction] (promulgated by Standing Comm. Nat’l People’s Cong., Jul. 10, 1982, effective Oct 10, 1982) ST. COUNCIL GAZ. 437 [hereinafter *1982 Regulations*].

⁵⁰ *Id.* art. 2.

⁵¹ *Id.* art. 9–12.

⁵² *Id.* art. 9–10.

⁵³ *See supra* text accompanying notes 51–54.

⁵⁴ *1982 Regulations*, *supra* note 49, art. 14–15.

⁵⁵ *Id.* art. 12.

⁵⁶ *Id.*; *see discussion infra* Part III.A (detailing eligibility for urban residency and the socioeconomic entitlements it entails).

⁵⁷ *See infra* Part I.B.

To better regulate the conversion of agricultural land for non-agricultural use,⁵⁸ the Standing Committee of the National People's Congress passed the Land Administration Law (hereinafter the 1986 LAL) on June 25, 1986.⁵⁹ The new law replaced the 1982 Regulations.⁶⁰ In addition, it regulated the use and allocation of urban state-owned land, which had been neglected by the 1982 Regulations.⁶¹ The 1986 LAL also incorporated the requisition clause of the 1982 Constitution: For the need of public interest, the State may requisition collectively owned land in accordance with the law.⁶² It also states that, if the State engages in economic, cultural, or defense construction (经济、文化、国防建设) or the establishment of social public causes (举办社会公益事业) and needs to *requisition* collectively owned land or *use* state-owned land, the State shall abide by this Chapter.⁶³

The 1986 LAL incorporated the 1982 Regulations' compensation standards and housing, employment, and livelihood guarantees.⁶⁴ When it came to the "use" of urban state-owned land, however, the law instructed the provincial (or equivalent) governments to enact compensation standards in light of rural land guidelines.⁶⁵ The 1986 LAL (which was amended in 1988) was the law governing land confiscations until it was systematically amended in 1998.⁶⁶

The 1986 LAL established a formal, albeit rudimentary and incomplete, eminent domain institution. First, it limited takings of land to serving the need of public interest and the need to engage in economic, cultural, or defense construction or establish social public causes.⁶⁷ Second, the ownership of requisitioned rural land shifted from the rural collective to the State, and the effective ownership of urban land shifted from the old state enterprise or organization to the new state enterprise or organization.⁶⁸ Third,

⁵⁸ Samuel P. S. Ho & George C. S. Lin, *Emerging Land Markets in Rural and Urban China: Policies and Practices*, 175 CHINA Q. 681, 686 (2003).

⁵⁹ Tudi guanli fa (土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986).

⁶⁰ Ho & Lin, *supra* note 58, at 686.

⁶¹ Land Administration Law, *supra* note 59, art 1.

⁶² *Id.* art. 2 ¶ 3–4 (translated into English from Mandarin).

⁶³ *Id.* art. 21–22, 24 (translated into English from Mandarin).

⁶⁴ *Id.* art. 27–31.

⁶⁵ *Id.* art. 27–28, 47.

⁶⁶ [Land Administration Law of the People's Republic of China] (promulgated by Standing Comm. Of the Sixth Nat'l People's Cong., June 15, 1998, effective Aug. 29, 1998) 1998 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. [hereinafter *1998 Land Administration Law*].

⁶⁷ Shi Guoqing et al., *Evolution of Land and Resettlement Laws in China: Setting New Standards*, RESEARCHGATE (2021), https://www.researchgate.net/publication/355403386_Evolution_of_land_administration_law_and_resettlement_regulation_in_China.

⁶⁸ *Id.*

compensation, both financial and in-kind, was given to the old user of the land.⁶⁹

This eminent domain institution was not easy to identify, because it did not say all in one clause that land could be “expropriated” to serve the public interest and with compensation. Instead, the three components were scattered in different parts of the law. The relevant clauses used the words “requisition” (for rural collectively owned land) and “use” (for urban state-owned land), neither of which entail an inherent obligation to compensate.⁷⁰

This rudimentary eminent domain system by no means reflected an American classical liberal conception of property. First, the “public interest” limitation was immensely broad to presumably include all “economic, cultural or defense construction” and “establish[ment of] social public causes” that the State might seek to engage or promote.⁷¹ And engage and promote the Chinese State did!⁷² While building a park or military facility would constitute public use under a classical liberal paradigm, taking villagers’ land and giving it to an investor to build a factory would likely not constitute public use under a classical liberal paradigm.⁷³ Yet, the latter was the primary purpose of land confiscations in China in the 1980s and 1990s.⁷⁴

Second, there was no “fair market value” compensation for land confiscation under China’s eminent domain system, as there was no market

⁶⁹ 1998 *Land Administration Law*, *supra* note 66.

⁷⁰ *Id.*

⁷¹ Shi Guoqing, *supra* note 67.

⁷² After the Third Plenary Session of the Eleventh Central Committee of the CCP in December 1978, economic development became the paramount policy of the CCP-led government. This decision was buttressed by a new consensus among the CCP leadership that per Marxist theory, productive forces determine the relations of production, which in turn determine the political superstructure of socialism; and for this reason, industrial and commercial development was an essential step toward socialism. In other words, the CCP now realized that the economic was the political. This belief was reiterated again by the CCP Party Secretary, Zhao Ziyang, a year after the passage of the 1986 LAL. “With the productive forces lagging behind those of the developed capitalist countries we are destined to go through a very long primary stage [of socialism]. During this stage, we shall accomplish industrialization, and the commercialization, socialization, and modernization of production that many countries have achieved under capitalist conditions. . . . Whatever is conducive to growth [of the productive forces] is in keeping with the fundamental interests of the people and is therefore needed by socialism and therefore allowed to exist.” ISABELLA M. WEBER, *HOW CHINA ESCAPED SHOCK THERAPY: THE MARKET REFORM DEBATE* 227 (2021).

⁷³ In this regard, the majority holding in *Kelo v. City of New London*, 545 U.S. 469 (2005), may not reflect a classical liberal paradigm of property. Justices O’Connor’s and Thomas’s dissents as well as some of the strong backlashes against *Kelo* are more reflective of a classical liberal spirit. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108–09 (2009). Relatedly, I do not view America’s takings history as consistently reflecting a classical liberal paradigm. For a condensed study of how courts revised property rights and redefined the scope of takings again and again to accommodate the needs of economic development in the past three centuries, see Naomi R. Lamoreaux, *The Mystery of Property Rights: A U.S. Perspective*, 71 J. ECON. HIST. 275 (2011).

⁷⁴ Saul Wilson, *The Landlord State: State Ambition During China’s Rapid Urbanization, 1978–2020* (June 2022) (Ph.D. dissertation, Harvard University) (on file with author).

for construction land. Although rural land was owned by individual collectives, the law prohibited them from selling, leasing, or in other ways conveying land to outside entrepreneurs.⁷⁵ Urban and industrial entrepreneurs had to rely on the county or municipal government, which would “requisition” rural collective-owned land (or “use” urban state-owned land) and transfer it to the entrepreneurs.⁷⁶ The government became a monopsony-monopoly middleman for all land transactions from rural users to urban-industrial developers.⁷⁷

B. Paradigm Shifts from Socialist Equity to Maximal Growth

Eminent domain was established to serve two functions in the 1980s. First, to facilitate economic growth—which the CCP now considered as its paramount mission—by supplying ample cheap land to urban and industrial developers.⁷⁸ Second, to minimize the hardships of dispossessed or displaced residents by providing financial and in-kind compensation.⁷⁹ The two functions were reflected in the 1982 Regulations. This law proclaimed that its purposes were to guarantee the supply of land for state construction (国家建设), reasonably use and conserve land resources, and appropriately resettle production entities and residents facing land requisition.⁸⁰ Although the 1986 LAL did not proclaim similar legislative purposes,⁸¹ it incorporated all the substantive clauses of the 1982 Regulations that served these purposes, particularly relocation.⁸²

⁷⁵ City Planning Law of the People’s Republic of China (promulgated by the St. Council, Jan. 5, 1984) art. 37; Tudi guanli fa (土地管理法)[Land Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 25, 1986), art. 43 & 48. Exceptions were the establishment of TVEs and joint ventures with the rural collective as a partner. *Id.*; Sino-Foreign Contractual Joint Venture Law (adopted by the Nat’l People’s Cong., Apr. 13, 1988, effective Apr. 13, 1988), art. 8. The inability of rural collectives to convey land to urban-industrial developers was overturned by the 2019 amendments to the Land Administration Law. *See infra* Part VI, Section A.

⁷⁶ City Planning Law of the People’s Republic of China, *supra* note 75, art. 31–33, 36, 38; art. 21–23 of the 1986 LAL, *supra* note 59; art. 31 of the 1989 Urban Planning Law (superseding the 1984 Urban Zoning Regulation), an English translation of the text is available at <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC023813/>. After 1988, urban and industrial entrepreneurs could purchase construction land use rights from enterprises that had obtained such rights from the State. *See infra* Part II, Section B.

⁷⁷ Wilson, *supra* note 74.

⁷⁸ *See* discussion *supra* note 72.

⁷⁹ The 1982 Regulations, *supra* note 49, art. 9–11.

⁸⁰ The 1982 Regulations, *supra* note 49, art. 1, 3.

⁸¹ The 1986 LAL was a much broader law than the 1982 Regulations and eminent domain was only a small part of the law.

⁸² *See supra* text accompanying note 65.

The limited research on land confiscations of this period does not show notable problems of conflict, dispossession, or violence.⁸³ Two factors might explain some of the smoothness. First was the compensation package given to displaced residents. Although the one-time financial compensation was not large, the in-kind guarantees of housing, employment, and urban welfare benefits mitigated residents' most pressing material hardships post-confiscation.⁸⁴

Second, the 1982 Regulations required the new user and old user to negotiate the compensation agreement in accordance with its guidelines.⁸⁵ The bargaining power disparity between the new and old users thus affected the terms of the agreement. The 1980s was a time when private real property rights were very limited in China.⁸⁶ In the cities, the industrial and service sectors were owned and run by state enterprises, and residents lived in public housing built by their (or their parents') state employer.⁸⁷ Some residents had built and thus owned their private urban homes.⁸⁸ In the countryside, agricultural land was owned by the rural collective.⁸⁹ Rural residents owned their home structures, but the lot was owned by the rural collective and residents only enjoyed a permanent use right.⁹⁰ Thus, land confiscations were mostly to transfer land from one public entity—a rural collective—to another public entity—an urban state enterprise or organization. As a result, the bargaining power of the two parties was more equal than in a negotiation between a local government and an individual resident.

This second factor is not idle speculation. Based on archival research and interviews with political actors of the time, Saul Wilson found that in the 1980s Chinese coastal villages managed to bargain for substantial sums of compensation and resettlement benefits.⁹¹ The high compensation elevated the costs of land for state enterprises and state projects, squeezed the local governments' revenue from agricultural-to-industrial land conversions,

⁸³ One cannot rule out the possibility that the existing research is too inadequate and has failed to uncover large numbers of instances of conflict, dispossession or violence.

⁸⁴ The 1986 LAL, *supra* note 56, art. 47.

⁸⁵ (国家建设征用土地条例) [Law on the Regulations on the Requisition of Land by the State for Construction] (promulgated by the Standing Comm. Nat'l People's Cong., May 14, 1982) STANDING COMM. NAT'L PEOPLE'S CONG.

⁸⁶ See *supra* text accompanying notes 73–76.

⁸⁷ Donald Clarke, *China's Stealth Urban Land Revolution*, 62 AM. J. COMPAR. L. 323, 327 (2014).

⁸⁸ For a fascinating political-institutional history of this development, see generally Wilson, *supra* note 74.

⁸⁹ (中华人民共和国民法通则) [The General Principles of Civil Law] (promulgated by the 4th plenary session of the 6th Nat'l People's Cong., Apr. 12, 1986,) art. 74.

⁹⁰ *Id.* art. 75–76.

⁹¹ Wilson, *supra* note 74.

threatened to deter foreign investors, and aggravated both reformist and conservative senior government leaders.⁹²

Local governments and party leaders came to realize the tension between the two goals of eminent domain. Compensating residents to their satisfaction would increase the costs of land for industrialists and urban developers, as well as for nonprofit enterprises and the government. Meanwhile, negotiations between the rural collective and the land builder/developer were lengthy, which further increased the time costs for industrialists, urban developers, and other enterprises. It was time to reevaluate the relative importance of the two functions.

The shift was dramatic. In 1991, the Chinese government drastically curtailed the protection of displaced urban residents to facilitate fast and cheap urban development.⁹³ In 1998, the Chinese legislature weakened the protection of dispossessed rural residents to facilitate fast and cheap industrialization and urban expansion.⁹⁴ The 2004 formal recognition of “eminent domain” (征收权) did not reverse this shift; the recognition only entrenched the disempowerment by constitutionalizing it and giving it a legitimate name.⁹⁵

C. The 1990s: Disempower Residents to Maximize Growth

As mentioned above, the 1982 Regulations did not concern urban land, and the 1986 LAL authorized provincial (and equivalent) governments to enact detailed compensation standards for the use of urban state-owned land.⁹⁶ In response, many provinces and municipalities issued regulations regarding urban housing demolitions and compensation.⁹⁷ The types of demolition procedures and compensation standards stipulated in these regulations were miscellaneous. Many subnational governments did not enact regulations for urban housing demolitions. In 1991 the State Council

⁹² *Id.* It is plausible that the high negotiation prices were one of the reasons that caused the 1986 LAL to abolish the bargaining approach embraced by the 1982 Regulations. However, the abolition (or omission) was short-lived. In 1991 the State Council issued the Regulations Regarding the Implementation of the Land Administration Law. Article 17, Paragraph 2 of the regulation reinstated the negotiation procedure.

⁹³ See *infra* Part I, Section C.

⁹⁴ See *infra* Part I, Section C.

⁹⁵ See *infra* Part I, Section D.

⁹⁶ See *infra* text accompanying notes 124–29.

⁹⁷ A search in the CNKI database of laws and regulations with “demolition” (*chaiqian*) in the title published between Jan. 1, 1979 and Jan. 17, 1991 yielded 72 items. Some of these legal documents came from the same government, which updated their pre-1986 regulations in accordance with the 1986 LAL. I chose Jan. 17, 1991 as the end date because it was the day before the first national regulation regarding urban housing demolition was published.

enacted the Regulations Regarding the Management of Urban Housing Demolitions (hereinafter the 1991 Regulations).⁹⁸

The 1991 Regulations brought some uniformity and minimum guarantees to urban housing demolitions across the country. For example, it required that the demolishing party compensate the party facing demolition with replacement housing of the same size or with the assessed value of the demolished housing or with a combination of both.⁹⁹ In cases where the demolished housing was leased to the occupants (the then most common housing arrangement in urban China), the 1991 Regulations required that compensation be replacement housing and that the original lease continue for the occupants.¹⁰⁰ It also required that the demolishing party pay for the costs of moving and provide temporary lodging or pay the costs thereof during the interim between demolition and receipt of replacement housing.¹⁰¹

On their face these guarantees seemed adequate. Urban residents already had jobs at state enterprises or organizations and were already entitled to urban welfare benefits, unlike their rural counterparts. Several provisions in the 1991 Regulations, however, worked to disempower displaced residents and keep the compensation down. The impact of these provisions was not obvious at the time the Regulations were enacted. As the Chinese Communist Party (CCP) took a market liberalization turn in the 1990s and public housing was being irresolutely privatized, the impact of these provisions became profound.¹⁰²

First, the 1991 Regulations created a special entity, “the Demolishing Party” (拆迁人), approved and licensed by the government to conduct demolitions.¹⁰³ This entity was a *repeat* player, and in many cities, the

⁹⁸ Chengshi Fangwu Chaiqian Guanli Tiaoli Zhonghua Renmin Gongheguo Guowuyuan Ling Di 78 Hao (城市房屋拆迁管理条例中华人民共和国国务院令 78 号) [Regulations on the Administration of Urban House Demolition and Relocation Order No. 78 of the State Council of the People's Republic of China] (promulgated by the St. Council, Mar. 22, 1991, effective June 1, 1991).

⁹⁹ *Id.* art. 20.

¹⁰⁰ *Id.* art. 24.

¹⁰¹ *Id.* art. 31.

¹⁰² The turn by the CCP and the Chinese State to market liberalization has been documented by many scholars. Besides the privatization of public housing in urban China, several other major reforms were illustrative of this neoliberal shift: (1) the expansion and price liberalization of markets for manufactured and agricultural goods; (2) the privatization of TVEs and most SOEs; (3) the enactment of laws recognizing, clarifying, and strengthening specific property rights of corporations and individuals; and last but not least, (4) the negotiation with major economies, including the United States, of China's entry to the GATT (later the WTO). Although scholars correctly noted that not all SOEs were privatized, China's SOE reform reflected a neoliberal shift, for even the SOEs which remained state-owned changed their operation logic and management practice. They no longer provided their workers with free (or nearly free) housing, childcare, medical services, cultural entertainment, or other welfare benefits. Their workers no longer enjoyed life-long job security. The relationship between the worker and the enterprise became exclusively transactional—labor for monetary remuneration.

¹⁰³ The 1991 Regulations, *supra* note 98, art. 8–9.

monopoly player, in the ‘demolition business.’¹⁰⁴ As such, it possessed all the advantages of a repeat and monopoly player in information, financial clout, manpower, government support, strategies of negotiation or confrontation, and overall bargaining power.

These advantages could be mitigated to some extent if the party whose housing was being demolished was a state enterprise or organization. At the time the 1991 Regulations were issued, urban housing was mostly owned by a state entity.¹⁰⁵ This, however, was about to change. Ten months after it promulgated the 1991 Regulations, the State Council published another policy to commodify and privatize urban housing.¹⁰⁶ By 1998, the State Council had terminated government provision of housing for urban residents, embraced the market as the provider of housing, and enacted a government-subsidized “cheap-rental housing” (廉租房) program for lowest-income urban families.¹⁰⁷ Thus, over the course of the 1990s, demolition negotiations were increasingly between the repeat, monopoly enterprise player and the individual residents. The bargaining power disparity between the two could not have been starker.

Second, the 1991 Regulations further exacerbated the bargaining power disparity. It required the parties to a demolition dispute to go through a series of administrative petitions and verdicts before litigating the dispute in court.¹⁰⁸ Worse for the resident, it authorized the Demolishing Party to go ahead with the demolition while the litigation was pending—so long as it provided temporary lodging for the resident.¹⁰⁹ In other words, residents could see their house turn into rubble—without having received any monetary compensation and without any hope of receiving satisfactory replacement housing.

¹⁰⁴ Article 9 of the 1991 Regulations allowed local governments to establish a special demolition entity to conduct all demolitions in the locale. The 1991 Regulations, *supra* note 98, art. 9. Many municipalities adopted this approach for demolitions within the city’s urban center. *See, e.g.*, Beijing Shi Shishi “Chengshi Fangwu Chaiqian Guanli Tiaoli” Xize (北京市实施《城市房屋拆迁管理条例》细则) [Detailed Rules of Beijing Municipality for the Implementation of the Regulations on the Administration of Urban Housing Demolition] (promulgated by State Council, Oct. 01, 1991) art. 7, <https://www.waizi.org.cn/policy/40850.html>.

¹⁰⁵ XIANFA, art. 10, § 1 (1982).

¹⁰⁶ Guanyu Quanmian Jinxing Chengzhen Zhufang Zhidu Gaige de Yijian (关于全面进行城镇住房制度改革的意见) (promulgated by State Council Leading Team on Housing Reform, Nov. 23, 1991) [Opinion on Comprehensively Undertaking the Reform of the Urban Housing System], ST. COUNCIL.

¹⁰⁷ Guanyu Jinyibu Shenhua Chengzhen Zhufang Zhidu Gaige Jiakuai Zhufang Jianshe de Tongzhi (关于进一步深化城镇住房制度改革加快住房建设的通知) [Notice of the State Council on Further Deepening the Reform of the Urban Housing System and Speeding Up Housing Construction] (promulgated by State Council, Jul. 3, 1998,) http://www.gd.gov.cn/zwgk/wjk/zcfgk/content/post_2722921.html.

¹⁰⁸ The 1991 Regulations, *supra* note 98, art. 14.

¹⁰⁹ *Id.*

Third, same-size replacement housing was not adequate compensation for many displaced residents. In the national context of urban expansion, it was a common practice for municipal governments to relocate city center residents to the outskirts.¹¹⁰ Residents resented the long distance they had to travel to keep (or get) a job; a lack of public transportation, good schools, and myriad other amenities and conveniences; and the destruction of their old community and lifestyle. One way to compensate for these losses would be to increase the size of replacement housing. Yet, the 1991 Regulations *suggested*, but did not *require*, that the Demolishing Party increase the size of replacement housing if built in worse locations.¹¹¹

As public housing was being privatized and an urban housing market was rapidly developing, the State Council updated the 1991 Regulations in 2001.¹¹² Two changes were particularly relevant to the wellbeing of urban residents facing demolitions. First, the 2001 Regulations were silent about having one Demolishing Party conducting all demolitions in the city. It did not require it, or recommend it, or prohibit it.¹¹³ Second, the 2001 Regulations adopted essentially a fair market value approach to financial compensation.¹¹⁴ It required the Demolishing Party to consider factors such as the location, use, and construction area of the demolished housing and to use real estate market assessment to determine financial compensation.¹¹⁵ These alleviative measures, however, could not alter the structural power disparity between the Demolishing Party and individual residents.

Together, these provisions disempowered urban residents facing demolitions and empowered demolishing entities. Structurally, they kept demolitions fast and compensations low, and reduced the costs of land for urban developers.¹¹⁶ These provisions embodied a paradigm shift by the Chinese State to favor urban developers over urban residents. It is no coincidence that urban housing demolitions between the mid-1990s and mid-

¹¹⁰ Xiaolin Guo, *supra* note 16, at 422, 424.

¹¹¹ The 1991 Regulations, *supra* note 98, art. 28, para. 2.

¹¹² Zhonghua Renmin Gongheguo Tudi Guanli Fa Shishi Tiaoli (中华人民共和国土地管理法实施条例) [Regulations for the Implementation of the Land Administration Law of the People's Republic of China] (promulgated by State Council, Dec. 27, 1998) ST. COUNCIL GAZ., http://www.gov.cn/gongbao/content/2011/content_1860861.htm.

¹¹³ *Id.* art. 36.

¹¹⁴ *Id.* art. 23-25.

¹¹⁵ *Id.* art. 10.

¹¹⁶ Yi Wang, *Urban Housing Demolition and Household Relocation Compensation: A Case Study of Compensation Practices in China Based on Social Impact Assessment* (Aug. 31, 2011) (Master Thesis, University of Groningen). *See also* Chen Li, *Nail Households' Heterogeneity in Housing Demolition and Relocation in Urban China: Motivations, Strategies and Consequences* (July 2018) (Ph.D. thesis, University of Melbourne).

2000s were accompanied with the most widespread resident resentment and governmental coercion.¹¹⁷

Rural residents living in peri-urban China were similarly disempowered. In 1998, the National People's Congress passed a systematically amended LAL.¹¹⁸ The amended legislation recognized, among other things, long-term lease rights of individual rural households.¹¹⁹ It increased the financial compensation by 50% for confiscations of agricultural land.¹²⁰ For these reasons it was praised by both the Chinese government and scholars of Chinese property rights as a landmark law in advancing property rights protection in China.¹²¹ Unexplored, however, is how the 1998 LAL in effect drastically weakened the protection of peri-urban villages and residents, whose rural-agricultural existence was threatened by China's rapid industrialization and urban expansion.

Like the housing privatization reform, the 1998 LAL reflected a market-centric conception of property. Rural land was recognized only for its economic and financial value. All the other functions, interests, and values that rural land might be serving were marginalized if not completely ignored in the decisionmaker's cost-benefit calculations. This view valorized economic activities of market capitalism but excluded productive and reproductive activities that existed outside the market—e.g., subsistence farming, unpaid domestic labor, and intra-community support—even if these activities sustained market capitalism itself.

The 1998 LAL set the maximum compensation for agricultural land confiscations at thirty times the annual production value of the land.¹²² A market-centric conception of property would deem this compensation reasonable, if not outright handsome. This was indeed the view of the Ministry of Land Resources, the drafting body of the 1998 amended bill.¹²³ Presenting the bill to the national legislature, the Minister of Land Resources commented that the 1986 LAL compensation standard, which capped financial compensation at twenty times the annual production value, was

¹¹⁷ Xiaolin Guo, *supra* note 16, at 422; Pils, *A Case from Sichuan*, *supra* note 16, at 274; So, *supra* note 16, at 570.

¹¹⁸ *See generally* The 1998 LAL, *supra* note 66.

¹¹⁹ *Id.* art. 14.

¹²⁰ Compare art. 27–29 of the 1986 LAL, *supra* note 59 with art. 47 of the 1998 LAL, *supra* note 66.

¹²¹ Roy Prosterman et al., *Implementation of 30-Year Land Use Rights for Farmers under China's 1998 Land Management Law: An Analysis and Recommendations Based on a 17 Province Survey*, 9 PAC. RIM L. & POL'Y J. 507, 507–09 (2000).

¹²² The 1998 LAL, *supra* note 66, art. 47.

¹²³ Zhou Yongkang, *Explanations Regarding the Amended Bill of People's Republic of China Land Administration Law of 1998*, NPC, http://www.npc.gov.cn/wxzl/gongbao/2000-12/17/content_5003977.htm (last visited Sept. 16, 2021).

calculated correctly.¹²⁴ If the confiscated family deposited all the financial compensation in a bank account, the going five percent interest rate would allow the family to receive an annual interest accrument equal to the average annual production value of the land.¹²⁵ Nonetheless, the Ministry of Land Resources proposed increasing compensation by fifty percent because this would help keep strict control of land confiscations and safeguard rural residents' interests.¹²⁶

What was missing from this calculation was that rural land performs crucial social security and reproduction functions for rural Chinese residents.¹²⁷ The 1986 LAL was cognizant of these functions and hence provided housing, employment, and welfare guarantees, in addition to financial compensation.¹²⁸ The 1998 LAL did not recognize these functions and mistakenly evaluated land from an exclusively market perspective. Yet, financial compensation, even at thirty times the annual production value, would pale in comparison to the social protection function of rural land. For one, agricultural production value was calculated based on the farmgate price of agricultural products, which was (and is) only a portion of the consumer price for the same product.¹²⁹ The 1998 LAL ignored the fact that due to small landholdings most rural Chinese families grew food primarily for self-consumption and only sold the excess portions to the market.¹³⁰ Thus, a family who sold their excess rice at two Yuan a kilo to the State granary or a grain merchant before confiscation now had to buy rice at four Yuan a kilo from a store after confiscation. The devastation brought by the loss of subsistence farming was particularly pronounced for older residents who, unlike their younger peers, could not easily find migrant work in the city.¹³¹

For another, living in a village also gave residents free access to resources that did not belong to any specific family. They could fetch water from nearby rivers for agricultural and domestic uses. They could collect kindling and firewood in the forest. They could graze cattle or pick wild plants on uncultivated land. They could rely on extended family members

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *See infra* Part III, Section B.

¹²⁸ *See supra* Part I, Section A.

¹²⁹ Silvia Sorescu & Florence Bossard, *China: Estimates of Support to Agriculture*, OECD (last visited Oct. 30, 2022), <https://stats.oecd.org/> (choose "Agriculture and Fisheries" from dropdown; then choose "Agricultural Policy Indicators;" then choose "Producer and Consumer Support Estimates;" then choose "Monitoring and evaluation: Reference Tables;" then choose "Total Support Estimate (TSE);" scroll down in chart and click "China (People's Republic of);" on right side click "Definitions and sources" to access pdf).

¹³⁰ Xiaoqian Hu, "A Glass of Milk Strengthens a Nation." *Law, Development, and China's Dairy Tale*, 16 *J. FOOD L. & POL'Y* 78, 91–92, 94–96 (2020).

¹³¹ *Id.* at 117, 131.

and neighbors to look after their children or feed their animals. These non-market resources and services drastically reduced the costs of living in rural China.¹³² Yet, they were no longer available to residents who had lost all their land to confiscation and had to move.

A second major change in the 1998 LAL was that it replaced the previous negotiation approach with a notice-and-comment approach.¹³³ The 1982 Regulations required that the new and old users negotiate and sign a compensation agreement with the approval of the government, *before* the land could be reallocated to the new user.¹³⁴ Conditioning land reallocation upon the signing of the compensation agreement was to ensure that the agreement was at least minimally satisfactory to the village collective whose land was confiscated.¹³⁵

The 1998 LAL and the subsequent Implementation Regulations issued by the State Council abolished the negotiation and signing requirement. Together, they gave the power to make the compensation plan to the local government conducting the confiscation.¹³⁶ The local government was required to publicize the compensation plan and hear the opinions of the collective and individual residents whose land was confiscated.¹³⁷ However, the local government was not required to incorporate any of the opinions of the rural collective or residents.¹³⁸ Additionally, disputes over the compensation plan should not affect the procession of the confiscation.¹³⁹ In other words, just like urban residents, villagers could see their land

¹³² Gonçalo D. Santos & Aurora Donzelli, *Rice Intimacies: Reflections on the "House" in Upland Sulawesi and South China*, 57–58 ARCHIV FÜR VÖLKERKUNDE 31, 34, 40 (2007–08) (ethnography on life in a rural Chinese rice-farming community).

¹³³ The 1998 LAL, *supra* note 66, art. 48.

¹³⁴ Zhonghua Renmin Gongheguo Fagui Huibian (1982 年中华人民共和国土地管理法实施条例) [Regulations Regarding the Implementation of the 1982 People's Republic of China Land Administration Law] (promulgated by the ???, 1982), FAGUI BUIBIAN. Although the 1986 LAL omitted the negotiation process, the 1991 State Council's implementation regulations reiterated Article 7 of the 1982 Regulations requirement in Article 18. Zhonghua Renmin Gongheguo Fagui Huibian (土地管理法实施条例 中华人民共和国) [Regulations for the Implementation of the Land Administration Law of the People's Republic of China] (promulgated by State Council, Jan. 4, 1991, effective Feb. 1, 1991) FAGUI BUIBIAN.

¹³⁵ [romanization needed] 年中华人民共和国土地管理法实施条例 [Implementation Regulations of the Land Administration Law of the People's Republic of China] ST. COUNCIL GAZ., 1982. I do not argue that the compensation agreement was satisfactory to all rural residents subject to land confiscation. Much depended on the bargaining power (dis-)parity between the rural collective and the new user, the representativeness of the village leadership of the residents, the financial capacity of the new user, and the bargaining capabilities of village leaders and their counterparts.

¹³⁶ Regulations on the Implementation of the Land Administration Law (promulgated by The State Council, Dec. 27, 1998, effective Jan. 1, 1999) St. Council Gaz., art. 25.

¹³⁷ Land Administration Law of the People's Republic of China, *supra* note 66, art. 48.

¹³⁸ *Id.*

¹³⁹ Regulations on the Implementation of the Land Administration Law, *supra* note 136, art. 25,

confiscated by the government—without having received any compensation and without any hope of receiving satisfactory compensation.¹⁴⁰

By the end of 1998, China's eminent domain institution had undergone a paradigm shift—from one which recognized the livelihood and social reproduction functions of land to one which disregarded these functions. This paradigm shift was simultaneously a political and economic shift—crucial interests of peri-urban and urban residents were sacrificed to make land cheaper and faster to obtain for industrialists and urban developers. As a popular slogan of the time said, “Prioritize Efficiency, Also Consider Equity” (效率优先, 兼顾公平).¹⁴¹ What the slogan was really saying was that where efficiency clashed with equity, efficiency shall trump equity.¹⁴²

D. 2004: Legitimize the Maximal Growth Paradigm

In 2004, eminent domain was constitutionalized via an amendment and legislated via a revision to the Land Administration Law. Both amendments stated that the government could expropriate land for the public interest (公共利益) with compensation.¹⁴³ All the other legal rules that governed land confiscations remained the same. These old and new provisions were once again incorporated in the 2007 Property Law and other relevant laws.¹⁴⁴

The eminent domain institution, thus established, enabled and legitimized local governments, industrialists, and urban entrepreneurs to systematically transfer land from the rural-agricultural sector to the urban-industrial sector. One scholar estimated that as many as “88 million [rural residents] became landless between 1990 and 2008” and characterized China's development as a process of symbolic, material, and psychological “[v]iolence.”¹⁴⁵ After 2004 news media and scholarly writings continued to document government use of violence or threat of violence in land

¹⁴⁰ *Id.* art. 25, para. 3 of the 1998 Implementation Regulations did require the confiscating government to pay the compensation in full within 3 months after the upper government had approved the compensation plan. This, however, was no reassurance for villagers who were unhappy with the compensation. Even if a local government sought to comply with this requirement by offering to pay, accepting the government's money would mean foregoing any effort to obtain higher compensation.

¹⁴¹ Wu Zhongming (吴忠民), “*Xiaolu Youxian, Jiangu Gongping*” *Tifa Zai Renshi* (“效率优先, 兼顾公平”提法再认识) [Reconsider the Notion of “Prioritize Efficiency, Also Consider Equity”], *TIANJIN SHEHUI KEXUE* (TIANJIN SOC. SCI.) 53, 53 (2001).

¹⁴² *Id.*

¹⁴³ XIANFA, *supra* note 38, art. 10 (1982); 中华人民共和国土地管理法 [Land Administration Law of the People's Republic of China] (promulgated by the People's Government of Guangdong Province, 2004, effective Jan. 1, 1999), art. 2.

¹⁴⁴ Property Law of the People's Republic of China (promulgated by The State Council, Mar. 16, 2007, effective Oct. 1, 2007), art. 42.

¹⁴⁵ Sally Sargeson, *Violence as Development: Land Expropriation and China's Urbanization*, 40 *J. PEASANT STUD.* 1063, 1068, 1074 (2013).

confiscations; instances of uncompensated or under-compensated confiscations; as well as contentious protests, petitions, lawsuits, and strategic bargaining by residents facing demolitions.¹⁴⁶ Some families resisted government demolitions with innovative strategies that caught national and international media attention and won widespread moral support.¹⁴⁷ Overall, however, land conflicts, particularly confiscation and demolition disputes, were the primary cause of social strife and citizen petitions in China in the late 1990s and 2000s.¹⁴⁸

Why does the history of China's eminent domain institution matter? Uncovering that history between 1982 and 2004 is important in three ways. First, it corrects a popular misunderstanding that China did not have a formal

¹⁴⁶ For news reports, see Chengdu Jiang Chaiqian Zifen Shijian Dingxing Wei Baoli Kang Fa Sizhe Zhangfu Beijiu (成都将拆迁自焚事件定性为暴力抗法, 死者丈夫被拘) [Chengdu Characterizes Self-Immolation as Violent Obstruction of Law Enforcement, Deceased's Husband Arrested] PEOPLE'S DAILY, (Dec. 3, 2009, 8:38 AM), <http://house.people.com.cn/GB/10500222.html>; Tangfuzhen Shijian Chengguan Juzhang Fuzhi Jinnian Chaiqian Zifen Wuguan Wen Ze (唐福珍事件城管局长复职, 近年拆迁自焚无官问责) [Former Director of Urban Management Department in Tang Fuzhen Incident Returned to Original Position, No Officials Have Been Held Accountable for Demolition-Inflicted Self-Immolations in Recent Years], SINA (Apr. 8, 2010, 10:13 AM), <http://news.sina.com.cn/c/sd/2010-04-08/101320031324.shtml>; Qiao Long, *Three Peasants Self-Immolate*, RADIO FREE ASIA (Nov. 7, 2011), <https://www.rfa.org/english/news/china/fire-11072011185343.html>; Wang Xian (王娴), Beijing Zui Niu Dingzi Hu Panju Naoshi Qi Nian Fangguan Ju Xia Chaiqian Caijue (北京最牛钉子户盘踞闹市七年 房管局下拆迁裁决) [Beijing's Biggest Nail-House Remained in Noisy Downtown for Seven Years, Housing Management Bureau Issues Demolition Verdict], CHINA NAT'L RADIO (中广网) (Dec. 12, 2010, 12:46 PM), <https://news.qq.com/a/20101212/000609.htm>.

For scholarly writings, see Matthew S. Erie, *Property Rights, Legal Consciousness and the New Media in China: The Hard Case of the "Toughest Nail-House in History"*, 12 CHINA INFO. 35, 42–47 (2012) (detailing cases of inadequate compensation and citizens' strategic resistance and negotiations with the government); Ching Kwan Lee & Yonghong Zhang, *The Power of Instability: Unraveling the Microfoundations of Bargained Authoritarianism in China*, 118 AM. J. SOCIO. 1475, 1485–86 (2013) (noting Chinese citizens' strategic bargaining with the government); see generally Julia Chuang, *China's Rural Land Politics: Bureaucratic Absorption and the Muting of Rightful Resistance*, 219 THE CHINA Q. 649 (2014) (discussing juridical and ideological bargaining as a means to resolve land disputes between rural farmers and the Chinese government.); Pils, *supra* note 16 (detailing the Chinese government's use of violence or threat of violence).

¹⁴⁷ Andrew C. Mertha, *From 'Rustless Screws' to 'Nail Houses': The Evolution of Property Rights in China*, 53 ORBIS 233, 247 (2009); Steve Hess, *Nail-Houses, Land Rights, and Frames of Injustice on China's Protest Landscape*, 50 ASIAN SURV. 908, 920–25 (2010); YONGSHUN CAI, COLLECTIVE RESISTANCE IN CHINA: WHY POPULAR PROTESTS SUCCEED OR FAIL 88–89 (2010); Erie, *supra* note 146, at 41–48; CHRISTOPHER HEURLIN, RESPONSIVE AUTHORITARIANISM IN CHINA: LAND, PROTESTS, AND POLICY MAKING 57–61, 77–83 (2016).

¹⁴⁸ For statistics on expropriation-inflicted petitions and protests vis-à-vis all petitions and protests in China in the 2000s, see HEURLIN, *supra* note 147, at 56–57, 78–80, 83–84; LIU SHOUYING (刘守英), SHIMIAN ZHONGGUO TUDI WENTI (直面中国土地问题) [LAND ISSUES IN THE TRANSITIONAL CHINA] 70–72, 75–76, 77–80 (2013) Shouying Liu (刘守英), SHIMIAN ZHONGGUO TUDI WENTI (直面中国土地问题) [Land Issues in China's Urban-Rural Stage of Development], in 7 CHINA IN THE WORLD: THE FUNDAMENTAL DYNAMIC EFFECT ON REFORM AND OPENING IN CHINA 70–72, 75–80 (Binhong SHAO ed., 2020).

eminent domain institution until 2004 and shows that China had established a rudimentary, albeit incomplete, eminent domain institution by 1986. It would be wrong to deny this institution as eminent domain simply because it had a different name.

Second, the investigation challenges the popular understanding that China's industrialization and urbanization were undertaken without a formal property law system to regulate and operationalize these processes. We should not deny this institution as property law simply because it did not reflect classical liberal values.

Third, this history tells us that the Chinese development was not a monolithic, pre-determined process of primitive accumulation characterized by a plunder of agriculturalists and a consequent enrichment of capitalists. Rather, there were two competing models of development: one more equitable though less pro-GDP growth and the other more pro-GDP growth, but far less equitable. The 1980s saw the dominance of the first model. Owners of capital were able to obtain land, but at substantial costs, while displaced rural residents received financial compensation and guarantees of new housing, employment, and welfare.¹⁴⁹ Over the course of the 1990s, the first model lost out and the second model gained preeminence. Owners of capital were able to get land cheaper and faster.¹⁵⁰ In the meantime, displaced residents were subject to the whim of an increasingly pro-capital state and a market-centric economy it helped create. Ironically, economic historians suggest that the first model was indigenously Chinese while the second model was an influence of Western, particularly American, economic thinking.¹⁵¹ The intense dispossession, conflict, and inequality that the second model unleashed between the late 1990s and the 2000s would propel another paradigm shift in the 2010s, to curb the excessive exploitation of the poor and make development more equitable.¹⁵²

¹⁴⁹ See *supra* Part I, Section A.

¹⁵⁰ Industrial land was much cheaper than commercial-residential land. See Shitong Qiao, *supra* note 15, at 1699.

¹⁵¹ WEBER, *supra* note 72, at 3–4 (an intellectual history on how and why indigenous economic thought outcompeted popular Western economic thought and gained influence among the CCP leaders in the 1980s); STEVEN MARK COHN, *COMPETING ECONOMIC PARADIGMS IN CHINA: THE CO-EVOLUTION OF ECONOMIC EVENTS, ECONOMIC THEORY AND ECONOMICS EDUCATION, 1976-2016*, 1–3 (2017) (an intellectual history of mainstream economic thought in China, particularly how and why Western neoclassical economic thought has dominated the thinking of Chinese intellectual elites since the 1990s).

¹⁵² See *infra* Part IV, Section A.

II. STAGE AND CREATE URBAN DEVELOPMENT

Eminent domain allowed land to transform from rural-agricultural use to urban-industrial use. It said nothing about how much land or which area of land would change uses, or how the newly converted land would be developed and by whom to maximize GDP growth. The latter issues were determined by two property institutions: zoning and the commodification of urban property. Part II examines the role of these two institutions in China's urban and industrial development.

A. Complement Eminent Domain with Zoning

In 1984 the State Council issued the Urban Zoning Regulations (城市规划条例), introducing zoning as a mechanism to guide and govern China's urban development and expansion.¹⁵³ The Urban Zoning Regulations gave subnational governments the authority to go beyond the existing urban boundaries and draw an "urban zoning district" (城市规划区) that would encompass surrounding rural territories.¹⁵⁴ Given that all levels of government are seated in urban areas, this meant that a prefectural (municipal) government could annex (or turn) a mostly rural county into an urban district.¹⁵⁵ The next level down, a county government could annex a rural village into a neighboring urban township.¹⁵⁶ The power to annex rural territories into urban space was not a typical zoning power affecting only land use, as in the United States. It was a power to change land ownership from the rural collective, which is a self-governing body outside China's formal government system, to the government itself. As mentioned previously, this change of ownership was operationalized through land requisitions under the 1982 Regulations and its successors.¹⁵⁷

¹⁵³ Guo Fa, (城市规划条例) [Urban Zoning Regulations] (promulgated by the State Council People's Republic China, Jan. 5, 1984, effective Jan. 5, 1984) STATE COUNCIL PEOPLE'S REPUBLIC CHINA (repealed 1990). The Chinese text of this regulation is available at <https://zh.m.wikisource.org/zh-hans/%E5%9F%8E%E5%B8%82%E8%A7%84%E5%88%92%E6%9D%A1%E4%BE%8B> (last visited Sept. 16, 2021).

¹⁵⁴ *Id.* art. 29. This top-down approach to urban expansion is in stark contrast with the bottom-up approach to annexation (and incorporation) in the United States.

¹⁵⁵ China has five tiers of government: central, provincial, prefectural (or municipal if the city has several urban districts), county (or urban district, or municipal if the city has no subsidiary urban districts), and township (or urban neighborhood block). The village is not a level of government officially, although village governance is densely affected by township and higher governments. XIANFA art. 1, 30, 111 (1982), http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm.

¹⁵⁶ Guo Fa (城市规划条例) [Urban Planning Regulations], art. 29. (promulgated by the State Council, 1984), <https://zh.m.wikisource.org/zh-hans/%E5%9F%8E%E5%B8%82%E8%A7%84%E5%88%92%E6%9D%A1%E4%BE%8B> (last visited Sept. 12, 2022).

¹⁵⁷ *See supra* Part I, Section A.

Urban development and expansion through the urban zoning district marked the beginning of China's economic policy which favored urban over rural development. This model survived multiple revisions and new legislation and continues to be China's urbanization model to this day. For example, in 1989 China enacted its first zoning legislation, the Urban Zoning Law (城市规划法).¹⁵⁸ This law further delineated city-based governments' power to enact "urban zoning districts" and expand into rural territories.¹⁵⁹ This power was further codified in the 1994 Urban Real Estate Administration Law (hereinafter the 1994 UREAL).¹⁶⁰ In 2008, the Chinese legislature enacted the Urban and Rural Zoning Law to coordinate and harmonize rural and urban spatial development.¹⁶¹ However, this law (including its subsequent revisions) did not alter the preeminence of urban zoning and spatial expansion vis-à-vis rural development.¹⁶²

The model of expansionist urban development through zoning and eminent domain greatly benefited local governments. In the United States, when an area industrializes or urbanizes, the government does not benefit directly when land changes hands from an agriculturalist to a developer. In China, the government is at once the planner, the buyer, and the seller of developable land. This allows municipal and county governments to reap enormous financial gains from planning, originating, and transferring land use rights to private developers.¹⁶³ The 1994 UREAL and subsequent laws and regulations required that the transfer fees collected by the government be

¹⁵⁸ (城市规划法) [Urban Planning Law] (promulgated by Standing Committee of the National People's Congress Dec. 26, 1989, effective Apr. 01, 1990). The Chinese text of this regulation is available at http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004524.htm (last visited Sept. 16, 2021).

¹⁵⁹ *Id.* art. 3, para. 2. Under the new law, an urban zoning district included the existing urban area; suburban areas on the outskirts of the city; and areas that were far away from the city but that were necessary for the city's functioning and development. The last category included infrastructure lands such as airports, water sources, transportation nodes, electricity and telecommunication sites, and water facilities, as well as scenic and tourist sites. 林汉雄 (Lin Hanxiong), 1989 年关于《中华人民共和国城市规划法(草案)》的说明 (1989 Nian Guanyu Zhonghua Renmin Gongheguo Chengshi Guihua Fa Cao'an de Shuoming) [1989 Explanations Regarding the Bill of the People's Republic of China Urban Zoning Law] (represented to the 10th Session of the 7th National People's Congress Standing Committee, Oct. 25, 1989) available at <http://www.ifagui.com/falv/154787804193279.html>.

¹⁶⁰ Chengshi Fangdichan Guanli Fa (中华人民共和国城市房地产管理法) [1994 Urban Real Estate Administration Law] (promulgated by Eighth Session of Standing Committee of the Eighth People's Congress, July 5, 1994). The text of this law is available at <https://leap.unep.org/countries/cn/national-legislation/urban-real-estate-administration-law-peoples-republic-china> (last visited Jun. 5, 2021). Article 8 of the law provided that if collective-owned land is within an urban zoning district, after having been lawfully confiscated and converted to state-owned land, the use rights to such land can then be transferred at a price (translated into English from Mandarin).

¹⁶¹ [Urban and Rural Zoning Law of 2008] (promulgated by Standing Committee of the Tenth Nat'l People's Cong., Oct. 27, 2007, effective Jan. 1, 2008). The English text of this law is available at http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474983042193.htm (last visited Feb. 24, 2022).

¹⁶² This was to change in 2019. See *infra* Part IV, Section A.

¹⁶³ For urban land use rights, see *infra* Part II, Section B.

used to build urban infrastructure or to foster arable land development.¹⁶⁴ This institution created a financial avenue for local governments to improve the attractiveness of urban areas for existing residents and prospective investors and, to some extent, spread the benefits of development to rural areas.¹⁶⁵

Zoning law not only operationalized urban development and expansion, but also proactively weighed and determined the relative importance of competing interests of local governments, developers, industrialists, peri-urban villages and residents, and ordinary residents of the region. More specifically, where the new urban boundary lay determined whether a rural family could continue their rural lifestyle and whether a village would become an urban neighborhood.¹⁶⁶ The magnitude of urban expansion determined how much profit developers could make, how many enterprises could open business (and at what costs), and how much revenue the government could collect from land sales and taxation. Lastly, how much land was zoned for what use determined the number of jobs created; the price of homes; the condition of public transportation; and the access to schools, hospitals, parks, and grocery stores for all residents in the region.¹⁶⁷

B. Commodify Urban Property

While the property rights of peri-urban residents were rendered insecure and destroyed through eminent domain, the property rights of industrialists and urban developers were created from scratch and protected through Constitutional amendments, legislative revisions, and new laws and regulations.

¹⁶⁴ 1994 UREAL, *supra* note 160, at art. 18 (for building urban infrastructure and land development); 1998 *Land Administration Law*, *supra* note 66, at art. 55; 中华人民共和国土地管理法 [Land Administration Law of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 28, 2004), art. 55, Standing Comm. Nat'l People's Cong. Gaz. (for arable land development) <https://www.cecc.gov/resources/legal-provisions/land-administration-law-of-the-peoples-republic-of-china-0>.

¹⁶⁵ Despite the law requiring land transfer fees be used for arable land development, local governments found ways to spend money on urban infrastructure and minimize spending on arable land development. Hu, *supra* note 15, at 270 (statistics on land transfer revenue spent on arable land development versus urban development between 2008 and 2010).

¹⁶⁶ Chen Yuefeng (陈越峰), *Woguo Chengshi Guihua Zhengdangxing Zhengcheng Jizhi: Hezuo Juece yu Quanli Fenxiang—Yi Shenzhen Shi Chengshi Guihua Weiyuanhui wei Duixiang de Fenxi* (我国城市规划正当性证成机制：合作决策说权力分享—以深圳市城市规划委员会为对象的分析) [*The Legitimacy Vindication Mechanism of China's Urban Planning: Cooperative Decision-Making and Power Sharing—A Study of Shenzhen Municipality Urban Planning Committee*], 12 XINGZHENGFA LUNCONG [ADMINISTRATIVE LAW REVIEW] 380, 381 (2009).

¹⁶⁷ For an excellent case study of how a municipal government weighed these competing interests through zoning law, how the weighing of competing interests threatened the legitimacy of its zoning power, and how the government responded to these challenges, *see id.* at 394.

When the Chinese government opened cities on the east coast to private investment as special economic zones (SEZs) in the 1980s, transferring state-owned or collective-owned land for use by private entrepreneurs was against the law.¹⁶⁸ Yet, governments of Shenzhen and other SEZs experimented with “leasing” land use rights to industrialists and developers, with tacit approval by the central government.¹⁶⁹

By 1988, the direction of the central government’s reform was clear—to commodify land for urban and industrial development. This direction was crystallized in a Constitutional amendment in 1988, which legalized market transfers of *land use rights* (土地使用权).¹⁷⁰ Given that the Chinese Constitution is not justiciable, the reform was further legislated via a revision to the Land Administration Law at the end of 1988.¹⁷¹ Two years later, the State Council operationalized transfers of urban construction land use rights.¹⁷²

The 1994 UREAL further recognized new forms of property rights. It authorized the municipal and county governments to originate and transfer land use rights to developers via auctions, bids, or contractual negotiations.¹⁷³ All transfers were to be carried out via a land use right transfer contract.¹⁷⁴

In some ways these land use rights resembled a commercial term-of-years leasehold in American law. They had a specific expiration date that was agreed upon at the time of conveyance.¹⁷⁵ The legal protection against the owner’s breach took a contractual approach similar to that of a modern American leasehold.¹⁷⁶ If a developer had paid the transfer fee but the government failed to convey the land as specified in the contract, the developer was entitled to rescind the contract and ask the government to return the fee and pay for damages.¹⁷⁷ The only scenario in which the

¹⁶⁸ (城市规划条例) [1984 Urban Planning Regulations] (promulgated by the State Council, Jan 5, 1984), art. 36–38, <https://zh.m.wikisource.org/zh-hans/%E5%9F%8E%E5%B8%82%E8%A7%84%E5%88%92%E6%9D%A1%E4%BE%8B>; 1986 LAL, *supra* note 59, at art. 2 para.2 (prohibiting sales, leases, and other transfers of land or land use rights). http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383939.htm.

¹⁶⁹ Hao Tiechuan (郝铁川), *Lun Liangxing Weixian* (论良性违宪) [*Benign Constitutional Violations*], 18 FAXUE YANJIU [CHINESE JOURNAL OF LAW] 89, 89 (1996).

¹⁷⁰ XIANFA, *supra* note 38, art. 10, para. 3.

¹⁷¹ The revision stipulated: “Use rights to state-owned and collective-owned land can be transferred according to the law; the state shall establish a system in which state-owned land use rights can be acquired at a price.” (中华人民共和国土地管理法) [Land Administration Law of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec 29, 1988), art. 2, § 3–4, STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. [lawinfochina.com/Display.aspx?lib=law&Cgid=4163#](http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=4163#)

¹⁷² Romanization Needed, (城镇国有土地使用权出让和转让暂行条例) [Temporary Regulations on the Assignment and Transfer of Use Rights to State-Owned Urban Land] (promulgated by Order No. 55 of State Council, May 19, 1990), art. 1–2.

¹⁷³ The 1994 UREAL, *supra* note 160, art. 11–12.

¹⁷⁴ *Id.* art. 14.

¹⁷⁵ *Id.* art. 7.

¹⁷⁶ *Id.* art. 16.

¹⁷⁷ *Id.*

government was allowed to repossess the land before the term expired was repossession for the public interest (eminent domain).¹⁷⁸ If this happened, the government was obligated to compensate the use right holder.¹⁷⁹

Three features made the Chinese urban land use right a strong property right. First, land use rights were freely alienable.¹⁸⁰ For a (partially) developed parcel, the developer could then sell the structures on the land as privately-owned property (same as a fee simple) along with the land use rights for the remaining term.¹⁸¹ Second, the Chinese urban land use rights could as a matter of law be used as capital or shares to establish or join an enterprise,¹⁸² or as collateral to obtain bank loans.¹⁸³ Third, the Chinese government had a strong obligation to renew the rights when they expired, unless the government needed to repossess the land for the public interest.¹⁸⁴

In other words, in addition to recognizing private ownership for built structures, the 1994 UREAL created a functional equivalent to private ownership for urban construction land.¹⁸⁵ These land use rights would last decades and could be renewed by default.¹⁸⁶ They were freely alienable and capitalizable.¹⁸⁷ These rights were protected from encroachment by other entities or individuals.¹⁸⁸ They were protected from expropriation by the government except for the public interest and with compensation.¹⁸⁹ By commoditizing urban property in the form of private ownership and long-term, presumptively renewable, fully alienable use rights secure (or as secure as possible) from arbitrary government confiscation, the 1994 UREAL helped establish a real estate market to facilitate industrial and urban development.

This reform vindicates the commonsense belief that protection of private property rights creates economic growth. However, what commonsense does not recognize is that wealth maximization does not or, arguably, cannot, require that *all forms* of property or *all parties'* property rights be commoditized and protected. In the Chinese development context, *only the property that was used for urban and industrial development* was recognized and commoditized as private property, and legal protection of private property was for *the new users* of urban real estate: developers, industrialists, businesses, and urban homebuyers. In the Chinese government's mind,

¹⁷⁸ *Id.* art. 19.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* art. 38.

¹⁸¹ *Id.* art. 31, 42.

¹⁸² *Id.* art. 27, 47.

¹⁸³ *Id.* art. 31.

¹⁸⁴ *Id.* art. 21.

¹⁸⁵ Clarke, *supra* note 22, at 904.

¹⁸⁶ The 1994 UREAL, *supra* note 160, art. 21 & 22.

¹⁸⁷ *Id.* art. 9 & 19.

¹⁸⁸ *Id.* art. 5.

¹⁸⁹ *Id.* art. 19.

urban real estate was the spatial, material, and financial bases for China's development, and *the new users* were the agents of that development. Rural property was *not* commoditized, and eminent domain made property rights in peri-urban areas more *insecure*.¹⁹⁰

While it is an empirical question to what extent the 1994 UREAL was enforced,¹⁹¹ the law *structurally* provided local governments with the legal power to create a real estate market exclusively for the new users of productive property—industrialists, developers, private businesses, and an emerging urban middle class. Along with other laws and institutions regulating market transactions, the 1994 UREAL further empowered these new users to use the real estate market to allocate resources following a profit-maximizing market logic. If and to the extent these actors wanted to find a legal, and relatively clear, predictable, and safe way to pursue profits and conveniences offered by urban and industrial development, the UREAL gave them just that.

III. POWER INDUSTRIALIZATION

By China's industrialization, I refer particularly to the historical period between 1978 when China began its "reform and opening up" policy (改革开放) and the 2000s. This period of China's industrialization was characterized by: (1) low-price, labor-intensive, and relatively low-tech manufactured goods; (2) produced by migrant workers from the Chinese countryside; (3) who were poorly paid (though better paid than working in agriculture in their home village); and (4) who were excluded from socioeconomic entitlements granted to urban citizens in their place of work.¹⁹² According to Chinese government statistics, in 1980, China had 20

¹⁹⁰ I hope it is clear to the reader that my account of China's development is a descriptive one. By pointing out that China's development relied on systemic weakening and destruction of peri-urban property rights, I am not arguing that this is a good approach. My goal is to explain the benefits and harms that this approach brought to China and Chinese people, and how these benefits and harms in turn propelled further changes to this approach. For subsequent changes to this approach, *see infra* Part IV, Sections A & B.

¹⁹¹ Clarke, *supra* note 22, at 905 ("A careful reading suggests that in virtually all cases, the people being displaced are on allocated [free] land, not granted [purchased] land subject to a long-term LUR [land use right] So far, it seems that LURs have at least a kind of 'actuarial immunity' from expropriation: it is very unlikely to happen. Thus, although LURs exist in a regime that takes the form of state ownership, they perform the function of offering security of tenure.").

¹⁹² On the contributions migrant workers make to China's industrialization and their socio-legal status in reform-era China, *see generally* MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS, AND THE STATE* (2017); ARIANNE M. GAETANO, *OUT TO WORK: MIGRATION, GENDER, AND THE CHANGING LIVES OF RURAL WOMEN IN CONTEMPORARY CHINA* (2015); LESLIE T. CHANG, *FACTORY GIRLS: FROM VILLAGE TO CITY IN A CHANGING CHINA* (2008); LI ZHANG, *STRANGERS IN THE CITY: RECONFIGURATIONS OF SPACE, POWER, AND SOCIAL NETWORKS WITHIN CHINA'S FLOATING*

million rural citizens working in off-farm jobs in or outside their home county.¹⁹³ In 2010, China had over 153 million rural citizens working outside their home county, and an additional 89 million doing off-farm jobs inside their home county.¹⁹⁴ Migrant workers power China's train of industrialization.

A. Externalize the Costs of Social Reproduction

For better or worse, the right to exclude is an essential component of property rights.¹⁹⁵ At the societal level, property law allocates scarce resources to some groups and individuals to the exclusion of other groups and individuals. These scarce resources include conventional objects of property such as land, water, and minerals. In the modern era, depending on the jurisdiction, they may also include socioeconomic entitlements such as employment, unemployment, disability, and pension benefits; and affordable housing, education, childcare, and health care. This Section focuses on these non-physical socioeconomic entitlements conferred or compelled by the government. For analytical purposes, this Article describes these socioeconomic entitlements as social property rights and describes laws that allocate these entitlements to some groups to the exclusion of others as property law.¹⁹⁶

POPULATION (2001); DOROTHY J. SOLINGER, *CONTESTING CITIZENSHIP IN URBAN CHINA: PEASANT MIGRANTS, THE STATE, AND THE LOGIC OF THE MARKET* (1999).

¹⁹³ Li Zhou (李周), *Nongmin Liudong: 70 Nian Lishi Bianqian yu Weilai 30 Nian Zhanwang* (农民流动: 70 年历史变迁与未来 30 年展望) [*Farmers on the Move: History of the Past 70 Years and Outlook for the Next 30 Years*], *ZHONGGUO NONGCUN GUANCHA* [CHINA RURAL SURVEY], 4 (2019).

¹⁹⁴ Guojia Tongji Ju, *2010 Nian Guomin Jingji heShehui Fazhan Tongji Gongbao* (2010 年国民经济和社会发展统计公报) [*2010 National Economy and Social Development*], NATIONAL BUREAU OF STATISTICS OF PEOPLE'S REPUBLIC OF CHINA, (2011), http://www.stats.gov.cn/tjsj/tjgb/ndtjgb/qgndtjgb/201102/t20110228_30025.html.

¹⁹⁵ *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072–73 (2021); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

¹⁹⁶ Property rights are economic rights. Despite efforts to limit and formalize the scope of subject matters that can be categorized as property, it is not conceptually controversial (though at times maybe normatively controversial) to include as property rights non-physical, non-rivalrous, and non-market-traded resources. For literature that discusses types of property rights outside the fee simple landownership ideal type, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 740–42 (1964) (government-issued licenses, franchises, social benefits, etc.); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (non-market-traded sentimental objects, etc.); JAMES W. ELY JR. THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS, 161 (3d ed. 1992) (contract rights, anti-trust regulations, etc.); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716 (1993) (Whiteness); Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 341 (1999) (various intellectual property rights); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1800, 1818, 1838–39 (2013) (welfare, community cohesion, immigration status, etc.); LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 408–09 (2019) (education). For efforts to limit and formalize the scope of property rights, see generally Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691,

In China, the master legal regime that determines citizens' access to social property rights is the system of Household Registration, or *huji* in Chinese, and somewhat inaccurately, *hukou* in English.¹⁹⁷ In China, *hukou* is a rigid place-based citizenship status. The default *hukou* of rural residents is their (or their husband's or father's) native village.¹⁹⁸ The default *hukou* of urban residents is their (or their parents') native city.¹⁹⁹ The *hukou* system ties citizens' access to social property rights to their *hukou* status.²⁰⁰ Given that providing social property rights is the responsibility of the local government and that it is extremely difficult for citizens to change their *hukou*, the *hukou* system essentially institutionalizes and perpetuates regional and rural/urban inequality across time, space, and generations.²⁰¹ The content of social property rights controlled by the *hukou* system varied overtime. During the Mao era (1949-1976), markets were prohibited, and social property rights included access to essential resources such as jobs, rice/flour, cooking oil, meat, eggs, sugar, fabrics, and in urban China, also housing, pensions, and health care.²⁰² Given the virtual impossibility to change one's *hukou* or to acquire essential resources outside the state system, the *hukou* system effectively prohibited rural Chinese citizens from traveling, let alone working or settling in more prosperous urban areas.²⁰³ In combination with mandatory grain targets and low grain prices set by the state, the *hukou* system secured a cheap labor force for agricultural production, and enabled the Chinese state to transfer food and raw materials from rural China to fund urban industrial development.²⁰⁴ For this reason, the *hukou* system is described by some scholars as "internal colonialism."²⁰⁵

1698 (2012); Thomas W. Merrill & Henry E. Smith, *The Architecture of Property*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY (Hanoch Dogan & Benjamin C. Zipursky eds.) 134–54 (2020).

¹⁹⁷ The *hukou* system was established in 1958 in the Household Registration Regulations, passed by the Standing Committee of the National People's Congress, and remains effective to this day. For a book-length analysis of China's *hukou* system as a form of institutional exclusion, see FEI-LING WANG, ORGANIZING THROUGH DIVISION AND EXCLUSION: CHINA'S HUKOU SYSTEM (2005).

¹⁹⁸ (中华人民共和国户口登记条例) [Regulations on Household Registration of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 9, 1958), art. 2, 1958 STANDING COM. NAT'L PEOPLE'S CONG. Gaz [hereinafter 1958 Household Registration Regulations]

¹⁹⁹ *Id.*

²⁰⁰ FEI-LING WANG, *supra* note 197, at 11, 22–23.

²⁰¹ 1958 Household Registration Regulations, *supra* note 198, at art. 10; WANG, *supra* note 197, at 11, 22–23, 44–45. For a classical exposition of the cumulative effects of unequal distribution of socioeconomic entitlements on regional inequality, see GUNNER MYRDAL, ECONOMIC THEORY AND UNDERDEVELOPED REGIONS 23–38 (1957).

²⁰² R.P. Sinha, *Chinese Economic Performance*, 30 WORLD TODAY 33, 38–39 (1974); WANG, *supra* note 197, at 44–45.

²⁰³ FEI-LING WANG, *supra* note 197, at 86–89.

²⁰⁴ Wang Yuesheng (王跃生), *Zhongguo Dangdai Renkou Qianyi Zhengce Yanbian Kaocha: Lizu yu 20 Shiji 50–90 Niandai* (中国当代人口迁移政策演变考察—立足于 20 世纪 50–90 年代) [*A Study of the Policy Evolution Regarding Population Migration in Contemporary China: From the 1950s to the 1990s*], 27 J. RENMIN U. CHINA 103, 105 (2013).

²⁰⁵ See, e.g., Ruskola, *supra* note 21, at 393.

In short, the *hukou* system of the Mao era exercised property law's exclusion function. Rural citizens were both physically excluded from urban spaces and materially excluded from state-conferred social property rights.²⁰⁶

In the era of reform and opening up, the *hukou* system was revised to perform a new function. As newly built factories on the east coast needed workers, the Chinese government loosened the *hukou* system to allow citizens to work away from home as long as they applied for a temporary residence certificate (暂住证) from the government of the place of work.²⁰⁷ The loosening of obstacles to physical movement unleashed a national wave of rural-to-urban migration. By 1988, China had 86 million rural citizens working off-farm jobs in or outside their home county.²⁰⁸ The number grew to almost 152 million in 2000.²⁰⁹ It was in this context that the phenomenon of *nongminggong* ("farmer-workers," or "migrant workers" in English) was born. Separating the rural status from the non-rural job, the migrant worker is an institutional child of China's *hukou* system.

The loosened *hukou* system proved tremendously beneficial for China's industrial and urban development. On the one hand, the selective decoupling of employment opportunities from one's *hukou* has allowed rural laborers to work in the city, providing urban-industrial China with an abundant labor force.²¹⁰ On the other hand, the continued coupling of social benefits to one's *hukou* has precluded migrant workers from accessing socioeconomic entitlements enjoyed by urban residents in their place of work, ensuring that the vast rural labor force remains cheap for urban-industrial China.²¹¹ The *hukou* system has also enabled coastal and urban governments to limit social property rights to local urban *hukou*-holders and helped create China's first urban middle class.²¹² The results have been less than ideal for migrant workers. They are physically in the city and are key contributors to the city's

²⁰⁶ The *hukou* system's rigid separation of socioeconomic benefits resembles pre-1834 English Poor Laws under the Act of Settlement 1662, which respectively relegated poor relief responsibility to local parishes and maximally restricted poor people's freedom to move from their native parish to more affluent parishes. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 86, 90–92, 289–90 (3d ed. 2001). Act of Settlement of 1662, (REGNAL YEARS GO HERE) c. I (Eng. And Wales), <https://www.workhouses.org.uk/poorlaws/1662act.shtml> (last visited Sep. 12, 2022).

The *hukou* system's spatial separation during the Mao era also resembles Jim Crow laws and racial zoning in the United States between the Civil War and Civil Rights eras, except that in the latter case the basis for separation was race rather than rural/urban status. *Plessy v. Ferguson*, 163 U.S. 537 (1892); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 40–44 (2017).

²⁰⁷ The system of temporary residence certificates was created in Romanization needed (关于城镇暂住人口管理的暂行规定) [Temporary Stipulations on the Management of Temporary Populations in Cities and Towns] (promulgated by the Chinese Ministry of Public Security, July 13, 1985).

²⁰⁸ Li Zhou, *supra* note 193, at 5.

²⁰⁹ *Id.*

²¹⁰ FEI-LING WANG, *supra* note 197, at 120.

²¹¹ *Id.*

²¹² *Id.* at 127–37.

prosperity, but they are institutionally outside the city and are excluded from the city's social benefits.

Scholars have described the Chinese phenomenon of migrant workers as an “incomplete proletarianization” of the rural workforce.²¹³ In classical Marxist theory, the proletariat is paid a subsistence wage, which includes not only the sum of money necessary to sustain the worker, but also an additional sum of money necessary to sustain the worker's dependent family.²¹⁴ Incomplete or semi-proletarianization occurs when workers are paid a below-subsistence wage.²¹⁵ Notable examples of incomplete or semi-proletarians in America include cottagers in eighteenth-century Pennsylvania, sharecroppers in the postbellum South, and immigrant farmworkers today.²¹⁶ In the Chinese migrant worker context, the proletarianization is incomplete because the *hukou* system allows urban employers to pay migrant workers a below-subsistence wage for life in urban China. While the wage is higher than what the migrant worker could earn on the farm back home, the wage is below-subsistence in two respects. First, it does not fully sustain life in the city for the migrant worker. Thus, when the migrant worker gets ill, old, or disabled, he or she returns to the rural home, and a young, able-bodied migrant worker takes his/her place. Second, the wage cannot sustain life in the city for the migrant worker's dependents. Thus, migrant workers have to endure separation from their family back home. Essentially, the *hukou* system allows urban China to externalize the costs of social reproduction onto rural China.

B. Skeletal Social Protection

It is one matter for the *hukou* system to authorize China's urban economy to externalize the costs of social reproduction onto rural communities. It is another matter for rural communities to find ways to shoulder those costs. Rural land tenure is key in the latter regard. According to Chinese property law, urban land is owned by the state, but private entities and individuals can obtain long-term land use rights either through free administrative allocation (for public entities) or through purchase (for private

²¹³ Ngai Pun & Huilin Lu, *Neoliberalism, Urbanism and the Plight of Construction Workers in China*, 1 WORLD REV. POL. ECON. 127, 133–34 (2010); Mark Selden & Wu Jieh-min, *The Chinese State, Incomplete Proletarianization and Structures of Inequality in Two Epochs*, 9 ASIA-PAC. J.: JAPAN FOCUS 1, 1 (2011), <https://apjjf.org/2011/9/5/Mark-Selden/3480/article.html>.

²¹⁴ KARL MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 21 (Martin Milligan ed. & trans., Dover Publications, Inc. 2007) (1961).

²¹⁵ For a succinct explanation of why semi-proletarianization is desirable in a capitalist economy and how it sustains itself, see IMMANUEL WALLERSTEIN, HISTORICAL CAPITALISM 26–27, 39 (1983).

²¹⁶ ALLAN KULIKOFF, THE AGRARIAN ORIGINS OF AMERICAN CAPITALISM 7 (1992); SETH M. HOLMES, FRESH FRUIT, BROKEN BODIES: MIGRANT FARMWORKERS IN THE UNITED STATES 12–13 (2013) (analyzing how the United States is able to pay its migrant workers low wages by externalizing the costs of social reproduction onto the countries that the migrant workers come from).

actors).²¹⁷ Rural land is owned by the rural collective (normally the village), but individual households have free, long-term land use rights—including rights to a residential plot—through village-wide land distribution based on household size.²¹⁸ While urban land use rights and homeownership can be permanently transferred to another party, rural land use rights and homeownership cannot; the latter are *hukou*-based socioeconomic entitlements.²¹⁹

Chinese scholars have long realized the dual function of rural land; that it is *both* a means of production, the legal-regulatory logic of which is utilitarian wealth maximization, *and* a means of social security, the legal-regulatory logic of which is egalitarianism and de-commodification.²²⁰ In China, liberal(-leaning) scholars advocate private landownership or, at the very least, long-term freely alienable and mortgageable land use rights (a functional equivalent to private ownership) for rural Chinese citizens.²²¹ Left(-leaning) scholars advocate for the legal status quo, on the ground that rural land serves a social welfare function, is a useful supplement to market-based wealth distribution, and is a crucial alternative when the market avenue fails for particular rural citizens.²²² For this reason, some scholars go so far

²¹⁷ 1986 LAL, *supra* note 59, art. 8; The 1994 UREAL, *supra* note 160, art. 3, 8, 23, 24, 42.

²¹⁸ Tudi guanli fa (土地管理法) [2019 Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 26, 2019, effective Jan. 1, 2020) art. 9, 11 NAT'L PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, <http://www.npc.gov.cn/npc/c30834/201909/d1e6c1a1ecc345eba23796c6e8473347.shtml>.

²¹⁹ *Id.* art. 62.

²²⁰ Wen Tiejun (温铁军), *Weihe Woguo Buneng Shixing Tudi Siyuhua* (为何我国不能实行农村土地私有化) [*Why China Cannot Implement Rural Land Privatization*], HONGQI WENGAO (红旗文稿) [RED FLAG MANUSCRIPT], (Sept. 28, 2010, 3:27 PM), <https://finance.ifeng.com/news/special/xintugai/20100928/2663908.shtml>; He Xuefeng (贺雪峰), *Nongye Wenti haishi Nongmin Wenti?* (农业问题还是农民问题) [*An Agricultural Issue or a Peasant Issue?*], SHEHUI KEXUE (SOC. SCI. J.) (July 24, 2015), <http://www.wywxwk.com/Article/sannong/2015/07/348303.html>; Han Song (韩松), *Nongdi Shebao Gongneng yu Nongcun Shebao Zhidu de Peitao Jianshe* (农地社保功能与农村社保制度的配套建设) [*Rural Land's Social Security Function and the Appurtenant Construction of a Rural Social Security System*], FAXUE (L. SCI.) (2010).

²²¹ See Wang Keqin, *Restoring Private Ownership of Rural Lands to Safeguard the Basic Rights of Farmers*, in *CONFRONTING DISCRIMINATION AND INEQUALITY IN CHINA: CHINESE AND CANADIAN PERSPECTIVES* 71, 86, 88–89, 91, 98 (Errol P. Mendes & Sakunthala Srighanthan eds., 2009) (advocating for private ownership); Qin Hui (秦晖), *Diquan Gui Nong Hui Buhui Cujin Tudi Jianbing* (地权归农会不会促进土地兼并?) [*Will Returning Land Rights to Farmers Encourage Land Consolidation?*], JINGJI GUANCHA BAO (THE ECONOMIC OBSERVER) (Aug. 30, 2006, 9:35 AM), <http://news.sina.com.cn/c/pl/2006-08-30/093510869571.shtml> (advocating for private landownership); Biliang Luo & Bo Fu, *The Farmland Property Rights Deformity: The History, Reality and Reform*, 1 CHINA AGRIC. ECON. REV. 435, 450–54 (2009) (advocating for functional equivalents to private ownership); Peking University China Center for Economic Research Comprehensive Project Team (北京大学国家发展研究院综合课题组), *Huanqu an Funeng—Chengdu Tudi Zhidu Gaige Tansuo de Diaocha Yanjiu* (还权赋能—成都土地制度改革探索的调查研究) [*Returning Rights and Granting Functions—A Study of Chengdu's Land System Reform Initiatives*], GUOJI JINGJI PINGLUN (国际经济评论) [INT'L ECON. REV.], no. 2, 2010 (advocating for functional equivalents to private ownership).

²²² Wen, *supra* note 220; He, *supra* note 220.

as to suggest that the rural-urban dual model created by the *hukou* system should be kept because it safeguards the social welfare function of rural land tenure and limits the power of capital in the countryside.²²³

From a property and development perspective, China's rural land law allows—and compels—rural communities to shoulder the costs of social reproduction by making sure that:²²⁴

- (1) rural land provides basic food security for China,
- (2) rural land employs (even if not fully) a reserve labor force for the urban economy and a labor force that cannot be absorbed by the urban economy, and
- (3) rural land sustains the most basic needs of a rural population that reproduces labor for China in the future.

It is for these reasons that China's rural property system enjoys strong social support in rural China.²²⁵ Peter Ho observes:²²⁶

China's rural land-lease system's role as an institution for the distribution of social security services, rather than for the distribution of land as a commodity, thus touches at the heart of the credibility [of the system in the eyes of rural Chinese citizens].

Between the 1980s and the 2000s, property law made China's industrialization possible. A dualist allocation of social property rights through the *hukou* system and a non-capitalist rural land tenure provided a cheap and versatile supply of labor to power China's industrial development. These institutional designs enabled urban economies to externalize the costs of social reproduction to cheapen the industrialization process and forced as well as enabled rural communities to shoulder these costs. The multi-function property laws resemble a Polanyian double movement: when the market subsumes an entire society to its ruthless law of exploitation and destruction, social and political actors find ways to establish a counter movement to provide basic (though inadequate) social protection and make the destruction more bearable.²²⁷

The costs to rural communities and citizens of this property system were enormous. The heavy tax burdens; exodus of young, more-skilled labor force; and lack of government funding resulted in poor schools, a non-existent rural health care system, the feminization and more frequently aging of the

²²³ See, e.g., He Xuefeng (贺雪峰), *Lun Zhongguoshi Chengshihua yu Xiandaihua Daolu*, (论中国式城市化与现代化道路) [*Path to Urbanization and Modernization: Chinese Style*], No. 1 ZHONGGUO NONCUN GUANCHA (CHINA RURAL OBSERVER) 5–6 (2014).

²²⁴ *Id.* at 6; Peter Ho, *The 'Credibility Thesis' and Its Application to Property Rights: (In)Secure Land Tenure, Conflict and Social Welfare in China*, 40 LAND USE POL'Y 13, 14 (2014).

²²⁵ Ho, *supra* note 224, at 22 (survey of 1140 farm households in 24 provinces).

²²⁶ *Id.* at 17.

²²⁷ POLANYI, *supra* note 206.

agricultural workforce, and an evisceration of community vitality.²²⁸ By the turn of the century, rural poverty had been so severe and rural vitality so eviscerated that one local official wrote passionately to the then premier Zhu Rongji: “Rural China is so miserable; rural citizens are so poor; agricultural is so endangered” (农村真苦, 农村真穷, 农业真危险).²²⁹ The letter ignited a national policy discussion and defined China’s rural challenge as the “three rurals” problem (rural China, rural citizens, and agriculture).²³⁰ The situation was untenable. Rural China was on the edge of collapse—or insurrection.

IV. SHIFT PARADIGM BACK TO MORE EQUITY

Around 1980, the CCP and the Chinese government initiated a national rural land reform called the Household Responsibility System (HRS). HRS privatized state and collective farming of the Mao era. Land in rural villages was allocated to individual households on an egalitarian basis and could be readjusted to accommodate household demographic changes.²³¹ HRS created hundreds of millions of small household farms, incentivized agricultural production, lifted rural Chinese out of starvation, spearheaded China’s economic growth in the reform era, and created one of the most egalitarian distributions of rural land in the world.²³²

However, by the turn of the century, rural China was in grave difficulty. The Chinese state had been prioritizing urban and coastal development and

²²⁸ For contemporaneous accounts of rural plight, *see generally*, CAO JINGQING (曹锦清), *HUANGHE BIANSHANG DE ZHONGGUO* (黄河边上的中国), [CHINA ALONG THE YELLOW RIVER: REFLECTIONS ON RURAL SOCIETY] (2000); LI CHANGPING 李昌平, *WO XIANG ZONGLI SHUO SHIHUA*, (我向总理说实话) [I AM TELLING THE PREMIER THE TRUTH] (2002); CHEN GUIDI & WU CHUNTAO (陈桂棣、吴春桃), *ZHONGGUO NONGMIN DIAOCHA*, (中国农民调查) [A REPORT ON RURAL CHINESE CITIZENS] (2003). Both Cao’s and Chen & Wu’s books have been translated into English and published outside of China.

²²⁹ Li Changping (李昌平), *Zhi Zongli de Yi Feng Xin*, (至总理的一封信) [A Letter to Premier] (Mar. 2000).

²³⁰ Li Chenglin (李成林), *Nongye Xiandaihua yu Sannong Wenti—Fang Zhongguo Xiangcun Guihua Shiji Yuan Yuanzhang Li Changping* (农业现代化与三农问题—访中国乡村规划设计院院长李昌平) [Agricultural Modernization and the “Three Rurals” Problem—An Interview with Dean of China Academy of Rural Planning and Design Li Changping], 14 *DALIAN GANBU XUEKAN* (J. DALIAN OFF.) 21 (2014). After his letter and participation in national discussion on rural issues, Li Changping joined academia and became a leading expert on rural China.

²³¹ For a detailed account of the HRS both in the state-farm system and in ordinary villages, *see* Hu, *supra* note 130, at 91–100.

²³² *Id.* By egalitarian distribution, I am referring to the size of household landholding vis-à-vis the size of the household. But HRS decreased gender equality. During the Mao era rural women participated in collective economic, social, and governance affairs. HRS privatized farming and designated male household heads as land contract/lease holders. Women systematically lost access to the public governance space and were pushed into the male-dominated private home. Dale Jiajun Wen, *China’s Rural Reform: Crisis and Ongoing Debate*, 43 *ECON. & POL. WKLY.* 86, 88 (2009).

using rural China as a source of cheap food, labor, and raw materials for urban-industrial development. Rural young adults, who constituted the best-educated workforce in rural China, left the village home to work in cities and rapidly industrializing towns on the east coast. Despite their remittances, rural economy stagnated, and rural communities faced decline and disintegration.²³³ A lack of tax transfer by the central government from rich to poor provinces further exacerbated China's rural problem.²³⁴ China's entry to the WTO was set to deal another blow to the rural economy, as it subjected hundreds of millions of small household farmers to global market competition and price fluctuations.²³⁵ Against this background, the "three rurals" problem (rural China, rural citizens, and agriculture) became the official rural discourse searching for a new rural policy.

Part V examines the property components of China's new rural policy. It focuses on the four property institutions that have been the primary analysis of this Article: eminent domain, zoning, a property as commodity model, and a property as social security model.

A. Eminent Domain and Zoning

In response to the immense conflicts and injustices caused by land expropriations in the 1990s and 2000s, the Chinese government began to reform the scheme to foster a more inclusive model of urbanization.²³⁶ Central to the reform were:²³⁷

- (1) two regulations issued by the State Council in 2011: Regulations Concerning the Implementation of the Land Administration

²³³ For an ethnographic account of rural desolation in the 1990s, *see generally* CAO, *supra* note 228.

²³⁴ According to Chinese government statistics, the ratio of rural citizens' disposable income to that of urban citizens was 2.2 in 1990 and jumped to 2.9 in 1994. After the 1994 tax reform that gave the central government more control over tax revenue, the ratio decreased to 2.5 in 1997. However, starting from 1998, the ratio rose again and hit 3.3 in 2009. UNICEF CHINA, *Tu 2.3 Chengxiang Jumin Renjun Kezhipei Shouru, 1990-2017 Nian* (图 2.3 城乡居民人均可支配收入) [1990-2017 (Figure 2.3 Per Capita Disposable Income, by Urban-Rural 1990-2017)], <https://www.unicef.cn/figure-23-capita-disposable-income-urban-rural-19902017>. The dynamics between rural and urban China in the 1990s resembled Gunnar Myrdal's now classic analysis of the "backwash effects" of market forces. MYRDAL, *supra* note 201, at 26-31.

²³⁵ Xiaoqian Hu, *supra* note 130, at 100-110 (a detailed account of the challenges that China's entry to the WTO posed to China's farmers and rural livelihoods); Wen, *supra* note 220, at 91-92 (devastation brought by WTO accession to Chinese sugarcane and soybean farmers).

²³⁶ HEURLIN, *supra* note 147, 90-146 (detailed description of how the number, scale, and disruptiveness of petitions by landless farmers and evictees contributed to national and provincial policy changes, leading to higher compensation and the establishment of social security for landless farmers).

²³⁷ For more details on these reforms, *see* Xiaoqian Hu, *supra* note 15, at 264-68.

Law,²³⁸ and Regulations on the Expropriation and Compensation of Houses on State-Owned Land,²³⁹

2) the Administrative Enforcement Law enacted by the National People's Congress in 2011,²⁴⁰

3) revisions of the Land Administration Law in 2019.²⁴¹

The 2011 legal reforms (1) delineated clear procedures for demolishing expropriated buildings; (2) set forth much more detailed delimitation of the term “public interest,” and (3) required that housing compensation be based on fair market value assessed by independent appraising agencies.²⁴² These reform measures have noticeably decreased land expropriation conflicts in China.²⁴³

The 2019 revisions of the Land Administration Law fundamentally revised China's eminent domain and zoning institutions. The amended law legislated the public interest delimitation and procedural guarantees required by the 2011 State Council regulations.²⁴⁴ It established a more equitable scheme of compensation, requiring the government to consider not only the land's original use and productivity, but also market factors, local land supply, demographics, and socioeconomic development; and to allow rural residents whose home is expropriated to choose among multiple compensation options including in-place relocation.²⁴⁵ In addition, rural residents are to be incorporated into the government's social security system, thus enjoying a

²³⁸ (2011 年中华人民共和国土地管理法实施条例) [2011 Implementation Regulations of the Land Administration Law of the People's Republic of China, (promulgated by State Council of the People's Republic of China, Dec. 27, 1998, Revised Jan. 8, 2011. (The Chinese text of this regulation is available at <http://www.people.com.cn/item/faguiku/jjff/T1070.html>) (last visited Sept. 16, 2021).

²³⁹ Guoyou Tudi Shang Fangwu Zhengshou Yu Buchang Tiaoli (国有土地上房屋征收与补偿条例) [Regulations on the Expropriation and Compensation of Houses on State-Owned Land] (promulgated by the State Council of the People's Republic of China, effective Jan. 21, 2011) STATE COUNCIL, http://www.gov.cn/zwgk/2011-01/21/content_1790111.htm.

²⁴⁰ Zhonghua Renmin Gongheguo Xingzheng Qiangzhi Fa (中华人民共和国行政强制法) [Administrative Compulsory Law of the People's Republic of China] (promulgated by the State Council of the People's Republic of China, effective Jan. 1, 2012) P.R.C. LAWS, http://www.gov.cn/flfg/2011-07/01/content_1897308.htm.

²⁴¹ Zhonghua Renmin Gongheguo Tedi Guanli Fa (中华人民共和国土地管理法) [Land Administration Law of the People's Republic of China] (promulgated by the Standing Comm. of the People's Republic of China effective June 25, 1986, rev'd Aug. 26, 2019) P.R.C. LAWS, <http://www.npc.gov.cn/npc/c30834/201909/d1e6c1a1e6c345eba23796c6e8473347.shtml> [hereinafter the 2019 Land Administration Law].

²⁴² Although the two State Council regulations dealt with urban land and housing, compensation was similarly increased for peri-urban land and housing via a judicial interpretation issued by the Supreme People's Court. Zuigao Renmin Fayuan Guanyu Shenli Sheji Nongcun Jiti Tudi Xingzheng Anjian Ruogan Wenti de Guiding (最高人民法院关于审理涉及农村集体土地行政案件若干问题的规定) [Stipulations by the Sup. People's Ct. on Several Issues in the Trial of Admin. Cases Concerning Rural Collective Land] (promulgated by the Judicial Comm. of the Sup. People's Ct. effective Sept. 5, 2011).

²⁴³ Qiaowen Lin et al., *Conflicts of Land Expropriation in China during 2006-2016: An Overview and Its Spatio-Temporal Characteristics*, 76 LAND USE POL'Y. 246, 250 (2018). Concurrently, there was a drastic decrease in scholarly writings on expropriation conflicts in China, particularly after 2015, perhaps in part due to the decreased severity of the problem.

²⁴⁴ The 2019 Land Administration Law, *supra* note 241, art. 45–47.

²⁴⁵ *Id.* art. 48.

pension and other forms of social insurance in the same manner as urban residents.²⁴⁶

Although not couched as a change in zoning power, the 2019 LAL gave rural collectives the power to zone land for industrial and commercial uses and to transfer land use rights to industrialists and commercial developers—in the same manner as urban construction land use rights.²⁴⁷ This was the most significant change to China’s urban-centric zoning structure and has the biggest potential to bring inclusive development to rural China.

A. Commodify Rural Property

Facing a declining rural economy, a massive labor exodus, and increasing competition from foreign growers, the Chinese government began in the 2000s to encourage farmland reallocation from household farmers to agricultural entrepreneurs. Rural land tenure lies at the heart of the Chinese government’s policy. As mentioned earlier, although HRS created private rural land use rights, the latter was deliberately *not* an alienable or capitalizable commodity, but rather a socioeconomic entitlement based on membership in a rural collective.²⁴⁸ As nonpaying leaseholders, individual households could possess, use, and sublet farmland, or transfer farmland leaseholds to other parties.²⁴⁹ However, they could not sell or, by implication, mortgage the land.²⁵⁰

Since the mid-2000s, the Chinese state has been pushing for deeper commodification of farmland to facilitate agricultural industrialization.²⁵¹ This policy initiative is operationalized through a three-tier property structure established by the most recent revision of the Rural Land Contract Law in 2018.²⁵² At the top is land ownership (所有权), which still belongs to rural communities or state-owned farms as a basic principle of socialism.²⁵³ In the middle is the residents’ right to lease land for free from their rural collective

²⁴⁶ *Id.*

²⁴⁷ *Id.* art. 11, 63.

²⁴⁸ *See supra* text accompanying notes 218–220.

²⁴⁹ Zhonghua Renming Nongcun Tudi Chengbao Fa (中华人民共和国农村土地承包法) [Rural Land Contract Law] (promulgated by Order No. 73 of the President of the People’s Republic of China effective Aug. 29, 2002) P.R.C. LAWS art. 10, 16, & 32.

²⁵⁰ *See id.* art. 4.

²⁵¹ This policy initiative was most comprehensively formulated in a State Council policy document. *See generally* Shenhua Nongcun Gaige Zonghexing Shishi Fangan (深化农村改革综合性实施方案), [A Comprehensive Implementation Plan for Deepening Rural Reform], XINHUA NEWS AGENCY (Nov. 2, 2015, 5:45 PM), http://www.gov.cn/zhengce/2015-11/02/content_2958781.htm.

²⁵² [Law of the People’s Republic of China on Land Contract in Rural Areas] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 29, 2002, rev’d Dec. 29, 2018).

²⁵³ *See id.* art 1–2.

or state-owned farm (承包权).²⁵⁴ This right is a membership based social property right.²⁵⁵ At the bottom is the right to manage land (经营权).²⁵⁶ This is a private property right that any farmer can acquire at a price from either a landowner or leaseholder.²⁵⁷ It can be used as capital to join a company or as collateral to secure a loan.²⁵⁸ It is this management right that the Chinese government is fully commodifying in the hope that it will help revitalize rural-agricultural China, similar to how fully commodified urban construction land use rights helped build urban-industrial China.²⁵⁹

Different from the exclusionary model that has characterized much of China's industrialization and urbanization, this round of rural land reform seeks to revitalize China's agriculture and rural economy without the kind of dispossession that has befallen tens of millions of peri-urban residents. Three property arrangements are tasked to carry out a more inclusive rural development: (1) subcontracting; (2) subleasing; and (3) cooperatization. Through subcontracting, household farmers manage the farms themselves but subcontract the bulk of production work to machine owners.²⁶⁰ Up to a point, subcontracting could channel the forces of mechanization to help sustain rather than eliminate small household farms. Through subleasing, household farmers sublet their contracted land to agricultural enterprises and receive annual rent payments.²⁶¹ Through cooperatization, household farmers voluntarily join an agricultural producers' coop and have the coop farm their land.²⁶² The annual rents and dividends provide a base income and enable those who cannot make a comfortable living from the land to seek off-farm jobs.²⁶³

²⁵⁴ See *id.* art. 5–6.

²⁵⁵ See *id.*

²⁵⁶ See *id.* art. 8, 10.

²⁵⁷ *Id.* art. 36–40

²⁵⁸ See *id.* art. 36, 47.

²⁵⁹ *Nongcun Tudi Jingyingyuan Liuzhan Guanli Banfa* (农村土地经营权流转管理办法), [Measures for the Management of the Circulation of Rural Land Operation Rights] (promulgated by the Ministry of Agriculture and Rural Affairs, Jan. 26, 2001, effective Mar. 1, 2021), art. 1, MINISTRY OF AGRICULTURE ORDER NO. 47.

²⁶⁰ This avenue is supplemented by the government's promotion and financial subsidization of agricultural machine purchases. Between 2004 and 2014, the Chinese government allocated 120 billion yuan to subsidies for farm machinery. *China to Direct Farm Machinery Subsidies to Growers of Key Crops*, REUTERS (Feb. 9, 2015, 4:51 AM), <https://www.reuters.com/article/china-agriculture-subsidies/china-to-direct-farm-machinery-subsidies-to-growers-of-key-crops-idUSL4N0VJ3NM20150209>.

²⁶¹ [P.R.C LAW on Land Cont. in Rural Areas] (promulgated by Order No. 73 of the President of China on Aug. 29, 2002), art. 36, 39.

²⁶² See generally Chen Yuqing, *Issues on Standardization of Farmers' Cooperatives in China*, 9 ASIAN AGRIC. RES. 34 (2017).

²⁶³ *Zhonghua Renmin Gongheguo Nongmin Zhuanye Hezuoshe Fa* (中华人民共和国农民专业合作社法) [Law of the People's Republic of China on Farmers' Professional Cooperatives] (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 31, 2006, effective July 1, 2007), art. 3–5, 14, 16. ST. COUNCIL GAZ. The English version of this law is available at L. of China on Specialized Farmers Coop., Civ. and Com. L., <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2008->

The results of these legal changes are already showing. According to official statistics, by November 2020 rural Chinese households had transferred management rights over 555 million *mu* (91.4 million acres) of farmland.²⁶⁴ Nationwide, there were more than 1 million commercial household farms, over 2.2 million rural cooperatives, and close to 0.9 million organizations providing services to agricultural growers.²⁶⁵

B. Stronger Social Protection

Up until the 2000s, China's *hukou* system was a mechanism of rural extraction and exploitation. Beginning in the 2000s, the Chinese government initiated a series of new policies designed to increase the welfare of rural citizens. Since then, the central government has been using tax and transfer to reallocate resources from urban to rural China and from richer to poorer regions. Notable policies include:

- (1) the abolition of agricultural taxes for household farmers in 2006,²⁶⁶
- (2) the elimination of rural elementary and middle school tuitions and fees in the late 2000s,²⁶⁷

01/02/content_1388023.htm (last visited Oct. 30, 2022). One scholar describes recent changes in rural land tenure as a Polanyian countermovement against the adverse consequences of earlier, excessive labor and land commodification. Tiantian Liu, *'Enclosure with Chinese Characteristics': A Polanyian Approach to the Origins and Limits of Land Commodification in China*, 20 J. PEASANT STUD. 1 at 8 (2022).²⁶⁴ Shelun (社论) [Editorial], *Tudi Liuzhuan "Fang Feilianghua" yu Bao Gefang Quanyi Ying Bingxing* (土地流转“非粮化”与保各方权益应并行) [“Anti-Degrainization” in Land Transfers Should Be Done in Conjunction with Guaranteeing All Parties' Rights and Interests], *DIYI CAIJING* (第一财经) YICAI, (Feb. 7, 2021, 9:37 PM), <https://www.yicai.com/news/100943854.html>.

²⁶⁵ *Id.*

²⁶⁶ Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Feizhi Zhonghua Renmin Gongheguo Nongyeshui Tiaoli de Jueding (全国人民代表大会常务委员会关于废止《中华人民共和国农业税条例》的决定) [Decision of the Standing Committee of the National People's Congress on the Abolition of the Agricultural Tax Regulations of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Dec. 29, 2005, effective Jan. 1, 2006) ST. COUNCIL GAZ.

²⁶⁷ *Guanyu Shenhua Nongcun Yiwu Jiaoyu Jingfei Baozhang Jizhi Gaige de Tongzhi* (关于深化农村义务教育经费保障机制改革的通知) [Notice on Deepening the Reform of the Rural Compulsory Education Funding Guarantee Mechanism] (Dec. 24, 2005). available at Circular of the St. Council No. 5 of 2006, St. Council of China, http://www.gov.cn/gongbao/content/2006/content_185157.htm.

- (3) the establishment of a heavily subsidized rural healthcare system,²⁶⁸ and a rudimentary social security system for the rural elderly,²⁶⁹
- (4) the incorporation of migrant workers in the national social insurance programs.²⁷⁰

Since 2013, the most comprehensive rural policy for distributing social property rights to rural citizens has been Xi Jinping's Targeted Poverty Alleviation Policy (精准扶贫政策).²⁷¹ Xi's poverty alleviation policy differs from the Chinese government's previous poverty alleviation programs in its goals, scale, and implementation mechanisms. Xi's program sought to eliminate absolute poverty in rural China by 2020, with every rural Chinese citizen enjoying basic security in food, clothing, housing, nine years of education (for children), and medical care.²⁷²

²⁶⁸ ARMIN MÜLLER, CHINA'S NEW PUBLIC HEALTH INSURANCE: CHALLENGES TO HEALTH REFORMS AND THE NEW RURAL CO-OPERATIVE MEDICAL SYSTEM 2–5 (2017). Emily T. Yeh et al., *Rural Politics in Contemporary China*, 40 J. PEASANT STUD. 915, 917 (2013). See also romanization needed (中华人民共和国社会保险法) [2018 Social Insurance Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective Jul. 1, 2011, most recently amended Dec. 29, 2018), art. 24.

²⁶⁹ The Social Insurance Law, *supra* note 268, at art. 20–21. For how much a rural citizen over the age of 60 receives from the government as social security income, see 31 Shengshi Nongcun 60 Sui Laoren Yanglaojin Biaozhun Shangzhang! (31省市农村60岁老人养老金标准上涨!) [31 Provinces and Municipalities See Increase in Rural Pension Standard for Residents 60 or Older!], WEIXUNSO, (Nov. 24, 2021, 7:34 PM), <https://www.weixinso.com/article/bvhjguw.html>. Affluent municipalities have higher rural social security incomes (SSIs). Shanghai leads the nation with 1100 Yuan per month, followed by Beijing (800 Yuan per month) (1 Yuan = 0.15 US\$). Noticeably, poor ethnic minority regions have higher rural SSIs than regions with comparable level of development. For example, Tibet's rural SSI (180 Yuan/month) ranks the 4th among China's 31 provinces and province-level municipalities while its per capita GDP ranks the 22nd. Xinjiang's rural SSI (140 Yuan/month) ranks the 11th while its per capita GDP ranks the 21st. The higher rural SSI in poor ethnic minority regions reflects larger tax transfers from the central government to these regions. For per capita GDP by province, see *id.*

²⁷⁰ The Social Insurance Law, *supra* note 270, at art. 95.

²⁷¹ For a detailed study of the scale, mechanisms, and effects of China's anti-poverty campaign, see generally Tings Chak et al., *Serve the People: The Eradication of Extreme Poverty in China*, TRICONTINENTAL INSTITUTE FOR SOCIAL RESEARCH (Jul. 23, 2021), <https://thetricontinental.org/studies-1-socialist-construction/>.

²⁷² Absolute poverty under Xi's policy is defined by a combination of indices: (1) minimum per capita income of Yuan 2300 (in 2010 value), consistent with the World Bank's global poverty line; (2) housing safety and per capita housing size; (3) access to transportation, drinking water, and electricity; (4) per capita arable land, crop structure, per capita grain production/procurement, and per capita revenue from production; (5) family's labor ratio, health status, labor skills, and per capita revenue from labor; and (6) debt from children's education or remittances from educated children. Wang Xiaolin & Feng Hexia (王小林、冯贺霞), 2020 Nian Hou Zhongguo Duowei Xiangdui Pinkun Biaozhun: Guoji Jingyan yu Zhengce Quxiang (2020年后中国多维相对贫困标准: 国际经济与政策取向) [Multi-Dimensional Criteria for Relative Poverty in Post-2020 China: International Experiences and Policy Preferences], ZHONGGUO NONGCUN JINGJI [CHINESE RURAL ECONOMY], no. 3. 1, 15–16 (2020); see also Zheng Xinye et al. (郑新业等), *Jingzhun Fupin Zhengce Xiaoguo Pinggu* (精准扶贫政策效果评估) [Targeted Poverty Alleviation Policy Effect Assessment], 1–2 (2019), <http://ae.ruc.edu.cn/docs/2019-08/4632c8c5c4154e84ae03a432bc5e981a.pdf>.

Although direct income transfer is a key part of Xi's poverty alleviation policy, the policy encompasses a broad range of interventions the selection of which is tailored to address the specific causes of poverty in individual cases.²⁷³ The primary causes of impoverishment for rural citizens are illnesses, disabilities, and educational expenses.²⁷⁴ For people impoverished by illnesses and disabilities, methods of intervention include free health checkups, free breast and cervical cancer screening (for women), free pre-marital health screening and pregnancy checkups (for people with disabilities); free home modifications to ensure wheelchair access; five overlaying programs of government-subsidized healthcare coverage; financial and technical assistance in starting a suitable enterprise; government-paid "public interest jobs" (e.g., picking up litter); free assisted living in nursing homes; and lastly, income transfer.²⁷⁵ For families impoverished by children's educational costs, intervention includes a preschool education subsidy, free school meals, free boarding schools (for children of migrant-worker parents), high school and vocational school fellowships, and college tuition assistance (grants and loans).²⁷⁶

Many families are impoverished by a lack of capital, skills, or labor. For families lacking capital, loans are provided to help them start an agricultural or small business enterprise.²⁷⁷ For families impoverished by a lack of skills, intervention includes free (and, in some cases, with financial incentives) vocational training programs; partnering with private enterprises to open factories locally or incorporate local businesses in national/global supply chains; partnering with private agencies that match poor rural laborers with urban/industrial employers; financial rewards for working in off-farm jobs; transportation subsidy for doing migrant work; and lastly, "public interest jobs" (janitor, forest guard, elder care worker, etc.).²⁷⁸ For families lacking

²⁷³ Zheng Xinye et al., *supra* note 272, at 32.

²⁷⁴ *Id.* at 29–30.

²⁷⁵ *Id.* at 32, 55–56, 79–80. According to the Chinese government, over 20 million residents with illnesses received medical treatment under the poverty alleviation policy, over 24 million residents with disabilities receive living and care subsidies, and over 20 million residents receive a living allowance and/or free assisted living in nursing homes. Xi Jinping (习近平), *Zai Quanguo Tuopin Gongjian Zongjie Biaozhang Dahui shang de Jianghua* (在全国脱贫攻坚总结表彰大会上的讲话) [*Speech at the National Poverty Elimination Reflection and Award Conference*], XINHUA WANG [XINHUA NEWS] (Feb. 25, 2021, 8:28 PM), http://www.xinhuanet.com/politics/leaders/2021-02/25/c_1127140240.htm.

²⁷⁶ Zheng Xinye et al., *supra* note 272, at 32, 55.

²⁷⁷ According to the Chinese government, loans granted to impoverished rural Chinese citizens totaled \$1.7 trillion. Xi Jinping, *supra* note 275 (number calculated by author).

²⁷⁸ Zheng Xinye et al., *supra* note 272, at 32, 68–69; Eliot Chen, *The Trick-Down Economics in China's Poverty Alleviation Drive*, THE WIRE CHINA, Nov. 14, 2021, <https://www.thewirechina.com/2021/11/14/the-trickle-down-economics-in-chinas-poverty-alleviation-drive/> (partnerships with private enterprises); see generally Lijie Fang & Chien-Chung Huang, *Targeted Poverty Alleviation in China: Evidence from Jingdong e-Commerce Poverty Alleviation*, 12 *POV. & PUB. POL'Y* 386 (2020) (same). According to the Chinese government, enterprises on China's more affluent east coast invested more than 1 trillion Yuan (\$157 billion) in poverty-stricken regions under the

laborers, methods include ecological compensation (payment for switching arable land to forestland); rents or dividends from subleasing land or having it farmed by a cooperative; dividends from village solar power generation; assistance with starting a suitable enterprise; and lastly, income transfer.²⁷⁹

In addition to individualized poverty alleviation, the Chinese government also targets place-based poverty by building infrastructure. Infrastructure includes: (1) highways or railways, hospitals, and nursing homes in all counties; (2) ecological restoration such as reforestation and river/lake cleanups in damaged regions; and (3) for all villages, full road, electricity, cable TV, and 4G Internet coverage; agricultural irrigation and arable land preservation; schools and teachers; safe drinking water, trash services, waste water treatment, and public bathrooms; and village squares and meeting places.²⁸⁰ For villages with extremely harsh or unsafe natural conditions, the government provides new housing (either for free or at discounted prices) concentrated in a safer or better-endowed location to families willing to relocate.²⁸¹

In the United States, government programs for housing insecurity are primarily public housing (which has stagnated) and housing vouchers (which are expanding).²⁸² Both methods rely on renting rather than ownership as a cheaper access to housing.²⁸³ China's particular property regime allows its government to target rural housing insecurity through private homeownership. Under Chinese property law, each rural family is entitled to a free residential plot in their village to build a house.²⁸⁴ Thus, in rural China housing poverty is almost exclusively old and unsafe housing, rather than (potential) homelessness. Against this background, the Chinese

government's poverty alleviation program. Xi Jinping, *supra* note 275. According to the same report, over 1.1 million poor rural citizens are hired as forest guards. *Id.*

²⁷⁹ Zheng Xinye et al., *supra* note 272, at 32, 54–57.

²⁸⁰ *Id.* at 32, 71–77. According to the Chinese government, under the Targeted Poverty Alleviation Policy, 1.1 million kilometers of village roads and 35,000 kilometers of railroad were built, poverty-stricken villages had 99% reliable electricity coverage and 98% optical fiber and 4G coverage. Xi, *supra* note 275.

Agricultural land preservation is referred to, rather misleadingly, as “land consolidation.” Its measures include preserving soil quality; increasing plot size by eliminating dividers between small plots and flattening terraced land; and reclaiming unused land or upgrading damaged agricultural land. For details on the Chinese government's plans, investments, goals, results, and problems regarding agricultural land preservation in the 2010s, see generally Yang Zhou et al., *Land Consolidation Boosting Poverty Alleviation in China: Theory and Practice*, 82 LAND USE POL'Y. 339 (2019).

²⁸¹ Zheng Xinye et al., *supra* note 272, at 32, 69–70, 80–81. According to the Chinese government, it built 35,000 relocation communities, 2.66 million relocation housing units, and accommodated over 9.6 million residents. Xi Jinping, *supra* note 275.

²⁸² John J. Infranca, *Housing Resource Bundles: Distributive Justice and Federal Low-Income Housing Policy*, 49 U. RICH. L. REV. 1071, 1080–81 (2015).

²⁸³ *Id.* at 1080.

²⁸⁴ Tudi guanli fa (土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 26, 2019, effective Jan. 1, 2020), art. 62

government enacted two major programs to address housing poverty. The first is financial assistance to the family to renovate or build anew a single-family house.²⁸⁵ The other is the relocation housing program for those living in extremely harsh or unsafe natural conditions.²⁸⁶ Government-subsidized or-constructed private housing has the downside of requiring large sums of money to start the program.²⁸⁷ However, once completed, it does not require the government to continue to manage the residents and the housing units, and the residents no longer need to rely on continued government grace for housing.

In 2021 Xi declared that the Targeted Poverty Alleviation policy had accomplished its goals.²⁸⁸ It had eliminated absolute poverty and achieved basic security in food, clothing, housing, education, and healthcare for close to 100 million rural Chinese citizens since the beginning of 2013.²⁸⁹

Will China's rural revitalization strategy succeed? Will the legal changes outlined above bring the country on a more inclusive growth path? It is too soon to tell. We are yet to examine how changes in eminent domain and zoning are affecting rural land use and profit distribution between rural collectives, developers, and ordinary residents; how farmland is being structurally reallocated from household farmers to commercial growers; whether agricultural enterprises are succeeding as a sector; and whether the combination of rents or dividends and nonagricultural income allows ordinary rural citizens to live a comfortable life.

A few comparisons of China's two structural reallocations of land may shed some light on whether the same inequities that occurred in urban-industrial China will recur in rural China.

First, the reallocation of land from agriculturalists to industrial and urban developers is permanent, irreversible, and closed with a one-time payment. The reallocation of land from household farmers to agricultural entrepreneurs, if in compliance with the law, is reversible, nonpermanent, and accompanied with annual payments throughout the whole period.

²⁸⁵ Zheng Xinye et al., *supra* note 272, at 81, 83, 88. According to the Chinese government, it financed or subsidized the renovation or rebuilding of unsafe housing for 7.9 million families (or 25.7 million residents). Xi Jinping, *supra* note 275.

²⁸⁶ Zheng Xinye et al., *supra* note 272, at 32, 69–70, 80–81.

²⁸⁷ See Wang Yahua & Shu Quanfeng (王亚华、舒全峰), *Zhongguo Jingzhun Fupin de Zhengce Guocheng he Shijian Jingyan* (中国精准扶贫的政策过程与实践经验) [*The Policy Process of and Practical Lessons from China's Targeted Poverty Alleviation*], 36 QINGHUA DAXUE XUEBAO ZHIXUE SHEHUI KEXUE BAN [JOURNAL OF TSINGHUA UNIVERSITY (PHILOSOPHY AND SOCIAL SCIENCES)] 2, 12 (2021).

²⁸⁸ Xi Jinping, *supra* note 275.

²⁸⁹ *Id.* See also Wang Yahua et. al., *supra* note 287, at 2.

Second, the bulk of land reallocations from agriculture to industrial and urban sectors ignored rural land's social reproduction function and resulted in inadequate compensation. The law that authorizes farmland reallocations from household farmers to agricultural entrepreneurs accounts for rural land's social reproduction function. Additionally, the legalization of farmland reallocations is supplemented with social protection programs and does not require rural residents to leave their home or community.

Third, reallocations from agriculturalists to industrialists and urban developers excluded the entire rural and agricultural population. They perpetuated urban China's exploitation of rural China and exacerbated rural-urban inequality. Farmland reallocations from households to entrepreneurs are legally available to household farmers and rural individuals who want to start an agricultural enterprise. If and to the extent the strategy succeeds, it will revitalize the rural economy, decrease rural-urban inequality, but at the same time increase inequality among rural citizens.

Stronger social property rights are welcomed by and overdue for rural Chinese citizens. However, China continues to face challenges in alleviating poverty and achieving Xi's latest policy goal of "common prosperity".²⁹⁰ For example, families impoverished by illnesses or disabilities have very limited capacity to achieve affluence or development in Amartya Sen's sense and are the most vulnerable to falling back to poverty.²⁹¹ Meanwhile, macro socioeconomic obstacles threaten to stem China's growth and pursuit of a more equal and affluent society. To name a few, these include the slowing of economic growth,²⁹² an aging population,²⁹³ wealth inequality within rural and urban populations,²⁹⁴ the middle-income trap,²⁹⁵ the narrowing of

²⁹⁰ Xi's term is "gongtong fuyu" (共同富裕), which literally means being affluent together. "Common prosperity" has become the standard English translation of the term.

²⁹¹ Zheng Xinye et al., *supra* note 272, at 96–103.

²⁹² GDP Growth (Annual %) - China, THE WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=CN> (last visited Jan. 5, 2022); Suranjana Tewari, *Five Reasons Why China's Economy Is in Trouble*, BBC NEWS (Oct. 5, 2022), <https://www.bbc.com/news/world-asia-china-62830775>. Notably, China's urban housing market, which had powered much of China's economic growth for the past two decades, is facing grave and compounding problems. Many predict a major contraction of the Chinese urban housing market with devastating consequences. Keyu Jin, *China's Property Market Is in Freefall. What does This Mean for the World Economy?*, THE GUARDIAN (Aug. 23, 2022), <https://www.theguardian.com/commentisfree/2022/aug/23/china-property-market-world-economy>.

²⁹³ Tan Xuewen & Tan Qingxiang (檀学文、谭清香), *Mianxiang 2035 Nian de Zhongguo Fan Pinkun Zhanlue Yanjiu* (面向2035年的中国反贫困战略研究) [*A Study of China's Anti-Poverty Strategy Up to 2035*], NONGYE JINGJI WENTI [ISSUES IN AGRICULTURAL ECONOMY], no. 12, 128 (2021).

²⁹⁴ *Id.* at 126–28.

²⁹⁵ SCOTT ROZELLE & NATALIE HELL, *INVISIBLE CHINA: HOW THE URBAN-RURAL DIVIDE THREATENS CHINA'S RISE 20* (2020). As an upper-middle income country, China is on the cusp of leaving but has not yet left the middle income category. WORLD BANK, *supra* note 10.

upward social mobility,²⁹⁶ global excess production capacity,²⁹⁷ and climate change.²⁹⁸

External obstacles aside, we are not sure to what extent the socioeconomic benefits that these 100 million Chinese citizens obtain under poverty alleviation are property rights. This benefit vs. right distinction matters not because of academic reasons, but because of its profound practical implications for Chinese citizens. Literature on U.S. government benefits programs has made clear that the extent to which a benefit is accessible, condition-free, and secure from termination determines whether the benefit upholds or undermines the beneficiary's dignity, autonomy, and wellbeing.²⁹⁹ That is why some scholars advocate making government benefits more like property rights.³⁰⁰

In China, the housing benefits for rural citizens are property rights in that the occupants own the unit constructed or partially financed by the government. Education up to middle school is a de facto property right as it has become free and available to every school-age child. The same may be said to living allowances and free assisted living in nursing homes for residents who have no independent source of income, who are unable to work due to illnesses, disabilities, or old age, and who have no close family to rely on. However, even for this category, we are yet to examine how widely accessible, easily obtainable, and secure from termination these entitlements are for eligible citizens in the future. The same question applies to healthcare and disability benefits, as well as other types of individual- or family-based poverty relief.

V. CONCLUSION

Contrary to the common perception of China's economic development as a lawless process, China's development is a process guided, operationalized, and mediated by formal property law. Zoning and eminent domain enabled a fast and cheap sectoral transfer of productive property, and helped form the spatial, material, and financial bases of China's

²⁹⁶ Shuanglong Li et al., *Mapping Public Concerns About Class Immobility in China*, 144 SOC. INDICATORS RSCH. 745, 758 (2018).

²⁹⁷ RAPHAEL KAPLINSKY, GLOBALIZATION, POVERTY AND INEQUALITY: BETWEEN A ROCK AND A HARD PLACE 225–28 (2005).

²⁹⁸ ATLAS OF ENVIRONMENTAL RISKS FACING CHINA UNDER CLIMATE CHANGE 21 (Qihong Tang & Quansheng Ge eds., 2018).

²⁹⁹ See generally SPENCER HEADWORTH, POLICING WELFARE: PUNITIVE ADVERSARIALISM IN PUBLIC ASSISTANCE (2021); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); Reich, *supra* note 196, at 786.

³⁰⁰ Reich, *supra* note 196, at 787; Super, *supra* note 196, at 1173.

industrialization and urbanization. The creation of property as commodity for urban-industrial entrepreneurs unleashed the power of the market to maximize urban wealth. A dualist property system, which adopted a social security model for rural property, secured a vast and cheap labor force to power China's industrialization. When these property institutions promoted growth at the expense of equality and equity, the Chinese state turned to property law once again as an instrument of change. Currently, property law is reallocating zoning power to rural collectives and facilitating a structural transfer of farmland from household farmers to commercial growers. Both changes aim to revitalize China's rural economy without permanently dispossessing rural residents or destroying rural communities.

Readers must wonder, if property law plays such an important role in China's economic transformation, how did previous scholarly accounts miss it? I wonder about the same question, and the puzzle prompted me to re-read some of the scholarly accounts to make sure that my understanding of them was not my own mistake. Below I quote a few passages from two scholarly accounts, one provided by Clarke, Peter Murrell, and Susan Whiting in 2008,³⁰¹ and the other by Qiao and Upham in 2017.³⁰² I select these two texts because I view the work of these authors as representative of the most focused, most sophisticated, and most respected analyses on Chinese property law and economic development.

As the title itself suggests, the lengthy article by Clarke, Murrell, and Whiting examines the role of law in China's economic development. The authors first give a highly detailed account of the laws and regulations enacted in reform-era China, and then delve into three areas to investigate the role of law in China's development: security of property rights of nonstate enterprises, security of transactions in goods and services, and corporate governance.³⁰³ Regarding property, the authors write, "Certainly, as a careful reading of [the section on enacted laws and regulations] makes clear, the Chinese legal system does not provide a secure system of property rights."³⁰⁴ "Indeed, it is impossible to make the case that the [Chinese] legal system has been crucial in protecting property rights."³⁰⁵ The authors find that "the political structure itself has served as an alternative to the formal legal system."³⁰⁶ "In sum, our tentative conclusion is that passably secure property rights might have provided a basis for China's economic growth during the first two decades of reform, but the legal system probably had little

³⁰¹ See generally Donald Clarke et al., *The Role of Law in China's Economic Development*, in CHINA'S GREAT ECONOMIC TRANSFORMATION (Loren Brandt & Thomas G. Rawski eds., 2008).

³⁰² Shitong Qiao & Upham, *supra* note 26.

³⁰³ Clarke et al., *supra* note 14, at 376.

³⁰⁴ *Id.* at 399.

³⁰⁵ *Id.* at 376.

³⁰⁶ *Id.* at 400.

to do with the creation and enforcement of these rights.”³⁰⁷ Summing up the role of law in all three examined areas, the authors conclude, “[a]lthough the legal system has made great strides since the beginning of reforms and currently has a role of some significance in the economy, it is impossible to make the case that formal legal institutions have contributed in an important way to China’s remarkable economic success. If anything, economic success has fostered the development of law, rather than the reverse.”³⁰⁸

The article by Qiao and Upham gives an overview of the development of Chinese property law to a global comparative legal audience.³⁰⁹ The authors begin with the observation that “The last four decades have seen fundamental changes in Chinese property law.”³¹⁰ However, in the next paragraph the authors make the following general reflection on Chinese law, “The first and most striking feature from a comparative perspective has been that law [in China] serves as the final confirmation of policy reforms, rather than the precondition of the reform. Law’s role has stayed marginal and nominal to a great extent.”³¹¹ Following this general characterization, the authors raise two questions. The first question, to which they answer in the affirmative, is “whether three decades of rapid economic growth without the presence of law should lead us to doubt the conventional wisdom that property rights are essential to development.”³¹² The second question is “how these markets – in our case, the real estate market – operate without a well-functioning legal framework considered necessary for Coasian bargaining.”³¹³

I beg readers to bear in mind that the quotations above are meant to illustrate a common view among scholars of Chinese law and policy that formal property law plays a marginal role in China’s economic development. These quotations cannot reflect, and should not be interpreted as reflecting, the authors’ much more complex and comprehensive analysis of Chinese law and society. In fact, in both accounts the authors make important caveats about their observations. Clarke, Murrell, and Whiting caution that “our analysis is much less applicable to the current decade [the 2000s], where privatization and the continuing growth of the private sector have made the property rights of local governments less relevant,” and highlight the importance of continuing research on this issue.³¹⁴ Qiao and Upham

³⁰⁷ *Id.* at 403.

³⁰⁸ *Id.* at 420.

³⁰⁹ Shitong Qiao & Upham, *supra* note 26, at 311.

³¹⁰ *Id.* at 1.

³¹¹ *Id.* at 1–2.

³¹² *Id.* at 32–33.

³¹³ *Id.* at 4–5.

³¹⁴ Clarke et al., *supra* note 301, at 403. In a 2022 article, Whiting explicitly critiques the marginal property law view: “What the literature has missed is the role of the state in reassigning of land rights from lower-value, agricultural use to higher-value, urban, industrial uses as part of the economic

deliberately adopt a strict definition of law: “From the narrow perspective adopted in this chapter, only statutes passed by the National People’s Congress qualify as ‘law’ or ‘falv’ in Chinese,” and it is in this sense that they characterize “much of Chinese governmental action [a]s lawless.”³¹⁵ In addition, authors of both accounts emphasize, either in the quoted article or separately, that urban real estate law plays an important role in creating a massive and vibrant urban real estate market in China.³¹⁶

Caveats aside, it is still puzzling that a common view in China scholarship holds that law, property law in particular, plays a marginal role in China’s 40 years of economic development. Over the course of writing this article, I have thought of or been presented with various potential explanations for this puzzle. One potential explanation, intimated by Clarke in an attempt to help me clarify my argument, is that previous analyses “have failed to cast their net wide enough.”³¹⁷ For example, the conclusion that Clarke, Murrell, and Whiting reach in their 2008 paper focus on the property rights of nonstate actors, particularly TVEs, in the 1980s and 1990s. This choice of focal area was wise and fruitful given the spectacular growth of TVEs and their contributions to the Chinese economy. Nonetheless, the same choice also precluded them from investigating, for example, how national legislation from 1982 onwards has legitimized, structured, and operationalized the sectoral transfer of land from peri-urban farmers to urban-industrial developers and enabled China’s economic development. However, this explanation is ultimately unsatisfactory because other scholars have analyzed, for example, this very specific issue. In fact, the article quoted above by Qiao and Upham explicitly mentions the 1986 LAL (along with other national statutes) as a contributor to China’s land expropriation frenzy and injustice.³¹⁸

The best potential explanation I could think of is that previous accounts are situated within specific scholarly traditions and perspectives. For example, the above-quoted articles by Clarke, Murrell, Whiting, Qiao, and Upham are interventions in an ongoing conversation about the causal relationship between property and contract rights and nations’ economic development. Thus, in examining Chinese property law and economic development, they are preoccupied with whether strong protection of private property rights against government predation is a prerequisite of economic development, as is believed by conventional wisdom (represented by Weber

development process. ... The Chinese state uses its political power, formalized in law, to take land for state-directed urbanization and industrialization.” Susan H. Whiting, *Land Rights, Industrialization, and Urbanization: China in Comparative Context*, 27 J. CHINESE POL. SCI. 399, 400 (2022).

³¹⁵ Shitong Qiao & Upham, *supra* note 26, at 341–42.

³¹⁶ Clarke, *supra* note 22, at 903; Shitong Qiao & Upham, *supra* note 26, at 312.

³¹⁷ E-mail from Donald Clarke, Professor of L., Geo. Wash. Univ. L. Sch. to Professor Xiaoqian Hu, Assoc. Professor of L., James E. Rogers College of L. (Jul. 21, 2021, 08:47 PM) (on file with author).

³¹⁸ Shitong Qiao & Upham, *supra* note 26, at 327.

and North for Clarke and coauthors, and by law and development practitioners for Qiao and Upham). For Clarke and his colleagues, China proves conventional wisdom (the legal Weber-North version) wrong.³¹⁹ Similarly, for Upham and Qiao, China is contemporary and colossal proof that conventional wisdom (the practitioners' version) is wrong; development entails systemic destruction, not just creation, of property rights.³²⁰ After using China as a test case to refute conventional wisdom, neither group sees a need to examine, as a stand-alone academic question, the role of property law in China's development.

The explanation of academic positionality may also broadly and indirectly apply to scholarly accounts of property rights in China's urban-industrial development. Most of these accounts are about the intense conflict, dispossession, resistance, inequality, and property rights violations in China's land expropriations. There is immense diversity within this literature. Overall, one may say that this literature is situated within broader scholarly interests in social justice, human rights, and citizen-state relationship. Thus, in examining property law's role in China's urban-industrial development, the most important question for the researcher is how property law, in both its implementation and its breach, has contributed to social injustice, human rights violations, and state oppression (or repression) of Chinese citizens. A minority of scholarly accounts on property rights and China's urban-industrial development study the phenomenon of illegal housing development in peri-urban areas.³²¹ This literature is situated within the broader law and society or law and norms tradition, and is mostly interested in how villagers and other actors manage to conduct illegal real estate development and maintain an illegal real estate market not *because of* formal property law, but *despite of it*.³²² The accounts from both literatures are so persuasive and powerful that they may have created an insuperable impression of rights-lessness and lawlessness for scholars of Chinese property law and economic development.

However, the academic positionality explanation is also unsatisfactory. Scholars who analyze Chinese property law and economic development do not work in siloed niches in isolation from other subject areas. Nor do they adopt a singular lens to analyze all phenomena in contemporary China. The

³¹⁹ Clarke et al., *supra* note 301, at 376.

³²⁰ Shitong Qiao & Upham, *supra* note 26, at 331.

³²¹ Shitong Qiao is perhaps the most influential and certainly the most prolific author in this literature. He describes China's illegal housing development as an example of Ellicksonian "order without law," where self-interested actors create social norms and use them to regulate their own behavior in defiance and to the exclusion of formal law. SHITONG QIAO, CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS (2018).

³²² I have given a different account in which illegal real estate development is a result of complex interactions between state laws and social and political norms; state laws are at once a cause, an obstacle, and a facilitator of illegal real estate development in China. Xiaoqian Hu, *supra* note 15, at 244–249.

positionality explanation may shed light on the limits of a few one-time analyses, but it cannot explain the limits of the collective and cumulative body of work by a community of scholars.

It is possible that the reason is simply that there are too many important China issues for scholars of Chinese law to examine, and property law's role in China's economic development happens to be one of those that are left out. This is a casual and unverifiable explanation, but it is my favorite because if it is true, it is a good reason to attract more brilliant minds to study China.

Thus, I return at exactly where I started: I do not know why previous accounts have missed property law's role in China's development and why instead they hold that China's development occurred without the help of property law.

China's property and development story not only describes the *actions* of the Chinese state. From a political economy perspective, it also constitutes, along with other building blocks, the *functions* of the Chinese state.³²³ This lesson is extremely important for Americans to understand today. As the ideology that all good comes out of strong private property and small government gained popularity in America in the past 40 years, Americans are reminded less and less that America did *not* become the wealthiest country in the world by protecting everyone's property rights and maintaining a small government.³²⁴ *Johnson v. M'Intosh* denied tribes the fee simple owner status over Indian land,³²⁵ deprived them of the ability to defend tribal territory and power to sell land on the market to fund tribal development,³²⁶ and suppressed the price of Indian land by making the federal government the monopsony buyer.³²⁷ After seizing ownership "either by purchase or by conquest[,]"³²⁸ the federal government transferred 50% of America's land mass to a multitude of actors—to investment companies to raise government revenue,³²⁹ to state governments in grants to finance economic development (328 million acres),³³⁰ to war veterans as

³²³ I thank Deval Desai for this insight.

³²⁴ William Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 753 (2008) (identifying the prevalent belief in and exposing the falsehood of the enduring myth of a weak American state).

³²⁵ 21 U.S. 543, 562–63, 567–68 (1823). Although *Johnson* holds that tribes possess the original title of occupancy, in *Tee-Hit-Ton Indians v. United States*, the Court holds that the Indian title of occupancy is not protected by the Takings Clause and "may be extinguished by Government *without* compensation." 348 U.S. 272, 289 (1955) (emphasis added).

³²⁶ *Johnson*, 21 U.S. at 567–70.

³²⁷ Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1078 (2015) (*Johnson* as part of the United States' strategy to drive down prices of Indian land through monopsony).

³²⁸ *Johnson v. M'Intosh*, 21 U.S. at 587.

³²⁹ RICHARD N. L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 72 (3d ed. 2020); Alan Taylor, *Land and Liberty on the Post-Revolutionary Frontier*, in *DEVisING LIBERTY: PRESERVING AND CREATING FREEDOM IN THE NEW AMERICAN REPUBLIC* 81, 98 (David Thomas Konig ed., 1995).

³³⁰ ANDREWS, *supra* note 329, at 72.

payment for service (61 million acres),³³¹ to settlers at heavily discounted rates to build individual livelihoods and America’s agriculture (273 million acres),³³² and to private syndicates in grants to build a world-leading railway system (155 million acres in the middle of the nineteenth century; one ninth of what was then America’s entire land area).³³³ Richard Andrews comments that public land in the nineteenth century was “the single most important tool of government . . . economic development policy,” and that “notwithstanding its free-market rhetoric, the United States was perhaps the world’s most successful model of ‘state-led development.’”³³⁴

Today, the belief that China is dangerous and antithetical to what America stands for is as strong as ever. Yet America’s own development history suggests that America and China are not antitheses, but fellow travelers on a tortuous and, to many, unjust path toward economic prosperity. A refusal to historicize, and see the similarities between, American and Chinese economic transformations exceptionalizes America and essentializes China.³³⁵ It is a hermeneutic mistake and, in a world of rising U.S.-China tensions, irresponsible and dangerous.

³³¹ *Id.*

³³² Matthew Snedden, *Northwest Homesteader: A Curriculum Project for Washington Schools, Section II, Historical Context and Essays*, CENTER FOR THE STUDY OF THE PACIFIC NORTHWEST, <https://www.washington.edu/uwired/outreach/cspn/Website/Classroom%20Materials/Curriculum%20Packets/Homesteading/II.html> (last visited Sep. 7, 2022).

³³³ ANDREWS, *supra* note 329, at 72; Robert W. Swenson, *Railroad Land Grants: A Chapter in Public Land*, 5 UTAH L. REV. 456, 557–58 (1957).

³³⁴ ANDREWS, *supra* note 329, at 71, 323.

³³⁵ See generally Novak, *supra* note 324; JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* 232 (2016) (“China is a nation, much like America, that faces a great many social problems. It is populated by people who take great risks to challenge what they see as unjust in their society. Many of these social problems are increasingly tied to mutual challenges that America and China face . . . Looking at China as our legal antithesis or as an object of our own influence distracts from this commonality and has only undermined the cause of liberal values.”).