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Form and function in China's urban land regime: The irrelevance of "ownership"☆

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ABSTRACT

China's urban land is typically said to be owned by the state, with private parties "merely" permitted to own long-term use rights of up to seventy years. This regime has been praised by those who believe it embodies socialist values and criticized by those who believe it will hamper growth. This article argues that both views are mistaken; that the features of the long-term use rights are not significantly different from those attaching to full private fee simple ownership, and that the main features of China's system are shared by other jurisdictions such as Hong Kong where the existence of a well functioning real estate market and satisfactory economic growth have never been doubted. In short, ownership is a sufficiently elastic concept that something called "state ownership" can easily accommodate any number of specific institutional arrangements that serve different functions. There is thus no substitute for a fine-grained analysis of the specific details of any particular land tenure regime before reaching conclusions about its economic effects.

This article also offers support for the idea that property rights cannot be understood as simply exogenously imposed rules of the game that must be followed. The rules of the game reflect and affect wealth and influence, which can be put to the service of changing the rules themselves. Although governments can attempt to create institutions, whether and how they will actually function in society is difficult to control.

1. Introduction

The first article in this issue looked at the question of housing; this paper examines property rights in land. More than sixty years ago, the People's Liberation Army captured the last of China's cities in the Communist Party's march to power, initiating a period of bloody land reform in the countryside and large-scale confiscations in the cities, formalized by the 1982 Constitution's declaration that all urban land belonged to the state. Today another land revolution, this time completely unheralded, is taking place in China's cities, in which the substance of private ownership is being restored. It is not the purpose of this article to lament or to praise this development. My purpose is threefold: (1) to explain where we are today and how we got here; (2) to argue that much of the debate over state ownership is a distraction—the label turns out to have little if any determinate meaning, and virtually any social purpose can be accomplished with or without the form of state land ownership; and (3) to address arguments that continuing elements of state ownership in the current system are likely to retard economic development.

This article proceeds in several parts. Part II sets the stage by discussing briefly why private ownership of land is often deemed important for economic development. Part III introduces China's post-1949 system of urban land tenure: its history and how we got to where we are today. Part IV looks in detail at the current form of marketable possessory tenure in urban China—called the "land use right"—and finds that it shares many important features with what are considered private land ownership rights in other jurisdictions. Part V assesses the likely future path of the land use right, looking both at the experience of Hong Kong and at theoretical considerations. It also considers, and rejects, the argument that the institution of the land use right will hamper economic development in any significant way. Part VI is the conclusion. It summarizes

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the arguments made in the article, considers the degree to which institutional form still influences substance, generalizes the findings to other jurisdictions, and discusses the article's relevance to theories of endogenous property rights, credibility, and function as expounded in this themed issue.[1]

2. The importance of private ownership of land

To understand the legal regime for urban land in China today in relation to my claim that private ownership has been virtually restored, we need to go back to first principles: why do people think that private ownership matters? What is its claimed superiority over public ownership? For many, the answer lies in the normative claim that a land tenure system should promote the economically efficient use of land, and the empirical claim that private ownership, because it internalizes the costs and benefits of land use in the person who controls it, does this better than any other system.[2] Publicly owned land is controlled by some government official, who (unless corrupt) has little or no personal stake in whether the land is put to its highest-value use.

In this context, secure property rights provide assurance to an investor of labor or capital that he will get a predictable, reasonably large share of the market return on his investment. These types of rights are associated in a number of studies with economic growth.[3] Although this view has come under criticism,[4] it is widely accepted among policy elites in China.[5]

The argument that urban land has essentially been re-privatized will turn on the claim that the possessors' incentives are similar to those they would face if they had full, formal private ownership. Whether this is true has implications not only for thinking about Chinese real estate law, but also for claims—made most recently in an essay by Robert Ellickson of Yale Law School[6]—that the current system of urban land tenure in China will retard economic growth. I will argue below[7] that this concern is exaggerated.

3. Urban land use in post-1949 China

To understand where we are today, some background in China's land tenure system for urban land is necessary. Upon the establishment of the People's Republic of China in October 1949, the government seized land belonging to the former government, many of its senior officials, and others deemed enemies of the regime. It did not, however, nationalize land generally. By the end of the 1950s, most urban land, regardless of use, was in government hands, although substantial amounts of privately held land remained as owner-occupied housing.

Non-owners typically lived in housing provided by their (state-owned) employer. If they rented from a landlord, it was under a regime so favorable to tenants that the landlord was merely a nominal owner, with the municipal government exercising actual control. During the Cultural Revolution, much of this nominally private housing stock lost even the name and passed into formal ownership by local governments. Land for non-housing purposes reflected the traditional priorities of socialist planning: cities were viewed as production centers, not consumption centers, and so high-ranking state-owned enterprises ("SOEs") were sited centrally.[8]

This system began to change in the 1980s, first with a step to full socialization of land, and then with a number of steps toward practical commodification. The 1982 Constitution formally nationalized all urban land still remaining in private hands by declaring all urban land to be state-owned.[9] The practical effect on private house-owners was not large. The state recognized as a practical matter their right to continue living in their houses, first by conceiving of the house as something that can be owned by individuals apart from the land on which it stands, and second by allowing the house-owners indefinite rights to use the land on which the house stood. The exact nature of these rights—for example, their term and their transferability—remains unclear.

The next major change came about in 1988, with the inauguration of the system of "granted" (*churang*) land use rights ("LURs"). LURs are rights to use state-owned urban land for a very long term; a fee is paid up front to the state and the land is effectively commoditized, being freely transferable on the secondary market thereafter for the duration of the LUR. A 1994 statute formalized the new system with the passage of the Urban Real Estate Administration Law.[10] This law provided for long-term leases of state-owned urban land as follows: for residential land, the maximum term is seventy years; for commerce, travel, and recreation, forty years; and for all other uses (for example, industrial), fifty years. (For simplicity's sake, the following discussion assumes that all land is like residential land unless otherwise specified.)

4. The content of rights attached to LURs

The concept of ownership ultimately proves useless as a tool for understanding the difference between rights under the Real Estate Law and "true private ownership." For example, it is commonly asserted in China today that there is an innate difference between owning "land" and owning "rights to the use of land." But ownership is nothing if not a legal concept; to "own" anything can never be more than to have certain rights that are recognized and protected by the legal system. The important question is what specific kinds of rights and interests the legal system recognizes, and how it protects them. It turns out that if state ownership is a form, it is one that accommodates many possible functions, and in no way precludes a system in which land goes to its highest-value use, costs

[1] For a discussion of endogenous property rights in pre-industrial China, see Helen Yang, *Dual Landownership as Tax Shelter: How Did the Chinese Solve Ricardo's Problem?* (MPRA Paper, No. 42689, Nov. 18, 2012), *available at* http://mpra.ub.uni-muenchen.de/42689/ ("complex land property norms could be the endogenous outcome of collective choice under institutional constraints, thus may not be inefficient per se", but instead credible and functional). On endogeneity and credibility, see Ilene Grabel, *The Political Economy of "Policy Credibility": The New-Classical Macroeconomics and the Remaking of Emerging Economies*, 24 Cambridge J. Econ. 1 (2000) pp 1-19.

[2] This is the classic argument made by Demsetz. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

[3] The foundations of this thinking go back at least to Max Weber. *See, e.g.*, Max Weber, *Modern Capitalism*, in Max Weber on Charisma and Institution Building 140, 142 (S.N. Eisenstadt ed. 1968) ("The capitalistic form of industrial organization, if it is to operate rationally, must be able to depend upon calculable adjudication and administration.").

[4] *See, e.g*, Daniel W. Bromley, *Formalising Property Relations in the Developing World: The Wrong Prescription for the Wrong Malady*, 26 Land Use Policy 20 (2008).

[5] *See, e.g*, Zhu Ying, *Qianghua Wuquan Baohu, Zengjia Caichan Shouru* (强化物权保护,增加财产性收入) [Strengthen Property Rights Protection, Increase Asset Income], Nov. 14, 2007, http://npc.people.com.cn/GB/6525622.html.

[6] Robert C. Ellickson, *The Costs of Complex Land Titles: Two Examples from China* (Yale Law School, John M. Olin Center for Studies in Law, Economics, and Public Policy, Research Paper No. 441, Oct. 31, 2011), *available at* http://ssrn.com/abstract=1953207.

[7] See *infra* Part 5.3.

[8] See You-Tien Hsing, *Land and Territorial Politics in Urban China*, China Q., No. 187, at 575, 580 (2006).

[9] Xianfa [Constitution], art. 10.

[10] Chengshi Fangdichan Guanli Fa (城市房地产管理法) [Law on Administration of Urban Real Estate], promulgated and effective Aug. 30, 1994, revised Aug. 30, 2007, *available at* http://www.law-lib.com/law/law_view.asp?id=212682 [hereinafter Real Estate Law].

and benefits are internalized as much as in full private ownership, and investment is encouraged by security of tenure.[11]

In this Part, I examine the substantive rights that attach to the LUR, showing that they strongly resemble rights of private ownership.[12] I then look at the critical (and ambiguous) question of renewal, and conclude by acknowledging some differences between LURs and private ownership.

4.1. Substantive rights attaching to LURs

4.1.1. Length of tenure

One of the allegedly key distinctions between the long-term LURs buyers get under the Real Estate Law and fee simple ownership under Anglo-American property law is the fact that the LUR is limited in time, while fee simple ownership is ownership in perpetuity.[13] A limited slice of time, however, is in no way inconsistent with private ownership. In many urban real estate markets whose "privateness" has never been questioned, most notably Hong Kong and Singapore, leasehold is a common form of tenure.[14]

4.1.2. Economic value of ownership

Another distinction between leasehold and fee simple is that the economic value of the former is less. But in fact it is not much less. At an annual discount rate of 5%, the present value of a seventy-year residential leasehold is almost 97% of the value of a perpetual fee simple. In markets where fee simples co-exist with long-term leaseholds, this mathematical near-equivalence seems to be reflected in buyer behavior.[15]

4.1.3. Ownership along vertical dimensions

Chinese law allows LURs to be specified along vertical dimensions (subsurface and airspace LURs), horizontal dimensions (surface LURs), and time dimensions.[16] The default rule in Chinese land tenure used to be that LURs covered only the surface, with modest extensions to the subsurface (for example, in order to lay a foundation or install heating and sewage pipes) and the air (for example, sufficient air space to allow for buildings to be built). At present, the picture is uncertain. The Property Law certainly contemplates the existence of LURs explicitly specified along the vertical dimension, but it is unclear how far ordinary LURs extend if the grant contract is silent on the matter. Nevertheless, the fact that LURs can be specified along the vertical dimension shows that in this respect they resemble what are ordinarily thought of as private land ownership rights; the state does not maintain certain rights along the vertical dimension.

4.1.4. Freedom to use land

The Real Estate Law grants LURs subject to certain use restrictions, which can be in the form of zoning regulations as well as written into the grant contract.[17] Yet private ownership of land has never, *pace* Blackstone[18] and the French Civil Code,[19] meant that one can do whatever one likes on the land. The law of nuisance[20] (and its equivalent in civil law jurisdictions) has long provided a private-sector check on an owner's right to use land as he pleases. Additionally, pervasive zoning regulations determine the general nature of the land use, and building a new structure may require government permission.[21]

4.1.5. Freedom to transfer

LURs are not significantly less transferable than the kinds of land use rights typically considered privately owned. Owners of LURs may negotiate any price with any transferee, and the transferee takes whatever rights the transferor owned.

4.1.6. Remedies for deprivation

In the common law, remedy is one of the defining distinctions between contract rights and property rights; in a sense, only by looking at the remedy for deprivation can we say something was property in the first place. To take a simple example, suppose I have a right to be in a certain place at a certain time and that someone interferes with that right. Can the interferer merely pay me the socially determined market value of the right, or am I entitled to the state's assistance in forcibly restoring me to the place in question until the would-be interferer pays me what I think the right is worth?[22] If my right stems from having bought a theater ticket, the theater owner can wrongfully eject me from the theater and still pay no more than the market value of the deprivation. If my landlord wants my apartment and tries to wrongfully evict me,

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[11] Sjaastad and Bromley discuss the interesting case of customary "use it or lose it" land tenure systems in Africa, where investment leads to security of tenure, not the other way around. *See* Espen Sjaastad & Daniel W. Bromley, *Indigenous Land Rights in Sub-Saharan Africa: Appropriation, Security and Investment Demand*, 25 World Development 549 (1997). And the same could be said for so-called "minor property rights" in China, where buyers of land rights not recognized by the state in effect are hoping that if there are enough of them, the state will be forced to recognize their rights. *See* Wan Jing (万静), *Hei Zhongjie Zhutui Xiao Chanquan Fang Weifa Jiaoyi* (黑中介助推小产权房违法交易) [Black Middlemen Push Illegal Transactions in Minor Property Rights], Fazhi Ribao (法制日报) [Legal System Daily], Jan. 2, 2014, at 6. But neither of these logics is operating in the urban real estate setting discussed here.

[12] The classic list of the incidents of ownership is in A.M. Honoré, *Ownership*, in Oxford Essays in Jurisprudence 107 (A.M. Guest ed. 1961). To canvass them in detail is not necessary here; I have instead chosen those elements the discussion of which will shed the most light on Chinese LURs in particular.

[13] A fee simple (sometimes called a freehold) is an ownership interest in land (called an "estate") that is the maximum available under the law and lasts forever. It includes the right to exclude others and the right to a restoration of the property (not just damages) if it is wrongfully taken. A leasehold carries similar rights, but is for a fixed term.

[14] *See, e.g*, Nicholas Mak, *Buying a Home: Freehold vs. Leasehold*, Business Times (Singapore), Dec. 4, 2009, *available at* http://bit.ly/jouMXi (describing Singapore's land tenure system).

[15] Consider the following quotation: "When times are good, there is marginal price differential between leasehold and freehold new launches," said Colliers International's director of research and advisory, Ms. Tay Huey Ying."But as the property ages and the lease shortens, the price gap will widen." Joyce Teo, *Freehold Better Than Leasehold?*, Sunday Times (Singapore), Jan. 6, 2010, *available at* http://bit.ly/lMyiHq. This is exactly what one would expect under standard economic assumptions.

[16] *See* Wuquan Fa (物权法) [Property Law] (promulgated March 16, 2007, effective Oct. 1, 2007), art. 136, *available at* http://www.law-lib.com/law/law_view.asp?id=193400.

[17] *See* Real Estate Law, *supra* note 10, arts. 18, 26.

[18] Blackstone famously defined property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, Commentaries *2. It has been noted that Blackstone then went on to list all the ways in which English law limited that supposedly despotic dominion. *See* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 Yale L.J. 357, 361 (2001); David B. Schorr, *How Blackstone Became a Blackstonian*, 10 Theoretical Inquiries in Law 103 (2009).

[19] The French Civil Code defines property as "the right of enjoying and disposing of things in the most absolute manner" ("la propriété est le droit de jouir et disposer des choses de la manière la plus absolue"). C. civ., Art. 544.

[20] Nuisance is the legal doctrine under which one may bring suit against another for interference with one's use and enjoyment of one's land. Not all interference is actionable; a court is unlikely to impose liability on someone who operates a loud lawn mower for one hour every week.

[21] It would not be an overstatement to say this has been so in all times and all places: Absolute ownership does not exist and has never existed. Ownership has always (in Justinian law as well) been restricted by all types of regulations which, in the general interest or in the interest of others, deprived the owner of part of his absolute power over the object. H.W.J. Sonius, *Introduction to Aspects of Customary Land Law in Africa: As compared with some Indonesian Aspects* 19 (1963).

[22] This is, of course, the distinction between liability rules and property rules analyzed in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

however, I have a right to have the possession of the apartment restored to me until the landlord and I come to an agreement on early termination of the lease. Although we tend to say that the first result—a contractual remedy—obtains "because" the theater ticket represents only a contractual right whereas the lease represents a property right, one could just as easily say that the theater ticket represents only a contractual right because it gets only a contractual remedy.

Chinese law provides property-like remedies for unlawful interference with LURs. Art. 34 of the Property Law states, "Where real property or movable property is occupied by someone without rights, the rightholder may demand the return of the property." LURs are by virtue of their inclusion in the Property Law deemed real property.[23] Contractual rights are treated differently. Under China's Contract Law, a breacher of contract may be required to perform as promised unless "the cost of performance is excessive" (*lüxing feiyong guogao*).[24] In other words, one party may deprive the other party of his right to performance and pay merely the socially, not subjectively, determined value of the loss. This cannot happen with property rights such as LURs (except upon expropriation by the state). In this respect, then, Chinese LURs look like private property rights in other jurisdictions.

4.1.7. Compensation upon expropriation

LURs are subject to expropriation by the state for public-interest purposes. In China, compensation is based on "the number of years of utilization and the actual development of the land by the land user,"[25] as opposed to the market value of the remaining term. What this presumably means is that compensation would not take into account increases or decreases in the value of the LUR due to events occurring after the grant date other than development (for example, the opening of a subway station near a residential development). In contrast, recent regulations issued by the State Council provide that buildings shall be compensated at "fair" value, defined as the market value of similar buildings.[26] The regulations do not, however, further define "similar."

Were China to permit fee simple estates, there is no reason to think they would be immune from expropriation; certainly few if any governments in the world have renounced this power. The important question for present purposes is whether LURs are somehow *more* prone to expropriation than a fee simple would be. It is impossible to answer this question in any rigorous way, because privately owned fee simples in urban land do not exist. The expropriations that do take place, however, suggest—but don't prove—the answer is no.[27]

First, consider the one area in Chinese land law where ownership without a term limit, considered so important in the Chinese discourse on land law, exists: rural land under so-called "collective" ownership.[28] Unlike LURs, collectively owned land is not subject to a reversion[29] in the hands of the state. Yet collectively owned land is frequently subject to expropriation as cities expand, convert rural land to urban state-owned land, and sell off LURs in the land. Perhaps the state treats all types of land ownership cavalierly. What we observe in expropriations of collective land, however, does not give us any prima facie grounds for believing that LURs are treated more cavalierly. Our observations do suggest that political clout of the possessor is important, not the form of ownership, as also posited in the introduction to this themed issue.

Second, consider the literature on expropriations in urban China and the social disruption they have caused.[30] A careful reading suggests that in virtually all cases, the people being displaced are on allocated land,[31] not granted land subject to a long-term LUR under the Real Estate Law. One can certainly find examples of expropriation of LURs, but there is no evidence that LURs are being expropriated in some cavalier or large-scale way.[32] So far, it seems that LURs have at least a kind of "actuarial immunity"[33] 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.

4.2. Provisions for renewal

Prior to the Property Law, which came into effect on October 1, 2007, the rule about LURs was quite clear: they lasted for a certain period and then they ended. Unless an agreement to extend the term was reached, the state would retake possession of the land and buildings. If the holder wanted to keep using the land, it would have to negotiate with the owner (the state) for a new term at a new price. The rule was exactly the rule that would apply to a lease for a term of years in, say, the United States.

Much subsequent commentary has tended to allege a degree of uncertainty that was not actually there. The first law-like norm[34] dealing with LUR leases, the State Council's 1990 Provisional Regulations on the Granting and Transfer of Use Rights to State-Owned Land in Cities and Towns ("Provisional Land Use Rights Regulations"),[35] stated the rule clearly in Article 40: "At the end of the land use right term, the land use right as well as ownership of buildings and other fixtures on the land reverts without compensation to the state."

[23] *See* Property Law, *supra* note 16, art. 135.

[24] Hetong Fa (合同法) [Contract Law] (promulgated March 15, 1999, effective Oct. 1, 1999), art.110(2), *available at* http://www.law-lib.com/law/law_view.asp?id=475

[25] Real Estate Law, *supra* note 10, art. 20.

[26] *See* Guowuyuan (国务院) [State Council], 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 for Buildings on State-Owned Land] (promulgated and effective Jan. 21, 2011), art. 19, available at http://www.law-lib.com/law/law_view.asp?id=341093.

[27] One reader has suggested that fee simples so labeled (with the appropriate Chinese term) might be more robust than LURs simply because of the power of names: officials would be more wary of taking, and owners would more zealously defend their rights. An argument can certainly be made for the power of framing in property law, *see* Jonathan Remy Nash & Stephanie M. Stern, *Property Frames*, 87 Wash. U. L. Rev. 449 (2010), but a full discussion of this question is beyond the scope of this article.

[28] While collectively owned land does not have a term limit, it is not equivalent to a fee simple in American or English law. It is subject to much more control and cannot be permanently alienated except through the process of condemnation and conversion to state-owned land.

[29] "Reversion" is the term used to describe the future possessory interest in land during the term of a lease that ripens into a possessory interest when the lease expires and the leaseholder's possessory interest ends. The holder of the reversion is called the reversioner.

[30] See, e.g., Eva Pils's contribution elsewhere in this themed issue,

[31] "Allocated land" refers to urban state-owned land that has not yet been commoditized through the grant process. It is still allocated through bureaucratic direction, not market transactions, and no user has yet paid market value for it.

[32] Ho has shown that the issues of tenure insecurity and conflict over land in China are very complex and vary over space and time. *See* Peter Ho, *The "Credibility Thesis" and Its Application to Property Rights: (In)secure Land Tenure and Social Welfare in China*, 40 Land Use Policy 13 (2014).

[33] The term is Tom Ginsburg's. *See* Tom Ginsburg, The "China Problem" Reconsidered: Property Rights and Economic Development in Northeast Asia (University of Chicago Law School, June 2011), available at http://bit.ly/1iw6P1N.

[34] By "law-like norm," I mean a rule issued by the National People's Congress, its Standing Committee, or the State Council.

[35] Guowuyuan (国务院) [State Council], Chengzhen Guoyou Tudi Shiyongquan Churang He Zhuanrang Zanxing Tiaoli (城镇国有土地使用权出让和转让暂行条例) [Provisional Regulations on the Granting and Transfer of Use Rights to State-Owned Land in Cities and Towns] (promulgated and effective May 19, 1990), *available at* http://bit.ly/1iw6Rqx [hereinafter Provisional Land Use Rights Regulations].

When the LUR system for urban land was formally enacted into statutory law in 1994 via the Real Estate Law, the rule lost a little of its prima facie clarity. Article 20 of the Real Estate Law states that when the LUR term ends, the right to the land reverts to the state and no compensation is due.[36] No mention is made of improvements. Nevertheless, a basic principle of Chinese land law is that rights to buildings and land, although technically separable, should generally go together. Moreover, the 1990 Provisional Land Use Rights Regulations are not considered superseded by the Real Estate Law.[37] After the promulgation of the Real Estate Law, Chinese commentators typically still regarded the rule as clear.[38]

Despite this clarity, there were many complaints from LUR holders. What, they lamented, would happen after seventy years when the LUR expired? Would grandma be thrown out into the street? One prominent member of the group drafting the 2007 Property Law, Professor Wang Liming, called these alleged uncertainties a "time bomb" that needed to be dealt with.[39] On the surface, these complaints make no sense. First, any current residential LUR holder is more properly concerned with the resale value of what he holds than with what will happen to his own possession.[40] The concerns, however, seem to be phrased in the physical language of personal eviction, not the financial language of discounted future values. Second, it is difficult to take seriously complaints about imminent homelessness from a propertied class that has had seventy years' advance notice of the loss of possessory rights. Thus, the complaints can be seen not as reflections of any inherent lack of clarity in the law, but instead as a move in the ideological struggle of current LUR holders to extend their claims.

The straightforward picture outlined above was at least arguably thrown into confusion by the 1997 Property Law. Article 149 of the Property Law, which deals with the termination of LURs, divides them into two kinds: residential LURs and all others. Non-residential LURs are to be dealt with as follows:

> With respect to extension after expiration of the term of use rights in non-residential construction land, the matter shall be handled in accordance with rules of law. With respect to ownership of buildings and other immovable property on the land, where there is an agreement, the provisions of the agreement shall be followed; where there is no agreement or the agreement is not clear, the matter shall be handled according to provisions of law (*yizhaofalü guiding*).

This provision gives no more or less legal reassurance than, as discussed below, that held by leaseholders in Hong Kong whose leases come up for discretionary renewal after 1997.[41]

In contrast to non-residential LURs, residential LURs are to be renewed "automatically" (*zidong xuqi*), a term that has sparked discussion. When compared, it is clear that "automatically" apparently means something different from "according to provisions of law," but neither the legislation nor any authoritative interpretation tells us what the difference is. "Automatically" is susceptible to a variety of interpretations; it could mean "at no cost," "for a fee to be fixed according to a formula," or "for a fee to be negotiated."

- "At no cost"

If "automatically" means "at no cost," then—assuming the rule applies to all extensions, not just the first—we are seeing the restoration of fee simple ownership: a possessory right that lasts forever. This is in fact very close to the land use regime that now prevails in Hong Kong: when leases are renewed, there is no premium charged and the annual rent is nominal. Because the real estate market treats these renewals as automatic, free, and guaranteed, the number of years remaining in the lease is not important. Government ownership would become a transparent, economically insignificant fiction.

- "For a fee to be fixed according to a formula"

A fee fixed according to a formula is, if collected by the government, hard to distinguish from a real property tax if the fee is either a flat fee or one based on the value of the property, and nobody thinks that the existence of property taxes is inconsistent with private ownership of land. Currently, China does not collect a periodic tax based on the value of residential property; the state may benefit from the market value of residential urban land only when the land is granted and when it is transferred.[42]

- "For a fee to be negotiated"

If "automatically" means "for a fee to be negotiated," then it means very little—at most, perhaps, a right of first refusal. LUR holders would have little more than they had before the Property Law.

What is the best understanding of the term? Interpreting "automatically" as "at no cost" certainly has a logical appeal. As Chinese commentators have observed, if there is a cost, then there is a possibility that the LUR holder will be unwilling or unable to pay it, and therefore renewal could not be said to be "automatic."[43] And yet, to paraphrase Holmes, the life of legislation is not logic; it is politics. Looking to the legislative history, although early drafts of the Property Law included language requiring the payment of a land use fee upon renewal, by the sixth reading, the language had been removed from the draft, leaving a gap that remained in the final version.[44]

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[36] *See* Real Estate Law, *supra* note 10, art. 22.

[37] *See* Patrick A. Randolph & Jianbo Lou, Chinese Real Estate Law 129 n.18 (2000).

[38] See, e.g, Deng He (邓鹤), *Churang De Tudi Shiyongquan Qiman Falü Houguo Fansi* (出让的土地使用权期满法律后果反思) [Reflections on the Legal Consequences of the End of the Term of Granted Land Use Rights], Zhongguo Fangdichan (中国房地产) [Chinese Real Estate], No. 3, at 59 (1996); Chen Yuedong (陈跃东), *Tudi Shiyongquan Qixian Jieman Dishangwu De Chuli Wenti* (土地使用权期限届满地上物的处理问题) [Issue of Disposition of Surface Objects Upon the Expiration of the Land use Right Term], Zhongguo Fangdichan (中国房地产) [Chinese Real Estate], No. 3, at 65, 66 (1997).

[39] *See Wuquan Fa: Diqi 70 Nian Zidong Xuyue* (物权法：地契 70 年后自动续约) [Property Law: After 70 Years, the Land Contract Is Automatically Extended], Chinese Civil and Commercial Law Network, March 20, 2007, http://old.civillaw.com.cn/article/default.asp?id=31725 [hereinafter *Automatically Extended*].

[40] "He" should be understood here to include male, female, and institutional holders.

[41] See below note 59 and accompanying text. Some pre-1997 leases have already come up for renewal; a great number, however, have their expiration dates in the future.

[42] This is an inadequate summary of China's complex system for taxing real estate. Suffice it to say here that the property tax with which Americans are most familiar—a regular tax paid by owner-occupants of houses on the market value of their property—does not exist. *See* Peter Ford, *China Embraces an Old Western Tradition... Property Taxes*, Christian Science Monitor, Jan. 28, 2011, *available at* http://bit.ly/ghYAeq.

[43] Cui Yongliang (崔永亮), Dui Zhuzhai Yongdi Shiyongquan Zidong Xuqi Youguan Wenti De Sikao (对住宅用地使用权续期有关问题的思考) [Thoughts on Issues Relating to the Automatic Extension of the Term for Residential Land Use Rights], Fazhi yu Jingji 法制与经济 [Law and Economy], No. 6, at 14, 14 (2007).

[44] *See* Wuquan Fa (Cao'an) (物权法（草案）) [Property Law (Draft) (June 2005)], available at http://npc.people.com.cn/GB/14957/3530629.html; Yu Yongjian (于永建) & Yonglin Cui (崔永林), "Zidong Xuqi" Bu Dengyu Wuchang Shiyong ("自动续期"不等于无偿使用) ["Automatic Renewal" Does Not Mean Free Use], Zhongguo Tudi (中国土地) [China Land], No. 5, at 37, 37 (2009).

What happened? According to one authoritative source, Prof. Wang Liming, the vagueness represents the legislative papering-over of a failure to agree:

> Specific rules for this are fairly complicated; there were many differences of opinion and much debate. Therefore, in formulating the Property Law, [we] deliberately passed over, or one could say avoided, making specific rules. We just stipulated the basic principle.[45]

That there was controversy is not surprising. It cannot have been lost on defenders of the LUR system that a truly unconditional extension for an indefinite number of times amounted in substance to fee simple and an abolition of the existing urban land tenure system.[46] The unwillingness or inability of the drafters to come up with a clear rule is reflected in Professor Wang Liming's self-contradictory assurance to LUR holders: "There will be no conditions on extension. As for the term of the extension and the cost, specific measures will be made clear through the promulgation of implementing rules."[47] LUR holders were left in almost exactly the same legal position—"almost" because the term "automatic," whatever it means, is new—as before the Property Law.

4.3. How Chinese urban land tenure is different

Urban land tenure in China is not identical to that in the developed West. One important difference is that Chinese law requires that the first grantee of an LUR from the state adhere to a stated plan for development. If the land remains undeveloped for two years following the grant, the state can reclaim it without compensation.[48] Developers may not transfer the LUR unless twenty-five percent of the planned investment has been made. Regardless of how strictly these provisions are enforced, they are inconsistent with a pure market model of land tenure, in which owners can make their own decisions about whether to improve the land.[49] Such restrictions, however, apply only to developers who are the initial grantees of land.

5. Future prospects for LURs

The previous Part looked closely at the content of the LUR, the extent of its resemblance to a fee simple, and the degree to which uncertainty still exists. This Part argues that such uncertainty is not a barrier to economic development in China. It does so first by considering the historical experience of Hong Kong, which has a land tenure regime similar to that of urban China. It then considers some theoretical approaches to the problem and makes some predictions.

5.1. Empirical analysis: Hong Kong

In this section I look at the major model for China's urban land tenure system: Hong Kong.[50] Hong Kong has both an active real estate market and a thriving economy, which should make us wary of claims that complexity and uncertainty of land tenure are by themselves major influences on growth.

Hong Kong's current land tenure system involves long-term leaseholds for which a high premium is paid upon purchase and annual rents are nominal—usually three percent of market rental. This system, however, took some time to evolve.

In 1843, China ceded the island of Hong Kong to Great Britain in perpetuity under the Treaty of Nanking. In 1860, Kowloon Peninsula, on the mainland opposite Hong Kong, was ceded under the Convention of Peking. Finally, the rest of rest of present-day Hong Kong—the mainland New Territories—was granted to Great Britain in 1898 under the Second Convention of Peking, but only under a ninety-nine-year lease.

On Hong Kong island, the British decided after some pre-1843 false starts to adopt a system of long-term leases.[51] No land was to be sold outright[52]; instead, seventy-five-year leases were to be granted by auction to the person who bid the highest amount as an annual payment.

In the late 1840s, in response to pressure from lessees, the British government agreed to allow the Hong Kong administration to replace existing seventy-five-year leases with 999-year leases. New leases in Hong Kong and later in Kowloon could also be for 999 years.

Beginning in 1851, annual rents were fixed at a moderate amount, and the competition was instead over the amount paid as a premium for the fixed-rent lease.[53] The premium might have amounted to very roughly half of the present value of the lease.[54]

In 1898, in the same year the New Territories were added to Hong Kong for the next ninety-nine years, the British government decided that 999-year leaseholds were too long—they are of course virtually indistinguishable from fee simple, which had been prohibited—and ordered that future leases in all parts of Hong Kong should in general be for seventy-five years, and in no case longer than ninety-nine years.[55] To stem the outcry from local landholders, however, the government agreed to make the seventy-five-year leases renewable for one further term at "a rent to be fixed by the Director of Public Works as the fair and reasonable rental value of the land at the date of such renewal."[56]

This sowed the seeds for the system in Hong Kong as we see it today. In 1973, a large number of seventy-five-year leases, which were renewable only for one further term, expired, and the British government responded to pressure from leaseholders by allowing renewal with no premium for the extension and at only a nominal annual rent: three percent of market rent ("rateable value").[57] This is essentially a giveaway.

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[45] *See Automatically Extended*, *supra* note 39.

[46] *See, e.g.*, Gao Binghua (高炳华), Xiong Jun (熊军) & Xiong Liling (熊丽玲), "Wuquan Fa" Guiding "Zidong Xuqi" Dui Juzhu Fangdichan Gujia De Yingxiang (《物权法》规定"自动续期"对居住房地产估价的影响) [The Influence of the Rule of "Automatic Renewal" in the Property Law on the Appraisal of Residential Real Estate], in Guoji Fangdichan Gujia Luntan—Gujia Yu Caichan Baohu Lunwenji (Diyi Ce) (国际房地产估价论坛——估价与财产保护论文集（第一册）) [International Forum on Real Estate Assessment—Collection of Essays on Appraisal and the Protection of Property (Vol. 1)] 347 (2008), *available at* http://bit.ly/1fLqawe.

[47] *See Automatically Extended*, *supra* note 39.

[48] *See* Real Estate Law, *supra* note 10, art. 26. I believe this kind of reclamation has occurred only rarely, if at all.

[49] No doubt one would find in many other countries similar requirements that developers who receive land from the government for the purpose of specific projects actually undertake the intended development. The difference in the case of China is that such transactions in other jurisdictions might constitute only a small part of the total, whereas in China they loom much larger in importance.

[50] This section is taken generally from Stephen D. Mau, Property Law in Hong Kong 91–93 (2010); Roger Nissim, Land Administration and Practice in Hong Kong 3–44 (2d ed. 2008); *Hong Kong Land Lease Reform, Part 1* (2010), Webb-Site, http://webb-site.com/articles/leases1.asp [hereinafter *HK Lease Reform*].

[51] Nissim, *supra* note 50, at 9.

[52] The one famous exception to this rule is St. John's Cathedral. In 1847, the Crown granted fee simple title to the Trustees of the Church of England, but subject to the condition that the land be used only for a church. *See id.* at 12.

[53] *Id.* at 13.

[54] *See HK Lease Reform*, *supra* note 50.

[55] Nissim, *supra* note 50, at 14.

[56] *Id.* at 15; for background history, see also (subject to the usual caution appropriate for the source) *Government Rent in Hong Kong*, Wikipedia, http://en.wikipedia.org/wiki/Government_rent_in_Hong_Kong.

[57] "Rateable value is an estimate of the annual rental value of the property at a designated valuation reference date, assuming that the property was then vacant

Prior to the transfer of sovereignty over Hong Kong to China in 1997, the U.K. and China negotiated the Joint Declaration of 1984, which dealt specifically with land leases in Annex III, and the policy set forth there was thereafter elaborated and implemented in a Hong Kong ordinance[58] and the Basic Law of the Hong Kong Special Administrative Region, a Chinese statute that serves as Hong Kong's constitution. Both deal with land tenure issues. The sum of their effects is as follows:

- New (post-1997) leases are typically granted for a fifty-year term. The main cost is paid up front as a premium; rent is set very low, at three percent of rateable value (market rent).
- Leases that expired before the handover, whether or not they had a right of renewal, were renewed for an additional term with no premium payment required, and only a nominal rent (three percent of rateable value).
- Leases that expire after the handover are renewed in the same way, but as part of discretionary government policy. The leaseholders have no legal right to these terms. In practice, the government has routinely granted these renewals.[59]

As for land use controls, like other modern jurisdictions, Hong Kong makes use of zoning. Modern leases are used extensively in conjunction with zoning to achieve planning ends. In particular, the use of leases for planning allows the government to impose positive obligations on leaseholders, whereas zoning rules typically impose negative obligations only.[60] The government possesses and uses its powers as a landlord in addition to its general police power to carry out land use regulation.

In summary, the Hong Kong experience offers three important lessons about the institution of privately owned long-term use rights within a regime of overall state ownership. First, such a system is in no way inconsistent with a real estate market in which land generally goes to its highest value use, investors have confidence in getting a return on their investment, and satisfactory economic growth occurs. Second, the holders of such use rights will likely be a politically influential class of people, and they will use that influence to shape the rules to their benefit. Third, the land use controls common in modern states can be accomplished as well with this system as with a system of full private fee simple ownership.

5.2. Theoretical analysis

In addition to considering formal legal rights, we must also consider the likely effect of politics and money in thinking about real incentives faced by real people. Here it is useful to look at economic theories of rights creation and why current rights may be unclear. The theory of rights creation pioneered by Harold Demsetz[61] suggests that people create and specify rights when it makes economic sense to do so. If a resource becomes valuable and the cost of internalizing is lower than the benefits, property rights in it will tend to develop.[62] Although the theory runs the risk of making tautologous claims—if property rights are not created, it must have been because it did not make economic sense to create them—it does have the virtue of calling our attention to the issue of costs.

Why was the right of renewal left fuzzy? Demsetz's theory suggests that it was not in anyone's interest to expend resources on making it clear. Consider the two main reasons why current or potential LUR holders might desire clarity now about what happens when their LUR expires some decades from now.

First, they might wish to know whether it is worthwhile to build a long-lasting building. Will it add value to the land—a value that they can recover—going beyond the expiration of the LUR term? Arguably, in China the entire problem can be finessed because post-expiration value does not enter into developers' calculations. Building codes stipulate a minimum usable life of fifty years for residential buildings.[63] Thus, a builder building to code cannot be disincentivized by a shorter LUR; building for a shorter usable life is not an option. Of course, builders in China are strongly suspected of not building to code; tales of shortcuts, corner cutting, and tofu construction are legion.[64] At a meeting in 2010, a senior Chinese housing official estimated the life of residential buildings at about thirty years.[65] In general, therefore, one could reasonably suspect that few buildings built in China today actually have a usable life beyond the term of the LUR with which they are associated. Thus, the prospect of expiration does not serve as a disincentive to investment when the LUR is first granted.

Second, they might wish to know whether the LUR can be renewed perpetually free of charge in order to price it properly. Here it turns out that the costs of guessing wrong are small. If a right in perpetuity is worth $100, then at a five percent discount rate the present value of the same right for seventy years is $96.71, just 3.29 percent less. At the same discount rate, the present value of the right for fifty years is still more than ninety percent of the value in perpetuity. Ironically, given Ellickson's lack of confidence in Chinese legal institutions,[66] the more Chinese economic actors share his lack of confidence and discount the future, the narrower will be the difference in value between an LUR for a given term and an LUR in perpetuity. Uncertainty will therefore matter less, not more. At a discount rate of ten percent, for example, the value of a seventy-year LUR rises to 99.97 percent of that of the same right in perpetuity.

This discussion, however, is incomplete because it is static, dealing only with circumstances when an LUR is first granted. We must also consider what will happen as the LUR matures. As the expiration date approaches and the number of years remaining in an LUR decreases, pressure increases on the parties to do something

and to let." Government of Hong Kong Rating and Valuation Department, Rates, http://www.rvd.gov.hk/en/public/rates.htm.

[58] The New Territories Leases (Extension) Ordinance, (1988) Cap. 150.

[59] In an official press release in 1997, the Secretary for Planning, Environment and Lands stated that "[w]e expect . . . that most of the non-renewable leases will be renewed." *See* Nissim, *supra* note 50, at 39.

[60] *See* Sarah Nield, Hong Kong Land Law 258, 259 (1992); Eric C.K. Ho, *The Leasehold System as a Land Management Measure to Attain Sustainable Development Planning by Contract*, 24 Property Management 272, 275-76 (2006).

[61] *See* Demsetz, *supra* note 2.

[62] There are several examples of this phenomenon in the literature. Demsetz's example is that of private rights in land that developed among the Montagnais Indians of the Labrador Peninsula as the fur trade developed and the potential for over-hunting grew. *See id.* at 351. Later work has cast doubt on some of Demsetz's empirical claims. *See, e.g.,* John C. McManus, *An Economic Analysis of Indian Behavior in the North American Fur Trade*, 32 J. Econ. Hist. 36 (1972).

[63] *See* Jianshe Bu (建设部) [Ministry of Construction], Guojia Biaozhun Zhuzhai Jianzhu Guifan (国家标准住宅建筑规范) [State Standard Residential Building Code] (promulgated Nov. 30, 2005, effective March 1, 2006), Item 6.1.1, *available at* https://perma.cc/HF5R-8GLP. I have not yet found the standards for non-residential buildings. I know by observation that it is permitted to build non-residential structures that are intended to be, and are, extremely temporary—perhaps just six months or a year in the case of an on-site leasing and sale office for a building complex under construction.

[64] Consider, for example, the story and remarkable photographs of the Lotus Riverside complex in Shanghai, where a nearly completed apartment building simply toppled over. *See* Sky Canaves, *Property Executives Get Life in Shanghai Building Collapse Case*, Wall Street Journal China Real Time Report, April 22, 2016, http://on.wsj.com/bHUt2o.

[65] *See Zhongguo Jianzhu Pingjun Shouming 30 Nian, Yingguo Jianzhu Shouming 132 Nian* (中国建筑平均寿命 30 年, 英国建筑寿命 132 年) [The Average Lifespan of Chinese Buildings Is 30 Years; the Lifespan of British Buildings Is 132 Years], ifeng.com, April 8, 2010, https://perma.cc/XF55-5CP7 (quoting Vice Minister of Housing and Urban-Rural Development Qiu Baoxing).

[66] See the discussion of Ellickson's essay in Part 5.3 below. To be sure, some doubt is quite justified. But I neither mean nor need to pass judgment here on this issue.

to clarify their rights.[67] The pressure on the LUR holder is easy to understand: it may wish to make decisions about whether to invest in new improvements in the land, and wants to know whether it will be able to benefit from value extending beyond the expiration date. There is also pressure on the reversioner (the state and more specifically its agents): it is now (at least in the case of non-residential LURs, which do not purport to renew "automatically") receiving requests from LUR holders to renew, and must decide whether to demand and receive a grant fee for renewal now, or to defer the decision until later. As with any option,[68] the failure to exercise it at a given time may prove a bad decision in light of later events.

There is an additional pressure (if that is the right word) on the LUR holder. As the expiration date approaches, there is an increasing difference in value between a truly expiring LUR, renewable only upon a successful renegotiation and payment of a new grant fee (a "term LUR") and one that is in effect predictably renewable at low or no cost (a "perpetual LUR"). The LUR holder thus faces a steadily increasing opportunity cost of not taking political steps to ensure that any ambiguity over whether it holds a term LUR or a perpetual LUR be resolved in favor of the latter interpretation.Of course, the LUR holder isn't necessarily acting alone. There are many LUR holders and they form, at least potentially, an interest group. And interest groups can be powerful forces in creating and delineating property rights in their own favor.[69] It is not necessarily always a happy Demsetzian story of efficient allocations triumphing over inefficient ones.

Whether LUR holders can act as a group depends on the cost of their getting organized relative to the benefits to be achieved. Whether they can act successfully depends as well on the effectiveness of interest groups arrayed against them.

It would be a mistake to make predictions about the effect of China's current set of property rights upon China's economic development on the basis of an assumption that those rights will not change. Of course, any argument is entitled to its assumptions, provided they are clearly stated, and one could respond by saying it is precisely the purpose of an argument about the inadequacy of current institutions to induce people to change them. My point here, however, is that such arguments may not be necessary. We can expect economic pressures and the self-interest of the wealthy and politically connected in Chinese society to accomplish the task. On the one hand, it might be in the interest of the state—or at least the local state—to be able to resell the LURs. But on the other hand, if China then is anything like China today, the individuals who actually control the state are likely to have large real estate holdings. It will thus be in their personal interest to have automatic and free renewals of LURs. My prediction is that any ambiguity in the rules will be resolved in their favor.

5.3. The effect of the current structure of LURs on economic development

In a recent essay, Robert Ellickson argued that China's system of urban LURs, as currently configured, will "seriously impair China's economic prospects."[70] His basis for so arguing is that under the LUR system, the possessor holds land subject to a future interest—the reversion that is in the hands of the state—and that this complication of land title leads to inefficient land use and underinvestment in improvements.[71] The possessor cannot be sure of getting the full benefit of improvements with a value lasting beyond the end of the term, and therefore certain otherwise socially valuable investments will not be made. While in theory the possessor could negotiate with the reversionerover compensation for the benefit or an extension of the term, in practice this may not happen because of transaction costs or legal prohibitions.

According to Ellickson, the LUR is beset by the following uncertainties:

- whether the holder can compel the state to extend the term;
- if so, the dates on which the holder can first and last apply for an extension;
- what charges the state can exact for an extension; and
- whether the state must compensate for improvements to the land if an agreement on extension is not reached.[72]

He finds contemporary Chinese law and practice on all these issues to be unsettled.[73] As he notes, the 2007 Property Law's reassuring language of "automatic renewal" hides unresolved ambiguities. Moreover, he doubts that an LUR holder could have confidence that courts would protect even clear statutory rights against the objections of future government officials.

Ellickson hypothesizes the owner of a profitable factory in 2047 with a fifty-year LUR granted in 2000 that expires in three years. The holder is not certain whether the government will renew. He might, therefore, skimp on basic maintenance. He might, indeed, have stopped making long-term improvements to the facility several years earlier because of uncertainty over whether he could reap the full benefit. "In the direst scenario, if current policies continue, the health of every private industrial, commercial, and residential enterprise in China will fade as its fixed-term land contract winds down."[74]

But is this scenario plausible? Even on Ellickson's own terms, it seems unlikely. How did we ever get to 2047 without having settled the question long before?[75] The transaction costs of negoti-

[67] Although statistics are remarkably hard to procure, it is pretty clear that LURs have been granted extensively at least since the mid-1990s for each of the three statutory uses and corresponding terms (40, 50, and 70 years). In 1995 and 1996, LURs were granted in the amount of 105473 and 103921 ha respectively. *See* Zhongguo Nianjian Wangluo Chuban Zongku (中国年鉴网络出版总库) [China Yearbook Network Publication Database], various sources, *available at* http://gb.oversea.cnki.net/kns55/brief/result.aspx?dbPrefix=CYFD. The numbers for 2004 through 2011 are 178700, 163200, 232500, 226500, 163100, 295500, 291500, and 333900. *See* Zhonghua Renmin Gongheguo Guotu Ziyuan Bu (中华人民共和国国土资源部) [Ministry of Land and Natural Resources of the People's Republic of China], Zhongguo Guotu Ziyuan Gongbao(中国国土资源公报) [China Land and Natural Resources Bulletin] (various years). I have not yet found numbers for the missing years, but have no reason to think they are not in the same ballpark.

[68] For a discussion of real property rights as a form of option, see Lee Anne Fennell, *Options for Owners and Outlaws*, 1 Brigham-Kanner Property Rights Conference Journal 239 (2012), *available at* http://bit.ly/1GLUW7r.

[69] *See generally* Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. Chi. L. Rev. 181 (2003). It could be argued, of course, that interest groups are politically powerful precisely to the extent that they represent economically efficient ways of doing things. This is not the place to explore the argument in detail, but at least on the surface it seems Panglossian.

[70] Ellickson, *supra* note 6, at 3.

[71] Ellickson does not make a serious effort to demonstrate this proposition empirically or theoretically. This is not a criticism of the essay, which can be understood as intended more to raise questions than to answer them definitively. Nevertheless, as I have argued above, it is hard to find prima facie evidence that holders of LURs are unduly worried by the various uncertainties they face.

[72] See Ellickson, *supra* note 6, at 17–18.

[73] As I have shown above, the first and third points are indeed unsettled. As for the second point, I know of no reason why an LUR holder could not engage in negotiations with the relevant state agency today to renew an LUR on which there were still a few decades left to run. As for the fourth point, as I have discussed above, I find a consensus that no compensation is required.

[74] Ellickson, *supra* note 6, at 18.

[75] To deny the validity of the scenario may seem a bit like Captain Kirk's famous solution to the *Kobayashi Maru* test, *see* http://en.wikipedia.org/wiki/Kobayashi_Maru, but in a discussion of real problems it is fair to discount unrealistic scenarios as such.

ation between a single LUR holder and a single, readily identifiable reversioner are negligible. Ellickson admits that such negotiations could have taken place in mid-term. For reasons that are not clear, however, he argues that mutual trust is a precondition of successful negotiations and that such trust might not exist because the LUR holder may view state agents as incompetent or corrupt. This cannot be correct—even if the parties did trust each other, their agreement binds successors whose identities might not be known. The real question is whether appropriate institutions exist to enforce an agreement when the other party proves untrustworthy.

To be sure, Ellickson does cover this base when he argues that Chinese courts might not enforce a LUR holder's statutory rights over the objections of government officials. But if the argument is founded upon doubts about the ability of Chinese courts to uphold statutory rights, then it is no longer an argument about the particular problems of LURs. Such courts would be equally unlikely to uphold statutory rights to a fee simple. If the government is both willing and able to ignore the statutory rights of possessors, abolishing limited-term LURs in favor of permanent title will not solve anything.[76]

6. Conclusion

This article has argued that the rights and remedies attaching to urban LURs in China are not significantly different from those attaching to rights to land in systems commonly regarded as featuring private ownership. It is even possible that urban residential LURs are already in fact perpetual in duration, making them in effect fee simples instead of leaseholds, although this cannot be known for certain until several decades from now. This means that the current system of urban LURs is very different from the system that existed in the 1980s. Urban land has to a great extent been returned to a regime of private ownership. Even if the owners are public bodies, they often own in the same way that private owners do.

If I am correct, though, that the substance of private ownership of land has already become part of China's urban land use regime, then one might reasonably ask why it matters. If the surviving form of state ownership is meaningless for practical purposes, then why worry about it?

A first answer is that although urban land property rights by and large resemble private ownership, form is not entirely meaningless. The rhetoric of state ownership of land continues as strongly as ever, and the perceived need to continue with that rhetoric to a certain extent acts as a real constraint on policy-making. This is unfortunate; it is always easier to regulate institutions the existence of which does not need to be denied. It is hard to think of any goals of state ownership—whether regulation of land use or benefiting from its value—that cannot be accomplished by the familiar methods of zoning and taxation.[77]

The form of state ownership still dictates certain features of China's real estate ownership system that cause difficulties and at the very least put large transaction costs in the way of deals that might otherwise be socially beneficial. For example, although it is forbidden to speak of private ownership of "land," it is permitted to speak of, and the system acknowledges, private ownership of buildings. As a result, title to and rights in buildings can be separate from title to and rights in land. This can lead to problems when a building and surrounding land is sold, and the revenue must be divided between a party with a right to the value of the building and a party with a right to the value of the land. There is no objective way of figuring out how to divide the total value in this way. If the system allowed us to talk about private ownership of land, a separate category of private ownership of buildings would not be necessary. The real estate system of the United States, for example, does not need a concept of building ownership. One purchases a house using a definition of the land on which the house sits. Ownership of everything permanently attached to the land goes with ownership of the land.

The question of whether form matters is in some degree analogous to the question of whether the differences between the civil-law and the common-law "style" of delineating property rights are trivial, given that both systems can often reach the same answer to a given problem. As Henry Smith and Yun-chien Chang argue, style can matter. It has meaning to participants in the system; to understand the style is to understand why a system takes one route to a solution and not another. Style can also affect the substantive result at the margin, when other forces are evenly balanced.[78]

Matters of form and style are also relevant to the question of how property rights are framed. Daniel Kahneman and Amos Tversky have shown that the way in which a choice is presented can powerfully affect the choice made, even if the substance of the choice is logically identical in each framing.[79] In a recent article, Jonathan Nash and Stephanie Stern have attempted to show experimentally the effect of framing on perceptions of property rights. They find that ownership perceptions are weaker where ownership is presented as a bundle of rights than when it is presented as rights to a thing itself, even when the substance of the rights is in effect identical.[80] By the same token, it is plausible that something characterized as "a bundle of mere transferable rights to the use of land for seventy years subject to state ownership" is perceived in China as less robust than "ownership of land for seventy years subject to a reversion in favor of the state upon expiration of the term," and interference with rights characterized in the former way will meet with less resistance. Indeed, matters of framing and form are important to the extent that property rights are determined not by what the legal system says you have, but by what you think you ought to have and will expend resources to defend.

A final answer is that understanding what lies behind the labels is critical to evaluating policy reform proposals. If the reversion in the hands of the state is deemed to be critically important both by those who want to retain it and by those who want to abolish it, then vital political energy will be wasted on a pointless struggle—pointless at least to those who are concerned with substantive reform and not with symbols. This is not to deny the power and sometimes the utility of symbols, but to insist on the distinction between symbol and substance. The reversion in the hands of the state is an example of a right with very little economic substance that nevertheless seems to stand for a broad set of policy positions that have a great deal of economic substance and are therefore subject to real and meaningful debate.

This article's discussion also has lessons generalizable to other jurisdictions engaged in debates over land law reforms. As the economist Daniel Bromley has written,

> the usual preoccupation with property rights is both overwrought and very often misplaced. The key issue in economic

[76] Part of the problem here is the focus on courts, and the assumption that if courts aren't enforcing rights, then nobody is. Chinese courts, at least at present, are indeed weak and unable to stand up to government (in this case meaning that part of the Chinese government that could be roughly analogized to an executive branch), at least when it has the same or superior administrative rank.

[77] For reasons of space, this article does not go into detail on this point.

[78] *See* Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil versus Common Law Property*, 88 Notre Dame L. Rev. 1, 5–6 (2012).

[79] *See generally* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Sci. 453, 453–454 (1981); Daniel Kahneman, Thinking Fast and Slow (2011).

[80] *See* Remy & Stern, *supra* note 27.

> policy is not property rights per se but rather the full complement of institutional arrangements—working rules—of the economic system. This full complement includes property regimes, but it does not stop there.[81]

All too often discussions about property rights in reforming economies, and in the prescriptions of international funding agencies, tend to assume that certain labels have certain necessary consequences. As I have argued, both defenders and critics of state land ownership in China believe that it has some determinate meaning. But there is no substitute for a fine-grained examination of the specific incentive structure involved in any system of property rights before it can be praised or condemned as meeting or failing to meet some standard.

Finally, the story told in this article, involving both the theoretical considerations canvassed in Part V.B above and the historical lessons of the Hong Kong experience, also supports the notion that property rights cannot be viewed simply as exogenously imposed rules of the game.[82] Any given endowment of property rights not only reflects, but also affects the distribution of wealth in society. Game players can use their endowments within the game to change the rules of the game itself. As Peter Ho has written,

> property rights cannot be externally designed. The efforts and intentions of the Chinese state—albeit perceived as a strong, centralized state with substantial organizational muscle power—are shaped and limited in itsendogenous interaction with other actors.[83]

The experience of Hong Kong is a demonstration of precisely this point—albeit with a different government, of course, but with a very similar regime of land ownership. Moreover, the saga of the LUR renewal controversy recounted in Part IV.B above offers little support for the idea of property rights as exogenously imposed. Instead, it shows the state whipsawed between contending lobbies and engaging in a classic kind of "muddling through."[84] Thus, we are presented with the fascinating paradox that while Chinese apparently find the current system credible—they pour their savings into real estate and property moguls become among China's wealthiest citizens—at the same time it appears that nobody can with confidence say exactly what China's urban real estate regime will look like a few decades from now.

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[81] Daniel W. Bromley, *Property Rights and Land in Ex-Socialist States: Lessons of Transition for China*, in Developmental Dilemmas: Land Reform and Institutional Change in China 43 (Peter Ho ed. 2005).

[82] *See generally* Peter Ho, *In Defense of Endogenous, Spontaneously Ordered Development: Institutional Functionalism and Chinese Property Rights*, 40 Journal of Peasant Studies 1087 (2013).

[83] *Id.* at 1109–1110.

[84] *See* Charles E. Lindblom, *The Science of Muddling Through*, 19 Public Administration Review 79 (1959).

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