

# Property Rights in Land, Agricultural Capitalism, and the Relative Decline of Pre-Industrial China

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	130
II.	CAPITALIST AGRICULTURE IN EARLY MODERN CHINA AND ENGLAND .....	141
III.	EXISTING EXPLANATIONS AND BACKGROUND INFORMATION .....	145
IV.	CONDITIONAL SALES IN QING AND REPUBLICAN CHINA .....	156
	A. <i>Local Custom</i> .....	158
	B. <i>The Qing Code and Other Central Regulations</i> .....	163
	C. <i>Local-Level Adjudication</i> .....	168
V.	COMPARISON WITH ENGLISH LAND TRANSACTIONS NORMS .....	175
	A. <i>Narrowing the Range of Inquiry</i> .....	177
	B. <i>Mortgages</i> .....	180
	C. <i>Other Transactional Instruments</i> .....	186
VI.	TESTING A NEW EXPLANATION .....	187
VII.	CONCLUSION .....	195

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## I. INTRODUCTION

With the rise of China, scholars once again face great questions in global history—questions about the rise of the West, but also its potential relative decline.<sup>1</sup> What role has law played in the rise and fall of global powers? There are, indeed, scholars who believe that legal institutions can determine the economic fate of civilizations and societies.<sup>2</sup> Many have focused in particular on the role of property rights in England’s rise to global preeminence in the eighteenth and nineteenth centuries,<sup>3</sup> an issue that captured academic attention as early as Max Weber and continues to do so today.<sup>4</sup> This Article sheds new light on this debate by focusing on

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1. On the “rise of the West,” see generally WILLIAM H. MCNEILL, *THE RISE OF THE WEST: A HISTORY OF THE HUMAN COMMUNITY* (1963); E. L. JONES, *THE EUROPEAN MIRACLE: ENVIRONMENTS, ECONOMIES AND GEOPOLITICS IN THE HISTORY OF EUROPE AND ASIA* (2d ed. 1981); and DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* (1998). For a discussion on potential decline, see IAN MORRIS, *WHY THE WEST RULES—FOR NOW: THE PATTERNS OF HISTORY, AND WHAT THEY REVEAL ABOUT THE FUTURE* (2010). China’s rise poses a significant challenge to theories of economic development established on the “rise of the west” presumption. See, e.g., Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth For Law And Development Theory*, 41 N.Y.U. J. INT’L L. & POL. 551 (2009); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC’Y REV. 829 (2000).

2. See generally TIMUR KURAN, *THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST* (2011); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); Rafael La Porta, et al., *Law and Finance*, 106 J. OF POL. ECON. 1113 (1998); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990). For a more critical perspective, see Ralf Michaels, *The Second Wave of Comparative Law and Economics?*, 59 U. TORONTO L.J. 197 (2009); Upham, *supra* note 1; see, e.g., Clarke, *supra* note 1, at 89–90; David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WIS. L. REV. 1062, 1075–76 (1974). For a summary of this considerable interdisciplinary literature, see Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 895–96 (2008).

3. For traditional statements on the English divergence, see DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 1–18 (1973); E.A. WRIGLEY, *POVERTY, PROGRESS AND POPULATION* 44–60 (2004). A more recent view is that divergence between England and China did not occur until the nineteenth century. See, e.g., KENNETH POMERANZ, *THE GREAT DIVERGENCE: EUROPE, CHINA, AND THE MAKING OF THE MODERN WORLD ECONOMY* 31 (2000). For a reasonably comprehensive survey of the relevant literature, see POMERANZ, *supra*, at 3–15, 31.

4. The relevant literature is vast. See, e.g., MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., 1954); NORTH & THOMAS, *supra* note 3, at 1–8; THE BRENNER DEBATE 10–63 (T.H. Aston & C.H.E. Philpin eds., 1985); Daron Acemoglu, Simon Johnson & James Robinson, *The Rise of Europe: Atlantic Trade, Institutional*

one of the great stories of relative decline in global history: The decline of China from one of the richest and most powerful countries in the sixteenth century to one overwhelmed by European, particularly English, economic and military superiority in the nineteenth.<sup>5</sup>

In recent years, the economic history field has undergone a sea change: Numerous senior historians who previously focused only on Europe have shifted their attention to global comparisons, particularly between Northwestern Europe and Eastern China.<sup>6</sup> The break from traditional Eurocentrism is commendable in itself, but more importantly, it has brought well-deserved attention to the dramatic ethno-cultural and political consequences of the Sino-English economic divergence.<sup>7</sup> Whereas Europeans marveled at China's social and economic complexity even in the late seventeenth century,<sup>8</sup> by the Opium War, England's economic strength was undeniably superior. The gap continued to grow for a century, as China was not able to successfully industrialize until the Communist era.<sup>9</sup> The economic divergence had massive psychological and material consequences: Chinese anguish over her persistent industrial and military ineptitude contributed heavily to the century-long stretch of self-doubt and cultural chaos that followed, starting with the crumbling of its traditional value-system and ending with the Communist revolution.<sup>10</sup>

*Change, and Economic Growth*, 95 AM. ECON. REV. 546, 546–72 (2005); CHARLES I. JONES, INTRODUCTION TO ECONOMIC GROWTH 121 (2d ed., 2002).

5. POMERANZ, *supra* note 3, at 11–12.

6. Brenner, for example, moved from his focus on the Anglo-French comparison to the Anglo-Chinese comparison, see THE BRENNER DEBATE *supra* note 4; and Robert Brenner & Christopher Isett, *England's Divergence from China's Yangtze Delta: Property Relations, Microeconomics, and Patterns of Development*, 61 J. ASIAN STUD. 609 (2002). Robert Allen and Joel Mokyr have also adopted a more global perspective that pays much attention to China. See generally ROBERT C. ALLEN, THE BRITISH INDUSTRIAL REVOLUTION IN GLOBAL PERSPECTIVE (2009); Joel Mokyr, *Why Was the Industrial Revolution a European Phenomenon?*, 10 SUP. CT. ECON. REV. 27 (2003).

7. POMERANZ, *supra* note 3, at 3–15.

8. See JONATHAN D. SPENCE, THE CHAN'S GREAT CONTINENT: CHINA IN WESTERN MINDS 19–51 (1998).

9. POMERANZ, *supra* note 3, at 229, 239 (setting the date of divergence in the early nineteenth century).

10. The psychological and ideological damage inflicted by the perception of material weakness is a prevalent theme in the modern Chinese history field. See, e.g., MARY CLABOUGH WRIGHT, THE LAST STAND OF CHINESE CONSERVATISM: THE T'UNG-CHIH RESTORATION, 1862–1874, at 5–7 (1957); BENJAMIN SCHWARTZ, IN SEARCH OF WEALTH AND POWER: YEN FU AND THE WEST 15, 18, 247 (1964); 1 JOHN KING FAIRBANK, TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS, 1842–1854 (1953); JOSEPH R. LEVENSON, CONFUCIAN CHINA AND ITS MODERN FATE: A TRILOGY (1968). It is highly questionable, however, whether China's modern intellectual

The causes of China's relative decline are, however, hardly obvious. In fact, recent scholarship has shown that England, the richest European economy, and the "Chinese core" shared many fundamental economic characteristics in the later eighteenth century: both possessed significant urbanization and highly developed markets, allowing much of their rural population to "produce for the market."<sup>11</sup> In both economies, households and individuals displayed rational, interest-based decision-making.<sup>12</sup> Finally, contrary to some influential assumptions, both societies recognized the private ownership of property, both real and personal.<sup>13</sup>

These fundamental similarities make China's relative decline all the more intriguing, even as they narrow the range of viable explanations. Despite this higher "standard of proof," there are no shortage of candidates, including, among many others. The peculiar nature of European science,<sup>14</sup> China's population growth,<sup>15</sup> her lack of natural resources and foreign trade,<sup>16</sup> the "oriental despotism" of the Confucian state,<sup>17</sup> the weakness

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and cultural history was *only* a reaction against Western impact. WILLIAM T. ROWE, *CHINA'S LAST EMPIRE: THE GREAT QING 1–10* (2009). Some argue that the groundwork for this reaction was laid by developments in Confucian thought going back to the sixteenth century. See generally BENJAMIN A. ELMAN, *FROM PHILOSOPHY TO PHILOLOGY: INTELLECTUAL AND SOCIAL ASPECTS OF CHANGE IN LATE IMPERIAL CHINA* (1984).

11. On market integration for agricultural produce, textiles, and other personal goods in the Chinese economic core, see, e.g., LILLIAN M. LI, *FIGHTING FAMINE IN NORTH CHINA: STATE, MARKET, AND ENVIRONMENTAL DECLINE 1690S–1990S*, at 113, 164–65, 196–220 (2007); LI BOZHONG, *AGRICULTURAL DEVELOPMENT IN JIANGNAN, 1620–1850*, at 107–08 (1998); PHILIP C.C. HUANG, *THE PEASANT ECONOMY AND SOCIAL CHANGE IN NORTH CHINA 118–20* (1985); *CHINESE HISTORY IN ECONOMIC PERSPECTIVE* 35–99 (Thomas G. Rawski & Lillian M. Li eds., 1992). As POMERANZ, *supra* note 3, at 86–87, points out, market development in pre-1800 Western Europe does not seem more advanced. On urbanization in China, a recent literature survey is Yu Tongyuan, *Ming Qing Zaoqi Gongyehua Shehuide Xingcheng yu Fazhan*, 11 *J. HIST. SCI.* (2007): 41, which argues that 20% of the Jiangnan population around 1700 was urban, while 30% was non-agricultural. This is comparable with even the most optimistic estimates on English urbanization in 1700, see *infra* notes 31, 32 and accompanying text.

12. See, e.g., Lynda S. Bell, *Farming, Sericulture, and Peasant Rationality in Wuxi County in the Early Twentieth Century*, in *CHINESE HISTORY IN ECONOMIC PERSPECTIVE*, *supra* note 11, at 207, 226–29, 232–39.

13. Private property had been the predominant form of land ownership in China since the 10th Century. See Joseph P. McDermott, *Charting Blank Spaces and Disputed Regions: The Problem of Sung Land Tenure*, 44 *J. ASIAN STUD.* 13, 13 (1984); Madeleine Zelin, *A Critique of Rights of Property in Prewar China*, in *CONTRACT AND PROPERTY IN EARLY MODERN CHINA 17–18* (Madeleine Zelin, Jonathan K. Ocko & Robert Gardella eds., 2004).

14. See Mokyr, *supra* note 6.

15. This is the basic thesis of JONES, *supra* note 1; MARK ELVIN, *THE PATTERN OF THE CHINESE PAST* (1973); and ALLEN, *supra* note 6.

16. POMERANZ, *supra* note 3, at 211–97.

17. The classic statement is attributable to KARL A. WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* (1957); see MAX WEBER, *THE RELIGION OF CHINA: CONFUCIANISM AND TAOISM* (1951) (arguing that China's Confucian "religion" prevented the development of capitalism). For criticism on this, see Peter C.

or negligence of the Qing state,<sup>18</sup> and, of course, comparatively “inefficient” property rights.<sup>19</sup> In particular, the recent advent of the “new institutional economics” has generated growing academic interest in the role of property rights. Many have asked whether Chinese property rights were historically different from English property rights and, if so, whether the differences were economically significant.<sup>20</sup> This would seem to invite legal scholars to enter a debate that they have largely ignored—a curious omission given their interest in issues of law and development.<sup>21</sup> Situating itself within the broader debate on Sino-English economic divergence, this Article examines the relationship between property rights in land—particularly land transaction norms—and agricultural development in pre-industrial China and England.

Two basic presumptions shape its general approach. First, it is probably impossible to draw a simple and direct casual relation between a certain property norm and the general Sino-English economic divergence. The logical leap seems unacceptably large. Instead, one must recognize the precise social and economic conditions that the norms operate within, and address seriously the intermediate outcomes that bridge the gap between norm and general divergence. This Article, for example, accepts prior arguments that the scarcity of managerial farming in China was important to the eventual divergence, and then argues that property rights can explain this scarcity. Second, the legal historian has an especially heavy burden to simply present legal facts accurately. In light of previous

Perdue, *China in the Early Modern World: Shortcuts, Myths and Realities*, EDUCATION ABOUT ASIA, June 1999.

18. See, e.g., RAMON H. MYERS, *THE CHINESE ECONOMY, PAST AND PRESENT* (1980); R. BIN WONG, *CHINA TRANSFORMED: HISTORICAL CHANGE AND THE LIMITS OF EUROPEAN EXPERIENCE* 76, 119 (1997); PETER C. PERDUE, *CHINA MARCHES WEST: THE QING CONQUEST OF CENTRAL EURASIA* 548, 551, 565 (2005).

19. Scholars originally believed that China simply had no civil law. See DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 4 (1967); Shiga Shuzo, *Qingdai Susong Zhidu zhi Minshi Fayuan de Kaocha*, in *MING QING SHIQI DE MINSHI SHENPAN YU MINJIAN QIYUE* 54 (Wang Yaxin & Liang Zhiping eds., Wang Yanxin et al. trans., 1998) (arguing that civil adjudication had no legal foundation). This led many European historians to incorrectly assume that private property was unique to Europe. See McDermott; Zelin *supra* note 13.

20. See *supra* note 19.

21. See Davis & Trebilcock, *supra* note 2, at 936, 946. Legal scholars have recently incorporated China into this literature, see discussion at *supra* note 1, but have so far focused almost exclusively on the contemporary Chinese economy. I have found only one law review article published in the past decade that analyzes the “Great Divergence”: Mokyr, *supra* note 6, at 49, 61–67. Mokyr is an economist.

missteps—claims that rural land was inalienable in the Qing Dynasty,<sup>22</sup> or that protection of private property was exclusive to Northwestern Europe<sup>23</sup>—this obvious point bears repeating.

Within the wide-ranging debates on China's relative decline, one of the few points of general agreement is that, relative to England, China lacked "managerial" or "capitalist" farming—defined as agricultural production that relied more on employed labor than household labor.<sup>24</sup> Most scholars would agree that household-level production dominated Chinese agriculture until the Communist era. In comparison, by the early-eighteenth century, English agriculture—including a large portion of open-fields agriculture—was predominantly capitalist, whereas it had been largely household-based in the sixteenth century.<sup>25</sup>

Historians traditionally believed that the higher labor productivity on managerial farms created enormous agricultural surpluses that directly stimulated English industrial growth.<sup>26</sup> Likewise, they often saw China's relative lack of agricultural capitalism as a crippling liability that prevented robust economic development.<sup>27</sup> Although more recent scholarship continues to agree that capitalist agriculture substantially boosted productivity, some—particularly Robert Allen—have questioned whether the increase was large enough to explain England's overall economic preeminence.<sup>28</sup> The debate remains inconclusive.<sup>29</sup> It is, however, a

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22. See discussion *infra* pp. 147–48.

23. E.g., NORTH & THOMAS, *supra* note 3, at 1–8.

24. There is a detailed discussion of this *infra* Part I. See generally ELVIN, *supra* note 15; LI WENZHI ET AL., MING QING SHIDAI DE NONGYE ZIBEN ZHUYI MENGYA WENTI (1983); PHILIP C.C. HUANG, THE PEASANT FAMILY AND RURAL DEVELOPMENT IN THE YANGTZE DELTA, 1350–1988, at 58–76 (1990); HUANG, *supra* note 11, at 85–87; SUCHETA MAZUMDAR, SUGAR AND SOCIETY IN CHINA: PEASANTS, TECHNOLOGY & THE WORLD MARKET 192–250 (1998); LI, *supra* note 11, at 85–87.

25. See Leigh Shaw-Taylor, *The Rise of Agrarian Capitalism and the Decline of Family Farming in England*, THE ECONOMIC HISTORY REVIEW, 4, 17–18, Mar. 1, 2011, <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0289.2010.00585.x/pdf>; ROBERT C. ALLEN, ENCLOSURE AND THE YEOMAN: THE AGRICULTURAL DEVELOPMENT OF THE SOUTH MIDLANDS 1450–1850, at 73, tbl.4-4, 78–104 (1992); Stephen Hipkin, *The structure of landownership and land occupation in the Romney Marsh region, 1646–1834*, 51 AGRIC. HIST. R. 69, 69 (2003); Daniel Grigg, *Farm size in England and Wales, from early Victorian times to the present*, 35 AGRIC. HIST. R. 179, 188–89 (1987). See generally R.H. TAWNEY, THE AGRARIAN PROBLEM IN THE SIXTEENTH CENTURY (1912); THE BRENNER DEBATE, *supra* note 4.

26. ALLEN, *supra* note 25, at 2–5 (summarizing the field prior to 1992). Even Allen, who is critical of this tradition, acknowledges that capitalist farms were somewhat more productive. *Id.*, at 18–19.

27. See *supra* note 24 (consider China's lack of managerial farming an important economic liability.)

28. Peter C. Perdue, *China and the World Economy: Exports, Regions, and Theories*, 60 HARV. J. ASIATIC STUD. 259, 272–75 (2000); ALLEN, *supra* note 25, at 17–19, 218–27.

fundamentally economic debate that reaches far beyond the scope of legal history, and this Article cannot offer a resolution. One might note, of course, that the transition to capitalist farming was important for reasons other than simply increasing agricultural productivity. Most notably, it aided industrial development by freeing up labor and concentrating capital. This latter effect was particularly valuable in economies that did not recognize limited liability corporations, a characterization that applies to both Qing China and pre-nineteenth century England.<sup>30</sup> For our present purposes, it suffices to state that one cannot argue intelligibly about the broader Sino-English economic divergence without addressing the contrast in the scale of agriculture, and that this contrast therefore deserves a thorough examination of its *causes*.

Here, legal history takes a far more central role. England was not always a land of managerial farms, nor was the transition easy. English agriculture was, as noted above, predominately household-based even in the sixteenth century, while the size of her agricultural population actually increased by *at least* 30%—quite possibly by as much as 75%—between

29. Allen has been criticized, based on his own data, for heavily understating the importance of capitalist farming to pre-1700 English agriculture. Shaw-Taylor, *supra* note 25, at 6–7. His admission that capitalist farms were ultimately more efficient than household farms has allowed some to use his own observations against him. See Brenner & Isett, *supra* note 6, at 626.

30. *E.g.*, ELLEN MEIKSINS WOOD, *THE ORIGIN OF CAPITALISM* 57–59 (1999). The idea that “primitive accumulation” of capital, particularly land, was crucial to the initiation of capitalist growth and has been central to Western economic thought since Adam Smith and Karl Marx. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 111 (Joseph Shield Nicholson ed., 1884); KARL MARX, *1 CAPITAL* ch. 31, available at <http://www.marxists.org/archive/marx/works/1867-c1/ch31.htm> (1867, last accessed Dec. 7, 2010). These ideas continue to be influential in modern political economics. *See, e.g.*, MICHAEL PERELMAN, *THE INVENTION OF CAPITALISM: CLASSICAL POLITICAL ECONOMY AND THE SECRET HISTORY OF PRIMITIVE ACCUMULATION* 2–5 (2000) (acknowledging primitive accumulation’s role in the creation of capitalism but arguing that it displaced peasants); DAVID HARVEY, *THE NEW IMPERIALISM*, 145–46, 149 (2003) (discussing accumulation by dispossession). Recent histories of Chinese business have argued that the lack of capital concentration among late-Qing entrepreneurs forced most companies to become joint-ventures, which was difficult and costly without the possibility of limited liability. MADELEINE ZELIN, *THE MERCHANTS OF ZIGONG: INDUSTRIAL ENTREPRENEURSHIP IN EARLY MODERN CHINA* 223–68 (2005); William C. Kirby, *China, Unincorporated: Company Law and Business Enterprise in Twentieth Century China*, 54 *J. ASIAN STUD.* 43 (1995). England also did not allow free limited liability incorporation until the nineteenth century. Ron Harris, *The Private Origins of the Private Company: Britain 1862–1907*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1613206](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1613206) (2009). But the concentration of wealth represented and facilitated by managerial farming conceivably allowed English proto-industrialists to bypass this institutional difficulty.

1500 and 1700.<sup>31</sup> Even in 1700, 60–80% of England’s population was agricultural.<sup>32</sup> Meanwhile, her vaunted textile industry remained very modest in size until the later eighteenth century, as did her overseas trade.<sup>33</sup> The creation of managerial farms during the sixteenth and seventeenth centuries was, therefore, the fundamental reorganization of a predominantly agricultural society, and not the transition between an agricultural society and a manufacturing-based one. Rather than driving people from farming into industrial shops, this process more often involved the contentious process of purchasing land from smallholders, creating large farms, and then reemploying the land-deprived poor as wageworkers. Qing China’s active markets for land, technological development, and significant urbanization<sup>34</sup> saved Qing and Republican smallholders from a similar fate?

Unsurprisingly, over two decades of academic discussion has not produced any consensus. Some argued that labor was simply too expensive for managerial farming in China.<sup>35</sup> Others emphasized various institutional or legal factors related to one’s ability to amass large, consolidated farms: Chinese family division customs, the weaker power of eviction Chinese landlords had against tenants, and lineage rights of first refusal (which purportedly limited a Chinese landowner’s ability to sell his land).<sup>36</sup>

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31. The 30% figure is obtained by combining data from Robert C. Allen, *Economic Structure and Agricultural Productivity in Europe, 1300-1800*, 3 EUR. R. ECON. HIST. 1, 11 (2000), and Theofanis C. Tsoulouhas, *A New Look at Demographic and Technological Changes: England, 1550 to 1839*, 29 EXPLORATIONS IN ECON. HIST. 169, 176–77 (1992) (using data from Wrigley and Lindert). The former estimates the percentage of the population in agriculture, while the latter estimates the total population. Tsoulouhas’ figures starts from 1550, but the 1500 population is either very similar or slightly lower. Allen’s estimate on the percentage of total population in agriculture for 1700, roughly 60%, is much lower than other estimates, which go up to 80%, see *infra* note 32. If we use this latter figure, then the 30% estimate would become 75%.

32. For an analysis of the 80% figure, see S. Todd Lowry, *The Agricultural Foundation of the Seventeenth-Century English Oeconomy*, 35 HIST. POL. ECON. 74, 75 (2003). Lowry notes that 94% of the population was agricultural in 1520, whereas over 70% remained so in 1800. Assuming a linear decrease, the percentage in 1700 would be around 80%. This is an underestimate, as the speed of urbanization accelerated in the later 1700s. For an analysis of the 60% figure, see Allen, *supra* note 31.

33. For the relative unimportance of trade to the early modern English economy and the “modest” size of her manufacturing sector, see RALPH DAVIS, *THE INDUSTRIAL REVOLUTION AND BRITISH OVERSEAS TRADE* 63 (1979). Davis’ evaluation is reconfirmed in Daron Acemoglu, Simon Johnson and James Robinson, *The Rise of Europe: Atlantic Trade, Institutional Change, and Economic Growth*, 95 AM. ECON. R. 546 (2005), although Acemoglu et al. argue that trade was institutionally important even if statistically modest.

34. For markets and private property, see notes 11–13. For the underestimated pace of Chinese technological development, see LI, *supra* note 11; and MAZUMDAR, *supra* note 24, at 120–91.

35. See *infra* Part II.

36. *Id.*



Anglo-American property law scholars will find this latter explanation particularly intuitive. American legal historians have often argued that “the Anglo-American system of private property emerged from a restrictive feudal regime in which . . . alienation of land was prohibited.”<sup>37</sup> As Henry Maine stated, “the movement of the progressive societies has . . . been a movement *from Status to Contract*.”<sup>38</sup> Modern scholars continue to believe that “[m]odernity . . . fosters alienability. . . . As groups modernize, they . . . relax traditional restrictions on transfer.”<sup>39</sup> Arguing that Chinese agricultural inefficiencies stem from the inalienability of land certainly constitutes a straightforward application of these ideas, but also one that suffers from serious empirical defects. Existing evidence suggests that lineage rights of first refusal did very little to obstruct the efficient transaction of land in China’s core socioeconomic regions.<sup>40</sup> Similarly, the evidence fails to show that either family division customs or the lack of eviction rights significantly impeded the spread of managerial farming.<sup>41</sup>

Other explanations have their own difficulties. Data from rural labor markets indicate that most Chinese peasants who possessed surplus land found it more productive and profitable to employ wage-labor than to rent out the surplus. The existence of economic incentives that favored managerial farming suggests, therefore, that its relative scarcity compared to English agriculture might be attributed to institutional differences. Previous scholarship has not, however, persuasively identified any such difference.

This Article attempts to fill the gap. It argues that the primary “problem” with Chinese property rights was not that they restricted the transaction of land, but rather that they frequently gave the original owner of transacted property an extremely strong right of redemption. The great majority of

37. Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 392 (2006).

38. HENRY SUMNER MAINE, *ANCIENT LAW* 170 (Transaction Publishers 2002) (3d ed. 1866).

39. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1376–77 (1993). See also JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 197–220 (5th ed. 2002). The law and development literature provides clear empirical evidence that modern economic development requires alienable property rights. Kevin Davis & Michael J. Trebilcock, *What Role Do Legal Institutions Play in Development?* 4, available at <http://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf> (1999) (“The current economic consensus would probably accord priority, in terms of the role of law in development, to well-defined and alienable private property rights . . .”).

40. See *infra* Part II.

41. *Id.*

Chinese land transactions were neither permanent sales nor mortgages in the modern sense, but “conditional sales” (*dian*) that transferred possessory rights to the “buyer” while, under most local customs, guaranteeing the “seller” a right of redemption at zero-interest that was virtually absolute and interminable. The central government did prohibit conditional sales redemption after a certain number of years, but had little success enforcing these regulations. Land transactions could therefore avoid finalization for decades. In comparison, English law and custom contained strong limits on the redemption of “conditional” conveyances—mainly mortgages—that forced permanent alienation if the seller failed to redeem within a short time frame, customarily only a year. Enforcement of redemption deadlines was extraordinarily harsh until the late seventeenth century, making permanent alienation a frequent and dependable outcome even for conditional conveyances, and thereby *conveniencing* the accumulation of large farms.

In Qing and Republican China, however, the unlimited right of redemption in *dian* sales meant that peasants had little incentive to permanently alienate their land. If they needed a lump sum to cover immediate needs, a conditional sale was usually satisfactory, while also preserving the option of zero-interest redemption. If, however, they simply wished to maximize the sale price of their land, the practice of *zhaotie* in conditional sales, as discussed below, allowed them to take advantage of future increases in land value—usually a reasonable assumption.<sup>42</sup> Permanent alienation was therefore unattractive, and rarely used. Farmers who acquired land under a *dian* sale therefore found it difficult to obtain secure and permanent ownership. For many, the lack of security would have been enough deterrence against managerial farming, as it cautioned against making capital investments to further boost productivity. As for those enterprising peasants who nonetheless chose to create managerial farms through conditional purchases, their farms would face disintegration whenever an original owner decided to redeem, always a real and disruptive possibility. Over the long run, these factors impeded the concentration of farmland.

This explanation is heavily understudied in the existing literature. A few scholars have made passing mention of the potential relationship between conditional sales and land accumulation,<sup>43</sup> but no serious analysis currently exists, especially one conducted from a rigorously comparative perspective. This is unfortunate, for the thesis proposed here neatly avoids the empirical difficulties that haunt other theories. This Article seeks to demonstrate its plausibility through surveying a fairly diverse collection

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42. See *infra* pp. 151–52.

43. See discussion *infra* Part III.

of legal and economic data, drawn from both primary and secondary sources.

Existing studies on the Qing and Republican regulation of conditional sales disagree over a number of key issues, including the precise content of central regulations and the extent to which they were enforced.<sup>44</sup> Much of this Article focuses, therefore, on carefully presenting the institutional comparison between Chinese conditional sales and English mortgages, drawing particular attention to the complex relation between customs and formal law. It then links this contrast in property rights to the divergence in agricultural capitalism. This involves unpacking the institutional economic theory outlined above in greater detail, but, more importantly, testing it against data on transaction volume, land-ownership patterns, and labor-to-land ratios. Existing evidence seems to confirm our theoretical hypotheses admirably well.

The creation of efficient property rights depended, therefore, on more than just making property rights “alienable,” that is, capable of being transacted if the owner so desired.<sup>45</sup> Whereas the problem with medieval European property rights often was that they were simply inalienable,<sup>46</sup> Qing and Republican property rights posed subtler difficulties: Although they were generally alienable, the specific mechanisms of transaction created questionable *incentives* for both sellers and buyers. Thus, any property rights-based perspective on economic development must consider not only *whether* property rights were alienable, but also *how*.

44. See *infra* pp. 150–52.

45. Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931–32 (1985) (defining inalienability as “any restriction on the transferability, ownership, or use of an entitlement,” and noting that other scholars focus only on situations where “sales are not permitted”). Even Rose-Ackerman’s broader definition cannot incorporate the issues we discuss here. The only substantive restriction of ownership, use or transferability we found was that the conditional buyer’s ownership could be terminated by redemption, similar to how a mortgagee or tenant’s rights are not absolute. Few would consider this a limitation upon alienability.

46. Entails limited the alienability of land in medieval England, although the prevalence of “common recoveries” severely diminished their practical effects by 1500. See Percy Bordwell, *Alienability and Perpetuities* III, 24 IOWA L. REV. 1, 51–56 (1938); A. JAMES CASNER & BARTON LEACH, CASES AND TEXT ON PROPERTY 256 (1969). After the demise of feudal incidents in the late seventeenth century, the entail was effectively revived in the form of the strict settlement. See Charles J. Reid, *The Seventeenth Century Revolution in the English Land Law*, 43 CLEV. ST. L. REV. 221, 261–80 (1995). Entails were widespread and powerful in France and Spain until the nineteenth century. Raymond Carr, *Spain, in THE EUROPEAN NOBILITY IN THE EIGHTEENTH CENTURY* 43, 51 (Albert Goodwin ed., 1967); ROBERT FORSTER, THE NOBILITY OF TOULOUSE IN THE EIGHTEENTH CENTURY: A SOCIAL AND ECONOMIC STUDY 120, 162–63 (1960).

Our findings here also relate to important debates within law and economics that address the economic efficiency of social norms.<sup>47</sup> While scholars have provided ample evidence that communities often create their own social norms and, moreover, that these norms frequently outrank formal laws in practical importance,<sup>48</sup> they have vigorously debated whether “norms are likely to promote social welfare,”<sup>49</sup> with “welfare” regularly defined as economic efficiency. Some express optimism, at least for “closely-knit” communities that share information;<sup>50</sup> others disagree.<sup>51</sup> This Article offers a direct test-case: The Chinese land customs examined here were probably the creation of close-knit rural communities, but also lowered macroeconomic efficiency by impeding the development of managerial farming. In fact, agricultural productivity would arguably have risen had central regulations limiting land redemption been effectively enforced. While it would be folly to “refute” the optimists based on one historical example, however significant, it does present a challenge that deserves consideration.

One lingering question is how and why Chinese rural communities created these comparatively inefficient property customs in the first place. Development economists might see the limiting effect that Chinese *dian* norms had on land concentration as a case study of the surplus labor model—the influential theory that agricultural communities often create income-sharing mechanisms that allow agricultural workers to earn more than their marginal product.<sup>52</sup> As discussed below, it is indeed possible that, consistent with the model’s predictions, poorer rural households negotiated *dian* norms to protect against economic expansion by richer households.<sup>53</sup>

Geographically, this Article focuses on the Lower Yangtze and North China. It makes little sense to compare England with *all* of China due to the enormous size difference. Instead, we focus only on the more developed areas: the Lower Yangtze was the richest region in the

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47. Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 542 (1998).

48. A concise review of the relevant literature can be found in Ellickson, *supra* note 47; and Amitai Etzioni, *Social Norms: Internalization, Persuasion and History*, 34 L. & SOC. REV. 157, 157 (2000). The path-breaking book in this field is, of course, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 128–30 (1991).

49. Richard H. McAdams, *Comment: Accounting for Norms*, 1997 WIS. L. REV. 625, 635 (1997).

50. *Id.*

51. *Id.*

52. See Gustav Ranis, *The Microeconomics of “Surplus Labor”* (Yale Econ. Growth Ctr., Discussion Paper 772, 1997), available at [http://www.econ.yale.edu/growth\\_pdf/cdp772.pdf](http://www.econ.yale.edu/growth_pdf/cdp772.pdf).

53. See *infra* pp. 180–81.

country, while North China was the relative “hotbed” of Chinese managerial farming.<sup>54</sup> Temporally, the Article covers 1500-1700 for England, mainly because managerial farming had achieved predominance by the latter date. The appropriate time frame for China is considerably longer and somewhat later, as farming remained household-based throughout the Qing and Republic. This article asks not only why English agriculture made the transition by 1700, but also why Chinese agriculture did not “catch up” for over two centuries, even though it had every economic incentive, at both micro and macro levels, to do so. One could say the same of the general Sino-English economic divergence: it is intriguing not simply because China did not industrialize before Western Europe, but also because it failed to do so long after the disparity had become painfully obvious.

Part Two surveys the extent of managerial farming in England and China. Part Three argues that existing explanations for this contrast are generally unsatisfactory and provides some economic background. In particular, the evidence suggests that it made economic sense, even in China, for relatively wealthy peasants to pursue managerial farming. Their general inability to do so suggests the existence of institutional obstacles.

Parts Four, Five, and Six present the case for a conditional sales-based explanation. Part Four examines Qing and Republican norms on conditional sales, highlighting the clash between law and local custom, in which the latter emerged victorious. Part Five then compares these customs with English law and custom on various land transaction mechanisms, arguing that English norms of land redemption were drastically harsher. Part Six discusses the economic consequences of this property rights comparison, conducting various empirical tests for our proposed explanation. A short conclusion identifies avenues for further research.

## II. CAPITALIST AGRICULTURE IN EARLY MODERN CHINA AND ENGLAND

The attractiveness of “managerial farming” as an academic concept derives from its statistical flexibility and clarity. A “capitalist” or “managerial” farm—for the sake of consistency, this Article will generally use the

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54. HUANG, *supra* note 11, at 69–84; WENZHI ET AL., *supra* note 24, at 215–17.

latter term—is simply one that employs wage labor for *most* of its everyday operations.<sup>55</sup> This avoids artificial numerical “lower bounds,” which would inevitably fail to account for at least some individual circumstances. Equally important, it avoids the somewhat tedious debate over Chinese *landownership* patterns, instead focusing directly on the actual *scale of farming*. After all, in terms of agricultural productivity, a 100 mu plot that is rented out to ten tenants is hardly any different from ten plots of 10 mu, separately owned. Finally, we might note that managerial farms also exist in open-fields agriculture<sup>56</sup>—in fact, around 1700, more than half of open-fields agriculture in Southern England was capitalist.<sup>57</sup> It is not logically tied to “enclosure,” nor as ideologically charged.

The idea that agricultural capitalism sparked the English economic takeoff is exceedingly old and resilient.<sup>58</sup> After much debate, scholars have reached at least some consensus on the basic chronology. By 1700, small-scale managerial farming predominated throughout the South, especially in the vicinity of London.<sup>59</sup> Although household production still predominated in parts of the poorer Northwest, the transition was nonetheless well underway, with nearly half of the farming population employed as full-time wage-laborers.<sup>60</sup> Whereas most scholars—some rather reluctantly—would agree that this transition boosted agricultural productivity,<sup>61</sup> the classic theory that such increases set off English economic divergence from continental Europe is questionable.<sup>62</sup> Recent studies show, for example, that the richer regions of France also experienced a strong shift towards small-scale managerial farming between 1550 and 1750.<sup>63</sup>

Despite deep and sweeping changes in Qing economic historiography over the past decades, the notion that Qing agriculture relied predominantly on household-level smallholdings remains unchallenged.<sup>64</sup> Scholars have

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55. ALLEN, *supra* note 25, at 56–57.

56. Even in open-fields agriculture, land was privately owned for most of the year. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1390 (1993).

57. ALLEN, *supra* note 25, at 73, tbl.4-4.

58. *Id.* at 2–5.

59. See sources cited *supra* note 25.

60. Shaw-Taylor, *supra* note 25.

61. See discussion *supra* notes 25–28. A literature review is also available at PHILIP T. HOFFMAN, *GROWTH IN A TRADITIONAL SOCIETY: THE FRENCH COUNTRYSIDE, 1450–1815*, at 143–45 (1996). For Hoffman’s own theories, see *id.* at 146–49, 162–64 (acknowledging that managerial farming boosted productivity).

62. HOFFMAN, *supra* note 61, at 143–49, 162–64.

63. *Id.*

64. See, e.g., McDermott, *supra* note 13, at 33 (noting that large manors, worked by bound labor, was giving way to smallholders and tenants even around 1100); POMERANZ, *supra* note 3, at 81 (more conservatively placing the transition at around

periodically debated the extent of landownership concentration, but this only discusses whether large landlords *owned* a higher percentage of total land than previously assumed, not whether they *farmed* a higher percentage. Higher concentration of ownership could simply have reflected a higher level of tenancy. Joseph Esherick, for example, argues that “landlords” and “rich peasants” owned around 56% of arable land in early twentieth century China, but nonetheless concedes that around 42% of this was rented out in small parcels.<sup>65</sup>

Given the significant regional variation in Chinese agriculture, national-level statistics are of limited use. A better approach would be to study individual agricultural regions, where ecological conditions and farming techniques were more uniform. For conceptual clarity, we will employ William Skinner’s physiographic subdivisions<sup>66</sup> and, as mentioned above, focus on “North China” and the “Lower Yangtze.” In John Buck’s 1937 statistical report, these are roughly equivalent to the “winter wheat-kaoliang area” and the “Yangtze rice-wheat area.”<sup>67</sup>

Philip Huang’s 1985 manuscript remains the most comprehensive agrarian study of North China. Huang estimates that hired labor accounted for around 17% of total labor input, with about half of that coming from managerial farms.<sup>68</sup> Including the owner’s own household labor,<sup>69</sup> managerial farms incorporated perhaps 9.5% of labor input. Since labor input-per-mu on “large” Northern farms was, according to Buck’s surveys, around 90% of the median,<sup>70</sup> managerial farms probably occupied at least 11% of total farmland. A crude calculation based on Esherick’s data<sup>71</sup> suggests a slightly higher figure. “Landlords” cultivated—as

1600). Both estimates support our claim, although McDermott’s data is more up-to-date than the controversial source Pomeranz relies on. ELVIN, *supra* note 15.

65. Joseph W. Esherick, *Number Games: A Note on Land Distribution in Prerevolutionary China*, 7 *MODERN CHINA* 387, 397, 405 (1981).

66. STANFORD UNIV. PRESS, *THE CITY IN LATE IMPERIAL CHINA* 3–31 (G. William Skinner ed., 1977).

67. JOHN L. BUCK, *LAND UTILIZATION IN CHINA: A STUDY OF 16,786 FARMS IN 168 LOCALITIES, AND 38,256 FARM FAMILIES IN TWENTY-TWO PROVINCES IN CHINA, 1929–1933*, at 27 (1937).

68. HUANG (1985), *supra* note 11, at 80–81. Other scholars, such as MAZUMDAR, *supra* note 24, at 237, frequently cite to his data.

69. Calculated from Mantetsu survey data reproduced in HUANG (1985), *supra* note 11, at 170.

70. JOHN L. BUCK, *THE CHINESE FARM ECONOMY* 47, 53 (1930).

71. Esherick, *supra* note 65, at 397, 402–05. These figures are derived by subtracting the “land rented-out” from the total amount of land owned. Assume, for example, that Class A of landowners owned x percent of total land under tenancy, which

opposed to rented out—around 10% of total farmland, while “rich peasants” cultivated another 18–20%. Assuming that nearly all landlords *and* some of the wealthiest “rich peasants” ran managerial farms, the total would probably be around 15% of total farmland.

Existing studies on the Lower Yangtze share fewer consensus. The common opinion seems to be that managerial farming was virtually non-existent here: Wage labor accounted for less than 5% of total labor-input and, in any case, was concentrated on rich peasant holdings that were too small to be considered managerial.<sup>72</sup> These arguments utilize two sources: Buck’s data and a 1949 study by the East China Military Administration Committee. This latter source indicates that roughly 4% of rural households in the early twentieth century were “agricultural laborers,” but this figure only includes *landless* households.<sup>73</sup> Wage laborers that owned any land were excluded. Moreover, the interpretation of Buck’s data is surprising—by his calculation, hired labor accounted for 12–14% of the Lower Yangtze’s total labor-input.<sup>74</sup>

This latter figure may be more plausible, even if Buck’s survey overemphasizes the importance of large farms.<sup>75</sup> By most estimates, the average nineteenth century Lower Yangtze household could only cultivate around 8 mu of grain—double-cropped—and 2 mu of mulberries without the aid of hired labor.<sup>76</sup> A detailed 1929 survey of three Wuxi villages<sup>77</sup> seems to support this assertion: nearly all farms that exceeded 10 mu employed substantial amounts of wage labor, generally for no less than 100 labor days per year. Of the three farms that exceeded 20 mu, wage labor accounted for more than 60% of total labor input on two, and for nearly 50% on the third. This suggests that most farms larger than 20 mu were managerial. According to a 1920s study, such farms occupied around 3 percent of total farmland in surveyed counties, while farms that exceeded 15 mu accounted for another 32%.<sup>78</sup> All in all, while the scale of managerial farming was considerably smaller in the

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accounted for y percent of total land, and that Class A owned z percent of all arable land, then the amount of land that Class A managed on its own would be  $z \cdot x \cdot y$ .

72. See, e.g., HUANG (1990), *supra* note 24, at 58–60; MAZUMDAR, *supra* note 24, at 237.

73. HUADONG JUNZHENG WEIYUANHUI, JIANGSU SHENG NONGCUN DIAOCHA 13, 29–30, 62–64 (1952).

74. BUCK, *supra* note 67, at 293.

75. This bias is well-known, but a quantitative adjustment seems impossible. See Esherick, *supra* note 65; Randy Stross, *Numbers Games Rejected*, 10 REPUBLICAN CHINA No. 3, at 1 (1985).

76. LI BOZHONG, AGRICULTURAL DEVELOPMENT IN JIANGNAN, 1620–1850, at 136–38, 140 (1998).

77. Bell, *supra* note 12, at 207, 226–29, 232–39.

78. See Li Bozhong, *Rengeng Shimu yu Mingqing Jiangnan Nongmin de Jingying Guimo*, 1996 ZHONGGUO NONGSHI No.1, at 1, 6.



Lower Yangtze than in North China, it did exist. Wage labor was probably much more prevalent than Huang suggests as well.

Still, when compared to eighteenth century English farming, even the North China figures seem miniscule. Nor was agriculture in other Chinese macroregions noticeably more concentrated. Nowhere did wage labor account for even 25% of total labor input.<sup>79</sup> Interestingly, the level of land concentration in China could experience mild but prolonged *declines* during times of relative peace, as it did between 1703 and 1771, and between 1870 and 1930.<sup>80</sup> There was ultimately a real and drastic difference between China and post-1700 England in the scale of agricultural production. But why?

### III. EXISTING EXPLANATIONS AND BACKGROUND INFORMATION

Existing explanations fall into two categories: economic and institutional. The former argues that managerial farming simply made no economic sense in China, either because it generated no increase in productivity, involved too much risk, or, somewhat more plausibly, was relatively unprofitable for most individual households.<sup>81</sup> The *economic demand* for managerial farming was therefore low. In comparison, institutional explanations argue that legal or customary obstacles would have prevented the creation of managerial farms *even had demand been high*. Scholars have recently explored two different possibilities. Some argue that certain Chinese customs *restricted* the free alienation of land—that is, landowners found it difficult to convey land even if they wanted to.<sup>82</sup> Others claim that the problem was with rights of exclusion. Large Chinese landlords were unable to expel their tenants and, therefore, could not consolidate their holdings into managerial farms.<sup>83</sup> Some also point to differences between Chinese and English inheritance norms, arguing

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79. BUCK, *supra* note 67, at 293.

80. For 1703 to 1771, see LI WENZHI, MINGQING SHIDAI FENGJIAN TUDI GUANXI DE SONGJIE 58 (2007). For 1870 to 1930, see Ramon Myers, *Land Distribution in Revolutionary China*, 8 THE CHUNG CHI J. 62 (1969).

81. LI WENZHI ET AL., *supra* note 24, at 215–17; HUANG (1990), *supra* note 24, at 58–76; CHINESE CAPITALISM 1522–1840, at 158–61 (Xu Dixin & Wu Chengming eds., Li Zhengde et al. trans., 2000).

82. See, e.g., HUANG (1990), *supra* note 24, at 107–08; MAZUMDAR, *supra* note 24, at 217–30. See also the discussion at POMERANZ, *supra* note 3, at 70–72.

83. The clearest argument to this is effect is made by Brenner & Isett, *supra* note 6.

that English primogeniture promoted economies of scale by keeping household property in one piece.<sup>84</sup>

Although recent developments in European economic history have questioned whether farms consistently become more productive as they increase in size, the key comparison in that particular debate has been between *smaller managerial farms and larger ones*.<sup>85</sup> The classical argument that small-scale managerial production is, at least, more productive than household production remains largely unchallenged.<sup>86</sup> Existing data on North China and the Lower Yangtze do seem to agree with this orthodoxy. Buck's surveys show that farms of all sizes generated nearly identical per-crop acre yields in the early twentieth century, but yield rather chaotic results on labor productivity. The general survey apparently shows that "large farms" used less than 50% of the labor input-per-cultivated acre that "small farms" needed, but a separate data sample suggests they used around 87%.<sup>87</sup> Nonetheless, the general impression is that households with surplus land could boost productivity by hiring outside labor, although the size of that boost could vary tremendously. When we factor in the more efficient use of farm animals and tools on large farms,<sup>88</sup> the productivity edge is even more pronounced.

Theoretically, managerial farms enjoy several important efficiency advantages over household-based ones. First, they usually manage labor input more effectively, most intuitively because their larger size enables greater labor specialization,<sup>89</sup> but also because they can swiftly adapt to changes in the size of land holding or production conditions by laying-off or hiring workers as circumstances demand.<sup>90</sup> Moreover, their larger

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84. See *infra* note 140.

85. See, e.g., Charles Sabel & Jonathan Zeitlin, *Historical Alternatives to Mass Production: Politics, Markets and Technology in Nineteenth-Century Industrialization*, 108 PAST & PRESENT 133 (1985). For a survey of more theoretical writings, see Matthew Gorton & Sophia Davidova, *Farm productivity and efficiency in the CEE applicant countries: a synthesis of results*, 30 AGRICULTURAL ECON. 1 (2004).

86. See discussion *supra* notes 25, 29.

87. BUCK, *supra* note 67, at 273, 276; BUCK, *supra* note 70. Professor Pomeranz raised some concerns at a 2011 American Historical Association panel discussion, "Property Rights and Economic Development in the Qing" (Jan. 9, 2011), about whether managerial farming really boosted labor productivity in the Lower Yangtze. I have yet to see, however, any substantive evidence to the contrary. The most conservative figures, drawn from BUCK, *supra* note 70, and reaffirmed by Pomeranz himself in *Land Markets in Late Imperial and Republican China*, 23 CONTINUITY & CHANGE 101, 118–19 (2008), still suggest that large, predominantly managerial farms enjoyed a 13 percent labor productivity edge even in the Yangtze Delta.

88. BUCK, *supra* note 67, at 277; see also, HUANG (1985), *supra* note 11, at 144–45.

89. HUANG, *supra* note 11, at 70.

90. *Id.*

size facilitates coordinated investments in the land that can improve its overall productivity, for example through optimizing irrigation, roads, or use of animals and fertilizer.<sup>91</sup> In short, managerial farming promotes economies of scale.<sup>92</sup> The main factors that potentially make managerial farming less productive than household production are management and supervision costs. By employing labor, one naturally increases the need for planning and oversight. In some cases these costs may be so high that they negatively affect productivity, but as we discuss later, such scenarios were unlikely in Qing and Republican China.<sup>93</sup>

A more complicated and ultimately more important issue is whether managerial farming was *profitable* enough to attract individual landowners, even if they were more *productive*. Profit is, after all, a better predictor of individual economic behavior than productivity. Several scholars have argued that the cost of hired labor was so high in the Yangtze Delta that landowners made larger profits by leasing out their land than by consolidating it into managerial farms.<sup>94</sup> The primary evidence for this claim seems to be a set of late-nineteenth century missionary surveys collected by Li Wenzhi, which suggest that leasing out was 35% more profitable than managerial farming in Southern Jiangsu, and nearly three times as profitable in Zhejiang.<sup>95</sup> As Li himself admits, however, his data relied heavily on a few scattered case studies and “are generally of limited trustworthiness.”<sup>96</sup> In fact, recent estimates of Lower Yangtze wages from 1750 to the early twentieth century would lower Li’s wage figures by 30 to 55%, or by 6 to 16 taels of silver.<sup>97</sup> Using these more

91. See discussion *infra* p. 175.

92. While it is also possible for several smaller farms to make these investment decisions cooperatively, consolidating the smaller patches under more unified ownership helps internalize and lower the transaction and organization costs involved. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937).

93. See discussion *infra* pp. 145–47.

94. LI WENZHI ET AL., *supra* note 24, at 215–17; HUANG, *supra* note 24, at 58–76.

95. LI WENZHI ET AL., *supra* note 24, at 215–17.

96. *Id.* at 216; see also HUANG, *supra* note 24, at 58–76 (but these pamphlets largely come from the early Qing, when labor was considerably scarcer).

97. The 1750 estimates come from POMERANZ, *supra* note 3, at 319–20 (estimating an upper-limit wage of around 12 taels). Robert Allen et al. argue, in *Wages, Prices, and Living Standards in China, 1738–1925: In comparison with Europe, Japan, and India* 51, (Oxford Univ. Dep’t of Econ., Working Paper No. 316 (2007)), that the nominal agricultural wage basically remained stable (or declined slightly) from 1750 to the nineteenth century and largely confirm Pomeranz’s estimates. Li’s wage estimates, *supra* note 24, at 216, when converted to silver taels, suggest an annual agricultural wage of around 28 taels for Southern Jiangsu and around 18 taels for Zhejiang.

conventional estimates, managerial farming was more profitable than leasing by at least 60% in Southern Jiangsu, and equally profitable in Zhejiang.

Assuming, for the sake of argument, that Li's figures are representative, they would imply that very few Lower Yangtze households had incentive to employ *any* wage labor. In particular, while Li's estimates focus on the cost of year-laborers, a quick calculation based on his sources indicates that day-laborers were comparably unprofitable. Using Li's data, leasing out would still have been 27 to 33% more profitable than employing day-laborers in Southern Jiangsu, and more than 2.5 times as profitable in Northern Zhejiang.<sup>98</sup> The problem is that wage labor was, in fact, important to the Lower Yangtze economy. As argued above, households employing some wage labor conceivably occupied 50% of total farmland<sup>99</sup>—wage labor accounted for perhaps 15% of total agricultural labor input.<sup>100</sup> For Li's data to make sense, we must assume that most of these households were financially irrational. Given that most Lower Yangtze households farmed significantly less than 10 mu,<sup>101</sup> households wishing to rent out excess land would have encountered a healthy supply of potential tenants. The assumption of widespread economic irrationality is, however, without merit.<sup>102</sup> Apparently, the employment of wage labor was profitable enough to attract a *very* significant portion of rural households, which makes good sense under the more recent wage data discussed above.

In any case, arguments that labor was too expensive are strictly limited to the Lower Yangtze. As their proponents acknowledge, quite the opposite was true of North China, where managerial farming was considerably

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98. This calculation uses data presented at Bell, *supra* note 12, and JOHN L. BUCK, LAND UTILIZATION IN CHINA: STATISTICS 328 (1937), and assumes that the average year-laborer worked around 200 days, HUANG (1985), *supra* note 11, at 81.

99. See discussion *supra* p. 141 (Farms exceeding 15 mu occupied 35% of total farmland, while nearly all farms exceeding 10 mu employed some wage labor. While we do not have precise numbers for households owning between 10 and 15 mu, it seems reasonable to assume that they occupied at least 15% of total farmland—given that farms between 15 and 20 mu occupied nearly a third of total farmland—and, therefore, reasonable to suggest that farms employing some wage labor occupied around 50% of total farmland).

100. See discussion surrounding *supra* note 74.

101. By the mid-nineteenth century, the average Lower Yangtze household farmed around 7 mu, split 7:3 between rice and mulberries. Various existing estimates and figures are compiled at Brenner & Isett, *supra* note 6, at 620.

102. See Bell, *supra* note 12. After the Song Dynasty, while certain elite families were still politically ambitious enough to focus instead on national examinations and political ties, even most gentry households depended on landholding and economic affluence for their social status. See HILARY BEATTIE, LAND AND LINEAGE IN CHINA: A STUDY OF T'UNG-CH'ENG COUNTY, ANHWEI, IN THE MING AND CH'ING DYNASTIES (1979); BEVERLY BOSSLER, POWERFUL RELATIONS: KINSHIP, STATUS, AND STATE IN SUNG CHINA (1996). Anyone who wishes to argue that rural Chinese households eschewed profit-maximizing behavior must, therefore, bear the burden of the proof.

more profitable than leasing out.<sup>103</sup> This certainly makes the predominance of smallholding there all the more puzzling. Labor prices were, therefore, probably not too high for managerial farming, but were they too low instead? A few scholars have also suggested that Qing population growth made managerial farms less profitable, mainly by lowering labor prices and making capital investment less attractive.<sup>104</sup> But there is no reason why a managerial farm *must* be capital-intensive. It could very well be labor-intensive, yet enjoy higher productivity simply through more efficient management of labor and better use of previous capital investments.<sup>105</sup>

One concern is that farms with more intensive labor input might be harder to supervise, which leads to the broader question of whether managerial farms were too costly to supervise in China. Such arguments are rarely seen in the English-language literature,<sup>106</sup> but merit consideration nonetheless. A preliminary variable to consider might be geographical segregation. Arable land might be too naturally scattered to cheaply manage. But this clearly was not true of North China or the Lower Yangtze, which had reasonably concentrated and flat farmland.<sup>107</sup> More importantly, moral hazard issues can exist where the employee earns a fixed wage, but his employer cannot efficiently monitor or control his behavior.<sup>108</sup> The more hired labor a farm requires, the higher supervision

103. LI WENZHI ET AL., *supra* note 24, at 215–17; HUANG (1990), *supra* note 24, at 69–72.

104. Zhao Gang, ZHONGGUO TUDI ZHIDU SHI, ch. 5 (2006); see also Martin Heijdra, *The Socio-Economic Development of Rural China During the Ming*, in 8 THE CAMBRIDGE HISTORY OF CHINA 417, 525–26 (Denis Twitchett & Frederick Mote eds., 1998).

105. This certainly does not mean that Chinese farms made no capital investments—quite the opposite, they made many, which further calls into question the theories in *supra* note 104. See discussion surrounding *infra* notes 327–29; see also Kaoru Sugihara, *Labour-intensive Industrialisation in Global History* (Kyoto Working Papers on Area Studies No. 1, 2007), available at [www.cseas.kyoto-u.ac.jp/edit/wp/Sugihara\\_WP\\_Web\\_081018.pdf](http://www.cseas.kyoto-u.ac.jp/edit/wp/Sugihara_WP_Web_081018.pdf) (regarding the importance of labor-intensive production in global economic history).

106. I find only one example: Heijdra, *supra* note 104, devotes one paragraph to this.

107. HUANG, *supra* note 11, at 53–66; HUANG, *supra* note 24, at 21–43.

108. Mukesh Eswaran & Ashok Kotwal, *A Theory of Contractual Structure in Agriculture*, 75 AM. ECON. REV. 352, 359–60 (1985) (arguing that, as long as management costs are low, rational landowners will employ wage labor whenever their own managerial abilities outpaced those of their employed workers). Since, as we have discussed at pp. 142–43, labor and animal productivity were notably higher on managerial farms than on household-size ones, we may reasonably assume that this latter condition

costs become. When applied to Qing China, however, such concerns seem unnecessary. Since most plots above 20 mu (3 acres) in Jiangnan were managerial, it would have taken around 10 minutes to walk around the basic managerial farm.<sup>109</sup> A managerial farm in North China would have been larger, but still small enough to circle in 30 minutes.<sup>110</sup> In comparison, early modern English managerial farmers frequently managed 200 acres or more.<sup>111</sup> Our question here is not why Chinese farms were not managerial on the scale of English farms, but rather, why they were generally not managerial *at all*, when even smaller managerial farms enjoyed notable labor and animal productivity boosts.<sup>112</sup>

A final economic explanation to consider is the potential attractiveness of risk-sharing—landowners with surplus land may tend to prefer a secure rent over a riskier crop yield.<sup>113</sup> This theory also runs into empirical difficulties. Generally, we expect smaller landowners, who are more at risk from economic fluctuations, to be more risk-averse than larger landowners.<sup>114</sup> In Qing China, however, we have shown that smaller households who owned some surplus land, but not enough for managerial farming, employed wage-labor regularly.<sup>115</sup> This suggests that risk-sharing was probably not a prevalent priority for those who could afford managerial farming.<sup>116</sup> All things considered, purely economic considerations do not seem capable of explaining China's lack of managerial farming.

It must be noted, however, that many of the wealthiest landowners in the Lower Yangtze chose to become “absentee landlords” instead of managerial farmers, renting their holdings to tenants while living in urban centers, preferring the comforts of urban life and the political and commercial opportunities it offered.<sup>117</sup> On the other hand, such opportunities were largely limited to the highest echelon of landowners.<sup>118</sup>

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was met. Kang Chao, *Tenure Systems in Traditional China*, 31 ECON. DEV. & CULT. CHANGE 295 (1983) (sharecropping was in steady decline in China since at least 1500).

109. See discussion *supra* p. 141.

110. HUANG, *supra* note 11, at 70.

111. Shaw-Taylor, *supra* note 25, at 4–6.

112. See discussion *supra* p. 143.

113. Heijdra, *supra* note 104.

114. See Luigi Guiso & Monica Paiella, *Risk Aversion, Wealth and Background Risk*, 6 J. OF EURO. ECON. ASS'N 1109 (2008) (“We find that risk aversion is a decreasing function of the endowment . . .”).

115. See discussion *supra* pp. 141–42.

116. See Chao, *supra* note 108, at 312 (“There seems to be no strong statistical evidence to suggest that distribution of tenurial contracts was based on the consideration of risk factors.”).

117. Madeleine Zelin, *China's Economy in Comparative Perspective, 1500 Onward*, in ASIA IN WESTERN AND WORLD HISTORY 474 (Ainslie Embree & Carol Gluck eds., 1997).

118. Landlords probably constituted less than 5% of total population. Esherick, *supra* note 65, at 405.

The vast majority of rural landowners and tenants regularly acted to maximize their *agricultural* profits,<sup>119</sup> which, as we argued, would have encouraged managerial farming, not rent-collecting.

There is some reason to suspect that even absentee landlords might have shared these preferences<sup>120</sup> and that they rented out their holdings due to necessity, not choice. As analyzed in detail below,<sup>121</sup> the landholdings of these large landlords were usually so scattered that managerial farming was not possible. Instead of owning several large plots, most large landowners owned dozens to hundreds of small and unconnected plots, which could not efficiently support managerial farming unless consolidated. I argue below that this was not by choice. Rather, they were unable to purchase land in more efficient patterns.<sup>122</sup> The prevalence of absentee landlordism among these large landowners does not, therefore, speak to the relative profitability of tenancy versus managerial farming. Rather, this latter option was inaccessible due to external factors.

All in all, the fact that economic incentives actually favored the creation of managerial farms suggests that we should be looking for institutional obstacles. One approach, recently advocated by Robert Brenner and Christopher Isett, is to examine whether landlords possessed strong rights of exclusion against their tenants.<sup>123</sup> Lower Yangtze tenants, for example, frequently enjoyed “permanent tenancy” (*yong dian*) rights, which protected them against exclusion and rent increases as long as they paid their rents. This right was strictly customary, since Qing provincial laws often attempted to ban the practice, although with limited success.<sup>124</sup> Brenner and Isett argue that these customs prevented Chinese landlords from excluding their tenants and creating large, consolidated plots capable of supporting managerial farming.<sup>125</sup> In comparison, British landlords had stronger exclusion powers, and were therefore able to build managerial farms.<sup>126</sup>

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119. See *supra* notes 12, 102.

120. See discussion *supra* note 102.

121. See discussion *infra* pp. 178–79.

122. *Id.*

123. Brenner & Isett, *supra* note 6, at 614–20.

124. See, e.g., YANG GUOZHEN, MING QING TUDI QIYUE WENSHU YANJIU 115 (1988); PHILIP C.C. HUANG, CODE, CUSTOM AND LEGAL PRACTICE IN CHINA: THE QING AND REPUBLIC COMPARED 107–08 (2001).

125. Brenner & Isett, *supra* note 6, at 614–20.

126. *Id.*

While the institutional contrast Brenner and Isett highlight probably existed, the exclusion of tenants was simply not the primary means of creating managerial farms even in England. The general consensus among English economic historians is that the initial creation of large farms during the sixteenth century was tenant-driven, instead of landlord-driven.<sup>127</sup> In addition, even when landlords became the main force in the seventeenth and eighteenth centuries, they utilized *both* purchases and exclusions to increase farm size.<sup>128</sup> Thus, the principle mechanism by which plot-size increased was the combining of adjacent farms via either outright purchase or mortgage closure, rather than exclusion of tenants.<sup>129</sup> Chinese landlords may well have possessed weaker exclusion rights, but this does not satisfactorily explain why China had less managerial farming. We must still ask why relatively richer peasants were unable to purchase enough land to create managerial farms, and especially why richer tenants did not, as they did in England, purchase enough tenancy rights from poorer neighbors—there is certainly no rule against creating managerial farms on rented land. Quite the opposite, the secure nature of tenancy rights in Qing China made this quite appealing.

One proposed solution is to emphasize the existence of lineage-based obstacles to alienability. Some have argued that local customs in both the Lower Yangtze and South China granted households the right of first refusal or even an outright veto power when their lineage members attempted to sell land.<sup>130</sup> In addition, lineage-owned land, which may have occupied as much as 35% of arable land in Guangdong, was simply inalienable.<sup>131</sup> Landowners therefore found it difficult to convey land even if they wanted to, which naturally made buying land equally difficult. English laws and customs seemed to impose fewer restrictions on free alienation. Legal historians have long agreed that, by at least the fifteenth century, royal and local courts expressed distinct hostility towards

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127. E.g. R.W. Hoyle, *Tenure and the Land Market in Early Modern England: Or a Late Contribution to the Brenner Debate*, 43 *ECON. HIST. REV.* 1, 2, 14 (1990); P. Glennie, *Distinguishing Men's Trades: Occupational Sources and Debates for Precensus England*, in *HISTORICAL GEOGRAPHY RESEARCH SERIES* 1, 33 (1990). More generally, see the discussion in Leigh Shaw-Taylor's working paper on Agrarian Capitalism, *supra* note 25.

128. ALLEN, *supra* note 25, at 14–15.

129. For the importance of mortgages in land transaction, see Christopher Clay, *Property Settlements, Financial Provision for the Family, and Sale of Land by the Greater Landowners, 1660–1790*, 21 *J. BRIT. STUD.* 18 (1981); ALLEN, *supra* note 25, at 15.

130. HUANG, *supra* note 24, at 108; MAZUMDAR, *supra* note 24, at 226–31; POMERANZ, *supra* note 3, at 70.

131. POMERANZ, *supra* note 3, at 71–72.



inalienable rights in land, mainly by recognizing and creating methods to break entail.<sup>132</sup>

Although this comparison of alienability is attractively straightforward, more recent scholarship suggests that it cannot adequately explain China's relative lack of managerial farming. First, lineages in the Lower Yangtze and South China were generally so large that "kin first" rules, or even "kin only" rules, would still have allowed many potential buyers to compete for most plots.<sup>133</sup> Second, although lineages owned a fair amount of "corporate land" in Guangdong, their holdings were miniscule elsewhere, including the Lower Yangtze and North China.<sup>134</sup> Finally, certain Medieval English borough and manor customs gave family members and heirs a "right of first purchase" similar to what we see in China,<sup>135</sup> suggesting that one should be cautious when arguing that kinship-based inalienability was unique to China.

Kenneth Pomeranz has recently suggested another way of measuring the economic effects of such customary restrictions.<sup>136</sup> If, in fact, these restrictions constituted a significant barrier to free alienation, we would expect that, as individual households fluctuated in size, they would have difficulty "adjusting the amount of land they worked to the amount of labor they possessed."<sup>137</sup> There should, therefore, be large differences in labor input per-mu between different size classes. Such variance should be particularly acute among small and medium farms, which employed little wage labor. Some of Buck's survey data present, however, a very different picture. If labor input per-mu on small farms was set at 100, then it was around 95 on medium farms, and around 87 on large farms.<sup>138</sup> Disregarding the discrepancies within Buck's data for the moment,<sup>139</sup> this suggests that customary restrictions placed no significant burden on free land alienation.

132. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 318–21 (3d ed. 1990).

133. SUSAN NAQUIN & EVELYN RAWSKI, CHINESE SOCIETY IN THE EIGHTEENTH CENTURY 100–01 (1987); POMERANZ, *supra* note 3, at 72.

134. CHEN HAN-SENG, LANDLORD AND PEASANT IN CHINA 34–35 (1936); BUCK, *supra* note 67, at 192 (estimating that 93% of arable land in China was owned in "fee simple" by individual households).

135. *See, e.g.*, 21 PUBLICATIONS OF THE SELDEN SOCIETY 66–68.

136. Pomeranz, *supra* note 87.

137. *Id.*

138. BUCK, *supra* note 70.

139. *See discussion supra* pp. 142–43.

Finally, we should address the somewhat ancient thesis that differences between Chinese and English inheritance norms allowed for greater concentration of land-ownership in England.<sup>140</sup> The basic idea is that, due to primogeniture and entail, English landowners were able to keep their holdings in one piece from generation to generation, while Chinese landowners, who customarily gave all sons equal inheritance, often saw their holdings split into smaller pieces by later generations.<sup>141</sup> This institutional comparison is, first of all, highly questionable and ambiguous. The widespread use of wills, trusts, and various “entail breaking” instruments in England since at least the fifteenth century allowed landowners to easily secure land for younger sons despite primogeniture and entail,<sup>142</sup> while Chinese cultural and customary traditions that promoted lineage solidarity often discouraged sons from disintegrating family property.<sup>143</sup>

Even if we unwisely disregard these complexities, the logical connection between family division and the prevalence of managerial farming would still be tenuous. A family that possesses both a managerial farm and multiple male heirs—who constitute the bulk of the household labor supply—would only create a number of smaller managerial farms after

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140. See NAGANO AKIRA, *ZHONGGUO TUDI ZHIDU DE YANJIU* 66 (Qiang Wo trans., 2004); William Lavelly & R. Bin Wong, *Family Division and Mobility in North China*, 34 *COMP. STUD. IN SOC. & HIST.* 439, 448 (1992); DAVID WAKEFIELD, *FENJIA: HOUSEHOLD DIVISION AND INHERITANCE IN QING AND REPUBLICAN CHINA* 188–91; CHRISTOPHER ISETT, *STATE, PEASANT, AND MERCHANT IN QING MANCHURIA, 1644–1862*, at 173. The more recent works argue that Chinese family division had negative effects on productivity and earning potential, which is undoubtedly correct, but do not explicitly link these effects to China’s relative lack of managerial farming. In an earlier work, Huang briefly suggests that partible inheritance obstructed managerial farming, but then immediately states that the effects of population growth and farm division were “ambiguous,” as they could also pressure more households to sell their land due to poverty. HUANG, *supra* note 11, at 117–18. For a summary of eighteenth and nineteenth century English academic thinking on primogeniture and entail, see William L. Miller, *Primogeniture, entails and endowments in English classical economics*, 12 *HIST. OF POL. ECON.* 558 (1980).

141. NAGANO, *supra* note 140.

142. For a discussion of how trusts were used to avoid primogeniture, see Kent D. Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 *U. OF MO.-KAN. CITY L. REV.* 181, 185–191 (2009). The ineffectiveness of entail is discussed at G.R. RUBIN & DAVID SUGARMAN, *LAW, ECONOMY, AND SOCIETY, 1750–1914: ESSAYS IN THE HISTORY OF ENGLISH LAW* 39 (1984). See ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: FAMILY, PROPERTY, AND SOCIAL TRANSITION* (1978), which argues that the widespread use of wills and trusts made institutions like primogeniture largely ineffective. See also *id.* at 104.

143. NAGANO, *supra* note 140, at 122. See also the case discussed at K.Y. Wong, *Dispute Resolution by Officials in Traditional Chinese Legal Culture*, 10 *MURDOCH U. ELEC J.L. No. 2*, at § 8, available at [http://www.murdoch.edu.au/elaw/issues/v10n2/wong102\\_text.html](http://www.murdoch.edu.au/elaw/issues/v10n2/wong102_text.html) (2003). The official was applauded for preventing family division, even though the brothers were within their rights to seek it.

household division. For example, a managerial farm with two male heirs and four hired laborers would create two managerial farms with one owner and two laborers each after division. On the other hand, if family division led to the creation of two non-managerial farms, then logically the original undivided farm could not have been managerial either. Family division does not, therefore, affect the total amount or percentage of Chinese farmland under managerial farming. Managerial farming exists if, and only if, household labor tills less than half the plot. If household labor were not expanding in the first place, there would probably be no need for family division.

None of this is to say that family division had no impact on per-capita wealth—by dividing family assets, households would lose some economies of scale, mainly in the form of lower labor productivity. This clearly affected future earning potential, but as pointed out above, lower productivity also meant that it took less land per-capita to create managerial farms. While a unified household with two sons might need to own 22 mu/person to create a managerial farm, this threshold might drop to 20 mu/person after family division, as each son was no longer capable of farming as much land on his own. This mathematically cancelled out the drop in earning potential.

Moreover, family division becomes macro-economically significant only when there is substantial population growth, but North China and the Lower Yangtze often failed to satisfy this prerequisite. Population growth in these two regions was dramatically slower than the national average due to outward migration.<sup>144</sup> The population of the Lower Yangtze grew by perhaps 35% from 1750 to 1850, much of it in urban areas, whereas the national average might have been around 80%.<sup>145</sup> It then *fell* by over 25% between 1850 and 1930—back to 1750 levels, while the national average was still steadily increasing.<sup>146</sup> A similar situation existed in North China, where the population of Zhili Province,

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144. HO PING-TI, *STUDIES ON THE POPULATION OF CHINA, 1368–1953*, at 136–68 (1959).

145. For the Lower Yangtze, see HUANG JINGBIN, *MINSHENG YU JIAJI: QINGCHU ZHI MINGUO SHIQI JIANGNAN JUMIN DE XIAOFEI* 70–71 (2009). Population growth in urban areas was much faster than elsewhere, further lessening the effect of family division on agriculture. *Id.* at 17. For national figures, see Robert B. Marks, *China's Population Size during the Ming and Qing* 3, available at [http://web.whittier.edu/people/webpages/personalwebpages/rmarks/pdf/env.panel\\_remarks.pdf](http://web.whittier.edu/people/webpages/personalwebpages/rmarks/pdf/env.panel_remarks.pdf) (last visited Nov. 29, 2010).

146. HUANG, *supra* note 145.

for example, hardly grew at all before 1850.<sup>147</sup> All in all, existing institutional explanations seem incapable of explaining China's relative lack of managerial farming.

#### IV. CONDITIONAL SALES IN QING AND REPUBLICAN CHINA

This hardly means, however, that it is impossible to craft a plausible institutional explanation. The theories examined above focus mainly on whether Chinese peasants *could* permanently sell land, and not whether they actually *would*. The remainder of this article argues that the main problem with Chinese property rights was, in fact, that peasants could transact their land in ways that English law did not allow, and that this created problematic *incentives*, chiefly for the potential seller. In particular, we should pay greater attention to the existence of conditional sales (*dian*), which allowed reluctant sellers to retain rights of redemption—at, in fact, the original sale price—for as long as they chose.

The relationship between this somewhat peculiar “institution” and China's relative lack of managerial farming remains severely underdeveloped. Although a few scholars have alluded to it, no serious analysis exists. Liang Zhiping, for example, suggests that conditional sales could have prevented land accumulation, but provides no economic data or reasoning to support this brief assertion.<sup>148</sup> An article by Pomeranz briefly expresses support for Liang's claims, yet goes on to argue that conditional sales really had little effect on land purchasing.<sup>149</sup> Isett's recent book on the Manchurian economy discusses both conditional sales and the lack of managerial farming without drawing a specific casual relation between them.<sup>150</sup> In any case, what applies to Manchuria does not necessarily apply to North China or the Lower Yangtze. If conditional sales did indeed affect managerial farming in the Chinese core, the existing literature has yet to adequately explain how. Moreover, no previous work has attempted to compare conditional sales with English norms of land transaction. Rigorous comparison is, however, logically necessary if we are to tackle Sino-English agricultural *divergence*.

Qing and Republican conditional land sales were conceptually simple: the original owner “sold” land under the condition that he could later

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147. Xing Long, *Jindai Huabei Nongcun Renkou Liudong ji qi Xiaozhang*, 2000 (4) LISHI YANJIU, available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1109&context=student\\_papers&sei-redir=1#search=%22Xing%20Long%2C%20Jindai%20Huabei%20Nongcun%20Renkou%20Liudong%20ji%20qi%20Xiaozhang%22](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1109&context=student_papers&sei-redir=1#search=%22Xing%20Long%2C%20Jindai%20Huabei%20Nongcun%20Renkou%20Liudong%20ji%20qi%20Xiaozhang%22).

148. LIANG ZHIPING, QINGDAI XIGUAN FA: SHEHUI YU GUOJIA 173–78 (1996).

149. Pomeranz, *supra* note 87, at 105, 123–30.

150. ISETT, *supra* note 140, at 85–89, 161–72.

redeem it *at the original price*.<sup>151</sup> Tenants, who generally enjoyed decent security of tenure in China's economic core, could also transfer their rights of possession through these instruments.<sup>152</sup> In either situation, the buyer could utilize the land as he wished until redemption.<sup>153</sup> Such contracts might specify, as a benefit to the conditional buyer, a period of time (*xian*) in which he was guaranteed usage of the land.<sup>154</sup> The seller could potentially reimburse the initial payment before this period expired, but could only regain usage rights after the expiration.<sup>155</sup> On the other hand, he was under no obligation to redeem immediately upon the expiration; as long as the contract did not expressly set a deadline for redemption, he could redeem at "any time after the guaranteed-usage period had expired."<sup>156</sup>

In any kind of conditional sale, the seller might decide to part with this right of redemption, either because he could not afford to redeem, or because he had simply lost interest in the land. When this happened, the conditional buyer would obtain full ownership rights, but would have to pay the seller an "additional payment" (*zhao tie*), equal to the difference between the original conditional sale price and the present market value of the land.<sup>157</sup>

Naturally, complications arose in actual practice. Most important was the issue of redemption: could the parties set a deadline for redemption? If the original contract did not expressly mention the deadline issue, would a default deadline apply, either by law or by custom? The few historians who have studied these issues share little consensus. Some argue that

151. Both the Qing Code and the earlier Ming Code simply define "*dian*" as a sale that could be redeemed. DA QING LV LI [THE GREAT QING CODE] 95.03 (1905); DA MING LV [THE GREAT MING CODE], Hu Lv: Tian Zhai Men. On redemption at the original price, see LIANG, *supra* note 148, at 93 (1996); WU XIANGHONG, DIAN ZHI FENG SU YU DIAN ZHI FALV 35 (2009).

152. See discussion *supra* accompanying note 83. Tenants were free to transfer or sublease their tenancy rights. See Pomeranz, *supra* note 87, at 131.

153. This would be buyer's incentive for participating in the sale despite not obtaining any interest on his "loan" (redemption was at the original price)—the lump sum he conveyed to the seller. See WU, *supra* note 151, at 100–03.

154. LIANG, *supra* note 148; Henry McAleavy, *Dien in China and Vietnam*, 17 J. ASIAN ST. 403, 406–07 (1958). Some have mistakenly interpreted "*xian*" as a deadline for redemption. See, e.g., discussion at *infra* notes 199, 200. But this would conflict with any reasonable reading of either customary or legal sources. See discussion *infra* notes 187, 206. See also WU, *supra* note 151, at 100–03.

155. *Id.*

156. *Id.*

157. These practices are summarized at HUANG (2001), *supra* note 124, at 74–75.

norms on all levels, from the Qing Code down to local custom, approached conditional sales from a basic presumption of permanent land-ownership and, therefore, protected strong redemption rights.<sup>158</sup> Others counter that Qing laws and customs were not hostile to the permanent alienation of land, while large numbers of people freely engaged in complex land transactions for pure financial gain.<sup>159</sup>

A more comprehensive survey of relevant law and custom suggests that the actual situation fell somewhere in the middle. Local customs in the regions we study do indeed display a prevalent social sympathy for attempts to maintain permanent land-ownership. They generally did not recognize redemption deadlines, permitting conditional sellers to retain redemption rights indefinitely. Central-level authorities, however, were hostile to such practices and banned redemption after eleven years. Faced with this conflict between law and custom, local magistrates generally left conditional land sale disputes to local mediation. While probably just a prudent act of self-preservation, this nonetheless shielded local customs from hostile legal regulations. Qing and Republican property rights did, therefore, favor strong redemption rights in practice, even though they may have opposed them as a matter of formal legal theory.

Section IV.A examines how county-level customs throughout China regulated conditional sales contracts. Section IV.B then describes how the Qing Code and other central regulations treated such transactions. Due to the lack of a new civil code after the Qing collapse, these rules remained in effect until the mid-Republican era.<sup>160</sup> Section IV.C argues that local courts very rarely enforced these laws and regulations that contradicted local customs.

### A. Local Custom

The term “custom,” as legal historians generally use it, is medieval European in origin. It refers to “rule[s] acknowledged by the population of a particular locality as having a *binding force*.”<sup>161</sup> As the medieval

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158. HUANG (2001), *supra* note 124, at 71–98. See also, MELISSA MACAULEY, SOCIAL POWER AND LEGAL CULTURE: LITIGATION MASTERS IN LATE IMPERIAL CHINA 230–45 (1998); YANG, *supra* note 124, at 279; Yang Guozhen, *Shilun Qingdai Minbei Minjian de Tudi Maimai*, 1 ZHONGGUOSHI YANJIU 29 (1981).

159. THOMAS BUOYE, MANSLAUGHTER, MARKETS AND MORAL ECONOMY: VIOLENT DISPUTES OVER PROPERTY RIGHTS IN EIGHTEENTH CENTURY CHINA 94 (2000); POMERANZ, *supra* note 3, at 70–73.

160. Late-Qing and early-Republican judicial reform efforts succeeded partially in constructing new courts and legal procedures, but were unable to seriously revise substantive civil law until the issuance of a new civil code in 1929. HUANG (2001), *supra* note 124, at 47–48.

161. Jerome Bourgon, *Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing*, 23 LATE IMPERIAL CHINA 50, 53 (2002).

Canonists saw it, “custom resonate[d] within law, while ordinary practice pertain[ed] to the domain of fact.”<sup>162</sup> In essence, a custom was a habitual practice that had acquired normative status.<sup>163</sup> It may be—as so many legal or social-science concepts are—a weberian “ideal type,”<sup>164</sup> but this does not necessarily detract from its usefulness in describing, however approximately, rules that *govern* social behavior, either due to fear of sanction or internalization,<sup>165</sup> rather than merely describe it. Modern property rights scholars often call these rules “social norms,”<sup>166</sup> but legal historians probably remain more familiar with the term “custom.”

Although “custom,” a concept of western origin, might have no straightforward equivalent in Qing legal terminology,<sup>167</sup> it would nonetheless be foolish to assume that Qing localities had no normative custom of their own. After all, conditional sales had been perhaps the most popular form of land transaction for longer than the dynasty itself,<sup>168</sup> but central regulation was sparse until the eighteenth century.<sup>169</sup> The myriad of disputes triggered by conditional sales were somehow resolved in the absence of formal law, allowing ample opportunity for the development of local custom. Existing sources, most importantly a number of early twentieth century surveys,<sup>170</sup> do indeed indicate the existence of well-established customs in the Qing.<sup>171</sup>

162. *Id.* at 54.

163. *Id.*

164. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY* 20–21 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Bedminster Press 1968).

165. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

166. *Id.*; see also discussion *supra* pp. 135–36.

167. The term did not enjoy widespread use in China until the early twentieth century. SUI HONGMING, *QINGMO MINCHU MINSHANGSHI XIGUAN DIAOCHA ZHI YANJIU* 18–76 (2005). Academic attempts to search for references to “custom” in Qing adjudication have often been overzealous, overlooking the possibility that those references were merely observations of habitual social fact, not norms. Shiga Shuzo, *Qingdai Susong Zhidu zhi Minshi Fayuan de Kaocha*, in *MING QING SHIQI DE MINSHI SHENPAN YU MINJIAN QIYUE* 54 (Wang Yaxin & Liang Zhiping eds., Wang Yaxin trans., 1998).

168. Yang (1981), *supra* note 158, at 31.

169. See discussion *infra* pp. 156–59.

170. MINSHANGSHI XIGUAN DIAOCHA BAOGAOLU [hereinafter XGDC] (Sifa Xingzheng Bu ed., 1930).

171. As early as the Ming Dynasty, scholars and officials had encouraged local communities to establish “county pacts” (*xiang yue*) as a source of order and regulation. Terada Hiroaki, *Ming Qing Shiqi Fazhixu zhong de “Yue” de Xingzhi*, in *MING QING SHIQI DE MINSHI SHENPAN YU MINJIAN QIYUE*, *supra* note 167, at 178. See also WILLIAM

The surveys were initiated in 1903 by the Qing court, but not completed until 1923.<sup>172</sup> The original intent, shared by both Qing and Republican authorities, was to gather information for the drafting of a new civil code.<sup>173</sup> The researchers in charge explicitly sought to identify local “customs” (*xiguan*) that possessed binding force,<sup>174</sup> and indeed produced a vast collection of local practices that, at least as presented in the final report, were clearly normative in nature. Numerous researchers commented on the “binding force” of certain customs, or how they could be used to “combat” non-conforming actions.<sup>175</sup> Republican era jurists took the normative nature of these customs seriously enough to designate them a *formal source of law* in the new 1929 Civil Code: “where the Code is silent, the courts shall apply custom.”<sup>176</sup> At the time, the survey reports were the only extensive compilation of Chinese custom in existence.

Despite the geographical diversity of the survey, which covered most of the country, its reports on conditional sales revealed considerable uniformity among local customs. Nearly all surveyed counties, for example, had customary prohibitions against redeeming conditionally sold land between the initial sowing of seeds and the final harvest.<sup>177</sup> Most prohibited early redemption if the contract had set a guaranteed-usage period.<sup>178</sup> More importantly for the purposes of this paper, almost none of the several hundred surveyed counties—and, indeed, only one county in North China or the Lower Yangtze—imposed any customary deadline on redemption.<sup>179</sup> Instead, the near-universal assumption seemed

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ROWE, SAVING THE WORLD: CHEN HONGMOU AND ELITE CONSCIOUSNESS IN EIGHTEENTH-CENTURY CHINA 102–03 (2003) (discussing the positive assessment of “xiangyue” by prominent officials). The local creation of written custom was prevalent in the Qing. Terada, *supra*; SUN LIJUAN, QINGDAI SHANGYE SHEHUI DE GUIZE YU ZHIXU: CONG BEIKE ZILIAO JIEDU QINGDAI ZHONGGUO SHANGSHI XIGUAN FA (2005) (discussing tablet engravings of local commercial customs).

172. SUI, *supra* note 167.

173. *Id.* at 18–19, 58–59.

174. *Id.* at 13, 18–19, 30–31.

175. XGDC *supra* note 170, at 153, 175, 194, 364.

176. THE CIVIL CODE OF THE REPUBLIC OF CHINA art. 1 (1930).

177. *See, e.g.*, XGDC, *supra* note 170, at 28, 30, 40, 67, 79, 84, 132, 141, 153, 157, 175, 194, 257, 291, 349, 418.

178. These were common. *See, e.g.*, XGDC, *supra* note 170, at 141, 153, 157, 175, 194, 257, 278, 279, 291. Exceptions include XGDC, *supra* note 170, at 225, 488, 234, 262 and 547, which allowed redemption at *any* time, regardless of any contractually established guaranteed usage period.

179. Deqing County, Zhejiang Province, guaranteed the ability to redeem for only thirty years, which would still be unimaginably long by the English standards discussed below in Part IV. XGDC, *supra* note 170, at 480–81. I can only find two other counties that imposed a mandatory deadline, both in Gansu Province. Xunhua imposed a three or five year redemption deadline for all conditional sales. Jingyuan capped the ability to redeem at sixty years. XGDC, *supra* note 170, at 684, 695. Numerous other counties in



to be that redemption rights would exist indefinitely, and could be exercised in any year after the guaranteed usage period, if one existed.

As a Fujian custom stated, conditional sales of land “could be redeemed even after several dozen or even several hundred years, and the price of redemption would always remain the same regardless of changes in land value.”<sup>180</sup> While such extreme language was rare, customs that expressly made redemption possible “at any time” existed in *all* reporting provinces, and were particularly abundant in North China, the Middle and Lower Yangtze, and South China.<sup>181</sup> Many explicitly forbid the original contract from setting any redemption deadline.<sup>182</sup> Most other customs simply stated that redemption rights could be exercised “anytime after the guaranteed-usage period’s expiration.”<sup>183</sup> The assumption seemed to be that no deadline for redemption would be made, which was indeed the case in actual practice. As several scholars have observed, the typical Qing *dian* contract in most regions would set a period of guaranteed usage, but no deadline for redemption.<sup>184</sup> Quite the opposite, it was common practice in North China and the Middle and Lower Yangtze for *dian* contracts to incorporate some version of the following: “If there is not enough cash to redeem [after the guaranteed usage period had passed], the buyer will continue to till the land with no deadline. Once the original amount has been paid, the land will revert to the original owner.”<sup>185</sup> On the other hand, a *very* small number of counties did expressly limit indefinite redeemability to contracts that imposed no clear deadline.<sup>186</sup> The contrast is quite distinct.

Gansu supported unlimited ability to redeem. See, e.g., XGDC, *supra* note 170, at 690, 691, 696.

180. XGDC, *supra* note 170, at 505.

181. A partial list: XGDC, *supra* note 170, at 28, 29, 67, 81, 225, 234, 262, 319, 356, 364, 370, 488, 505, 524, 547, 570, 586, 600, 631 (dealing explicitly with burial grounds), 645, 646, 690, 691, 696, 722, 822, 1160.

182. Examples from *supra* note 181 include XGDC 234, 262, 524, 547.

183. Examples include every custom cited in *supra* note 181, except those also cited in *supra* note 182.

184. LIANG, *supra* note 148; Isett, *supra* note 140, at 88. See also the North China custom discussed at XGDC, *supra* note 170, at 232 (clarifying that the original owner could not be compelled to surrender his redemption rights upon the termination of the guaranteed-usage period).

185. TIANCANG QIYUE WENSHU CUIBIAN (Hugh T. Scogin & Zheng Qing eds., 2001): nos. 17, 71, 91, 130, 198, 279; XGDC, *supra* note 170, at 312.

186. I can find only three examples of this: XGDC, *supra* note 170, at 586, 688, 818.

Other counties prohibited redemption during guaranteed usage periods and between sowing and harvest, but made no express statement on redemption deadlines.<sup>187</sup> Some do comment that, if the seller failed to redeem before sowing time, “he would have to wait until the following year,” implying that redemption rights were viable for some extended period of time.<sup>188</sup> We can interpret this relative silence either to indicate an unspoken adherence to the formal Qing law, or simply to mean that no customary deadline existed. Default adherence to Qing law seems fairly unlikely. For example, numerous customs expressly prohibited redemption during guaranteed usage periods<sup>189</sup> even though the Qing Code carried an identical prohibition,<sup>190</sup> which would make little sense if default adherence was assumed. More plausibly, silence on redemption deadlines simply meant that none existed by custom, especially since the great majority of contracts, as mentioned above, also decline to impose any deadline.

All in all, these custom surveys clearly suggest that most local communities in the Chinese core supported indefinite redeemability.<sup>191</sup> A few localities, in fact, went a step further and prohibited permanent land selling of *any* kind: even irrevocable sales could be redeemed as long the original owner still possessed a copy of his original deed.<sup>192</sup> Social historians will notice that the widespread existence of indefinite redeemability customs fit in with cultural perceptions of land in Qing society. Ownership of land was a “very personal thing” for most Qing farmers, as it was in many pre-industrial societies.<sup>193</sup> Land “shared in the individual and social nature of the owner.”<sup>194</sup>

The uniformity of such customs across geographical regions indicates that the practice had very deep social and historical roots, and had therefore existed long before the late-Qing custom surveys. Indeed, as will be discussed shortly, Qing officials had been attempting to limit rights of redemption since the mid-Qianlong era—a campaign that Republican governments carried on well into the twentieth century,<sup>195</sup> suggesting that such norms were a widespread “problem” by at least the

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187. This list is very long. See, e.g., XGDC, *supra* note 170, at 141, 153, 157, 175, 194, 257, 278, 279, 291.

188. See, e.g., XGDC, *supra* note 170, at 55, 378, 548, 291, 940.

189. See *supra* note 178.

190. See discussion *supra* p. 156.

191. The immediate audience of these surveys, Republican lawmakers, would have agreed with our observations. See discussing surrounding *infra* notes 256, 257.

192. See, e.g., XGDC, *supra* note 170, at 28, 225, 319.

193. MACAULEY, *supra* note 158, at 234.

194. Eduard Kroker, *The Concept of Property in Chinese Customary Law*, 3 TRANSACTIONS OF THE ASIATIC SOC'Y OF JAPAN 123, 127–31.

195. See discussion *supra* pp. 156–59, see also discussion *infra* p. 164.

mid-eighteenth century.<sup>196</sup> The reluctance of later-Qing magistrates to enforce these official regulations further confirms this impression.<sup>197</sup>

The idea that Qing and Republican society favored permanent landownership ideals has encountered some recent criticism. For example, based on surveys of provincial homicide cases, Thomas Buoye claims that Qing landowners often made conditional sales “to raise cash to invest in trade or business,” and in increasingly “innovative” ways that “indicated a good deal of commercial savvy.”<sup>198</sup> This suggests, he claims, that the ideal of permanent landownership was in decline. These observations are not, however, logically inconsistent with the arguments in this article. Even if landowners became more open to complex conditional sales, they could nonetheless have assumed that no permanent loss of land would occur. In fact, customary protection of redemption rights might actually have encouraged “innovative” conditional sales; since the risk of permanently losing the land was low, landowners felt less wary towards such transactions. Oddly, Buoye does not discuss the content or operation of any actual local custom.

Contrary to our observations in this section, some scholars have argued that most conditional sale contracts in the Lower Yangtze did contain a contractual deadline—usually three or five years—for redemption.<sup>199</sup> This seems to stem, however, from a misinterpretation of contractual language. They note, for example, that certain Anhui contracts contained the clause “can be redeemed after three years,” interpreting this to mean that the seller must redeem *within* three years.<sup>200</sup> The various sources examined above, however, make it abundantly clear that such language almost always meant “*cannot* redeem within three years,” but says nothing about redemption deadlines.<sup>201</sup>

### B. *The Qing Code and Other Central Regulations*

Compared to the seller-friendly tendencies of most local customs, formal Qing civil law came to exhibit considerable hostility towards the

196. See *supra* pp. 28–31.

197. See discussion *supra* pp. 159–62; see also discussion *infra* p. 164.

198. Thomas Buoye, *Litigation, Legitimacy, and Lethal Violence*, in CONTRACT AND PROPERTY, *supra* note 13, at 94, 106, 113; BUOYE, *supra* note 159, at 94.

199. Pomeranz, *supra* note 87, at 130–31; ZHOU YUANLIAN & XIE ZHAOHUA, QINGDAI ZUDIANZHI YANJIU 312–13 (1986); HUANG (1985), *supra* note 11, at 176.

200. ZHOU & XIE, *supra* note 199.

201. See discussion *supra* notes 154, 187, and *infra* note 206.

unlimited redemption of conditional sales, although this was a slow and extended process. Earlier editions of the Qing Code make little mention of conditional sales. The central statute on this subject was statute 95, “Conditional Sales of Land or Real Estate” (*Dian Mai Tian Zhai*), which sets three rules.<sup>202</sup> First, the conditional buyer must register the contract with local officials and pay the accompanying tax.<sup>203</sup> Second, the buyer must not impede redemption after the guaranteed usage period has passed. Third, the conditional seller must not sell the contracted land to any other party before he fully redeemed it. These are, of course, very narrow rules that fail to address most conditional sales-related complications.

Realizing these inadequacies, the Qing Court issued several addendums during the eighteenth century. The first, promulgated in 1730, banned the redemption of sales expressly labeled as “irrevocable sale.” If no such phrase existed, *or* if the contract “set a guaranteed usage period,” “then the property shall be redeemable.”<sup>204</sup> In addition, should the conditional seller eventually decide to irrevocably sell his land to the conditional buyer, he could henceforth demand only one additional payment.<sup>205</sup> Finally, any attempt by the seller to prematurely redeem before the guaranteed usage period had expired would carry criminal liability.<sup>206</sup>

A 1744 addition by Emperor Qianlong attempted to further crack down on ambiguously worded contracts that failed to specify whether the sale was redeemable or not, banning redemption of such contracts if “a long time has already passed.”<sup>207</sup> This vague edict paved the path for a more detailed 1753 sub-statute, which stipulated that any ambiguous contract made after 1723, but before 1753, could be “redeemed in accordance with this sub-statute.”<sup>208</sup> Ambiguous contracts made before 1723 would, however, be considered irrevocable sales that carried no possibility of either redemption or additional payment. From 1753 onwards, all new contracts were required to expressly indicate their legal status, either as a *dian* or a *jue mai*, through the phrases “to be redeemed” or “sold irrevocably, never to be redeemed.”<sup>209</sup>

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202. DA QING LV LI [THE GREAT QING CODE] [hereinafter DQLL] 95.00 (1905).

203. Later edicts effectively voided this rule by granting tax exemptions to *dian* contracts. *Id.* at 95–109.

204. *Id.* at 95–103.

205. *Id.*

206. *Id.*

207. 14 QING SHILU, at ch. 436 (1985).

208. DQLL, *supra* note 202, at 95–107.

209. Some scholars have proposed a more ambitious but somewhat less literal interpretation: the sub-statute meant that *any* ambiguous contract, whether drawn before or after 1753, would be presumed redeemable for thirty years. HUANG (2001), *supra* note 124, at 74; MACAULEY, *supra* note 158, at 240–41. The evidence is drawn from a paper by Kishimoto Mio, which records three murder cases from the *Xing'an Huilan* that purportedly adjudicated “according to the 30-year rule.” HUANG (2001), *supra* note 124,

The Qing Code clearly left a substantial amount of contractual freedom to private parties. Most importantly, it did not set any absolute maximum on redemption deadlines or require that contracts specify a deadline. Philip Huang, for one, considers this lack of regulation a commitment to “a precommercial ideal of permanence in landholding.”<sup>210</sup> A few scholars have disagreed,<sup>211</sup> but the sub-statutes did seem to at least tolerate that ideal.

While this is certainly a reasonable reading of the Code, the Code itself hardly presents a comprehensive and accurate view of Qing conditional sales regulation. Most scholarship in English, with a few exceptions,<sup>212</sup> seems to assume, either implicitly or explicitly, that the Code constituted the *only* Qing legal authority on conditional sales.<sup>213</sup> Chinese and Japanese scholars have done better in recent decades. Most importantly, they have given the Board of Finance Regulations (*Hubu Zeli*) some well-deserved attention.<sup>214</sup> This was a set of regulations issued by the

at 74. None of the three cases expressly applied any such rule. Instead, they simply ruled that, since the original contracts were ambiguous and too much time had passed, the land in question was no long redeemable. Kishimoto Mio, *Ming Qing Shidai de “Zhaojia Huishu” Wenti*, in III-4 ZHONGGUO FAZHISHI KAOZHENG 423, 457–58 (Terada Hiroaki ed., Zheng Minqin trans., 2003). They do not tell us whether those contracts were made before or after 1753. There is, therefore, no way to identify the precise statutory rationale of the judgment. See also Terada Hiroaki, *Shindai Chuuki no Ten Kisei ni Mieru Kigen no Imi ni*, in TOUYOU HOSHI NO TANKYUU 339, 347–51 (1987) (refuting any attempt to apply DQLL, *supra*, note 202, at 95–107 to post-1753 contracts).

210. HUANG (2001), *supra* note 124, at 74.

211. See, e.g., Buoye, *Litigation, Legitimacy, and Lethal Violence: Why County Courts Failed to Prevent Violent Disputes over Property in Eighteenth-Century China*, in CONTRACT AND PROPERTY 106.

212. Henry McAleavy does not explicitly discuss any other legal authority, but does, based on the *Taiwan Shiho*, notice the existence of the crucial “ten year rule” in the *Hubu Zeli*, discussed below. McAleavy, *supra* note 154, at 410–11. Macauley does recognize the existence of the *Hubu Zeli* as an alternative source of legal regulation, but does not mention the “ten year rule.” MACAULEY, *supra* note 158, at 241.

213. See, e.g., HUANG (2001), *supra* note 124, at 88–89; Buoye, *supra* note 211. Neither of the two main essay collections in the Chinese legal history field mentions any statutory source other than the Qing Code and some scattered edict collections in their bibliographies. See CIVIL LAW IN QING AND REPUBLICAN CHINA (Kathryn Bernhardt & Philip C.C. Huang eds., 1994); CONTRACT AND PROPERTY IN EARLY MODERN CHINA, *supra* note 13.

214. See, e.g., Lin Qian & Zhang Jinfan, *Hubu Zeli de Falv Shiyong*, 5 FAXUE QIANYAN 197 (2003), available at [http://www.legalhistory.com.cn/index.php?option=com\\_content&view=article&id=827:n&catid=40:2011-03-05-16-10-18&Itemid=41](http://www.legalhistory.com.cn/index.php?option=com_content&view=article&id=827:n&catid=40:2011-03-05-16-10-18&Itemid=41); 8 ZHONGGUO FAZHI TONGSHI 436 (Zhang Jinfan ed., 1999); ZHONGGUO MINFA SHI 60–03 (Kong Qingming, Hu Liuyuan & Sun Jiping eds., 1996); Terada, *supra* note 209, at 352–60.

Board of Finance at five-year intervals, beginning in 1776. Since the Board of Finance's official duties centered on the administration of land and tax, these regulations naturally focused on similar issues. By the end of Qianlong's reign, they had become crucial parts of the Qing legal apparatus by and were binding over all levels of government adjudication.<sup>215</sup>

The Qianlong series of Board of Finance Regulations (Regulations) made two crucial changes to conditional sales law. First, the Regulations now allowed the buyer of a *dian* to sell his conditional ownership,<sup>216</sup> upon which the third-party purchaser would assume all the rights and obligations of the original buyer. Second, and more drastically, if the conditional seller failed to redeem within eleven years of the original sale, the conditional buyer could claim full ownership by assuming tax responsibilities for the property (*tou shui guo hu*).<sup>217</sup> After ten years, the seller could ask for, at most, a one-year extension, after which redemption would be at the discretion of the buyer.<sup>218</sup> There was one exception: when bannermen sold land to commoners, they were guaranteed redemption rights for twenty years.<sup>219</sup>

Court documents claim that the official legislative intent was to “eliminate social conflict” and “prevent litigation.”<sup>220</sup> Recalling the widespread protection of indefinite redeemability by local customs, these somewhat cryptic phrases seem to suggest that the central government was indeed aware of those customs and, moreover, felt burdened by the social disputes they frequently generated. Quite possibly, these regulations amounted to a direct and conscious assault on customary rights of *dian*-redemption.

One might question whether “eliminating social conflict” and “preventing litigation” really was the main motivation behind these regulations, but

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215. Lin & Zhang, *supra* note 214.

216. 1 QINGDAI GE BUYUAN ZELI: QINDING HUBU ZELI (QIANLONG CHAO) [hereinafter HBZL] 148 (Fuchi Shuyuan ed., 2004).

217. *Id.* at 83, 148–49.; ZHONGGUO FAZHI TONGSHI, *supra* note 214, at 435; Terada, *supra* note 209, at 357–58. There has been some debate over whether this ten-year limit was a deadline for redemption or merely an upper limit for guaranteed usage periods—the language is somewhat ambiguous and could support either interpretation. See GUO JIAN, DIAN QUAN ZHIDU YUANLIU KAO 196 (2009) (supporting the latter interpretation); Terada, *supra* note 209, at 357–58 (supporting a version of the former interpretation, in which the buyer *could* terminate the seller's right of redemption after eleven years, if he chose to). However, discussions of the rule in imperial memorials, in which officials pleaded with the Jiaqing Emperor to allow impoverished bannermen to retain redemption rights after the eleven-year deadline, make it fairly clear that Qing officials, at least, tended to follow the former interpretation. Lin Qian & Zhang Jinfan, *supra* note 214 at § 3. I see no solid reason to challenge them.

218. ZHONGGUO FAZHI TONGSHI, *supra* note 214, at 435. The buyer did not have to exercise this claim immediately. Terada, *supra* note 214, at 357–58.

219. ZHONGGUO FAZHI TONGSHI, *supra* note 214, at 435.

220. Lin & Zhang, *supra* note 214, at Part 3.

there is no solid reason to assume otherwise. Qing local government famously suffered from an extraordinary lack of both financial and human resources.<sup>221</sup> This was at least partially a conscious decision by the central government. In an attempt to streamline the bureaucracy, the Qing court made it a general policy to withdraw from direct management of local economic and social affairs, leaving tax-collection, dispute settlement, and even limited rulemaking powers to local guilds, lineages, and other social groups.<sup>222</sup> Compared with earlier dynasties, the Qing employed roughly the same number of local officials despite dealing with a population that was several times larger.<sup>223</sup> “Preventing litigation” was, therefore, a real and pressing issue.

Combined with the Qing Code, the Board of Finance Regulations put forth a set of rules that was distinctly intolerant of permanent landownership ideals. No matter the circumstance or contractual language, conditional sellers had at most ten (or twenty) years to redeem, and could receive only one additional payment if they made the sale irrevocable. The drafters of these rules were quite willing to sacrifice the conditional seller’s ability to maintain ownership for legal clarity and perhaps administrative simplicity. This is a drastically different picture than what the Qing Code offers on its own, and one that has unfortunately escaped Western academic attention for the most part.

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221. The literature is enormous, but this basic observation remains unchallenged. Two of the more famous works are CH’U TUNG-TSU, *LOCAL GOVERNMENT IN CHINA UNDER THE CH’ING* 24–32 (1962); and BRADLEY W. REED, *TALONS AND TEETH: COUNTY CLERKS AND RUNNERS IN THE QING DYNASTY 169–70* (2000), both of which argue that local magistrates suffered from resource limitations so acute that they had very little coercive power over local communities.

222. See ROWE, *supra* note 10, at 32–33. For an overview of the importance of guilds, see Christine Moll-Murata, *Chinese Guilds from the Seventeenth to Twentieth Centuries: An Overview*, in *THE RETURN OF THE GUILDS* at 213, 213–247 (Jan Lucassen, Tine De Moor & Jan Luiten van Zanden eds., *Int’l. Rev. of Soc. Hist. Ser. No. 16*, 2008).

223. The classic statement is HO PING-TI, *THE LADDER OF SUCCESS IN IMPERIAL CHINA; ASPECTS OF SOCIAL MOBILITY, 1368–1911* (1962), which calculates the size of the Song, Ming, and Qing bureaucracies in comparison to their respective populations. The book’s definition of “social mobility” has been controversial. See the literature review at F.W. MOTE, *IMPERIAL CHINA 900–1600*, at 126–34 (2003), and BENJAMIN ELMAN, *A CULTURAL HISTORY OF CIVIL EXAMINATIONS IN LATE IMPERIAL CHINA 647–50, 656, 659* (2000), which revises a number of Ho’s claims on social mobility, but largely confirms his estimates on the overall size of the bureaucracy. For data on population growth, see discussion at *supra* note 145.

### C. Local-Level Adjudication

Central regulations possess limited judicial significance until they are actually enforced through the official resolution of relevant disputes. Since the Qing Code expressly discouraged the appeal of commonplace “residency, marriage, or land” (*huhun tiantu*) disputes, the great majority of such disputes were handled only by county magistrates.<sup>224</sup> Whether central regulations on conditional sales redemption could indeed supplant contradictory local customs largely depended, therefore, on the adjudicatory behavior of these entry-level officials. Here, however, it becomes much harder to pinpoint relevant original sources. Adjudication is, naturally, best studied through case records, which generally fall into one of three categories: first, serious criminal cases compiled by provincial governments or the imperial court;<sup>225</sup> second, privately written casebooks, usually compiled by retired officials based on their personal adjudication experience;<sup>226</sup> and third, local county archives such as the famous Baxian, Baodi, and Danxin collections.<sup>227</sup>

Of these three, the second category is the least useful for our present purposes. Private collections generally only incorporate cases that, in the editor’s judgment, possess significant explanatory force or set good examples for future adjudication.<sup>228</sup> As such, they have a strong tendency to favor technically difficult or morally educational cases over “mundane,” commonplace ones, which explains why cases focusing on redemption or additional payment rights almost never make it into these compilations. This Article uses these compilations only in a complementary role.

The first category—central and provincial level criminal adjudication records—offers little reliable information on the local adjudication of land disputes. Since imperial law strongly discouraged the appeal of *huhun tiantu* cases to the provincial level unless a strong criminal

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224. DQLL, *supra* note 202, at 334.05.

225. See XINGKE TIBEN (TUDI ZHAIWU LEI); XING’AN HUILAN. For books utilizing these sources, see BUOYE, *supra* note 159; DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* (1967).

226. E.g., QIU HUANG, FUPAN LUCUN, in 1 MING QING FAZHI SHILIAO JIKAN 371 (Nat’l Library of China ed., 2008); FAN ZENGXIANG, FANSHAN PIPAN (Shanghai Guangyi Bookstore ed., 1915); DONG FEI, RUDONG PANYU.

227. Historians have recently discovered a fourth in Nanbu county. Yasuhiko Karasawa, Bradly W. Reed, & Matthew H. Sommer, *Qing County Archives in Sichuan: An Update from the Field*, 26 LATE IMPERIAL CHINA 114 (2005). It remains relatively unknown in Western academia. Mainland Chinese scholars have fared better. See LI ZAN, WAN QING ZHOXIAN SUSONG ZHONG DE SHENDUAN WENTI (2010) (utilizing the Nanbu archives).

228. See, e.g., QIU, *supra* note 226, at 375–77.



element was present,<sup>229</sup> provincial and central adjudication focused almost exclusively on serious crimes. The largest category actually seemed to be homicide.<sup>230</sup> More problematically, Qing law explicitly separated *huhun tiantu* disputes from more serious cases not only in the availability of appeal, but also in the level of discretion that local magistrates enjoyed. For example, a magistrate could diverge from the prescribed punishments in the Qing Code for *huhun tiantu* cases.<sup>231</sup> Thus, instead of receiving a physical beating, the losing side would generally pay damages or obey a court injunction.<sup>232</sup> More importantly, the magistrate could allow *huhun tiantu* cases, but not serious criminal charges, to end in informal mediation.<sup>233</sup> We cannot project the adjudication patterns found in provincial homicide cases onto the processing of ordinary civil cases.

This is especially true of cases where sharp differences existed between local custom and formal law. In such situations, the magistrate had good reason to be cautious: enforcing formal law could frequently trigger enough discontent to damage his personal reputation and local standing, if not outright threaten his personal safety.<sup>234</sup> Assuming that his decision would probably be unappealable, the prudent move would be to allow mediation, and thus avoid enforcing a potentially unpopular law. As we will see shortly, this is exactly what happened in most county archive cases.

This leaves us with the third category: county-level case archives. There are, as noted above, three major archives that have been employed in legal history research since the 1980s. Combined, these archives offer detailed case records of several hundred civil disputes, ranging from the late-Qianlong era to the early Republican years.<sup>235</sup> The archives preserved a significant percentage of the county's actual caseload, with no obvious

229. See Jonathan Ocko, *I'll Take It All the Way to Beijing: Capital Appeals in the Qing*, 47 J. ASIAN STUD. 291, 295 (1988) ("[N]o appeals of minor civil cases . . . could be accepted."); Qiang Fang, *Hot Potatoes: Chinese Complaint Systems from Early Times to the Late Qing*, 68 J. ASIAN STUD. 1105, 1121 (2009) (noting that *huhun tiantu* cases could not be appealed beyond the prefecture level).

230. BUOYE, *supra* note 159, at 1–16.

231. LIBU CHUFEN ZELI, cited in ZHONGGUO FAZHI TONGSHI, *supra* note 214, at 676–77.

232. Mark Allee, *Code Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century County Court*, in CIVIL LAW IN QING AND REPUBLICAN CHINA, *supra* note 213, at 122, 126–27.

233. PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING 119 (1996).

234. See discussion *supra* notes 221, 222.

235. HUANG, *supra* note 233, at 239–40.

sign of institutional or personal filtering. What they offer, then, is an opportunity to observe local-level adjudication in its original colors. For our present purposes, these cases are especially valuable because they occurred *after* both the Qing Code revisions discussed above and the issuance of the Board of Finance Regulations, and therefore provide information on their enforcement.

We focus here on twenty-seven civil disputes related to conditional sales, of which twenty-six are randomly drawn from county case archives.<sup>236</sup> Within these twenty-seven, only nine reached a formal court decision, while the other eighteen ended through some out-of-court process, usually community mediation.<sup>237</sup> A cursory glance at this ratio suggests a clear willingness on the magistrate's behalf to allow mediation. More importantly, the nine formally adjudicated cases were mostly "easy cases" that did not involve the more provocative rules in either the Qing Code or the Board of Finance Regulations. In particular, *none* involved the issue of redemption deadlines. Two examples will suffice to illustrate this. In the first, the Baxian county government had sold land confiscated from a temple, which was engaged in illegal activities.<sup>238</sup> That land, however, had previously been conditionally sold to several parties, who now petitioned for repayment. The magistrates determined that they had no relation to the temple's crimes and arranged compensation. This case does not, in fact, involve *any* legal rule discussed above, but was morally straightforward. The second case involved a peasant who had conditionally sold land to another,<sup>239</sup> but had later made the sale irrevocable and had received the additional payment. A few years afterwards, he attempted to reclaim the land by cutting down its trees for sale. The magistrate found for the new owner, and no other result was possible unless he assumed that *irrevocable* sales could be redeemed.<sup>240</sup>

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236. Baodi Archives [hereinafter Baodi] 194, 1839.2.23; Baodi 96, 1846.95.8; Baodi 96, 1846.100.6; Baodi 103, 1863.117.27; Baodi 104, 1865.5.22; Baodi 109, 1870.22.8; Baxian Archives [hereinafter Baxian] 6:1:722, 1770.7; Baxian 6:1:739, 1774.8; Baxian 6:1:746, 1775.3; Baxian 6:1:749, 1775.10; Baxian 6:1:761, 1777.3; Baxian 6:2:1413, 1796.11; Baxian 6:2:1415, 1797.1; Baxian 6.2.1418, 1797.3; Baxian, 6:2:1416, 1797.6; Baxian 6:2:1427, 1797.6; Baxian 6.2:1428, 1797.8; Baxian 6.2:1430, 1797.8; Baxian 6:2:1421, 1807.4; Baxian 6.4:1707, 1851.8; Danxin Archives [hereinafter Danxin] 23201, 1868.10.23; Danxin 23202, 1873.10.18; Danxin 23205, 1879.2.18; Danxin 23206, 1879.11.6; Danxin 23208, 1881.11.21; Danxin 23209, 1882.3.8; Shen Yanqing, *Huaiqing Yigao*, in 1 JINDAI ZHONGGUO SHILIAO CONGKAN 525–27 (Shen Yunlong ed., Taipei, Ser. No. 0378, 1966).

237. For the nine formally adjudicated civil disputes, see Baodi 103, 1863.117.27; Baodi 96, 1846.95.8; Baodi 194, 1839.2.23; Baxian 6:1:722, 1770.7; Baxian 6:2:1413, 1796.11; Baxian 6:2:1415, 1797.1; Baxian, 6:2:1416, 1797.6; Danxin 23206, 1879.11.6; Danxin 23209, 1882.3.8.

238. Baxian 6:1:722.

239. Baxian 6:2:1415, 1797.1.

240. See also Danxin 23209, 1882.3.8; Baodi 194, 1839.2.23.

More interestingly, one case actually saw the magistrate explicitly disobey a Qing Code statute. In a late-eighteenth century Baxian case, Yang Panlong had conditionally purchased a piece of land from Liu Hongzhi.<sup>241</sup> Some time later, he asked Liu to redeem it. Liu agreed, but also wanted to sell it outright to a third-party. He therefore proposed to pay his debt to Yang through the revenue from that third-party sale. Yang disagreed and brought the case to court, where the magistrate ordered Liu to proceed with his sale and pay Yang afterwards. This clearly contradicted Statute 95 of the Code, which, as noted above,<sup>242</sup> stated that no land under a conditional sale contract could be sold unless the seller first redeemed it in full.

On the other hand, *no* case that potentially involved the mandatory eleven-year redemption deadline ever reached a formal court decision. They were instead mediated out-of-court. These account for nine of the eighteen un-adjudicated cases, most involving an outright attempt to redeem, others involving a conditional seller claiming “sharecropping rights” over the transacted land, but all seeing at least eleven years pass between the original transaction and the suit.<sup>243</sup> Several of these involved attempts to redeem contracts made many decades ago. In an 1865 Baodi case, for example, Zhao Yong sought to redeem land that his great-grandfather conditionally sold in 1788.<sup>244</sup> When the conditional buyer’s descendant refused, Zhao cut down his wheat. While this would have been a clear-cut decision for the current owner if the magistrate enforced the Board of Finance Regulations, he allowed it to end in mediation, where, as discussed below, the mediator apparently recognized Zhao’s claim to the land. A Danxin magistrate in charge of a similar

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241. Baxian 6:2:1413, 1796.11.

242. See DQLL, *supra* note 202.

243. Baodi 104, 1865.5.22; Danxin 23208, 1881.11.21; Baxian 6:2:1418, 1797.3; Yanqing, *supra* note 235; Baxian 6:1:761, 1777.3; Baxian 6:2:1430, 1797.8; Danxin 23201, 1868.10.23; Danxin 23202, 1873.10.18; Danxin 23205, 1879.2.18. All of these involve conditional sellers claiming an ownership stake in the transacted land at least ten years after the original transaction. Apart from these nine redemption-related cases, the other nine un-adjudicated cases are Baodi 109, 1870.22.8 (involving a price-dispute over the added value to a piece of conditionally sold land); Baodi 96, 1846.100.6 (involving a sharecropping agreement over a piece of conditionally sold land); Baxian 6.4:1707, 1851.8 (involving ownership of an ancestral gravesite on a transacted property); Baxian 6:1:739, 1774.8 (likewise); Baxian 6:2:1421, 1807.4 (likewise); Baxian 6:2:1427, 1797.6 (likewise); Baxian 6.1:749, 1775.10 (conditionally selling the same piece of land multiple times); Baxian 6.2:1428, 1797.8 (likewise); Baxian 6.1:746, 1775.3 (likewise).

244. Baodi 104, 1865.5.22.

1881 case, involving a conditional sale from 1835, actually went beyond this.<sup>245</sup> While he did not formally issue a decision, he told the grandnephew of the original seller: “the land was conditionally sold by your granduncle to Su Gong . . . . How can his grandson Su Li refuse to allow redemption?”<sup>246</sup> This magistrate clearly ignored the eleven-year limit on redemption.

Some cases also involved additional payment claims on top of the redemption attempts. In another 1797 Baxian case, two brothers attempted to squeeze further additional payments out of their grandfather’s conditional sale contract, even though it had become legally irrevocable over thirty years ago due to the grandfather’s acceptance of an additional payment.<sup>247</sup> They returned to the land and, using a familiar tactic, cut down its bamboo, stating that their ownership interests had yet to terminate, and that they were reclaiming their rights. This case also went to mediation, but the case record does not document the mediation result. The other six cases involving contested redemption offer basically similar fact patterns to the three described above.<sup>248</sup>

The general tendencies of local magistrates are fairly apparent. They tended to leave conditional sales disputes, especially ones that involved prolonged redemption rights, to mediation, and usually declined to enforce potentially controversial regulations. While most cases that did reach a formal decision adhered to the published law—a conclusion reached by several previous studies,<sup>249</sup> a few did not. In some mediated cases, the magistrate expressly indicated his disagreement with central regulations. All in all, enforcement of central-level laws and regulations was weak.

To scholars familiar with the existing historiography on Qing local government, these conclusions are unsurprising. The structural peculiarities of Qing county bureaucracies are well known. In a system where, as discussed above, county magistrates had a very limited staff and few personal acquaintances in the local community, they hardly had the tools to effectively combat local interest groups or custom.<sup>250</sup> Nor would they have much incentive to. As noted before, most land-related cases were relatively non-appealable, so deference to local custom would rarely cause any problem with their superiors. The fact that their administrative

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245. Danxin 23208, 1881.11.21.

246. *Id.*

247. Baxian 6:2:1418, 1797.3.

248. Shen, *supra* note 236; Baxian 6:1:761, 1777.3; Baxian 6:2:1430, 1797.8; Danxin 23201, 1868.10.23; Danxin 23202, 1873.10.18; Danxin 23205, 1879.2.18.

249. HUANG, *supra* note 233, at 17; Buoye, *supra* note 198, at 99–100. These conclusions do not contradict our conclusions here, which simply argue that difficult cases involving a law-custom split were usually left to mediation—the magistrate was not violating any legal rule by allowing this.

250. See discussion *supra* pp. 158, 160.

organization was staffed by locals with deep social connections only increased their reliance on local goodwill.<sup>251</sup>

Of course, the mere fact that magistrates tended to leave conditional sales disputes to informal mediation does not necessarily mean that the mediations followed local custom, rather than formal law. Of our nine mediated disputes that potentially involved the ten-year deadline, only three suggest how the mediation proceedings eventually concluded. This is too small a sample to generate concrete conclusions on its own, but can nonetheless offer interesting insights when read together with the custom surveys examined in Section IV.A. Moreover, since existing mediation documents are *extremely* rare, one must make the best of what is available.

Two such cases have appeared above. The first is the 1881 Danxin case involving a conditional sale from 1835.<sup>252</sup> As noted, the magistrate issued no verdict, but did observe to the grand-nephew that “the land was conditionally sold by your granduncle to Su Gong . . . . How can his grandson Su Li refuse to allow redemption?”<sup>253</sup> The case record then indicates that the dispute was eventually resolved through mediation. This strongly suggests that the final mediation result allowed redemption, although potentially with some financial concessions to the buyer’s grandson. Since the magistrate’s comment was a clear violation of the Board of Finance Regulations, the motivation for his comments lay elsewhere, either in his personal sense of equity or a prudent deference to local custom. The latter motivation works well, of course, for our argument that *dian* redemption customs were socially influential, but if extended redemption rights were actually part of the magistrate’s personal sense of equity, then perhaps we have *underestimated* the social importance of permanent landownership ideals.

The other case, the Zhao Yong incident from Baodi, had a very similar fact pattern. The record shows that communal mediators took control and reached a settlement: the original seller’s great-grandson, who had cut down wheat from the contracted land, could keep the crops, but would also allow the original buyer’s family to keep using the land.<sup>254</sup> The original contract would *not*, however, be replaced by an irrevocable deed. While this seems to be a compromise, we must remember that the

251. REED, *supra* note 221.

252. Danxin 23208, 1881.11.21.

253. *Id.*

254. Baodi 104, 1865.5.22.

original contract was over eighty years old, so *any* acknowledgement of the great-grandson's claim would suggest that the mediators did indeed consider his right of redemption was still valid. As with all individual mediation results, we cannot be sure whether the mediators were consciously following local custom or just trying to make both sides happy. As argued in Section IV.A., however, local customs in North China, where Baodi is located, did support indefinite redeemability vigorously. The concurrence between these customs and the specific outcome in this case is at least suggestive.

The third case is perhaps the most interesting—it is the only case in our sample that was not drawn from a county archive, but is nonetheless included here due to its fascinating fact-pattern. This was an early nineteenth century case from Jiangxi, found in a magistrate's private case collection. It involved an old man attempting to redeem land that he had sold to his neighbor forty years ago.<sup>255</sup> The old man claimed that the sale was conditional, but the magistrate found that it had actually become *irrevocable* some years ago. In any case, the eleven-year redemption window had long expired for this Jiangxi transaction, and the old man would have had no legal right to redeem even if the contract were still conditional. Here, however, the magistrate expressed sympathy with the old man's economic plight and informally persuaded the neighbor to allow redemption. Consciously avoiding formal law, he instead favored an out-of-court settlement that agreed with local customs.

Ultimately, what limited information we have on mediation results does indeed show that they tended to agree with local custom, perhaps with the magistrate's active encouragement. Moreover, the very fact that most local conditional sales customs continued to contradict official law well into the early-twentieth century already constitutes fairly convincing proof that local enforcement of the ten-year regulatory deadline was weak. One particularly interesting development in the 1929 Republican Civil Code was that it extended the mandatory redemption deadline for conditional sales from eleven years—the Qing rule—to thirty, even though rural commercialization had increased drastically since the mid-Qing.<sup>256</sup> Republican lawmakers might have realized that the ten-year deadline was simply unenforceable, and therefore made a concession to local customs.<sup>257</sup> Shielded from formal legal pressure by the passiveness

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255. Shen, *supra* note 236.

256. ZHONGHUA MINGUO MINFA DIAN [CIVIL CODE OF THE REPUBLIC OF CHINA], arts. 912, 924 (1929).

257. Philip Huang has interpreted this as a partial rethinking of the "pre-commercial" logic of rural society. HUANG, *supra* note 124, at 88–89. As noted above, however, Huang did not seem to be aware of the ten-year rule in the *Hubu Zeli*, and

of county magistrates, these customs regulated conditional sales in most of China's economic and cultural "core," creating a widespread normative presumption in favor of indefinite redeemability.

#### V. COMPARISON WITH ENGLISH LAND TRANSACTIONS NORMS

How, then, do these transactional norms compare to English land transaction institutions? Ultimately, an explanation of the Sino-English divergence in capitalist agriculture must be an exercise in *comparative* legal history. The central issue is not, of course, what the term "conditional sale" means in English law, but whether we can find a functional equivalent in sixteenth and seventeenth century English land transaction norms. When the transition to managerial farms occurred did English real property norms allow landholders to transact their land for a lump sum—in essence, use land as security for a monetary loan—while retaining indefinite rights of redemption at little or no interest? We argue here that they did not. English law and custom did recognize a right of redemption for certain transactions, but such rights were only secure for relatively short periods of time. For example, local customs often mandated a one-year redemption period for mortgages. Thus, redemption windows were generally quite limited and, moreover, were enforced with extraordinary rigor until the late seventeenth century. This created a transaction system that was perhaps cleaner and less dispute-prone than Qing conditional sales, but also much harsher on the conveyor.

One preliminary issue that haunts any study of English property rights is the status of copyhold land—land technically owned by the lord of the manor, but then rented out to tenants. More precisely, were the rules for copyhold transaction substantively different from those governing the transaction of freehold land? Fourteenth century copyholders were transacting and conveying their land in roughly the same ways as a freehold tenant, and by the later sixteenth century any major normative difference on this issue had largely vanished.<sup>258</sup> The main differences

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therefore conceivably interpreted the Republican rule as *less* tolerant of redemption than Qing laws.

258. See generally ERIC KERRIDGE, *AGRARIAN PROBLEMS IN THE SIXTEENTH CENTURY AND AFTER* 32–93 (1969) (arguing that, by the sixteenth century, copyhold and freehold were effectively equivalent for most legal questions); J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 348–50 (3d ed. 1990); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 165 (2d ed., 1981) (“[The] copyhold [by the early Seventeenth Century] . . . had equal protection . . .”).

were that copyholds could only change hands through a “surrender and admittance” in the lord’s court, but this was predominantly a formality.<sup>259</sup> Otherwise, copyhold conveyances employed conditions, limitations, remainders, trusts and mortgages just like freeholds.<sup>260</sup> These were nominally governed by local customs, but the distinction between custom and law on these issues had begun to blur as early as the fourteenth century, when royal courts began to enforce “reasonable” customs,<sup>261</sup> and had certainly become rather insignificant in our era of interest (ca. 1500–1700). Courts of equity had recognized copyhold claims well before the reign of Henry VIII, and, by at least the sixteenth century, even the sluggish common law courts had caught up, applying common law rules to copyholds via writs of trespass.<sup>262</sup>

Moreover, common law rules on real property had possessed deep customary roots ever since their creation in the twelfth century. Instead of imposing a foreign system, they generally attempted to reinforce manorial custom, which was actually quite uniform across different geographical regions.<sup>263</sup> While custom differed from the common law in issues such as fines and services to the lord, it recognized the same modes of transaction and applied similar rules.<sup>264</sup> Indeed, when legal treatises discussed the rules of medieval land conveyance, they drew freely from customary sources.<sup>265</sup> Although the distinction between copyhold and freehold was undoubtedly important in some circumstances—when, for example, the copyholder wished to sue his lord—it did not

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259. See, e.g., WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 371 (Univ. of Chicago Press 1979) (1776); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 170 (2d ed., 1986).

260. See, e.g., BAKER, *supra* note 258, at 350 (discussing conditional and limited remainders in copyhold); SIMPSON, *supra* note 259 (“[Mortgages] could be used for both freehold and leasehold property . . . .”); University of Nottingham, Copyhold Land, <http://www.nottingham.ac.uk/manuscriptsandspecialcollections/researchguidance/deeds/depth/copyhold/copyhold.aspx> (last visited May 6, 2009) (noting that copyholds could be “bought and sold, inherited by descendents, left in a will, mortgaged, and settled, just like freehold estates.”).

261. Albert Kiralfy, *Custom in Mediaeval English Law*, 9 J. LEGAL HIST. 26, 28–30, 32–33 (1988).

262. WILLIAM HOLDSWORTH, 7 A HISTORY OF ENGLISH LAW 306 (2d ed., 1937) (“[T]he grants made by the copyholder were subject to the ordinary rules of law.”); CHARLES MONTGOMERY GRAY, COPYHOLD, EQUITY, AND THE COMMON LAW 23–34, 54–66 (1963).

263. S.F.C. MILSOM, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM (1976); Kiralfy, *supra* note 261, at 28–29 (“In principle the custom of each manor was separate, but obviously the basic principles would be similar though adapted to local geography and conditions.”).

264. ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 95 (1966).

265. See, e.g., BLACKSTONE, *supra* note 259, at 156 n.q.; HENRY DE BRACTON, 2 DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 69 (Samuel Thorne trans., 1970), available at <http://hls15.law.harvard.edu/bracton/> (discussing the law of lay assizes).



seem to substantively affect the basic rules and categories of conveyance by the sixteenth century.<sup>266</sup> Since this Article examines both legal and customary norms, there is little need to maintain a rigid separation of copyhold and freehold tenure throughout the following analysis.

Section V.A surveys the main categories of revertible land transactions—fees “upon condition” and “upon limitation,” and considers their comparability with Chinese conditional sales. Section V.B hones in on the most comparable subcategory, mortgages, and carefully examines the legal and customary regimes that regulated mortgage redemption. Section V.C then examines some statutory transactions that bear some resemblance to conditional sales.

#### *A. Narrowing the Range of Inquiry*

To students of modern Anglo-American law, the default example of a land transaction that allows redemption is, of course, the mortgage. In the “classic” English mortgage, which existed from the fifteenth century to the early twentieth century,<sup>267</sup> the mortgagor conveyed ownership rights to the mortgagee, but retained rights of redemption until a fixed date.<sup>268</sup> Other forms of “mortgages” or “gages” had been in use since Anglo-Saxon times, but followed similar principles. Much of the following discussion will, therefore, compare English mortgages to Chinese conditional sales.

A preliminary question to consider is, however, whether to focus *exclusively* on mortgages. In English legal history, the idea that a landed estate could be cut short and “revert” back to the original conveyer was certainly not exclusive to mortgages. As early as Bracton’s time, a conveyance could be “conditional,” the conveyer would have a reversion if some specified condition—generally if the receiver failed to have heirs of his body—was satisfied.<sup>269</sup> By Blackstone’s time, jurists had broken down such transactions into further subcategories: a conditional conveyance

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266. See KERRIDGE, *supra* note 258.

267. The “classic” mortgage was prevalent by the fifteenth century. See THOMAS DE LITTLETON, *LITTLETON’S TENURES IN ENGLISH* § 332 (Eugene Wambaugh ed., 1903). This mortgage remained largely predominant until 1925 with the passing of the Law of Property Act. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20 (Eng.), available at [http://www.legislation.gov.uk/ukpga/1925/20/pdfs/ukpga\\_19250020\\_en.pdf](http://www.legislation.gov.uk/ukpga/1925/20/pdfs/ukpga_19250020_en.pdf).

268. BLACKSTONE, *supra* note 259, at 155.

269. BRACTON, *supra* note 265, at 71–83.

could either be “upon condition” or “upon limitation.”<sup>270</sup> The former gives the conditional conveyer an *option* of retrieving the property, while the latter simply returns ownership automatically.

The “classic” English mortgage outlined above was “subject to a condition”: the mortgagor could choose to terminate the mortgagee’s ownership upon timely payment of debt.<sup>271</sup> The condition for reversion here was, of course, timely repayment. The question we must ask, however, is whether *all* conveyances that could revert after repayment—in other words, allowed *redemption*—were necessarily mortgages. If not, then we cannot limit our inquiry to mortgages. A deeper look into the medieval roots and definition of mortgages suggests, however, that such concerns are largely unnecessary.

In their earliest form, mortgages were not conditional conveyances at all. The term “conveyance” implies that some transfer of formal title, whether in fee simple, for a term of years, for life, or via lease, has occurred, but in Glanvill’s time (circa 1180) no such transfer accompanied the establishment of a “gage”—broadly defined as a landed security for debt.<sup>272</sup> Instead, the “gagor” simply put the “gagee” in possession of the transacted land without giving him any formal right to it.<sup>273</sup> Glanvill separated gages into “living gages” (*vivum vadium*) and “dead gages” (*mortuum vadium*, or “mortgages”). In “living gages,” the transacted land’s annual yield counted towards the gagor’s debt as long as the gagee was in possession, whereas in “dead gages” it did not.<sup>274</sup>

The problem with these antique gages is, naturally, the gagee’s lack of either legal or customary title. Judges in both royal and local courts found it difficult to determine to what, exactly, the gagee was entitled.<sup>275</sup> Theoretically speaking, he had no legal claim to the gaged land, and was only entitled to recover his debt.<sup>276</sup> In practice, however, the judges were often unable to compel monetary repayment, and thus could *only* offer relief through compelling formal and permanent conveyance.<sup>277</sup> How they justified such conveyance remains somewhat ambiguous, but later jurists correctly point out that they must have attempted to invent

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270. BLACKSTONE, *supra* note 259, at 154–55.

271. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 2 *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 123 (1968); HOLDSWORTH, *supra* note 262, at 375.

272. RANULF DE GLANVILL, *TRACTATUS DE LEGIBUS ET CONSUECUDINIBUS REGNI ANGLIAE* X. 6–12 (G.D.G. Hall ed., 1965).

273. *Id.* at x. 8.

274. These concepts had Roman roots. See H.W. Chaplin, *The Story of Mortgage Law*, 4 *HARV. L. REV.* 1, 5–8 (1890).

275. POLLOCK & MAITLAND, *supra* note 271, at 121.

276. GLANVILL, *supra* note 272, at x. 11.

277. POLLOCK & MAITLAND, *supra* note 271, at 121.

some kind of new and imaginary estate category to accommodate gages.<sup>278</sup>

Not until the fifteenth century did the “classic” mortgage finally replace these archaic forms.<sup>279</sup> Since mortgages and conditional conveyances had been quite unrelated up until this point, their legal merger required a number of conceptual modifications. Mortgages were now conveyances of either full ownership or for a long term-of-years—generally over 100 years.<sup>280</sup> These mortgages could be redeemed at any time prior to the deadline, which was usually six months to a year after the initial transaction.<sup>281</sup> In the latter case, the right of redemption did not terminate upon the end of the term-of-years, but upon default of debt, which, of course, was not nearly as distant into the future. Upon default, either the full ownership would become free from future reversion, or the long term-of-years would “swell” into full ownership.<sup>282</sup>

On the other hand, the legal concept of conditional conveyance also required tinkering so that it recognized a new kind of condition for reversion: that reversion would become possible upon repayment of debt, that is, upon redemption. In Bracton’s time, conditional conveyances consisted of three subcategories: those that depended “on the donee,” those that depended on some third party, and those that were “fortuitous.”<sup>283</sup> Noticeably missing from this framework were conditional conveyances that reverted upon some action by the *conveyor*—redemption, for example. Jurists needed, therefore, to expand the concept of “conditional conveyance” before it could logically accommodate mortgages, and had largely succeeded by Blackstone’s time.<sup>284</sup> We must remember, however, that the emergence of active redemption as a recognized legal condition directly reflected the need to formalize mortgages. It would be odd, therefore, if we could find a redeemable conditional conveyance that was somehow *not* a mortgage.

278. *Id.*

279. See discussion *supra* note 267.

280. See *Bamfield v. Bamford* (1675), 73 PUBLICATIONS OF THE SELDEN SOCIETY 183; BLACKSTONE, *supra* note 259, at 157–58; SIMPSON, *supra* note 259, at 242–43.

281. See discussion *supra* p. 161.

282. See the discussion at LITTLETON, *supra* note 267, at §§ 216–18.

283. BRACTON, *supra* note 265, at 71–72. An example of a valid condition for reversion would be if the “donee” (or conveyee) failed to possess “heirs of his body.” See POLLOCK & MAITLAND, *supra* note 271, at 18. Additionally, another valid condition for reversion would be if he alienated his land to men of religion, or even if he alienated the land at all. See MILSOM, *supra* note 257, at 173–75.

284. BLACKSTONE, *supra* note 259, at 155.

The definition of “mortgage” after the fifteenth century further confirms this impression. A “mortgage,” whether at law or at custom, was simply “any arrangement whereby a loan was secured by a conveyance of real property.”<sup>285</sup> Because *any* redeemable conveyance of land was, theoretically, a secured debt—and vice versa, the concept of “mortgage” was broad enough to incorporate all transactions that involved active redemption. The diverse legal forms that a mortgage could assume only emphasized the broad scope of its basic concept. A mortgage might well be a conditional conveyance or a long term-of-years, but it did not necessarily attach itself to any particular form of legal estate. Instead, it embodied a fundamental “intent”—to secure debt through conveyance of land—that could take any one of several legal shapes.<sup>286</sup> Indeed, we find this broad definition of “mortgage” in fifteenth century legal authorities, and it remained predominant until at least the late nineteenth century,<sup>287</sup> even though mortgages had been firmly and almost exclusively bound to conditional conveyances for centuries by then. Finally, a basic survey of the main legal sources for the sixteenth and seventeenth century, including the *English Law Reports* and the *Publications of the Selden Society*, does not reveal any case or custom where a redeemable conditional conveyance, whether “upon condition” or “upon limitation,” was classified as anything *but* a mortgage.<sup>288</sup> All in all, the various developments and legal authorities examined above strongly suggest that mortgages were the *only* recognized instruments of transaction in common law, equity, or custom that contained an express right of *redemption*.

### B. Mortgages

The issue, therefore, is whether English mortgages and Chinese conditional sales were different enough to have affected the extent of managerial farming. As should be apparent by now, the two had much in common: they both involved the conveyance of land in exchange for a lump sum, and both imbue the conveyor with certain rights of redemption.

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285. BAKER, *supra* note 258, at 353. For similar statements from earlier jurists, see *Seton v. Slade*, (1802) 32 Eng. Rep. 108 (Ch.); 7 Ves. 265; Mortgagees Legal Cost Act, 1895, 58 & 59 Victoria c.25 (Eng.); and W.F. BEDDOES, A CONCISE TREATISE OF THE LAW OF MORTGAGE 2–5 (2d ed. 1908).

286. SIMPSON, *supra* note 259, at 242.

287. *See supra* note 267.

288. *E.g.*, *Manning v. Burges*, (1663) 22 Eng. Rep. 678; 1 Ch. Ca. 29; *Roscarrick v. Barton*, (1672) 22 Eng. Rep. 769; 1 Ch. Ca. 216. The customs are mainly found in 18 PUBLICATIONS OF THE SELDEN SOCIETY (1904), and 21 PUBLICATIONS OF THE SELDEN SOCIETY (1906). See especially *Collier v. Walters* (1873), L.R. 17 Eq. 252, which considered whether a determinable fee (a conditional conveyance upon limitation) that reverted upon repayment of debt was valid. Judge Jessel determined that “there is not any authority to be found” for any such limitation, and ruled it void. *Id.* at 261.

Of course, these are what make the two instruments comparable in the first place. Moving on to the details, however, we find differences of varying importance.

Those familiar with modern mortgages will probably notice rather obvious differences in the distribution of possession rights. In modern English and American mortgages, the mortgagee generally does not possess the transacted land until default,<sup>289</sup> whereas Chinese conditional sales allowed the buyer to maintain possession until redemption. This distinction, if true, would be economically significant. A conditional sales buyer who exercised his right of possession would, until conversion into an irrevocable sale, have little incentive to either improve the land or utilize it as a source of long-term capital. A mortgagor who retained possession, however, could more or less control his own destiny, and would therefore have greater incentive to improve the land.

Unfortunately, this institutional difference only emerged in modern times. The basic theory of English mortgages underwent significant revisions in the Law of Property Act 1925.<sup>290</sup> This law attempted to fit all mortgages into a uniform "lien theory," giving the mortgagee a power of foreclosure upon default but refusing him pre-foreclosure possession.<sup>291</sup> In contrast, the classic English mortgage discussed above conveyed ownership rights to the mortgagee, whether for a long term-of-years or for full ownership, and theoretically allowed the mortgagee to take immediate possession unless the contract expressly covenanted otherwise.<sup>292</sup> Mortgagees would often decline possession in actual practice,<sup>293</sup> but the normative framework was no different from Chinese conditional sales. It is true that late-seventeenth century courts began to actively discourage pre-foreclosure mortgagee possession,<sup>294</sup> but the widespread creation of managerial farms had started much earlier.

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289. Lien theory mortgages, established in England by the Law of Property Act, 1925, 15 & 16 Geo. 5, c.20 (Eng.), give the mortgagee no title to the land until foreclosure. For a brief summary of American mortgage law, see DAVID A. SCHMUDDE, *A PRACTICAL GUIDE TO MORTGAGES AND LIENS* 7 (2004).

290. Law of Property Act 1925, 15 & 16 Geo. 5, c.20 (Eng.).

291. *Id.*

292. BLACKSTONE, *supra* note 259, at 158–59.

293. *Id.* at 159.

294. They did this by "calling the mortgagee very strictly to account, not only for all rents and profits actually received, but for all rents and profits which *ought with due diligence* to have been received." *Bucks v. Gayer*, (1684) 23 Eng. Rep. 453 (Ch.); 1 Vern. 258; *Blacklock v. Barnes*, (1725) 25 Eng. Rep. 218 (Ch.); Sel. Cas. T. King 53.

The primary institutional difference between Chinese conditional sales and English mortgages lies, ultimately, in the regulation of redemption deadlines and default. Whereas conditional sales customs, as we have emphasized above, usually *guaranteed* the seller an indefinitely viable right of redemption, the notions of limited redeemability and default had been central to English mortgages since at least the fifteenth century. By the time Littleton wrote his treatise on tenures, he described mortgages as a conveyance “upon such condition, that if the [mortgagor] pay to the [mortgagee] *at a certain day*, [for example], 40 *l.* of money, that then the [mortgagor] may reenter.”<sup>295</sup> This basic format remained virtually unchanged for at least three centuries. Thus, Blackstone could claim that a mortgage is where “a man borrows of another a specific sum . . . and grants him an estate in fee, on condition that if [he] shall repay the mortgagee the said sum . . . on *a certain day mentioned in the deed*, that then the mortgagor may [reclaim the land].”<sup>296</sup> The “living gage” that we discuss above does allow for the possibility of indefinite redeemability, but it was an extremely archaic form that only Glanvill mentions.<sup>297</sup>

We can assume, then, that early modern English mortgages generally—probably universally—carried deadlines for redemption. There was no law that prevented a mortgage contract from stating “this deed shall be forever redeemable,” but no normative authority ever acknowledges this possibility. Moreover, we know that sixteenth and seventeenth century mortgages generally gave one-year redemption periods, with few exceptions. Collections of mortgage contracts at, for example, the University of Nottingham demonstrate remarkable homogeneity in this regard.<sup>298</sup> But what about contracts that, whether purposely or not, failed to state an express deadline? By the nineteenth century, courts would regularly apply default redemption deadlines in such cases: any use of the term “as mortgagor” would automatically imply a half-year

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See also R.W. Turner, *The English Mortgage of Land as a Security*, 20 VA. L. REV. 729, 730 (1934).

295. LITTLETON, *supra* note 267 (emphasis added).

296. BLACKSTONE, *supra* note 259, at 158 (emphasis added).

297. See *supra* discussion surrounding note 273. See, however, the discussion of statutory transaction instruments in Part IV.C—some of these instruments resembled living gages in their mechanisms, but, as they were created by statute and largely limited to urban merchants, cannot be considered continuations.

298. *Mortgage by Demise*, UNIVERSITY OF NOTTINGHAM, <http://www.nottingham.ac.uk/manuscriptsandspecialcollections/researchguidance/deedsindepth/mortgaged/demise.aspx> (last visited Aug. 26, 2011) (“The date for repayment is usually given as one year from the date of the mortgage.”); *Mortgage by Conveyance*, UNIVERSITY OF NOTTINGHAM, <http://www.nottingham.ac.uk/manuscriptsandspecialcollections/researchguidance/deedsindepth/mortgaged/conveyance.aspx> (last visited Aug. 26, 2011) (“The date for repayment is usually given as one year from the date of the mortgage.”).

redemption period unless expressly made otherwise.<sup>299</sup> Scholars have suggested that the rule had origins in the seventeenth century.<sup>300</sup>

If we backtrack a little to the fourteenth and fifteenth centuries and search surviving customs records, we do indeed find numerous customs that mandated one-year redemption periods. For example, in the customs compilations of the Selden Society, many localities that have preserved their medieval mortgage customs report a mandatory one-year redemption period.<sup>301</sup> There is, in fact, good reason to suspect that such customs were quite prevalent throughout the late medieval and early modern periods. The striking uniformity of sixteenth and seventeenth century mortgage contracts in this regard strongly suggest the existence of some underlying normative force. It would otherwise be very difficult to understand why most contracts converged onto a one-year time frame, which, by this time, would be just as random as any other schedule. All in all, the existing evidence strongly suggests that one-year redemption periods had deep roots in historical practice, and that they were a common customary norm in the early modern period. It is hardly inconceivable that increasing commercialization of land persuaded courts to shorten this norm to half-a-year by the nineteenth century.

Redemption deadlines meant very little, of course, if courts refused to enforce them, but lack of enforcement was probably not an issue in pre-eighteenth century England. Common law courts, in particular, were notoriously harsh in enforcing default provisions. As legal historians have long noticed, the date for repayment was strictly adhered to at common law.<sup>302</sup> Once it passed, the mortgagee would theoretically have an absolute right of exclusion against the mortgagor, even if the amount of the loan were *less* than the land's full market value.<sup>303</sup> The harshness of this rule is remarkable especially from a comparative perspective. In the event of permanent alienation, Chinese conditional sales customs

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299. Turner, *supra* note 294, at 736; *see also* BEDDOES, *supra* note 285, at 1.

300. Turner suggests that it may have originated in the later seventeenth or early eighteenth century. Turner, *supra* note 294, at 731.

301. See the customs at 18 PUBLICATIONS OF THE SELDEN SOCIETY 143, 145, 147, 193 (1904).

302. Wade's Case, (1602) 77 Eng. Rep. 232 (C.P.); 5 Co. Rep. 114a; BLACKSTONE, *supra* note 259, at 158; BAKER, *supra* note 258, at 355; David Sugarman & Ronnie Warrington, *Land law, citizenship, and the invention of "Englishness": The Strange World of the Equity of Redemption*, in EARLY MODERN CONCEPTIONS OF PROPERTY 111, 113 (John Brewer & Susan Staves eds., 1995).

303. See sources *supra* note 302.

would compel the buyer to provide the seller with “additional payments,” and thereby pay him the land’s full market value.<sup>304</sup>

Until the late seventeenth century, however, the common law rule of strict default was undoubtedly the highest mortgage redemption norm in England. How frequently mortgagees actually utilized this rule is less clear. Many mortgagees were probably willing to grant repayment extensions, if for no other reason than to accumulate more interest.<sup>305</sup> On the other hand, given the high level of concern over strict default in later seventeenth century equity courts,<sup>306</sup> we can safely assume that a substantial number of mortgagees *did* successfully exercise these exclusion rights. Since this paper focuses on institutional comparisons, it focuses more about whether people *could* exercise these rights than how many of them actually chose to.

Some local customs treated defaulting mortgagors more leniently than common law norms, but only marginally. In the medieval customs of one Lancashire borough, for example, default did not give the mortgagee an immediate right of possession, but rather a right of sale.<sup>307</sup> A mortgagee must sell the land for its full value, take what is owed to him, and return the rest to the mortgagor. The rule did not, however, prohibit the mortgagee himself from being the purchaser,<sup>308</sup> and so he could potentially pay the difference to the mortgagor and then assume full ownership. For our purposes, however, whether the mortgagee himself purchases the land is of little consequence. The central point is that default would lead swiftly to permanent alienation from the mortgagor, whether to the mortgagee or to some other buyer. In the larger scheme of things, this arrangement might actually have been more economically efficient than simply transferring ownership to the mortgagee.

The customs of Romney, in Kent, were more complicated.<sup>309</sup> The Selden Society records preserve two sets of customs for this locality, one from the mid-fourteenth century, the other from the late-fifteenth. Mortgage redemption customs remained largely stable between these eras.<sup>310</sup> Once default occurred, the mortgagee would come to the local court and demand repayment. The court would then publish this request for eight days and, should the mortgagor fail to redeem, convey full

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304. See discussion *supra* p. 151.

305. For a survey of foreclosure and debt practices among high-income groups, see Christopher Clay, *Property Settlements, Financial Provision for the Family, and Sale of Land by the Greater Landowners, 1660–1790*, 21 J. BRIT. STUD. 18 (1981).

306. See discussion *supra* p. 172.

307. 18 PUBLICATIONS OF THE SELDEN SOCIETY 143 (1904).

308. *Id.*

309. 18 PUBLICATIONS OF THE SELDEN SOCIETY 144–46.

310. *Id.*



ownership to the mortgagee. If, however, the full value of the land exceeded the mortgagor's debt, the mortgagee would pay the difference.

Other mortgage redemption customs in the Selden Society records resemble one or both of the above. They generally guaranteed mortgagors the full value of their land, while also providing for permanent alienation — if the mortgagee demanded immediate satisfaction—within a few weeks of default.<sup>311</sup> By any measure, these customs were more accommodating to the mortgagor than the common law rule, but nonetheless gave the redemption deadline significant normative weight. Since, as mentioned above, most customs also mandated “year-and-a-day” redemption periods, it was virtually impossible for English mortgages to mutate into the century-long affairs that Chinese conditional sales frequently became, unless it somehow made sense for the mortgagee.

Probably not until the later seventeenth century did any English court substantially interfere with contractual redemption deadlines. In 1654, the Court of Chancery outlined, for the first time, “the equity of redemption.”<sup>312</sup> By the mid-eighteenth century, there was a fixed format for this. As a matter of equity, default of payment gave the mortgagee not an absolute right of ownership, but only a right of foreclosure. This meant an action of foreclosure in court, where the judge decided whether to compel immediate satisfaction or to extend the redemption period for a “reasonable time,”<sup>313</sup> usually ranging from six months to two years.<sup>314</sup> Once the extension expired, the mortgagor could then obtain a decree of absolute foreclosure. Alternatively, the mortgagee could exercise a *power of sale* immediately after the first default, but could not purchase the land himself.<sup>315</sup>

Despite the equity of redemption's eventual legal importance, it has little significance for our present inquiry. As noted above, English agriculture had become largely managerial by 1700, meaning that tenant-driven land accumulation took off well before that. The equity of redemption, however, was not firmly established until the eighteenth

311. Apart from the customs discussed above, see also 18 PUBLICATIONS OF THE SELDEN SOCIETY 143–44, 147, 192–93, 289. The longest extension is found on page 289, which gave roughly one month—between Michaelmas and All Saints Day.

312. *Duchess of Hamilton v. Countess of Dirlton*, (1654) 21 Eng. Rep. 539; 1 Chancery Reports 165.

313. Sugarman & Warrington, *supra* note 302, at 113; Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 576–78 (1937).

314. Tefft, *supra* note 313.

315. *Id.* at 580–81; BLACKSTONE, *supra* note 259, at 159.

century,<sup>316</sup> and therefore had very little impact on the process of accumulation. Although the first decision appeared in 1654, Chancery was split for the rest of the seventeenth century, with Nottingham in favor of equitable redemption and North against. In, for example, the 1681 case of *Newcombe v. Bonham*, North refused to allow equitable redemption, reversing Nottingham's earlier decision and ordering immediate alienation.<sup>317</sup> Meanwhile, common law courts adhered to their strict default rules until at least 1672.<sup>318</sup> All in all, courts of equity played no significant role in easing mortgage redemption until well after the takeoff of managerial farming. Within our period of interest, common law and customary norms probably predominated and, as demonstrated above, usually provided for strictly enforced one-year redemption periods.

### C. Other Transactional Instruments

Apart from these more "organic" forms of land transaction, English law also recognized a number of statutory transaction forms. These were generally created by royal decree to meet certain economic needs. Two of these forms, the statute merchant and the statute staple,<sup>319</sup> were somewhat similar to mortgages. They are "securities for debts . . . whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied: and during such time . . . he is tenant by statute merchant or statute staple."<sup>320</sup> Unlike mortgages, these did not carry a fixed deadline for redemption. They were not, however, freely available to most landowners. Since these instruments were created by statutory decree,<sup>321</sup> the state maintained tight control over their procedural application. The transacting parties needed to appear before the mayor of an authorized "staple," of which there were only a few in England, and register their agreement.<sup>322</sup> Moreover, prior to 1532, they were only available to registered traders.<sup>323</sup>

Finally, one can conceive of two legal fictions that might allow a landowner to "borrow" money via reversible conveyance of land, but avoid formal categorization as a mortgage. The first would be a term-of-years conveyance that was then rented back to the conveyor. For

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316. *E.g.*, *Burgess v. Wheate*, (1759) 96 Eng. Rep. 67; 1 Black. W. 123 (K.B.).

317. *Newcomb v. Bonham*, (1681) 23 Eng. Rep. 266; 1 Vern 7 (Ch.).

318. *Roscarrick v. Barton*, (1672) 22 Eng. Rep. 769; 1 Ch. Cas. 216.

319. BLACKSTONE, *supra* note 259, at 160; *see also* A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF ASSUMPSIT* 87–88, 126–35 (1975).

320. BLACKSTONE, *supra* note 259, at 160.

321. *The Statute of Merchants*, 1285, 13 Edw. (Eng.); 1353, 27 Edw. 3 st. 2, c.9 (Eng.).

322. BLACKSTONE, *supra* note 259, at 160.

323. 1531, 23 Hen. 8 c.6 (Eng.).

example, the conveyance would be for thirty years at £300, with yearly rent set at £12. This effectively created a £300 loan, repayable in thirty years with £60 of interest. The potentially extended (but not indefinite) repayment schedule does resemble Qing conditional sales to a limited extent, but the other aspects of this transaction are far more burdensome to the conveyor. Without the purchaser's consent, he could not regain ownership either sooner or later than the fixed term—if repayment could cut short the term-of-years, the transaction would become a mortgage and therefore subject to the same rules. A second option might be to “lease” land for a nominal rent, but require a large security deposit. The “landlord” could then regain possession via repayment of the deposit. Since, however, the “tenant” could terminate the lease at will, the “landlord” would be under even greater pressure to repay than a usual mortgagor. In any case, as early modern legal treatises and cases contain very few, if any, instances of these transactions, one may reasonably suspect that they had little socioeconomic importance.

Ultimately, English law and custom do not seem to recognize any mode of land transaction that was both redeemable for indefinite periods and easily available to the general population. To most landowners, the mortgage was probably the only practically accessible transaction that contained a right of redemption—but of a fundamentally different quality than what we find in Chinese customs. The difference between an indefinitely viable right of redemption and a strictly-enforced deadline, usually for a year, is simply enormous. This, then, is the institutional distinction we wish to draw between Chinese and English norms of land transaction. The remainder of this paper will consider its effects on land accumulation and the scale of agricultural production.

## VI. TESTING A NEW EXPLANATION

The institutional differences between Chinese conditional sales and English mortgages—more specifically, the difference between an indefinite right of interest-free redemption and a one-year redemption window—had enormous impact on patterns of land ownership and transaction. English norms were, first of all, much more likely to create permanent alienation. Scholars have persuasively demonstrated, in fact, that mortgage foreclosure and debt repayment accounted for enormous amounts of permanent land acquisitions in sixteenth and seventeenth century England, usually by richer farmers from their less fortunate neighbors, and therefore in favor of managerial farming over the long

run.<sup>324</sup> The evidence from China, as discussed below, points in the opposite direction.

Second, indefinite redeemability creates a highly different set of incentives for landowners who need to sell land. It allows landowners to “sell” their land for a substantial sum without risking their permanent ownership, which intuitively made irrevocable sales both unnecessary and suboptimal in most situations. As a large number of social studies on both Qing and early modern English society have argued, the great majority of land-sellers, even those that were very wealthy, did so out of raw necessity, usually to meet an immediate expense or pay off a pressing debt.<sup>325</sup> Landowners in both societies were highly hesitant to part with their property and, when forced to do so, generally hoped to retain redemption rights for as long as possible.<sup>326</sup> Thus, when given the choice between a permanent transaction and an indefinitely redeemable “conditional sale” that did not accrue interest, we would expect a significant majority to choose the latter, as long as it brought enough money to cover immediate needs. In comparison, the English mortgagor who had a year to redeem was in a much more perilous position, making the choice between a permanent transaction and a mortgage much less obvious.

The general preference for conditional sales over permanent sales could, in fact, exist even in a society where most people used land as a freely transact-able investment tool, and did not sell it merely to cover needs. As long as people anticipated rising land prices—certainly a valid assumption given increasing commercialization, land (not labor) productivity and rent levels in most of the Qing and Republic<sup>327</sup>—a

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324. ALLEN, *supra* note 25, at 15; Clay, *supra* note 305. *Cf.* Sugarman & Warrington, *supra* note 302.

325. For the Qing, *see, e.g.*, HUANG (2001), *supra* note 124, at 73; HUANG (1990), *supra* note 24, at 106; MACAULEY, *supra* note 158, at 230; Madeleine Zelin, *The Rights of Tenants in Mid-Qing Sichuan: A Study of Land-Related Lawsuits in the Baxian Archives*, 45 J. ASIAN STUD. 499, 515 (1986). Qing officials generally assumed that conditional sales were done out of a pressing and unavoidable need for cash. *See* Lin Qian & Zhang Jinfan, *supra* note 214, at part 3. For England, *see* Sugarman & Warrington, *supra* note 302.

326. This explains why social demand for the equity of redemption was so high in late-seventeenth century England. *See* Sugarman & Warrington, *supra* note 302.

327. On the existence and growth of markets for agricultural produce throughout the early to mid-Qing, *see supra* note 11. After the mid-nineteenth century, exposure to foreign trade further boosted market integration levels. *See, e.g.*, THOMAS G. RAWSKI, *ECONOMIC GROWTH IN PREWAR CHINA* (1989) (attributing early-twentieth century growth to market integration driven by the foreign presence); LILLIAN M. LI, *CHINA'S SILK TRADE: TRADITIONAL INDUSTRY IN THE MODERN WORLD, 1842–1937* (1981) (positively assessing the impact of foreign trade on silk production); ROBERT PAUL GARDELLA, *HARVESTING MOUNTAINS: FUJIAN AND THE CHINA TEA TRADE, 1757–1937* (1994) (discussing the growth of the tea trade after the mid-Qing). On growing land productivity, *see* Philip C.C. Huang, *Development or Involution in Eighteenth-Century Britain and China?*, 61 J. ASIAN STUD. 501, 512 (2002) (arguing that land productivity

conditional sale would allow the seller to wait for long-term value increases while still obtaining a substantial lump sum immediately. There simply was very little downside in choosing a conditional sale over a permanent one.

This suggests the following explanation for China's relative lack of managerial farming: The availability of conditional sales in Chinese society made landowners less willing to engage in permanent transactions. Moreover, the eventual probability of permanent alienation in a conditional sale was much lower than in an English mortgage. Combined, these factors made permanent land accumulation difficult and slow—too slow, in fact, for the widespread buildup of managerial farms. If, however, affluent peasants attempted to create managerial farms upon conditionally-owned land, they would have had to shoulder the risk that land redemption, which was beyond their control, could swiftly lead to the farms' disintegration. It was not, therefore, that managerial farms were harder to create in China, but rather that they fell apart more easily. Over the long run, this prevented managerial farms from occupying a more prominent place in Chinese agriculture.

The prospect of redemption also might have impeded the creation of managerial farms by deterring capital investments in land. The productivity advantage of at least *some* Qing managerial farms came from the fact that they could coordinate certain capital investments more efficiently than household-size farms—Chinese agriculture may not have been capital intensive, but it certainly was not capital free. In particular, irrigation, the use of roads, the creation of raised banks for fruit trees, and the long-term maintenance of fertilizer were all more efficient on managerial farms.<sup>328</sup> Other forms of long-term capital investment include tools or animals that worked better on larger farms.<sup>329</sup> Since these all involved making permanent or semi-permanent investments, farmers might hesitate to pursue them on conditionally-held land that could be redeemed at any time. In fact, several scholars would argue that permanent capital

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increased despite declining labor productivity). On increasing pressure from landlords to increase rent-levels throughout the nineteenth and early-twentieth centuries, see KATHRYN BERNHARDT, *RENTS, TAXES, AND PEASANT RESISTANCE: THE LOWER YANGTZE REGION, 1840–1950* (1992).

328. For North China, see JING SU & LUO LUN, *QINGDAI SHANDONG JINGYING DIZHU JINGJI YANJIU* 130–41 (1984); HUANG (1985), *supra* note 11, at 139. For the Lower Yangtze, see LI BOZHONG, *supra* note 11, at 62–68.

329. Farm animals were indeed used more efficiently on larger farms. *See* discussion *supra* p. 143.

investments were one of the *main* reasons why managerial farms enjoyed higher productivity, and therefore to remove them would be to lose the point of managerial farming.<sup>330</sup> The validity of this argument depends on whether these capital investments were cheap enough, relative to labor, to merit widespread use in Qing China. If they were, then it would indeed make little sense to create a managerial farm on conditionally-held land. If they were not,<sup>331</sup> then affluent peasants could conceivably choose to create a labor-intensive managerial farm through conditional purchases. The problem there, as we have noted in the previous paragraph, would be that the purchases could be redeemed—and the farm disintegrated.

Under this latter scenario, we would expect to find that, first, enterprising Chinese peasants who wished to purchase land usually had to rely on conditional sales; second, conditional sellers generally protected their redemption rights and rarely agreed to permanent alienation; and, third, obtaining permanent ownership of land was therefore highly difficult. This would be fundamentally different from the situation in early modern England, where, as noted above, the combination of irrevocable sales and fixed-term mortgages generated a steady stream of permanent conveyances from poor peasants into the hands of managerial farmers.<sup>332</sup>

The remainder of this article attempts to test these three hypotheses against economic data. The second hypothesis has already been discussed in some detail above. The tension and drama contained even in our small sample of cases suggest, however crudely, that people took redemption rights seriously. We do know that they fought over these rights so frequently—by some estimates, this one issue might have accounted for six percent of local civil litigation<sup>333</sup>—that the Qing Court attempted to “reduce litigation” by imposing mandatory ten-year deadlines.<sup>334</sup> Its failure to do so only highlights the importance of *dian* redemption to local communities. Quantitative data is rare, but what limited information we possess has led at least some scholars to argue that conditional sales were common, whereas permanent alienation of land was rare.<sup>335</sup> For example, around 10% of arable land in a North

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330. JING & LUO, *supra* note 328, at 130–41; LI BOZHONG, *supra* note 11, at 62–68.

331. A number of scholars have argued this point. See *supra* note 104.

332. See *supra* notes 128, 129, 324.

333. WU, *supra* note 151, at 114. Existing surveys of local gazetteers have likewise confirmed that sellers protected their customary redemption rights jealously, and that this was a frequent source of social negotiation and tension since at least the mid-Qing. MACAULEY, *supra* note 158.

334. See *supra* Part III.b.

335. NAGANO, *supra* note 140, at 121–23.

China county was under conditional sale when Buck arrived with his survey team, while perhaps 5% of land in several Lower Yangtze counties permanently changed hands over a generation.<sup>336</sup> This latter figure includes not only land that became irrevocable after a conditional sale, but also outright permanent transactions.

The first hypothesis is also easily confirmed. Historians have known for some time that conditional sales were by far the most important means of transacting land in Qing and Republican China. The Japanese survey data cited in the previous paragraph speaks clearly to this effect. Moreover, virtually every scholar who has studied mainland Chinese contract archives confirms that conditional sales outnumber irrevocable ones by a significant margin: Yang Guozhen and Cao Xingsui have done this for Fujian and the Lower Yangtze, while Philip Huang has made similar claims about North China.<sup>337</sup> As noted above, this makes good sense if conditional sales usually generated enough money to cover immediate financial needs, which they probably did. By most indications, conditional sales in North China commanded around 70% of the land's full market value, while their counterparts in the Lower Yangtze and South China could command up to 80%.<sup>338</sup> For most landowners who needed to finance an upcoming wedding, funeral, or some other contingency, conditional sales probably met their needs just as well as a full-value but irrevocable sale.<sup>339</sup>

336. *Id.*

337. Yang, *supra* note 158, at 31; CAO XINGSUI, *JIU ZHONGGUO SUNAN NONGJIA JINGJI YANJIU* 31 (1996); HUANG (1990), *supra* note 24, at 106.

338. HUANG (1985), *supra* note 11, at 176; McAleavy, *supra* note 154, at 406; MACAULEY, *supra* note 158, at 231.

339. These studies of land contracts also provide information on the socioeconomic identity of conditional sellers and buyers. The general impression is that poorer farmers sold land more frequently to make ends meet, but large landlords, too, conditionally sold land with some frequency. Loren Brandt & Barbara Sands, *Land Concentration and Income Distribution in Republican China*, in *CHINESE HISTORY IN ECONOMIC PERSPECTIVE*, *supra* note 11, at 179, 185. On the purchaser side, the most active players seemed to have been relatively well-off peasants who probably employed some wage labor. We have, for example, relatively detailed survey information on transactions in Qingyuan County, Hebei between 1934 and 1936. See Zhang Peigang, *Qingyuan de Nongjia Jingji*, 7 *SHEHUI KEXUE ZAZHI* 1 (1936); Shi Zhihong, *20 Shiji San Sishi Niandai Huabei Pingyuan Nongcun de Tudi Fenpei ji Qi Bianhua*, 3 *ZHONGGUO JINGJISHI YANJIU* 3 (2002). Over 60% of buyers in these transactions were either "middle farmers" or "rich farmers." See Zhang Peigang, *supra*, at 8, 16, and data at Shi Zhihong, *supra*, at 5–6. The survey suggests that "middle farmer" households tilled, on average, around 27 mu, while the average "rich farmer" household managed around 90 mu. Shi Zhihong, *supra*, at 5–6. Given that the average nineteenth century North China household could only

This leaves the third hypothesis, that permanent land purchasing was highly difficult. In this particular aspect, our proposed explanation shares considerable common ground with existing theories of Chinese land inalienability, which, as discussed above, suggested that lineage first purchase rights posed inefficient obstacles to free alienability.<sup>340</sup> Their other empirical problems aside, they, too, sought to demonstrate that the market for permanent transactions was too small. The actual volume of permanent land transactions in any Chinese regional economy is, however, nearly impossible to estimate. To make a reasonably useful calculation, we must measure both the size *and* the frequency of permanent transactions. Whereas we can find scattered local data on the former,<sup>341</sup> the latter remains largely a mystery. The Communist government did attempt to measure the frequency of both conditional sales and permanent alienations in Baoding between 1930 and 1957, but provides reliable statistical data for only one village: Gushang, in Qingyuan County.<sup>342</sup> The frequency of permanent alienations there fluctuated wildly between forty-four transactions in 1935 to only eight in 1936. The number of conditional sales is only measured for 1930 and 1936, but for both years they were nearly twice as high as permanent transactions.<sup>343</sup> In any case, the small survey sample and the lack of statistical consistency make it impossible to reliably project these figures onto even the provincial level. Other piecemeal Republican-era surveys suggest that, within the permanent landholdings of an average Lower Yangtze household, only a minuscule percentage, perhaps 5%, had been bought instead of inherited.<sup>344</sup> This would support our thesis very nicely, but once again, the limited reach of the surveys does not inspire confidence.

Some scholars have attempted to compensate for the lack of frequency figures by emphasizing that the vast majority of transactions were small.<sup>345</sup> This is undoubtedly true, but its usefulness is limited without reliable data on frequency. Another issue is how to interpret the size of transactions. They were small in absolute terms, with a North China average of perhaps 5

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farm 20–30 mu without outside help, see HUANG (1985), *supra* note 11, at 70, it would be unsurprising if most land-purchasing “middle farmers” and all “rich farmers” employed some wage labor.

340. See discussion *supra* pp. 147–48.

341. See discussion *infra* note 345.

342. Shi Zhihong, *supra* note 339, at 4, 14.

343. Compare *id.* at tbl.19, with *id.* at tbl.22 (as Shi observes on p.14, data on land transactions is only available for Gushang village. We can assume, therefore, that the data in both table 19 and table 22 come from this one village).

344. NAGANO, *supra* note 140, at 122–23.

345. See, e.g., MAZUMDAR, *supra* note 24, at 231–33.



mu (0.85 acres) and a Lower Yangtze average of 3 mu,<sup>346</sup> but so was the average Chinese farm. If we remember that the great majority of North China farms were below 25 mu, and that most Lower Yangtze farms did not exceed 10 mu, then these figures seem much more substantial. All in all, these figures mean very little until we have better evidence on *who* sold *how much* at *what frequency*. This seems unlikely for the foreseeable future.

If a direct measurement of transaction volume remains elusive for now, is there any way to compensate? One solution is to take a harder look at landholding patterns. If landowners purchased real property in patterns that were clearly disadvantageous to them, then it seems reasonable to assume that obtaining permanent rights to land was highly difficult, and that the demand for permanent transactions often outpaced supply. Somewhat predictably, we only have decent information on the landholding patterns of large landlords, but these are nonetheless suggestive: Lower Yangtze landlords very rarely possessed large and contiguous tracts of land, instead owning a large number of tiny patches dispersed over several counties. For example, a Guangxu era landlord in Yuanhe owned several hundred segregated plots in forty different polders, while a Pinghu landlord living in the later Qianlong era owned numerous unconnected parcels spread out over 60 percent of the county.<sup>347</sup> Likewise, in 1903, the Zhang family of Zhe County, Southern Anhui, owned sixty-three unconnected plots spread over ten different villages, none larger than 3 mu.<sup>348</sup> We can also measure this from a different angle—according to Mantetsu surveys, over 80% of arable land in one 1940 Shanghai village was owned by eighty different outsiders, each possessing an average

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346. In the Gushang survey, the average transaction between 1930 and 1936, before the Japanese invasion triggered massive social upheaval, was around 5 mu. Shi Zhihong, *supra* note 339, at 14. This seems to agree with other sources from North China, which all indicate that the vast majority of permanent transactions were between 1 and 10 mu. 6 IWANAMI SHOTEN, CHUGOKU NOSON KANKO CHOSA 406–20 (Committee for the Publication of the Rural Customs and Practices of China ed. 1958); JING & LUO, *supra* note 328, at 65–68, 98–102. Private contract collections from the Lower Yangtze suggest that most permanent transactions were somewhat smaller, usually between 0.5 and 5 mu. KATHRYN BERNHARDT, RENTS, TAXES, AND PEASANT RESISTANCE: THE LOWER YANGTZE REGION, 1840–1950 17 (1992); *See also* contracts from Anhui, Zhejiang and Jiangsu. TIAN, *supra* note 185, at nos. 1–17, 19–21, 23–26, 99, 138, 239, 240, 244, 275, 471, 506, 587, 928.

347. BERNHARDT, *supra* note 346.

348. TIAN, *supra* note 185, at no. 908. *See also supra* note 345 (discussing how Hong Ruoci's 95 purchases can be separated into at least 17 unconnected plots, each no larger than 7–8 mu).

of 6 mu.<sup>349</sup> Small wonder, then, that large landowners in the Lower Yangtze often became absentee landlords instead of managerial farmers<sup>350</sup>—their land was so scattered that they had no choice.

Tenancy was, of course, somewhat less prevalent in North China, but the existing data still suggests that large landlords in Hebei and Shandong rented out more land than they managed themselves: roughly 17% of total arable land fell into the former category, compared with 10-15% in the latter.<sup>351</sup> Within this 17%, holdings were apparently just as scattered as they were in the Lower Yangtze. The Meng family of Jiujun, for example, rented out 600 mu to at least ninety tenant families, generally in separated plots spread across four or five villages.<sup>352</sup>

It is hard to imagine why any landlord would have preferred to scatter his holdings to such an extent. It made rent collection and account keeping exceedingly difficult and, moreover, severely limited the landlord's economic flexibility: renting out large and consolidated bundles to rich tenants, which would have provided greater rent security, was rarely possible. Some landlords may have wished to geographically diversify their holdings to safeguard against natural disasters, but this hardly justifies the extreme dispersion we find in both North China and the Lower Yangtze. It might have made more sense to own medium-size parcels in a handful of villages than to own one big plot, but further intra-village or intra-polder separation into numerous tiny parcels probably provided no additional ecological security. Most villages, especially in the Lower Yangtze, were small and consolidated enough to ensure that its various segments experienced similar ecological conditions.<sup>353</sup>

Chinese landowners were also notoriously unwilling to pay official land and property taxes, so could the scattering of holdings simply have been a tax evasion technique? Lower Yangtze landlords, in particular, were known for *registering* their holdings in hundreds of small parcels, each under a different name, to confuse tax collectors,<sup>354</sup> but that hardly justifies *actually* breaking up one's holdings into hundreds of tiny, unconnected plots—which is what we see here. What really confuses the tax collector is the registration of land under different names, but that can occur with or without actual segregation of land. This latter action does very little to aid the former, and would simply add to logistical

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349. This survey is described at HUANG (1990), *supra* note 24, at 107.

350. See *supra* p. 146.

351. The 17% figure is calculated based on Esherick, *supra* note 65, at 397. The 10-15% figure has been discussed above in the text surrounding notes 68-74.

352. JING & LUO, *supra* note 328, at 98-102.

353. See HUANG (1990), *supra* note 24, at 21-43.

354. MADELEINE ZELIN, *THE MAGISTRATE'S TALE: RATIONALIZING FISCAL REFORM IN EIGHTEENTH CENTURY CH'ING CHINA* 245 (1992).

confusion. All things considered, the severe scattering of landlord property was probably not by choice, which suggests that even the largest landlords found it highly difficult to permanently purchase real property. Since the supply of permanent transactions was very low, potential purchasers could not afford to be as selective as they would have ideally preferred.

We have thus far confirmed, to the extent possible, all three hypotheses laid out above, strongly suggesting that the existence of conditional sales was indeed a major limiting factor on the creation of managerial farms. Compared to preexisting inalienability theories that emphasize lineage first-purchase rights, our proposed explanation highlights the different *incentives* in English and Chinese land markets, rather than the different *restrictions*. Its empirical advantages should be fairly obvious by now, but one point deserves particular mention. As discussed in Part Two, Pomeranz has pointed out that labor input-per-mu figures in both North China and the Lower Yangtze were fairly consistent between and within different size-classes,<sup>355</sup> which runs contrary to statistical projections based on traditional inalienability theories. General stability in labor input makes excellent sense, however, in our conditional sales-based explanation: relatively easy access to conditional sales meant that farmers could efficiently adjust their landholdings to accommodate short-term fluctuations in household labor supply—but also that, due to the interminability of redemption rights, such adjustments often failed to accumulate over the long run. Thus, labor input ratios could remain relatively stable even while redemption activity kept the overall concentration of farmland at much lower levels than we find in early modern England.

## VII. CONCLUSION

This Article has argued for a property rights-based approach to the Sino-English divergence in agricultural production. Whereas harsh rules on mortgage redemption and conditional fee reversion facilitated the tenant-driven creation of managerial farms in sixteenth and seventeenth century England, the existence of infinitely redeemable conditional sales in Qing and Republican China diminished landowners' incentive to permanently sell land and, thereby, obstructed the creation of managerial farms. The “problem” with Chinese property norms, therefore, was not

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355. See discussion *supra* p. 148.

that it was too rigid, but rather that it was too flexible and accommodating towards sellers. This may well have generated important benefits for social stability and cohesion, but, over the long run, did lead Chinese agriculture onto a fundamentally different path than English agriculture.

Logically speaking, this Article is only the start of a larger project. Whereas conditional sales were probably the institutional impetus that diverted Chinese agriculture away from managerial farming, the creation and social embracement of this institution suggest that deeper cultural currents were at work: Did Chinese society possess a stronger commitment to permanent landownership than English society, or was it that English society valued free alienability and normative simplicity more highly? If so, then why? For now, at least, it makes sense to first clarify and organize our understanding of conditional sales and mortgages—they were, at least, the institutional mechanisms that these cultural undercurrents operated through, but a thorough account of “the great agricultural divergence,” if we may call it that, will eventually require further probing into these deeper socio-cultural issues.

While there is clearly no space here to address these issues seriously, it may be worthwhile to throw out some hypotheses. I suspect that the institutional distinctions between Chinese conditional sales and English mortgages had less to do with broad cultural perceptions and attitudes towards landed property than with the different allocations of social status, prestige and power in Chinese and English rural communities. Poorer households in Chinese localities enjoyed relatively greater social bargaining power than in England, and were better able to protect their socioeconomic interests in the creation and maintenance of local customs. In the context of conditional sales, this meant giving stronger protection to “sellers,” who were usually significantly poorer than “buyers,”<sup>356</sup> by granting them strong rights of redemption. The balance of social power in English communities, on the other hand, favored wealthier households, and therefore more often mortgagees than mortgagors.

Chinese kin networks, I suspect, tended to allocate social authority based on kinship ties and seniority. In crude terms, under a culture influenced by Neo-Confucian ideals, people were encouraged to respect the opinions and interests of relatives, more than those of non-relatives, and to respect elder relatives more than junior ones. There were, of course, other important factors that influenced one’s status and reputation, including wealth and political ties, but I suspect that they were unable to drown out the effect of kinship ties and seniority. Moreover, kinship closeness often did not correlate with economic similarity—Chinese kin

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356. See *supra* notes 324, 339.

networks were expansive, even in North China.<sup>357</sup> Given that the economic fortunes of the average household could fluctuate quite drastically within a generation or two,<sup>358</sup> richer households usually had a fair number of poor relatives. The correlation between wealth and seniority is, of course, even weaker. It was quite possible, therefore, to obtain decent status and authority within certain circles even if one was poor—although, of course, possessing wealth made it easier.

In comparison, while more recent scholarship has come to question the usefulness of “class” in describing English social structures, preferring instead terms such as the “middling sort,” it nonetheless tends to agree that social status correlated rather strongly with wealth—even if wealth was not the only, or even the dominant, determinant of status.<sup>359</sup> Wealth was, at least, usually a necessary precondition of higher status and authority. In addition, most scholars now agree that early modern English communities rarely possessed powerful and expansive kin networks, and that the individual household was the primary unit of social activity.<sup>360</sup> All in all, assuming that my hypothesis about the allocation of status and authority within Chinese kin networks is largely correct, poor Chinese rural households probably enjoyed substantively higher social bargaining power than their English peers. The fact that Chinese customs on conditional sales redemption were more accommodating towards poorer households than English mortgage customs conceivably reflected this bargaining power disparity. These contentions are, of course, strictly hypothetical, but a detailed study of rural Chinese land disputes and social structures will probably be able to verify them.

Further research on the institutional comparisons we examine here should be of interest not only to historians, but also to law and economics theorists in general. As noted in the Introduction, property rights scholars have long debated whether local communities tend to create economically efficient social norms. One influential argument is

357. See Myron Cohen, *Lineage Organization in North China*, 49 J. OF ASIAN STUD. 509 (1990).

358. Lavelly & Wong, *supra* note 140.

359. See, e.g., KEITH WRIGHTSON, ENGLISH SOCIETY, 1580–1680, at 43 (2003); H.R. French, *Social Status, Localism and the ‘Middle Sort of People’ in England, 1620–1750*, 166 PAST AND PRESENT 66, 77–86, 93 (2000).

360. H.R. French & Richard Hoyle, *English Individualism Refuted and Reasserted: the Case of Earls Colne (Essex), 1550–1750*, 56 ECON. HIST. REV. 595, 595–96 (2003); David Cressy, *Kinship and Kin Interaction in Early Modern England*, 113 PAST AND PRESENT 38, 41 (1986).

that closely-knit communities will usually create economically efficient norms through internal negotiation and communication.<sup>361</sup> They achieve this, Robert Ellickson argues, by developing a “market of norms.” When a community faces new socioeconomic conditions, community members with superior knowledge of cost-benefit conditions or internal communal dynamics will supply competing norm “candidates” to the entire group, from which the group then rationally chooses the most meritorious norm.<sup>362</sup> In contrast, other scholars have circulated more pessimistic views of social norm creation, arguing that norms are not consistently created as thoughtful, measured responses to changing conditions, but more often represent the equilibrium outcomes of selfish bargaining or signaling processes.<sup>363</sup> There is, therefore, no guarantee that these outcomes will advance overall communal utility.

The institutional and economic comparisons explored in this Article provide a historically significant case study for this debate. Although Chinese rural communities were probably no less closely-knit than English ones—if not more so—due to the existence of powerful kin networks, the conditional sales customs they created had strongly negative economic consequences over the long run. Ironically, the Qing government’s attempts at imposing a ten-year deadline on conditional sales redemption, had they succeeded, would probably have given the creation of managerial farms a much-needed shot in the arm. All this seems to agree more with the pessimists than the optimists, but their full theoretical implications remain unclear until we study the norm creation mechanisms at work here in greater detail.

Finally, this Article focused on the *agricultural* divergence between China and Western Europe, without fully addressing the general Sino-English economic divergence, which covers a range of non-agricultural

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361. See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167 (1991); JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 249–58 (1990); Robert D. Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT’L REV. L. & ECON. 215, 224–26 (1994).

362. Robert C. Ellickson, *The Market for Social Norms*, 3 AM. LAW ECON. REV. 1 (2001).

363. ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697 (1996); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997). See also David Chamy, *Illusions of Spontaneous Order: “Norms” in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1848 (1996) (arguing that norm-making suffers from the same inefficiencies that plague legislation). In fact, one can find the seeds of such pessimism as early as Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968), and NORTH & THOMAS, *supra* note 3, which famously considered pre-sixteenth century English commons to be economically inefficient and in need of state intervention to establish private property rights.

developments including industrial growth and trade.<sup>364</sup> Managerial farms did enjoy higher agricultural productivity, but, as noted in the Introduction, whether this can explain Europe's industrial and manufacturing advantage remains a complex matter of great contention. The precise scale and significance of the productivity boost is one issue, but one must also consider the effects of managerial farming on overall labor mobility, proto-industrial concentration of capital, and so on.<sup>365</sup> Limitations in length and time have prevented this article from tackling the full divergence question, but it is, in the end, what gives the agricultural divergence examined here much of its historical significance. For this particular Article, the relative lack of managerial farming in China is an end-point, something that needs to be explained. Within the broader literature on China's relative decline, on the other hand, it is one of several starting points. This Article does, at least, demonstrate that laws and institutions are highly important to any serious study of Chinese or English economic history—but perhaps in less obvious ways than many scholars have previously assumed.<sup>366</sup> Chinese and English property rights shared broad similarities in terms of private ownership and alienability, but, as the saying goes, the devil is in the details.

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364. WRIGLEY, *supra* note 3.

365. See discussion *supra* pp. 159–62; see also discussion *infra* p. 164.

366. Some have used the example of China's recent economic boom to argue that traditional Western notions of "private property" may not be necessary for robust economic growth. See Upham, *supra* note 1; Clarke, *supra* note 1. A closer inspection of their arguments suggests that these scholars are arguing that we need to change our idea of what constitutes an efficient property rights regime, not that "property rights do not matter." Our arguments here agree with this sentiment.

