

Cultural Paradigms in Property Institutions

Taisu Zhang*

Abstract

Do “cultural factors” substantively influence the creation and evolution of property institutions? For the past several decades, few legal scholars have answered affirmatively. Those inclined towards a law and economics methodology tend to see property institutions as the outcome of self-interested and utilitarian bargaining, and therefore often question the analytical usefulness of “culture.” The major emerging alternative, a progressive literature that emphasizes the social embeddedness of property institutions and individuals, is theoretically more accommodating of cultural analysis but has done very little of it.

This Article develops a “cultural” theory of how property institutions are created and demonstrates that such a theory is particularly powerful in explaining large-scale institutional differences between societies. Empirically, it argues that, in the two centuries before large-scale industrialization, China, England, and Japan displayed systematic and fundamental differences in their regulation of property use and transfer. It further argues that these legal and institutional differences are best explained by certain aspects of social culture, specifically by the criteria for sociopolitical status distribution. Some of these criteria are distinctly “cultural” in the sense that they were probably generated by the widespread social internalization of moral values, rather than by utilitarian bargaining.

Cultural paradigms can exist, therefore, in property institutions. If we assume, as conventional law and economics urges, that individuals generally approach property use and regulation through a self-interested and utilitarian mindset, their pursuit of personal utility can nonetheless be constrained or empowered by cultural norms of status distribution that determine their relative bargaining power.

* Associate Professor, Yale Law School. Parts of this project were made possible by the Prize Fellowship from the Yale East Asian Council. For comments and suggestions, I thank Ralf Michaels, Jedediah Purdy, James Boyle, Barak Richman, Henry Smith, John Goldberg, Mark Ramseyer, William Alford, and participants of workshops and panels at Duke University and Harvard University. I also thank Zack Gong for research assistance. All mistakes are mine.

Introduction

Do “cultural factors” substantively influence the creation and evolution of property institutions? For the past several decades, few legal scholars have answered affirmatively. Those inclined towards a law and economics methodology tend to see property institutions as the outcome of self-interested and utilitarian bargaining, and therefore often question the analytical usefulness of “culture”—defined here as social norms, values, and beliefs that are embraced and internalized without empirical discovery or analytical justification¹—in understanding this process.² The major emerging alternative, a progressive literature that emphasizes the social embeddedness of both property institutions and individuals, is in theory more accommodating of cultural analysis³ but has thus far done very little of it.⁴ In either case, the notion that “culture” can significantly influence property use and regulation has fallen by the wayside.

This Article develops a “cultural” theory of how property institutions are created and seeks to demonstrate that such a theory is particularly powerful—perhaps indispensable—in explaining large-scale institutional differences between societies. To this end, it argues that, in the two centuries before large-scale industrialization, China, England, and Japan displayed systematic and fundamental differences in their regulation of property use and transfer. It further argues that these legal and institutional differences are best explained by certain aspects of social culture, specifically by the criteria for sociopolitical status distribution. Some of these criteria

¹ This definition of culture is drawn from Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection of Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).

² See literature reviews at, for example, Lauren B. Edelman, *Rivers of Law Contested Terrain: A Law and Society Approach to Economic Rationality*, 38 L. & SOC’Y REV. 181 (2004); Jack Knight & Lee Epstein, *Building the Bridge from Both Sides of the River: Law and Society and Rational Choice*, 38 L. & SOC’Y REV. 207 (2004); Amitai Etzioni, *Social Norms: Internalization, Persuasion and History*, 34 L. & SOC. REV. 157, 158 (2000); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 542 (1998); Kenneth G. Dau-Schmidt, *Economics and Sociology: The Prospects for an Interdisciplinary Discourse on Law*, 1997 WISC. L. REV. 389, 399, 400-02 (1997); Robert Cooter, *Law and Unified Social Theory*, 22 J.L. & SOC’Y. 50 (1995); and JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 251-52 (1995). See also Yun-chien Chang & Henry E. Smith, *Structure and Style in Comparative Property Law*, in RESEARCH HANDBOOK IN COMPARATIVE LAW AND ECONOMICS (Giovanni B. Ramello & Theodore Eisenberg eds., forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373377 (arguing for a functionalist theory of comparative property law); Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J.L. & HUMAN. 333 (2003) (criticizing certain cultural theories of property); Thomas E. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875 (2003) (arguing for “scientific” theories of law that parallel economics).

³ A brief summary of progressive property’s core arguments is provided by Hanoch Dagan, *Property’s Structural Pluralism: On Autonomy, the Rule of Law, and the Role of Blackstonian Ownership*, in 3 BRIGHAM-KANNER PROP. RTS. CONF. J. (2014); and Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009). The literature is surveyed at Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 101 (2011).

⁴ There are exceptions. E.g., GREGORY S. ALEXANDER, *GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* (2006); Anna di Robilant, *Property: Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869 (2013).

are distinctly “cultural” in the sense that utilitarian, self-interested bargaining alone could not plausibly have created them. Instead, they were probably generated, in large part, by the widespread social internalization of moral values.

These historical arguments pave the way for a broader theoretical claim: “culture” is often a major determinant of property institutions, so much that we can actually identify societal “cultural paradigms” in property institutions. Even if we assume, as conventional law and economics urges, that individuals generally approach property use, alienation, and regulation through a self-interested and utilitarian mindset,⁵ their pursuit of perceived personal utility is nonetheless constrained or empowered by social norms of status distribution that determine their relative bargaining power. In fact, precisely because we assume that most people prefer property norms that advance their perceived self-interest, we also need to explain what happens when there is fundamental conflict between individual interests,⁶ and here cultural internalization is more critical than property scholars have commonly acknowledged.

The Article first presents a straightforward social choice theory of property norm bargaining: the higher someone’s social and political status, the more capable they are of advancing their own norm preferences over the competing preferences of others. A society in which, for example, large landholders monopolize social and political positions of high status and prestige will have far more “rich-friendly” property norms than a society in which such positions are distributed somewhat equally between the rich and poor.

Building on this basic observation, the Article then argues that different societies often have fundamentally different “status distribution criteria”—that is, the social norms that determine how individuals obtain social and political status: some societies rank individuals primarily by wealth, whereas others rank by electoral or social popularity, by academic achievement, by age and generational seniority, by hereditary bloodlines, or by caste systems.⁷ What status distribution criteria a society abides by has enormous consequences for the power balance between its various social groups and classes, and therefore great impact on its choice of property norms.

What distinguishes this Article from other theories of property norm formation is, ultimately, its insistence that these “status distribution norms” are often *cultural*. It argues that purely utilitarian or functionalist theories of norm formation often fail to explain why different societies tend to adopt different status distribution norms. Instead, these differences are best explained by differences in social culture—

⁵ See, e.g., GREGORY S. ALEXANDER & EDUARDO PENALVER, AN INTRODUCTION TO PROPERTY THEORY, ch. 1 (2012) (summarizing utilitarian property theory); Thomas W. Merrill, *Property as Modularity*, 125 HARV. L. REV. 151, 152 (2012); GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976); ROBERT COOTER & THOMAS ULEN, INTRODUCTION TO LAW AND ECONOMICS (6th ed. 2011); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (7th ed. 2007); Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1 (2001); Christine Jolls, Cass Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476-80 (1997) (discussing bounded self-interest).

⁶ This is something that mainstream property theory tends to overlook. See Katrina M. Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117 (2005).

⁷ See Xiaotian Zhang, *Status Inconsistency Revisited: An Improved Statistical Model*, 24 EURO. SOC. REV. 155, 156 (2008) (noting the complex factors that affect the calculation of social status).

social values that are systematically embraced and internalized, perhaps “taken for granted,” by large segments of the society as innately “right” and “moral,” and are not regularly re-justified or reexamined based on their material consequences. Some status distribution norms can, in fact, enjoy long-term popularity despite having strongly *negative* material consequences, whether for society as a whole or for many prominent individuals. Their longevity is understandable only if we accept that individuals can morally internalize certain status distribution norms that actually damage their material self-interest.⁸

There is, therefore, a chain of causation from these cultural norms of status distribution to the power balance between different social classes, to the shape and substance of property institutions. In other words, property institutions can be determined by certain aspects of social culture. Should we ignore these cultural undertones, we risk confining ourselves to an incomplete understanding of how property institutions are created. In particular, we will struggle to explain why different societies have historically differed dramatically in some of their most important property institutions.

To illustrate this, this Article focuses on three major Western European and East Asian economies in the two centuries immediately before large-scale industrialization. It specifically examines how—and, more importantly, why—the property institutions that governed land mortgages differed from country to country. These were, in fact, some of the most economically significant norms in any preindustrial economy: short of selling land outright, mortgaging land was often the only way for the average landholder to obtain large sums of cash, something that became increasingly important with rapid commercialization. Creditors, on the other hand, relied heavily on mortgage default and the seizure of collateral to accumulate landed wealth. Given the very high stakes involved, debtors and creditors clashed fiercely over the legal and customary rules that governed these transactions: should they enforce mandatory redemption/repayment deadlines?⁹ If so, where should they set the deadline? What rights should they grant the creditor in case of default?

The battle lines were similarly drawn in all three countries: the stereotypical land mortgagor everywhere was a cash-strapped smallholder who borrowed money from a richer neighbor and who almost always preferred property norms that allowed

⁸ Such acceptance is extremely commonplace in anthropological or sociological studies, *see, e.g.*, LAW AND ANTHROPOLOGY: A READER (Sally F. Moore ed., 2005), and in the work of some political scientists, *see, e.g.*, ROBERT D. PUTNAM, ROBERT LEONARDI & RAFAELLA NANETTI, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY (1993) (discussing the importance of civic culture to democratic governance). It is only in certain fields—microeconomics and political economy are the major ones—that this needs to be “proven,” rather than simply assumed. Property theory is, however, one of these, given its strongly law and economics-oriented methodology.

⁹ Early modern mortgages, whether English, Chinese, or Japanese, generally gave the creditor a right of occupation and use over the collateral—in some cases, formal title—prior to full repayment, and therefore repayment was the same thing as redemption of the collateral. *See* discussion at *infra* pp. 34-43 (basically just Section A of Part III). The modern Anglo-American distinction between timely “repayment” and “redemption” during foreclosure only exists because of the rise of lien mortgages, in which the creditor has no property right prior to default and foreclosure. *See* DAVID A. SCHMUDDER, A PRACTICAL GUIDE TO MORTGAGES AND LIENS 7, 261-63 (2004).

him a longer period to redeem his mortgaged land.¹⁰ In comparison, larger, wealthier landholders generally played the role of creditor, and therefore fought hard to impose tight customary limits on redemption and harsh consequences on defaulters. The economic rationales underlying these entrenched positions were complex but fairly universal: essentially, land was so valuable in all these preindustrial agrarian economies that debtors desperately wanted to maximize their odds of redeeming the collateral, while creditors were no less eager to minimize those odds and maximize their own odds of seizing the collateral upon default.¹¹

Although the negotiation of mortgage norms tended to be a rich-versus-poor process almost everywhere, the actual laws and customs that emerged from this process were profoundly different from country to country: English norms were strongly pro-creditor and pro-rich, imposing extremely short deadlines on mortgage redemption and allowing creditors to permanently seize collateral immediately upon default. Chinese norms were almost unreasonably pro-debtor and pro-smallholder, allowing debtors to retain valid redemption rights for *eternity*—at virtually no interest—and therefore almost never risk permanent loss of the collateral. In-between these two extremes, Japanese norms resembled the English framework but usually gave debtors a longer period to repay.¹² Correspondingly, both early modern England and Japan underwent periods of massive land concentration and growing inequality, with the English process being especially rapid and ruthless.¹³ China, however, experienced minimal land concentration in its pre-industrial history.¹⁴

Why were Chinese smallholders so much more successful than their English and Japanese peers in securing favorable property rules, and why were English smallholders particularly unsuccessful? The historical evidence strongly suggests that these divergent outcomes had roots in the different sociopolitical status and power of smallholders in these societies: Chinese smallholders regularly occupied positions of high political authority in local communities, and therefore had the sociopolitical clout to win important property norm concessions from wealthier households.¹⁵ In comparison, large landholders enjoyed a virtual monopoly on high sociopolitical status in rural England and were therefore able to push through legal changes that aided their accumulation of land.¹⁶ Japanese local politics was likewise dominated by the rich, but not quite to the same extent.¹⁷

¹⁰ See discussion *infra* pp. 33-34.

¹¹ *Id.*

¹² See discussion *infra* pp. 34-43 (basically just Section A of Part III).

¹³ See discussion surrounding *infra* note 144.

¹⁴ See discussion surrounding *infra* note 166.

¹⁵ See discussion *infra* pp. 47-49. For a more detailed treatment, see Taisu Zhang, *Social Hierarchies and the Formation of Customary Property Law in Pre-Industrial China and England*, 62 AM. J. COMP. L. 171 (2014).

¹⁶ See 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 & PRESENT 66, 74 (2000).

¹⁷ See discussion *infra* pp. 49-51. Detailed studies on Tokugawa social hierarchies include EDWARD E. PRATT, *JAPAN'S PROTOINDUSTRIAL ELITE: THE ECONOMIC FOUNDATIONS OF THE GONŌ* (1999); HERMAN OOMS, *TOKUGAWA VILLAGE PRACTICE: CLASS, STATUS, POWER, LAW* (1996); KÄREN WIGEN, *THE MAKING OF A JAPANESE PERIPHERY 1750-1920* (1995); THOMAS C. SMITH, *THE AGRARIAN ORIGINS OF MODERN JAPAN* (1959); Brian W. Platt, *Elegance, Prosperity, Crisis: Three Generations of Tokugawa Village Elites*, 55 MONUMENTA NIPPONICA 45 (2000).

Up to this point, the historical account is completely compatible with conventional political economy theories of property norm formation: individuals tend to support norms that serve their economic self-interest, and those with higher sociopolitical status tend to get the norms they want. The account begins to diverge from utilitarian assumptions about social behavior, however, when we consider how high status individuals obtained that status in the first place. The divergence is primarily driven by the need to account for both cross-country differences and intra-country homogeneity: one of the most striking things about the comparisons drawn above is that they were truly *country-level* differences. Within core Chinese macroregions, there was remarkably little regional variation in either mortgage norms or rich-poor power balances. The same can be said of Japan and England.

Country-level differences deserve country-level explanations. The amount of ecological and economic diversity within each country, especially China, makes it exceedingly difficult to explain intra-country homogeneity without invoking some sort of country-level external influence. The usual solution—centralized legislation and regulation by the state—is largely inapplicable to these early modern societies, as they simply did not possess governments powerful enough to dictate local property institutions or social structures.¹⁸ Customs and social norms were the true sources of local property regulation.¹⁹ The question, therefore, is how decentralized self-governance produced similar status distributions and property institutions across entire countries.

Shared cultural values are likely the only plausible answer: there is much evidence to suggest that the different power balances between rich and poor in these countries was the systemic result of normative differences. Chinese society broadly embraced the Neo-Confucian social ideal that individuals should self-organize into large kinship networks and that social rank within those networks should be determined by age and generational seniority.²⁰ In rural Japan, most communities believed that individuals drew their social status from both the status of their ancestors and from their own wealth.²¹ This created a system that eventually converged on ranking by wealth, but with some destitute households hanging onto high status—for a time—by virtue of former wealth. Early modern English society, in comparison, tended to allocate sociopolitical status based primarily on landed wealth, thereby excluding virtually all smallholders from positions of social authority.²²

Moreover, while it might be possible, if difficult, to argue that English or Japanese “status distribution criteria” were simply the result of utility maximization

¹⁸ England began modern state-building considerably earlier than China or Japan. See HE WENKAI, *PATHS TOWARDS THE MODERN FISCAL STATE: ENGLAND, JAPAN, AND CHINA* (2014). See generally STEVEN PINCUS, *1688 THE FIRST MODERN REVOLUTION* (2009) (describing England’s fifteenth century state-building).

¹⁹ See discussion *infra* pp. 34-43 (basically just Section A of Part III). On the manipulation of formal law by Japanese villagers, see OOMS, *supra* note 17, at 222-42; and J. MARK RAMSEYER, *ODD MARKETS IN JAPANESE HISTORY* 26 (1996). For a detailed treatment of how Qing law was generally overrode by local custom, see Taisu Zhang, *Property Rights in Land, Agricultural Capitalism, and the Relative Decline of Pre-Industrial China*, 13 *SAN DIEGO INT’L L.J.* 129, 168-74 (2011).

²⁰ See discussion *infra* pp. 47-49. For more detailed discussion, see Zhang, *supra* note 15.

²¹ See discussion *infra* pp. 49-51. For more detailed discussion, see sources cited *supra* note 17.

²² WRIGHTSON, *supra* note 16; French, *supra* note 16.

by local communities, it is almost certainly impossible to construct such an argument for China.²³ There are few utilitarian advantages to ranking by age and generational seniority, and almost certainly none that could explain its dominance across such a vast and ecologically diverse country for at least six centuries. It is far more likely—both more logically coherent and more empirically documentable—that the near-universal embrace of Confucian kinship hierarchies was driven by widespread value-internalization and moral agreement.

There was, therefore, a chain of causation that linked distinctly cultural norms of status distribution to power balances between the rich and poor, and then to the creation of customary property institutions that reflected those power balances. This allows us to speak of “cultural paradigms” in the property institutions of these societies. We could ask, of course, why widespread moral internalization of cultural values happened in the first place, but the “why” questions must stop somewhere in this Article. Stopping at cultural values emphasizes the qualitative difference between moral internalization on the one hand, and, on the other, the utilitarian calculation of self-interest that property scholars usually associate with property use and regulation.

Let me immediately acknowledge that there is perhaps nothing theoretically incompatible between the kind of cultural narrative advocated here and utilitarian assumptions of self-interested economic behavior: one could argue, for example, that value internalization simply alters individual utility functions, whereas microeconomic theory usually takes individual utility functions as given, rather than something to be explained.²⁴ Certainly, this Article does not argue that utilitarian theories of property are *wrong*—it merely argues that they are *incomplete* without serious analysis of cultural values. If there are indeed paradigmatic, cultural differences in individual utility functions that explain societal institutional divergence, then surely we cannot be satisfied with a theory of property that simply takes those utility functions for granted.

Another issue is whether we can take the cultural influence thesis even further—to argue that the very notion of property is inherently cultural, that the economic maximization of property is itself a cultural value, contingent upon societal internalization and acceptance. The major obstacle is that, in matters of basic economic production, land use, and even the negotiation of property norms, people behaved similarly pragmatically in all countries studied here. People in similar economic circumstances, whether English, Chinese, or Japanese, tended to prefer similar property norms and were indeed similarly vocal and aggressive about it.²⁵ On the one hand, none of this disproves the, put somewhat crudely, all-economic-

²³ See discussion at *infra* pp. 52-64.

²⁴ Neoclassic versions of this assumption often assume utility functions to be not only exogenous, but also unchanging and universal. Cf. Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675 (1988); George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977). But see David Krackhardt, *Endogenous Preferences: A Structural Approach*, in DEBATING RATIONALITY: NON-RATIONAL ASPECTS OF ORGANIZATIONAL DECISION MAKING 239 (Jennifer Halpern & Robert N. Stern eds., 1998); Robert A. Pollak, *Habit Formation and Dynamic Demand Functions*, 78 J. POL. ECON. 745 (1970).

²⁵ See discussion *infra* pp. 33-34.

rationality-is-a-cultural-construct argument.²⁶ On the other hand, however, it also fails to contradict the view that economic maximization of land resources is, essentially, human nature, especially in agrarian economies where land is the most important source of livelihood. Additional research may be capable of differentiating between these two positions, but this Article cannot.

In other words, this Article attempts to establish a “lower bound” for the cultural analysis of how property institutions are created: at a minimum, cultural factors *can* significantly affect the creation of property institutions, and therefore deserve to be taken more seriously. This may be underselling the influence of cultural internalization over property institutions, but given how little work has been done in this direction—and how openly skeptical some leading scholars are of “culture” as an analytical unit²⁷—it seems only prudent to take it one step at a time.

The placement of the Article’s historical narrative in pre-industrial economies deserves some additional explanation. This is largely driven by empirical concerns: once China began large-scale industrialization in the 1950s, a number of factors emerged that make observation of cultural influences on property institutions considerably more difficult. The Communist party-state not only was vastly more powerful than its predecessors but also adhered to a political ideology of substantial foreign origin.²⁸ This makes it highly difficult to distinguish transplanted ideas from indigenous ones, superficial institutions from substantively effective ones, and utilitarian calculations from internalized values. A somewhat similar transformation—expansion of state authority coupled with elite embracement of foreign political ideologies—occurred in Japan after the Meiji Revolution.²⁹ Essentially, it is much easier to structurally analyze pre-industrial East Asian societies than industrialized ones. Picking the low-hanging empirical fruit first does not, however, necessarily damage the theoretical claim the Article attempts to illustrate. Moreover, pre-industrial societies are not necessarily pre-modern, especially when they are highly commercialized, privatized, and populated by aggressively wealth-maximizing individuals.³⁰

²⁶ For major works that have made this argument see, among others, MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (W.D. Halls trans., 2000) (1925); KARL POLANYI, *THE GREAT TRANSFORMATION* (1944); MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968); J.I. Prattis, *Synthesis, or a New Problematic in Economic Anthropology*, 11 *THEORY AND SOCIETY* 205-28 (1982); and STEPHEN GUDEMAN, *THE ANTHROPOLOGY OF ECONOMY COMMUNITY, MARKET, AND CULTURE* (2001).

²⁷ *E.g.*, RAMSEYER, *supra* note 20, at 7; Ellickson, *supra* note 2.

²⁸ Local histories that document the expansion of state power under the PRC include, for example, EDWARD FRIEDMAN, PAUL G. PICKOWICZ & MARK SELDEN, *CHINESE VILLAGE, SOCIALIST STATE* (1991); and ANITA CHAN, RICHARD MADSEN & JONATHAN UNGER, *CHINESE VILLAGE UNDER MAO AND DENG: EXPANDED AND UPDATED EDITION* (1992).

²⁹ DANIEL V. BOTSCHAN, *PUNISHMENT AND POWER IN THE MAKING OF MODERN JAPAN* (2005); ANDREW GORDON, *A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIMES TO THE PRESENT* 61-77, 94-138 (2d ed. 2003); CONRAD TOTMAN, *A HISTORY OF JAPAN* 322-67 (2000).

³⁰ There have been endless debates on when China and Japan entered the “modern era,” with some placing the Chinese transition as early as the tenth century. *See, e.g.*, VALERIE HANSEN, *THE OPEN EMPIRE: A HISTORY OF CHINA THROUGH 1600*, at 3-14 (2000); Robert M. Hartwell, *Demographic, Political, and Social Transformations of China, 750-1550*, 42 *HARV. J. ASIATIC STUD.* 365 (1982). On Japan, see BOTSCHAN, *supra* note 29; and Arland Thornton, *The Developmental Paradigm, Reading History Sideways, and Family Change*,

A final word about terminology: as noted above, “culture,” in this Article, refers to social norms, values, and beliefs that are commonly embraced and internalized without empirical discovery or analytical justification. This is the definition most commonly adopted by law and economics scholars or institutional economists, but is also substantially narrower than the conventional definition in legal anthropology. There, as one prominent anthropologist once put it, “culture is all,” and encompasses “durable customs, ideas, values, habits, and practices.”³¹ The problem with this more expansive definition of “culture” is that it potentially incorporates many social phenomena that are actually equilibrium outcomes of self-interested bargaining. Defining “culture” as internalized norms and values does, at the very least, distinguish it from conscious, utilitarian calculations of self-interest.

The remainder of the Article is structured as follows: Part I discusses how and why cultural analysis has been absent from modern theories of how property institutions are created. Part II outlines a “cultural” theory that largely complements, rather than contradicts, these preexisting schools of thought. Parts III and IV then demonstrate its applicability to mortgage institutions in pre-industrial China, Japan, and England. Part III argues that distributions of sociopolitical status exerted tremendous influence over these mortgage institutions. Part IV then identifies the specific social hierarchies that underlay these status distribution patterns, and argues that some of them were the product of cultural internalization. The Conclusion offers further theoretical discussion and some preliminary thoughts on how the theoretical insights developed here can be applied to contemporary societies.

A quick note on the ordering of Parts III and IV: as a matter of causation, the material in Part IV precedes that in Part III, in that the “chain of causation” I argue for runs from cultural norms to status distribution patterns to property institutions. I have found, however, that it is generally easier to work backwards—from the phenomenon back to the explanation—when arguing for historical causation. Hence, I start with a description of mortgage institutions in Part III, identify the status distribution patterns that underlay them, and then work my way back to cultural norms in Part IV.

I. The Absence of “Culture” in Property Theory

A. “Culture” in Economic Theories of Property

As more than one scholar has observed, contemporary property theory is dominated by law and economics.³² None of the field’s major debates in recent decades, including its close involvement in the law and social norms literature during the 1990s and early 2000s and the ongoing debate over the divisibility of property,³³

38 DEMOGRAPHY 449 (2001).

³¹ Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999*, in LAW AND ANTHROPOLOGY: A READER 346, 347, *supra* note 8.

³² ALEXANDER & PEÑALVER, *supra* note 5.

³³ For surveys of the social norms literature, see Ellickson, *supra* note 2; Etzioni, *supra* note 2; and Richard H.

have unfolded without heavy, and in some cases near-exclusive, reliance on economic analysis. This is especially true of those parts of the field that study the creation and evolution of property institutions. Most theories on this issue are constructed upon the basic behavioral assumption that individuals seek to maximize some unitary measure of personal utility, often assumed to correlate closely with wealth.³⁴ This self-interested mindset then determines both their reaction to preexisting property institutions and, when given the ability to change or create such institutions, their preferences and bargaining strategy. In particular, people will support those property institutions that they believe will generate the most expected personal utility.

This section argues that “culture,” defined here as internalized social values, has been largely invisible in the economic analysis of how property institutions are created and that this absence is very likely due to the strong methodological individualism of mainstream economic analysis. To make this argument, it is helpful to first look beyond property theory per se, towards broader, more abstract, discussions and surveys of law and economics methodology. It is primarily in this latter category that scholars have explicitly considered—and sometimes expressly rejected—the analytical potential of cultural internalization.

At a 1989 symposium on “Post-Chicago Law and Economics,” Robert Ellickson suggested two ways in which law and economics might move beyond the strict rational actor model that, at the time, dominated the field.³⁵ Discussing the field in general, but with a constant eye towards property theory, Ellickson outlined both a “psychological” approach and a “sociological” approach. The former would introduce “innate” cognitive biases into models of economic and legal behavior, whereas the latter would examine how “social forces influence human behavior,” particularly how they “may shape a person’s internal tastes for particular outcomes.”³⁶ These forces are also referred to as “culture” and the process by which they influence individual preferences as “the internalization of culture.”³⁷ Looking forward, Ellickson argued that scholarship based only on rational actor models would face “diminishing returns” and that scholars should “investigate . . . two notions: the frailty of human cognition and the possibility of a self-enforced altruism arising from the influence of culture.”³⁸

The primary difference between Ellickson’s “psychological” and “sociological” approaches appears to be the difference between universal, innate

McAdams, Comment, *Accounting for Norms*, 1997 WISC. L. REV. 625. For surveys of the ongoing debate over the “bundle of rights” metaphor, see Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 145-66 (2013) (surveying progressive ideas on the structure of property rights); Daniel B. Klein & John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, 8 ECON J. WATCH 193 (2011); and Eric R. Claeys, *Bundle-of-Sticks Notions in Legal and Economic Scholarship*, 8 ECON J. WATCH 205 (2011) (surveying the law and economics branch of this debate).

³⁴ See sources cited *supra* note 5.

³⁵ See Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).

³⁶ *Id.* at 44.

³⁷ *Id.* at 45.

³⁸ *Id.* at 55.

behavioral tendencies and highly localized cultural norms that must be learned and digested. We would not expect English communities to share the same cultural norms as Korean ones, but we might expect that both display risk aversion, endowment effects, and framing effects. There is, of course, room for overlap and interaction between the two approaches, as evidenced by the growing body of scholarship on “cultural cognition,” which examines how certain cognitive biases, such as framing effects, reinforce cultural differences between social groups.³⁹

In retrospect, Ellickson’s prescriptions appear to have been, more or less, half-embraced: Since the early 1990s, cognitive psychology and behavioral economics has indeed come to assume a commanding position within law and economics, to the point where scholars could begin talking about “what comes after victory for behavioral law and economics.”⁴⁰ The second prong—that law and economics also investigate “the influence of culture”—has, however, met with a much more muted response. A number of more recent field surveys have noted that sociological approaches to legal scholarship remained “largely unexplored” in general, and had virtually no import on law and economics in particular.⁴¹

Theories of how property institutions are created and evolve prove no exception to these general observations. They have encompassed a tremendous variety of topics in recent years—covering the spectrum from social norms to formal laws and regulations, from the “core” characteristics of property to specific rules regulating use and alienation—but have generally done so without employing what Ellickson would recognize as sociological methods or cultural theories of human behavior. A major recent article by Henry Smith argues, for example, that “both *the mind* and *the law* can be regarded as information-processing devices that manage complexity and economize on information by employing concepts and rules, the specific-over-general principle, modularity, and recursiveness.”⁴² This leads Smith to argue elsewhere that different legal systems tend to produce functionally similar property institutions because, at some fundamental level, they are all designed to help individuals manage and reduce the information costs inherent in property use and transaction.⁴³ Lee Anne Fennell likewise acknowledges that, in her view, “property’s core debates” generally “boil down ... to a question of production functions and

³⁹ See generally The Cultural Cognition Project at Yale Law School, <http://www.culturalcognition.net/> (last visited Feb. 2, 2015).

⁴⁰ Russell Korobkin, *What Comes After Victory for Behavioral Law and Economics?*, 2011 U. ILL. L. REV. 1653. Studies on how cognitive biases influence the creation of property norms include, for example, Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PAPA. L. REV. 2097 (2012); Russel Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003); and Lee A. Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008). See also Eric A. Kades, *A Positive Theory of Eminent Domain* (William & Mary Law Sch., Working Paper, No. 08-08, 2008).

⁴¹ Edelman, *supra* note 2, at 182. A similar observation is found in Robert Cooter, *Law and Unified Social Theory*, 22 J.L. & Soc’y. 50 (1995). A recent attempt by Menachem Mautner to systematically survey works on “law and culture” reveals quite a bit of work done by scholars trained in sociological or anthropological methods, but hardly any that incorporates significant amounts of economic analysis. Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011).

⁴² Smith, *supra* note 40.

⁴³ Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1 (2012).

nonlinearities”⁴⁴ and that property norms are therefore created and transformed in response to objective economic necessities. In both articles, the driving force behind the creation of property rights—information costs inherent in property use or the nonlinearity of production functions—exists largely independently of sociocultural context.

Other works explain the creation of property institutions through models or narratives that make no mention of “cultural factors” but are also not categorically incompatible with their existence. For example, in a 2009 article on the origins of property rights, James Krier considers two different but somewhat overlapping models of human behavior: a “biological model” in which human preferences on property rights are “product[s] of biological evolution”⁴⁵—and therefore “genetically predetermined”⁴⁶ for any given individual; and a “human model” in which individuals consciously choose how to behave based on personal cost-benefit analysis, but nonetheless have “have some ‘innate sense of possession and territory.’”⁴⁷ Although value internalization is never mentioned in either model, it could conceivably play some role, at least, in shaping the personal preferences that shape cost-benefit analysis. The same is true of Abraham Bell and Gideon Parchomovsky’s recent attempts to construct a “unified theory of property,” in which property norms are primarily designed to “defend the value”—defined here as social welfare or utility—“in stable ownership.”⁴⁸ There is, logically, the possibility that individual compositions of value or utility could vary depending on sociocultural context, but the authors do not pursue this line of inquiry.

If we turn our attention away from these “core debates” over the nature and origin of property, and towards the economic analysis of how specific rules and norms are created, “the influence of culture” is similarly indiscernible. Recent articles that seek to explain, for example, zoning laws, land demarcations, probate reforms, or the rule against perpetuities all adhere to traditional assumptions about individual economic and political rationality and, perhaps correspondingly, pay very little attention to the possibility of value internalization.⁴⁹

⁴⁴ Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1984 (2012).

⁴⁵ James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139, 152 (2009).

⁴⁶ *Id.* at 154.

⁴⁷ *Id.* at 155 (quoting ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION and Welfare* 107 (1986)).

⁴⁸ See Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005).

⁴⁹ See, e.g., Vicki Been et al., *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014); Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641 (2011); Gary D. Libecap, Dean Lueck & Trevor O’Grady, *Large Scale Institutional Changes: Land Demarcation in the British Empire*, 54 J.L. & ECON. 295 (2011); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013); James R. Hines Jr., *Rational Choice and the Rule Against Perpetuities* (Univ. Mich. L. Sch., Working Paper, 2015); James R. Hines Jr., Workshop Presentation at University of Chicago Law School: Rational Intestacy and Probate Reform (Feb. 2013); Robert H. Sitkoff & Max M. Schanzlenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005). In fact, if one were to comb through all the property law-focused papers presented at the past twelve American Law and Economics Association annual meetings, one would be hard pressed to find any paper that seriously engages with the notion of internalized cultural values and mores. See *Annual Meeting*, AM. L. & ECON. ASS’N, <http://www.amlecon.org/alea-meeting.html> (last visited Feb. 1, 2015).

What explains this general reluctance to engage in sociocultural analysis? Ellickson himself offers perhaps the best explanation: writing in 1998 on the “discovery” of social norms by the legal academy, Ellickson appeared to reconsider his earlier willingness to incorporate sociological methods.⁵⁰ He put forth a brief but compelling explanation for why sociological methods had been, and would probably continue to be, unappealing to law and economics: sociologists were “unable to coalesce around a dominant paradigm” of human behavior.⁵¹ More importantly, their tendency to see “informal groups and cultures as operative engines . . . bewilders economists and other devotees of methodological individualism.”⁵² In other words, sociologists all too often failed to explain the individual incentives and decisions behind group activity or norm creation, instead choosing to present them “as is”—and this was, in Ellickson’s view, incompatible with the economist’s need to explain economic or social phenomenon as the aggregate of logically coherent individual behavior models. In many ways, this may also explain why law and economics scholars have been far more accepting of cognitive science: despite their many challenges to rational actor models, behavioral biases manifest as innate individual biases, which can then be aggregated onto the group level. In comparison, treating “groups” or “cultures” as “operative engines” may feel insufficiently rigorous or coherent, even lazy.

But while legal scholars have generally declined to introduce cultural factors into the economic analysis of property institutions—or perhaps into law and economics in general—if we look beyond the confines of the legal academy, there have actually been some very serious, if ultimately problematic, attempts at incorporating “culture” into institutional economics. In fact, several pioneers of the New Institutional Economics, including Harold Demsetz, Douglass North, and Oliver Williamson, were open to the possibility that cultural factors could significantly influence the creation and evolution of political and legal institutions, including, and perhaps especially, property institutions. Demsetz, in his seminal article on the origin of property norms, hypothesized that property institutions could depend very much on a “community’s taste” for collectivism.⁵³ North and Williamson both acknowledge the potential existence of “Level 1” “norms, customs, mores, traditions, etc.” that are socially embedded and change extremely slowly.⁵⁴ These “Level 1” norms then affect the formation of lower level institutions—property and contract institutions, for example—that regulate economic activity more directly. At one point, North poses the question: “[w]hat is it about informal constraints that gives them such a pervasive

⁵⁰ See Ellickson, *Law and Economics Discovers Social Norms*, *supra* note 2.

⁵¹ *Id.* at 542.

⁵² *Id.*

⁵³ Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967). Note that this does not necessarily amount to a substantive account of how property rights are created. Instead, Demsetz is simply discussing a few hypothetical possibilities. See Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 289 (1979) (discussing Demsetz).

⁵⁴ Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LIT. 595, 596 (2000); see also Douglass C. North, *Institutions*, 5 J. ECON. PERSPECTIVES 97 (1991) (discussing the basic assumptions of institutional economics).

influence upon the long-run character of economies?”⁵⁵ Neither he nor Williamson provides an answer. The great majority of institutional economists, in Williamson’s assessment, simply take these norms “as given.”⁵⁶

There have, however, been some significant exceptions. In 1994, for example, Avner Greif published a widely-discussed paper on how differences in “cultural beliefs—defined as “ideas . . . that are not empirically discovered or analytically proven”—led medieval Maghribi and Genoese trader societies down “distinct institutional trajectories.”⁵⁷ He argued that the Maghribis shared a religious belief that all members of the same umma (“nation”) were responsible for one another, whereas the Christian Genoese were far more individualistic in both their religious beliefs and social behavior. These “cultural” differences led Genoese merchants to compensate for their relative lack of social capital by creating formal legal and administrative institutions, whereas the Maghribis could rely on informal collective enforcement mechanisms to impose social and moral sanctions against “deviants.”

Greif’s study inspired a moderate number of follow-up studies, most of which attempt to identify correlations and potential causal relations between “culture”—often dissected into measures of trust, individualism, and hierarchy, but also sometimes equated with major religions such as Islam, Catholicism, or Protestantism—and various institutional or economic outcomes.⁵⁸ Several of these focus specifically on the connection between “cultural factors” and property institutions: some have argued that Catholic and Islamic countries offer weaker protection of private property,⁵⁹ while others suggest that societies with higher levels of social trust and individualism offer stronger protection.⁶⁰ In aggregate, these studies constitute a small but notable subset of recent institutional economics work. As discussed above, however, they have yet to make much of an imprint either on law and economics in general, or on what one might call the law and economics branch of property theory.

B. Alternative Schools of Thought

Although law and economics remains, even in the eyes of its critics, the “dominant” school in property theory, it is hardly the only school. The major emerging alternative, a “progressive” school that criticizes law and economics for focusing on “efficiency” as “the sole means of evaluating laws and establishing

⁵⁵ North, *supra* note 54, at 111.

⁵⁶ Williamson, *supra* note 54, at 596.

⁵⁷ Greif, *supra* note 1, at 914.

⁵⁸ See Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222 (1999); Rene M. Stulz & Rohan Williamson, *Culture, Openness, and Finance*, 70 J. FIN. ECON. 313 (2003); Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659 (2007); Mariko J. Klasing, *The Cultural Roots of Institutions* (Univ. of St. Gallen, Working Paper Series, 2008); Guido Tabellini, *Culture and Institutions: Economic Development in the Regions of Europe*, 8 J. EUROPEAN ECON. ASS. 677 (2010); Claudia R. Williamson & Carrie B. Kerekes, *Securing Private Property: Formal Versus Informal Institutions*, 54 J. LAW & ECON. 537 (2011); Claudia R. Williamson, *Culture and the Cost of Contract Enforcement*, working paper (Miss. State Univ., March 6, 2014).

⁵⁹ La Porta et al., *supra* note 58.

⁶⁰ Licht et al., *supra* note 58, at 663; Williamson & Kerekes, *supra* note 58.

property norms,”⁶¹ is, in fact, highly compatible with cultural analysis at a theoretical level. For the most part, however, it has been a normative literature and has shown relatively little interest in producing an actual descriptive account of how cultural factors influence the creation of property institutions.

This is not to say that “progressive property” has made no statement on how and why property institutions are created: as several of its major figures have stated, it seeks to examine the “underlying human values that property serves and the social relationships it shapes and reflects.”⁶² Such an examination, they argue, will show that “property implicates plural and incommensurable values.”⁶³ This stands in contrast to the economic analysis of property, which, as progressive scholars correctly observe, generally applies one all-encompassing value—usually “utility,” and most often measured in monetary terms. Some progressive scholars prefer to discuss these plural values under a unified conceptual blanket—“freedom,” or “flourishing”—but they nonetheless insist that these blankets are “irreducibly plural concept[s],”⁶⁴ and must take into account the variety of “preferences, values and commitments” that people may adopt.⁶⁵ They also recognize “the significant role that our social values play in our conception of property,” and that property institutions can “vary . . . according to the social context.”⁶⁶ To quote Hanoch Dagan, “[e]ach of our property institutions, as noted, targets a specific set of values to be promoted by its constitutive rules in one subset of social life”⁶⁷ Unfortunately, Dagan does not specify *how* property institutions came to assume these promotional functions.

“Progressive property” is, therefore, theoretically consistent with the possibility that “social culture” can play a significant role in the creation of property institutions, and would probably welcome the existence of “cultural paradigms” in property institutions. An empirical account that demonstrates how different societies construct property institutions based on different internalized values would not only demonstrate the value of cultural analysis but also provide serious support for the progressive claim of value pluralism and its belief in the existence of more than just one paradigm of property.⁶⁸

For now, these possibilities remain largely unexplored. Over the past decade or so, the progressive literature has been consistently more normative than descriptive; its major works have usually shown more interest in either presenting progressive property as a prescription for future institutional design or in demonstrating its philosophical appeal than in demonstrating its empirical superiority to economic

⁶¹ Rosser, *supra* note 33, at 110, *see also* HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011); Alexander, *supra* note 3; Rosser, *supra* note 33.

⁶² Alexander et al., *supra* note 3, at 743.

⁶³ *Id.*

⁶⁴ AMARTYA SEN, *RATIONALITY AND FREEDOM* 585 (2002).

⁶⁵ JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 126 (2010).

⁶⁶ Dagan, *supra* note 3, at 7.

⁶⁷ *Id.*

⁶⁸ *Id.* at 12-13.

accounts.⁶⁹ To the extent that their preferred objectives require some descriptive basis, they tend to quickly outline a couple of case studies, but rarely attempt more systematic empirical analysis.⁷⁰ Even those works that claim to “begin[] with a straightforward descriptive observation”⁷¹ rarely go beyond the case study level and, even at that level, rarely seek to systematically demonstrate that their preferred interpretative framework is objectively *more* plausible than law and economics-oriented alternatives. Some progressive scholars do employ some variation of intellectual history, where they demonstrate that leading intellectuals, jurists, or politicians of certain eras wrote and thought about property in ways that lend support to their arguments, but one can easily question whether high-level intellectual history is truly reflective of ground-level socioeconomic realities.⁷²

Consequently, the progressive literature and the law and economics approach have tended to operate at somewhat different levels of empirical detail and scope, which occasionally can give their debates an apples-to-oranges quality.⁷³ There is certainly nothing wrong with being more normative than descriptive, especially in the early stages of developing a school of thought, but for the purposes of this article, the current progressive literature offers some general theoretical compatibility with cultural analysis, but quite little in theoretical specifics or empirical support.⁷⁴

Apart from the progressive literature, the most influential alternative in property theory to economic analysis is probably Margaret Jane Radin’s “personhood” theory, which emphasizes the emotional and perhaps spiritual investment in property ownership that conventional microeconomics often fails to capture.⁷⁵ Similar to the progressive literature, the personhood theory is potentially compatible with cultural analysis: at the very least, it seems to tolerate the possibility that different cultural values could lead to different levels and kinds of emotional investment. Also similar to the progressive literature, however, is the lack of empirical exploration of this possibility. More recently, Radin’s work has taken on pluralist tendencies that strongly resemble the progressive school, to the point where some scholars have begun to consider her part of it.⁷⁶

⁶⁹ Alexander, *supra* note 3, at 102, 107 (outlining the primary normative agendas of pluralist property theory).

⁷⁰ E.g., JOSEPH W. SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 19-55 (2000).

⁷¹ Dagan, *supra* note 3, at 28.

⁷² PURDY, *supra* note 65; Anna di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367 (2014).

⁷³ See, e.g., Rosser, *supra* note 33 (discussing the still ongoing debate over whether exclusion is an innate feature of property). The progressive side has, I think it is fair to say, not been operating at quite the same level of empirical ambition that the law and economics side has been. Cf. Chang & Smith, *supra* note 43, with Robilant, *supra* note 72.

⁷⁴ There have, of course, been several synthetic works of legal history that seem to lend some support to progressive theories of property: LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2005); and STUART BANNER, AMERICAN PROPERTY (2011) are perhaps the best examples. But even here, serious cultural analysis is largely missing. Friedman’s book, of course, covers the entirety of American legal history, and can therefore discuss the history of property only in a highly abbreviated manner. Banner, on the other hand, ultimately emphasizes technological advancement as the major driver of legal change—a surprisingly Demsetz-ian conclusion.

⁷⁵ Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

⁷⁶ Alexander, *supra* note 3, at 116-19.

C. Finding Room for Cultural Analysis

All in all, the major schools of modern property theory have thus far devoted very little substantive attention to the potential influence cultural factors exert over the creation of property institutions, even though their basic theoretical frameworks, including those based on law and economics, are often compatible with this possibility: like most forms of microeconomic analysis, law and economics usually claims to maximize subjective “utility,” for which wealth is only a measure or a proxy. Utility functions, however, are often taken to be exogenous, and beyond the scope of economic analysis.⁷⁷ It is theoretically possible, at least, to fold what Ellickson calls the “internalization of cultural values” into these black box-like utility functions. In other words, cultural analysis studies how utility functions are formed, whereas economic analysis takes those functions for granted.

This cannot, however, constitute a valid reason for property scholars to ignore “the influence of culture.” Property theory seeks to explain how property institutions are formed, not merely to explore those parts of the process that lend themselves most naturally to conventional microeconomic analysis. Economists may well limit themselves to a certain methodology, but property scholars as a group—if not necessarily as individuals—should not do so unless they are reasonably sure that the methodology can produce something close to a *complete* understanding of institutional formation. Our subject is property itself, not the methodology.

Ellickson, as noted above, once cited the inaccessibility of sociology as an explanation for why cultural analysis has been unpopular with economically-minded legal scholars.⁷⁸ This may well be true, but it, too, falls short of providing an actual justification: if preexisting sociological studies of social culture have not offered coherent accounts of individual-level behavior, then the best academic response is to try and provide one, not to despair of the possibility. In fact, the institutional economics literature discussed above, particularly Greif’s work, demonstrates that it is quite possible to build individual-level theories of human behavior that take sociocultural factors into account.

A potentially more compelling way to reject cultural analysis is to empirically argue that—irrespective of societal context, geographical region, and historical era—individuals generally approached the creation and modification of property institutions through similarly self-interested and utilitarian mindsets: Because we do not observe major societal variation in individual approaches to property regulation, there is apparently no reason to believe that “culture,” which is innately society and region-specific, significantly influenced those approaches. A few major property articles have, in fact, experimented with this strategy: Henry Smith and Yun-chien Chang, for example, have recently argued that common law and civil law countries—which actually encompass most of the world’s largest legal systems—possess

⁷⁷ See Stigler and Becker, *supra* note 24, at 88.

⁷⁸ Ellickson, *Law and Economics Discovers Social Norms*, *supra* note 2.

“remarkably similar” property institutions “for functional reasons.”⁷⁹ Ellickson, too, pursued a somewhat similar line of argument in his seminal “*Property in Land*” article, in which he argues that landowners across a considerable variety of human societies adapted customary property institutions to economic, demographic and ecological conditions in similarly wealth-maximizing ways.⁸⁰ Lending additional support to these arguments, a considerable number of legal and economic historians have recently demonstrated that individual patterns of property use tended to be similarly wealth-maximizing, rational, and industrious across many historical societies, both Western and Asiatic.⁸¹

Nonetheless, these empirical observations do not constitute sufficient reason to reject the “influence of culture.” They remain compatible with at least two different theories of cultural influence: first, they do not rule out the possibility that “economically utilitarian property use and regulation” is itself a cultural or social construct.⁸² They do mitigate against this argument—if only because they make it more difficult to explain why these otherwise very different societies eventually constructed similar cultures of individual economic behavior—but they do not do so very decisively. For example, one could hypothesize that only those societies that develop such an economic culture are likely to reach a certain level of size and economic complexity⁸³ and that the historical studies discussed above focus, by design, on very large and complex civilizations. If we turn our attention, as many anthropologists have, to smaller, less economically developed societies, we might be

⁷⁹ Chang & Smith, *supra* note 43, at 1-2.

⁸⁰ Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

⁸¹ On the basic economic rationality of Chinese farmers, see LI BOZHONG, AGRICULTURAL DEVELOPMENT IN JIANGNAN, 1620-1850, at 107-08 (1998); THOMAS BUOYE, MANSLAUGHTER, MARKETS AND MORAL ECONOMY: VIOLENT DISPUTES OVER PROPERTY RIGHTS IN EIGHTEENTH CENTURY CHINA 94 (2000); KENNETH POMERANZ, THE GREAT DIVERGENCE: CHINA, EUROPE, AND THE MAKING OF THE MODERN WORLD ECONOMY 86-87 (2000); and Lynda S. Bell, *Farming, Sericulture, and Peasant Rationality in Wuxi County in the Early Twentieth Century*, in CHINESE HISTORY IN ECONOMIC PERSPECTIVE 207, 226-29, 232-39 (Thomas G. Rawski & Lillian M. Li eds., 1992). On English economic behavior, see JOHN BROAD, TRANSFORMING ENGLISH RURAL SOCIETY: THE VERNEYS AND THE CLAYDONS, 1600-1820 (2004) (examining the rural entrepreneurship of gentry families); and JAN DE VRIES, THE INDUSTRIAL REVOLUTION: CONSUMER BEHAVIOR AND THE HOUSEHOLD ECONOMY, 1650 TO THE PRESENT (2008). On Japanese economic behavior, see PRATT, *supra* note 17; SMITH, *supra* note 17; Masayuki Tanimoto, *The Role of Tradition in Japan's Industrialization: Another Path to Industrialization*, in THE ROLE OF TRADITION IN JAPAN'S INDUSTRIALIZATION 3 (Masayuki Tanimoto ed., 2006); T.J. Byres, *The Agrarian Question, Forms of Capitalist Agrarian Transition and the State: An Essay with Reference to Asia*, 14 SOC. SCIENTIST 3 (1986); and Osamu Saito, *Land, Labour and Market Forces in Tokugawa Japan*, 24 CONTINUITY & CHANGE 169 (2009). On economic behavior and political economy in the Ottoman Empire, see TIMUR KURAN, THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST 3-24 (2010); and ALAN MIKHAIL, NATURE AND EMPIRE IN OTTOMAN EGYPT 1-38 (2011).

⁸² Apart from sources cited at *supra* note 26, see also DAVID GREWAL, THE INVENTION OF THE ECONOMY: THE ORIGINS OF ECONOMIC THOUGHT (forthcoming 2015) (discussing the sociopolitical foundations of modern economic thinking). **[AU: This book has not been published. Please provide a copy if possible. David doesn't want precirculation of drafts—I suggest you either ask him directly or just trust me that the book is relevant.]**

⁸³ This would be somewhat similar to the “cultural determinacy” arguments made in 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).

tempted to believe that many individuals and societies *do not* approach property use from a utilitarian mind set.⁸⁴

The second possibility, which is the one this Article explores in detail, is that individual utilitarianism in property use can coexist with cultural internalization in other areas of social behavior. This is, in fact, the strategy that Greif and some of his fellow institutional economists have adopted. Greif, for example, appears to believe that social compactness and individualism were internalized values, whereas economic institutions such as contracts or formal court systems were created via utilitarian calculations.⁸⁵ This harkens back to North and Williamson's identification of different "levels" of human institutions.⁸⁶

As discussed above, property theory has largely declined to embrace this particular strand of institutional economics. This may have something to do with the flawed execution in these studies: somewhat surprisingly, Greif makes no serious attempt to explain why compactness and individualism were truly "cultural" characteristics.⁸⁷ Could these tendencies have emerged for reasons other than value or belief internalization? Greif does not address this concern, nor do the follow-up studies discussed above. Some, in fact, attempt to draw correlations between religious systems and belief internalization in even broader strokes than Greif.⁸⁸

Timur Kuran's recent work offers a refreshing departure from these tendencies: Kuran's 2011 manuscript on the "Long Divergence" between Western Europe and the Middle East has drawn its share of critics,⁸⁹ but at the very least, it makes a serious and well-documented attempt to argue that "certain institutions of great significance for investment, productivity, and exchange *were* grounded in Islamic teachings."⁹⁰ His efforts demonstrate, at least, that these specific shortcomings in Greif's work need not dissuade scholars from accepting its broader insight that cultural factors can fruitfully coexist with both methodological individualism and the belief that human beings generally approach *property use* through a materialistic and utilitarian mindset.

One major common theme that emerges from this institutional economics literature is its general reliance on comparative methods. Comparative strategies, especially those that compare how different property systems deal with similar economic problems, serve at least two major functions in cultural analysis. First, as

⁸⁴ E.g., PAUL BOHANNAN, JUSTICE AND JUDGEMENT AMONG THE TIV (1989); GUDEMAN, *supra* note 26; CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167-234 (1983); BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (2014); LEOPOLD POSPISIL, KAPAUKU PAPUANS AND THEIR LAW (1959); ISSAC SHAPER, A HANDBOOK OF TSWANA LAW AND CUSTOM (1994); MAX GLUCKMAN, THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (ZAMBIA) (2d ed. 1967).

⁸⁵ Greif, *supra* note 1, at 915-16, 922-25. [I don't think this source is correct. Can someone check to see that it's saying this? - EB]

⁸⁶ Williamson, *supra* note 54, at 596 (discussing levels of institutions). See also, North, *supra* note 54, at 111 ("What is it about informal constraints that gives them such a pervasive influence upon the long-run character of economies?").

⁸⁷ Greif, *supra* note 1.

⁸⁸ Licht et al., *supra* note 58.

⁸⁹ E.g., Arshad Zaman, *Review Article*, ISLAMIC STUD., Summer 2010 at 277 (reviewing TIMUR KHAN, THE LONG DIVERGENCE: HOW ISLAMIC LAW HELD BACK THE MIDDLE EAST (2011)).

⁹⁰ KURAN, *supra* note 81, at 25.

discussed above, what differentiates cultural analysis from behavioral economics is primarily the examination of behavioral tendencies that are not innate, but rather the product of post-birth socialization, education, and indoctrination. In other words, cultural analysis' primary methodological attraction is probably its ability to explain societal differences. Second, comparative methods also help demonstrate the logical *necessity* of cultural analysis: many factors can exert influence over any given social phenomenon, but only those that help explain comparative differences have a strong claim on necessity.

As noted above, the "progressive property" school also has much to gain from comparative studies of cultural influence. It has thus far attempted to illustrate its theoretical claim that property institutions can embody more than one kind of social value through case studies drawn from American property law.⁹¹ An equally compelling, indeed quite possibly more effective, strategy would be to identify cultural norms that led different societies to calibrate functionally comparable parts of their property laws in qualitatively different ways. If the goal is to demonstrate the existence of value pluralism in property use, then finding value pluralism across different societies works just as well as finding it in one society.

All in all, contemporary property theory has largely neglected or declined to seriously examine the potential influence of culture on property institutions. There does not, however, seem to be any persuasive reason why it should continue to do so. The remaining parts of this Article seek to provide positive reasons for why cultural analysis is necessary for a reasonably complete understanding of how property institutions are created.

II. "Reculturalizing" Property Theory

This Part constructs a cultural theory of how property institutions are created. It argues that the following chain of causation is possible and may be especially effective at explaining certain inter-society patterns of divergence in property institutions. The cultural internalization of certain values and mores leads to adoption of correlated status criteria, those criteria then influence the power balance between certain interest groups, who negotiate and ultimately produce various property norms based on their respective—potentially utilitarian and self-interested—positions and bargaining power. There can, therefore, be some significant correlation between a society's internalized cultural values and its property institutions.

This does not purport to be a complete theory of property, or even the only possible "cultural" theory of property. The goal here is simply to demonstrate that there are theoretically coherent ways of incorporating cultural factors into property theory, even if we assume, following conventional law and economics, that most individuals approach property use and regulation through a self-interested and utilitarian mindset. As later parts of the Article will demonstrate, moreover, the theory provided here is compatible, perhaps uniquely compatible, with some major

⁹¹ There are exceptions. See sources cited *supra* note 4.

sociolegal phenomena in early modern history and helps explain some important institutional differences between major Asiatic and European societies. The theoretical incorporation of cultural internalization is therefore necessary if we are to understand several crucial chapters in the global history of property.

The theory begins with the basic empirical observation that the creation of property rules often produces clear winners and losers. This coexists a bit uneasily with the tremendous amount of attention that economists have traditionally devoted to finding Pareto-efficient solutions to institutional problems.⁹² Even the most optimistic of scholars would acknowledge, however, that Pareto-efficiency is extremely elusive in practice,⁹³ and therefore compensate by applying what is commonly referred to as Kaldor-Hicks efficiency, in which an outcome is efficient if “a Pareto optimal outcome can be reached by arranging sufficient compensation from those that are made better off to those that are made worse off so that all would end up no worse off than before.”⁹⁴

Even so, for the more empirically-minded, it is probably simpler, and ultimately much more realistic, to accept that property institutions are sometimes—

⁹² See, e.g., GARY D. LIBECAP, CONTRACTING FOR PROPERTY RIGHTS 11-12 (1989) (suggesting that changes to property law should be such that “[t]he bargaining parties must see their welfare improved or at least made no worse off”); Louis de Alessi, *Property Rights, Transaction Costs, and X-Efficiency: An Essay in Economic Theory*, 73 AM. ECON. REV. 64, 68 (1983) (noting that neoclassical models of property rights evolution yield outcomes that are Pareto efficient); Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LITERATURE 1137 (1972) (discussing how the academic literature on property rights addresses the issue of Pareto efficiency).

⁹³ Ellickson, *supra* note 1, at 28-29; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 955-56 (1996).

⁹⁴ Allison Chaney, *Kaldor-Hicks Efficiency*, PRINCETON U., https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Kaldor-Hicks_efficiency.html. (last visited Feb. 17, 2015). But this begs the question of why the losers would agree to the outcome if compensation does not actually take place. Some have proposed that it is rational for individuals to pursue Kaldor-Hicks efficiency at the group level because, over the long run, they will be better off even if they occasionally lose. E.g., Ellickson, *supra* note 1; Daphna Lewinsohn-Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L. J. 377 (1998); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1. There are two possible scenarios for this. First, if “wins” and “losses” are distributed somewhat equally across all group members, each individual group member will, in all likelihood, eventually win more than they lose. Second, even if we assume that some individuals always win and some always lose, long-term wealth accumulation over a series of Kaldor-Hicks group decisions by regular winners could nonetheless have a trickle-down effect on the welfare of regular losers. Both scenarios have significant weaknesses. The first simply seems incompatible with the enormous amount of scholarship on various forms of social oppression and structural inequality. This literature is obviously much too vast to cite here. A celebrated recent reiteration of the argument that inequality is innately built into certain socioeconomic forms, particularly capitalism, is, of course, THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014). This echoes the arguments made by 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Ben Fowkes trans., 2004). For others, inequality is not so much an innate feature of capitalism as it is the result of elites twisting social, cultural, and political institutions to sustain their dominance. See PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION: ESSAYS ON ART AND LITERATURE* (1993). It seems quite obvious that, in many communities, there are those who lose far more frequently than they win, and vice versa. The second scenario, on the other hand, will only generate individual-level “loser support” for a Kaldor-Hicks efficient outcome if the losers are somehow capable of predicting the long-term trickle-down effect. But that would necessarily assume that they possess absurdly high information collection and processing abilities, especially when economists cannot even agree on whether trickle-down effects really exist. See, e.g., John Kenneth Galbraith, *Recession Economics*, N.Y. REVIEW OF BOOKS, Feb. 4 1982, <http://www.nybooks.com/articles/archives/1982/feb/04/recession-economics/>; Heather Stewart, *Wealth Doesn't Trickle Down—It Just Floods Offshore, Research Reveals*, THE GUARDIAN (July 21, 2012), <http://www.theguardian.com/business/2012/jul/21/offshore-wealth-global-economy-tax-havens>.

indeed very often—not the outcome of consensual pursuit of “efficient” outcomes, but rather the result of winners imposing their will and preferences on the losers. The losers do not acquiesce because of murky long-term benefits, but because the short-term cost of clashing with the winners is too high. This is not to deny that Pareto-efficient outcomes are possible, or that it may sometimes be rational for losers to accept Kaldor-Hicks efficient outcomes, but rather to suggest that there are different processes of institutional creation at work.

The belief that legal or quasi-legal institutions in general, and property institutions in particular, are often created via a political process in which the interests of certain social groups “win” over the interests of others is, of course, commonplace in many branches of social science.⁹⁵ The field of property theory, however, has been somewhat slow to expressly embrace this belief. As Katrina Wyman has observed, until quite recently, most major theories on the origin and evolution of property rights tended to neglect the role of the “political process,” instead assuming that property rights were largely the product of voluntary, even unanimous, social decisions.⁹⁶ If, however, we accept that there are winners and losers in process of creating property institutions, the question then becomes: who tend to be the winners, and who tend to be the losers?

There are many possible answers, including how important an issue is to a particular individual, relative physical proximity to the affected properties, varying information costs imposed on interested parties, or even different levels of mental and physical ability. This Article argues, however, that one of the most crucial factors over the long run is the relative social and political status of interested parties. Conventionally, social status is the rank of either an individual or a group in a social hierarchy of honor, prestige, or perceived merit,⁹⁷ and can depend on a variety of factors, such as physical prowess, academic achievement, popularity, wealth, religious piety, age, or lineage.⁹⁸ The reputational and material costs of contradicting a higher social status person tend to outweigh those of contradicting a lower status one. Correspondingly, higher social status individuals also tend to possess greater political power and status.⁹⁹

⁹⁵ This literature is, of course, vast. For a basic literature review of public choice theory, see James M. Buchanan, *Public Choice: The Origins and Development of a Research Program*, CTR (2003), <http://www.gmu.edu/centers/publicchoice/pdf%20links/Booklet.pdf>.

⁹⁶ See Wyman, *supra* note 6.

⁹⁷ See, e.g., Yoram Weiss & Chaim Fershtman, *Social Status and Economic Performance: A Survey*, 43 EUR. ECON. REV. 801, 802 (1998); *Social Status*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/551450/social-status> (last visited Dec. 1, 2014) (“Social status [is] . . . the relative rank that an individual holds . . . in a social hierarchy based upon honour or prestige.”).

⁹⁸ See Xiaotian Zhang, *Status Inconsistency Revisited: An Improved Empirical Model*, 24 EUR. SOC. REV. 155, 156 (2008) (noting the complex factors that affect the calculation of social status).

⁹⁹ Of course, one could ask why we should not simply discard the status moniker and simply focus on power. The answer is that “power” is too broad a term to be applied with much analytical precision, whereas status corresponds to a specific kind of power—subjective, perceived, and often intertwined with concepts of legitimacy—that is of particular relevance to how power is obtained in modern societies. A man who holds a gun to my head has power over me, as does someone who has lent me money, but they do not hold higher status than I do.

This is, of course, necessarily a long-term approximation: in any given case, a lower status individual may very well be able to advance her institutional preferences over those of a higher status individual because she cares more about the issues at hand and is willing to devote more social capital to them, or because she has better access to information. Over the long run, however, these relatively contingent and individualized advantages will probably even out at the group level. When this happens, relative social status will be a fairly accurate predictor of how often, and to what extent, different individuals can obtain desirable institutional outcomes.¹⁰⁰

Alternatively, from the perspective of comparative scholarship, if large, similarly constituted societies in comparable economic circumstances—that is, if comparable segments of their respective populations share similar preferences of similar intensity on comparable economic issues—consistently end up with different property norms, then we should take seriously the likelihood that different distributions of social status within each society are driving the institutional divergence. First, the size of the societies will smooth out differences in individual intelligence or physical ability. Second, the consistency of the divergence over time smooths out short-term changes in institutional preferences or information access. Finally, similarity between economic conditions suggests that purely materialistic explanations are unlikely to succeed.

If all these conditions are met, then a status-based public choice theory seems highly attractive: if the individuals who support establishing property norm *A* in Society 1 collectively have higher relative status—compared to opponents of norm *A*—than the individuals who support norm *A* or its equivalent in Society 2, then we would naturally expect that norm *A* has a higher chance to emerge in Society 1 than in Society 2. Essentially, status distributions determine the relative bargaining power of different interest groups, leading to different institutional outcomes.

It is rarely acceptable, however, to simply take status distributions as exogenous: a satisfactory theory must also explain how the specific distributions of status it utilizes to explain property institutions were created in the first place. One way to begin this inquiry is to ask why the formal criteria by which status is allocated often differ dramatically from society to society: there are aristocracies, where status depends on lineage, gerontocracies, where it depends on seniority, and formal plutocracies, where wealth is explicitly the primary determinant.¹⁰¹ Socialist societies often claim, at least, to value fundamentally different personal traits than capitalist

¹⁰⁰ This leads, of course, to structural inequality where certain social classes and groups are able to sustain their dominance over long periods of time. *See* discussion at *supra* note 94.

¹⁰¹ Aristocracies were arguably the dominant European form of political organization for most the past two millennia, beginning with the Roman Empire. *See, e.g.,* ROBERT BARTLETT, *THE MAKING OF EUROPE: CONQUEST, COLONIZATION, AND CULTURAL CHANGE, 950-1350*, at 24-59 (1993); JONATHAN DEWALD, *THE EUROPEAN NOBILITY, 1400-1800* (1996); JOHN MATTHEWS, *WESTERN ARISTOCRACIES AND IMPERIAL COURT, AD 364-425* (1990); SUSAN REYNOLDS, *FIEFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED* (1994). Later parts of this Article argue that Qing and Republican local society was, to a significant extent, a gerontocracy, whereas early modern English society was, to a large extent, a plutocracy dominated by the landed classes. Many would argue, of course, that modern capitalism has a worrying tendency to become plutocratic. For a very recent version of this argument, see JOHN SKINNER, *CAPITALISM, SOCIALISM, SOCIAL PLUTOCRACY: AN AMERICAN CRISIS* (2014).

ones.¹⁰² Much of this may be rhetorical, but if we look past the rhetoric, and instead at the actual correlations between sociopolitical stature and factors such as wealth or age—as the remainder of this Article attempts to do—there is still considerable reason to believe that different societies can indeed allocate status based on qualitatively different criteria.¹⁰³

Assuming, then, that there is at least a serious theoretical possibility that different communities and societies sometimes choose fundamentally different status allocation criteria, why do they do that? There are both materialist and non-materialist ways to answer this. The materialist answer would point to the possibility that the different status allocation criteria were simply pragmatic reactions to different economic, ecological, or geopolitical circumstances. It makes sense to tie status to military achievement, for example, in a resource-poor country that relies on external conquest or colonization for economic sustenance.¹⁰⁴ Alternatively, rich city-states that rely heavily on commerce and trade might give higher status to the wealthy.¹⁰⁵ In other words, the old Marxist axiom of “economic base determines superstructure” applies.

The alternative would be to emphasize the cultural agency that both human societies and individual human beings possess—to argue that they do not merely react passively to material circumstances, but in some cases act according to internalized social values.¹⁰⁶ In this scenario, status hierarchies and the criteria upon which they are based may not be what is materially necessary or optimal, or the equilibrium outcome of self-interested negotiation, but rather what members of the society have “internalized” as right, moral, or just. Cultural internalization can kick in at any point in a society’s history: one can easily imagine a set of status criteria emerging initially through utilitarian bargaining, but later becoming internalized as a core moral principle. That is, later generations may take for granted what earlier generations fought over. This would still be a qualitatively different process than path dependence, which occurs when later generations decide that the costs of revising the criteria outweigh the potential benefits of revision.¹⁰⁷ In contrast, cultural

¹⁰² For a recent discussion on the evolution of popular political culture—including perceptions of individual self-worth and social prestige—in pre-1978 China, see WU YI-CHING, *THE CULTURAL REVOLUTION AT THE MARGINS: CHINESE SOCIALISM IN CRISIS* (2014). On political culture in socialist societies, see generally Kenneth Jowitt, *An Organizational Approach to Political Culture in Marxist-Leninist Systems*, 68 AM. POL. SCI. REV. 1171 (1974).

¹⁰³ See discussion *infra* pp. 52-64.

¹⁰⁴ On the martial culture of the Mongols, see THOMAS T. ALLSEN, *CULTURE AND CONQUEST IN MONGOL EURASIA* (2001). On the political culture of Vikings, see ANGELO FORTE ET AL., *VIKING EMPIRES* 170-216 (2005).

¹⁰⁵ On the political culture of Italian city-states, see DANIEL WALEY & TREVOR DEAN, *THE ITALIAN CITY-REPUBLICS* 128-69 (4th ed. 2013).

¹⁰⁶ See Greif, *supra* note 1; Ellickson, *supra* note 1; Etzioni, *supra* note 2; Cooter, *supra* note 2, at 1. For more general discussions on the topic, see CHARLES E. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY: DECISION-MAKING THROUGH MUTUAL ADJUSTMENTS* (1965); HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* (4th ed. 1976); Amartya Sen, *Rational fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

¹⁰⁷ See, e.g., Paul A. David, *Why Are Institutions the “Carriers of History”? Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205

internalization would, at some level, void the cost-benefit analysis in favor of moral commitment.

A law and economics scholar who is committed to methodological individualism may well harbor doubts about both the plausibility and desirability of cultural internalization.¹⁰⁸ The plausibility question would likely come in the following form: why would an individual internalize a set of status criteria that has the potential to damage his or her material interests? As noted above, there is considerable empirical evidence to suggest that individual economic behavior in early modern and modern societies was strongly utilitarian and self-interested, and there is certainly no reason to believe that contemporary societies are any less utilitarian. Can the cultural internalization of status criteria be consistent with a basic assumption of individual economic utilitarianism?

The simplest answer to these concerns would be to point out that individual utilitarianism in things like land use and wealth management does not imply that human beings are similarly utilitarian in other parts of their behavior. There is, fortunately, a less cynical way to put this: it seems very possible that status hierarchies and criteria are usually introduced to individuals at a far earlier stage of life than economic decision making regarding land or other major sources of livelihood. Correspondingly, there is some reason to suspect that the former is more susceptible to value internalization than the latter.

Status criteria are probably among the earliest norms a child is exposed to as he or she develops cognitive reasoning abilities. Parents are usually the first and primary source of authority and hierarchy, with other adult relatives, babysitters or nannies, teachers, and other children following closely behind. Young children rapidly acquire a fairly accurate and nuanced sense of which people to respect and obey, and also of which personal traits to value and prioritize.¹⁰⁹ In particular, children born in highly religious or morally consolidated societies will likely be introduced to basic religious or moral tenets, including those regarding status hierarchies, well before they reach adolescence.¹¹⁰

(1994); S.J. Liebowitz & Stephen E. Margolis, *Path Dependency, Lock-in, and History*, 11 J.L. ECON. & ORG. 205 (1995); James Mahoney, *Path Dependency in Historical Sociology*, 29 THEORY & SOC'Y 507 (2000); Paul Pierson, *Increasing Returns, Path Dependency, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

¹⁰⁸ See sources cited *supra* note 27.

¹⁰⁹ E.g., CAROLYN U. SHANTZ, DEVELOPMENT OF SOCIAL COGNITION (1975); John D. Coie et al., *Dimensions and Types of Social Status: A Cross-Age Perspective*, 18 DEVELOPMENTAL PSYCHOLOGY 557 (1982); Patricia H. Hawley, *The Ontogenesis of Social Dominance: A Strategy-Based Evolutionary Perspective*, 19 DEVELOPMENTAL REV. 97 (1999). There have also been studies that consider whether humans have an innate need for status hierarchies. E.g., HAROLD J. LEAVITT, TOP DOWN: WHY HIERARCHIES ARE HERE TO STAY AND HOW TO MANAGE THEM MORE EFFECTIVELY (2004); ARNOLD S. TANNENBAUM ET AL., HIERARCHY IN ORGANIZATIONS (1974); Joe C. Magee & Adam D. Galinsky, *Social Hierarchy: The Self-Reinforcing Nature of Power and Status*, 2 ACAD. OF MGMT. ANNALS 351 (2008); Jessica L. Tracy & David Matsumoto, *The Spontaneous Expression of Pride and Shame: Evidence for Biologically Innate Nonverbal Displays*, 105 PROC. NAT'L ACAD. SCI. U.S. 11655 (2008).

¹¹⁰ E.g., Everett L. Worthington Jr., *Religious Faith across the Life Span*, 17 COUNSELING PSYCHOLOGIST 555, (1989); David Elkind, *The Child's Conception of His Religious Denomination II: The Catholic Child*, 101 J. GENETIC PSYCHOLOGY 185 (1962).

In comparison, while almost all children experience basic urges to acquire food, or to hoard toys, few are exposed, even in early modern agrarian societies, to serious wealth management problems or to property norms and laws until a much more advanced age—that is, these are usually “adult problems.”¹¹¹ It may simply be that serious economic planning or substantive thinking about property norms requires fairly mature reasoning abilities, and is therefore something that most individuals do not grapple with until a relatively advanced age, whereas basic status criteria require only elementary cognitive abilities to understand and digest. *Justifying* status criteria is, of course, vastly more complicated, but the point of value internalization is precisely to render conscious justification unnecessary.

There is a considerable body of psychological research, going back to Freud, Piaget, and Kohlberg, which argues that children acquire their internalized normative preferences at a young age and that younger children tend to be more normatively malleable than older ones.¹¹² Such assertions remain commonplace.¹¹³ This suggests that there is some basis for suspecting that status criteria, by virtue of their extremely early introduction in the average person’s life, may be more “internalizable” than property norm preferences, which are generally not developed until many years later. In fact, status criteria are encountered and accepted so early in most people’s lives that, if we allow for any possibility of non-self-interested norm internalization at all, they would probably be one of the most likely candidates.

So much for plausibility, but what about desirability? Why should we seriously investigate a cultural internalization theory of status hierarchies when, as noted above, there are plenty of materialistic alternatives available? The basic answer is that, while it may not be a bad idea to consider the materialistic alternatives first, there are also some fairly commonplace scenarios, especially historically, where the materialistic theories run into serious difficulties, but where a cultural internalization account would work very well. The basis for this argument is the apparent truism that societal-level phenomena deserve societal-level explanations: applied to the proliferation of status criteria, it would mean that a widely embraced set of criteria

¹¹¹ There is some consensus that this is true in contemporary populations.. Annamaria Lusardi et al., *Financial Literacy Among the Young: Evidence and Implications for Consumer Policy* (Nat’l Bureau of Econ. Research, Working Paper No. 15352, 2009), <http://www.nber.org/papers/w15352>; Haiyang Chen & Ronald P. Volpe, *An Analysis of Personal Financial Literacy Among College Students*, 7 FIN. SERV. REV. 107 (1998). There is also quite a bit of evidence on this for pre-modern and early modern Europe. See ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY PROPERTY AND SOCIAL TRANSITION 1650 TO THE PRESENT* (2008).

¹¹² JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 13-108 (Marjorie Cabain trans., 1965); see also LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE* 409-12 (1981); RICHARD WOLLHEIM, *FREUD* 177-218 (1971); PARENTING AND CHILDREN’S INTERNALIZATION OF VALUES: A HANDBOOK OF CONTEMPORARY THEORY (Joan E. Grusec & Leon Kuczynski ed., 1997); Joan E. Grusec & Jacqueline J. Goodnow, *Impact of Parental Discipline Methods on the Child’s Internalization of Values: A Reconceptualization of Current Points of View*, 30 DEVELOPMENT PSYCH. 4 (1994); K.V. Roe, *Early Empathy Development in Children and the Subsequent Internalization of Moral Values*, 110 J. SOC. PSYCH. 147 (1980).

¹¹³ Amir N. Licht, *Social Norms and the Law: Why Peoples Obey the Law*, 4 REV. L. & ECON. 715 (2008) (citing HANS KELSEN, *PURE THEORY OF LAW* 193-278 (1989)). But see Etzioni, *supra* note 2.

deserves an origins story that explains not merely why it makes sense in any specific locality but why it became popular across so many different communities.

In some cases, it could simply be that different parts of society share enough core material traits—economic production, ecology, geopolitical challenges, and so on—that a purely organic, bottom-up, and materialistic norm creation process would still have generated similar status criteria. In other cases, however, a society can possess so much material diversity that it becomes extremely difficult to imagine how status criteria-homogeneity came to exist without the interference of exogenous, societal-wide factors.

Take, for example, the case of Qing China: within its economic core, some macro-regions produced wheat, others rice, still others a mixture of the two.¹¹⁴ In some regions, the primary commercial good, apart from grain, was silk, in others, salt, tea, or tobacco. Water-based transportation and trade was readily available in some regions, extremely expensive in others. Correspondingly, the level of urbanization and proto-industrialization varied wildly from region to region.¹¹⁵ Despite all this, as will be argued below, most local communities within its core macroregions seemed to coalesce around a common set of status criteria. It simply seems unlikely that a bottom-up ecological or economic need-based theory of norm creation can explain the coexistence of normative uniformity with such vast ecological and economic variance. To do that, we would have to identify some hidden but crucial material characteristic shared by the core Chinese macroregions that drove their local communities towards a single mode of social ordering. The precise nature and socioeconomic consequences of Chinese social hierarchies, as discussed below, make this appear a virtually impossible task.

The challenge then becomes to identify an exogenous cross-regional “force” that can account for the normative uniformity. For modern societies, the obvious solution would probably be to consider political economy-based theories of centralized state action. Modern state and legal apparatuses are, especially in developed countries, centralized, complex, and powerful enough to offer an extremely large range of such possibilities: legislation, administrative rulemaking, public education, or even the establishment of a state religion could all provide ample material or political incentives, both positive and negative, to adopt a certain set of status criteria.¹¹⁶

¹¹⁴ THE CITY IN LATE IMPERIAL CHINA 211 (G. William Skinner ed., 1977); Jonathan D. Spence, *The Search for Modern China* 75-78 (1999).

¹¹⁵ Compare the description of the Lower Yangtze economy in BOZHONG LI, *AGRICULTURAL DEVELOPMENT IN JIANGNAN, 1620-1850*, at 107-08 (1998), with the description of the North China economy in PHILIP C.C. HUANG, *THE PEASANT ECONOMY AND SOCIAL CHANGE IN NORTH CHINA* 118-20 (1985).

¹¹⁶ On the ability of laws to shape social norms, see, for example, TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1998); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); Kenworthy Bilz & Janice Nadler, *Law, Psychology and Morality*, in 50 *MORAL COGNITION AND DECISION MAKING: THE PSYCHOLOGY OF LEARNING AND MOTIVATION* 101 (D. Medin et al. eds., 2009); Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); and Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

If, however, we turn our attention once again to pre-modern or early modern societies, then it becomes much harder to argue that centralized state activity was driving social norm creation through coercion or incentivizing. Simply put, states were usually not that powerful back then, especially—and ironically, considering the longevity of the “oriental despotism” thesis—in non-Western societies.¹¹⁷ Returning to the Chinese example, historians generally agree that late imperial governments rarely interfered with local socioeconomic life and, indeed, did not have the financial resources to do so even when they desired a more active role.¹¹⁸ There is very little reason to believe that local communities felt at all compelled or substantially incentivized to seek state approval for their preferred status criteria. Quite the opposite, local communities very often *violated* express legal prohibitions to establish the kind of kinship networks and hierarchies that they preferred.¹¹⁹

This implies, then, that local communities had to have *voluntarily* accepted and sustained these status hierarchies, but often not for economic or ecological reasons. What potential explanations, then, do we have left? We could try, presumably, to construct a coordination game where the chosen set of status criteria acquired focal point status out of a set of multiple available criteria, none that were more materially attractive at the group level than others,¹²⁰ but this, too, runs into serious difficulties, especially in the China case: if economic and ecological variation is inconsistent with one set of criteria being materially optimal in most local communities, then it is probably equally inconsistent with the “multiple equilibria pools” in these communities all sharing one particular equilibrium. In fact, the set of status criteria that ultimately “emerged victorious” in late imperial China arguably did a very poor job, when compared to available alternatives, of boosting economic efficiency and protecting social stability.¹²¹ Focal point theories cannot explain this.

At this point, it is far simpler to look into cultural explanations—to examine whether there is a coherent account of value and norm internalization that could explain the popularity of these status criteria. There are at least two major possibilities. First, people internalized the criteria themselves, or at least certain mores or values that supported them. Second, people internalized a desire—not connected to any direct material incentive—to imitate the sociopolitical elite, who possessed certain quantities of innate “moral prestige.”¹²² This would presumably

¹¹⁷ See discussion *infra* p.34. On legal orientalism, see William P. Alford, *Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law*, 23 MODERN CHINA 398 (1997); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

¹¹⁸ See discussion *infra* note 156.

¹¹⁹ See discussion *infra* Parts III.A.1 and IV.B.2.

¹²⁰ See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 54-67 (1960); Maarten C.W. Janssen, *Focal Points*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 150 (Peter Newman ed., 1998); Richard McAdams, *Beyond the Prisoner's Dilemma: Coordination, Game Theory, and Law*, 82 SOUTHERN CAL. L. REV. 173 (2009); Richard McAdams, *A Focal Point Theory of Expressive Law*, 79 VA. L. REV. 339 (2000); Maarten C.W. Jaanssen, *Rationalizing Focal Points*, 50 THEORY & DECISION 119 (2001); Robert Sugden, *A Theory of Focal Points*, 105 Econ. J. 533 (1995).

¹²¹ See discussion *infra* pp. 55-56.

¹²² On the imitation of elite culture and rights by the general population, see, for example, James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1165-89 (2004) (describing how European elite concepts of privacy and dignity came to be embraced by the general

drive them to adhere to whatever status criteria they believed the elite abided by. In the historical evidence surveyed below, the former possibility is much more pronounced than the latter, but the latter certainly could have played a significant role, both here and in other social scenarios.

Some might argue that going straight to cultural internalization overlooks the possibility that social groups or individuals might adopt certain status criteria because they believe it will boost their social status or reputation among peers—assuming, as discussed above, that the criteria do not make economic or ecological sense.¹²³ This is plausible, but it leads to a chick-and-egg conundrum: why would these groups or individuals believe that these criteria will boost their reputation unless they also believed that their peers had already internalized them? That is, such a mindset might explain why newcomers to a region with pre-established norms chose to abide by those norms,¹²⁴ but it cannot explain how the norms initially emerged.

A few additional notes on how this study differs from previous attempts to compare property systems: Greif's theory of cultural influence is thematically quite similar to what is being attempted here but, as discussed above, makes no real attempt to demonstrate that the "cultural factors" it relies upon are actually "cultural."¹²⁵ The account below attempts both to present a thicker account of social culture and to demonstrate that its emergence, predominance, and longevity demand an internalization-based explanation.

Smith and Yun-chien Chang have recently produced an important comparative study of property frameworks in common law and civil law systems. They find that these legal systems differ more in form than in substance, and all display a strong commitment to "the right to exclude, in rem status and running with assets."¹²⁶ The account presented below is, in fact, compatible with this: it is perfectly possible that the basic principles of private property use are similar in most commercial economies due to the information cost issues that Smith and Chang identify. Nonetheless, substantive differences on narrower issues of use and alienability—the specific terms of tenancy termination, the length of mortgage redemption windows, the division of inheritable assets, and so on—may well exist within this common framework and, despite their more limited scope, be of enormous socioeconomic consequence.

III. From Status Distributions to Property Institutions

Parts III and IV apply the theoretical framework outlined in Part II to the pre-industrial legal history of China, England, and Japan. The chain of causation in this

population).

¹²³ See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (providing a theory of social norms based on reputation sanctions) ; and ERIC POSNER, *LAW AND SOCIAL NORMS* (2000) on reputational sanctions and the value of signaling.

¹²⁴ See Jonathan Bendor & Piotr Swistak, *The Evolution of Norms*, 106 AM. J. SOC. 1493, 1496 (2001).

¹²⁵ See discussion surrounding *supra* notes 87-**Error! Bookmark not defined.**

¹²⁶ Chang & Smith, *supra* note 43.

framework runs, as discussed above, from cultural norms of status allocation to distributions of sociopolitical power, to property institutions. This Part illustrates the latter part of this chain: it argues that major differences in mortgage institutions between pre-industrial China, England, and Japan had roots in their different distributions of sociopolitical status. Lower-income households consistently occupied a large share of political leadership positions in the early modern Chinese countryside, but were largely excluded from such positions in Tokugawa Japan, and almost completely excluded in early modern England. Correspondingly, they were able to secure very favorable mortgage redemption norms in China, but accepted much harsher norms in Japan and succumbed to extremely harsh ones in England.

At around two centuries prior to large-scale industrialization, correlating to the mid-eighteenth century in China, mid-nineteenth in England, and early eighteenth in Japan, the three rural economies had a great deal in common. Recent historical scholarship strongly suggests that all three economies were significantly commercialized, with large segments of their rural populations—in core macroregions, at least—producing food and textile materials for market consumption.¹²⁷ The corresponding drive to specialize production led to improving living standards for most rural households, although natural disasters and famine remained a real threat. All three economies were fairly self-contained: foreign trade, while certainly a growing presence, only accounted for a fraction of total economic output.¹²⁸ They were also predominantly rural, with well over eighty percent of the population engaged in agricultural production.¹²⁹

¹²⁷ On Chinese market integration, see, for example, Yeh-Chien Wang, *One Secular Trends of Rice Prices in the Yangzi Delta, 1638-1935*, in CHINESE HISTORY IN ECONOMIC PERSPECTIVE, *supra* note 81, at 35, 35-99; HUANG *supra* note 115; BOZHONG LI, AGRICULTURAL DEVELOPMENT IN JIANGNAN, 1620-1850, at 107-08 (1998); LILLIAN M. LI, FIGHTING FAMINE IN NORTH CHINA: STATE, MARKET, AND ENVIRONMENTAL DECLINE 1690s-1990s, at 113, 164-65, 196-220 (2007). For comparisons with England, see POMERANZ, *supra* note 81; ROBERT ALLEN, THE BRITISH INDUSTRIAL REVOLUTION IN GLOBAL PERSPECTIVE (2009). On Japanese market integration, see Jean-Pascal Bassino, Market Integration and Famines in Early Modern Japan, 1717-1857 (Nov. 2007) (unpublished manuscript), <http://federation.ens.fr/ydepot/semin/texte0708/BAS2007MAR.pdf>.

¹²⁸ On the modest size of early modern English trade, see RALPH DAVIS, THE INDUSTRIAL REVOLUTION AND BRITISH OVERSEAS TRADE 62-63 (1979); and Daron Acemoglu, Simon Johnson & James Robinson, *The Rise of Europe: Atlantic Trade, Institutional Change, and Economic Growth*, 95 AM. ECON. REV. 546 (2005). On Chinese foreign trade, see Wolfgang Keller, Ben Li & Carol H. Shive, *China's Foreign Trade: Perspectives from the Past 150 Years*, 34 WORLD ECON. 853 (2011). On Japan, see Daniel M. Bernhofen & John C. Brown, *An Empirical Assessment of the Comparative Advantage Gains from Trade: Evidence from Japan*, 95 AM. ECON. REV. 208 (2005).

¹²⁹ On England, see Robert C. Allen, *Economic Structure and Agricultural Productivity in Europe, 1300-1800*, 4 EUR. R. ECON. HIST. 1, 11 (2000); S. Todd Lowry, *The Agricultural Foundation of the Seventeenth-Century English Economy*, 35 HIST. POL. ECON. 74, 75 (2003); 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 EDWARD A. EDWARD A. WRIGLEY & ROGER S. SCHOFIELD, THE POPULIST HISTORY OF ENGLAND 1541-1871 A RECONSTRUCTION (1981)). On China and Japan, see James I. Nakamura & Matao Miyamoto, *Social Structure and Population Change: A Comparative Study of Tokugawa Japan and Ch'ing China*, 30 ECON. DEV. & CULTURAL CHANGE 229 (1982); and Yu Tongyuan (余同元), *Ming Qing Zaoqi Gongyehua Shehuide Xingcheng yu Fazhan* (明清江南早期工业化社会的形成与发展) [*The Formation and Development of Early Industrialized Society in Jiangnan in Ming-Qing Period*], 11 J. HIST. SCI. (2007).

Beyond these broad macroeconomic similarities, the three societies also shared some finer characteristics. First, their rural economies were dominated by smallholder households at this point in time. In two of China's most developed macroregions, the Lower Yangtze and North China, the top ten percent of landowners probably owned, respectively, around forty and twenty percent of arable land, and only managed ten to fifteen percent themselves, which meant that some eighty to ninety percent of arable land was being tilled by household-sized production units.¹³⁰ A similar situation existed in England during the early seventeenth century,¹³¹ and in Japan during the seventeenth and early eighteenth centuries.¹³²

Second, the ownership—and, in cases of tenancy, usage—rights of these smallholder households were generally secure. Most smallholders owned much of the land they farmed in China, and enjoyed what modern lawyers would recognize as secure private control: the ability, guaranteed by both formal and customary law, to exclude others, the sole authority to enjoy after-tax produce, and close-to-full control over land usage.¹³³ Those who leased land from larger landlords often enjoyed highly secure tenancy rights under a system called “one land two owners” (*yitian liangzhu*), which prevented them from being evicted except under some fairly extreme circumstances.¹³⁴ In early sixteenth century England, most smallholders held copyhold tenure over their land, which enjoyed a level of legal protection in both common law and manorial courts comparable to freehold land.¹³⁵ In Japan, too, secure private ownership—technically of usage rights, given the country's feudal superstructure—gradually became the dominant kind of property right during the fourteenth and fifteenth centuries, triggering a large rise in permanent investments in land and irrigation during the following three centuries.¹³⁶

¹³⁰ Taisu Zhang, *Property Rights in Land, Agricultural Capitalism, and the Relative Decline of Pre-Industrial China*, 13 SAN DIEGO INT'L L.J. 129 (2011).

¹³¹ Leigh Shaw-Taylor, *The Rise of Agrarian Capitalism and the Decline of Family Farming in England*, 65 ECON. HIST. REV. 26, 31-36 (2011); 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 Land Ownership and Land Occupation in the Romney Marsh Region, 1646–1834*, 51 AGRIC. HIST. REV. 69, 69 (2003).

¹³² SMITH, *supra* note 17; THOMAS C. SMITH, NATIVE SOURCES OF JAPANESE INDUSTRIALIZATION, 1750-1920 (1988).

¹³³ See Madeleine Zelin, *A Critique of Rights of Property in Prewar China*, in CONTRACT AND PROPERTY IN EARLY MODERN CHINA 17-8 (Madeleine Zelin, Jonathan K. Ocko & Robert Gardella eds., 2004). Private property became a predominant feature of the Chinese economy as early as the 12th and 13th Centuries. See Joseph P. McDermott, *Charting Blank Spaces and Disputed Regions: The Problem of Sung Land Tenure*, 44 J. ASIAN STUD. 13, 13 (1984).

¹³⁴ E.g., KATHRYN BERNHARDT, RENTS, TAXES, AND PEASANT RESISTANCE: THE LOWER YANGTZE REGION, 1840-1950, at 25 (1992); PHILIP C.C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED 99-118 (2001).

¹³⁵ See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 348–50 (3d ed. 1990); ERIC KERRIDGE, AGRARIAN PROBLEMS IN THE SIXTEENTH CENTURY AND AFTER 32-93 (1969); S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 41-64 (2d ed. 1981).

¹³⁶ See RAMSEYER, *supra* note 19, at 26-27; Osumu Saito, *Land, Labour and Market Forces in Tokugawa Japan*, 24 CONTINUITY & CHANGE 169, 170-71 (2009). But see Philip C. Brown, *State, Cultivator, Land: Determination of Land Tenures in Early Modern Japan Reconsidered*, 56 J. ASIAN STUD. 421 (1997) (arguing that some villages redistributed land fairly regularly).

Third, landholders in all three countries also enjoyed considerable freedom to alienate their property rights. Land selling, leasing, and mortgaging was routine in the Chinese countryside. This applied not only to owners but to tenants as well, who often transferred, subleased, and mortgaged their tenancy rights, especially when they were of the “one land two owners” variety.¹³⁷ Early modern English copyholders sold, mortgaged, and leased their land through basically the same legal instruments as freeholders.¹³⁸ Japanese landholders, while theoretically banned from selling land by Tokugawa law, nonetheless found a number of ways to circumvent these restrictions.¹³⁹

Fourth, the primary impetus for landholders, whether Chinese, English, or Japanese, to sell or mortgage land was serious financial stress: upcoming weddings, funerals, or large debts coming due.¹⁴⁰ Median or lower-income rural households, in particular, usually could only meet these financial demands through the selling or mortgaging of land. Outside of these circumstances—in which a failure to raise cash could trigger severe social penalties—they rarely put their land up for sale or mortgage, and indeed for very good reason: given the relative paucity of non-agricultural employment in these pre-industrial economies, the price of land would have had to be extraordinarily high for significant numbers of peasants to willingly put their property on the market.¹⁴¹ The large number of smallholders who were forced to sell or mortgage land due to financial stress, however, kept prices substantially lower than that. For similar reasons, larger landholders who had access to spare cash were usually eager to acquire additional land.

These basic incentives created some fairly strong income-based divisions between sellers/debtors and buyers/creditors: larger landholders rarely needed to sell land to make ends meet, whereas smallholders frequently did. In two North China villages, for example, nearly ninety percent of land mortgagors and sellers during the later 1930s came from the bottom half of landholders, whereas only three percent

¹³⁷ Kenneth Pomeranz, *Land Markets in Late Imperial and Republican China*, 23 *CONTINUITY & CHANGE* 10, 131-36 (2008).

¹³⁸ See sources cited *supra* note 135.

¹³⁹ See RAMSEYER, *supra* note 19 at 26.

¹⁴⁰ On China and England, see TAISU ZHANG, *LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP, PROPERTY, AND AGRICULTURAL CAPITALISM IN PRE-INDUSTRIAL CHINA AND ENGLAND* 37 (forthcoming 2016); THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE 10-63, 236 (T.H. Aston and C.H.E. Philpin eds., 1987); Phillipp R. Schofield, *Dearth, Debt and the Local Land Market in a Late Thirteenth-Century Village Community*, 45 *AGRIC. HIST. REV.* 1 (1997); Govind Sreenivasan, *The Land-Family Bond at Earls Colne (Essex) 1550-1650*, 131 *PAST & PRESENT* 3 (1991) (documenting the unwillingness of English peasants to sell land); and Zvi Razi, *Family, Land and the Village Community in Later Medieval England*, 93 *PAST & PRESENT* 3 (1981). On the economic incentives to sell land in Tokugawa Japan, see SMITH, *supra* note 17, at 8158 (“[Mortgaging documents] show that borrowing by peasants usually originated in poverty . . .”); WILLIAM CHAMBLISS, *CHIARAJIMA VILLAGE: LAND TENURE, TAXATION, AND LOCAL TRADE, 1811-1884*, at 36-37 (1965) (noting that selling or mortgaging land tended to indicate declining economic fortunes); and Tsutomu Ouchi, *Chiso kaisei zengo no nominsho no bunkai to jinushisei*, in 1 *CHISO KAISEI NO KENKYU* 37 (Uno Kozo ed., 1957).

¹⁴¹ On China, see HUANG, *supra* note 134, at 73; and 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, 514-517 (1986). On Japanese labor markets, see Saito, *supra* note 136, at 176.

belonged to the top twenty-five percent.¹⁴² Moreover, nearly all existing contract archives from Qing and Republican China suggest that land mortgages and sales generally involved a few large landholders accumulating land from dozens of poorer neighbors.¹⁴³ The same was true of both England and Japan, where existing historical sources document a steady flow of land from smallholders to wealthier households in the early modern era, but very little in the other direction.¹⁴⁴

Finally, customary law, rather than formal legal regulations, tended to govern how landholders (usually smallholders) could sell and mortgage land (usually to a wealthier neighbor). As discussed below, central level laws and regulations in China and Japan were often ignored, both by local communities and even by local courts. The English common law enjoyed a relatively more harmonious coexistence with local customs, but even there, manor and borough customs played a larger role in regulating land use and transaction than formal legal institutions.¹⁴⁵ In general, early modern governments were rarely powerful and expansive enough to effectively regulate local economic behavior.¹⁴⁶

These, then, were the broader socioeconomic conditions under which early modern Chinese, English, and Japanese rural communities contemplated and created mortgage institutions. The scope and depth of these macro-level similarities supplies the functional comparability of something as specific as mortgage institutions: in all three societies, mortgages, like permanent sales, were primarily a way for smallholders to exchange land for cash in times of financial stress. Correspondingly, they were also an important way for larger landholders to begin the process of accumulating land, which, as discussed below, was generally their main incentive in handing out loans.¹⁴⁷ For all these commonalities, however, the three countries diverged wildly on the specific rules that governed mortgage redemption, indeed with enormous economic consequences.

Section A below outlines the core characteristics of each society's mortgage regime. It also explains the basic economic incentives and consequences for both mortgagor and mortgagee. Section B considers possible explanations for these

¹⁴² 3 Chugoku Noson Kanko Chosa [Investigation of Rural Chinese Customs] [hereinafter Mantetsu Surveys] 5 (Comm. for the Publ'n of the Rural Customs and Practices of China ed., 1958); 4 Mantetsu Surveys, at 218 (showing a similar situation in a different village).

¹⁴³ ZHANG, *supra* note 140, at 79.

¹⁴⁴ On England, see THE BRENNER DEBATE, *supra* note 140; KERRIDGE, *supra* note 135, at 36-37; J.V. Beckett, *The Pattern of Landownership in England and Wales, 1660-1880*, 37 ECON. HIST. REV. 1 (1984); and 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, 7-12, 17-18 (1990) (placing the start of conscious landlord encroachment at around 1550). On Japan, see ANNE BOOTH & R. M. SUNDRUM, *LABOUR ABSORPTION IN AGRICULTURE: THEORETICAL ANALYSIS AND EMPIRICAL INVESTIGATIONS* 145 (1985); SMITH, *supra* note 18; T.J. Byres, *The Agrarian Question, Forms of Capitalist Agrarian Transition and the State: An Essay with Reference to Asia*, 14 SOC. SCIENTIST 3 (1986); and Saito, *supra* note 136, at 173-74.

¹⁴⁵ On the general detachment of the common law from regular socioeconomic life, see Richard Ross, *Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520-1640*, 146 U. PENN. L. REV. 323 (1998).

¹⁴⁶ On the limitations of the Chinese state, see discussion surrounding *infra* note 156. On Japan, see OOMS, *supra* note 17, at 192-242 (discussing village-level autonomy). On the evolution of the English state and how it compares with Chinese and Japanese state capacity, see sources cited at *supra* note 18.

¹⁴⁷ See discussion surrounding *infra* notes 170-171.

institutional differences, arguing that a sociopolitical status-based explanation is superior to conceivable alternatives.

A. Mortgage Redemption in Early Modern Societies

1. China

The Qing or Republican landholder who faced some kind of pressing financial need—assuming the need was too large to be met through unsecured borrowing or the pawning of personal items—had two basic options. First, he could permanently sell some of his land. Qing and Republican law recognized and enforced land-sale contracts with automatic regularity, as did the customary laws of virtually all rural communities. Alternatively, he could put the land up for a *dian* sale, which was basically the Chinese equivalent of a classic common law mortgage. Under this arrangement, the landholder conveyed land usage rights to a creditor in exchange for sixty to eighty percent of the land's full value under a permanent sale.¹⁴⁸ The creditor could use the land freely until the original landholder paid off his debt, upon which he regained usage rights. No interest accrued on the debt,¹⁴⁹ which meant that the creditor's primary incentive for issuing the loan was temporary use of the land itself. To protect this interest, many contracts provided for a guaranteed-usage period of one to five years, starting immediately after the signing of the *dian* contract, within which the debtor was not allowed to redeem.¹⁵⁰

Once this period passed, however, customary law in China's core macroregions, especially North China, the Lower Yangtze, and South China, generally gave the debtor a valid right of redemption for, essentially, forever.¹⁵¹ As one local custom stated, *dian* sales "could be redeemed after several hundred years, and the price of redemption would always remain the same."¹⁵² Under the influence of such customs, very few *dian* contracts from these macroregions attempted to establish any redemption deadline, and most *dian* sales were apparently redeemed at some point, often many decades afterwards.¹⁵³

These norms were strictly customary. In fact, government laws and regulations enacted during the eighteenth century expressly banned *dian* redemption after eleven years, largely because prolonged *dian* sales tended to generate social tension and litigation.¹⁵⁴ Previous surveys of local customs, contracts, and cases

¹⁴⁸ ZHANG, *supra* note 140, at 38.

¹⁴⁹ LIANG ZHIPING (梁治平), QINGDAI XIGUAN FA: SHEHUI YU GUOJIA (清代习惯法: 社会与国家) [QING CUSTOMARY LAW: SOCIETY AND STATE] 93 (1996); WU XIANGHONG (吴向红), DIAN ZHI FENGSU YU DIAN ZHI FALÜ (典之风俗与典之法律) [THE CUSTOMS AND LAWS REGULATING "DIAN" SALES] 35 (2009).

¹⁵⁰ LIANG, *supra* note 149; Henry McAleavy, *Dien in China and Vietnam*, 17 J. ASIAN ST. 403, 406-7 (1958).

¹⁵¹ Zhang, *supra* note 130, at 161-63.

¹⁵² MINSHANGSHI XIGUAN DIAOCHA BAOGAOLU (民商事习惯调查报告录) [RESEARCH REPORT ON CIVIL AND COMMERCIAL CUSTOMS] 505 (Sifa Xingzheng Bu ed., 1930).

¹⁵³ *Id.* at 161, 192-93.

¹⁵⁴ 1 QINGDAI GE BUYUAN ZELI: QINDING HUBU ZELI (QIANLONG CHAO) (清代各部院则例: 钦定户部则例(乾隆朝)) [REGULATIONS OF QING BOARDS AND MINISTRIES: IMPERIAL BOARD OF FINANCE REGULATIONS (QIANLONG ERA)] 83, 148-49 (Fuchi Shuyuan ed., 2004).

demonstrate very clearly, however, that these laws and regulations had virtually no effect on local contractual behavior.¹⁵⁵ County magistrates were severely understaffed, underfinanced, and therefore highly reliant on the cooperation of local lineages and groups in even the most basic of administrative tasks.¹⁵⁶ Therefore, when central laws contradicted local custom, they rarely attempted to enforce the former over the latter.¹⁵⁷

Local communities were aware of these government bans on extended *dian* redemption but generally ignored them in practice. Many wealthier landholders, especially those who had made *dian* purchases, repeatedly argued, both in local courts and within their village communities, that state-mandated redemption deadlines should take precedence over local norms of infinite redeemability.¹⁵⁸ These opinions faced stiff opposition, however, from lower-income smallholders, who insisted that the proper norm was infinite redeemability.¹⁵⁹ Historical evidence suggests that smallholders, rather than their wealthier creditors, usually carried the day, as communal mediation regularly enforced the right of debtors to redeem against unwilling creditors, even many decades after the initial *dian* sale.¹⁶⁰

As noted above, smallholders generally assembled their institutional preferences regarding *dian* sales from the position of potential or actual debtor, whereas wealthy households generally approached the issue as potential or actual creditors. But why did infinite redeemability appeal so much to debtors—and so little to creditors? The key to understanding this is to recognize the abnormally high value of land in a predominantly agrarian economy.¹⁶¹ This meant that smallholders very rarely sold or *dian* sold land unless forced to by negative circumstances. Selling or collateralizing land under conditions of financial stress generally meant, however, that, once the stress had passed, the seller or *dian* seller generally preferred to redeem the land if possible. This usually made him prefer mortgages to permanent sales, so long as the terms of the mortgage were not overly harsh. In fact, in virtually all surviving Qing and Republican contract archives, *dian* sales outnumber permanent sales by well over nine to one.¹⁶² Moreover, a *dian* seller would usually prefer an institutional setup that maximized his chances of successful redemption.

¹⁵⁵ Zhang, *supra* note 130, at 168-74.

¹⁵⁶ See CH'U TUNG-TSU, *LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING* 168-92 (1962); BRADLY W. REED, *TALONS AND TEETH: COUNTY CLERKS AND RUNNERS IN THE QING DYNASTY* (2000) (arguing that county magistrates were highly dependent on local clerks and runners, who in turn relied on their familial and social ties to lubricate the daily government operations).

¹⁵⁷ Republican governments eventually recognized the futility of enforcing the eleven-year ban and extended the legal deadline to thirty years. ZHONGHUA MINGUO MINFA DIAN (中華民國民法典) [CIVIL CODE OF THE REPUBLIC OF CHINA], arts. 912, 924 (1929).

¹⁵⁸ ZHANG, *supra* note 140, at 179-83.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See discussion surrounding *supra* notes 140-144.

¹⁶² See Yang Guozhen (杨国桢), *Shilun Qingdai Minbei Minjian de Tudi Maimai* (试论清代闽北民间的土地买卖) [Discussing Land Transactions in Qing Northern Fujian], 1 ZHONGGUOSHI YANJIU (中国史研究) [A STUDY OF CHINESE HISTORY] 29, 31 (1981); CAO XINGSUI (曹幸穗), *Jiu Zhongguo Sunan Nongjia Jingji Yanjiu* (旧中国苏南农家经济研究) [RESEARCH ON THE RURAL ECONOMY OF SOUTHERN JIANGSU IN OLD CHINA] 31 (1996); PHILIP C.C. HUANG, *THE PEASANT FAMILY AND RURAL DEVELOPMENT IN THE YANGZI*

This is precisely what *dian* redemption customs did: because most *dian* sales were made under considerable financial stress, it was probably not in the seller's interest to individually negotiate redemption terms under an institutional assumption of complete contractual freedom and flexibility. Doing so would allow the creditor to take advantage of his difficult financial circumstances to drive a hard bargain. Instead, he probably preferred to establish, under more neutral conditions, an *a priori* redemption deadline that covered all future *dian* sales in the local community. The range of options could theoretically extend from immediately after the *dian* sale to infinity. Among these, a blanket rule of infinite redeemability clearly offered the highest probability of successful redemption.

Arguably, the only downside of this blanket rule was that, by precluding case-by-case negotiation of redemption deadlines, it forced debtors to accept lower *dian* prices, which were only sixty to eighty percent of the land's full value. In balance, this seems like a small price to pay for maximizing one's likelihood of redemption.¹⁶³ Moreover, there *were* ways to negotiate higher *dian* prices: the seller could simply grant a longer guaranteed-usage period, which gave buyers greater security and larger returns, and therefore increased their willingness to give a larger loan.¹⁶⁴

All things considered, *dian* redemption customs were highly protective of the economic interests of debtors. In fact, they did so with such success that, while English and Japanese smallholders both lost considerable ground to larger farms during their respective early modern histories,¹⁶⁵ Chinese smallholders managed to retain a largely stable share of arable land. During the Late Qing and Republic, for example, the share of land owned by the top ten percent of landholders in North China and the Lower Yangtze remained between thirty-five to fifty percent, with some prolonged periods of actual decline. Of this thirty-five to fifty percent, they directly managed only one-third.¹⁶⁶ There are many reasons for this, but as previous

DELTA, 1350-1988, at 106 (1990); QINGDAI NINGBO QIYUE WENSHU JIJIAO (清代宁波契约文书辑校) [QING CONTRACTS FROM NINGBO] (Wang Wanying ed., 2008); 3 SHICANG QIYUE (石仓契约) [Shicang Contracts] (Cao Shuji ed., 2010).

¹⁶³ Implicit in this statement is, of course, an assumption that the utility value of land to a farmer was so high that a measurable increase in the likelihood of redemption generated an expected utility gain that outweighed the corresponding dip in *dian* prices. Considering that, even with infinite redeemability, *dian* prices remained at sixty to eighty percent of full market value, this seems to be an acceptable assumption.

¹⁶⁴ The only hypothetical *dian* sellers who really lost out under the Chinese customary regime were those who were completely certain that they could repay within a very short period of time, but also urgently needed to obtain a loan worth significantly more than the percentage of full market value commonly issued by *dian* buyers. Such people were, in all likelihood, extremely rare in real life. In fact, they never emerge at all in previous studies on this subject. Presumably, if a potential *dian* seller was completely and predictably able to repay within a short period of time, he very rarely would have needed to make the sale in the first place.

¹⁶⁵ See sources cited *supra* note 144.

¹⁶⁶ ZHANG, *supra* note 140, at 174-78; Joseph W. Esherick, *Number Games: A Note on Land Distribution in Prerevolutionary China*, 7 MODERN CHINA 387, 391, 405 (1981); LI WENZHI (李文治), MINGQING SHIDAI FENGJIAN TUDI GUANXI DE SONGJIE (明清时代封建土地关系的松解) [THE LOOSENING OF FEUDAL LAND RELATIONS IN THE MING AND QING] 58 (2007); Ramon Myers, *Land Distribution in Revolutionary China*, 8 THE CHUNG CHI J. 62 (1969).

scholarship has argued, the highly debtor-friendly nature of *dian* customs was certainly among the most important.¹⁶⁷

At the same time, these customs imposed serious inconvenience on creditors. Once the guaranteed-usage period expired, creditors could lose their usage rights in any year, which discouraged them from making long-term investments in the land.¹⁶⁸ The tremendous attractiveness of *dian* customs to potential land sellers also drained the supply of permanent land sales, as evidenced by the virtual nonexistence of permanent sale contracts in many existing contract archives.¹⁶⁹ Not only was accumulating land via *dian* sales economically under-productive, but doing so also exacerbated the difficulty of productive permanent accumulation.

One has to wonder why, under these conditions, *dian* buyers were still willing to issue loans equal to some sixty to eighty percent of the land's full permanent sale value. There are several possible explanations. First, despite the inconveniences they caused, *dian* sales still offered significant economic value to buyers. Even if the seller eventually redeemed, the buyer would at least have enjoyed free use of the land for several years. Such use was, as noted above, usually suboptimal, but even so, land productivity on *dian*-sold land could reach some eighty percent of productivity on permanently owned land.¹⁷⁰ A series of *dian* purchases was therefore only moderately less productive agriculturally than a permanent purchase of comparable physical size. Second, the combination of population growth, commercialization, and pre-industrial technological innovation during this era tended to boost land prices and intensify demand for land accumulation.¹⁷¹ At the same time, the economic predominance of agriculture generally meant that wealthier households had few alternative investment opportunities: most often, they could either let their money sit idly or acquire land, through any means possible.

¹⁶⁷ Zhang, *supra* note 130.

¹⁶⁸ See Robert C. Ellickson, *The Cost of Complex Land Titles: Two Examples from China* (Yale Law & Econ., Research Paper No. 441, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1953207.

¹⁶⁹ See Zhang, *supra* note 130, at 187-94.

¹⁷⁰ NAGANO AKIRA, *ZHONGGUO TUDI ZHIDU DE YANJIU* [RESEARCH ON CHINA'S LAND INSTITUTIONS] 116-28 (Qiang Wo trans., 2004).

¹⁷¹ Land prices rose between 1650 and 1835, and between 1860 and 1930 as well, further decreasing the economic risk involved. For 1650-1835, see Li Wenzhi (李文治), *Lun Yapien Zhanzheng qian Dijia he Goumai Nian* (论鸦片战争前地价和购买年) [On Land Prices and Purchase Years Before the Opium War], *ZHONGGUO SHEHUI JINGJI SHI YANJIU* (中国社会经济研究) [STUD. OF SOC. & ECON. HIST.] 1 (1988). On Lower Yangtze land values, see BERNHARDT, *supra* note 134, at 248-49. 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 Involvement in Eighteenth-Century Britain and China?*, 61 *J. ASIAN STUD.* 501, 512 (2002) (arguing that land productivity increased despite declining labor productivity). On increasing pressure from landlords to increase rent-levels throughout the nineteenth and early-twentieth centuries, see BERNHARDT, *supra* note 134.

Still, it is very easy to understand, given the above analysis, why *dian* sellers were often unhappy with the idea of infinite redeemability, and indeed frequently argued against it. They truly would have benefitted from some kind of limit on redemption: not only would this have limited the period of uncertainty, but more importantly, it would have generated a larger likelihood of *dian* default, thus boosting the supply of permanent land transactions. Theoretically, the shorter the redemption window, the greater these benefits would have been. In other words, the economic preferences of creditors directly contradicted those of debtors. It is hardly surprising, then, that *dian* redemption norms were a major source of social tension.

What is much more surprising is that, throughout the Qing and Republic, customary law in China's core macroregions consistently and almost uniformly sided with relatively impoverished debtors over their far more affluent creditors.¹⁷² It becomes even more striking when we place the institutional "victory" of Chinese smallholders in a comparative context: smallholders in England and Japan consistently and almost uniformly had to settle for mortgage institutions that were far less favorable, and far more conducive to the economic interests of land-accumulating creditors.

2. England

From late medieval times onwards, mortgage redemption norms in England slowly moved against the economic interests of smallholders until, by the sixteenth and seventeenth centuries, they placed debtors under such enormous economic pressure that many cash-strapped smallholders chose to forego the mortgage option and simply sell their land. This was, naturally, a welcome development for wealthier landholders, most of whom were accumulating large "capitalist" farms that relied primarily on hired labor. Correspondingly, the percentage of English farmland that fell under capitalist management rose from only a fraction of total arable land in the early fifteenth century to well over half by the end of the sixteenth.¹⁷³

The "classic mortgage" of sixteenth and seventeenth century England was a blunter instrument than modern Anglo-American mortgages. During that era, "mortgages" referred to "any arrangement whereby a loan was secured by a

¹⁷² This is, especially if one adheres to a Marxist view of history, a highly counterintuitive outcome. The notion that primitive accumulation of capital in early modern societies generally occurred via the dispossession and exploitation of smallholders is a central argument of Marxist historiography. See KARL MARX, 1 CAPITAL, ch. 31 (1867), <http://www.marxists.org/archive/marx/works/1867-c1/htm> (last visited 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).

¹⁷³ See Shaw-Taylor, *supra* note 131, at 4, 17–18; ALLEN, *supra* note 131, at 73, 78–104 (1992); Hipkin, *supra* note 131; 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 140.

conveyance of real property.”¹⁷⁴ The debtor, or mortgagor, transferred either full title or a long term-of-years to the creditor, on the condition that the transfer would revert upon repayment of debt. If the mortgagor defaulted, however, he lost his right of redemption.

There are several major differences between this arrangement and modern mortgages: first, the great majority of modern mortgages do not convey title to the creditor, but merely the right to be repaid from a foreclosure procedure.¹⁷⁵ In addition, they often allow repayment schedules of up to several decades, generally permit the mortgagor to maintain possession of the property and, in cases of default, arrange foreclosure auctions to raise the collateral’s full market value.¹⁷⁶ The classic mortgage was not nearly as lenient to mortgagors. Mortgagees were allowed to possess the land while waiting for repayment,¹⁷⁷ but more importantly, local customs generally dictated that mortgagors must redeem within, most often, six months to a year, or go into default, upon which the mortgagee would obtain full, unburdened ownership without any additional payment.¹⁷⁸

Until the early eighteenth century, most English courts—common law courts, manor and borough courts, and so on—enforced these customary deadlines quite ruthlessly. They were such a major source of social tension that Chancery eventually felt compelled to aid beleaguered mortgagors by establishing “the equity of redemption,” allowing judges to extend redemption deadlines and demand foreclosure auctions upon final default.¹⁷⁹ These reforms did not, however, harden into established doctrine until the early eighteenth century, and even then, their dominance over harsher common law rules was questionable.¹⁸⁰

All in all, compared to his counterparts in Qing and Republican China, the early modern English smallholder who needed to raise large sums of cash was clearly in much direr straits: the short and harshly enforced redemption deadlines imposed by customary law meant that he was under serious danger of quickly losing his collateral for less than full market value. Much of the time, he was actually better off selling the land outright, which would at least leave him with a larger sum of money. What is even more striking about the Sino-English comparison is that, while Chinese *dian* redemption norms remained largely stable throughout the Qing and Republic, English mortgage institutions became progressively harsher towards debtors over time. During the twelfth and thirteenth centuries, laws and customs still acknowledged the existence of “living gages” (*vivum vadium*)—an archaic

¹⁷⁴ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 353 (3d ed. 1990).

¹⁷⁵ This is the rule under all “lien theory” jurisdictions, which covers England and most American states. DAVID A. SCHMUDDE, A PRACTICAL GUIDE TO MORTGAGES AND LIENS 7 (2004).

¹⁷⁶ *Id.*

¹⁷⁷ See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 157–58 (Univ. of Chicago Press, 1979); A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 242–43 (2d ed. 1986).

¹⁷⁸ Zhang, *supra* note 130, at 182–86.

¹⁷⁹ 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).

¹⁸⁰ See *Burgess v. Wheate* (1759), 96 Eng. Rep. 67, 1 Black. W. 123 (K.B.); Sugarman & Warrington, *supra* note 179, at 117.

predecessor to mortgages—in which the debtor did not face any fixed deadline to redeem.¹⁸¹ Rather, the creditor would assume possession of the collateral, and some of the yearly produce it generated would count towards the initial debt. By the fifteenth century, however, this debtor-friendly instrument had been almost completely replaced by “mortgages” that required repayment within a very short term.¹⁸² The saving grace was that many local customs still guaranteed the defaulting debtor a foreclosure sale, so that he might at least recoup the full market value of the collateral.¹⁸³ The debtor’s institutional position deteriorated further, however, during the sixteenth century, when the foreclosure sale was gradually replaced by automatic full conveyance to the creditor upon default.¹⁸⁴

The deterioration of debtor-protection in mortgage was but one part of a broader trend in early modern English property law. During the sixteenth century and later, smallholders clashed often and severely with large landowners over rent and fee increases, evictions, and unilateral enclosures, but generally lost out in the end.¹⁸⁵ Especially in the sixteenth and seventeenth centuries, the wide array of legal reforms that wealthy households pushed through clashed intensely with what lower-income households considered normatively appropriate.¹⁸⁶ Even after 1700, when enclosures had become so commonplace that they were no longer a major source of tension, higher-income households continued to pressure lower-income ones over issues such as gleaning rights.¹⁸⁷ Scholars therefore regularly portray the evolution of English property institutions in this era as one driven by strong self-interested utilitarianism, if not outright class conflict.¹⁸⁸ Wealth-based social tension and conflict played a major role, therefore, in the negotiation of both early modern Chinese and English property institutions. But while English smallholders emerged from these conflicts much weakened both institutionally and economically, Chinese smallholders somehow achieved the opposite.

3. Japan

¹⁸¹ RANULF DE GLANVILL, *TRACTATUS DE LEGIBUS ET CONSUEUDINIBUS REGNI ANGLIAE* x.8 (G.D.G. Hall ed., 1965); H.W. Chaplin, *The Story of Mortgage Law*, 4 HARV. L. REV. 1, 5-8 (1890).

¹⁸² 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 158 (Univ. of Chicago Press 1979).

¹⁸³ Zhang, *supra* note 130, at 184-85.

¹⁸⁴ Sugarman & Warrington, *supra* note 179, at 113 (discussing the consequences of default prior to the rise of the equity of redemption).

¹⁸⁵ See THE BRENNER DEBATE, *supra* note 140, at 30; KERRIDGE, *supra* note 135; Hoyle, *supra* note 144.

¹⁸⁶ THE BRENNER DEBATE, *supra* note 140, at 35; KERRIDGE, *supra* note 135; Hoyle, *supra* note 144; R.W. Hoyle, *An Ancient and Laudable Custom: The Definition and Development of Tenant Right in North-Western England in the Sixteenth Century*, 116 PAST & PRESENT 24, 29-36 (1987) (portraying the evolution of tenant right as tensioned bargaining between lord and tenant).

¹⁸⁷ Gleaning rights are customary rights given to the poor to collect leftover crops from farmers’ fields after they have been commercially harvested. Peter King, *Legal Change, Customary Right, and Social Conflict in Late Eighteenth-Century England: The Origins of the Great Gleaning Case of 1788*, 10 LAW & HIST. REV. 1 (1992).

¹⁸⁸ Such portrayals are also seen in, for example, Rab Houston, *Custom in Context: Medieval and Early Modern Scotland and England*, 211 PAST & PRESENT 35 (2011); and Andy Wood, *The Place of Custom in Plebeian Political Culture: England, 1550-1800*, 22 SOC. HIST. 46 (1997).

At a cursory glance, virtually all transactions on Tokugawa land markets were mortgages. This was because, as noted above, the Tokugawa state formally outlawed permanent selling of land, which forced landowners to disguise sales as ten-year mortgages (*zyunenki shichichi nagare*) that would not be redeemed and would convey full ownership to the creditor upon default.¹⁸⁹ Village communities and local officials recognized the difference between such in-name-only mortgages and “real” mortgages that carried a possibility of redemption.¹⁹⁰ Beyond these formalities, Japanese smallholders in need of large sums of cash faced essentially the same options as their Chinese or English peers: either sell land or collateralize it.

“Real” mortgages came in two forms: *kakiire*, in which the debtor retained control of the land, and *shichiire*, in which the creditor assumed control until redemption.¹⁹¹ Some villages only recognized one of the two, but most seemed to allow both.¹⁹² Most often, land collateralized under both arrangements would forfeit completely to the creditor upon default.¹⁹³ Alternatively, some villages allowed officials to hold a foreclosure sale, which at least allowed the debtor to recoup the land’s full market value.¹⁹⁴

Redemption deadlines could vary depending on the district. The most common custom was a uniform ten-year deadline that triggered automatic full conveyance to the creditor upon default.¹⁹⁵ Other districts or villages recognized shorter deadlines, ranging from twenty-two months to seven years,¹⁹⁶ and a few allowed the debtor as much as twenty years to repay.¹⁹⁷ Not only did redemption deadlines vary from district to district, but they also fluctuated within individual districts. In Hanishina District, Shinano Province, for example, local customs were renegotiated quite often, and went from ten years before the mid-eighteenth century to five to ten years in the late eighteenth, to three to five by the mid-nineteenth.¹⁹⁸

Only in a few districts do we find anything resembling Chinese *dian* redemption rules, where debtors could redeem “at any time, no matter how long after the pledge was made.”¹⁹⁹ Even in these districts, Japanese debtors were still worse off than their Chinese counterparts, simply because virtually all Japanese mortgages carried interest. Interest rates were not a major concern during the early Tokugawa but increased sharply from the mid-eighteenth century onwards, so much that

¹⁸⁹ 2 LAW AND JUSTICE IN TOKUGAWA JAPAN 11 (John Henry Wigmore ed., 1967).

¹⁹⁰ GRACE H. KWON, STATE FORMATION, PROPERTY RELATIONS, AND THE DEVELOPMENT OF THE TOKUGAWA ECONOMY (1600-1868), at 64-65 (2002); Frank G. Bennett Jr., *Getting Property Right: “Informal” Mortgages in the Japanese Courts*, 18 PAC. RIM L. & POL’Y J. 463, 468-70 (2009).

¹⁹¹ 2 LAW AND JUSTICE IN TOKUGAWA JAPAN, *supra* note 189, at 79 (discussing differences between *kakiire* mortgages, which the editor calls “hypothees,” and *shichiire* mortgages, which he calls “pledges”).

¹⁹² *Id.* at 79.

¹⁹³ *Id.* at 82, 91.

¹⁹⁴ *Id.* at 80, 86.

¹⁹⁵ *Id.* at 80, 91, 94, 96.

¹⁹⁶ *Id.* at 85-86, 88, 89, 91.

¹⁹⁷ *Id.* at 83-84, 94.

¹⁹⁸ *Id.* at 85-86.

¹⁹⁹ *Id.* at 87, 93.

historians have often considered them a major source of social tension in the later Tokugawa.²⁰⁰

Japanese mortgage redemption and default rules came, therefore, in a variety of shapes and sizes, but coalesced primarily around a model that was, effectively, a moderately more humane—to debtors—version of English customs. At one extreme were the districts that only gave debtors twenty-two months to repay and provided no foreclosure sale upon default. Others gave longer redemption windows, usually ten years, and a minority of these districts provided the financial security of a foreclosure sale. There was also the occasional twenty year deadline and a few localities that guaranteed infinite redeemability. Correspondingly, although “real” mortgages were quite plentiful on the Japanese land market, they did not crowd out permanent sales like they did in China.²⁰¹ The combination of permanent sales and mortgage foreclosures allowed wealthier Japanese farmers to accumulate a much larger share of arable land during the mid to late Tokugawa—but apparently at a slower pace than their English counterparts—and drive large numbers of smallholders into wage labor.²⁰²

Both the cross-regional variation of redemption deadlines and their fluctuation within single villages across time suggest that they were the product of regular reexamination and renegotiation. Unsurprisingly, these were often rich versus poor affairs, to the point where government officials came to consider land concentration and the institutional conflicts it provoked perhaps *the* major source of social tension during the later Tokugawa.²⁰³ Japanese smallholders did not always fare that badly in these negotiations, especially when compared to the plight of English smallholders, but, as the case of Hanishina District suggests, they nonetheless tended to lose ground over time.

B. Explaining Institutional Divergence

To summarize, early modern Chinese smallholders were significantly more successful than Japanese smallholders—and vastly more successful than English ones—at securing favorable mortgage institutions. The economic consequences of this institutional divergence were immense. At around two centuries prior to large-scale industrialization, smallholder farmers were the dominant force in all three economies, both population-wise and output-wise, but only in China were they able to retain that position until the eve of industrialization.

²⁰⁰ See SMITH, *supra* note 17, at 157-200; STEPHEN VLASTOS, PEASANT PROTESTS AND UPRISINGS IN TOKUGAWA JAPAN 156-67 (1986); HERBERT BIX, PEASANT PROTEST IN JAPAN, 1590-1884 (1986); JAMES W. WHITE, IKKI: SOCIAL CONFLICT AND POLITICAL PROTEST IN EARLY MODERN JAPAN (1977); HUGH BORTON, PEASANT UPRISINGS IN JAPAN OF THE TOKUGAWA PERIOD (1938).

²⁰¹ See RAMSEYER, *supra* note 19, at 23-27; Saito, *supra* note 136; KWON, *supra* note 190, at 86; SMITH, *supra* note 17, at 157-61.

²⁰² On the gradual decline of smallholding, see KWON, *supra* note 190, at 55-73; and SMITH, *supra* note 17, at 124-56. Nonetheless, the pace of change described in these studies seems to be more drawn out and less dramatic than the rapid ascension of managerial farming in the seventeenth century England. See sources cited *supra* note 131.

²⁰³ See sources cited *supra* note 200.

The broad socioeconomic similarities between these societies discussed at the beginning of this Part severely curtail the range of plausible explanations. One might be tempted to suggest, for example, that wealthier Chinese landholders simply cared less about accumulating land than their English and Japanese counterparts, and were therefore more willing to compromise on mortgage institutions, but this is almost certainly untrue. Local Chinese court archives are well-stocked with cases in which large landholders begged government officials to override “backwards” or “evil” *dian* redemption customs by applying regulatory redemption deadlines.²⁰⁴ Republican era village surveys, too, present no shortage of such complaints.²⁰⁵ If anything, we may have *more* evidence that large landholders held very strong opinions on mortgage redemption from China than from either England or Japan.

If we consider the powerful economic incentives that drove Chinese landholders towards aggregating large farms, it seems extremely unlikely that they would have “cared less” about land accumulation than their English or Japanese peers. By some estimates, labor productivity was more than twenty percent higher on large, managerial farms than on household-sized plots in North China and the Lower Yangtze, and the gap in animal productivity was similarly large.²⁰⁶ In fact, the historical record strongly suggests that managerial farms failed to assume greater importance in the rural Chinese economy only because unlimited *dian* redemption made them exceedingly hard to assemble.²⁰⁷

Similarly, there is no reason to believe that Japanese or English smallholders had any less incentive than Chinese smallholders to fight for favorable mortgage redemption norms. In fact, historians have never described the creation of large farms in England and Japan as anything but a highly coercive process. The loss of land in both societies meant the loss of long-term livelihood and entrance into a volatile and relatively low-wage rural labor market.²⁰⁸ Few smallholders succumbed to such a fate without vigorous resistance.

Ultimately, the broad-sweeping economic similarities between these societies suggest that the cause of institutional divergence was more likely one of sociopolitical clout than one of economic incentive: why were large Chinese landholders unable—rather than unwilling—to impose their institutional preferences on smallholders the way that their Japanese or English peers did? The historical evidence strongly suggests that they simply did not have the political influence to do so: Chinese smallholders brought more sociopolitical chips—by occupying local positions of authority and prestige—to the bargaining table than Japanese or English

²⁰⁴ See ZHANG, *supra* note 140, at 70, 202-17.

²⁰⁵ *Id.*

²⁰⁶ See JOHN LOSSING 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 273, 276 (1937) [hereinafter BUCK, LAND UTILIZATION]; BUCK, *supra* note 114, at 47, 53; Kenneth Pomeranz, *Land Markets in Late Imperial and Republican China*, 23 CONTINUITY & CHANGE 10, 118-19 (2008).

²⁰⁷ BUCK, LAND UTILIZATION, *supra* note 206, at 277; see also HUANG, *supra* note 115, at 144-45.

²⁰⁸ See discussion surrounding *supra* notes 141, 200.

smallholders, and were therefore more successful in securing favorable property institutions.²⁰⁹

Compared to Japanese, and especially to English smallholders, Chinese smallholders generally seemed to possess far more political power. For example, in a collection of North China village surveys from the early 1940s, below-median landholders accounted for sixty-three of 128 identifiable village leadership positions, include village chief, vice-chief, heads of smaller administrative units, and chiefs of major local lineages.²¹⁰ At least one village chief was virtually landless.²¹¹ This pattern of status distribution also seemed to exist in the Lower Yangtze and South China since at least the late Ming Dynasty.²¹² Wealth did seem to confer some political advantage—nine of the top thirty-five landholders in the seven North China villages had occupied a leadership position at some point, a significantly higher percentage than what we find in lower wealth tiers—but the advantage was modest.²¹³

In comparison, social histories of early modern England generally agree that wealthy landowners enjoyed a virtual monopoly over local political appointments. Surveys of English localities during the sixteenth and seventeenth centuries have repeatedly shown that recognition as a “gentleman” and the assumption of political authority were almost universally dependent upon the possession of substantial landed wealth.²¹⁴ Some recent studies point out that other factors, including a consistent commitment to public service or long-term residency in the community, also influenced one’s political stature,²¹⁵ but even they continue to emphasize that significant landed wealth was at least a prerequisite for high status.²¹⁶

Japanese smallholders, too, were largely shut out of the village political elite, but not quite as uniformly. Previous scholarship suggests that, although village headmen were almost always wealthy, in many—perhaps most—villages, at least some political elites were smallholders.²¹⁷ Smallholders were therefore better “represented” politically than in the English countryside, but not nearly as well as in

²⁰⁹ The only real alternative explanation proposed by preexisting scholars is that Chinese rural communities often embraced “precommercial” moral ideals of “permanency in landownership”—that is, they believed that the permanent deprivation of land was morally wrong. See HUANG, *supra* note 134, at 74; MELISSA MACAULEY, *SOCIAL POWER AND LEGAL CULTURE: LITIGATION MASTERS IN LATE IMPERIAL CHINA* 234 (1998). There is, however, virtually no evidence of such moralizing. Quite the opposite, the fact that larger landholders were almost uniformly critical of strong *dian* redemption rights argues against the existence of any moral consensus on whether permanent land alienation was permissible. See discussion surrounding *supra* note 81.

²¹⁰ See Zhang, *supra* note 15, at 203-04.

²¹¹ *Id.* at 204.

²¹² See FENG ERKANG ET AL. (冯尔康等), *ZHONGGUO ZONGZU SHI* (中国宗族史) [HISTORY OF CHINESE LINEAGES] 318-25 (2009); INOUE TOHRU, *ZHONGGUO DE ZONGZU YU GUOJIA LIZHI* (中国的宗族与国家礼制) [CHINA’S LINEAGES AND RITUAL INSTITUTIONS OF THE STATE] (Hang Qian trans., 2008).

²¹³ See Zhang, *supra* note 15, at 203-04.

²¹⁴ WRIGHTSON, *supra* note 16; French, *supra* note 16; E.P. Thompson, *Eighteenth-Century English Society: Class Struggle Without Class?*, 3 SOC. HIST. 133 (1978).

²¹⁵ French, *supra* note 16.

²¹⁶ *Id.*

²¹⁷ OOMS, *supra* note 17, at 166-91; SMITH, *supra* note 17, at 50-64; CHAMBLISS, *supra* note 148, at 39-41.

China. Some of these politically recognized smallholders were formerly rich households who managed to retain some of their old political stature despite declining economic fortunes, but others were “genuine” smallholders who regularly belonged to the village’s economic underclass.²¹⁸

The level of economic protection that mortgage institutions afforded smallholders strongly correlated, therefore, to the level of sociopolitical status the smallholders seemed to cumulatively possess. Smallholders occupied a large share of local leadership positions in Qing and Republican China. Correspondingly, they also enjoyed highly favorable mortgage institutions that minimized their likelihood of permanently losing the collateral. In comparison, English smallholders were almost entirely unrepresented among local political elites and also faced exceedingly harsh mortgage institutions that regularly led to undercompensated default and seizure. Japanese smallholders generally fell in-between the two extremes in both cumulative status and mortgage institutions.

Although correlation is not causation, previous historical research has demonstrated that there is, in fact, much qualitative and circumstantial evidence, especially from China and England, to suggest that a causal relationship existed between distributions of sociopolitical status and mortgage institutions.²¹⁹ The North China rural surveys cited above contain a number of court cases in which high political status smallholders utilized their political position to enforce local *dian* customs upon unhappy landlords.²²⁰ In one such case, a village chief of middling wealth had made a *dian* sale to the second wealthiest landlord in the county, who then attempted to impose a number of restrictions against redemption.²²¹ The village chief argued that local customs did not recognize these restrictions, whereas the landlord sought to persuade judges that those customs were unconscionable. When the court declined to issue a formal judgment, the village chief mobilized a number of lower-income village elders to put social pressure on the landlord, who eventually relented.

Similarly, historians have long argued that the near-monopolization of political authority by early modern English landlords allowed them to actively reshape political institutions in ways that were beneficial to their economic interests.²²² While the classic example is the evolution of tenancy institutions away from tenant security towards greater landlord discretion,²²³ the basic narrative is equally applicable to the gradual deterioration of debtor’s rights in mortgage institutions. Scholars have yet to examine whether, and to what extent, the “political power drives legal change” narrative applies to the specific history of Japanese property institutions, but in general, they have often argued, especially in recent years, that legal change in Japan, whether historical or contemporary, is largely driven by self-interested and economically motivated behavior.²²⁴ All in all, differences in

²¹⁸ OOMS, *supra* note 17, at 166-91; CHAMBLISS, *supra* note 141, at 39-41.

²¹⁹ Zhang, *supra* note 15, at 209-16.

²²⁰ *Id.*

²²¹ *Id.*

²²² See sources cited *supra* note 186.

²²³ *Id.*

²²⁴ See especially OOMS, *supra* note 17, at 319 (“The juridical field of Tokugawa Japan was marked by

sociopolitical status distribution probably go a long way towards explaining the differences between early modern Chinese, English, and Japanese mortgage institutions. As political economists probably would have predicted, political “might” determined, or at least significantly influenced, institutional “right.”

This is a strictly *comparative* explanation. Should we limit the analysis to, for example, China, it would be much more difficult to gauge the relative significance of political status vis-à-vis other potential explanatory factors. As the above analysis repeatedly indicates, distributions of status operated within a complex socioeconomic context that includes, among other factors, the relative social stability of the Chinese countryside, the dominance of customary law over formal law, and the commercialization of the rural economy. Any of these factors arguably facilitated the emergence of debtor-friendly *dian* customs. Apart from status distribution, however, the other factors do not really distinguish China from England and Japan, and were therefore unlikely to have generated institutional *divergence*.

But even with that qualification, status distributions alone would still be an inadequate explanation for institutional divergence: status distributions do not simply “exist” but are necessarily shaped and influenced by other sociopolitical factors. A satisfactory explanation for institutional divergence must ask why Chinese, English and Japanese distributions of sociopolitical status differed so dramatically in the first place. This is the subject of Part IV.

IV. From Culture to Status Distributions

This Part examines the first half of the “cultural norms to status distributions to property institutions” causation chain: the (so far) theoretical claim that status distributions had cultural origins. It makes, therefore, two arguments. First, it argues that the status distribution differences outlined in Part III stemmed from the different social hierarchies accepted in early modern Chinese, English, and Japanese societies. Second, it argues that, at least in the Chinese case, these social hierarchies were distinctly “cultural,” in that they were the product of widespread moral internalization. Similar arguments may also apply to England and Japan but are not explored in detail.

A. Social Norms of Status Distribution

This Section argues for the existence of well-established and fairly clear *norms* of status allocation in all three societies. In other words, each society had its own specific criteria by which sociopolitical authority and stature were allocated. In China, age and generational seniorities were, at least nominally, the dominant criteria, whereas English social hierarchies were largely determined by landed wealth. Japanese villages appeared to embrace a mixture of status determinants, including both landed wealth and hereditary lineage. These social hierarchies not only were

substantive rationalism.”); RAMSEYER, *supra* note 19; Saito, *supra* note 136.

highly durable across time, remaining largely stable during the early modern era, but could also possess remarkable geographic reach. In the Chinese case, a similar set of basic status criteria was applied across numerous macro-regions with varying ecological and economic circumstances. These status criteria do an extremely effective job of explaining the different patterns of sociopolitical status allocation described in Part III.

As an increasing number of scholars have come to realize, the most obvious and prevalent source of hierarchy and inequality in early modern Chinese society—apart from the systemic patriarchal gender inequalities that existed in virtually every major early modern society²²⁵—was the social, political and legal dominance of elder generations over their younger kinsmen.²²⁶ Virtually all sources of legal or quasi-legal regulation in Qing society, including legal codes, government regulations, local customs, or lineage codes of conduct, recognized systematic inequalities between different family members:²²⁷ parents occupied a higher socio-legal position than their offspring, as did uncles over nephews, and elder brothers or cousins over younger ones. Elder members of the household therefore dominated socioeconomic decision making.²²⁸ Mere disobedience or rudeness to a senior relative was a punishable offense. Normatively, wealth did not affect status differences within kinship groups. A wealthy nephew owed the same socio-legal obligations to a penniless uncle as a penniless nephew to a wealthy one. These kinship hierarchies retained much of their vitality even after the Qing state's collapse. Republican legal codes narrowed the range of privileges afforded to senior relatives, but continued to recognize many of them.²²⁹ More importantly, the great majority of local communities continued to enforce traditional kinship hierarchies throughout the Republican era, and many do so even today.²³⁰

²²⁵ Women, particularly senior women, could wield significant influence over household decision making. However, beyond the household, their status largely depended on the status of their household patriarch. SHIGA SHUZO (滋贺秀三), *ZHONGGUO JIAZU FA YUANLI* (中国家族法原理) [THE PRINCIPLES OF FAMILY LAW IN CHINA] 109-10 (Zhang Jianguo & Li Li trans., Falü Press 2003). In fact, the sociopolitical position of women in China seemed to *decline* from the medieval era (circa 900 A.D.) to the Ming and Qing dynasties, a process that was paralleled in England, and possibly in Japan as well. KATHRYN BERNHARDT, *WOMEN AND PROPERTY IN CHINA 960-1949* (1999); SARA MENDELSON & PATRICIA CRAWFORD, *WOMEN IN EARLY MODERN ENGLAND: 1550-1720* (1990); Yukata Yabuta, *Rediscovering Women in Tokugawa Japan*, <http://rijs.fas.harvard.edu/pdfs/yabuta.pdf> (last visited Mar. 31, 2016).

²²⁶ See, e.g., William P. Alford, *The Inscrutable Occidental? Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEXAS L. REV. 915, 931 (1986); Avner Greif & Guido Tabellini, *Cultural and Institutional Bifurcation: China and Europe Compared*, 100(2) AM. ECON. REV.: PAPERS & PROC. 1 (2010); Teemu Ruskola, *The East Asian Legal Tradition*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 257, 263-64 (Mauro Bussani & Ugo Mattei eds., 2012).

²²⁷ See ZHANG, *supra* note 140, at 113-35; 8 ZHONGGUO FAZHI TONGSHI (中国法制通史) [HISTORY OF LAW IN CHINA, hereinafter TONGSHI] 208, 256-57, 508 (Zhang Jinfan ed., 1999).

²²⁸ See SHUZO, *supra* note 225, at 40-46.

²²⁹ See Liu Guoqiang (刘国强), *Qingmo Minguo Shiqi Xingfadian Jianshe Zhong Qinshu Lunli Guanxi De Chuancheng Yu Biange* (清末民国时期刑法典建设中亲属伦理关系的传承与变革) [Continuity and Change in the Treatment of Kinship Ties in Late Qing and Republican Criminal Codes], 2012(4) DAODE YU WENMING (道德与文明) [ENGLISH TRANSLATION] 67.

²³⁰ FENG ERKANG (冯尔康), 18 SHIJI YILAI ZHONGGUO JIAZU DE XIANDAI ZHUANXIANG (18 世纪以来中国家族的现代转向) [THE MODERN TURN OF CHINESE LINEAGES SINCE THE 18TH CENTURY] 214-313 (2005).

This meant that sociopolitical status in these “core” Chinese macroregions should, in theory, have correlated strongly with two factors: first, membership in a large kinship group and, second, generational and age-based seniority. While most local communities seemed to recognize a general gerontocratic principle that elders deserved respect and deference, elder relatives almost always commanded greater respect and deference than elder non-relatives. The highest status individuals in any given village should therefore have been the senior members of large kinship networks, especially those large and consolidated enough to constitute a major economic and political force. Such kinship networks did, in fact, exist in the vast majority of Chinese villages.²³¹

Strong status correlation with seniority generally meant weak correlation with wealth. This was simply because the life-expectancy of wealthy households in early modern rural China was not significantly longer than that of middling or even lower-income ones.²³² Smallholder households had only a moderately smaller chance of producing a high seniority individual than their wealthier neighbors. A true gerontocracy should therefore have produced a class of political elites that was well-stocked with low-income but high-seniority individuals.

These conjectures are largely borne out by historical evidence. In the North China surveys cited above, not only did political leadership correlate weakly with wealth, but it also correlated extremely strongly with generational seniority in a major local lineage. At least 108 of the 128 individuals belonged to the most senior generation of what villagers identified as a “major kinship group.”²³³ Only nine people clearly belonged to a younger generation, whereas the generational standing of the other eleven are unclear.²³⁴ Similarly, existing Qing and Republican lineage regulations from the Lower Yangtze almost uniformly listed seniority among the most important selection criteria for internal leadership positions. Most regulations

²³¹ See KUNG-CHUAN HSIAO, *RURAL CHINA: IMPERIAL CONTROL IN THE NINETEENTH CENTURY* 326 (1960); PHILIP C.C. HUANG, *THE PEASANT FAMILY AND RURAL DEVELOPMENT IN THE YANGZI DELTA, 1350-1988*, at 144-48 (1990); LI WENZHI & JIANG TAIXIN (李文治 & 江太新), *ZHONGGUO ZONGFA ZONGZU ZHI HE ZUTIAN YIZHUANG* (中国宗法宗族制和族田义庄) [LINEAGE INSTITUTIONS AND COMMON PROPERTY IN CHINA] 167-77 (2000). This description is substantially different from Kathryn Bernhardt’s characterization of Lower Yangtze lineages as predominantly “based in urban centers” and only loosely organized in rural areas. BERNHARDT, *supra* note 134, at 19-21. Bernhardt underestimates the social importance and organization power of rural lineage groups, which more recent scholarship by mainland Chinese scholars have explored quite extensively. See Zhang Jinjun (张金俊), *Qingdai Jiangnan Zongzu zai Xiangcun Shehui Kongzhi zhong de Zuoyong* (清代江南宗族在乡村社会控制中的作用) [The Role of Lineages in the Qing Lower Yangtze], 34(3) J. ANHUI NORMAL UNIV. (安徽师范大学学报) 353 (2006).

²³² Lin Wanxiao (林万孝), *Woguo lidai ren de pingjun shouming he yuqi shouming* (我国历代人的平均寿命和预期寿命) [Average Lifespans and Life Expectancy in Chinese Dynasties], 1996(5) SHENGMING YU ZAIHAI (生命与灾害) [HUMAN LIFE & NATURAL DISASTERS] 27; see also YANGFANG HOU (侯杨方), 6 *ZHONGGUO RENKOU SHI* (中国人口史) [A DEMOGRAPHIC HISTORY OF CHINA] (Jianxiang Ge eds., 2005) (summarizing demographic trends in the late imperial and Republican eras).

²³³ See ZHANG, *supra* note 140, at 217-32.

²³⁴ *Id.*

simply identified it as *the* most important criteria.²³⁵ Equally significantly, a large portion of these regulations expressly denounced selecting leaders based on wealth.²³⁶

The early modern English countryside embraced a very different set of status criteria. As noted above, the dominant criteria for higher sociopolitical status was actually landed wealth itself.²³⁷ When and how this norm became social entrenched is somewhat unclear. To some extent, it was buttressed by sociopolitical reorganization after the Black Death,²³⁸ although significant wealth-based stratification certainly predated the Black Death.²³⁹ In any case, it was not until the early modern era that the link between status and wealth became ironclad.

Japanese status criteria resembled English ones to some extent. In most Tokugawa villages, there was apparently both a general norm that political leadership positions were hereditary *and* a widely held belief that they should be held by relatively wealthy individuals.²⁴⁰ Correspondingly, when state vassals initially assigned village headmen and granted “titled peasant” status—which provided the status-holder a formal voice in village politics—in the early Tokugawa, they almost uniformly gave these positions to the wealthiest men in the village under the assumption that the positions would be hereditary.²⁴¹ In theory, the official ban against permanent land alienation meant that the relative wealth of households would change relatively little over time, and therefore that political authority could be *both* hereditary and wealth-based. Lineages were important in Japanese social life but also appeared to select their leaders based on a mixture of wealth and inheritance considerations, rather than by seniority.²⁴²

As discussed above, however, the ban against land alienation was swiftly circumvented in actual commercial practice, which led to the constant reshuffling of relative household wealth. Over time, and especially by the mid-Tokugawa, traditional headmen and titled-peasant households often lost their economic prominence to previously middling or even lower-income households.²⁴³ Consequently, while these traditional political elite were sometimes able to retain

²³⁵ *Id.* at 232-39.

²³⁶ *Id.*

²³⁷ See discussion surrounding *supra* notes 214-216.

²³⁸ ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH 1348-1381*, at 1 (2001).

²³⁹ *Id.* at 9-11.

²⁴⁰ OOMS, *supra* note 17, at 166-91; PRATT, *supra* note 17, at 15-17; SMITH, *supra* note 17, at 50-64. For more general discussion of wealth-based class divisions in Tokugawa village life, see BIX, *supra* note 200; OOMS, *supra* note 17, at 71-124; SMITH, *supra* note 17, at 181-83; VLASTOS, *supra* note 200; and James W. White, *Economic Development and Sociopolitical Unrest in Nineteenth-Century Japan*, 37 *ECON. DEV. & CULTURAL CHANGE* 231 (1989).

²⁴¹ OOMS, *supra* note 17, at 80-82.

²⁴² See LI ZHUO (李卓), *ZHONG RI JIAZU ZHIDU BILIAO YANJIU* (中日家族制度比较研究) [A COMPARATIVE STUDY OF FAMILY INSTITUTIONS IN CHINA AND JAPAN] 170-81, 251-71 (2004) (summarizing the academic literature, and arguing that, especially when compared with Chinese lineages, Japanese lineages were less concerned with blood ties and generational seniority, and more concerned with maintenance of the lineage’s economic assets).

²⁴³ OOMS, *supra* note 17, at 81-82, 125-91; SMITH, *supra* note 17, at 50-64; PRATT, *supra* note 17, at 105-78 (documenting the volatility in the landholdings and wealth of traditional economic elites).

some authority by virtue of their hereditary position, they were also under regular pressure by “nouveau riche” households to share that authority.

The struggle by these newly economically prominent households to gain political status tended to be moderately successful. With some effort, they often acquired positions among the village elite, sometimes at the expense of elite households who had fallen on very hard times, but more often simply by expanding the ranks of the political elite.²⁴⁴ Nonetheless, this was truly a struggle, and demanded skillful political maneuvering and coalition-building. This came in the form of alliances between newly rich households, but also through alliances between these households and smallholder or even landless households.²⁴⁵

The result of all this was that, while Tokugawa village politics were largely a rich-dominated affair, they were also one in which poor households played some substantial role. The semi-hereditary nature of political stature meant that formerly rich households often possessed high status despite severe declines in economic fortunes. In addition, the political calculations of newly rich households also led to the political ascension of some “true” smallholder households under their patronage. Smallholders were, therefore, usually far less numerous within the village council than large landholders, and often of lower status, but could nonetheless occupy some share of political authority.

To summarize, the distributions of sociopolitical status in early modern Chinese, English and Japanese villages were almost exactly what their status distribution norms and criteria would have predicted. Seniority-based kinship hierarchies in rural China led to gerontocracies in which senior smallholders were very well represented. The landholding prerequisites for high political status in England effectively allowed large landholders to monopolize formal sociopolitical authority. Finally, the mixture of wealth-based and hereditary status criteria in Japanese villages led to a weaker form sociopolitical dominance—but still dominance—by large landholders than in the English countryside. One can cite, once again, the “correlation is not causation” maxim, but when the stated status criteria correlate so well with actual status distributions, the burden must be on potential skeptics to identify plausible alternative explanations.

The only alternative explanation that has drawn any serious academic attention is the theory that rice-growing regions tend to have a different social culture than wheat-growing ones: rice agriculture, due to its extremely high labor intensity during seeding and irrigation, is often more collaborative than wheat agriculture, which may incentivize rich households in rice-growing regions to treat their poorer neighbors more deferentially than they would in wheat-growing regions.²⁴⁶

Nonetheless, this theory completely fails to explain the specific comparisons illustrated in this Article. North China and the Lower Yangtze had far more in

²⁴⁴ OOMS, *supra* note 17, at 81-82, 125-91.

²⁴⁵ *Id.* at 161-78.

²⁴⁶ E.g., ZHANG PEIGUO (张佩国), JINDAI JIANGNAN XIANGCUN DIQUAN DE LISHI RENLEIXUE YANJIU (近代江南乡村地权的历史人类学研究) [A HISTORICAL ANTHROPOLOGICAL STUDY OF EARLY MODERN LAND RIGHTS IN THE LOWER YANGTZE] 279-89 (2002); T. Talhelm et al., *Large-Scale Psychological Differences within China Explained by Rice Versus Wheat Agriculture*, 344 SCIENCE 603, 603 (2014).

common than the Lower Yangtze had with Japan, despite the fact that North China was a wheat-growing region, whereas the other two were rice-growing regions. In general, smallholders had much higher cumulative sociopolitical status in North China than they did in Japan, which is the opposite of what the rice-wheat distinction would predict. Moreover, Northern Chinese social hierarchies had almost nothing in common with English ones, despite both being wheat-growing economies. It is far more likely that the sociopolitical strength of smallholders in North China and the Lower Yangtze derived from the seniority-based kinship hierarchies that dominated local society in both macroregions.

But why did Chinese communities embrace these gerontocratic—“Confucian,” if you will—kinship hierarchies in the first place? The following section argues that the primary driving force was, to quote Ellickson, “the internalization of culture.”²⁴⁷ Whether the same was true for English and Japanese status allocation norms is less clear, but at least one prong of the three-pronged institutional comparison made in this Article had distinctly “cultural” foundations.

B. Cultural Internalization and Chinese Kinship Hierarchies

This Section considers how “Confucian” kinship hierarchies came to be embedded in Chinese society in the first place. It argues that they were at least partially the product of widespread moral internalization by the Chinese population. By and large, this claim is uncontroversial among historians. The Mainland Chinese historian Feng Erkang probably speaks for many when he states that Qing society adhered “piously” to the “collectivist” ideal that “one should make their ancestors proud” by closely adhering to Confucian moral values.²⁴⁸ The problem is that these are, to the critical academic eye, *assumptions*, and will probably fail to satisfy social scientists who adhere more to a rational-choice view of social institutions. This Article, however, presents a systematic argument—the first of its kind—for the widespread internalization of kinship hierarchies.

There are three possible explanations for the social dominance of kinship hierarchies in Qing and Republican China. Two are largely “functionalist” or utilitarian, in that they focus on the pragmatic utility of kinship hierarchies, both to individuals and groups. First, they conveyed substantial sociopolitical or economic benefits on those who self-organized into kinship networks, and therefore spread and were sustained “organically” from the bottom up. Second, they were encouraged as a matter of state policy. The third, non-functionalist possibility is that kinship hierarchies were morally internalized on a large scale, and therefore spread simply

²⁴⁷ Ellickson, *supra* note 35, at 45.

²⁴⁸ FENG, *supra* note 130, at 12; *see also* DAVID FAURE, EMPEROR AND ANCESTOR: STATE AND LINEAGE IN SOUTH CHINA 6 (2007) (discussing how Zhu Xi’s neo-Confucianism was “put into practice” by South China lineage building); ZHENG ZHENMAN, FAMILY LINEAGE ORGANIZATION AND SOCIAL CHANGE IN MING AND QING FUJIAN 286 (Michael Szonyi trans., 2000) (describing lineage organizational principles as an “ethics”); LI & JIANG, *supra* note 231, at 57-63, 111-17 (discussing possible changes in the “lineage ethics” of the Chinese population).

because people believed that they were a morally desirable or “natural” means of social organization.

Common sense suggests that all three mechanisms probably coexisted to some extent. The more pertinent and far more difficult question is whether any of them were *necessary conditions* for the social dominance of kinship hierarchies. This is best answered through examining the *longue durée* history of kinship hierarchies. By the Qing and Republic, the social dominance of “Confucian” kinship hierarchies was stable and rarely challenged.²⁴⁹ For the purposes of this section, however, the more significant question is how they became dominant in the first place, which can only be answered by studying earlier eras—as early as the eleventh century—when kinship networks were still emerging and spreading.

The following subsections evaluate the three major potential explanations—bottom-up socioeconomic demand, top-down political incentivizing, and widespread cultural internalization—one-by-one, ultimately arguing that the basic historical chronology of kinship hierarchies is, in all likelihood, inexplicable if widespread cultural internalization did not exist.

1. “Bottom-Up” Socioeconomic Demand

Few would question that bottom-up socioeconomic demand played a crucial role. In the end, the decision to form kinship networks had to be made and executed—willingly—by local communities and households, not by increasingly remote central policymakers, and not by the moralistic urgings of Confucian scholars. The more challenging question is to what extent the latter two factors affected that decision, whether by shaping economic and political incentives, or by imposing a sense of moral propriety.

Historians generally agree that, prior to the Song Dynasty, the great majority of large, organized kinship networks belonged to major aristocratic houses who dominated the central government and resided in major urban centers.²⁵⁰ It was not

²⁴⁹ See CHEN ZHIPING (陈支平), *JIN 500 NIAN LAI FUJIAN DE JIAZU SHEHUI YU WENHUA* (近 500 年来福建的家族社会与文化) [LINEAGE SOCIETY AND CULTURE IN FUJIAN OVER THE PAST 500 YEARS] (1991); FENG ET AL., *supra* note 212, at 318-25; LIN Ji (林济), *CHANGJIANG ZHONGYOU ZONGZU SHEHUI JI QI BIANQIAN: MING QING ZHI 1949 NIAN* (长江中游宗族社会及其变迁: 明清至 1949 年) [THE LINEAGE SOCIETY OF THE MIDDLE YANGTZE REGION AND ITS EVOLUTION: FROM THE MING AND QING TO 1949] (1999); WANG HUNING (王沪宁), *DANGDAI ZHONGGUO CUNLUO JIAZU WENHUA* (当代中国村落家族文化) [LINEAGE CULTURE IN CONTEMPORARY CHINESE VILLAGES] 24 (1991); XU YANGJIE (徐扬杰), *ZHONGGUO JIAZU ZHIDU SHI* (中国家族制度史) [A HISTORY OF LINEAGE INSTITUTIONS IN CHINA] 459 (1992); Tang Lixing (唐力行), *20 Shiji Shangbanye Zhongguo Zongzu Zuzhi de Taishi-Yi Huizhou Zongzu wei Duixiang de Lishi Kaocha* (20 世纪上半叶中国宗族组织的态势-以徽州宗族为对象的历史考察) [The Trends in Chinese Lineage Organization in the First Half of the 20th Century—A Historical Study on the Lineages of Huizhou], 34 J. SHANGHAI NORMAL UNIV. 103 (2005); Yang Wanrong (杨婉荣), *Shilun Minguo Shiqi Nongcun Zongzu de Bianqian* (试论民国时期农村宗族的变迁) [On the Evolution of Rural Lineages in the Republican Era], 2002 GUANGDONG SOC. SCI. 103.

²⁵⁰ For a summary of the general narrative, see FENG ET AL., *supra* note 212, at 164-289; INOUE, *supra* note 212; XU, *supra* note 249; and CHANG JIANHUA (常建华), *ZONGZU ZHI* (宗族志) [A HISTORY OF LINEAGES] (1998). For a historical periodization of lineage development, see KE CHANGJI (中国农村古代宗社史)

until the tenth or eleventh centuries that they began to trickle down, with limited and somewhat reluctant government approval,²⁵¹ into the general population. Private lineage-formation seemed to speed up during the twelfth century in both North China and the Lower Yangtze, and then again after the Mongol occupation ended in the fourteenth century.²⁵² By the fifteenth and sixteenth centuries, expansive kinship hierarchies were highly prevalent in North China and the Lower Yangtze and had begun to emerge *en masse* in South China as well.²⁵³ By at least the early eighteenth century, they were a cornerstone of social life in virtually all core Chinese macroregions.²⁵⁴

During the Northern Song, a substantial share of lineages were created by new generations of high-level degree holders and officials who hoped to enshrine their historical legacy through lineage creation, but as time passed, kinship networks became more “plebian” in origin.²⁵⁵ The percentage of the population that held high-level degrees plunged after the Song, and then plunged again from the Ming to the Qing.²⁵⁶ At the same time, organized kinship networks were spreading rapidly across the country. Inevitably, a significant majority of these kinship networks had to operate without any substantive ties to a *jinshi* degree-holder, or even a *juren*.

Correspondingly, rationales for creating kinship networks tended to “descend” from enshrining one’s historical legacy to more straightforward calculations of socioeconomic utility. In any macroregion, self-organizing into large kinship networks conveyed some fairly obvious and significant advantages: resource sharing, labor pooling, better information sharing, and a stronger capacity for collective action—all leading to higher economic productivity, more orderly social life within the group, and stronger responses to external challenges.²⁵⁷ In particular, once a few established kinship networks had emerged in a region, the pressure intensified on other households to form their own kinship networks, or else be at a considerable disadvantage in all dimensions of social and economic life.²⁵⁸

[RURAL COMMUNES IN CLASSICAL CHINESE HISTORY] (1988) (presenting a historical periodization of lineage development).

²⁵¹ See discussion *infra* pp.56-60.

²⁵² FENG ET AL., *supra* note 212; INOUE, *supra* note 212.

²⁵³ FAURE, *supra* note 248; MAURICE FREEDMAN, CHINESE LINEAGE AND SOCIETY: FUKIEN AND KWANGTUNG (1966); MICHAEL SZONYI, PRACTICING KINSHIP: LINEAGE AND DESCENT IN LATE IMPERIAL CHINA (2002); ZHENG, *supra* note 248, at 71-142.

²⁵⁴ See CHRISTOPHER M. ISETT, STATE, PEASANT, AND MERCHANT IN QING MANCHURIA, 1644-1862 (2007).

²⁵⁵ This process is discussed in, among other works, HILARY J. BEATTIE, LAND AND LINEAGE IN CHINA: A STUDY OF T'UNG-CH'ENG COUNTY, ANHWEI, IN THE MING AND CH'ING DYNASTIES (1979); BEVERLY J. BOSSLER, POWERFUL RELATIONS: KINSHIP, STATUS, AND STATE IN SUNG CHINA (1996); ROBERT H. HYMES, STATESMEN AND GENTLEMEN: THE ELITE OF FU-CHOU, CHIANG-HSI, IN NORTHERN AND SOUTHERN SUNG (1986); and Robert M. Hartwell, *Demographic, Political, and Social Transformations of China*, 42 HARV. J. ASIATIC STUD. 365 (1982).

²⁵⁶ BENJAMIN ELMAN, A CULTURAL HISTORY OF CIVIL EXAMINATIONS IN LATE IMPERIAL CHINA (2000); Benjamin A. Elman, *Political, Social, and Cultural Reproduction via Civil Service Examinations in Late Imperial China*, 50 J. ASIAN STUD. 77, 14-15 (1991).

²⁵⁷ FAURE, *supra* note 248; SZONYI, *supra* note 253.

²⁵⁸ NG CHIN-KEONG, TRADE AND SOCIETY: THE AMOY NETWORK ON THE CHINA COAST, 1683-1735, at 31 (1983).

But while socioeconomic utility may explain the emergence and proliferation of kinship *networks*, it cannot explain why, by at least the later Ming, most of them had adopted an internal *hierarchy* based primarily on age and generational seniority.²⁵⁹ Utilitarian considerations actually seem to urge *against* adopting such hierarchies. Seniority-based hierarchies are so deeply non-meritocratic that their material functionality is highly questionable. While one may quibble about whether age and experience often lead to wisdom, the unavoidable fact is that there were vastly more effective ways of putting the most capable, however defined, people in charge. Educational level, economic success, popular support, and moral reputation—any of these would have been a more reasonable proxy for leadership qualities than age or patrilineal proximity. There are, in fact, many signs that some kinship networks were seriously concerned about the amount of meritocracy within their internal governance structures. Many, if not most, kinship networks gave exalted status to people who held *juren* or *jinshi* degrees.²⁶⁰ Others expressed a preference for leaders who “possessed a good reputation among relatives,” or were “known for good sense and integrity.”²⁶¹

Neither of these mechanisms, however, did much to challenge straightforward ranking by age and generation over the long run. After the Ming, and especially during the Qing, higher-level degrees were extraordinarily hard to come by.²⁶² Consequently, at any given time, the great majority of kinship networks possessed no living *juren* or *jinshi*. Considerations of social reputation, on the other hand, were generally subsumed within the age hierarchy and only used, if at all, to differentiate between people of comparable seniority.²⁶³ However we look at it, Chinese kinship networks usually were organized around predominantly non-meritocratic principles.

Of course, meritocracy is not always equivalent to socioeconomic efficiency. There are a number of potentially overriding concerns, especially political stability and the cost of leadership transitions. Pure meritocracy can create frequent leadership changes and may cause significant inefficiencies if the cost of transitioning is high—especially when there is considerable subjectivity and room for disagreement involved in evaluating “merit.”²⁶⁴ In comparison, ranking by seniority can be a more objective, simpler, and therefore low-cost way of selecting leaders. But even so, this suggests that, at most, kinship hierarchies may have had some redeeming qualities,

²⁵⁹ FENG, *supra* note 230, at 95-96, 111-13, 248-56; ZHU YONG (朱勇), QINGDAI ZONGFA YANJIU (清代宗族法研究) [STUDIES ON LINEAGE RITUALS IN THE QING] (1987).

²⁶⁰ CH’U, *supra* note 157, at 168-80.

²⁶¹ E.g., NANJIN JIANGSHI MINFANG FAXIANG PU (南津蒋氏敏房发祥谱) [FAMILY TREE OF SOUTHERN JIN JIANG FAMILY MINFANG] (1890) (on file with author); SIMING ZHUSHI ZHIPU (四明朱氏支谱) [FAMILY TREE OF SIMING ZHU FAMILY] (1936) (on file with author); YAONAN DINGSHAN FANGSHI ZONGPU (姚南丁山方氏宗谱) [FAMILY TREE OF YAONAN DINGSHAN FANG FAMILY] (1921) (on file with author); YONGSHANG TUSHI ZONGPU (甬上屠氏宗谱) [FAMILY TREE OF YONGSHANG TU FAMILY] (1919) (on file with author); BIANSHI ZONGPU (边氏宗谱) [FAMILY TREE OF BIAN FAMILY] (1874) (on file with author).

²⁶² Elman, *supra* note 256, at 14-15; MATTHEW H. SOMMER, SEX, LAW AND SOCIETY IN LATE IMPERIAL CHINA 8 (2000) (“By the eighteenth century, all but a tiny percentage of the population could be considered free commoners.”).

²⁶³ This is true of all lineage regulations cited in *supra* note 261.

²⁶⁴ See Zhang, *supra* note 7.

and falls far short of showing that they were consistently preferable to more meritocratic selection.

Quite the opposite, the long-term socioeconomic consequences of gerontocratic social ordering in late imperial China were very likely negative. As argued above, its predominance helped create and sustain a set of property institutions that were distinctly hostile to land accumulation by the economic elite. Over time, this most probably led to lower agricultural productivity, but more importantly, it cut off entrepreneurial families from a crucial source of capital accumulation, and may very well have contributed to China's very slow pace of industrialization in the late nineteenth and early twentieth century.²⁶⁵

At a more micro level, there is evidence from South China that a substantial minority of lineages that had amassed considerable common property during the eighteenth and nineteenth centuries—property that was owned by the lineage, rather than any specific household—became so concerned about the negative financial consequences that non-meritocratic governance generated that they eventually switched to a model where the wealthiest households in the lineage were solely responsible for managing the common property.²⁶⁶ Smallholders still retained a strong voice in other aspects of lineage governance but apparently recognized their own limitations in managing large estates.²⁶⁷ This suggests that the economic cost of ineffective leadership was often high, which may explain why, in North China and the Lower and Middle Yangtze, lineage ownership of common property was actually very limited.

Given all this, the truly curious thing about Chinese kinship hierarchies was, as noted in Part II, their uniformity and consistency across highly diverse geographic, economic, and social terrain. During the late Ming, Qing, and Republic, a period of some 500 years, they were the predominant organizational principle almost everywhere, whether wheat-growing or rice-growing, silk-producing or cotton-producing, mountainous or flat, humid or arid, densely populated or sparsely, interior or frontier.²⁶⁸ It is not terribly difficult to imagine *some* economic or ecological scenario where kinship hierarchies were a socioeconomically optimal institution, but that does nothing to explain their near-universal appeal. A society-wide phenomenon deserves a society-wide explanation, especially under these circumstances. As the previous paragraphs show, the strongly non-meritocratic nature of kinship hierarchies makes it extremely difficult to argue that they were almost always, or perhaps even frequently, socioeconomically desirable.

If we limited our analytical timeframe to the late Qing and early Republic, we could plausibly argue that the longevity of non-meritocratic hierarchies derived simply from path-dependency or from institutional capture by smallholders. But this argument clearly cannot apply to the Song and Yuan, when extended kinship networks were still a relative novelty. In fact, for much of the Song, Yuan, and early

²⁶⁵ See ZHANG, *supra* note 140, at 25-33.

²⁶⁶ ZHENG, *supra* note 248. The fact that traditional kinship hierarchies could be eroded by economic concerns does not imply that economic forces were also responsible for their establishment.

²⁶⁷ *Id.*

²⁶⁸ See discussion surrounding *supra* note 259.

Ming, large numbers of smaller landowners and tenants still lived under fairly feudal conditions of personal bondage to large landlords,²⁶⁹ which suggests that their social clout and influence was probably very limited. If lower-income households received most of their social status from kinship hierarchies, then one has to question why wealthier households would agree to such hierarchies in the first place, especially when they often produced questionable leadership.

The two most plausible explanations, as discussed above, are political incentives issued by the central government and widespread moral internalization of related values. Either could have provided a sufficiently powerful exogenous shock to generate normative uniformity across multiple and highly diverse economic macroregions. But was it one of the two, or both?

2. State Policy

The interaction between government policy and the private establishment of “Confucian” lineages during the Song, Ming and Qing is well-documented. Throughout these dynasties, the central government maintained criminal codes that, as discussed above, afford unequal legal status to senior and junior relatives, and enforced basic norms of filial piety.²⁷⁰ For the most part, these were straightforward continuations of earlier dynastic legal codes.²⁷¹

Compared to earlier dynasties, however, the Song government and its successors were increasingly willing to recognize the private establishment of extended kinship hierarchies by officials who possessed no hereditary title and, in later dynasties, by commoners. Pre-Song governments generally prohibited the establishment of kinship networks beyond a very narrow circle of hereditary nobility or high-level officials.²⁷² Prior to the eleventh century, non-aristocratic officials and commoners were generally prohibited from engaging in systemized ancestor worship beyond their father and grandfather.²⁷³ Apparently, central authorities preferred that commoner family networks remain small, unorganized, and without the kind of social authority that could realistically obstruct government power.²⁷⁴

In 1041, however, the Song government tentatively allowed all government officials, including those without any hereditary title, to engage in systemized ancestor worship “according to ancient rituals.”²⁷⁵ This sent a clear message that the government was interested in loosening the traditional aristocratic monopoly over large-scale ancestor worship and extended kinship hierarchies. By 1108, a clearer set of regulations had been issued, which allowed all officials of the third rank or higher to worship five generations of ancestors, officials of the eighth to fourth rank to worship three generations, and all other officials and commoners to worship two

²⁶⁹ McDermott, *supra* note 133.

²⁷⁰ See discussion surrounding *supra* notes 226-230.

²⁷¹ See Zhang, *supra* note 227, 113-35.

²⁷² FENG ERKANG ET AL., *supra* note 212, at 93-163.

²⁷³ *Id.* at 170-71.

²⁷⁴ LI & JIANG, *supra* note 231, at 27-32.

²⁷⁵ FENG ERKANG ET AL., *supra* note 212, at 170.

generations—that is, the patriarch’s father and grandfather.²⁷⁶ The construction of ancestral worship halls needed special permission from the emperor, and only a handful were authorized throughout the Song.²⁷⁷

This basic legal framework went largely unchanged for several centuries, until the Ming.²⁷⁸ In 1384, following a series of petitions by local county magistrates, all commoners received the right to worship three generations of ancestors, which expanded their formally recognized kinship networks by several times, while all officials, regardless of rank, could worship four—and only four—generations.²⁷⁹ More radical change came in 1536, when the Ming Court authorized all commoners and officials to worship up to five generations.²⁸⁰ Moreover, an unpublished internal document apparently *required* all ranked officials to construct ancestral worship halls.²⁸¹ Commoners, on the other hand, were still formally forbidden from constructing ancestral halls.

By the early Qing, the central government had gone from merely permitting the formation of large commoner kinship networks to actively promoting them. The Kangxi and Yongzheng emperors issued several edicts that praised both the emergence of extended kinship networks and their close adherence to “proper” Confucian norms of seniority and status.²⁸² To further incentivize the creation of extended kinship hierarchies, the Qing government regularly granted symbolic economic favors to kinship networks that displayed particularly “virtuous” behavior: “five generations living under one roof,” for example.²⁸³

At the same time, the government ramped up its legal efforts to recognize and protect lineage corporate property. Embezzlement of lineage common property was punishable by either temporary incarceration for minor offenses or permanent banishment for major ones.²⁸⁴ Moreover, if a lineage leader committed a criminal offense, whatever economic penalty the government imposed would not touch upon

²⁷⁶ SONG SHI (宋史) [THE OFFICIAL HISTORY OF THE SONG], ch. 109 (Li Zhi no. 12), <http://gj.zdic.net/archive.php?aid=7760>.

²⁷⁷ FENG ET AL., *supra* note 212, at 171.

²⁷⁸ *Id.* at 171–72.

²⁷⁹ Chang Jianhua (常建华), *Mingdai Zongzu Cimiao Jizu Lizhi ji Qi Yanbian* (明代宗族祠庙祭祖礼制及其变迁) [*The Evolution of Ancestor Worship Practices in Ming Dynasty Lineages*], 2001(3) NANKAI XUEBAO (南开学报) [ACAD. J. OF NANKAI U.] 61.

²⁸⁰ Xia Yan (夏言), *Ling Chenmin De Ji Shizu Li Jiamiao Shu* (令臣民得祭始祖立家庙疏) [A Petition Asking that All Subjects Be Allowed to Worship their Founding Ancestors], in GUIZHOU WENJI (贵州文集) [WRITINGS OF GUIZHOU], ch. 11 (1574, Microfilm, Peking University Library); ZHU GUOZHEN (朱国桢), HUANG MING DAZHENG JI (皇明大政记) [A COLLECTION OF RIGHTEOUS WRITINGS IN AN ERA OF A BENEVOLENT EMPEROR], ch. 28-2 (Qilu Shushe ed., 1997). But see INOUE, *supra* note 212, at 122–26, for skepticism on whether Xia Yan’s proposal was really implemented by official decree.

²⁸¹ JI HUANG ET AL. (嵇璜), QINDING XU WENXIAN TONGKAO (钦定续文献通考) [OFFICIAL SEQUEL TO THE EXEGESIS OF HISTORICAL DOCUMENTS], ch. 115 (1784, microfilm, Zhejiang Univ. Library).

²⁸² QINDING DAQING HUIDIAN SHILI (钦定大清会典事例) [OFFICIAL APPLICATIONS OF THE DAQING HUIDIAN], ch. 397 (Shangwu Press ed., 1909). See Chang Jianhua (常建华), *Lun Shengyu Guangxun yu Qingdai de Xiaozhi* (论圣谕广训与清代的孝制) [*On the Shengyu Guangxun and the Use of Filial Piety as a Governing Tool in the Qing*], 1988(1) NANKAI SHIXUE (南开史学) [NANKAI UNIV. HIST. STUD.] 35, for analysis.

²⁸³ FENG, *supra* note 230, at 52.

²⁸⁴ QINDING DAQING HUIDIAN SHILI (钦定大清会典) [OFFICIAL DAQING HUIDIAN] (1909), ch. 755.

any common property he was managing.²⁸⁵ Effectively, the lineage had acquired some degree of legal personhood.

The Qing government's unusual enthusiasm for private lineage formation may have had something to do with its unique political circumstances. Being a conquest dynasty, its Manchu rulers were keen to find ways of pacifying their predominantly Han population.²⁸⁶ Openly embracing "Confucian" virtues such as filial piety was one potentially effective way of doing this. In addition, the Qing also adopted an extremely *laissez faire* approach towards local governance, keeping its bureaucratic apparatus at a very small size despite rapid population growth.²⁸⁷ Encouraging the formation of self-regulating kinship hierarchies may simply have been a way to compensate for the government's own administrative limitations.

Given all this, is it plausible to argue that the widespread embracement of Confucian kinship hierarchies by private kinship networks during the Second Millennium was simply a direct response to legal or economic incentives provided by the government? In short, probably not. First of all, the Song and Ming governments never actively embraced the idea that commoners should be forming their own extended kinship hierarchies. Rather, they seemed merely to permit it—indeed rather grudgingly—and their regulatory efforts generally fell far behind the actual proliferation of private ancestor worship in local social life.

The Song government, as discussed above, never allowed lower-level officials and commoners to worship more than two generations of ancestors and expressly forbade them from constructing ancestor worship halls. Local documents indicate, however, that not only did large numbers of commoner lineages worship far more than two generations of ancestors, but many, perhaps most, of them had constructed private worship halls.²⁸⁸ This was increasingly the case throughout the Song, Yuan, and early Ming.²⁸⁹ Thus, when the Ming government finally allowed commoners to worship five generations of ancestors in 1536, it was simply belatedly recognizing and legitimizing what had long been an extremely common social practice.²⁹⁰

²⁸⁵ FENG, *supra* note 230, at 54.

²⁸⁶ See WILLIAM T. ROWE, CHINA'S LAST EMPIRE: THE GREAT QING 11-62 (2009).

²⁸⁷ On the limited size and reach of the Qing bureaucracy, see CH'U, *supra* note 156; ELMAN, *supra* note 256; REED, *supra* note 156; ROWE, *supra* note 286; and JOHN R. WATT, THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA (1972). On examination degree quotas, see ELMAN, *supra* note 256.

²⁸⁸ Examples are drawn from FENG ET AL., *supra* note 212, at 172-76.

²⁸⁹ LI & JIANG, *supra* note 231, at 35-71; INOUE, *supra* note 212, at 26-74.

²⁹⁰ It is not difficult to understand why the imperial government was often reluctant to extend ancestor worship rights to commoners. People who have exclusive privileges are rarely eager to share them with others. But perhaps more importantly, such extension amounted, effectively, to a conferral of social authority and privilege from the central political elite to commoners, and would erode their control over local affairs. The very compelling counterargument to all these concerns was, of course, that state power in localities would shrink inevitably and, therefore, that the state might as well boost its public legitimacy and popularity by granting extended worship rights. See INOUE, *supra* note 212, at 106-07, 123-24; HAMASHIMA ATSUTOSHI, MINDAI KOUNAN NOUSON SHIAKAI NO KENKYU [RESEARCH ON MING DYNASTY JIANGNAN RURAL SOCIETY] (1982); Chang Jianghua (常建华), *Yuandai Muci Jizu Wenti Chutan* (元代墓祠祭祖问题初探) [A Preliminary Study on Yuan Dynasty Ancestor Worship Practices], in ZHONGGUO SHEHUI WENHUA SHI DUBEN (中国社会文化史读本) [THE CHINESE SOCIAL AND CULTURAL HISTORY READER] 260 (Liu Yonghua ed.,

The Qing government was often more active in promoting private establishment of kinship hierarchies, but was also prone to changes of heart. In 1726, it issued an edict stating that large local lineages should elect a *zuzheng*, who would wield government-recognized arbitration and policing powers and could rely on local magistrates to help enforce his decisions.²⁹¹ The rationale seemed to be that this would allow the state to more effectively harness the organizational capacities of local lineages. Within a few decades, however, it had become abundantly clear that this formal delegation of power simply emboldened lineages to further expand the scope of their self-governance, and therefore weakened government control. In 1789, the Qianlong emperor abolished the position entirely.²⁹²

There are other reasons to doubt that state advocacy and encouragement had much to do with the continued proliferation of kinship hierarchies during the Qing. First and foremost, the government was, as discussed above, probably not powerful enough to substantively intervene with communal and lineage self-governance.²⁹³ Perhaps reflecting the state's limited capacity, the material incentives it offered to "virtuous" lineages were largely symbolic, conveying a small amount of prestige, but no significant economic or political benefit.²⁹⁴ It is hard to imagine them having more than a peripheral impact on the private creation of kinship hierarchies. In fact, the social dominance of large kinship networks was already very much secure by the early Qing, at least the Lower Yangtze and North China. It was still a work-in-progress in the frontier regions of Fujian or Guangdong, but the state's administrative capacity was even weaker there than in core macroregions.²⁹⁵ Ultimately, it seems unlikely that late imperial state activity really did much to directly stimulate the spread of kinship hierarchies.

3. Values and Moral Internalization

The previous two subsections have argued that socioeconomic and political incentives alone cannot satisfactorily explain the rapid proliferation of large kinship hierarchies. The inadequacy of these functionalist or utilitarian explanations suggests that kinship hierarchies were also sustained by some form of moral internalization,

2011); Xu Huailin (許懷林), *Chenshi Jiazu de Wajie ji "Yimen" de Yingxiang* (陳氏家族的瓦解與義門的影響) [*The Disintegration of the Chen Lineage and the Influence of the "Yimen"*], 1994(2) ZHONGGUO SHI YANJIU (中國史研究) [STUD. CHINESE HIST.] 56 (discussing the Song government's role in limiting lineage development); XU MAOMING (徐茂明), JIANGNAN SHISHEN YU JIANGNAN SHEHUI (1368-1911 NIAN) (江南士紳與江南社會(1368-1911年)) [THE JIANGNAN GENTRY AND JIANGNAN SOCIETY 1368-1911] 72-77, 84-95 (2004) (discussing Ming and Qing efforts to curb local gentry lineages).

²⁹¹ 19 QINGCHAO WENXIAN TONGKAO (清朝文獻通考) [COMPREHENSIVE STUDY OF QING HISTORICAL DOCUMENTS] 5031 (1988).

²⁹² 25 QING SHILU (清實錄) [TRUE RECORDS OF THE QING] 1097, 1101 (1986).

²⁹³ This was true even in major urban centers. See Christine Moll-Murata, *Chinese Guilds from the Seventeenth to Twentieth Centuries*, 53 INT'L REV. OF SOC. HIST. 213 (2008).

²⁹⁴ FENG, *supra* note 230, at 52.

²⁹⁵ See FAURE, *supra* note 248; SUSAN MANN, LOCAL MERCHANTS AND THE CHINESE BUREAUCRACY, 1750-1950 (1987); ROBERT MARKS, TIGERS, RICE, SILK, AND SILT: ENVIRONMENT AND ECONOMY IN LATE IMPERIAL SOUTH CHINA 226-48 (2006.).

wherein people justified seniority-based inequality through moral reasoning, rather than through calculations of socioeconomic welfare or political interest. To some extent, they had to think it was “the right thing to do.” The remainder of this section provides “positive” evidence that widespread moral internalization among the general population had probably occurred as early as the Southern Song.

Basically, this relies on both the volume and uniformity of late imperial private writings on kinship relations and ancestor worship. As many have observed, there was an explosion, relative to immediately preceding eras, of such writings in the Southern Song, and again in the Ming and Qing, and then again in the early Republic.²⁹⁶ Virtually all of these writings speak of the basic principle that senior relatives possessed higher social status than junior ones in highly and exclusively moral terms.

As with most discussions of late imperial social morality, the major Song Neo-Confucian scholar-officials—Zhang Zai, Cheng Yi, Zhu Xi, and so on—are a good place to start. Zhu Xi, in particular, zealously promoted the establishment of large, private kinship networks organized according to traditional Confucian seniority principles.²⁹⁷ His Northern Song predecessors uniformly believed, despite their otherwise deep and sometimes irreconcilable philosophical differences, that “privileging elders” (“zun gaonian”) was a fundamental principle of human morality.²⁹⁸ Indeed, virtually all major Song statesmen who left some written record at some point found it necessary or desirable to morally endorse extended kinship networks organized according to Confucian hierarchies and principles.²⁹⁹

If we descend into the much more diverse world of non-academic private writings—for example, personal eulogies and lineage registries—the largely unconditional acceptance of kinship hierarchies continues to be a basic theme.³⁰⁰ The style and narrative focus of eulogies and registries changed considerably from the

²⁹⁶ See, e.g., FENG ET AL., *supra* note 212, at 195-208; LI & JIANG, *supra* note 231, at 32-35; BOSSLER, *supra* note 255 (focusing on the proliferation of eulogies in the Song); FEI CHENGKANG ET AL. (费成康), ZHONGGUO DE JIAFA ZUGUI (中国的家法族规) [FAMILY AND CLAN REGULATIONS IN CHINA] 14-25 (1998); XU (1992); ZHU (1987).

²⁹⁷ ZHU XI (朱熹), JIALI (家禮) [FAMILY RITUALS] (Wang Yanjun & Wang Guangzhao eds., 1999).

²⁹⁸ ZHANG ZAI JI (張載集) [COLLECTED WRITINGS OF ZHANG ZAI] 258-59 (Zhonghua Shuju ed., 1978); 2 ER CHENG JI (二程集) [COLLECTED WRITINGS OF CHENG HAO AND CHENG YI] 350-52 (Zhonghua Shuju ed., 1981); Qiu Hansheng (邱汉生), *Songmin Lixue yu Zongfa Sixiang* (宋明理学与宗法思想) [Song-Ming Neo-Confucianism and Lineage Rituals and Thought], 1979(11) LISHI YANJIU (历史研究) [HIST. STUD.] 63.

²⁹⁹ On Fan Zhongyan (范仲淹), see Bian Guofeng (卞国凤), *Fan Zhongyan Zongzu Fuli Sixiang Yanjiu* (范仲淹宗族福利思想研究) [A Study on Fan Zhongyan's Thoughts on Lineage Welfare] (unpublished M.A. Thesis, Jilin Univ., 2004). On Wang Anshi (王安石), see Shi Yingying (石樱樱), *Wang Anshi Jingxin yu Jingshi Sixiang Lunshu* (王安石經心與經世思想述論) [On Wang Anshi's Ideology of “Heart-Cultivation” and “Social Cultivation”] (unpublished Ph.D. Thesis, Pengjia Univ., 2011). On Sima Guang (司马光), see Ma Jialu (马加路), *Sima Guang Shehui Sixiang Tanxi* (司马光社会思想探析) [An Exploration of Sima Guang's Social Thought] (unpublished M.A. Thesis, Qingdao Univ., 2009).

³⁰⁰ See sources cited at *supra* note 296.

Tang to the Song, and underwent further changes during the Song, but the praising of individuals for filial obedience to elder relatives remained consistent.³⁰¹

The observations drawn above could basically be made of any late imperial dynasty. Ming and Qing scholars almost uniformly shared the basic conviction that inequality and some measure of sociopolitical dominance between senior and junior relatives was simply the natural order of things. For all their philosophical differences, Wang Yangming echoed Zhu Xi very closely when he wrote that “the different statuses of senior and junior relatives” had been a fundamental and self-evident natural principle since the age of Yao and Shun.³⁰² Even scholars who expressly challenged the Neo-Confucian mainstream generally embraced these basic “human principles” (“renlun”): Gu Yanwu, Huang Zongxi and Wang Fuzhi during the Ming-Qing transition, and any number of “Hanxue” advocates during the Qing.³⁰³ The famed contrarian intellectual Li Zhi, who relentlessly accused most Neo-Confucian scholars of being thorough “fakes,”³⁰⁴ nonetheless endorsed filial piety as a desirable moral principle.³⁰⁵ In fact, it really was not until the early twentieth century that serious skepticism towards kinship hierarchies began to emerge among the intellectual elite,³⁰⁶ but by then kinship hierarchies were so deeply entrenched in Chinese society that such skepticism had very little rural social effect until the Communist era.³⁰⁷

Throughout these dynasties, an increasing number of kinship networks began compiling genealogies and internal regulations, which were natural venues for

³⁰¹ Buddhism and Daoism did, of course, compete with Confucianism, sometimes violently, for political and social influence during much of the first millennium, but by the Song they had largely retreated from the realm of high politics, and sought out a more peaceful coexistent in local religious and cultural life. See RICHARD VON GLAHN, *THE SINISTER WAY: THE DIVINE AND THE DEMONIC IN CHINESE RELIGIOUS CULTURE* (2004); JACQUES GERNET, *BUDDHISM IN CHINESE SOCIETY: AN ECONOMIC HISTORY FROM THE FIFTH TO THE TENTH CENTURIES* (Franciscus Verellen trans., 1995); BAREND TER HAAR, *THE WHITE LOTUS TEACHINGS IN CHINESE RELIGIOUS HISTORY* 16-63 (1992); VALERIE HANSEN, *CHANGING GODS IN MEDIEVAL CHINA, 1127-1276* (1990).

³⁰² Wu Tianxia (吴天霞), *Chuantong Xiaodao de Chuancheng yu Yanbian* (传统孝道的传承及演变) [The Inheritance and Evolution of Traditional Filial Piety] (unpublished M.A. Thesis, Shaanxi Normal Univ., 2008) (demonstrating the basic continuity between Zhu and Wang in their ideas on filial piety and kinship hierarchies).

³⁰³ Zhou Qirong (周启荣), *Rujia Lijiao Sichao de Xingqi yu Qingdai Kaozheng Xue* (儒家礼教思潮的兴起与清代考证学) [The Rise of Confucian Ritualism and Evidential Scholarship of the Qing], 2011(3) NANJING SHIDA XUEBAO (南京师大学报) [ACADEMIC J. NANJING NORMAL UNIV.] 7. For a more general survey, see LU BAOQIAN (陆宝千), *QINGDAI SIXIANG SHI* (清代思想史) [INTELLECTUAL HISTORY OF THE QING] (2009).

³⁰⁴ PAULINE C. LEE, *LI ZHI, CONFUCIANISM, AND THE VIRTUE OF DESIRE* (2012).

³⁰⁵ These writings are summarized at Shi Jiaoyu (石教余), *Lun “Yiduan” Li Zhi de Chuantong Sixiang* (论“异端”李贽的传统思想) [The Traditional Thought of the “Heretic” Li Zhi], 16(2) CHONGQING ZHIYE JISHU XUEYUAN XUEBAO (重庆职业技术学院学报) [J. CHONGQING TECH. INST.] 78 (2007).

³⁰⁶ For a general summary, see Yuan Hongtao (袁红涛), *Zai “Guojia” yu “Geren” Zhijian-Lun 20 Shiji Chu de Zongzu Pipan* (在“国家”与“个人”之间-论20世纪初的宗教批判) [Between “Country” and “Individual”-On the Criticism of Lineages in the Early 20th Century], 119 TIANFU XINLUN (天府新论) [NEW OPINIONS FROM SICHUAN] 119 (2004).

³⁰⁷ See PRASENJIT DUARA, *CULTURE, POWER AND THE STATE: RURAL NORTH CHINA, 1900-1942*, at 169-73 (1988).

philosophical and moral discussion on social hierarchies.³⁰⁸ These writings routinely declared that ranking kinship members by generation and age was a form of natural law that reached back into the distant past.³⁰⁹ An early Ming genealogy claimed that traditional Confucian hierarchies were “heavenly moral principles” (“tianlun”), and that those who violated them “would be annihilated by the heavens, and abandoned by men.”³¹⁰ Similar language was epidemic in Yuan, Ming and Qing genealogies.

As discussed at the end of Part II, one can further separate the process of moral or cultural internalization into the internalization of a norm itself and the internalization, independent of any material or political benefits, of the desire to “behave like the perceived sociopolitical elite.” It may be logically useful to consider whether the latter alone can explain the historical account presented above without the former occurring on a large scale. The answer is probably no: one very rarely finds any substantial language to this effect in the myriad of moral or intellectual writings surveyed above. Gerontocratic hierarchies are almost always justified through appeal to their innate justness and moral necessity, rather than to their practice by elite families. One would imagine that, if imitation was the primary motivation, there would be a much greater volume of local writing that attempted to identify the similarities between local kinship hierarchies and contemporary elite social practice.

This is not to deny that elite social practice played an important role in the initial creation and proliferation of kinship hierarchies. As David Faure and others have argued, in South China, “lineage institutions spread only as government ideology permeated village society.”³¹¹ Local communities looked, first and foremost, to state and elite practice to determine what was proper and right, but this was a process of education, persuasion, and setting “moral examples,” not unconditional imitation. Within a few generations, the moral examples set by political elites came to acquire widespread normative authority of their own and could sustain themselves with or without the continuous existence of contemporary elite examples.

C. A Note on English and Japanese Social Hierarchies

If Chinese kinship hierarchies were “cultural,” could the same be said of England and Japan? There is, unfortunately, no clear answer to this question. The primary argument in favor of widespread cultural internalization in China—the formidable uniformity of non-meritocratic kinship hierarchies across diverse ecological and economic conditions—is inapplicable to England and Japan. England is far smaller than either China or Japan. Correspondingly, one finds far less economic and ecological diversity in rural England, which makes it much easier to accept bottom-up utilitarian narratives of norm formation.

³⁰⁸ FEI ET AL., *supra* note 296, at 17-25.

³⁰⁹ FENG ET AL., *supra* note 212, at 203 (citing Chen Gao).

³¹⁰ FANG XIAORU (方孝孺), XUNZHI ZHAI Ji (遜志齋集) [WRITINGS FROM XUNZHI VILLA] 34 (Xu Guangda ed., Ningbo Press, 2000). The quote is drawn from Zongyi Jiushou: Jin Xin [Nine Verses on Lineage Ritual: Act with Prudence]).

³¹¹ FAURE, *supra* note 248, at 2.

Japan is much larger and more ecologically diverse, but its property institutions and social hierarchies are also considerably less uniform than their Chinese or English counterparts. Its customary mortgage redemption deadlines ranged from less than two years to a decade, and in a few cases to perpetuity.³¹² In addition, the representation of smallholders among the village political elite varied from village to village. The tension between hereditary status and wealth-based status itself probably caused much normative variation and fluctuation between and within Japanese villages.

Moreover, the “non-meritocratic” accusation is much easier to lodge at hierarchies based on seniority than at those based on wealth. Making status dependent on wealth incentivizes wealth maximization and productivity growth. It also tends to place the most economically capable members of the community in leadership positions, which would intuitively benefit economic development. In other words, wealth-based hierarchies, like other meritocratic hierarchies, are arguably more desirable from a utilitarian perspective than seniority-based ones.

Despite all this, there is nonetheless some evidence to suggest, if extremely tentatively, that English and Japanese social hierarchies did indeed possess a fair amount of *moral* authority. The English notion that status should depend upon landed wealth was generally discussed in highly moralistic terms—for example, the landed gentry were sometimes referred to as “those whome their race and blood or at least their virtues doo make noble and knowne”—that suggested at least some degree of internalization.³¹³ Likewise, Japanese villagers sometimes spoke of their status hierarchies in somewhat reverent terms, claiming that they stemmed from titles granted in “the ancient past.”³¹⁴ Whether these quotes are accurate reflections of deeper underlying sociocultural currents is an issue for another day. The Article’s theoretical claim was, as the reader will recall, that cultural factors *could* shape property institutions, not that they always and necessarily did so. One society out of three will suffice, for now.

Conclusion

This Article has argued that a cultural theory of property is necessary to understand some major divergences between early modern Chinese, English, and Japanese property institutions—that, essentially, there were “cultural paradigms” in the property institutions of these societies. It has demonstrated a chain of causation, at least in the Chinese case, from culturally internalized norms of status allocation to actual distributions of sociopolitical status, to the property institutions that emerged from bargaining between social groups of varying sociopolitical stature. By doing so, the Article argues that cultural factors can substantively shape and influence property institutions, even if people generally approach property regulation per se from a self-

³¹² See discussion *supra* pp. 41-43.

³¹³ WRIGHTSON *supra* note 16 at 27.

³¹⁴ OOMS, *supra* note 17, at 214.

interested and utilitarian perspective. The failure to recognize this is, indeed, one of contemporary property theory's major blind spots.

Beyond these general arguments, the historical narrative also illustrates several finer theoretical points made in Part II. First, the persistent and powerful rich-poor tensions that drove mortgage regulation provide yet another example of how property institutions are often deeply political and divisive. There was very little collective thinking about "general social welfare." Instead, there was hard-nosed bargaining based on foreseeable economic self-interest. In addition, there were clear winners and losers in the bargaining process—just not always the winners and losers that a modern observer would intuitively expect.

Second, the formation of Chinese *dian* customs vividly illustrates the often fundamentally different ways in which individuals approach property institutions and status hierarchies. The former was a decidedly utilitarian affair, whereas the latter was deeply moral, even religious. There is little reason to assume that the same behavioral assumptions about self-interest or moral internalization must apply equally to all human institutions. Unfortunately, the historical evidence produced here does not really permit a deeper inquiry into *why* status hierarchies were morally internalized, at least in China, whereas property institutions, whether Chinese, English, or Japanese, were apparently not. The psychological theories of childhood norm internalization discussed in Part II are highly plausible, but difficult to verify in a historical context.

Third, the historical narrative presented here is actually highly compatible with conventional law and economics. Cultural factors only enter the narrative at the status hierarchy stage, by which point it becomes conceptually possible to subsume them within individual utility functions. This is a distinctly individualist account of cultural influence: "cultural factors" are not "operative engines" that act upon human society in a consolidated fashion but are, instead, influential only because individuals have internalized them. This methodological individualism is, in all likelihood, why Greif and other institutional economists have favored an internalization-based definition of culture over the more expansive definitions espoused by anthropologists.³¹⁵ As Ellickson pointed out, speaking broadly of "culture" without a coherent theory of its individual application is incompatible with the otherwise individualist analysis favored by law and economics.³¹⁶ This Article has attempted to provide both such a theory and historical evidence to support it.

The remainder of the conclusion considers how we might apply and test the general theoretical claim that culture influences property institutions in post-industrial, modern societies and what its broader implications might be. The pre-industrial empirical setting of this Article conveys a number of very obvious advantages: most importantly, it avoids the massive wave of governmental expansion that accompanied large-scale industrialization in all three countries. In the Japanese and Chinese contexts, governmental expansion also went hand-in-hand with the attempted implementation of Western-influenced legal codes—German for Japan, Soviet for

³¹⁵ See sources cited *supra* notes 87-90

³¹⁶ Ellickson, *supra* note 2, at 542.

China—that aimed to “modernize” or “revolutionize” traditional law and custom, including most areas of property law.³¹⁷ The great expansion of state authority gave these legal transplants some actual teeth, unlike the oft-ignored, usually-circumvented legal codes of earlier eras.³¹⁸ In other words, actual legal practice becomes much harder to observe once large-scale industrialization kicks in: it becomes subsumed under new, stronger, and linguistically foreign layers of legal authority. The relative simplicity and clarity of village commercial customs created through communal self-regulation no longer existed.

Nonetheless, the pre-industrial setting of this Article is merely empirically convenient, rather than theoretically necessary. There is no obvious reason to assume that culture matters less in contemporary societies, only that it is made more fluid and complex. Status hierarchies clearly continue to exist in virtually all human societies, and continue to vary, at least nominally, from country to country.³¹⁹ It also seems quite plausible that they continue to exert serious influence on property institutions. In other words, the basic theoretical moves made in this Article are by no means logically specific to early modern societies.

Some social and political theorists, particularly those writing in the post-Cold War decade, have suggested that a number of “modern” social forces—globalization, the internet, or perhaps the ideological dominance of liberal democracies—will eventually render “cultural” differences between societies nonexistent.³²⁰ Such arguments have lost, however, much of their intellectual appeal in recent years.³²¹ In particular, the apparent ability of many East Asian economies to rapidly “modernize” their economy while retaining apparently distinct cultural, ideological, and political identities gives the “cultural question” examined here a strong claim to contemporary relevance.³²² For the specific purposes of this Article, which only seeks to make a baseline theoretical argument, it suffices to pick the low-hanging, pre-industrial fruit first, but this is obviously inadequate as a long-term strategy.

³¹⁷ See discussion surrounding *supra* notes 28-29.

³¹⁸ *Id.*

³¹⁹ For international surveys, see Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q.J. ECON. 1251 (1997), *supra* note 113; and Licht et al., *supra* note 58.

³²⁰ The most (in)famous of these statements is probably FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). See also MARWAN KRAIDY, *HYBRIDITY, OR THE CULTURAL LOGIC OF GLOBALIZATION* 1-23 (2005); JOHN TOMLINSON, *GLOBALIZATION AND CULTURE* (1999).

³²¹ See, e.g., ALAN RUGMAN, *THE END OF GLOBALIZATION* (2012); JAN AARTE SCHOLTE, *GLOBALIZATION: A CRITICAL INTRODUCTION* 159-223 (2d ed. 2005); Christian Collet & Takashi Inoguchi, *Is Globalization Undermining Civilizational Identities? A Test of Huntington's Core State Assumptions among the Publics of Greater Asia and the Pacific*, 13 JAP. J. POL. SCI. 553 (2012); Robert J. Lieber & Ruth E. Weisberg, *Globalization, Culture, and Identities in Crisis*, 16 INT'L J. POL. CULT. SOC'Y. 273 (2002); Pippa Norris & Ronald Inglehart, *Islamic Culture and Democracy: Testing the Clash of Civilizations' Thesis*, 12 COMPARATIVE SOCIOLOGY 235 (2002). One result of such skepticism is a new wave of interest in SAMUEL HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996).

³²² This has led, in fact, to arguments that the social influence of Confucianism in East Asian societies has driven their economic rise. See, e.g., MICHIO MORISHIMA, *WHY HAS JAPAN “SUCCEEDED”?: WESTERN TECHNOLOGY AND THE JAPANESE ETHOS* (1982); Ming-Yih Liang, *Confucianism and the East Asian Miracle*, 2 AM. ECON. J.: MACROECON. 206 (2010); Tu Wei-ming, *The Rise of Industrial East Asia: The Role of Confucian Values*, 4 COPENHAGEN J. ASIAN STUD. 81 (1989).

There are a number of ways to deal with the heightened sociolegal complexity brought along by modern state-building and legal transplanting. The obvious one is to look at the margins of government authority, at places where grassroots or local social forces remain strong enough to substantively curb state authority, and where the influence of “traditional culture” is probably strongest, and easiest to discern. Most often, this will be in rural areas. There is, for example, a growing academic literature on whether traditional kinship structures affect rural Chinese political and legal institutions.³²³ At least one such study has found that the existence of large, well-organized kinship networks in contemporary Chinese villages tend to deter against government land expropriation.³²⁴

Of course, there is a considerable gap between these findings and the claim that “cultural factors” affected these institutional outcomes. As discussed in Part IV, kinship networks themselves are not necessarily cultural constructs—very often, they are simply pragmatic responses to socioeconomic challenges. What was distinctly “cultural” about traditional kinship networks were the status hierarchies they enforced. It remains to be seen whether these status hierarchies continue to play a significant role in the sociopolitical operation of contemporary kinship networks.

“Margins of state authority” also exist even where the government’s general legal and political authority is strong and largely unchallenged: as Lawrence Lessig, commenting on the advent of social norms theory in law and economics during the 1990s, once argued, one does not have to look at remote localities and under-regulated “frontiers” to appreciate the existence of social norms that shape how legal institutions are applied in real life.³²⁵ Under what circumstances, for example, will an average urban property owner initiate litigation against, rather than informally settle with, a trespasser? Are there cultural undertones, however remote, to her pattern of decision making?

It is not terribly difficult to imagine how a cultural examination of state legislation, rulemaking, or adjudication might proceed. A growing number of property scholars now apply political economy analysis to property regulation, ranging from the initial allocation of property rights to use regulations such as zoning.³²⁶ From there, it is but a small step to studying the influence of status hierarchies or other potentially cultural social norms on political preferences and power. Similarly, studies of judicial behavior now regularly portray judges as either political or self-interested, and often both.³²⁷ This, too, easily facilitates further

³²³ Yusheng Peng, *Kinship Networks and Entrepreneurs in China’s Transitional Economy*, 109 AM. J. SOC. 1045 (2004); Lily Tsai, *Solidary Groups, Informal Accountability, and Local Public Goods Provision in Rural China*, 101 AM. POL. SCI. REV. Taisu Zhang & Xiaoxue Zhao, *Do Kinship Networks Strengthen Private Property? Evidence from Rural China*, 11 J. EMPIRICAL LEGAL STUD. 505 (2014).

³²⁴ Zhang & Zhao, *supra* note 323.

³²⁵ Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998).

³²⁶ E.g., Adesoji O. Adelaja & Paul D. Gottlieb, *The Political Economy of Downzoning*, 38 AGRI. RESOURCE ECON. REV. 181 (2009); Been et al., *supra* note 49; Stephen Calabrese et al., *On The Political Economy of Zoning*, 91 J. PUB. ECON. 25 (2007); Schleicher, *supra* note 49; Raquel Fernandez & Richard Rogerson, *Zoning and the Political Economy of Local Redistribution* (Nat’l. Bureau of Econ. Research, Working Paper No. 4456, 1993).

³²⁷ The literature is extensive. See, e.g., JACK KNIGHT & LEE EPSTEIN, *THE CHOICES JUSTICES MAKE* (1997);

inquiries into the (potentially cultural) origins of their political leanings, or into the content of their perceived self-interest.

Ultimately, there are several promising empirical strategies one can employ to handle the challenges posed by large-scale legal transplanting in contemporary societies. One could argue, in fact, that such transplanting is precisely what gives cultural analysis its normative significance in many contemporary societies. Given the tremendous amount of West-to-East legal transplanting of property law in the past century, a coherent account of how legal transplants are “localized” is essential to understanding and evaluating their transitional costs and eventual consequences. This Article demonstrates that, at the very least, these accounts should seriously consider the possible influence of local cultural factors on property use and regulation.³²⁸

Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000); Mitu Gulati, Stephen Choi & Eric Posner, *Judicial Ability and Securities Class Actions* (John M. Olin Law & Econ., Working Paper (2d Series) No. 519, 2010); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism* (Cornell Law Faculty Publ'ns Paper 733, 2002), <http://scholarship.law.cornell.edu/facpub/733>.

³²⁸ Although this Article has focused on the connection between cultural norms and property institutions, there is very little in its theoretical framework that cannot be applied to other kinds of legal institutions. There is, in fact, a growing and more general “law and culture” literature, which has thus far been largely uninvolved with property theory. See, e.g., Robert Ahdieh, *Beyond Individualism in Law and Economics*, 91 B.U. L. REV. 43 (2011); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275 (2003); Lan Cao, *Culture Change*, 47 VA. J. INT’L L. 357 (2007); Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 BUFF. L. REV. 511 (2009); Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFFALO L. REV. 973 (2005).