ISSN 1936-5349 (print)
ISSN 1936-5357 (online)

HARVARD

JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS

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Discussion Paper No. 1097

03/2023

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Key words: property, commons, anti-commons, hold-ups, opportunism
JEL: K11, K12, K15, K42, N15, N55, Q15, Q22
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Draft of Sept. 21, 2022

Property Law at the Transition to Exponential Growth

Examples from Japan

By C. Alexander Evans & J. Mark Ramseyer*

Economies grow when people make ever-more productive use of the assets and skills they control. Growth requires shifting those resources and that labor to ever-more-productive uses. Before the industrial revolution, economies grew steadily, but very slowly. As they grew, people did shift resources and labor, but without much urgency.

By the 20th century, however, most large economies were accelerating from linear to exponential rates of growth. With that change, people faced large incentives to shift their resources more rapidly. That shift was often a prerequisite to exponential growth–but more profitable uses also resulted from the exponential growth.

Where an economy grows slowly, people need not worry much about their ability to shift resources to higher valued uses. After all, the slow rates of growth mean that they are not likely to want to move assets to new uses very often. So, if they worry others in their village might try to expropriate their wealth, it may make sense for them to opt for an unanimity requirement for decisions about resource transfer.

Where growth is slow, in other words, it may be rational to prioritize protection from opportunistic claimants over flexibility.

Sometimes, however, multiple veto players delay shifts in the asset use, for protection from exploitive claims comes with diminished flexibility as a trade-off. An unanimity requirement makes every claimant a veto holder. This problem is exacerbated as increasing growth makes transfer of resources more frequently incentivized. In this essay, we explore several examples from early 20th century Japanese property law that gave multiple parties a veto over changes in asset use. We illustrate how these unanimity rules dampened the pace of economic change, and we discuss how courts and legislators responded.

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In the late 20th century, Tokyo Electric decided to build two more nuclear reactors (numbers 7 and 8 at the Daiichi complex) off the coast of Fukushima. To do this, they needed to pour concrete along the shore. Local fishermen held rights in common through their fishing union to fish in the bay and therefore held a veto over any changes to the shoreline. To obtain the fishermen's approval, Tokyo Electric paid each fisherman 40 to 50 million yen in 2000.[1]

In 1998, a gunman shot and killed Tadayoshi Ueno, the 70-year-old head of a local fishing union in northern Kyushu. Later, Mr. Ueno's local union merged into a larger municipal fishing union nearby. Mr. Ueno's younger brother became head of the merged union. In 2013, a gunman shot and killed the younger brother. Then, in 2014, a would-be assassin attacked Tadayoshi Ueno's grandson (a dentist totally unconnected with the union) in a parking lot. The grandson survived.[2]

The murders and attempted murder had nothing to do with fish. They had everything to do with construction in the bay. The local union held a veto over new construction along the harbor. The local organized crime syndicate (the Kudokai yakuza) wanted that veto for themselves, and they set out to obtain it the way they knew best.

I. Introduction

Economies grow when men and women make ever-more productive use of the assets and skills they control. Growth requires shifting those resources and that labor to ever-more-productive uses. Before the industrial revolution, economies grew steadily, but very slowly. As they grew, people did shift resources and labor, but without much urgency.

By the 20th century, however, most large economies were accelerating from linear to exponential rates of growth. With that change, men and women faced large incentives to shift their resources more rapidly. That shift was often a prerequisite to exponential growth–but more profitable uses also resulted from the exponential growth. We will not try to identify causation in this positive feedback loop; but exponential growth has often coincided with newly attractive opportunities for assets and labor.

Where an economy grows slowly, men and women need not worry much about their ability to shift resources to higher valued uses. After all, the slow rates of growth mean that they are not likely to want to move assets to new uses very often. So, if they worry others in their village might try to expropriate their wealth, it may make sense for them to opt for an unanimity requirement for decisions about resource transfer. This rule will make it harder to shift asset use, but with slow growth villagers will infrequently have those incentives anyway.

Where growth is slow, in other words, it may be rational to prioritize protection from opportunistic claimants over flexibility. That is why, in many jurisdictions, customary rules have

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[1] Tsukue wo tatakuhodo agaru gyogyo hosho [Fishing Compensation -- It Rises with the Number of Times You Pound the Table]. Wedge Report, March issue, Feb. 21, 2012.

[2] See "Korede toppu made ikeru" ... ["Now We Can Reach to the Top" ...], Nishi Nihon shimbun, Aug. 26, 2021; Kensatsu, kowan riken nerai wo kyocho ...[Prosecution Stresses Aim for Bay-Related Subsidies], Nishi Nihon shimbun, Jan. 10, 2021; Kensatsu, kowan riken nerai wo kyocho ...[Prosecution Stresses Aim for Bay-Related Subsidies], Nishi Nihon shimbun, Dec. 26, 2019; Kangoshi shisho ... [Nurse Stabbed ...], Asahi shimbun, June 29, 2020; Gyokyo to jiba marikon ... [Fishing Union and Local Marine Construction ...], NetIVNews, Jan. 19, 2010; Kudokai toppu saiban ... [Trial of the Kudokai Leadership ...], Bijinesu jaaneru, Mar. 19, 2021; see generally Kuni v. [No name given], D1-law.com No. 28282033 (Fukuoka D. Ct. Mar. 28, 2019), aff'd, D1-law.com No. 28282035 (Fukuoka High Ct. June 25, 2020); Kuni v. [No name given], D1-com. No. 28260266 (Fukuoka D. Ct. Dec. 15, 2017), aff'd, D1-law.com No. 28263308 (Fukuoka High Ct. July 4, 2018).

often required claimants to a common resource to demonstrate unanimity in any major decision affecting the resource, a custom that Japanese courts have traditionally followed. Sometimes, however, multiple veto players delay shifts in the asset use, for protection from exploitive claims comes with diminished flexibility as a trade-off. An unanimity requirement makes every claimant a veto holder. This problem is exacerbated as increasing growth makes transfer of resources more frequently incentivized.

In the chapter that follows, we explore several examples from early 20th century Japanese property law that gave multiple parties a veto over changes in asset use. We distinguish the point from the related concept of Heller's "anti-commons." We illustrate how these unanimity rules dampened the pace of economic change, and we discuss how courts and legislators responded.

We observe throughout that laws change as society changes—and as the industrial demands powering economic growth create new uses for capital. We see a general -- not inevitable or uniform, but general nevertheless -- shift in the interpretation of custom, as it interacts with the Civil Code, to facilitate higher-value uses of capital. These legal changes were caused by the transition to exponential economic growth—but they also then accelerated the same growth. This positive feedback loop would eventually reshape both Japan's economy and its laws.

II. Japan's Economic Transition

A. Custom in the Tokugawa Period:

Despite its staid reputation, Japan's economy grew throughout the Tokugawa (1600-1868) period. Farmers carved paddies from the mountain side. Craftsmen expanded their shops into factories. Men and women migrated to the urban centers -- both to national cities like Edo (Tokyo) and Osaka, and to dozens of regional centers around the country.

The Tokugawa rule might have seemed stifling to the entrepreneurs of the Meiji (1868-1912) period, but the peace brought by Tokugawa conquest finally allowed ordinary people to plan out a longer economic future, after a century of civil conflict. And plan people did. They invested. They traded. They expanded coastal shipping. And they built a network of (pedestrian and horse) highways.

As they invested and traded, people formed contracts. To enforce their contracts, they turned to a variety of informal and formal sources. If they invested and traded within their social networks, they could employ the wide range of sanctions against default available to those who contract within communities with high levels of social capital.[3] But when they pushed the boundaries of those communities (or simply dealt with people immune to social pressure), many turned to the courts.

These courts were based in the provincial government of the quasi-independent domains, called *han*. For the most part, these domains enforced the trades, investments, and contracts in scarce resources. The Tokugawa legal system was federal rather than centralized, so generalization is dangerous—statutes, precedent, and procedure varied from domain to domain. But for the most part, domain courts enforced large-scale investments and contracts in scarce resources.

B. The Meiji Transition:

[3] *See* Robert Ellickson, Order Without Law: How Neighbors Settle Disputes (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 1 (1992).

In 1868, samurai from several outlying domains ousted the Tokugawa family. In its place, they established a government that remained nominally headed by the Imperial family, but with actual power located in a new military and business elite. In 1889, following an around-the-world mission to survey leading legal designs, the new regime promulgated a constitution based loosely on Prussian legal principles.

This new regime was central rather than federal. The regime enacted a Civil Code based explicitly on the German model in 1896 (effective 1898). The Code governed the entire country. As was typical of European civil codes, it covered contracts, property, tort, and family law.

But the new government began to rewrite its private law along western lines long before 1896. Immediately after taking power in 1868, the new regime declared that farmers (rather than the government) owned farmland.[4] Four years later, the regime made clear that farmers could buy and sell their land.[5] The new regime created a national land-titling system and instructed local administrators to document land ownership and transfers.[6] The regime followed up with a Western-style set of formal land registries.[7]

The new legal system provided the basic private property rights necessary for Japan to switch from steady but linear growth to the exponential growth rates characteristic of modern capitalist societies. The Meiji government enforced these nationally uniform and ascertainable titles to real estate by supplying mostly predictable and honest courts. These courts enforced uniform rules by which people could bind each other to most agreements about scarce resources.

II. The Rights to the Commons:

Many of these agreements involved rights to the commons. Japan is a heavily forested mountainous archipelago, and Tokugawa villagers used the forests. They did not farm the forests. They farmed the plains, the valleys, and the paddies they carved out of the mountains. In the forests, they collected firewood. They grazed their horses and cattle. They collected wild vegetables and mushrooms.

Coastal villagers used the bay. Some villagers fished full-time. Some collected seaweed for food. Some found plants that they could use as fertilizer. Some farmed shellfish.

Tokugawa men and women, in other words, regularly used nearby mountains and bays as commons resources. To prevent over-use, they typically enforced on each other a variety of restrictions. Beyond those usage rights, however, they did not have much use for the mountain or the bay. And because they did not have much use for it, they did not bother specifying the residual rights. They did not care who "owned" the mountain, because the mountain had little value beyond the uses that they made of it. No one purported to claim fee simple in the sea.

In 1967, Harold Demsetz observed that people generally find it worthwhile to define property rights only over those objects scarce enough to have significant value.[8] To define and

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[4] Kiyoshi Miyakawa, Nihon ni okeru kindai teki shoyuken no keisei [The Structure of Early Modern Ownership in Japan] 67 (Tokyo: Ochanomizu shobo, 1969); Kiyoshi Miyakawa, Meiji shonen no tochi shoyuken no hoteki seikaku ni tsuite [Regarding the Legal Character of Early Meiji Land Ownership] Pt. 2, 21 Rikkyo keizai gaku kenkyu 93, 94 (1968); Dajokan fukoku 1096 of Dec. 18, 1868; Matsuo 2018, 106).

[5] (M5/2/15: Dajokan fukoku No. 50 of Feb. 15, 1872; Miyakawa 1969, supra note, at 67.

[6] Miyakawa 1969, supra note, at 129, 168; Okura sho tatsu No. 25 of 1872; Okura sho tatsu No. 83 of 1872.

[7] Miyakawa 1969, supra note, at 141, 235: Law No. 1 of 1886 (recordation act) and Law No. 13 of 1889 (land registries); Fudosan toki ho [Real Estate Recordation Act], Law. No., 24 of 1899.

[8] Harold Demsetz, Towards a Theory of Property Rights, 57 Am. Econ. Rev. 347 (1967).

enforce rights to property is costly. Only when those resources have sufficient value do people find it worthwhile to define their rights to the resources.

In the Tokugawa Era, neighboring villagers found the mountain valuable enough to enforce a collective right to graze their cattle and horses, or to harvest mushrooms. But they had little incentive to parcel the mountain into smaller fee-simple units. They enforced a customary collective right to use the mountain for limited purposes, and let it rest at that.

To govern their collective rights, villagers generally chose an unanimity rule. By defining commons rights by custom, the 1896 Civil Code continued this arrangement.[9] Because each member thus had a veto over any proposed change, opportunistic attempts to transform the resource were quite difficult. By contrast, under a majority rule, each member faced the risk that others might form a coalition that would expropriate his share. A veto for all helped prevent at least that worst-case possibility.

One obvious downside to an unanimity rule is rigidity in the face of new opportunities. This effect is most relevant when the group discovers a way to shift the common resource to a higher valued use. Sometimes this value-enhancing shift would enable to commons group to improve the welfare of all members. However, because unanimity is required to approve the change, a holdout strategy becomes possible. Even though the new use benefits all members, one member can try to secure a higher share of the new use by threatening to veto the move. As we see in experiment, while this sort of behavior is uncommon it does happen.[10] Therefore, if a group is primarily concerned about moving assets to higher valued uses (rather than protecting property from tyranny of the majority exploitation), the group will do better under a majority decision rule.

When economic opportunity comes slowly, owners of a commons can rationally decide that the risk of majority exploitation is higher than risk that opportunists might veto value-enhancing shifts. When economic change comes slowly, value-enhancing options appear slowly. Without urgency, the group has a better chance to negotiate the terms of a deal that enhances the welfare of all members -- even under an unanimity rule.

At the close of the 19th century, Japan faced extraordinarily rapid economic growth. It needed to shift value resources to more valuable uses quickly. And in those circumstances, unanimity rules to rights in commons potentially stymied projects that could have benefited everyone.

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[9] The 1896 Meiji Civil Code specified two forms of rights to the commons. Suppose villagers had common rights to use a property, but also held the residual right. The Code treated their usage right as a variation on fee simple, with details to follow local custom (Sec. 262). If instead they had the common rights to use a resource owned by someone else, it placed that common usage right within servitudes, but again with details to follow local custom (Sec. 294). In either case, the villagers held the usage right as a form of in rem.

[10] Perhaps the clearest experiment showing this effect is the ultimatum game. In this game, two players are tasked with splitting a reward. One player is allowed to propose a split and the other player can either accept that proposed split or refuse, in which case neither party gets anything. Player strategies vary widely when tasked with this game. While most offers are in the 50/50 range, many propose more aggressive offers. For many of the most aggressive of these offers, the other player often refuses in experiments—even though accepting the offer would benefit all players. The possibility of refusing even against one's interest—in other words, the possibility of adopting a self-harming holdout strategy—benefits the passive player by incentivizing the active player to make a more equal offer. *See* William Press and Freeman Dyson, *Iterated Prisoner's Dilemma Contains Strategies that Dominate Any Evolutionary Opponent,* 109 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES 10409 (2012).

The region along the Sea of Japan in what is now Shimane Prefecture provides a useful example. From ancient times, the beaches in this area were used for fishing and for gathering.[11] The beaches were generally "owned" in common by local villagers. As the economy grew and technology improved, nearby cities expanded. With improved infrastructure, a new opportunity arose for the beaches: harvesting salt.

This proved no obstacle despite the unanimity rules required by local village leaders. With plenty of time to adapt, and with mediation available through local religious authorities, many villages transitioned successfully to a salt-harvesting focus. Soon, salt was harvested and shipped up and down the coast, from Taisha-cho to Oda.[12]

As Japan's economy developed more swiftly following the Meiji Restoration, the demand for salt was outpaced by the demand for raw metals, for use in Japan's newly growing factories. Many parts of Honshu were possible sources of metal, including Shimane, which boasted the Iwami Ginzan silver mine.[13] Towns near the mines along Shimane's coast had access to plenty of rare minerals and the whole area had promise as a source for Japan's booming industry.

However, such a radical change in use of commonly owned mountains and streams would have required unanimity from many separate villages, working together to transition from a predominantly agricultural emphasis to a new industrial economy. Unanimity rules and conservative local custom required securing consent from villagers across the coast.[14]

This proved too difficult. Objections from leaders in Hinomisaki and Taisha-cho led to dallying, and Japan's major factories had no time to waste. They quickly found other sources of copper and iron ore. By the time Matsue and Izumoshi were ready to start serious construction, the window had closed, and the opportunity had passed.[15]

Prior to the onset of exponential growth, the consensus-driven rulemaking in Shimane Prefecture was well-suited to promoting stability without too much cost to growth. After the transition, the same system prevented residents from making the most of available opportunities.

Today, Shimane remains one of the least economically developed of Japan's prefectures. Deeply beautiful, like much of Japan's countryside—but struggling, as it has since the Meiji Era.[16]

III. The Perpetual Lease

A. The Problem

The 1896 Civil Code provided for both fee-simple ownership (Sec. 206) and for fixed-term leases (Sec. 601). The former is defined as a right in *rem*. The latter is defined as a right in *personam*. These definitions led to a predictable consequence: if a lessor sold land to a third party, the lessee had a right only for damages, and only against the selling lessor. The lessee could circumvent this result only if he and the lessor agreed in advance that he would have rights against

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[11] Kawahara Yukiko, Local Development in Japan: the Case of Shimane Prefecture from 1800-1930 (1990).

[12] Personal conversation with Masataka Matsuura, Mayor of Matsue City, Shimane Prefecture (Dec. 9, 2015).

[13] *See* Torigoe, *The Fukuishi Deposit in the Omori Mine (Iwami-ginzan), Shimane Prefecture*, 36 JAPAN HISTORICAL STUDY GROUP OF MINING AND METALLURGY 24 (1998).

[14] Matsuura, *supra* note 13.

[15] Naoki Murakami, *Changes in Japanese Industrial Structure and Urbanization: Evidence from Prefectural Data*, 20 J. ASIA PACIFIC ECON. 385 (2015).

[16] *Id.*

a third-party buyer. Provided they then jointly recorded the agreement, he could enforce the lease against any transferee (Sec. 605).

The 1896 Code also provided for perpetual leases -- an arrangement sometimes translated as "emphyteusis" (Sec. 270). At the close of the Tokugawa period, some farmers apparently held the right to cultivate a given field as lessee in perpetuity. Because these rights had nearly as much substance (if not more) as the "owner" of the underlying fee simple, the drafters of the Code catalogued a perpetual lease as a right in *rem*.

The juxtaposition of term leases (in *personam*) and perpetual leases (in *rem*) created a puzzle. Suppose a tenant (and perhaps his father or grandfather) had farmed a field for decades. Did he hold a term lease that he and his lessor had regularly (if perhaps implicitly) renewed? Or did he hold a right to lease the farm in perpetuity?

Lessors and lessees renew term leases regularly. If the arrangement benefits them both, they have little reason to do anything else. But the distinction between a renewed term lease and a lease-in-perpetuity mattered, because the perpetual lease created two veto gates -- and, necessarily, the risk of opportunistic hold-ups. Because both the lessor and the lessee of a perpetual lease held in *rem* rights, they could each veto proposed any changes. Even if presented with a higher valued use, they could both veto. Both had a right to hold up the other in return for a side payment.[17] Where the value of alternative uses changed only slowly, this problem was minor. But by the end of the 19th century, the pace of economic transformation changed the highest value uses on some assets at an extraordinary pace.

B. <u>The origins of perpetual lease:</u>

Most of the early 20th century perpetual leases seem to have dated from the Tokugawa period. According to many accounts, the parties negotiated these arrangements as compensation for the work entailed in creating a new paddy.[18] Over the 2-1/2 centuries of Tokugawa rule, farmers and entrepreneurs had massively expanded the amount of paddy land in use. To do so, they needed both money and labor. Some of them used the perpetual lease to split the returns to the collective effort.[19]

Into these construction projects, entrepreneurs invested capital. They may have earned the money in finance, in trade or in industry. However they earned it originally, they invested in farming because they expected a market rate of return on their invested capital.

The farmers, on the other hand, invested their labor. Many were probably second or third sons. Their older brother had inherited the small family farm. They could emigrate to the city and find a job at a factory, but they preferred to farm. They located an entrepreneur who planned to build a paddy. They agreed to do the work, and for it demanded market compensation.

Rational entrepreneurs and farmers expected to earn from the new project a stream of income large enough to earn market returns on the invested capital and on the time-cost of the

[17] This situation is not totally dissimilar to perpetual lease rights on modern property; for example, a rent-control grant on a modern apartment in Manhattan. Then, as now, to make changes to the property (or to re-rent it) a landowner may need to offer a tenant an attractive side-payment, sometimes valued in the millions.

[18] See, e.g., Kato v. Kitagawa, 15 Saihan minshu 790 (Sup. Ct. Apr. 24, 1936; Ito v. Ito, 3979 Horitsu shimbun 11 (Sup. Ct. Apr. 9, 1936); Nakano v. Fujii, 2568 Horitsu shimbun 5 (Osaka D. Ct. May 29, 1926).

[19] Readers familiar with the English system of estates will recognize the similarity to fee simple absolute, a strong form of entitlement to property granted by the King in return for labor (originally, armed military service).

invested labor. Through the perpetual lease, the farmer and the entrepreneur split that income stream.

Classical economic reasoning tells us that, in order to make the arrangement rational for both parties, the entrepreneur would have demanded a fixed rental rate equal at least to a market return on the funds he had supplied. The farmer, in turn, would have demanded a rental charge (i) lower than the market rent on a term lease, (ii) by an amount equal at least to the market return on the value of the labor he provided.[20] Given the inevitable variation in the relative amounts of capital and labor necessary to create new paddies, a perpetual leasehold could sometimes sell for more than the residual fee simple.[21]

As an example, consider a 1914 Osaka High Court opinion about Amagasaki.[22] The town is now a major coastal city between Osaka and Kobe, but much of it stands on silt washed downstream over the centuries by several local rivers. During the Tokugawa period, the local *daimyo* decided to encourage his residents to build a dike against the sea, reclaiming more land. Building the dike required enormous amount of labor from locals. In exchange for their work, wrote the court, the *daimyo* granted the right to cultivate the reclaimed land in perpetuity (at a low stated rent) to farmers that worked on the project. This right was assignable; farmers could freely transfer the cultivation rights they had earned (Civil Code Sec. 272). Should the owner of the underlying fee simple estate in the claimed land choose to transfer his right, the perpetual lease ran with the land.[23]

C. The Resolution:

1. The puzzles. -- Whether entrepreneurs and farmers chose this contractual structure varied across the country. Obviously, they could contract for funds and labor in a wide variety of economically comparable ways. Suppose farmer 'F_1' tills a field. He and his family have tilled it for decades. Every year, he pays a fixed amount of cash to wealthy villager 'W_1'.

Several formally different contracts could account for this arrangement. On the one hand, W_1 (or his predecessor) might have loaned money to F_1 (or his predecessor), who then used the money either to buy the paddy or to build it on undeveloped land. In this case, F_1 would own the land in fee simple, and would be making a regular interest payment on that loan to 1.

On the other hand, W_1 (or his predecessor) might have funded the construction of a paddy on an undeveloped piece of land he owned. For this project, F_1 (or his predecessor) would have provided the labor necessary to build the paddy. In this case, W_1 would own the land, and F1 would pay rent to W_1. As compensation for his work in building the paddy, W_1 might have granted F_1 the right to farm the paddy in perpetuity for a fixed sub-market rent.

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[20] In its 1940 survey, the Ministry of Agriculture and Forestries calculated the average rental on a medium-grade paddy as 1.112 koku under a perpetual lease, and 0.578 koku under a term lease. It calculated an averagde rental on a medium-grade field as 0.568 koku under a perpetual lease, and 0.309 under a term lease. The report does not give the size of the fields in question. Norin sho, ed., Norin sho tokei hyo [The Ministry of Agriculture and Forestry Statistics] 73 (Tokyo: Norin sho, 1940).

[21] See Ito v. Ito, 3979 Horitsu shimbun 11 (Sup. Ct. Apr. 9, 1936). This is not as incredible as it may sound at first. To return to the example of rent controlled homes, it is rare but possible for a rent-controlled desirable apartment in the city to receive a buyout offer from the landlord that exceeds the market value of the unencumbered underlying apartment.

[22] Akioka v. Kitakata, 1014 Horitsu shimbun 27 (Osaka High Ct. Dec. 15, 1914).

[23] Kato v. Kitagawa, 15 Saihan minshu 790 (Sup. Ct. Apr. 24, 1936); see Yoshida v. Yoshie, 6 Saihan minroku 131 (Sup. Ct. June 22, 1900 (rights of perpetual lessee are unaffected by actions of fee simple owner).

Although these two arrangements are legally quite distinct, for outside observers—and for all practical purposes--the loan and the lease will appear identical.

Similarly, suppose F_2 (and his family) have similarly farmed W_2's (and his family's) field for several decades. On the one hand, F_2 might have rented the land for a term. F_2 and W_2 had both found the arrangement satisfactory, and hence renewed it regularly. On the other hand, F_2 and W_2 (or their respective predecessors) might have agreed that F_2 should have the right to farm the land in perpetuity.

Unfortunately for judges, Tokugawa farmers and landlords often concluded leases without drafting a written contract. Since for all practical purposes the term lease and the perpetual lease will be observationally equivalent, this posed enormous challenges for judges tasked with arbitrating landlord-tenant disputes.

2. Judicial distinctions. -- In some cases, judges deciding a lease dispute could find an explicit contract. For example, in 1906, the Supreme Court faced a dispute between two Nagano hamlets. One of the hamlets negotiated a contract to lease a piece of land from the other "in perpetuity." On the strength of that agreement, residents from the lessee village removed thickets, cut weeds, and slashed and burned vegetation. They worked for over twenty years to increase productivity, but now the lessor hamlet claimed to have leased the land for a term. The lower court called the agreement a tenancy in perpetuity, and the Supreme Court affirmed.[24]

Alas, most cases apparently lacked an explicit contract, and Meiji judges tended to decide that term leases were most appropriate for ambiguous cases.[25] These judges often summarily disregarded some of the claimed evidence. Just because the parties called a lease a "tenancy," for example, did not make it perpetual.[26] Similarly, just because the lessee paid the rent in kind did not make it perpetual.[27] Indeed, judges generally presumed that leases for unspecified terms were contractual.

When a farmer could trace his lease back to a reclamation project, however, judges sometimes held that the lease was perpetual. On the one hand, the judges may have done this because the parties to a reclamation project had actually used perpetual leases. On the other hand, judges may have done this because they thought the parties had used perpetual leases in these projects. Examining early 20th century decisions, we observe that judges more commonly found perpetual leases in cases where the parties could trace the lease back to a reclamation project. Whether that reflected historical practice or a 20th century judicial decision rule, however, we cannot say.

3. Statutory modification. -- From the start, legislators treated perpetual leases as a complication they hoped would someday disappear.[28] So, in the Civil Code's 1898 implementation

[24] Makisato mura v Nobuta mura, 12 Saihan minroku 1514 (Sup. Ct. Nov. 12, 1906).>

[25] In re Nakayama, 4291 Horitsu shimbun 17 (Sup. Ct. May 27, 1938). See also Kato v. Kitagawa, 15 Saihan minshu 790 (Sup. Ct. Apr. 24, 1936); Ishizawa v. Shiraiwa, 2011 Horitsu shimbun 22 (Sup. Ct. March 16, 1922).

[26] Ninomiya v. Aizawa, 758 Horitsu shimbun 24 (Tokyo Ct. App. Oct. 7, 1911).

[27] Ishizawa v. Shiroiwa, 2011 Horitsu shimbun 22 (Sup. Ct. Mar. 16, 1922).

[28] Western legal readers may see a parallel here to the treatment of equitable claims in the Restatements of Contract. In both cases, commentators saw the cause of action (equity in the Restatement, perpetual leases in Japan) as a historical artifact arising out of path-dependent circumstances.

statute, reformers determined that all nominally "perpetual" leases would expire after fifty years.[29] The Civil Code already provided property rights for fee simple, easements, and security interests, as well as contractual provisions for leases and loans. Perpetual leases seemed to serve little purpose that people could not fulfill at least as well through a mix of those other provisions.

Almost immediately, however, the men and women claiming to hold perpetual leases protested the fifty-year limit on their property rights. The shrinkage to fifty years changed the terms of their original transaction, they argued. Never mind that the present value of any stream of income more than fifty years out is effectively zero.[30] The holders protested anyway.

Legislative drafters responded with an amendment. Under the revised implementation statute, at the end of the fifty-year term a fee-simple owner of a paddy had a right to purchase any perpetual leasehold at a "reasonable" price. Should he choose not to do so, the lessee had a right to buy the owner's fee simple interest at a "reasonable" price.[31]

This new fifty-year limit, combined with consistent judicial presumptions against perpetual leases, led perpetual leases to slowly disappear over the next half-century.

IV. The Right to Build:

By the close of the 19th century, Japanese were moving *en masse* from the countryside to the cities. Developers were replacing single-family homes with multi-family housing. They were also replacing residential units with larger scale operations. As neighborhoods gentrified, developers replaced primitive farmhouses with more elaborate permanent structures. To do this, they purchased tracts of land—and, if a house stood on that land, they tore it down.

This development pattern proved to be a frequent source of conflict. When developers purchased land, sometimes the property on the land had already been rented. In such circumstances, were the new owners permitted to evict the old tenants?

Ex ante, the efficient answer was obviously to enforce whatever deal the parties had chosen. If someone wants to build a house, let him either buy the land or negotiate a clause for liquidated damages. *Ex post*, however, evicting the tenant and destroying the house could seem unfair.

Faced with this dilemma, courts and legislators tended to side with the tenant. In the process, they created yet another set of dual veto gates. In the future, should an entrepreneur create a value-increasing use for a piece of property, he potentially faced two parties that could independently veto the transaction: the fee-simple owner of the property, and the party that held a lease on the land.

To some extent, a lack of concern over veto gates appeared in the 1896 Civil Code. The Code permitted parties to negotiate for a distinctive and explicit right to build as a property right in *rem* (this right is usually translated as “superfice”; *see* Sec. 265). The builder could pay for this right through regular (e.g., monthly) payments (Sec. 266).

But this new right created problems. If a builder built a house on land that she had leased for a term, she held only an *in personam* contract right; her rights did not run with the land.[32] If

[29] Minpo shiko ho [Civil Code Implementation Act], Law No. 11 of 1898, Sec. 47. The original 1896 Civil Code had not included such a limitation. See Kato (1972, 157).

[30] This economic point often seems to be of little relevance in these sorts of cases. In Hong Kong, for example, residents fiercely protested efforts to amend *ninety-nine-year* property leases; calling them a tyrannical taking.

[31] Minpo shiko ho, supra note, at Sec. 47.

[32] Sato v. Asatsuma, 27 Saihan minroku 1913 (Sup. Ct. Nov. 10, 1921) (lease has no effect against 3d party; exception for building recorded under 1909 statute).

instead she built her house on land for which she had specifically negotiated for a right to build (even if she paid for it through regular periodic payments), she could enforce her right against anyone who bought the underlying fee simple. She could enforce this right against transferees only if she had recorded her interest, but the landowner could not block that recordation (Civil Code Sec. 177).[33]

The complexity and fact-specificity of these provisions created an obvious nightmare for judges. Given the difference between in *rem* and *in personam* interests, it obviously mattered enormously whether a homeowner held a term lease or a right to build. But this distinction was created by the Civil Code and was novel; a judge could not distinguish between the two legal rights by reading prior existing contracts.

The Diet stepped in to solve the immediate problem by statute in 1900: all owners of existing homes sitting on land owned by someone else were declared to hold a real right to build.[34]

Although the Diet rescued *existing* lessees by the 1900 statute *ex post*, the question of future homeowners remained. Should homeowners in the future hope to build on rented land, they could explicitly specify by contract whether they held a term tenancy or a right to build. They did -- and they usually specified term tenancy. Rather than contract for the in *rem* right to build, builders and landowners overwhelmingly choose the *in personam* term lease instead.

The choice to build on a term lease will strike many readers as bizarre, but in time the Diet decided to grant term lessees rights that mimicked rights in *rem* anyway. By statute in 1909, the Diet opted explicitly to protect tenants who built houses on leased land. Never mind that the lessees could have contracted for the in *rem* right to build but did not. Never mind why anyone would build a house on rented land anyway.

Initially, if one leased land for a term and built a house on it, one held only an interest *in personam*, and could not (without the lessor's advance consent)[35] enforce the new lease against a transferee of the underlying fee simple. But by statute in 1909, the Diet changed this rule: provided that a lessee recorded his building (and the owner could not block recordation), she could enforce her leasehold against any transferee of the land.[36]

Cases in the wake of the massive 1923 Tokyo earthquake and fire illustrate the problems caused by this new rule. Yoshi Negishi owned a house in the Asakusa merchant quarters of Tokyo. A fire leveled the lot, but squatters soon built two corrugated steel shacks on top of it. Effective January 1, 1924, Negishi leased the property to one Moemon Enjoji. Both parties specified a five-

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[33] Nada v. Yamagata, 3 Daihan minshu 34 (Sup. Ct. Feb. 29, 1924) (effect of recordation of chijoken); Iwafuchi v. Sugawara, 26 Saihan minroku 1935 (Sup. Ct. Dec. 8, 1920) (effect of recordation under 1909 statute); Ariizumi & Wagatsuma 1984, 341).

[34] Chijoken ni kansuru horitsu [Act Regarding Superfices], Law No. 72 of 1900; see Nada v. Yamagata, 3 Daihan minshu 34 (Sup. Ct. Feb. 29, 1924) (presumption applied); see generally Wagatsuma & Ariizumi 1984, 338-48).

[35] Consent to record -- Civil Code, Sec. 605.

[36] Tatemono hogo ho [Building Protection Act], Law No. 40 of 1909; Iwafuchi v. Sugawara, 26 Saihan minroku 1935 (Sup. Ct. Dec. 8, 1920) (effect of recordation under 1909 statute); Ichiura v. Matsuura, 25 Saihan minroku 1355 (Sup. Ct. July 23, 1919) (effect of recordation under 1909 statute); see Wagatsuma & Ariizumi 1984: 339-40, 363.

The legislative experimentation continued. The 1921 Land Lease Act and House Lease Act added a wide variety of other "tenant protection" provisions. By the time they were finally repealed in 1991, they had made eviction extraordinarily hard. See generally Shakuchi ho [Land Lease Act], Law No. 49 of 1921; Shakuya ho [House Lease Act], Law No. 50 of 1921.

year term and a ban on any new buildings constructed from stone or brick. Five years later, it emerged that Enjoji had built something nonconforming (the court did not say) and now refused to leave.

The Supreme Court declared that it would decide the case according to what (it thought) the parties had *intended* -- and not what they had specified. That they had signed a lease was, according to the Court, only the beginning of the inquiry. The parties agreed to a five-year term, the Court said, but they could not have meant what they said. After all, they would have realized that it would take Enjoji considerable time just to evict existing squatters on the property. Negishi, concluded the court, must have been the opportunist. In early 1924, no one knew whether Tokyo would recover. Landowners negotiated the best that they could. By 1928 Tokyo was thriving once again, and landowners like Negishi wanted better terms. Based on this analysis, the Court denied the eviction.[37]

This resolution may have seemed fair with knowledge of the parties to the dispute, but the consequences were significant. Suppose an entrepreneur located a value-increasing use for a piece of property. He now faced potential vetoes from two independent parties: the owner of the underlying property, and a tenant who had (even without the permission of his lessor) built a house upon it.

Predictably, the presence of multiple veto gates decreased the attractiveness of development. To this day, though Tokyo has some of the most active new construction markets in the world, real estate investment continues to struggle—and contemporary Tokyo is the only OECD metropolis where home values have declined or remained stagnant for an extended period.

V. Conclusions

Tempora mutantur, nos et mutamur in illis. Such is for life, and such is for law.

As observers, separated by time, we tend to view legal chance as stochastic and incremental. The rules of the game are what they are—shaped by politics, by culture or by other forces. The economy is far more dynamic; it moves day-by-day or even hour-by-hour.

This perspective makes it tempting to look at Japan's transition to exponential growth as the story of a dynamic flexible economy adapting to growth-promoting static background rules; Hernando de Soto's rules of the game, against which market players play.

Our research reveals this picture understates the dynamism and complexity of this turbulent era. Instead, as the economy changed, the law changed with it. Customary rules of decision making for common goods and for joint resources emphasized protection from exploitation: a prudent focus during a time of slow growth. As economic growth and Schumpeterian disruption accelerated, these rules came under pressure. Courts, tasked with balancing custom in the context of a new Civil Code, generally found ways to to shift rights along the path of legal least resistance.

Far from static background rules, the economy's rules-of-the-road changed markedly as society's needs changed. That, perhaps, is how it should be: law is created to serve society, and if it poorly matches the economy, it probably is not serving very well. But the dynamism of the law is worth remembering. If Japan's example is typical, we should expect similar changes across societies as they transition to exponential growth.

We leave that comparative question to future work—and to the work of other essays presented in this volume.

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[37] Enjoji v. Nemoto, 1 Daishin'in hanketsu zenshu 6, 17 (Sup. Ct. Feb. 22, 1934).