

PROPERTY LAW WITH CHINESE CHARACTERISTICS:
AN ECONOMIC AND COMPARATIVE ANALYSIS

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ABSTRACT

Commentators have contended that China's Property Law of 2007 ("CPL") demonstrates "Chinese characteristics"; yet only the most obvious ones have been spelled out. Whether the unique features of the CPL increase or decrease welfare has not been explored either. In this article, I use comparative and economic approaches to analyze this important enactment that presumably will lead socialistic China closer to capitalism. Taiwan's civil code, because of the similarity of its structure, contents, and origins to the CPL, is compared to the CPL in order to identify the CPL's other Chinese characteristics. Then, economic analysis of law is used to evaluate the efficiency of the CPL's unique features or to explain their economic functions.

I find that the CPL contains peculiar contents that are unseen in other civil codes but at the same time omits some doctrines (such as the rule of first possession) that are widely recognized in other jurisdictions. I argue that the most salient Chinese characteristic of the CPL is centralization of power. Some unique stipulations of the CPL (or lack thereof) make economic sense in China's context or demonstrate that China has learned lessons from other civil codes' interpretive problems. Nevertheless, sometimes what makes the CPL special also reduces welfare.

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INTRODUCTION

China's Property Law of 2007 ("CPL") is the latest addition to the family of civil property law. The CPL was highly controversial in China before its enactment. A law professor at Peking University Law School (a top law school in China) even wrote a public letter on the internet, contending that the CPL would be unconstitutional because of its capitalistic bent.¹ This high-profile incident delayed the enactment of the CPL for a couple of years. The story of the CPL is not only socialism versus capitalism, but also the competition between the U.S. and Germany (or American common law and German-model civil law²). The Ford Foundation in the U.S. and the German

1. See the description of this event in, e.g., XIANZHONG SUN, *ZHONGGUO WUQUANFA ZONGLUN* [GENERAL PRINCIPLES ON REAL RIGHTS LAW OF CHINA] 4 (2d ed. 2009) (in Chinese).

2. There are, of course, other legal systems, such as the French-model civil law, the Nordic legal system, and the Islamic legal system. See, e.g., KONRAD ZWEIGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 3d ed. 1998). Nevertheless, because of network effects, it makes more sense for the CPL to base its system on either the common law (also used by, for instance, Hong Kong and Singapore) or the German-model civil law (also used by Japan and Taiwan, to name a few), as adopting either regime makes it easier for Chinese businessmen to communicate with China's major trading partners and attract more foreign direct investment.

Academic Exchange Service (“DAAD”) Foundation in Germany,³ among others, have poured grants into China since the 1980s,⁴ partly hoping to convert the Chinese legal system to their own camp. Eventually, the CPL and the preceding Contract Law of 1999 followed the model of civil law, probably due to the difficulty of transplanting the bottom-up common-law system, and due to the more centralized structure in civil-law systems.⁵ Below I will demonstrate that centralization of land use power is the most prominent “Chinese characteristic” in the CPL.

Chinese scholars have emphasized the “Chinese characteristics” of the CPL. Indeed, since former Chinese leader Deng Xiaoping used this term in the 1980s, the political structures, economic institutions, and legal system characteristics in China that are different from those in other countries have been described as having Chinese characteristics. One example is “socialism with Chinese characteristics,” which was written into the preamble of the PRC Constitution in 1993. This essay takes this claim of Chinese characteristics seriously and tries to flush out the unique features of the CPL. Some leading property scholars in China have identified the major Chinese characteristics of the CPL as adopting state and collective ownership of land and inventing three new types of *superficies* rights.⁶ Others even argue

3. According to DAAD official website, DAAD “is the largest funding organisation in the world supporting the international exchange of students and scholars.” See <http://www.daad.de/portrait/wer-wir-sind/kurzportrait/08940.en.html>. DAAD has funded, among others, the translation of many German legal textbooks and treaties into Chinese.

4. According to its official website, the Ford Foundation has “made grants totaling more than \$275 million dollars in China.” See <http://www.fordfoundation.org/regions/china/history>. The Ford Foundation has funded, among others, the translation of many books by American legal scholars into Chinese.

5. At the outset of the twentieth century, when China, then ruled by the Qing Dynasty, was considering whether to emulate the civil law or the common law, the former was preferred because of its more centralized power structure. See Feng Deng, *Qingmo Bianfa De Falu Jingjixue Jieshi: Weisheme Zhongguo Xuanzele Dalufa* [Why China Adopted the Civil Legal System: A Political Economic Explanation of Transitional Justice in Later Ch'ing's Empire], 21 PEKING U. L.J. 165 (2009) (in Chinese).

6. Proponents of this view include Lixin Yang, a professor at Renmin University of China Law School; Lian Zhang, a professor at Wuhan University Law School; and Baoyu Liu, a professor at the Law School of Beihang University, to name a few. See Lixin Yang, *Woguo Wuquanfa Nonglie De Zhongguo Tese* [The Strong Chinese Characteristics of the Chinese Property Law] (Apr. 2, 2007), <http://www.civillaw.com.cn/article/default.asp?id=31848>; Lian Zhang & Hao Wang, *Zhongguo Tese Shehui Zhuyi Tudi Wuquan Zhidu De Jiangou Yu Fazhan* [The Construction and Development of a Land Use and Property System with Chinese Socialistic

that the most salient Chinese characteristic is “equal protection”⁷ of public property and private property.⁸ Nevertheless, the “equal protection” achievement of the CPL might be more aptly viewed as an improvement in property jurisprudence *within* China than viewed as a theoretical breakthrough or a Chinese characteristic. Protection of private property has been emphasized in property scholarship outside China, but it does not follow that state ownership (or collective ownership, if recognized as a form of ownership) is not “equally” protected.⁹ As for the special forms of ownership and *superficies*, they are indeed Chinese inventions, but they are not the only Chinese characteristics of the CPL. Many other interesting and special features of the CPL have not yet been identified by commentators.

In order to spell out other Chinese characteristics of the CPL, the comparative law approach is necessary. Surely, comparative law scholarship regarding the CPL is not in short supply, but the literature has only emphasized the CPL’s inheritance of the German Civil Code (*Bürgerlichen Gesetzbuches*) (“BGB”) and Swiss Civil

Characteristics] (Jan. 26, 2009), <http://www.civillaw.com.cn/article/default.asp?id=42867>; Baoyu Liu, *Zhongguo Wuquanfa De Chengjiu Yu Buzu* [*The Achievements and Deficiencies of the Chinese Property Law*], <http://www.civillaw.com.cn/article/default.asp?id=47390> (last visited July 9, 2012). A general yet important introduction to the Chinese characteristics of the CPL by Zhaoguo Wang, the Deputy Commissioner of the Standing Committee of the National People’s Congress, was delivered in his speech to the congressmen before the last draft of the CPL was presented for final discussions. The full text of the speech is available online at many web sites, including the government news agency’s website, Xinhua. Zhaoguo Wang, *Guanyu Zhonghua Renmin Gongheguo Wuquanfa (Caoan) De Shuoming* [*Description of the “Property Law of the People’s Republic of China (Draft)”*], (Mar. 8, 2007), http://news.xinhuanet.com/misc/2007-03/08/content_5818772.htm.

7. “Equal protection” became an issue because the PRC Constitution of 1982 stipulates that public property is sacred and inviolable (Article 12) while private property is *only* inviolable, *but not sacred* (Article 13), leading to the interpretation that public property enjoys more constitutional protection than private property. The equal protection argument is that the CPL has given private property and public property “equal protection.”

8. The leading advocate of this view is Liming Wang, the former dean of Renmin University of China Law School and the current provost of the university. See Liming Wang, *Wuquanfa Xianming Tese Zaiyu Queli Pingdeng Baohu Yuanze* [*The Distinct Characteristic of the Chinese Property Law Is Establishing the Equal Protection Principle*] (Jan. 16, 2007) <http://news.sina.com.cn/c/2007-01-16/184412054017.shtml>. See also Zhang & Wang, *supra* note 6; Liu, *supra* note 6; YIN-CHIN CHEN ET AL., *ZHONGGUO DALU XIN WUQUANFA JIANXI* [AN INTRODUCTION TO CHINA’S NEW PROPERTY LAW] 18 (2008).

9. For example, in the U.S., the federal government is required to pay just compensation to states or local governments if the latter’s properties are condemned by the former. See Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PENN. L. REV. 829 (1989).

Code—and even the influence of the former USSR.¹⁰ The critical role of Taiwan’s Civil Code (“TCC”)¹¹ has been mostly neglected.¹² This essay contends that only by comparing the CPL with the TCC can one really appreciate the Chinese characteristics of the CPL.¹³ This essay will highlight several theoretically interesting differences between the CPL on the one hand and TCC, BGB, and other civil codes on the other hand.

The important role of the TCC in understanding the CPL deserves further explanation. First of all, enacted around 1930, the TCC was the law of the land in China for twenty years, until the Chinese Communist Party abolished every law stipulated by the Republican government,¹⁴ which continued to rule Taiwan after 1949 and implemented the TCC there. In addition, the TCC was also modeled after BGB and the Swiss Civil Code. With the same legal origins, a comparison of the differences between the TCC and the CPL is more likely to reveal the real Chinese characteristics than comparing the CPL with the private laws in Hong Kong, Singapore, or Macau.¹⁵ Similar cultural traditions between China and Taiwan further enable us to rule out Confucianism or other aspects of Chinese culture as the reasons for the differences. Moreover, the CPL may have imported German and Swiss property law by emulating the TCC. The TCC, intended to govern the whole of China, remained

10. See Albert H.Y. Chen, *The Law of Property and the Evolving System of Property Rights in China* 7 (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1615499; SUN, *supra* note 1, at 190–94.

11. The Taiwan Civil Code contains five books, the third of which is the Law of Things, the counterpart of the CPL. To simplify my prose, I refer to both the Taiwan Civil Code as a whole and the Book of Law of Things in particular as the TCC.

12. *But cf.* Lei Chen, *Private Property with Chinese Characteristics: A Critical Analysis of the Chinese Law on Property of 2007*, 5 EUR. REV. PRIVATE L. 983, 991 n.45 (2010) (mentioning that Taiwan Civil Code “was referred to frequently” when the CPL was drafted); Chen, *supra* note 10, at 22–23 (arguing that the tradition embodied in Taiwan’s Civil Code is being resurrected in China and that it shows the convergence of property law between China and Taiwan).

13. *But cf.* Gebhard M. Rehm & Hinrich Julius, *The New Chinese Property Rights Law: An Evaluation from a Continental Perspective*, 22 COLUM. J. ASIAN L. 177, 179 (2009) (comparing Chinese law with German law to explain the former’s major features and peculiarities).

14. Anecdotal evidence suggests that some Chinese judges in the post-1949 era still consult the TCC and use the doctrines contained in the TCC as fundamental private-law principles in adjudications.

15. Hong Kong and Singapore have received the English common law, while Macau transplanted its Civil Code from Portugal, whose system had been influenced by the Code Napoléon.

intact when the CPL was drafted and enacted,¹⁶ making the TCC a fitting starting point for the CPL lawmakers. Indeed, the structures of the German and Swiss Law of Things in their respective civil codes differ greatly from the structure of the CPL,¹⁷ whereas the structure of the CPL is more congruent to that of the TCC.¹⁸ Finally, long before the enactment of the CPL, leading Chinese property scholars heavily cited their Taiwanese colleagues' doctrinal interpretations of the TCC, as well as decisions, "precedents," and interpretations rendered by the ordinary courts and constitutional court in Taiwan. Since the passing of the CPL, scholars continue this practice.

This essay classifies the unique features of the CPL into two types: (1) stipulations that are available elsewhere but are omitted in the CPL; and (2) stipulations that cannot be found elsewhere. The two types are discussed in Parts I and II, respectively.

Dissatisfied with merely describing these unique features, this essay employs the law-and-economics approach to analyze them. Because extant literature in English focuses more on the evolution of Chinese property law¹⁹ or security rights such as mortgage,²⁰ this essay, to the best of my knowledge, is the first to apply economic analysis to the CPL. Specifically, this essay examines the costs and benefits with and without such unique features, and explores the possible economic reasons behind them.²¹ Because China is contemplating

16. Only one article in the Book of Law of Things in the TCC was revised before the CPL was passed.

17. *But see* Chen, *supra* note 12, at 991 (arguing that the structural layout of the CPL resembles that of the BGB and the Japanese Civil Code).

18. The CPL and the TCC both start with general principles, registration for real estate, delivery of personal property, etc.; then both stipulate ownership, condominium law, neighborly relations, and co-ownership; what follows is several types of *superficies* and then servitude; then comes (ordinary) mortgage, maximum amount mortgage, pledge of personal property, pledge of rights, and right of retention; and finally possession.

19. *See* Rehm & Julius, *supra* note 13, at 181–85; Chen, *supra* note 10; Lei Chen, *The Historical Development of the Civil Law Tradition in China: A Private Law Perspective* (working paper), available at <http://ssrn.com/abstract=1479442>.

20. *See* Yuanshi Bu, *Security Rights in Property in Chinese Law: The Unattainable Goal of Constructing a Coherent Legal Regime?*, 5 EUR. REV. PRIVATE L. 1005 (2010); Gregory M. Stein, *Mortgage Law in China: Comparing Theory and Practice*, 72 MO. L. REV. 1315 (2007) (describing how mortgage in China worked a few years before the CPL was passed).

21. Granted, economic analysis of law, if anything, is a capitalistic methodology, and yet many unique features of the CPL are arguably driven by socialistic ideology and the communist party's political concerns. Here I do not intend (or pretend) to excavate the *actual* rationales behind the decisions by the CPL lawmakers, but instead explore whether there may be economic reasons that are also supporting the unique features of the CPL.

the incorporation of the CPL, Contract Law of 1999, Tort Law of 2009, and other laws into a comprehensive Chinese Civil Code, this essay's economic evaluations of the unique features in the CPL should provide the Chinese policymakers with an alternative viewpoint.

My analysis reveals that the most salient Chinese characteristic of the CPL is the centralization of (thing use) power, as the CPL subjected the three types of *superficies* rights to public regulations (rather than to private negotiations), and chose not to recognize the right of first possession. Adding administrative regulations into the CPL also increases controls by Beijing.

Some Chinese characteristics of the CPL make economic sense. For example, because land in China is not privately owned and cannot be transferred, optional registration of farming rights will not impose high information costs on third parties. Also, not recognizing the right to abandon minimizes the social costs of abandonment, given that the right of first possession is not included in the CPL. Giving up the venerated accession doctrine (*specificatio*) and adverse possession doctrine in the CPL is more efficient than incorporating it. Nevertheless, the omission of the *accessio* and *confusio* doctrines in the CPL is welfare-reducing.

The CPL also demonstrates China's late-mover advantage. The definition of property rights in the CPL is more logically consistent than that in other civil codes. Paring down the contents in the "neighborly relations" part of the CPL and leaving it for regulatory statutes avoids the interpretive problems between the civil code and regulations that other civil law countries have experienced.²²

I. NOTABLE OMISSIONS

The omissions discussed below are no doubt conscious decisions made by the CPL lawmakers. The right of first possession, the right to abandon, the accession principle, and the adverse possession doctrines are stipulated in most, if not all, civil law jurisdictions, including Germany and Taiwan, and many Chinese legal scholars have elaborated on them in their works before the enactment of the CPL.

22. For example, the TCC has eleven articles on stipulating the right to appropriate water, whereas several regulatory statutes also prescribe matters regarding water appropriation. It becomes complicated even for property scholars like me to sort out when TCC stipulations can and should be used.

In addition, most of these rights or doctrines have been included in one or more drafts of the CPL but left out in the final version. In this Part, I will discuss the possible reasons for the omissions and evaluate their economic consequences.

A. Right of First Possession

While the right of first possession has been long lauded as the root of titles in U.S. law,²³ and at least still has a place in most civil codes, the CPL lawmakers avoided giving such a right, supposedly because the rule of first possession is impractical (as there will be very few such cases),²⁴ it encourages “gains without pains,” and it may contribute to the loss of state properties.²⁵ Nevertheless, even if the rule of first possession is impractical, it will not lead to loss of state properties, and in any case the CPL could easily put state properties off-limits. In addition, possession still requires effort; thus, first possession should not be considered a windfall. Furthermore, the rule of first possession may only be used in practice occasionally, but containing a provision on first possession in the CPL takes only a small amount of fixed costs in legislating, and this would avoid a lot of confusion in practice and save the judges from the laborious work of reinventing this rule.²⁶ As for encouraging windfall gains, most jurisdictions in the world recognize the rule of first possession, and this rule does not seem to create such a bad incentive scheme.

There should be deeper reasons for ousting the rule of first possession from the CPL. The first reason which comes to mind is socialistic ideology. The doctrine of first possession transforms resources from being held in common to being owned privately, averting much

23. See, e.g., Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985); Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979).

24. See WEIXING SHEN, WUQUANFA YUANLI [PRINCIPLES OF PROPERTY LAW] 221–22 (2008) (in Chinese). In a 2004 CPL draft, one article gave the titles to abandoned properties and, under certain circumstances, wild animals and plants, to the private parties who first possess them. Nevertheless, this stipulation was thereafter deleted for the above reason. See *id.*

25. See HUIXING LIANG & HUABIN CHEN, WUQUANFA [REAL RIGHT LAW] 222 (5th ed. 2010) (in Chinese).

26. Weixing Shen, a leading property scholar at Tsinghua University Law School, China, told me that he believed if courts in China handle a case that is best dealt with by the doctrine of first possession, they will still do it, notwithstanding the rejection of the doctrine by the legislature.

of the tragedy of the commons along the way.²⁷ Socialism (particularly Chairman Mao's communism), however, praises resources held in common, and believes that as long as everyone acquires only what she needs from the commons, there will be no tragedy of the commons. Thus, for socialists, the rule of first possession provides no benefits.

The second reason is maintaining centralized power. As Richard Epstein pointed out more than 30 years ago, either first possession or common ownership has to be the root of title, but the latter requires much more extensive public control than the former.²⁸ In other words, the rule of first possession decentralizes the process of resource allocation.²⁹ Hence, not recognizing the right of first possession in the CPL retains centralized controls on allocation of unassigned resources.

Indeed, the CPL does just that. The things that are usually subject to first possession,³⁰ such as city land, mineral resources, water, wild animals and plants, and the broadcast spectrum, have all been declared state-owned by the CPL (Articles 46–50). In addition, rural land and other natural resources are collectively owned (Article 58). Finally, the CPL does not recognize the right to abandon, so there is no abandoned chattel for first possession. Consequently, even if the CPL stipulates a right of first possession, there is hardly anything to get first possession of.³¹ Still, not recognizing such a right leaves the state to allocate resources that have not been designated as publicly or collectively owned in statutes.

B. Right to Abandon

While in the U.S. the abandonment of fee simple interests and other possessory interests in real property is flatly prohibited,³² in

27. See THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* 21 (2010).

28. See Epstein, *supra* note 23, at 1238–39.

29. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 62–63 (1995); MERRILL & SMITH, *supra* note 27, at 21–22.

30. For discussions of these things, see, e.g., Dean Lueck, *The Rule of First Possession and the Design of the Law*, 38 *J. L. & ECON.* 393, 412–21 (1995).

31. Article 49 of the CPL prescribes that wild animals and plants are state-owned only if so stipulated in statutes. Thus, certain wild animals and plants (stray dogs probably) could have been subject to first possession.

32. See Lior Jacob Strahilevitz, *Unilateral Relinquishment of Property*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW* 125, 142 (Kenneth Ayotte & Henry E.

the civil law systems the rights to abandon both personal and real properties are usually recognized by the civil codes.³³ The CPL, however, for unknown reasons, is silent about the general right to abandon.³⁴ Theoretically, it does not matter, as, following Tom Merrill's argument, one can deduce the right to abandon from the right to exclude,³⁵ which is defined as the core element of property rights in Article 2 of the CPL. Nevertheless, traditional civil property law scholarship never links the right to exclude with the right to abandon. It will be almost a leap of faith for the Chinese courts to make such a deduction.

Doctrinal interpretations aside, the more pressing issue for China should be whether it will be welfare-enhancing to formally recognize the right to abandon in the future Chinese civil code. Lior Strahilevitz provides the most comprehensive and insightful cost-benefit analysis of the right to abandon.³⁶ He pointed out three costs of abandonment: third parties' confusion as to the state of ownership of property (that is, whether the assets are lost, mislaid, or abandoned); deterioration of an asset's value during the time period of abandonment; and lawless-race costs to be the first one to capture the abandoned assets.³⁷ To apply Strahilevitz's insights to the Chinese context, first consider Table 1, showing the social costs of abandoning chattels:

Smith eds., 2011); Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 200 (2010).

33. See, for instance, Sections 928 (real property) and 959 (personal property) of the BGB; Article 764 of the TCC. See also Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 394–98 (2010) (describing the escheat system employed in several civil law countries, in which a real property owner can only relinquish land to the state).

34. Holders of security interests, however, are allowed to abandon their mortgage or pledge right (Articles 177, 194, and 218). It has also been argued that construction rights generally can be abandoned. See JIANYUAN CUI, WUQUANFA [PROPERTY LAW] 23 (2d ed. 2011) (in Chinese). Some Chinese scholars have gone even further and argued that in principle all property interest holders can abandon their rights. See LIANG & CHEN, *supra* note 25, at 109.

35. See Yun-chien Chang, *An Economic Analysis of the Article 826-1 of the Taiwan Civil Code: The Distinction Between Property Rights and Quasi-Property Rights*, 40 NAT'L. TAIWAN U. L.J. 1255 (2011) (in Chinese). This argument is derived from Tom Merrill's insights that "if we start with the right to exclude, it is possible with very minor clarifications to derive deductively the other major incidents that have been associated with property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 744 (1998).

36. See Strahilevitz, *supra* note 33; Strahilevitz, *supra* note 32, at 125. For a thoughtful and critical examination of the right to abandon in American common law, see Penalver, *supra* note 32.

37. See Strahilevitz, *supra* note 33, at 372–75; Strahilevitz, *supra* note 32, at 127.

Table 1: Social Costs of Abandoning Chattels in Four Scenarios

		The <i>de jure</i> right of first possession	
		Yes	No
The <i>de jure</i> right to abandon	Yes	(1) Deterioration costs: Low† Confusion costs: High Race costs: High	(2) Deterioration costs: High Confusion costs: Zero Race costs: Zero
	No	(3) Deterioration costs: Zero Confusion costs: Low‡ Race costs: Low	(4) Deterioration costs: Zero Confusion costs: Zero Race costs: Zero

† I mark the costs as high, low, or zero by comparing the same type of costs in each cell.

‡ There are still confusion costs in the absence of the right to abandon, because not all unowned assets are abandoned assets.

Table 1 has at least two limitations. First, it only includes positive market value chattels.³⁸ Nevertheless, the right to abandon negative market value chattels in any case will be qualified by public regulations or criminal laws. And most law-and-economists would agree that it is welfare-reducing to allow people to abandon negative market value chattels and impose external costs. Thus, whether in the CPL or other statutes, abandonment of negative market value chattels should be discouraged.

Second, Table 1 assumes that people will abandon or first possess movable things only if they have a *de jure* right to do so. It is unclear how often people exercise the *de facto* rights in the absence of *de jure* rights.³⁹ Part of the answers to these empirical questions lie in the enforcement level of other regulatory statutes and criminal laws that, for instance, punish people for dumping toxic wastes at will or misappropriating state-owned assets.

That being said, from Table 1 one can get a sense of why the CPL does not recognize a right to abandon chattels. While Strahilevitz focused on Cells (1) and (3) in Table 1, given that the CPL does not recognize the right of first possession, our discussions on China

38. For the distinction between positive and negative market value chattels in the right to abandon context, see Strahilevitz, *supra* note 33, at 362–72.

39. For example, people littering or throwing toxic waste on public land without being caught have a *de facto* right to abandon.

should focus on Cells (2) and (4). The comparison of these two cells (indeed, all four cells) immediately reveals that, as long as the exercise of *de facto* rights can be reasonably curbed, not recognizing the right to abandon minimizes the social costs of abandonment.

The social costs of abandoning real properties should be lower than those of abandoning chattels. Given my analysis above and the fact that land is publicly owned in China, it is not surprising that if China recognizes the right to abandon constructions or apartments in the future, it will adopt the escheat system,⁴⁰ in which abandoned real properties automatically become state-owned. In this case, race costs and confusion costs are essentially zero. As long as a notification to the registrar is the prerequisite to abandoning real properties, deterioration costs should be low—as compared to the high deterioration costs for abandoned chattels (see Cell (2) in Table 1).

Of course, to complete the cost-benefit analysis, we have to pay attention to the benefits of abandonment as well. As Strahilevitz pointed out, the major benefits of abandonment are “reduced transaction and decision costs.”⁴¹ Theoretically, however, it is difficult to determine whether Cell (3) or Cell (4) will produce higher net benefits. Consequently, it might make economic sense for the CPL to aim for the (relatively) sure thing—minimizing social costs of abandonment by not recognizing the general right to abandon.

C. The Accession Principle

Although *specificatio*, *accessio*, and *confusio* are stipulated in four drafts of the CPL, ultimately the CPL does not say a word about them, purportedly because they rarely happen in the real world and in any case are better dealt with in tort law.⁴² Below I will argue that it is efficient to leave the *specificatio* doctrine out of the CPL, but efficient to incorporate *accessio* and *confusio* doctrines into the CPL.

First of all, a primer on the three doctrines for readers immersed in common law: What the venerable doctrines of *specificatio*, *accessio*, and *confusio* do is reallocate titles to property. *Specificatio* arises when a man’s labor is mixed with another’s thing, whereas *accessio*

40. For an economic analysis of the escheat rule applied to abandoned treasure trove, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 46–47 (8th ed. 2010).

41. See Strahilevitz, *supra* note 33, at 372.

42. See SHEN, *supra* note 24, at 227–28.

and *confusio* arise when two things owned by different parties are combined or intermingled, respectively. Tom Merrill has used the term “the accession principle” to cover *specificatio*, *accessio*, *confusio*, and some other related doctrines, but in the U.S., the term “accession” is more often used to cover only *specificatio* and *accessio*, distinguished from “confusion” (*confusio*).⁴³ This American typology will certainly confuse civil lawyers, who instead group *accessio* together with *confusio*.⁴⁴ From an economic standpoint, the civil-law classification makes more sense, because *specificatio* and the other two doctrines are different in terms of their economic efficiency (more on this below).

1. Specificatio

The U.S. common law⁴⁵ and the second draft of the CPL have adopted similar *specificatio* doctrines.⁴⁶ The basic structure of this doctrine is as follows: a bad-faith improver can neither gain title nor request compensation; a good-faith improver will gain title if the “disparity-of-value test” is met, but will have to compensate the owner the value of the object before the improvements were undertaken.⁴⁷ According to the “normative Hobbes theorem,” “the law should allocate property rights to the party who values them the most.”⁴⁸ Elsewhere I have demonstrated that the *specificatio* doctrine fails this test and proposed abolishing it.⁴⁹ China may be the

43. See Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 464 n.4 (2009).

44. For example, in Sections 946–948 of the BGB and Articles 811–813 of the TCC, the stipulations of *accessio* are applied, *mutatis mutandis*, to *confusio*.

45. For the U.S. *specificatio* doctrine, see Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1769 (2007); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1878–79 (2007); Jay L. Koh, *From Hoops to Hard Drives: An Accession Law Approach to the Inevitable Misappropriation of Trade Secrets*, 48 AM. U. L. REV. 271, 321–34 (1998).

46. See SHEN, *supra* note 24, at 227.

47. Note that in most civil law countries, bad-faith improvers can still acquire the title of the improved thing. For discussions of the *specificatio* doctrine in civil law systems, see Yun-chien Chang, *An Economic Analysis of the Accession Doctrine: A Case for the Property Rule* (working paper), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1576426.

48. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 98 (5th ed. 2008); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 446 (1995).

49. See Chang, *supra* note 47. But see Epstein, *supra* note 29, at 116–18 (defending the efficiency of the *specificatio* doctrine).

first country to adopt my proposal, though for very different reasons. In any case, in my opinion, the CPL lawmakers make a wise choice in not reallocating titles to properties when nonconsensual improvements happen.

2. *Accessio and Confusio*

The *accessio* and *confusio* doctrines in the second draft of the CPL⁵⁰ transplant those in the BGB (Sections 946–948) and resemble those in the TCC (Sections 811–813). If a movable thing is combined with an immovable thing (building or land) in such a way that the former becomes an essential part of the latter, the ownership of the immovable thing extends to the movable thing. And if two movable things are combined or intermingled in such a way that they both become an essential part of a unified thing, the previous owners become co-owners of this thing, except when one of the things can be regarded as the “principal thing,”⁵¹ in which case its owner acquires the sole ownership but has to compensate the other owner. Below I will first argue that the CPL should have contained provisions on *accessio* and *confusio*, and then demonstrate how these two doctrines can be interpreted economically.

Although in practice very few people would litigate over *accessio* or *confusio* (particularly that of personal properties), these two doctrines should be an indispensable part of any civil code.⁵² Disputes regarding *accessio* or *confusio* arise when, for instance, paints are attached to tables, liquid fertilizers are sprayed onto the land, or two cans of tomato juice are poured into one big jug. Without the force of these two doctrines, two ownerships exist in the colorful table, fertilized plot, and full jug. Yet any previous owner (say, that of the paints) who tries to control or possess her “thing” will at the same

50. See SHEN, *supra* note 24, at 227.

51. The opposite of a principal thing is an accessory thing. Pursuant to Article 68 of the TCC, an accessory thing is not part of a principal thing, but the former usually facilitates the utilization of the latter. The disposition of a principal thing extends to its accessories. In the TCC, a principal thing and an accessory thing have to belong to the same owner, while the BGB does not have such a requirement.

52. As Richard Epstein pointed out, “[it is] misleading to measure the importance of a rule solely by its frequency in litigation.” Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 673 (1986).

time possess the thing (say, the table) of the other party. Neither has the right to claim sole title to the combined or intermingled thing. Absent the doctrines of *accessio* and *confusio* in the CPL, if the Chinese court takes the legislative history of the CPL seriously and refuses to infer new doctrines similar to *accessio* and *confusio* from other articles in the CPL, the only plausible way to solve the dispute seems to be dividing the combined or intermingled thing apart, which often leads to destruction of both things, if such division or separation is possible at all. Hence, it should be clear that when *accessio* or *confusio* happens, there are good economic reasons to reduce the number of titles from two to one, and this is exactly what the doctrines of *accessio* and *confusio* serve to do.⁵³

If the doctrines of *accessio* and *confusio* are added to China's civil code, they should not be structured, or at least interpreted, in the traditional way. The TCC, BGB, and the second draft of the CPL all contain an obscure criterion to judge whether *accessio* and *confusio* have happened—that is, the “essential part” test, which requires the court to determine whether the two originally separate things have become essential parts of the newly combined thing. The “essential part” test is too abstract to make economic sense. The “high separation costs” test that is used occasionally in the TCC and the BGB is a more operable standard for judging *accessio* and *confusio*.⁵⁴

Specifically, “high separation costs” should be interpreted as follows: if [separation costs] > {[the market value of thing A after separation] plus [the market value of thing B after separation] minus [the market value of the combined or intermingled thing]}, separation costs are high.⁵⁵ In other words, if the marginal costs of separation are higher than its marginal benefits, from a social standpoint separation is not worth doing; the law should either assign the title of the combined or intermingled thing to one of the parties or make both parties co-owners, instead of ordering separation.

53. *Specificatio* does not suffer from similar problems; thus, a civil code can do without the *specificatio* doctrine. The reason is that the improver's labor is not a well-defined property. Absent the *specificatio* doctrine, the improver can neither claim lost title for her labor nor claim title to the improved thing. Thus, the law can simply ignore the contribution of the improver, and allow the thing owner to keep a sole title.

54. To be more exact, in *confusio*, the criterion is “high identification costs.”

55. For more discussions, see Yun-chien Chang, *An Economic Analysis of Accessio and Confusio in Property Law*, 36 CROSS-STRAIT L. REV. 74 (2012) (in Chinese).

D. Adverse Possession

Adverse possession (or prescriptive acquisition) is a complicated and controversial doctrine. To apply the doctrine, the court has to know the mental state of the possessor,⁵⁶ the type of the possessed things (personal properties or real estate), the nature of the possession (open, notorious, continuous, etc.), and the various issues regarding statute of limitations.⁵⁷ While most scholars agree on treating bad faith adverse possessors worse than good faith ones (although there is still no consensus on the treatment and its justifications),⁵⁸ Lee Anne Fennell has made a strong case for limiting the use of adverse possession doctrine to only bad faith adverse possessions that meet certain requirements, mainly because only a bad faith possessor could be conscious of her making better use of the resource she is possessing.⁵⁹ Partly due to its doctrinal complexity,⁶⁰ and partly due to its controversial nature,⁶¹ the CPL does not incorporate the adverse possession doctrine.

Law-and-economics scholars have provided several justifications for the American adverse possession doctrine, including slothfulness of the true owner, rewarding diligent possessors, as well as clearing land records and stale claims.⁶² Not all of these economic rationales are applicable to China's context, however. Countries (such as China)

56. Unlike in the U.S., where common law courts do not always inquire whether the adverse possessors are good faith or bad faith, in civil law countries like Germany, France, and Taiwan, the courts have to ascertain whether the adverse possessors are good faith, in order to determine whether to apply the prescription doctrine, or which sets of prescription doctrines to apply.

57. See, e.g., HERBERT HOVENKAMP & SHELDON F. KURTZ, *PRINCIPLES OF PROPERTY LAW* 57–58 (6th ed. 2005) (dissecting the adverse possession doctrine).

58. See, e.g., Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723 (1986); Epstein, *supra* note 52; Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122 (1984).

59. See Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037 (2006).

60. See SHEN, *supra* note 24, at 223–24 (noting that the scholarly debate on whether to follow the Japanese or the German system of statutes of limitations has yet to be settled, and that this is one of the reasons for the CPL not recognizing adverse possession doctrine).

61. The CPL lawmakers worried that adverse possession is against "socialistic morality" and may encourage "gains without pains." See LIANG & CHEN, *supra* note 25, at 148; SUN, *supra* note 1, at 310.

62. See MERRILL & SMITH, *supra* note 27, at 37–38. See also Epstein, *supra* note 52, at 678; Merrill, *supra* note 58, at 1128–31.

that adopt the registration system (rather than the recording system employed in almost all American jurisdictions) have much less of a need to clear land records, as old records do not matter anyway—the registration system is designed to avoid the hassles of examining previous land records. Moreover, without any *legally* recognized future interests in the CPL,⁶³ there will not be many old claims to be cleared.⁶⁴

As for other justifications for adverse possession, I agree with Fennell that the goal of property law should be facilitating transfer of property rights to higher-value users,⁶⁵ and the adverse possession doctrine in the U.S. common law is not helpful in this end.⁶⁶ Fennell has advocated that the adverse possession doctrine should be narrowed and applied only when two conditions are met: (1) the difference between parties' valuations of the property is very large; (2) a market transaction is not available.⁶⁷ Still, I doubt whether even this shrunken version should have a place in the future Chinese civil code.⁶⁸

As far as adverse possession of immovable property is concerned,⁶⁹ land in China is publicly owned, and Chinese lawmakers are highly unlikely to allow adverse possession of land. Thus, the adverse possession doctrine is only applicable to ownership of constructions, *superficies* rights, or servitudes. The case for adverse possession of

63. As Robert Ellickson's article that also appears in this issue shows, a redeeming right to a Dian right and the landlord's right to take back the property after the lease expires are, functionally speaking, future interests. Robert C. Ellickson, *The Costs of Complex Land Titles: Two Examples from China*, 1 BRIGHAM-KANNER PROPERTY RIGHTS CONF. J. 281 (2012). But note that lease is a type of contract in China law and Dian is a customary property right. Other functional future interests in the CPL are registered and thus will not produce great information costs.

64. See the discussions of the "quieting title" argument in Merrill, *supra* note 58, at 1129.

65. Cooter and Ulen call this the "normative Hobbes theorem." See COOTER & ULEN, *supra* note 48, at 97.

66. The adverse possession doctrine in the TCC, the BGB, and many other civil codes, though different in details, share the same contour and will be considered inefficient under Fennell's framework.

67. See Fennell, *supra* note 59, at 1040–41. Judge Posner also emphasizes that transaction costs have to be high to justify adverse possession. See Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 560 (2000).

68. *But see* LIANG & CHEN, *supra* note 25, at 148 (arguing that the future Chinese civil code should stipulate the adverse possession doctrine).

69. I believe that Fennell's insights are also applicable to movable properties as well, but I will concentrate on frying the bigger fish—real properties—here.

superficies rights or servitudes on land⁷⁰ is weak, because Fennell's second condition does not hold. A market transaction is not available when one does not know who the true owner is or where she is—in China, the government or the collective, who owns the land, is always there. Granted, adverse possession of buildings could meet the two conditions above. Nevertheless, building ownership is subject to mandatory registration; thus, it is not often difficult to locate the owner.

Not recognizing the right to adversely possess real properties at all in the CPL, therefore, seems to be welfare-increasing. The above discussions show that even a narrow adverse possession doctrine that aims to transfer property rights to higher-value users can at most be infrequently used, mainly due to China's public ownership of land and real property registration system. Discarding the doctrine altogether has the advantage of simplifying the legal rule, thus reducing (social) judicial costs, as no one will litigate in court to claim adverse possession, and the court thus does not have to examine the complicated issues and evidence involved. Eliminating any hope of acquiring titles to real properties through adverse possession should facilitate voluntary transactions, which generally promote efficiency. Moreover, like in the case of the accession doctrine, the property law system can work smoothly without the adverse possession doctrine, because in their absence property law can simply stick to its norm—the property rule protection of titles.⁷¹

II. UNUSUAL CONTENTS

This Part demonstrates and analyzes several groups of unusual contents in the CPL. Subpart A shows that the CPL contains a lot of stipulations of regulatory nature that are not included in other developed countries' civil codes; these unique stipulations are sometimes symbolic and sometimes substantive. Subpart B observes that in at least three ways the CPL uses the governance strategy differently from other civil codes. Subpart C argues that the CPL makes quite

70. In practice, servitudes on constructions are not plentiful. *See, e.g.,* SHEN, *supra* note 24, at 293.

71. *See* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1722 (2004) (“the law treats property rule protection as the norm and liability rule protection as the exception”).

a few exceptions to the rule of mandatory registration. Subpart D points out that the CPL defines property rights, which is a rare feat among civil codes.

A. Mixture of Administrative Law and Property Law

One of the most salient differences between the CPL and the TCC—indeed, probably any developed country’s civil code, is the mixture of administrative law and property law.⁷² A handsome portion of the relatively short CPL is devoted to declaring prohibitions or mandates—but usually without specifying the penalties for violations. Some of the public law-like stipulations direct government agencies and employees to do or not to do certain things. For instance, Article 22 stipulates that the registrar should charge by the number of filings, rather than by the size or market value of the registered real estate.⁷³ Article 13 forbids the registrar to require, among other things, repetitive registration in the name of annual inspection. Article 57 essentially asks government employees in charge of state-owned properties to work harder. Besides, Articles 10 and 43 declare the legislature’s policy stance on a national real estate registration system and rezoning, respectively.

Some of the public law-like stipulations target property interest holders. For example, Articles 83, 89, 90, and 120 tell them to obey the relevant law, whereas Article 11 lists the documents necessary for real estate registration application.

Other stipulations shall find an audience in the general public. For example, Article 42 stipulates that no institution or individual shall withhold, misappropriate, or embezzle the takings compensation. In addition, after Article 4 announces that state-owned, collective, and private properties are protected by law and shall not be infringed upon by any institute or person, Articles 56, 63, and 66

72. Note that the public-private distinction is well recognized in China. *See, e.g.*, SUN, *supra* note 1, at 30 (distinguishing between property rights and regulatory power).

73. There is no official English translation of the CPL. In this essay, I consult the translation published by a Chinese law firm, Lehman, Lee & Xu, but I use my own translation whenever I see fit. Lehman’s translation is available online for free. *See* Lehman, Lee & Xu, *Property Rights Law of the People’s Republic of China*, LEHMAN, LEE & XU http://www.lehmanlaw.com/fileadmin/lehmanlaw_com/laws___regulations/Propoerty_Rights_Law_of_the_PRC__LLX__03162007.pdf (last visited July 9, 2012).

restate that these three types of property are legally protected and are prohibited from occupation, theft, cheating, or being withheld or damaged by any institution or person.

These unusual contents may appear in the CPL because Chinese lawmakers have been accustomed to the command-and-control approach in legislating. The CPL lawmakers thus did not notice that such regulatory contents do not square with other private law contents. Nevertheless, the Contract Law of 1999 and the Tort Law of 2009 do not intermingle administrative contents and private law contents; therefore this argument thus does not hold much water.

An alternative explanation is that the CPL lawmakers may have wished to use the CPL as an educational document for government officials and even the general public. Most Chinese people have grown up immersed in communism, in which every righteous citizen has a right to take resources from the common and has little respect for *private* properties. Hence, the CPL has to tell its readers: “You, you, and you, we mean it. These are private (or state-owned or collective) properties, not common resources. Get your hands off them.” In addition, iteration of “the obvious” in the CPL may also signal the Party/state’s will to protect property rights.

B. Different Uses of Governance Strategy

Henry Smith has famously distinguished the strategies for delineating property rights into exclusion and governance. In the exclusion strategy, “decisions about resource use are delegated to an owner,” whereas the governance strategy “pick[s] out uses and users in more detail.”⁷⁴ For transaction cost reasons, property law has to rely on the exclusion strategy most of the time and as a default, while using the more costly governance strategy to delineate property rights when the stakes are high.⁷⁵ Interestingly, the CPL uses the governance strategy in a different fashion than the TCC and other civil codes do. I discuss three examples below.

74. See Henry Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S454–55 (2002).

75. See Yun-chien Chang & Henry Smith, *An Economic Analysis of Civil Versus Common Law Property*, 87 NOTRE DAME L. REV. (forthcoming 2012) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017816.

1. Superficies *Subject to Public Regulation*

The CPL frequently uses public regulation in delineating the three types of *superficies* rights⁷⁶: the farming right (Articles 124–134),⁷⁷ the construction right (Articles 135–151),⁷⁸ and the residence right (Articles 152–155).⁷⁹ Ordinarily, the term, renewal, transfer, and other contents of a *superficies* right is subject to negotiation between the “bare owner”⁸⁰ and the (potential) holders of lesser property interests. Under the CPL, due to the state ownership of land in the city (Article 47) and collective ownership of farmland (Article 60),⁸¹ the bare owners in a *superficies* relation are always the state or “the collective,”⁸² whereas the holders of farming, construction, or residence rights are private parties. Still, the CPL can authorize the “quasi-public”⁸³ collectives and the local governments that manage the state properties to negotiate, as if they were private parties, the contents of the *superficies* with the (potential) holders of lesser property interests. The CPL, however, chooses instead to rely on the governance strategy more heavily than the TCC and other civil codes do.

The CPL deprives the collectives and local governments (as managers of state properties) of discretion, and controls various contents of *superficies* rights. For example, Article 126 stipulates that upon expiration of farming rights, the bare owners generally are obliged

76. For an overview of these three types of *superficies* rights, see Rehm & Julius, *supra* note 13, at 208–16.

77. This right can be literally translated as the “right to manage land through contracting” (*tudi chengbao jingyingquan*). Article 125 of the CPL stipulates that a holder of such a right enjoys the right to possess, utilize and obtain profits from the farmland, forestland and grassland.

78. This right can be literally translated as the “right to use construction land” (*jian-sheyongdi shiyongquan*). Article 135 of the CPL prescribes that a holder of such a right shall, according to law, be entitled to possess, utilize and obtain profits from the state-owned land, and have the right to build buildings and their accessory facilities.

79. This right can be literally translated as the “right to use residential housing land” (*zhajijidi shiyongquan*). Article 152 stipulates that a holder of such a right shall enjoy the right to possess and utilize collectively owned land, and the right to build residential buildings and their accessory facilities on such land.

80. A bare owner or a nude owner is an owner of a thing that is burdened by a lesser property interest, such as mortgage or servitude.

81. Many other different types of resources are state-owned or collectively owned. See Articles 45–52, 58, and 59 of the CPL.

82. Article 60 defines how and when the resource is collectively owned. For discussions of the meaning of “the collective” in the CPL, see Chen, *supra* note 10, at 19–22.

83. The nature of the collectives is a complicated question and I will defer the discussion to another paper.

to renew.⁸⁴ Similarly, Article 149 stipulates that construction rights on residential land are automatically renewed upon expiration.⁸⁵ In addition, Article 126 prescribes the exact term of farming rights on arable land (30 years). Moreover, according to Article 153, the acquisition, exercise, and transfer of residence rights are regulated by the Land Management Act, among other statutes. Finally, Articles 128 and 140 require holders of farming rights and construction rights to obtain approvals from relevant competent administrative agencies if they plan to use the land in a different way.

The rationales behind these unconventional uses of the governance strategy are probably to centralize land use power.⁸⁶ If the length of term and the standards for renewal and allowing changes of land use are not specified by a national law, but are left to the discretions of the collectives or local governments, the central government would lose the power to shape land use policy. Additionally, as Steven Cheung pointed out in China's context, "[t]he right to decide and allocate land use is the key issue in a developing country," and the economic power has already by and large rested in the *xians* (a level of local government below provinces and cities) in today's China.⁸⁷

Given the non-private land ownership under the CPL, centralization of power, however, is not necessarily a bad thing.⁸⁸ The farming right and the residence right are so-called "member rights," meaning that one has to be a member in the collective to qualify for acquisition of such rights in the first place.⁸⁹ In addition, the constitutional right to travel freely within the country (or, for that matter, to change "membership") is still in its infancy. Consequently, the collectives are monopolists in agricultural land and land for residential use in the

84. See CUI, *supra* note 34, at 278.

85. Interestingly, the automatic renewal of construction rights on residential land and the bare owners' obligation to renew farming rights make these *superficies* rights, economically speaking, essentially full ownership.

86. Eva Pils also pointed out that "both rhetorical 'over-protection' in the private sphere and under-protection against the government result in a concentration of power in the hands of the State . . ." Eva Pils, *Chinese Property Law as an Image of PRC History*, 39 HONG KONG L.J. 595, 597 (2009).

87. See STEVEN N. S. CHEUNG, *THE ECONOMIC SYSTEM OF CHINA* 45–46 (2008).

88. In the context of police control, Tanner and Green argue that decentralization of law enforcement power constitutes "a major obstacle to building rule of law in China." Murray Scot Tanner & Eric Green, *Principals and Secret Agents: Central Versus Local Controls Over Policing and Obstacles to "Rule of Law" in China*, 191 CHINA Q. 644, 645 (2007).

89. See SHEN, *supra* note 24, at 273, 289 (noting that the farming right and the residence right are generally member rights); LIANG & CHEN, *supra* note 25, at 275–76.

countryside and face no competition from other collectives, because peasants hardly have the right to “exit.” Granted, for most homeowners in most jurisdictions, exit is always a costly option. Nevertheless, there are always some people looking for new places to live, and the possibility of “entrance” (particularly entrance of people from the upper echelon, who contribute to the local tax receipt) often stimulates juridical competitions. In China’s context, due to the nature of membership right, peasants simply cannot move to different villages. Therefore, local governments have fewer incentives to reduce corruption to attract new taxpayers.

If the land use power is decentralized to the collectives, and they abuse the power, peasants can still “voice.”⁹⁰ Voice, however, is much less powerful without regular, competitive local elections. A unique type of voicing in China, *xinfang* or *shangfang*,⁹¹ is not always very effective and certainly very costly. It is doubtful whether peasants’ voice alone is enough to curtail the local corruption. Therefore, the heavy use of the governance strategy in *superficies* rights to centralize the land use power and to reduce abuse of such power by the collectives may be more welfare-enhancing for Chinese peasants.⁹²

2. Neighborly Relations Lightly Treated

The “neighborly relations”⁹³ part in a civil code is usually a gathering point for governance strategies, but the CPL contains a relatively short and simple neighborly relations part. Many civil codes contain long and sophisticated stipulations in the neighborly relations part. For example, in civil codes of Portugal, Italy, Taiwan, and Germany, neighborly relations takes up roughly 20%, 12%, 10%, and 5%, respectively, of their Book of the Law of Things in terms of the

90. For discussions of voice versus exit, see, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 72–74 (2001).

91. For discussions of *xinfang*, see, e.g., Taisu Zhang, *The Xinfang Phenomenon: Why the Chinese Prefer Administrative Petitioning Over Litigation*, 3 SOCIOLOGICAL STUD. 139 (2009).

92. Note that the governance strategy used here does not simply transfer the decision-making power from local officials to officials in central government. If done this way, it may be the officials in central government that are taking bribes. The crystal-clear rule stipulated by the national legislature, instead, gives no official the opportunity to take bribes.

93. In civil law systems, the law of neighborly relations contains doctrines that in the common law would usually be discussed in nuisance law, and sometimes in trespass law.

number of articles. And many of these stipulations are typical examples of the governance strategy.⁹⁴ By contrast, only 4% (9 out of 247) of the CPL concerns neighborly relations, and the nine articles are brief.⁹⁵

I have two conjectures on the light treatment of the neighborly relations by the CPL. First, land is either collectively owned or state-owned; thus, there is no *private* dispute between neighboring landowners, simplifying the neighborly relations. Second, many civil codes were enacted before the rise of the regulatory state. Adjustments of property rights in a civil code will not be in conflict with an existing public regulation. In China, the development is the other way around—many regulations were already in place by 2007. Thus, sophisticated governance of neighborly relations in the CPL may confuse the administrative agencies or the court as to when and whether the CPL or regulatory statutes should prevail. Therefore, the CPL shies away from beefing up the contents in the neighborly relations part, but only because the governance strategy has already been employed elsewhere—in regulatory statutes.

3. Imposition of a Market Standard

The socialistic CPL at times imposes a market standard when capitalistic civil codes fail to.⁹⁶ Articles 195, 219, and 236 require that market prices shall be used as benchmarks when mortgaged,

94. For examples of the governance strategy used in neighborly relations, see Yun-chien Chang, *Customs in Taiwan's Property Law: From the Perspective of the Information-Cost Theory*, 188 TAIWAN L. REV. 81 (2011) (in Chinese).

95. Note that the CPL contains 14 other articles regarding condominiums, which are traditionally treated as part of the neighborly relations. For the CPL lawmakers, it makes sense to emphasize condominium dispute resolution, as apartments, unlike land, are mostly privately owned.

96. For example, the civil codes of Taiwan, Germany, and the Netherlands do not impose such market standards. Section 1221 of the BGB does mention market price, but does not use it as a mandatory benchmark. Section 1221 of the BGB stipulates that “if the pledged item has a stock exchange or market price, the pledgee may affect the sale privately at the current price through a commercial broker officially authorized to affect such sales or through a person authorized to sell by public auction.”

Note, however, that codes of civil procedure or civil enforcement acts may contain stipulations that try to maximize the value of mortgaged, pledged, and retained assets. In Taiwan, anecdotal evidence suggests that mortgaged land and buildings are usually sold or auctioned by the court at below market value (I am starting to work on an empirical project to verify this claim). Imposing a stipulation of a market price standard like those in the CPL and the TCC, if taken seriously, would change the whole dynamics of court auctions and court sales in Taiwan.

pledged, and retained assets are “sold” by the court (or other independent institutions) or “converted into money” through bilateral bargaining. Nevertheless, this market price standard is not imposed when these assets are “auctioned” by the court. The CPL does not specify the consequences for failure to comply (for example, when the court sells an asset for 80% of its market value). To my knowledge no Chinese scholars have elaborated on these stipulations, either. If these articles are interpreted to mean that a mortgagor’s debt claim equivalent to the asset’s market price will be written off, no matter how much the asset is actually sold for, Articles 195, 219, and 236 use a strong governance strategy. If these articles are instead just a gentle reminder or a wish by the lawmakers, the governance strategy adopted here is at most symbolic.⁹⁷

C. Occasional Optional Registration

Registration of real property rights is not always mandatory, declarations by Articles 9, 14, and 17 of the CPL notwithstanding.⁹⁸ For instance, servitudes and residence rights need not be registered (Articles 158 and 155, respectively).⁹⁹ China has yet to have a unified registration system or an electronic real estate registration database,¹⁰⁰ and many lesser property interests had not been registered before the enactment of the CPL in 2007, either. The huge

97. At the private law workshop in Renmin University Law School, the attending scholars, judges, and doctoral students all have a different take of what these three articles mean. Notably, a judge in the People’s Supreme Court informed me that in practice, “market prices” are a floating concept. Secured assets are usually auctioned first. After two rounds of auction, if no one bids, the court will try to sell the secured assets at half price—because in the second auction, the asset is listed at $80\% \times 80\% = 64\%$ of its original market price, and it is expected that only by further lowering the sale price can the court actually sell the asset. The judge contends that the practice will not violate Articles 195, 219, and 236, because the asset’s “market price” has decreased as the foreclosure process drags on.

No matter how these three articles are interpreted, their ambiguity imposes transaction costs on parties who need to use secured transactions.

98. Pursuant to Articles 9 and 14, modifications of real property rights shall take effect upon registration, unless otherwise provided by law. Article 17 adds that the land register is the final authority on real property rights.

99. See LIANG & CHEN, *supra* note 25, at 275.

100. Although Article 10 of the CPL proclaims that it implements a “unified registration system,” the real estate registration system in China as it now stands is extremely complicated, as various administrative agencies are in charge of registration for different property rights. For a list that matches the property rights with the agencies in charge, see SHEN, *supra* note 24, at 167–70.

administrative costs of integrating all the current real estate registration systems, investigating all unregistered interests to put them on record, and daily updating of registration records must have prevented the CPL from sticking to the system of mandatory registration that is quite common in civil-law jurisdictions such as Germany and Taiwan.

One particularly interesting example of optional registration is farming rights.¹⁰¹ Local governments are obliged to issue certificates to farming right holders and keep an up-to-date registry, which is separate from the land registry (Article 127). Farming rights that are not registered in the local government's registry are invalid only in relation to third parties acting in good faith (Article 129). For example, Abby is the original holder of a farming right; Abby first sells the right to Bob, without updating the transfer in the local government's registry, and then to Christine who is unaware of the previous transaction between Abby and Bob. Christine will acquire the farming right.

It has been argued that the optional registration of farming rights makes economic sense for the following reasons. First, only peasants who are "members" of the collective are qualified to acquire farming rights, and these peasants would know each other and everyone's rights—information costs are low for potential farming rights acquirers. In addition, the certificates issued by the local governments serve as notice and further decrease third parties' information costs. Finally, mandatory registration of all—literally millions—of farming rights would overwhelm the land registrar.¹⁰²

I would add one more economic rationale for the optional registration of farming rights. The key is that a bare owner has incentives to conceal the existence of *superficies* to her potential buyer (to increase prices), while a holder of *superficies* rights has incentives to prove to her potential buyer that her right exists (to make a deal). Uniform and mandatory registration, therefore, reduces information costs mostly for land buyers. But since under the CPL, farming land is collectively owned and cannot be sold, no potential buyers exist to

101. For criticism of optional registration of farming rights, see CUI, *supra* note 34, at 266–67. *But see* LIANG & CHEN, *supra* note 25, at 260–61 (arguing that it is impractical to mandate registration).

102. *See* CHEN, *supra* note 8, at 222.

benefit from mandatory registration. As for buyers of *superficies* rights, the official certificate and records kept by the local governments are enough evidence to show them that the farming rights indeed exist. Therefore, optional registration of farming rights shall not hamper market transactions of farming rights.

D. Definition of Property Right

A surprising fact regarding civil property law is that the civil codes rarely define what a property right is.¹⁰³ As a result, civil property law theories often fail to distinguish between property rights and ownership.¹⁰⁴ Article 2 of the CPL manages to avoid such conceptual confusion and define a property right as a right to directly control a specific thing and to exclude others. Article 2 further articulates that property rights are composed of ownership, *usufruct*, and security rights, dispelling any notion that property rights are co-terminous with ownership. In doing so, the CPL also demonstrates that it follows the civil-law tradition in conceptualizing a property right as “men versus things,” rather than “men versus men regarding resource,” which is rooted in the common-law tradition.¹⁰⁵ Elsewhere, Henry Smith and I have already criticized the concepts of property rights in both traditions,¹⁰⁶ so I will stop here.

Article 2 also stipulates that the objects of property rights include movable and immovable things, which is quite conventional. What demonstrates the CPL’s late-mover advantage is the unusual clause that ensues: “Rights can be objects of property rights if the law so stipulates.”¹⁰⁷ Movable and immovable things are corporeal, while rights are incorporeal. The BGB has been criticized as inconsistent because, on the one hand, it recognizes only corporeal things as objects of property rights and, on the other hand, pledge of rights is

103. It seems that only one civil code has done so: the Austrian Civil Code of 1811 (in Article 307). See Chunqi Wu, *Wuquanfa [Property Law]*, in CHINESE CIVIL LAW [ZHONGGUO MINFA] 246, 246–47 (Jer-Sheng Shieh ed., 2007) (in Chinese); SHEN, *supra* note 24, at 42; SUN, *supra* note 1, at 30, 41.

104. See Chang & Smith, *supra* note 75.

105. For discussions of these two traditions, see *id.*

106. See *id.*

107. For a critical discussion of rights as objects of property rights, see Chen, *supra* note 12, at 992.

listed as a property right.¹⁰⁸ By adding the aforementioned clause, the CPL, at least doctrinally speaking, avoids the inconsistency.

CONCLUSION

After years of fierce debates, in 2007 China finally enacted the first comprehensive property law since the communist party took over China in 1949. Using civil law logic and “style,”¹⁰⁹ the CPL firmly declares its stance of protecting private properties. For a country that is only thirty plus years removed from the Cultural Revolution and, despite the economic reforms, is still under socialism, the achievement of the CPL, its lawmakers, and the large number of property scholars that have worked on or commented on the drafts of the CPL should be lauded.

Nevertheless, to integrate capitalistic ideas into a socialistic structure, and to maintain social and political stability, the CPL makes quite a few compromises, some of which are unique in modern property law—thus, the CPL is called a law with Chinese characteristics. This article finds that the compromising choices by the CPL lawmakers often lead to the (unintended?) consequence of centralizing the power to determine the use of immovable things and even movable things, although this is not necessarily inefficient, given the current overarching structure of the CPL. In addition, a few stipulations that are unique features of the CPL have unfortunate welfare-reducing effects.

The long-awaited Chinese civil code had been expected to come out in 2010, but has since been postponed. Still, it may be enacted in the near future. Hopefully, being informed of the inefficiency of certain stipulations with Chinese characteristics in the CPL, Chinese lawmakers can fix them in the civil code. Without doubt, property law and property theory should be adjusted to reflect the idiosyncrasy of a country; hence, enacting a law with a jurisdiction’s own characteristics is a laudable endeavor. Nevertheless, eventually, at least from the law-and-economic perspective, the welfare of the people should be the priority concern.

108. See CHRISTIAN VON BAR & ULRICH DROBNIG, *THE INTERACTION OF CONTRACT LAW AND TORT AND PROPERTY LAW IN EUROPE: A COMPARATIVE STUDY* 317 (2004); Chang & Smith, *supra* note 75.

109. For the common law’s and civil law’s different styles of delineating property rights, see Chang & Smith, *supra* note 75.