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## Article

# Rights-Weakening Federalism

Shitong Qiao<sup>†</sup>

### INTRODUCTION

Economic development requires “political institutions that credibly commit the state to honor economic and political rights.”<sup>1</sup> It is widely considered that federalism, or more specifically, interjurisdictional competition, can force local governments to protect property rights.<sup>2</sup> China is a unitary country by

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1. Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 1 (1995).

2. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 506–11 (1991); Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 79 (2005); Maureen E. Brady, Penn Central Squared: What the Many Factors of *Murr v. Wisconsin* Mean for Property Federalism, 166 U. PA. L. REV. ONLINE 53, 57, 63 (2017); Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 757 (2009); Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 891–92 (2006); Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1692 (2007); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 887 (2007); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 271 (2004); cf. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM.

virtue of its constitution, but leading scholars believe that its economic success, which has occurred with neither rule of law nor democracy, is attributable to a de facto federalist system.<sup>3</sup> Most notably, Professor Barry Weingast and his co-authors coined the term “market-preserving federalism” (MPF) to describe decentralized economic governance and interjurisdictional competition in China.<sup>4</sup> MPF scholars have examined the impact of fiscal federalism, that is, fiscal autonomy and hard-budget constraints for local governments, on China’s economic development.<sup>5</sup>

But does MPF apply to land institutions? Does interjurisdictional competition force local governments to protect land rights? As Professor Steven Cheung, a pioneer in law and economics, has pointed out, land is the most important asset that Chinese local governments have to compete with one another on economic development.<sup>6</sup> Therefore, understanding the relationship between land rights and federalism is central to any claim that MPF is the political foundation of China’s economic success.<sup>7</sup> Unfortunately there has been no research on the power allocation and interactions between the central and local governments on property rights. Even Cheung takes land institutions as a given and does not examine the impact of interjurisdictional competition on the development of land institutions.<sup>8</sup>

This Article examines whether federalism protects land rights in China from two dimensions. I first compare national

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& MARY L. REV. 301 (1993). For a critique, see generally Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53 (2011).

3. Eric Maskin & Chenggang Xu, *Soft Budget Constraint Theories: From Centralization to the Market*, 9 ECON. OF TRANSITION 1, 10–11 (2001); Gabriella Montinola et al., *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50, 56 (1995); Yingyi Qian & Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11 J. ECON. PERSP. 83, 86–90 (1997); Weingast, *supra* note 1, at 21–24; Chenggang Xu, *The Fundamental Institutions of China’s Reforms and Development*, 49 J. ECON. LITERATURE 1076, 1105 (2011). For a critique of market-preserving federalism, see generally Hongbin Cai and Daniel Treisman, *Did Government Decentralization Cause China’s Economic Miracle?*, 58 WORLD POL. 505 (2006); Jonathan Rodden & Susan Rose-Ackerman, *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521 (1997).

4. See Weingast, *supra* note 1, at 3.

5. See, e.g., *id.* at 8; Montinola et al., *supra* note 3, at 66, 72.

6. See Steven N.S. Cheung, *The Economic System of China*, 1 MAN & ECON. 1, 18 (2014) (concerning intercounty competition in China).

7. See Montinola et al., *supra* note 3, at 51.

8. See generally Cheung, *supra* note 6.

law with local institutions of eminent domain, revealing that local governments take much more land than the national government approves, frequently violating, tweaking, and challenging national law. I next examine the impact of interjurisdictional competition on the development of local land institutions, demonstrating that local governments are weakening individual land rights for the benefits of mobile capital. Overall, Chinese federalism weakens rather than strengthens individual land rights and should be called rights-weakening federalism.

This China case also has general theoretical implications. For decades, leading property law scholars in the United States have debated whether federalism protects land rights but have achieved no consensus.<sup>9</sup> The existing debate centers around the immobility of land,<sup>10</sup> however, this Article argues that land immobility is not an essential factor. The structure and power of local governance, the balance between land and capital in particular, matters much more. Hence, the better question to ask with respect to interjurisdictional competition is *who* benefits from the competition. This Article also poses a more fundamental challenge to the literature on interjurisdictional competition by adopting agglomeration economics, which poses the question of whether such competition constitutes sorting or agglomeration.<sup>11</sup> All the existing literature on property rights and federalism presumes a market of sorting—that investors are indifferent to location, and are thus attracted by local governments offering the best price or strongest protection.<sup>12</sup> However, urbanization and industrialization in China are actually a process of agglomeration, which determines that a few cities with a natural, or at least initial, advantage are taking over, and the local governments of the remainder will therefore eventually lose in the competition.<sup>13</sup> The implication is that interjurisdictional competition is actually a race to the bottom for

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9. See generally *supra* note 2; see also Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149–51 (1992) (discussing limitations and promising aspects of federalism).

10. See generally Been, *supra* note 2; Ellickson, *supra* note 2; Epstein, *supra* note 9; Somin, *supra* note 2.

11. For a more thorough explanation of agglomeration economics, see generally MASAHISA FUJITA & JACQUES-FRANÇOIS THISSE, *ECONOMICS OF AGGLOMERATION: CITIES, INDUSTRIAL LOCATION, AND GLOBALIZATION* (2013) (exploring theories of economic geography and urban economics that concern differing concentrations of economic activity around the world).

12. See *supra* note 9 and accompanying text.

13. See *infra* Part II.C.

most local governments rather than a win-win game as the sorting literature suggests.

The Article is structured as follows. Part I examines the allocation of power regarding land institutions between national law and local laws and finds that local governments fail to honor national laws on property rights protection. It also explores the sources of local power in China's authoritarian regime and identifies the patterns of national-local interactions reflected in different forms of illegal local practices. Part II then evaluates whether competition matters for land rights, arguing that land immobility is not the key factor and, hence, that the focus should be the nature of competition and whose interests are served. Part III concludes with a reflection on the paradoxical nature of authoritarian federalism and possible directions for reform, thereby setting an agenda for future work.

#### I. WHO IS THE GUARDIAN? NATIONAL LAW VERSUS ILLEGAL TAKINGS

After *Kelo v. City of New London*,<sup>14</sup> many state and local governments in the United States voluntarily committed to not pursuing eminent domain for the purpose of economic development.<sup>15</sup> Professor Ellickson takes this as evidence of “federalism at work,” that is, local governments constraining themselves from abusing property rights under the pressure of interjurisdictional competition, and further argues that a decision or baseline need not be delineated at the national level.<sup>16</sup> Professors Epstein and Somin disagree that interjurisdictional competition provides adequate protection for immobile assets.<sup>17</sup> The two parties disagree upon whether local governments provide better or the same property rights protection than the federal government,<sup>18</sup> but neither worries about the possibility

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14. 545 U.S. 469 (2005) (holding that although a sovereign generally may not assert its eminent domain power to effectuate a transfer of property from one private party to another, it may constitutionally do so where it is part of an economic development plan which serves the public purpose, even if the condemned property would not eventually be open to the public).

15. See, e.g., Ellickson, *supra* note 2, at 763. See generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (describing the “massive backlash” against *Kelo* by state legislatures enacting anti-eminent domain laws).

16. Ellickson, *supra* note 2, at 762.

17. Compare Epstein, *supra* note 9, at 150 (describing competition as “the great virtue of federalism”), with Somin, *supra* note 2, at 57–66 (arguing that competitive federalism provides insufficient protection for property rights).

18. See *supra* note 17.

that local governments can be worse than the federal government at protecting property rights. The aforementioned disagreement concerns only whether local governments' decisions to constrain their own power of eminent domain after *Kelo* are nominal or substantive.<sup>19</sup> Think about the opposite situation: had the Supreme Court decided in *Kelo* that local governments could not take property from one private party and transfer it to another even for the purpose of economic development, local governments' eminent domain power would have been severely constrained. Would such constraint be effective, however?

The boundary between national and local power is tricky to identify. Scholars have documented encroachment from both directions in the United States: backdoor federalization, in which federal power expands to an arena originally belonging to a state or local government;<sup>20</sup> and uncooperative federalism, in which state or local governments encroach upon federal jurisdiction over particular issues.<sup>21</sup> Both the federal and state governments can contest their jurisdictions, and the boundaries are often blurry. In a centralized, authoritarian country such as China, however, the boundaries seem at first glance to be clearer cut. All power stems from the national authority, which decides what local governments can and cannot do. In the specific context of takings, the national law establishes a system of top-down control combined with quotas specifying how much land a local government can take.<sup>22</sup> Nevertheless, local governments do rebel. Many of their takings decisions clearly violate national law and are, therefore, illegal.<sup>23</sup>

Illegal takings constitute clear evidence that local governments in China take more land than national law allows. This is markedly different from United States state and local governments instituting higher standards constraining themselves from exercising eminent domain power in the post-*Kelo* backlash.<sup>24</sup> In other words, in China national law and the national authority have established a baseline and quotas for eminent

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19. See Ellickson, *supra* note 2, at 761–63; Somin, *supra* note 15, at 2154.

20. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1353–58 (2006).

21. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271 (2008).

22. See Shitong Qiao, *The Politics of Chinese Land: Partial Reform, Vested Interests, and Small Property*, 29 COLUM. J. ASIAN L. 70, 98–102 (2015).

23. See *infra* Part I.C.1.

24. See Somin, *supra* note 15, at 2114–48.

domain that local governments clearly encroach upon.<sup>25</sup> Accordingly, local governments provide weaker property rights protection than the national authority. However, it seems counterintuitive that local governments in such a centralized, authoritarian regime could encroach upon the national authority on such a phenomenal scale. Compared with the national authority in a federalist system such as the United States, an authoritarian regime such as China is expected to exercise stricter control over local authorities, which are expected in turn to behave like “servants” serving only one “master.”<sup>26</sup> An important question is thus where local governments’ power comes from. How can they operate contrary to national law? If, in a federalist and democratic country, we see contest and tension within the system as a checks-and-balances mechanism, then how should we view the illegal behaviors of local governments in an authoritarian regime? Related to the foregoing issues is whether there is any variation in illegality in the conflicts between national and local authorities in China and, if so, what it tells us.

This Part lays out a dynamic system describing the interactions between national and local authorities in China’s authoritarian regime. The system is interesting in that, on the one hand, there seems to be a clear and simple boundary between the two sets of authorities, while, on the other, local governments appear to hold the power to break national laws and encroach upon the national authority. Moreover, the different ways in which local authorities depart from national law, as reflected in a taxonomy of illegality, exert differing impacts on the national and local agendas. Section A introduces the national law of eminent domain; Section B analyzes the sources of local power; and Section C presents a taxonomy of illegality and discusses the different central-local dynamics under each category of illegality.

#### A. PROPERTY AS NATIONAL LAW

Property law does not have to be national, and in many countries is not.<sup>27</sup> However, China’s unitary system applies to

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25. See *infra* Part I.C.1.

26. Cf. Bulman-Pozen & Gerken, *supra* note 21, at 1265–71 (describing the ways state and local governments are subservient to the national government).

27. See, e.g., Serkin, *supra* note 2 (proposing a system allowing local governments to choose what kind of property regime to have).

every area of law, including property law.<sup>28</sup> The Chinese property law system is comprised of the Constitution, Law on Legislation (LOL), Property Law (PL),<sup>29</sup> Land Administration Law (LAL), Rural Land Contract Law, and Urban Real Estate Administration Law, through which the division of power between the central and local authorities regarding land administration and rights is defined.<sup>30</sup> Beyond the specific division of power are two general principles. The first is contained in article 8 of the LOL, which defines the exclusive authority of the national legislature—the National People’s Congress and its Standing Committee—including the authority to regulate the expropriation of private property and basic civil law institutions.<sup>31</sup> The second is the *numerus clausus* principle, instituted by article 5 of the PL, which states that “[t]he categories and contents of property rights shall be stipulated by law.”<sup>32</sup> Again, this principle gives exclusive authority to the national legislature to define and regulate the categories and contents of property rights.<sup>33</sup> These two principles together determine the exclusive

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28. See XIANFA art. 3 (2004) (China) (emphasizing the centralized leadership of the national authority).

29. Zhonghua Renmin Gongheguo Wuquan Fa (中华人民共和国物权法) [Property Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471118.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm) (China).

30. See, e.g., Zhonghua Renmin Gongheguo Chengshi Fangdichan Guanli Fa (中华人民共和国城市房地产管理法) [Urban Real Estate Administration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995, amended on Aug. 30, 2007 and Aug. 27, 2009), arts. 7, 11, 12, 14 (China).

31. See Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000), art. 8 (China) (“The following matters shall only be governed by laws: . . . (7) Expropriation and requisition of property not owned by the state; (8) The basic system of civil matters . . .” (author’s translation)).

32. Zhonghua Renmin Gongheguo Wuquan Fa (中华人民共和国物权法) [Property Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), art. 5 (China).

33. The National People’s Congress (and in certain situations, its Standing Committee), can make laws (法律), XIANFA arts. 58, 62 (1982) (China), as opposed to administrative regulations, which are made by the State Council (行政法规), departmental regulations, which are made by departments of the State Council (部门规章), and local regulations, which are made by local people’s congresses (地方性法规). See Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective July 1, 2000), arts. 7, 65, 72, 80 (China).

authority of national legislation in regulating property rights. Two considerations underpin this institutional design. First, affording local authorities and various government agencies the power to make rules concerning property rights would likely impose an overly high information cost that would jeopardize national unification and the common market.<sup>34</sup> The second consideration is the potential power abuses by other authorities, including local authorities. Only the national legislature can serve as the guardian of property rights, a basic citizen right sanctioned by the constitution.<sup>35</sup> In addition, the LAL also institutes a top-down control system for land expropriation.<sup>36</sup> According to that law, the expropriation of agricultural land must satisfy three requirements: (1) consistency with the land use plan; (2) approval for its conversion to construction land; and (3) land expropriation approval from the provincial-level government or State Council.<sup>37</sup> The national government is in charge of making annual land use plans, which specify the amount of land to be expropriated and allocate expropriation quotas to local governments.<sup>38</sup>

#### B. LOCAL POWER IN AN AUTHORITARIAN COUNTRY: WHERE DOES IT COME FROM?

Local power in China arises from two sources. The first I refer to as the power of numbers: the sheer size of the country and its numerous subnational units make it costly, if not impossible, for the central authority to monitor local governments. The second can be called “the power of the servant”: the integration of and interdependence between the national and local authorities entitle the latter to a say in the decision-making process and afford them a louder voice in the system.<sup>39</sup>

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34. Liang Huixing (梁慧星), (是物权法定还是物权自由) [*Numerus Clausus or Numerus Apertus?*], (人民法院报) [PEOPLE'S COURT DAILY] (Nov. 20, 2006), <http://www.iolaw.org.cn/showarticle.asp?id=1974>.

35. *Id.*

36. See Zhonghua Renmin Gongheguo Tudi Guanli (中华人民共和国土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, amended on Aug. 29, 1998 and Aug. 28, 2004), arts. 44–45, 52, [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383939.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383939.htm) (China).

37. *Id.*

38. See *id.* arts. 4, 18, 21, 43–45.

39. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 35–40 (2010).

More than three thousand city- and county-level governments in China conduct the daily management of and exercise control over the land within their jurisdictions, either within or beyond national government authorization.<sup>40</sup> Hayek argued that local information is key to understanding whether production should be centralized or decentralized.<sup>41</sup> A recent *American Economic Review* article reveals that information costs determine whether the Chinese national government retains or relinquishes control over state-owned enterprises.<sup>42</sup> The same logic applies to state land ownership. Information costs are the main reason for the Chinese national government's failure to compete with local governments over control of the land.<sup>43</sup> The sheer number of local-government units makes direct control by the national government infeasible.<sup>44</sup> The national government has tried to strengthen its control over land by setting up regional land-monitoring offices, separate from local governments.<sup>45</sup> Nevertheless, if we compare the number of Ministry of Land and Resources (MLR) employees with the total number of land-administration staff employed by over three thousand local governments, the former is but a tiny fraction of the latter.<sup>46</sup> As a result, the national government has even been forced to give up its share of land-sale revenue.<sup>47</sup>

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40. According to the National Bureau of Statistics of China, through 2015, there were 334 city-level and 2850 county-level administrative regions in China. See NAT'L BUREAU OF STATISTICS OF CHINA (中华人民共和国国家统计局), CHINA STATISTICAL YEARBOOK § 1-1 (中国统计年鉴) (2016), <http://www.stats.gov.cn/tjsj/ndsj/2016/indexch.htm>.

41. F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524–26 (1945).

42. See generally Zhangkai Huang et al., *Hayek, Local Information, and Commanding Heights: Decentralizing State-Owned Enterprises in China*, 107 AM. ECON. REV. 2455 (2017) (explaining that lower information costs tend to lead to less decentralization, and vice versa).

43. See *id.* at 2456.

44. See *id.*

45. For example, in 2006 the State Council approved the establishment of nine land-supervising offices across the country, aiming at supervising the land administration of local governments. See Guowuyuan Bangongting Guanyu Jianli Guojia Tudi Ducha Zhidu Youguan Wenti de Tongzhi (国务院办公厅关于建立国家土地督察制度有关问题的通知) [Notice of the State Council Office on the Establishment of the National Land Supervision Institution] (promulgated by State Council Office No. 50, July 13, 2006, effective July 13, 2006) (China).

46. This can be shown by comparing the number of local administrative regions, and thus the number of land-administration offices all around the country, with the central-government level, where there is only one Department of Land Resource. See NAT'L BUREAU OF STATISTICS OF CHINA, *supra*

Judged by population and the amount of land within their respective jurisdictions, Chinese provinces are comparable to many European countries, and tend to be too large as economic development units, whereas townships tend to be too small.<sup>48</sup> Cities and counties, in contrast, tend to be of an efficient scale for economic management.<sup>49</sup> In China's economic reform process, cities and counties have thus become the administrative units that actually manage the economy.<sup>50</sup> Because land is the main instrument for financing and promoting economic development in the Chinese case,<sup>51</sup> city and county governments cannot manage the economy without effective daily control over land. In other words, the allocation of power over land matches the allocation of power over the economy. In this sense, Chinese local governments are no different from their counterparts in the United States. The second source of local power, what Professor Gerken dubs the power of the servant,<sup>52</sup> is often neglected.

The local governments in centralized, authoritarian regimes are supposed to be weaker than their counterparts in federal, democratic regimes in which local authorities enjoy legitimacy from the bottom up, as well as inherent independence and autonomy from the federal government.<sup>53</sup> However, being part of the national government can be an advantage. Because their membership in the national community is taken for granted, as there is no separation between national and local authorities, local authorities can legitimately claim entitlement to be part of the national decision-making process. Local governments are therefore inherently endowed with the power and

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note 40, at § 1-1 (listing the divisions of administrative areas in China).

47. See Qiao, *supra* note 22, at 82.

48. See Cheung, *supra* note 6, at 18–19.

49. *Id.*

50. See *id.*

51. See, e.g., Xuejun Du (杜雪君) & Zhonghua Huang (黄忠华), *Yi Di Mou Fazhan: Tudi Churang yu Jingji Zengzhang de Shizheng Yanjiu* (以地谋发展: 土地出让与经济增长的实证研究) [*Land for Development: An Empirical Study of Urban Land Supply and Economic Growth*], 7 (中国土地科学) [CHN. LAND SCI.] 40, 40–47 (2015); Yonggang Li (李勇刚) & Shijie Zhang (张士杰), *Jinsheng Jili, Tudi Caizheng yu Jingji Zengzhang Jixiao- Jiyu Zhongbu Liusheng de Mianban Shuju* (晋升激励、土地财政与经济增长绩效——基于中部六省的面板数据) [*Promotion Incentives, Land Finance and the Efficiency of Economic Growth—Based on the Panel Data of Six Central Provinces*], vol. 31, no. 4 JINGJI JINGWEI (经济经纬) [ECON. SURVEY] 116, 116–21 (2014).

52. Gerken, *supra* note 39, at 35–40.

53. *Id.*

legitimacy to fulfill national policy goals, which from time to time supersede the constraints imposed by national law. In other words, local governments are national governance insiders and have a voice in shaping the national legal and policy agenda. City and county governments constitute a formidable interest group in national politics and legislation in China. They are represented directly in the national legislature and its highest political body, and many of their leaders are already national politicians, as is the case of the leaders of Beijing and Shanghai, or potential leaders with a promising national political career ahead.<sup>54</sup> This situation adds a national perspective to the daily operation of Chinese local governments. As a result, the power of the servant can be much stronger, more prevalent, and more effective in China than in federal systems. Local governments have a choice as to whether they activate their role as national-government servants. They sometimes play that role to suit local needs, and sometimes with a true national agenda in mind.<sup>55</sup> The latter is particularly true for cities with a prominent status in the national system or whose leaders have national political ambitions.<sup>56</sup>

### C. TAXONOMY OF ILLEGALITY

The illegality of local actions, or the conflicts between national law and local institutions, can take different forms, as measured by the tradeoff between the risk of exposure and a local authority's claim of legitimacy: the more a local authority seeks legitimacy from a local decision's national impact, the less likely it is to avoid attention, monitoring, and supervision by the national authority. Conversely, the more a local authority defines its decision in purely local terms, the less national attention that decision is likely to draw. A local government can choose to: (1) operate under the national radar, that is, do

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54. Leaders of Beijing and Shanghai are often also members of the Political Bureau—or Politburo—of the Central Committee of the Communist Party of China (CPC), which consists of the top twenty-five national political elites. See, e.g., Cheng Li, *China's New Politburo and Politburo Standing Committee*, BROOKINGS INST. (Oct. 26, 2017), <https://www.brookings.edu/interactives/chinas-new-politburo-standing-committee> (providing profiles of the current Politburo members, including party secretaries of Beijing and Shanghai). For example, the current leader of Beijing, Cai Qi, is a member of the Politburo. See Yamei, *Cai Qi – Member of Political Bureau of CPC Central Committee*, XINHUA (Oct. 25, 2017), [http://news.xinhuanet.com/english/2017-10/25/c\\_136705690.htm](http://news.xinhuanet.com/english/2017-10/25/c_136705690.htm).

55. See *infra*, Part II.C.

56. *Id.*

what it likes in the hope that the inconsistency of its behavior with national law will not be exposed; (2) tweak<sup>57</sup> the law to suit its needs without openly challenging it; or (3) openly challenge a particular national law by going beyond it, often invoking a national agenda or higher law, such as the Constitution. All three choices create inconsistencies between national law and local institutions, and are thus clearly illegal in a technical sense in a centralized, authoritarian country such as China, but they have different implications. The surprising discovery of the current research is that even under the current authoritarian regime in China, local governments' best strategy is often to go beyond the law, either from the perspective of its own interests or with the aim of institutional improvement.

### 1. Under the Radar

Flagrantly illegal behavior often hides under the radar of legal enforcement, for example, when local governments take land from farmers without authorization. This type of illegal taking is different from tweaking the law in the sense that the local governments involved do not try to justify their expropriation actions or claim that they are legal. At the same time, however, they do not challenge the national eminent domain system by appealing to higher laws or goals. Instead, they accept the legitimacy of the current system and their own illegality, and simply hope to get by without being discovered or publicized.

Since the revision of the LAL in 1998, local governments in China have faced increasingly stringent institutional constraints imposed by the central authority in the land expropriation arena.<sup>58</sup> Although local governments enjoy eminent do-

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57. Cf. Gerken, *supra* note 39, at 46.

58. See *Zhonghua Renmin Gongheguo Tudi Guanli Fa* (中华人民共和国土地管理法) [Land Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 25, 1986, amended on Aug. 29, 1998 and Aug. 28, 2004) (China); the 2004 Constitutional Amendment, *Zhonghua Renmin Gongheguo Xianfa Xiuzheng An* (中华人民共和国宪法修正案) [Amendments to the Constitution of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 14, 2004, effective Mar. 14, 2004) (China); *Zhonghua Renmin Gongheguo Wuquan Fa* (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471118.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm) (China); *Guoyou tudi shang fangwu zhengshou yu buchang tiaoli* (国有土地上房屋征收与补偿条例) [Regulation on the Expropriation of Buildings on State-owned Land and Compensation]

main power to expropriate rural land and convert it into urban construction land, that power is limited in several ways, most importantly by the centralized land-use quota system.<sup>59</sup> Another limit is the top-down approval system determining that any taking without proper authorization is illegal.<sup>60</sup> The MLR can use satellites to monitor land-use changes on the ground and theoretically can find out how much land has been illegally taken and where.<sup>61</sup> Even equipped with such a convenient technology, however, legal enforcement by the MLR can only control, not eliminate, illegal takings.

According to MLR data, between 2005 and 2015, local governments annually appropriated land in the range of 10,000 to 50,000 hectares without authorization.<sup>62</sup> Considering that Chinese farmers own on average 0.09 hectares,<sup>63</sup> local governments took land away from 100,000 to 500,000 farmers every year, in violation of national land use law and quotas.

## 2. Tweaking the Law

A national and centralized legal system is often more fragmented and layered than it is centralized and unified. National land law in China comprises not only the national PL, but also the LAL, an eminent domain ordinance, and a number

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tion] (promulgated by the State Council, Jan. 21, 2011, effective Jan. 21, 2011) (China).

59. *Difang Zhengfu Suku Yongdi Zhibiao Buzu Guotubu Foure Chen Bu Quedi* (地方政府诉苦用地指标不足 国土部否认称不缺地) [*Local Government Complains Lack of Land Use Quota While Department of Land Resource Denied*], FIRST FIN. DAILY (第一财经日报) (Jan. 11, 2011), <http://business.sohu.com/20110111/n278788848.shtml> (discussing government plans to reform the use of quotas).

60. Hayek, *supra* note 41, at 524 (discussing the advantages of central planners leaving some decisions to the “man on the spot”).

61. See, e.g., *Guotu Ziyuanbu Guanyu Kaizhan 2016 Niandu Tudi Kuangchan Weipian Zhifa Jiandu Jiancha Gongzuo de Tongzhi* (国土资源部关于开展 2016 年度土地矿产卫片执法监督检查工作的通知) [*Notice on Legal Enforcement, Supervising and Monitoring Work through Satellite Pictures in 2016*], MINISTRY OF LAND AND RES. OF THE PEOPLE’S REPUBLIC OF CHINA (中华人民共和国国土资源部), [http://www.mlr.gov.cn/zwgk/zytz/201612/t20161206\\_1423514.htm](http://www.mlr.gov.cn/zwgk/zytz/201612/t20161206_1423514.htm) (last visited Nov. 10, 2017).

62. Original Data from Guotu Ziyuan Bu (国土资源部) [Ministry of Land and Resources], *Zhongguo Guotu Ziyuan Nianjian* (中国国土资源统计年鉴) [China Land and Resources Statistical Yearbook] 2006–2016.

63. Zhan Yan, *China Seeks a Balance Between Food Security and Urbanization*, PERMANENT MISSION OF THE PEOPLE’S REPUBLIC OF CHINA TO THE U.N. (Sept. 17, 2008), <http://www.china-un.org/eng/zt/nationalday2008/t513215.htm>.

of more specific laws serving various functions.<sup>64</sup> These multiple laws and ordinances address different aspects of land institutions while sharing similar goals, concepts, and frameworks, but they also represent tension, conflict, and inconsistency within the legal system. Such a complicated system affords local governments leeway for manipulation and tweaking. When local governments tweak various parts of the national legal system, their law-breaking intention is less clear than when they choose to act under the national authority's radar, in which case they clearly know that they are violating the law. In the case of tweaking, however, regardless of legality or illegality, local governments at the very least know that their actions are inconsistent with national practice. Because their tweaking of the law can be attributed in part to the ambiguity or inconsistency of national law, though, they can claim more legitimacy for that behavior than for flagrant illegality. However, law-tweaking is defensive rather than offensive in seeking legitimacy from the higher law or the national policy agenda. The local governments that take on such action often have no clear national agenda, but are seeking only to find national legal basis for their local agendas.

The following is a good example. In 2011, after the State Council promulgated the Regulations on Expropriation of Houses on State-Owned Land (the "2011 Regulations"),<sup>65</sup> local governments across the country formulated implementary regulations.<sup>66</sup> Although some of these local regulations were pure-

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64. These specific laws include the Urban Real Estate Administration Law, *Zhonghua Renmin Gongheguo Chengshi Fangdichan Guanli Fa* (中华人民共和国城市房地产管理法) [Urban Real Estate Administration Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995, amended on Aug. 30, 2007 and Aug. 27, 2009) (China), and the Rural Land Contract Law, *Zhonghua Renmin Gongheguo Nongcun Tudi Chengbao Fa* (中华人民共和国农村土地承包法) [Rural Land Contract Law] (promulgated by the Nat'l People's Cong. Standing Comm., Aug. 29, 2002, effective Mar. 1, 2003) (China).

65. *Guoyou Tudi shang Fangwu Zhengshou yu Buchang Tiaoli* (国有土地上房屋征收与补偿条例) [Regulation on the Expropriation of Buildings on State-owned Land and Compensation] (promulgated by the State Council, Jan. 21, 2011, effective Jan. 21, 2011) (China).

66. For example, on October 19, 2011, the Shanghai City Government issued its Implementation Regulations on the Expropriation of Buildings on State-Owned Land and Compensation in Shanghai. *Shanghaishi Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Shishi Xize* (《上海市国有土地上房屋征收与补偿实施细则》) [Implementation Regulations on the Expropriation of Buildings on State-Owned Land and Compensation in Shanghai] (promulgated by the Shanghai Municipal People's Gov., Oct. 19, 2011, effective Oct. 19, 2011) (China). On November 13, 2011, the Gansu Province Government issued

ly complementary in nature, some created new rules that deviated from or even jeopardized the national regulations. For example, Wuhan, a leading city in central China, introduced a two-part clause designed to simplify the expropriation procedure and weaken the bargaining power of potential hold-out owners.<sup>67</sup> The first part of the clause copied article 13 of the 2011 Regulations, whereas the second part granted local land-administration agencies the direct power to revoke individual land-rights certificates in accordance with expropriation decisions.<sup>68</sup> In other words, land-rights holders within the area designated for expropriation would lose their property rights the moment the government issued its eminent domain decisions—prior to any negotiation between the condemnor and the condemnee. In one publicly reported occurrence, the Wuhan government had revoked more than three hundred land-use rights (LUR) certificates through a notice on its website and then broken into houses that had lost their valid LUR certificates to force the occupants' eviction.<sup>69</sup> The second part of the clause appears to be a straightforward application of article 28 of the PL, which stipulates that a change in property rights takes effect the moment that expropriation or judicial decisions or arbi-

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its Several Regulations on the Implementation of the “Regulation on the Expropriation of Buildings on State-owned Land and Compensation” in Gansu. Gansu sheng Shishi Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Tiaoli Ruogan Guiding (甘肃省实施《国有土地上房屋征收与补偿条例》若干规定) [Several Regulations on the Implementation of the “Regulation on the Expropriation of Buildings on State-owned Land and Compensation” in Gansu] (promulgated by Gansu Provincial People's Gov., Nov. 13, 2011, effective Jan. 1, 2012) (China). After the issuance of Order No. 590, according to original legal research conducted by the author on a database compiled by Peking University, as of October 28, 2017, more than three hundred implementation documents have been issued across the country, including nine local regulations (地方性法规), thirty-two local government rules (地方政府规章), two hundred eighty-four local regulatory documents (地方性文件), three local judicial documents (地方司法文件), and two local working documents (地方工作文件).

67. Wuhan Shi Guoyou Tudi Shang Fangwu Zhengshou yu Buchang Shishi Banfa (武汉市国有土地上房屋征收与补偿实施办法 武汉市人民政府令第 234 号) [Implementation Regulations on Expropriation of Buildings on State-owned Land and Compensation in Wuhan City] (promulgated by the Wuhan City Gov., Oct. 13, 2016, effective Dec. 1, 2016), <http://www.wpl.gov.cn/pc-361-101899.html> (China).

68. *Id.*

69. Xuan Hua (滑璇) & Luxiao Wang (王露晓), (公告一出, 产权证作废? 武汉汉阳注销 330 拆迁户不动产证引争议) [*Property Rights Certificate Invalidated Once Expropriation Notice Issued? The Revocation of 330 LUR Certificates Gives Rise to Disputes*], NANFANG ZHOUMO (南方周末) [S. WKLY.] (Jan. 20, 2017), <http://www.infzm.com/content/122445>.

tration awards take effect.<sup>70</sup> The problem is that the term expropriation decision in the PL, which was passed in 2007, refers to the entire expropriation process, and thus differs from the term's use in the 2011 Regulations, which distinguish between expropriation decisions and compensation decisions, with the former only initiating the expropriation process.<sup>71</sup> The 2011 Regulations also specify which procedures a local government should follow in conducting expropriation, procedures the Wuhan city government intentionally evaded by referring to the earlier PL.<sup>72</sup>

### 3. Beyond the Law: Can a City Government Interpret the Constitution?

When a local government chooses to go beyond the law and seek legitimacy from higher laws or policy goals, it is acting flagrantly illegally, albeit while making a claim for legitimacy. Doing so more bluntly manipulates rather than tweaks the law, as well as more severely encroaches the national authority, which alone has the power to define higher laws such as the constitution and set the national policy agendas.<sup>73</sup> Nevertheless, even in a centralized, authoritarian country such as China, local governments refer to higher laws or national agendas from time to time to justify practices that deviate from national laws. Such high-profile illegality may simply be a byproduct of local government leaders' economic development efforts, or may have

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70. Article 28 of the Property Law stipulates that: "Where a real right is created, changed, transferred or eliminated for a legal document of the people's court or arbitration commission or a requisition decision of the people's government, etc, the real right shall become effective upon the effectiveness of the legal document or the expropriation decision of the people's court." *Zhonghua Renmin Gongheguo Wuquan Fa* (中华人民共和国物权法) [Property Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471118.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471118.htm) (China).

71. Compare expropriation decision in article 28 of the Property Law of the People's Republic of China (中华人民共和国物权法), *id.* 28, with expropriation decisions in chapters two and three of the 2011 Regulations, *Guoyou tudi shang fangwu zhengshou yu buchang tiaoli* (国有土地上房屋征收与补偿条例) [Regulation on the Expropriation of Buildings on State-owned Land and Compensation] (promulgated by the State Council, Jan. 21, 2011, effective Jan. 21, 2011) (China).

72. See *Guoyou tudi shang fangwu zhengshou yu buchang tiaoli* (国有土地上房屋征收与补偿条例) [Regulation on the Expropriation of Buildings on State-owned Land and Compensation] (promulgated by the State Council, Jan. 21, 2011, effective Jan. 21, 2011), ch. 2 (China).

73. QIANFAN ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* 84–96 (2012).

a clear agenda to establish a national model. In any event, local governments' illegalities spur national dialogue and debates, and often exert lasting impact nationwide. For example, the Shenzhen city government interpreted the PRC Constitution in an idiosyncratic manner to serve its own industrial development, providing a good case for illustrating how local governments go beyond the law to design their own land institutions and rules.<sup>74</sup> In 2003, the Shenzhen city government initiated what it called the "land nationalization after urbanization" (城市化转地) campaign.<sup>75</sup> It declared that Shenzhen had completed the urbanization process to become the first city in China without agriculture or farmers.<sup>76</sup>

Accordingly, all land within its jurisdiction should be state-owned pursuant to article 10 of the PRC Constitution, which states that "urban land is state-owned."<sup>77</sup> It therefore followed that the Shenzhen city government could take all land previously owned by villagers without implementing any eminent domain procedures because it was not exercising eminent domain but rather state land ownership. Shenzhen's land nationalization constituted a serious encroachment of villagers' land rights. It also constituted an intentional misinterpretation of the PRC Constitution and LAL to circumvent the increasingly strict land expropriation approval procedure implemented by the central government. In its one-year campaign, the Shenzhen city government took over 594 square kilometers of land from roughly 300,000 indigenous villagers in the name of land nationalization.<sup>78</sup> Its motivation was to grab land from farmers to supply to industrial investors.<sup>79</sup> The Shenzhen city government managed to complete its land nationalization before the MLR could stop it, although the MLR publicly declared afterwards that "this practice in Shenzhen cannot serve as a precedent" (深圳做法, 下不为例).<sup>80</sup> The MLR was right to be concerned about the potential precedent effect, as quite a number of other cities and counties followed suit by converting farmers

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74. See SHITONG QIAO, CHINESE SMALL PROPERTY: THE CO-EVOLUTION OF LAW AND SOCIAL NORMS 138–42 (2017).

75. *Id.* at 138.

76. *Id.*

77. XIANFA art. 10 (2004) (China).

78. QIAO, *supra* note 74, at 138–39.

79. *Id.*

80. *Id.* at 139.

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into urban residents and declaring their land urbanized and therefore owned by the state.<sup>81</sup>

## II. DOES COMPETITION MATTER FOR LAND RIGHTS?

The concept of competitive federalism argues that inter-jurisdictional competition curbs property rights abuses by local governments.<sup>82</sup> It originates from Charles Tiebout's classic article *A Pure Theory of Local Expenditures*, which posits that "[i]f consumer-voters are fully mobile, the appropriate local governments, whose revenue-expenditure patterns are set, are adopted by the consumer-voters."<sup>83</sup> In other words, "local government represents a sector where the allocation of public goods . . . need not take a back seat to the private sector."<sup>84</sup> Property protection is a form of public good, the value of which can be capitalized into markets. But land is immobile and it seems that land rights holders would not be able to vote by foot. If that is the case, do local governments still compete on land rights protection? What are they competing for? What is the nature of the interjurisdictional competition?

### A. LAND IMMOBILITY IS NOT THE PROBLEM!

Leading scholars contend that competitive federalism is unlikely to provide effective protection for property rights in land because property is an immobile asset.<sup>85</sup> Professor Somin, for example, argues that people who vote with their feet by leaving a jurisdiction cannot take their land with them.<sup>86</sup> For this reason, interjurisdictional competition is unlikely to protect property rights in land effectively, although it may prove more useful in the case of rights to mobile property. Professor Epstein further argues that "[t]he first weakness of the exit right under the federalist system concerns cases with specific

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81. *Id.*

82. Somin, *supra* note 2, at 54.

83. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956).

84. *Id.*

85. See Bell & Parchomovsky, *supra* note 2, at 78 (arguing that because real property is immobile, it is excluded from some of the benefits of federalism); Epstein, *supra* note 9, at 155–57 (explaining the difficulty for landowners and developers of abandoning a project because they are tied to the location); Somin, *supra* note 2, at 54 (arguing competitive federalism is unlikely to provide effective protection for property rights in land because property is an immobile asset).

86. Somin, *supra* note 2, at 54.

assets tied to a single jurisdiction,” and also that “the landowner is tied to the location, and so long as the political forces are aligned against him—nothing can stop the losses.”<sup>87</sup> Professors Bell and Parchomovsky claim that “relocation costs are a distortion of the market for property forms.”<sup>88</sup> They propose allowing the residents of one state to choose property forms in other jurisdictions without relocating to promote interjurisdictional competition on property rights protection.<sup>89</sup> Professor Ellickson acknowledges that the immobility of land reduces the political pressure on states and cities to treat landowners fairly, but concludes that interjurisdictional competition still works for two reasons.<sup>90</sup> First, governmental abuse of property rights in a given jurisdiction lowers property values across the jurisdiction, which affects politically advantaged and disadvantaged citizens alike.<sup>91</sup> Second, in addition to land, landowners also own other more mobile assets that governments do not wish to lose to neighboring jurisdictions.<sup>92</sup>

If we place this federalism debate into a broader context and trace it back to the areas of corporate governance and environmental regulation from which the debate both originated and has sparked several generations of discussions,<sup>93</sup> we can more clearly examine whether land institutions differ from corporate governance or environmental regulation. Land is actually not as separable or different from a corporation or a factory as it might at first appear; the distinction between mobile and immobile property is not as clear as it looks. Corporate governance provides a perfect example for interjurisdictional competition because corporations can change their registration *situs* at very low cost, whereas environmental law and property law dif-

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87. Epstein, *supra* note 9, at 155–56.

88. Bell and Parchomovsky, *supra* note 2, at 102.

89. *Id.*

90. Ellickson, *supra* note 2, at 762 n.66.

91. *Id.*

92. *Id.*

93. See generally Marcel Kahan, *The State of State Competition for Incorporations*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2015) (examining the desirability of federal corporate law as an alternative to the law of the firm’s state of incorporation); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 599–613 (1996) (reviewing the environmental federalism debate); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-To-The-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing for state rather than federal environmental regulation).

fer in the sense that the costs of moving operations from one jurisdiction to another to escape overly stringent environmental or property regulations are much higher.<sup>94</sup> However, it is just a matter of degree. Relocation always involves replacing something in a given jurisdiction, be it land, employees, pensions, etcetera, with something in another jurisdiction. Relocation costs are universal across the areas of corporate governance, environmental regulations, and property institutions. Local governments do have the power to make the exercise of the right to exit costly, be it corporations, factories, or a plot of land.<sup>95</sup> A city government can simply delimit a date by which all property, regardless of movable or immovable, within its jurisdiction is subject to the regulation in question. It is not feasible to simply relocate a targeted property to avoid such regulatory costs, even if it is mobile. The idea that somebody can simply relocate his or her property, which can be a plot of land, a factory, or a corporation, after a particular regulation or decision has been passed is fanciful, and could be illegal if the property were targeted by the government. The question then is whether local governments would impose such costs or prohibition on corporations, investors, or landowners.

There are two risks for local governments: existing residents will flee and potential residents will not come. What matters most is the future and therefore the second risk: the deterrence of potential residents and investors. Even a city leader with a term lasting only a couple of years will consider not only the corporations or residents already in his or her jurisdiction but also potential corporations or residents deciding where to locate.<sup>96</sup> It is reputational costs rather than the immediate loss of existing residents or corporations that constrain local governments from abusing corporations or residents. Immobility is not a substantive issue if we adopt a temporal perspective or view property protection as a sequential game in which potential investors consider how local governments treat existing investors. There is a potential chilling effect that a local leader

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94. See Bell & Gideon Parchomovsky, *supra* note 2, at 97–98, 104.

95. Chinese local governments have a tendency of local protectionism, which hinders the free moving of corporations across the country. See Rodden & Rose-Ackerman, *supra* note 3, at 1547–55 (discussing how local governments in China have an incentive to limit imports, monopolize sale, and tax exports); see also Bai Chong-En et al., “Local Protectionism and Regional Specialization: Evidence from China’s Industries,” 63 J. OF INT’L ECON. 397 (2004) (researching regional specialization and local protectionism in China).

96. Cheung, *supra* note 6, at 28.

with a reasonable time horizon will take into consideration.<sup>97</sup> That is why Chinese local governments dare not confiscate investment, a large part of which—such as factories—is actually immobile.

#### B. WHAT ARE LOCAL GOVERNMENTS COMPETING FOR?

Interjurisdictional competition in China clearly promotes economic development, primarily via local governments' expropriation of resources, mainly land, from less-productive sectors, such as agriculture, and distributing them to more-productive industrial sectors.<sup>98</sup> Government intervention reduces the transaction costs for investors,<sup>99</sup> and even provides protection for investment in the face of competitive pressure. What has been largely ignored, however, is the impact of such intervention on individual rights to less-productive property. The downside of prioritizing economic development is the downgrading—and even sacrifice—of individual rights if they conflict with development goals.

Professors Acemoglu and Robinson argue, in *Why Nations Fail*, that China does not adequately protect property rights and therefore its economic growth is unsustainable.<sup>100</sup> Many economists would argue, however, that local governments in China provide a decent level of investment protection.<sup>101</sup> Acemoglu and Robinson's argument is based on the study of the Tieben case, in which the owner of Tieben steel company lost its investment due to the change of policy.<sup>102</sup> However, even in this case, the Changzhou city government protected and fully supported the company and suffered together with its owner

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97. See Wan Jiang (万江), *Zhongguo de Difang Fazhi Jianshe Jingzheng* (中国的地方法治建设竞争) [*Legal Competition within Local Governments in China*], 25 *中外法学* [PEKING U. L.J.] 817, 824–27 (2013).

98. See Shitong Qiao & Frank K. Upham, *China's Changing Property Law Landscape*, in *COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES* 311, 311–32 (Graziadei & Smith eds., 2017).

99. Qijing Yang (杨其静), *Fenquan, Zengzhang yu Bugongping* (分权, 增长与不公平) [*Separation of Power, Growth and Inequality*], 4 *世界经济* [WORLD ECON.] 102, 106 (2010).

100. DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY* 437–38 (2013).

101. See, e.g., Joseph P.H. Fan et al., *Institutions and Foreign Direct Investment: China Versus the Rest of the World*, 37 *WORLD DEV.* 852 (2009) (arguing that China has a quality government that promotes foreign direct investment).

102. Acemoglu & Robinson, *supra* note 100, at 437–38.

from the central government's selective enforcement.<sup>103</sup> The neglected part of the story is that the Changzhou government had facilitated Tieben's expansion by expropriating a considerable amount of land from farmers and transferring it to Tieben, in violation of central government regulations.<sup>104</sup> Having lost their land and shelter, many farmers were reduced to living in abandoned boats and cement pipes.<sup>105</sup> Local government officials had in fact been so eager to expropriate rural land on Tieben's behalf, in order to make it the top steel company in Asia, that they had exceeded the company's original request for approximately 2000 *mu* of land, or 329 acres, by approximately 3988 *mu*, or 656 acres.<sup>106</sup> It was thus with the Changzhou government's hearty endorsement, encouragement, and full support that Tieben decided to expand its operations.<sup>107</sup> Why did local officials in Changzhou behave in this manner? Because of competitive pressure from neighboring cities. Changzhou had been ranked the lowest in economic growth of the three main cities in southern Jiangsu province—Suzhou, Wuxi, and Changzhou—although two decades before the three cities had enjoyed roughly the same level of economic development.<sup>108</sup> Changzhou government officials thus considered Tieben's expansion an opportunity to turn the situation around.<sup>109</sup> If the central government had not selected Tieben as an example to signal to the whole country that the steel industry was experiencing a bubble that needed to be burst, the company's—and local government officials'—plan would likely have succeeded, at least in the short run. Regardless of the outcome, the major cost was borne by the farmers who lost their land.

Chinese local governments can be considered as “super growth machines,” and exhibit two major characteristics: they are (1) development-oriented and (2) conducive to power-

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103. Junjie Li (李军杰) & Weifeng Zhou (周卫峰), *Jiyu Zhengfujian Jingzheng de Difang Zhengfu Jingji Xingwei Fenxi: Yi Tieben Shijian Weili* (基于政府间竞争的地方政府经济行为分析——以“铁本事件”为例) [*Analysis on the Economical Behavior of Local Governments Based on Competitions Between Governments—Based on the Example of “Tieben Case”*], 1 (经济社会体制比较页) [COMP. SOC. & ECON. SYS.] 51 (2005).

104. *Id.*

105. *Id.*

106. *Id.*; *Chinese Weights and Measures*, CHINASAGE, <http://www.chinasage.info/measures.htm> (last visited Jan. 25, 2018) (explaining China's standard of weights and measures).

107. Li & Zhou, *supra* note 103.

108. *Id.* at 51–52.

109. *Id.*

business alliances.<sup>110</sup> Sociologists Harvey Molotch and John Logan offer the most vivid formulation of the term growth machine, arguing that urban politics and policy-making are dominated by a coalition of businesspeople and various “politically mobilized local elites” who are united in their shared interest in economic growth.<sup>111</sup> The central government has granted city and county governments across the country a great deal of autonomy to manage their own economies, thereby encouraging competition among them. Economic growth means the transfer of resources from lower- to higher-productivity sectors or, more specifically in the case of China, the transfer of land from agricultural use to industrial use; this, in turn, has fueled China’s fast-paced industrialization and urbanization over the past three decades.<sup>112</sup> The imbalance in the allocation of tax authority also renders local governments reliant on land to finance their operations.<sup>113</sup>

Moreover, within local government jurisdictions, mobile capital often has a louder voice than immobile land interests. That is not to say that capital and land cannot be integrated. Investors can, and often do, hold land rights, and real estate developers are also powerful players in Chinese cities.<sup>114</sup> However, we need to distinguish between individual land rights and the property rights of big business interests. In China, individuals do not have voting rights, and thus cannot decide who the next mayor of their city will be, and their participation in local governments is quite limited.<sup>115</sup> They can protest, but protests jeopardize governance only when they accumulate to a certain scale. Individual property-rights holders, be they farmers or urban housing owners, enjoy much less mobility than investors. Farmers cannot sell their land, even if they choose to work in another locale. Urban housing owners have slightly more freedom, in that they can select the city in which they buy, but housing choices are generally secondary to job choices.<sup>116</sup> For most citizens, moving to a new city is a life-changing event, and

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110. Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. Cal. L. Rev. (forthcoming 2018) (manuscript at 10).

111. See Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 310–14 (1976).

112. Qiao & Upham, *supra* note 98, at 312–13.

113. Qiao, *supra* note 22, at 103.

114. Pritchett & Qiao, *supra* note 110, at 28.

115. *Id.* at 25–26.

116. Within a city, parents also consider the quality of the public school district. See Been, *supra* note 2, at 523.

it is therefore very costly to exercise the right to exit in protest over local government policies.

Theoretically, real estate developers can be seen as a proxy for housing consumers: the weakening of individual property rights exerts a negative impact on housing demand and prices, and therefore induces real estate developers to lobby local governments on behalf of housing consumers.<sup>117</sup> However, there are two main problems with this view. First, the proxy is imperfect at best, as developers do not experience uncertainty in the same way that consumers do.<sup>118</sup> Even if we take developers as proxy for housing consumers, there is a significant agency cost involved.<sup>119</sup> Second, and more importantly in the Chinese context, the interests of developers and individual property owners often conflict because the former do not buy land from the latter, as in the United States, but rather rely on the government to expropriate land from individuals.<sup>120</sup> The result is an alliance between local governments and real estate developers, which profit from expropriating land at low prices and then selling the houses built thereon at multiple times the cost of land and construction. Therefore, developers benefit more from weak individual rights than they lose from the theoretically possible shrinkage of housing demand and prices.<sup>121</sup>

Lastly, incomplete property rights in both rural and urban China provide local governments with incentives to grab land from individual property owners. Under Chinese law since the 1998 LAL revision, local governments enjoy monopoly power to convert rural land to urban land and from agricultural use to manufacturing use.<sup>122</sup> They do so by expropriating land from farmers, whose compensation is calculated by the land's agricultural value, which is much lower than its value for industrial or other urban uses.<sup>123</sup> In other words, although rural land is collectively owned in China, if we examine the bundle of sticks of collectively owned rural land, the most valuable stick, the right to develop the land, belongs to local governments rather

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117. *Id.* at 529–33.

118. Epstein, *supra* note 9, at 154–59.

119. The author thanks Professor Richard Epstein for this point.

120. Qiao, *supra* note 22, at 93–95.

121. Theoretically property rights abuses will discourage a potential property buyer and their costs will be negatively capitalized in property sales prices if those abuses become widely known. See Ellickson, *supra* note 2, at 762–63 n.66.

122. Qiao, *supra* note 22, at 98–103.

123. *Id.*

than to farmers or their collectives. Local governments can capitalize on that stick only by expropriating land from farmers. As a result, they have huge incentives to do so; otherwise, the development value of rural land would be left unrealized.

### C. WHAT KIND OF COMPETITION: SORTING OR AGGLOMERATION?

Before we apply market logic to understand government behavior, we need to understand the logic of market competition. There are two kinds of markets: one is matching, which is a win-win process, and the other is winner-takes-all.<sup>124</sup>

The Tiebout model and market-preserving federalism assume the former: individuals and firms move among local governments to take advantage of public policies that match their preferences, just like ordinary consumers look around for a seller who is willing to provide a particular service or product at a price both parties can agree upon.<sup>125</sup> However, both the market of places and market of politics fall into the winner-takes-all model in which a few places or local politicians become nationwide winners by successfully gaining national attention and agglomerating resources nationwide. Leading economists across the ideological spectrum have developed a field called agglomeration economics, the basic claim of which is that individuals and businesses make location decisions based on where other individuals and businesses have decided to locate.<sup>126</sup> By locating themselves near specific others, individuals and businesses can benefit from reduced transportation costs for goods, capture information spillovers, and participate in larger and more specialized labor and consumption markets.<sup>127</sup> Agglomeration benefits can outweigh preferences for particular policies in the location decisions of both individuals and investors.<sup>128</sup> Agglomeration economics explain why individual citizens and investors choose to remain in New York, Silicon Val-

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124. See, e.g., Kristian Behrens & Frederic Robert-Nicoud, *Survival of the Fittest in Cities: Agglomeration, Polarization, and Income Inequality*, IDEAS Working Paper, <http://ideas.repec.org/p/lvl/lacir/0919.html>; Mark Hulbert, *Investing in a "Winner Takes All" Economy*, WALL ST. J. (Apr. 9, 2017), <https://www.wsj.com/articles/investing-in-a-winner-takes-all-economy-1491790561>.

125. David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1507–13 (2010).

126. *Id.* at 1509–10.

127. *Id.*

128. *Id.*

ley, Shanghai, or Beijing despite their unaffordable housing, traffic congestion, and bad (or even exclusionary) policies.<sup>129</sup>

Now put yourself in the shoes of the mayor of a medium-sized Chinese city, assuming that you are still decades from retirement and eager for a promotion. Think about the pyramid structure of China's bureaucratic system: on average, a city has about eight to nine counties within its jurisdiction,<sup>130</sup> a province has over a dozen cities, and there are 31 provinces in China.<sup>131</sup> Hence, the odds of a local leader being promoted to the next bureaucratic level are low, and, among a dozen or more peers, only one or two will win the promotion competition. This is not a matching process, but rather one in which just one or two winners will be chosen in each round. Economic development, as measured by gross domestic product (GDP), is a key criterion in the evaluation and promotion of local government leaders in China, and urbanization and industrialization have been the driving forces behind the country's impressive economic development.<sup>132</sup> Think about Shenzhen, a shining model of industrialization and urbanization that, over the course of less than forty years, has been transformed from an agricultural county with about 300,000 farmers and fishermen into the fourth largest city in China with over eighteen million people,<sup>133</sup> and garnered a reputation as China's Silicon Valley.<sup>134</sup> So, as mayor, what are you going to do? You want to turn your

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129. *Id.*; see also Pritchett & Qiao, *supra* note 110, at 36; David Schleicher, *City Unplanning*, 122 *YALE L.J.* 1670, 1673–95 (2013).

130. This is different from the United States, in which a county is generally larger than a city.

131. See Xu, *supra* note 3, at 1084.

132. Yonggang Li (李勇刚), Bo Gao (高波) & Chunzhao Xu (许春招), *Jinsheng Jili, Tudi Caizheng yu Jingji Zengzhang de Quyue Chayi: Jiyu Mianban Shuju Lianli Fangcheng de Guji* (晋升激励, 土地财政与经济增长的区域差异—基于面板数据联立方程的估计) [*The Regional Difference on Promotion Incentives, Land Finance and Economic Growth—an Analysis Based on Panel Data Simultaneous Equations*], 1 (产业经济研究) [*INDUSTRY ECON. RES.*] 100, 110 (2013); Lian Zhou (周黎安), *Zhongguo Difang Guanyuan de Jinsheng Jinbiaosai Moshi Yanjiu* (中国地方官员的晋升锦标赛模式研究) [*An Analysis of Promotion Tournament Model of Chinese Local Officials*], 7 (经济研究) [*J. ECON. RES.*] 36, 50 (2007).

133. Eli MacKinnon, *The Twilight of Shenzhen's Great Urban Village*, *FOREIGN POLY MAG.* (Sept. 16, 2016), <http://foreignpolicy.com/2016/09/16/china-demolition-economy-the-twilight-of-shenzhens-great-urban-village-baishizhou>.

134. *Shenzhen Is a Hothouse of Innovation: Copycats Are Out, Innovators Are In*, *ECONOMIST* (Apr. 8, 2017), <https://www.economist.com/news/special-report/21720076-copycats-are-out-innovators-are-shenzhen-hothouse-innovation>.

city into another Shenzhen, full of investors and skyscrapers, or at least into a mini-Shenzhen in your region. In any case, you want to attract enough investment for economic development. However, you must never forget that your peers and competitors in the region's other cities have the same goals, and investment is scarce and must be agglomerated in a particular place to generate benefits.

Industrial investment brings GDP growth with little time lag.<sup>135</sup> For local leaders whose terms are, on average, about four to five years, assigning land to investors in their first two years in office can equate to GDP growth in the next two to three years, regardless of whether those investors' enterprises are successful in the long run.<sup>136</sup> This also gives city leaders an incentive to take land for industrial development. This type of political competition is a race to the bottom owing to China's pyramid bureaucratic structure, wherein a local leader's chances of promotion are based on his or her performance relative to that of his or her peers in competing cities rather than on his or her absolute performance. Although other factors such as political connections also play a role, a city leader cannot risk losing the economic competition. Scholars have compiled empirical evidence demonstrating the correlation between industrial land assignment and the promotion of city leaders.<sup>137</sup> Leaders need to attract as much industrial investment as possible, certainly more than their peers in other cities, which means that the amount of investment needed and the conditions under which it is attracted are determined neither by real societal demand nor the specific situation of their cities, but rather by the amount of investment and conditions competing cities are offering. The result is that city leaders compete with one another on the amount of land (usually oversupplied) and price of land (often much lower than a well-functioning market would offer) they assign to industrial investors.

The nature of agglomeration economies ensures that inter-jurisdictional competition among Chinese local governments is not a win-win game, but rather a race to the bottom for most.

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135. Qijing Yang (杨其静) & Yanqiong Peng (彭艳琼), *Jinsheng Jingzheng yu Gongye Yongdi Churang: Jiyu 2007-2011 nian Zhongguo Chengshi Mianban Shuju de Fenxi* (晋升竞争与工业用地出让——基于 2007-2011 年中国城市面板数据的分析) [*Promotion Competition and the Transfer of Industrial Land—An Analysis Based on the Panel Data of Chinese Cities from 2007 to 2011*], 9 (经济理论与经济管理) [ECON. THEORY & ECON. MGMT] 5, 17 (2015).

136. *Id.*

137. *Id.*

Local governments, in their role as landlords, are willing to grant land at low prices (or even for free) to industrial investors. They hope that the resulting industrial development will not only generate tax revenue, which is to be shared with the central government, but also positive spillover effects, namely, development of the commercial and service sectors, which in turn generate business tax, 100% of which goes to local governments.<sup>138</sup> Manufacturing enterprises can agglomerate people in a certain area. Population flows into a city generate demand for housing and push up housing prices, which relates to an important motivation for local governments: land sale revenues. Local governments control 100% of land-sale revenues.<sup>139</sup> From 2000 to 2012, local governments accrued total revenue of 160 trillion yuan, a larger sum than all local taxes combined.<sup>140</sup>

The foregoing economic-development model makes use of the agglomeration effect of industrial development. It is true that local governments in China can internalize the costs and benefits of industrial development because they monopolize the land supply.<sup>141</sup> The model also works for a few cities, represented by Shenzhen in the Pearl River Delta and Suzhou in the Yangtze River Delta. However, the distribution effect of agglomeration has not received sufficient attention. Not every small county can grow into a big city like Shenzhen. Agglomeration means that industries and economic activities are, in the long run, concentrated in a few large cities.<sup>142</sup> Assume that ten counties are competing with one another for industrial investment in the expectation that it will boost commercial and service activities and, consequently, housing prices. In the long run, however, only one or two will be successful in drawing suf-

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138. Yisheng Xu (徐以升) & Lin Wang (王琳), *Juzhu Yongdi Xique de Huangdi Xinzhuang: Fang Renmin Daxue Guojia Fazhan Yanjiuyuan Fuyuanzhang Tao Ran* (居住用地稀缺的“皇帝新装”—访中国人民大学国家发展研究院副院长陶然) [*Take Off the “Emperor’s New Clothes” on the Scarcity of Residential Land: An Interview with Ran Tao*], 5 (新华月报) [XINHUA MONTHLY] 17, 20 (2014).

139. Since the public finance reform in 1994, land-sale revenues do not need to be submitted to the central government and are retained by the local government in full. See, e.g., Li, Gao & Xu, *supra* note 132; Li Zhang (张莉), Xianbin Wang (王贤彬), & Xianxiang Xu (徐现祥), *Caizheng Jili, Jinsheng Jili yu Difang Guanyuan de Tudi Churang Xingwei* (财政激励, 晋升激励与地方官员的土地出让行为) [*Finance Encouragement, Promotion Encouragement and the Land Sale Behavior of Local Officials*], 4 (中国工业经济) [CHINESE INDUS. ECON.] 35, 43 (2011).

140. Xu & Wang, *supra* note 138.

141. *Id.*

142. Schleicher, *supra* note 125.

efficient investment and population to their jurisdictions to generate agglomeration effects. The rest will be losers in the competition game. At the outset, each competitor will reduce prices below what they would be in an isolated jurisdiction in the hopes of winning the game because its offering price depends on those of its competitors. In other words, a city government's decision to assign industrial land to an investor depends not only on its land-expropriation cost and the direct tax revenue the investor will pay, but also on the industrial investment's potential spillover effect on residential housing prices, as well as whether it can win the interjurisdictional competition to generate agglomeration effects. However, owing to the nature of agglomeration, most cities will lose the competition. This race-to-the-bottom competition among Chinese local governments constitutes the prisoner's dilemma.

Without competitive pressure, local governments would likely have granted land to investors at higher prices than in the real world. At present, industrial land prices are often only a tenth of residential land prices, or even lower.<sup>143</sup> For example, in Hangzhou, the average industrial land price in 2009 was 483 yuan per square meter, whereas that for residential land was 1526 yuan per square meter.<sup>144</sup> Numerous studies have revealed that local governments commonly assign industrial land to investors at prices lower than the costs of expropriation and building infrastructure.<sup>145</sup> A former director of the Jiangsu Provincial Bureau of Land Administration puts it this way:

Industrial land has grown very quickly in Jiangsu, but all towards similar industries and repeated constructions happen a lot; development zones are everywhere and vicious competition on the basis of offering land at lower prices, even publicly offering zero-price land, is triggering land occupation and waste.<sup>146</sup>

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143. Bai Xue (薛白), *Caizheng Fenquan, Zhengfu Jingzheng yu Tudi Jiage Jiegouxing Pianli* (财政分权、政府竞争与土地价格结构性偏离) [*Separation of Financial Powers, Government Competition and the Structural Deviation of the Land Price*], 3 (财经科学) [FIN. & ECON.] 49, (2011).

144. *Id.*

145. See, e.g., Qingyong Zhang (张清勇), *Difang Zhengfu Jingzheng yu Gongye Yongdi Churang Jiage* (地方政府竞争与工业用地出让价格) [*Local Government Competition and the Price of Industrial Land Transfer*] (中国制度经济学会精选论文 (第一部分) [CHINA INSTITUTIONAL ECON. ANN. CONF. SELECTIONS] at 299 (2005); Qijing Yang (杨其静), Pin Zhuo (卓品) & Jidong Yang (杨继东), *Gongye Yongdi Churang yu Yinzi Zhiliang Dixian Jingzheng* (工业用地出让与引资质量底线竞争—基于 2007–2011 年中国地级市面板数据的经验研究) [*Transfer of Industrial Land and Race to the Bottom in Attracting Investment: An Empirical Study*], 11 (管理世界) [MGMT. WORLD] 24, 34 (2014).

146. Zhang, *supra* note 145, at 299.

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Economists have studied the supply of cheap industrial land, and lawyers have examined local government abuses of expropriation power, but rarely have scholars examined the connections between them systematically. A few have connected the prevalence of land expropriation with the huge gap between residential land prices and rural land compensation, but most expropriated rural land is turned over to industrial rather than residential development.<sup>147</sup> Local government competition for industrial capital is the main cause of the prevalent land expropriation witnessed in China.

### III. THE CONUNDRUM FOR AUTHORITARIAN FEDERALISM: CENTRALIZATION OR DECENTRALIZATION?

This Article asks and answers the question of whether local governments provide stronger or weaker property rights protection than the national government and why. More specifically, it queries the divergence between national law and local practices in the eminent domain arena. My answer to the first question is that local governments take much more land than national law allows, rig national law, and create their own mechanisms of eminent domain that go against national law. My answer to the second question, why local governments provide weaker property-rights protection, is that interjurisdictional competition for economic development motivates local governments to take more land than national law permits. Hence, such competition does weaken individual land rights.

Assuming that you care about individual rights in China, the observation of rights-weakening federalism does not necessarily lead to advocacy for centralization. The widespread illegal takings by local governments, which run contrary to the national authority's efforts to construct a centralized and unified system of property-rights protection, point to the failures of centralization, but certainly do not put decentralization forward as the solution. After all, it is interjurisdictional competition that has worsened the protection of individual rights. This is the paradox of authoritarian federalism. The two components of the term are in conflict: authoritarianism emphasizes authority and demands centralization, whereas federalism conventionally cries out for decentralization and local autonomy. This internal tension or conflict speaks to the China paradox—

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147. *Id.*

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the national government wants to control local governments but fails to do so because of information and administrative costs, meaning that local governments have actually become more powerful than and have a larger national impact than their counterparts in democratic countries. This Chinese style of federalism, or authoritarian federalism, is however inherently unstable. The more power local governments gain, the less control the national government retains, and vice versa. Losing too much control on either side seems to be a bad idea. When the national government loses control, local governments compete to take land from farmers, which jeopardizes the national public good of social stability. At the same time, when local governments lose their autonomy, the national government fails to govern effectively or develop the economy efficiently.

Centralization or decentralization? If it seems hard to choose, it is probably because that we have asked a wrong question. As Professors Jonathan Rodden and Susan Rose-Ackerman write:

An MPF would have to resemble a layer cake, with each distinct layer of government linked only by frosting, rather than a marble cake, in which the layers are swirled together. Jurisdictional lines separating levels of government in modern federal systems are rarely so well-defined, and it is usually a mistake to view any jurisdictional unit as autonomous.<sup>148</sup>

Chinese local governments' manipulation of national property laws, including a relevant constitutional clause, testifies to the above argument that the jurisdictional lines separating various levels of government are rarely well-defined. What matters is not to delineate a clear boundary between national and local power, but the dynamic and pattern of national-local interactions. By providing a taxonomy of illegality in national-local interactions in the Chinese land-rights arena, this Article attempts to pierce the structure of authoritarian federalism and identify the patterns of the national and local authorities' interactions with each other.

The next step is finding a way to reform authoritarian federalism. Here, I make a start. The failure of national law within rights-weakening federalism originates from the numbers; that is, a single national authority cannot overcome the huge information and administration costs involved in micromanaging several thousand local-government units. However, there are ways to beat the numbers, for example, by mobilizing and

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148. Rodden & Rose-Ackerman, *supra* note 3, at 1527.

empowering individual citizens to monitor the local governments that are violating individual rights. Such mobilization and empowerment can be effected in two ways: first, through the judiciary, granting individual citizens access to challenge local governments in national courts to defend national laws; second, through local governance reform, thereby increasing both the voice and exit power of individual citizens.<sup>149</sup>

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149. See Roderick M. Hills, Jr. & Shitong Qiao, *Voice and Exit as Accountability Mechanisms: Can Foot-Voting Be Made Safe for the Chinese Communist Party?*, 48 COLUM. HUM. RTS. L. REV. 158, 158 (2016).