

Property and the 100-Year Life

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This chapter examines how property regimes are likely to respond to the significant increase in average life expectancy predicted by “100-year life” theories. It takes a relatively pessimistic position, arguing that the optimal institutional response to demographic aging will be very difficult to produce: Some countries, most notably the US, are likely to underrespond to the socioeconomic demands that demographic aging will probably impose on property law, whereas others, such as China and Japan, may well overrespond. This is because, within the realm of property rights and regulation, the economics and politics of demographic aging may well contradict each other: Aging potentially reinforces political opposition to public governance even as it creates economic demand for it.

21.1 SOCIAL MODELS OF THE “100-YEAR LIFE”

The first step of any intellectual exercise on the legal impact of a “100-year life” should, of course, be to unpack what such a significant gain in life expectancy would mean in broader socioeconomic terms. A society in which the top-income classes live on average to 100, but lower-income classes live only to seventy-five – which is increasingly where the US is headed¹ – obviously would have fundamentally different structural problems and institutional needs than one in which most people’s life expectancy rises into the nineties – Japan, for example, seems headed more in this direction.² Furthermore, an aging society that is also shrinking in total population has a completely different set of problems than one that is demographically stable or expanding.

To make this exercise manageable, this chapter will focus on one specific set of circumstances: a society that is seeing life expectancy increase significantly across the board and that does not demographically contract. With some exceptions, most

¹ Aaron O’Neill, *Life Expectancy in the United States, 1860–2020*, STATISTA (June 21, 2022), <https://www.statista.com/statistics/1040079/life-expectancy-united-states-all-time>.

² Shoichiro Tsugane, *Why Has Japan Become the World’s Most Long-Lived Country: Insights from a Food and Nutrition Perspective*, 75 EUR. J. CLINICAL NUTRITION 921 (2021).

developed countries have yet to experience outright demographic contraction despite significant aging and may not experience it even in the future if they can sustain a reasonable amount of immigration.³ Some of these societies also have a strong-enough welfare system that life expectancy gains are distributed somewhat equitably across economic classes – although many, including the US, do not.⁴ The great majority of developing countries, in contrast, continue to expand demographically while seeing life expectancy increase across nearly all social classes. In other words, they age while not necessarily becoming smaller.

Under these general circumstances, the total amount of resources needed to sustain a society will increase if and only if aging dovetails with population growth, but the consumption and possession of those resources will inevitably shift toward the older end of the population. The ramifications of such a shift for general socioeconomic inequality are unclear.⁵ On the one hand, longer life expectancy may increase economic inequality within age cohorts by amplifying the consequences of differences in physical endowment, intelligence, education, and inherited wealth. On the other, societal aging could also increase the economic returns to labor relative to capital and, therefore, reduce inequality.

Regardless of which of these scenarios materializes, an aging population will probably produce significant socioeconomic demand for urbanization and public infrastructure. Unless there is some fundamental breakthrough in medical technology, older populations will require more medical care than younger ones, even if they are not necessarily any less economically productive. Given that there are still enormous economies of scale in the provision of medical care, all else being equal, longer life expectancy will probably lead to more urbanization over the long run, which, all else being equal, will produce greater functional demand for public infrastructure.⁶

³ See, e.g., the European Union's ability to maintain low levels of population growth despite aging. Guillaume Marois et al., *Population Aging, Migration, and Productivity in Europe*, 117 PNAS 7690 (2020). The US also continues to expand demographically. *US Census: Five Key Takeaways on Population Trends*, BBC (April 26, 2021), <https://www.bbc.com/news/world-us-canada-56896154>.

⁴ Gary Burtless, *The Growing Life-Expectancy Gap between Rich and Poor*, BROOKINGS INST. (Feb. 22, 2016), <https://www.brookings.edu/opinions/the-growing-life-expectancy-gap-between-rich-and-poor>.

⁵ Xudong Chen et al., *Population Aging and Inequality: Evidence from the People's Republic of China* (Asian Dev. Bank Inst. Working Paper No. 794, 2017).

⁶ Donald O. Cowgill, *The Aging of Populations and Societies*, 415 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1974); Fabiane Ribeiro Ferreira et al., *Aging and Urbanization: The Neighborhood Perception and Functional Performance of Elderly Persons in Belo Horizonte Metropolitan Area: Brazil*, 87 J. URB. HEALTH 54 (2010); Theresa Grafeneder-Weisteiner et al., *Three Pillars of Urbanization: Migration, Aging, and Growth*, 168 DE ECON. 259 (2020); Louise Plouffe & Alexandre Kalache, *Towards Global Age-Friendly Cities: Determining Urban Features that Promote Active Aging*, 87 J. URB. HEALTH 733 (2010).

At the same time, longer life expectancy means that a smaller share of an individual's life will be spent living with his or her parents. In other words, older populations will likely consist of more households than younger ones – unless, of course, a significant share of elderly people move back in with their middle-aged children, which is rarely the case in developed countries and significantly less likely to be the case in developing countries now than it was several decades ago. This will produce greater demand for housing units in general, but perhaps less demand for large, single-family homes. There are obvious synergies between both of these trends and the aforementioned demand for urbanization.

All of these likely developments will place some institutional demands on property law, and particularly on its land-use subcomponents. Urbanization, demographic density, and housing unit availability are all intimately supported or constrained by various property rights systems, and any significant and durable shift in them will require corresponding adjustments in those systems. For the most part, a shift toward greater density and higher levels of urbanization will probably generate higher levels of socioeconomic demand for more “publicness” in property institutions, but not all legal systems will respond to this demand in a positive manner – and it is not even clear that it is always normatively desirable for them to do so.

21.2 PROPERTY REGIME TYPES

Property regimes deal with the demands of resource allocation and demographic management through varying levels of centralized regulation and private self-governance. Nearly all regimes make some use of both, but the specific combination differs sharply from country to country and region to region. On one end are highly centralized regimes, most often seen in smaller, more concentrated jurisdictions – Singapore may be closest of any country to this ideal type⁷ – that rely primarily on state-driven planning and rule-making. In such regimes, the state enjoys high administrative and legal capacity within its geographical boundaries and, therefore, can regulate and control property relationships in relatively granular, socioeconomically contextualized ways through a combination of laws, rules, and executive actions. Scholars have sometimes labeled these “governance”-type regimes.⁸

Several East and Southeast Asian countries take a governance-oriented approach to property law. Land use in Japanese cities, for example, is controlled by a top-down yet nonetheless highly detailed legal structure in which the central government possesses ultimate authority over all local laws and regulations.⁹ Much of this

⁷ See, e.g., ANNE HAILA, *URBAN LAND RENT: SINGAPORE AS A PROPERTY STATE* (2015).

⁸ Henry E. Smith, *Exclusion versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002).

⁹ Byōn Shibata, *Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis*, 10 WASH. U. J.L. & POL'Y 161 (2002).

authority is delegated to lower-level governments, allowing for finessed adjustments based on local conditions, but there is a substantial amount of procedural uniformity throughout the system. Although the vast majority of property is indeed privately owned, the state, rather than private entities, supplies the lion's share of property and land-use institutions, enjoying very robust regulatory powers.

Despite being a theoretically “socialist” legal system in which the state nominally owns all nonrural land, the Chinese property system shares a large amount of functional common ground with the Japanese system: Land use rights are privately owned, used, and alienated, but laws and regulations govern these activities with very high levels of granularity, right down to exercising direct oversight over many homeowners’ associations.¹⁰ Private property owners are compensated for government expropriation but generally not for regulatory interference.¹¹ Given China’s enormous size, there is significantly more regional institutional variation than one finds in Japan, but such variation stems primarily from provincial and local state activity rather than from self-governance by nonstate actors. More recently, the coronavirus pandemic has only seemed to strengthen the state’s presence in and control over nearly all facets of urban life.

These institutional features carry substantial benefits but also major costs. On the one hand, they allow legal systems to effectively respond to market failures and impose public solutions for socioeconomic problems that belie private management. This is particularly valuable in urban settings where high population density and its socioeconomic consequences often require robust state action. It is no coincidence that East and Southeast Asia are now home to both a disproportionately high number of the world’s largest – and often richest – megacities and some of the most aggressive and powerful property governance regimes. There is a strong functional correlation between the two. On the other hand, expansive governance powers can also be misused, leading to high levels of corruption and, occasionally, severe systemic misallocation of resources: China’s often wasteful urban development over the past three decades is perhaps the most economically visible example of this.¹²

On the other end of the spectrum are weak state capacity regimes – relatively speaking, at least – in which the state lacks the ability to intervene effectively at the granular level and instead supplies a simple legal regime that provides a basic and highly standardized allocation of private rights and obligations upon which non-governmental actors can layer supplementary social norms and self-governance institutions. Because the simplest and most effective basic allocation tends to be

¹⁰ <https://www.ft.com/content/efd9a15-13ae-4709-b741-e4f3599f431d>; SHITONG QIAO, *THE AUTHORITARIAN COMMONS: DIVERGENT PATHS OF NEIGHBORHOOD DEMOCRATIZATION IN BEIJING, SHANGHAI AND SHENZHEN* (in-progress book manuscript) (on file with author).

¹¹ LI PING, *RURAL DEV. INST., THE IMPACT OF REGULATORY TAKINGS BY THE CHINESE STATE ON RURAL LAND TENURE AND PROPERTY RIGHTS* (2007).

¹² Yiping Xiao et al., *How Far Has China’s Urbanization Gone?* 10 *SUSTAINABILITY* 2953 (2018).

one that predominantly relies on private ownership, backed by strong rights of exclusion, these legal regimes are sometimes called “exclusion regimes.”¹³ One of the most prominent examples in the modern world is the US.

American property law and land-use law have historically been constructed around a fundamentally privatized paradigm, specifically, a fee-simple paradigm that is rooted in private land ownership by socioeconomically independent single-family households. American law therefore prioritizes private security, clarity of rights and obligations, and legal standardization over finessed governance.¹⁴ Under this paradigm, property owners typically possess strong and clear rights of exclusion against trespassers of all kinds, sometimes backed by the right to claim exorbitant amounts of punitive damages against intentional trespassers. Governmental expropriation of land is, as a rule, both legally complicated and financially costly.

American property owners enjoy relatively expansive freedom to use their land as they please, only constrained by a relatively limited set of state-imposed usage regulations – for which the state must sometimes offer compensation, private covenants and easements, and a functionally unwieldy nuisance law.¹⁵ The latter, in cases where neighboring property owners engage in mutually incompatible uses, typically grants legal priority to the highest value use through an amorphous balancing test. Finally, there are relatively few legal constraints on property alienation, allowing for a largely free and open real estate market. All three of these “sticks” – strong exclusion rights, relatively unconstrained use rights, and free alienation rights – are usually wrapped in a uniform fee-simple parcel that grants a single household perpetual and undivided ownership over a spatially condensed property parcel, usually a piece of land.

This kind of exclusion-oriented paradigm originated in a historical sociolegal context in which land was relatively plentiful and, therefore, cheap and sparsely populated: Due to a combination of relatively low population density and constant westward expansion, property law in the early American republic was often constructed without the kinds of scarcity rationales that drove – plagued, perhaps – contemporary European and Asian legal systems.¹⁶ The abundance of arable land, often seized through armed conflict with indigenous peoples, meant that the law

¹³ Smith, *supra* note 8.

¹⁴ ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND (2007); David L. Callies and J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J. L. & POL’Y 39 (2000); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008). See also the debate between Gregory Alexander and Henry Smith over how exclusion-oriented American property law is. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Henry E. Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009).

¹⁵ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

¹⁶ E.g., John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996).

could operate in general and relatively standardized terms without risking either significant loss of economic efficiency or grave sociopolitical tension over resource distribution and use. This allowed it to coalesce around a largely unified paradigm of private ownership and control, with weak constraints on usage rights and a comparatively limited role for the state.

Such a paradigm could no longer function well once the population became increasingly urbanized over the course of the late nineteenth and early twentieth centuries. The density of urban populations and the inherently greater need for public infrastructure in cities meant that the state had to take a more active role in property and land-use regulation, which eventually led to the rise of urban zoning in the 1920s. Even after these developments, however, American urban property regulation remained substantially more decentralized and privatized – more exclusion-oriented, in other words – compared to more governance-oriented legal systems. To this day, there is relatively little centralized rule-making or legislation, with cities, towns, and counties doing most of the regulatory work without top-down guidance.¹⁷ Beyond that, an enormous swathe of socioeconomic rules come from private contracting and governance: homeowners' associations, condominium associations, cooperatives, corporations, and the like.¹⁸

This kind of institutional structure not only produces large amounts of regional variance but also gives abnormally large amounts of regulatory power to long-term local property owners, often at the expense of shorter-term residents, especially tenants. It therefore facilitates significant levels of NIMBYism ("not in my back yard"-ism), which aims to keep real estate scarce and local property values high, even if doing so produces serious housing shortages and escalating inequality.¹⁹ This long-term owner-centric political economy functionally dovetails with the broader exclusion orientation of American property law, further privileging private control over public governance.

21.3 AGING, URBANIZATION, AND PROPERTY

One might imagine that demographic aging and the greater urban density it will likely create will exert a largely uniform force on property institutions – in favor of public governance and away from privatized exclusion – but that would be an oversimplification. It is almost certainly true that aging and urbanization will create greater functional demand for public governance, but it is unclear whether legal systems will actually respond to this demand. The political economy of aging may well prevent exclusion-oriented systems like the American one from breaking free of

¹⁷ See SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* (2015).

¹⁸ Ellickson, *supra* note 15.

¹⁹ David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2012).

institutional path dependence. At the other end of the spectrum, although governance-oriented regimes will probably be able to ramp up governance and public legal infrastructure in response to demographic aging, there is also a distinct danger that they will do so too aggressively.

Consider first the range of possible political consequences of demographic aging in a democratic, relatively decentralized, exclusion-oriented system like the US: An aging population is not merely one that requires more health care and public goods but also one that will likely experience significant changes in political orientation and composition. Two specific changes are especially relevant for property governance: first, older populations are, all other things being equal, somewhat more conservative than younger ones, particularly with regard to property rights.²⁰ This may amplify resistance to public governance in societies that are politically conditioned to mistrust state authority. Second, older populations are also somewhat less geographically mobile ones,²¹ which means that political capture by NIMBYism could worsen under some conditions.

The connection between aging and political conservatism is a fairly well-documented phenomenon. As people age and accumulate wealth, they often have more to lose from radical political and legal change and are, therefore, inclined to support stability over change, risk aversion over risk-taking – the very definition of Burkean conservatism. In particular, their relatively larger amounts of private wealth create stronger demand for secure and legally unburdened private property rights. The fact that most people will have exhausted their potential for upward socio-economic mobility by middle age further intensifies this demand: If I feel there is no longer much room for me to rise on the socioeconomic ladder, but a significant amount of room to fall, then I will likely become more risk-averse and, therefore, more jealously protective of what I already have. Moreover, given that older generations naturally hold – relative to their demographic share – a disproportionately large share of societal wealth,²² they are also less likely to be pro-redistribution than younger generations. These tendencies do not imply that older populations will necessarily become significantly more conservative across *all* ideological dimensions, but to the extent that property rights are a politically salient issue, they will likely lean toward classical conservative positions of strong private property rights and limited state intervention even if they lean liberal on other issues like race or gender.

²⁰ Norval D. Glenn, *Aging and Conservatism*, 415 ANNALS AM. ACAD. POL. & SOC. SCI. 176 (1974); Johnathan C. Peterson et al., *Do People Really Become More Conservative as They Age?* 82 J. POL. (2020).

²¹ Anzelika Zaicewa, *The Impact of Aging on the Scale of Migration*, IZA WORLD LAB. (NOV. 2014).

²² Guillaume Vandenbroucke & Heting Zhu, *Aging and Wealth Inequality*, ECON. SYNOSES 2 (2017).

These inclinations are likely more powerful in societies like the US that have deep sociopolitical traditions of “state skepticism.”²³ The relative lack, both historical and contemporary, of resource scarcity and high population density in the US meant that it could do without robust top-down governance for long periods of time – and that robust top-down governance was substantially more difficult to establish. Coupled with long-standing ideological inclinations toward decentralization and deregulation, these socioeconomic conditions render the American legal system inherently more hospitable to conservative-leaning positions on property rights and exclusion and, therefore, amplify the political influence of such trends whenever they emerge.

Furthermore, because demographic aging also tends to concentrate wealth in the hands of senior generations, it also grants them higher levels of sociopolitical status, often at a considerable cost to younger generations. In particular, unless significantly increased inheritance taxes get in the way, longer life expectancy naturally enhances the socioeconomic significance of inheritance, which increases intergenerational economic dependency, thereby further boosting the sociopolitical status of the elderly – a form of economically enhanced gerontocracy.²⁴ In other words, if demographic aging is the driving factor, then not only will the ideological composition of a society trend toward conservatism, but the political power of its more conservative components will also increase. Combined, these forces can easily produce an ideological swing that reinforces any preexisting institutional bias toward exclusion and privatization.

The impact of demographic aging on property is therefore inherently complex, perhaps even self-contradictory: At the economic level, it produces major demand-side pressures and incentives in favor of public governance, but at the political and ideological level, it will also produce significant trends that instead favor private exclusion. Now, one could argue that the former will, over the long run, produce changes in political perception that eventually neutralize the latter – that elderly property owners will eventually embrace the societal and personal need for more governance, given that they are some of the primary beneficiaries of it – but this assumes a fairly primitive version of economic determinism. In fact, it is not even clear that the economic calculus for senior property owners will be perfectly aligned in favor of governance: Seniors may have much to gain from stronger public governance, but by virtue of their stronger economic position, they also have less

²³ Andrew Fiala, *Political Skepticism and Anarchist Themes in the American Tradition*, EUR. J. PRAGMATISM & AM. PHIL. 2 (2013); Matt Grossmann, *Americans Are Skeptical of the Government: Except When There's a Crisis*, FIFTYEIGHT (Apr. 15, 2020).

²⁴ This is contested, but most studies seem to favor a positive correlation between aging and the importance of inheritance. See Harun Onder & Pierre Pestieau, *Inherited Wealth and Demographic Aging* (World Bank Pol'y Rsch. Working Paper No. 7739, 2016); Thomas Piketty & Gabriel Zucman, *Wealth and Inheritance in the Long Run*, in HANDBOOK OF INCOME DISTRIBUTION 1303 (Anthony B. Atkinson and François Bourguignon eds., 2015).

to lose from sticking to an exclusion-oriented legal paradigm. As a result, the economic costs of indulging their ideological and political preferences are not necessarily that large.

Given this inherent political complexity, instead of seeing a universal shift toward governance as societies age, we may simply experience another couple of decades of institutional path dependency. There are at least two different ways to understand this: First, the relatively complicated bundle of institutional incentives that demographic aging produces, in which economics and politics have a tendency to cancel each other out, makes it somewhat less likely that the political benefits of a progovernance shift in property law will be large enough to clearly outweigh the costs of large-scale institutional change. Institutional inertia is, as scholars have long recognized, an inherently self-reinforcing force: It is always costly to overturn a long-standing institutional paradigm, both because of the administrative costs necessary for institutional change and because of the economic uncertainty it unavoidably generates.²⁵

These costs are especially strong and salient in the context of property law: More so than other parts of the legal system, and perhaps even more so than other components of private law, property law places an enormous functional premium on institutional stability and economic predictability.²⁶ Given that property rights constitute the legal foundation of almost any economic exchange and any attempt to utilize an economic resource, any changes to property institutions are systemically magnified through the layers of contracting, tort rights, or organizational governance that are built upon that foundation. Reliance interests are therefore unusually strong in property law, both descriptively and normatively, even by the standards of private law. An exclusion-oriented property law may or may not be functionally superior to a governance-oriented one, depending on the socioeconomic context, but an institutionally stable property law is almost always functionally superior to a constantly changing one. As a result, property law tends to be unusually path-dependent, usually requiring an unusually large amount of political force to generate paradigmatic change. Demographic aging, with all its internal sociopolitical contradictions, is not especially likely to satisfy this requirement.

Second, how the institutional politics of aging play out in any specific society will depend heavily on what kind of political priors and leanings it carries into the process: In all likelihood, societies that are already institutionally and politically conditioned to favor exclusion over governance will likely assign greater amounts of perceived salience to the political costs discussed above, and less to the economic benefits; whereas those that are institutionally predisposed toward governance will

²⁵ Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L.J. 341 (2009).

²⁶ Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988); Henry E. Smith & Thomas W. Merrill, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

likely do the opposite. When there are strong and complex forces both for and against an institutional change, which side wins out in the end will often depend on perception rather than objective significance – and therefore be subject to significant confirmation and framing biases that generally work in favor of path dependence.

To illustrate how these dynamics might play out in real life, consider what could happen if the US population reaches an average life expectancy of around ninety years in the near future – from around seventy-eight currently. Such a leap might seem overly optimistic given the stagnation and even decline of this statistic in recent years, but the country has experienced large gains in life expectancy after decades of stagnation before: From 1950 to 1970, American male life expectancy stagnated at around sixty-seven, and then leaped to seventy-three by 1990, and then to current levels by around 2008.²⁷ Imagine, then, a qualitatively similar but quantitatively more robust demographic trend emerging on the back of biomedical breakthroughs over the next two or three decades.

The last time this “sort of” happened, American politics underwent the Nixon era and the “Reagan Revolution,” ending up, in most parts of the country, with a more conservative property regime that undid at least some of the progress toward fair housing and aggressive land-use regulation that had marked the 1960s.²⁸ Private exclusion never gave way to public governance as the population aged, and if anything, the trend was in the opposite direction. Demographic aging may well have had something to do with this: Even as younger, more mobile demographics flocked into large cities, older groups of long-term homeowners managed to successfully combat a considerable share of proposed public development projects and maintain privatized control over most parts of major American cities like New York and San Francisco.²⁹ Ironically, all of these cities are highly liberal in basic political orientation but nonetheless persistently conservative in how they have handled land-use regulation and property development.

History may well repeat itself if the American population undergoes yet another major round of aging: The elder generations in society, now more populous than they have ever been, flock to cities, towns, or the suburbs of major metropolitan centers in search of better health care, and as they do so, they are often wealthy enough to purchase title to property rather than rent. This drives up urban property prices, much to the delight of local property owners, new and old. When the city government attempts to construct affordable housing to accommodate the younger working population, which is increasingly being priced out of the real estate market, property owners rebel and manage to stall most of the projects. Infrastructure

²⁷ Maureen Stanley, 1900–2000: *Changes in Life Expectancy in the United States*, SENIOR LIVING (Dec. 21, 2023).

²⁸ See, e.g., David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011).

²⁹ E.g., Schleicher, *supra* note 19.

development meets with similar obstacles insofar as it requires some expropriation of private property, but homeowners are willing to pay the price of mediocre infrastructure if it means keeping the government away from their property assets, which are increasingly important to them as they age and become more reliant – both economically and psychologically – on those assets. In the end, the US becomes even more urbanized, but without any corresponding expansion in governmental regulatory authority or taking powers and without the expansion of affordable housing needed to ward off gentrification and escalating socioeconomic inequality, both of which intensify in the aftermath.

Contrast this with what might happen – indeed, has already happened – in an aging but governance-oriented society like China or Japan: Once demographic aging becomes a sociopolitically salient issue, multiple layers of government will likely claim that it presents societal challenges of caregiving and health services that can only be solved through public coordination and infrastructural renewal. This will give them political cover to pursue large-scale construction projects in metropolitan centers to accommodate the demographic influx into cities, and also to redraw land-use regulations to create the institutional space for those projects. The former will almost certainly require heavy use of eminent domain, which will in turn create political opportunities to expand that power and reduce the bargaining power of private property owners. In fact, the expansion of government regulatory and expropriation powers in urban centers is more or less what has already happened in Japan over the past two or three decades,³⁰ and is also what has been happening in China in the past five to ten years.³¹ In the latter case, demographic aging only became a highly salient sociopolitical issue in the past decade, which has coincided with a partial reversal of the privatization and market-oriented property law reforms that characterized the 1990s and early 2000s. Instead, most Chinese cities now seem to be moving toward a property rights regime in which the government exercises tighter regulation over both land use and transfer and also continues to expropriate land with high regularity.

These measures have met with some resistance from urban homeowners, who have occasionally spoken out – or taken even more dramatic measures – against what they perceive as governmental encroachment on their rights and, perhaps more importantly, on the economic value of those rights.³² Even so, their actions seem to have produced very limited concessions from the state, even before the COVID-19 pandemic made the expansion of state control all but irresistible in

³⁰ Daisuke Akimoto, *Does Japan Need to Control Land Purchases by Foreigners?* DIPLOMAT (Mar. 23, 2021); Stephen Hesse, *New Land Law Still Ignores Public Voice*, JAPAN TIMES (Apr. 26, 2001); André Sorensen, *Land, Property Rights, and Planning in Japan: Institutional Design and Institutional Change in Land Management*, 25 PLAN. PERSPS. 279 (2010).

³¹ Wenjing Han et al., *Land Use Regulation and Urban Land Value: Evidence from China*, 92 LAND USE POL'Y 104432 (2020).

³² QIAO, *supra* note 10.

nearly every East and Southeast Asian country. There was, and is, no clear sociopolitical consensus in favor of shielding private ownership rights from state authority in many of these societies, some of which have clearly favored statist solutions to socioeconomic problems for decades. Once demographic aging becomes firmly embedded into political discourse and its economic effects are made clearer, it may even produce strong bottom-up social demand for more state intervention – which would likely baffle American property owners.

These sociopolitical conditions will almost certainly allow governance-oriented regimes to more robustly address the economic challenges of demographic aging than their exclusion-oriented peers, but that may very well prove to be a mixed blessing. In regimes where the accountability of government officials is relatively low and social distrust of them is relatively high, further expansion of public governance may lead to unsustainably high levels of corruption and eventually to strong public dissatisfaction. Moreover, too much state intervention is a distinct possibility in some of these regimes: State control and regulation is all too often an inherently self-reinforcing thing and could easily snowball in suboptimal ways if left to its own devices.

This can happen through at least two different mechanisms: First, government officials may simply enjoy the status and power that an expansion of governmental authority gives – including, perhaps, the rent-seeking opportunities it creates – and therefore seek more of it. As their power grows, it becomes more and more difficult to keep their self-interest in check, until eventually the system arrives at a breaking point. Second, and somewhat less nefariously, more state regulation may erode the self-governance and self-regulation capacity of some local communities: Neighborhoods or villages that previously produced robust social norms and covenants become reliant on the state for the regulation and coordination of socioeconomic behavior.³³ This produces even more demand for state intervention, which then erodes social institutions even further, generating a vicious cycle of constant governmental expansion. By creating strong demand for public goods and infrastructure that only the state can effectively provide, demographic aging could potentially set off either of these processes – or both – thereby producing too much state control over the long run.

China is arguably in the early stages of this: Over the past decade, the government has consistently expanded its regulatory and planning powers, often at significant cost to social or communal institutions like residents' associations.³⁴ Increasingly, it sees almost any type of social self-governance as a threat to its control and has attempted to formalize such self-governance into the state apparatus more fully.³⁵

³³ For an illustration of these dynamics, *see, e.g.*, JOEL S. MIGDAL, *STRONG SOCIETIES AND WEAK STATES* (1989).

³⁴ *See, e.g.*, QIAO, *supra* note 10; Han et al., *supra* note 31.

³⁵ ELIZABETH ECONOMY, *THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE* (2015); Sangkuk Lee, *An Institutional Analysis of Xi Jinping's Centralization of Power*, 26 J. CONTEMP. CHINA 325 (2017).

While it is still too early to tell whether these trends will lead to measurable overregulation, things certainly seem to be headed in that direction. At the very least, it is extremely difficult to imagine how, under present circumstances, the expansion of state control can be halted, let alone reversed, which would seem to suggest that, if there is such a thing as too much governance, then China currently seems to be as good a candidate to eventually reach it as any in the modern world.

21.4 CONCLUSION

This chapter has discussed some possible property law and land-use regulation scenarios that could potentially emerge in response to certain forms of demographic aging. Regardless of the plausibility of its factual assumptions, it has attempted to tease out some of the likely interactions between demographics, economic demand, and political composition and to show that the economics and politics of demographic aging may well contradict each other when it comes to property law. The most likely institutional outcome therefore seems to be path-dependent: Countries that are currently exclusion-oriented will continue to be exclusion-oriented, and therefore underrespond to the economic demands of aging. In contrast, countries that are already governance-oriented will likely become even more so, to the point where overgovernance becomes a distinct possibility. The ideal balance between these two poles, like any optimal political economic equilibrium, may well prove highly elusive.