LAND OPTIONS FOR HOUSING:
HOW NEW PROPERTY RIGHTS CAN BREAK OLD LAND MONOPOLIES

RODERICK M. HILLS, JR.∗ AND SHITONG QIAO**

ABSTRACT

The world today is afflicted by inequality of wealth created in large part by monopolistic ownership of land. Hong Kong, with the least affordable housing in the world, provides a particularly apt example of how property law protects such monopolies—and also how the creation of new property rights can break them up.

In this Article we use Hong Kong as a case study to suggest both a diagnosis and a solution to two aspects of property law that slow down the creation of housing. First, the division of property rights between private owners and the government creates a bilateral monopoly that results in gridlock. Second, reallocating property rights to end such gridlock is impeded by the reciprocal causation between property rights and political influence—what we will call a “constituency effect” of property law. Rather than attempt a frontal assault on existing holdings that would likely be foiled by such

∗ William T. Comfort III Professor of Law, New York University Law School. Email: roderick.hills@nyu.edu.

** Professor of Law and Ken Young-Gak Yun and Jinah Park Yun Research Scholar, Duke Law School; Professor of Law (on unpaid leave), The University of Hong Kong. Email: qiao@law.duke.edu.

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constituency effects, we suggest that the government should create entirely new property rights around which new interest groups could form. By giving every Hong Kong resident “land options for housing” (LOHs), the government could create a competitive market for development rights that simultaneously ends the gridlock of monopoly and creates a new constituency to lobby for more housing. Under our proposal, property owners would compete with each other to purchase LOHs from LOH holders in order to build high-density housing. Such a system would simultaneously give the LOH holders a stake in moving land from low-value to high-value uses while providing ample compensation to existing stakeholders.

The problem posed by Hong Kong’s mix of bilateral monopoly and constituency effects transcends Hong Kong. We also examine how these connected obstacles to housing construction can defeat or be defeated by land options in places ranging from Israel to New York City. There is a larger lesson for property theory at stake in the interaction of bilateral monopolies with constituency effects. The sense of entitlement generated by existing property rights limits politicians’ ability to design new, more flexible forms of property. There are, in other words, transaction costs generated by property that impede not only economic but also political transactions. Overcoming those transaction costs requires legislative proposals that create new constituencies but are not yet blocked by the old constituencies that the existing property regime promotes.
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I. INTRODUCTION

The world today is afflicted by inequality of wealth created in large part by monopolistic ownership of land. Thomas Piketty has famously shown how returns to capital have outstripped returns to labor.\(^1\) The share of wealth accruing to the owners of land turns out to be at least as great an engine of inequality as ownership of finance capital.\(^2\) The returns to land are driven by the unique value of parcels in cities where labor is most productive. Individuals and enterprises frequently depend on proximity to each other for their productivity.\(^3\) Gains in productivity from such proximity—what economists call “agglomeration economies”—are huge.\(^4\) Because there is a fixed supply of parcels in cities with large agglomeration economies, landowners in such cities can levy immense tolls on everyone else by charging extraordinary premiums to buy or rent real estate.\(^5\) Across the globe, in cities like Rio de Janeiro,\(^6\) Yangon,\(^7\)


\(^2\) See Matt Rognlie, Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2015, at 51.

\(^3\) See, e.g., AGGLOMERATION ECONOMICS (Edward Glaeser ed., 2010) (examining the reasons why economic activity continues to cluster together despite the falling costs of moving goods and transmitting information).

\(^4\) See David Schleicher, Stuck! The Law and Economics of Residential Stagnation, 127 YALE L.J. 78, 96 (2017) (explaining that, according to agglomeration economics, “location matters. When people and capital congregate in particular cities and regions, they learn and trade more easily, and this creates wealth and generates economic growth”).

\(^5\) See generally Roderick M. Hills, Jr. & David Schleicher, Planning an Affordable City, 101 IOWA L. REV. 91, 115-16 (2015) (arguing that binding and comprehensive urban planning, one of the most criticized ideas in land-use law, could be part of an antidote for regulatory barriers strangling our housing supply).


Johannesburg, and London, landowners are reaping rents from their monopolistic position, creating a shortage of housing that divides residents between housing haves and have-nots.

In this Article we use Hong Kong as a case study to suggest both a diagnosis and a solution to the problem of inequality driven by monopolistic property rights. Among cities dominated by real estate oligarchy, Hong Kong is a special case. Its housing market has been the least affordable in the world for a decade, easily beating out London and San Francisco for this dubious distinction. Yet this housing crisis is a paradox of housing scarcity amidst plenty of land. Only about 24% of Hong Kong’s land is built up, with the balance currently occupied by woodland, shrubland, and grassland. Moreover, that 24% of built-up land includes warehouses and industrial facilities that are manifestly less urgently needed than more housing: 1,414 hectares (5.46 square miles) consist of brownfield sites containing old industrial facilities. Despite this abundance of buildable land, Hong Kong’s population is crammed into apartments with an “average living area per person of about 215 square feet—much less than in New York City, Shanghai, or nearby Shenzhen”—and “[t]he waitlist for public housing is on average 5.7 years.” Unsurprisingly, Beijing-affiliated pundits have touted the

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13 See id.

idea of a communist-style land reform as a solution to the most severe housing crisis in the world and the deep social inequality and division caused by that crisis.\textsuperscript{15}

We offer a different solution based on our diagnosis of the problem as rooted in two familiar aspects of property law theory. First, Hong Kong’s division of property rights between private owners and the government creates a bilateral monopoly that results in gridlock—that is, a kind of anti-commons in which an asset lies unused because each side enjoys a veto over its development.\textsuperscript{16} Second, reallocating property rights to end such gridlock can be impeded by the reciprocal causation between property rights and political influence—what we will call a “constituency effect” of property law. Property rights create a focal point around which owners can rally, reducing their costs of political organization and thereby enabling them to resist changes in the property status quo. Governmental officials armed with apparently sweeping legal powers can be practically stymied by such constituency effects. In Hong Kong, for instance, villagers, tycoons, and activists, provoked by their sense of entitlement to the status quo, engage in vigorous and effective litigation and lobbying to block any political change to existing property entitlements.\textsuperscript{17}

Hong Kong’s housing crisis seems to emerge from this combination of anti-commons gridlock and entitlement-protecting constituency effects. Current entitlement-holders—developers, indigenous villagers, land justice activists, and the government itself—have for decades been locked in apparently endless dickering over how to divide the gains from converting land from low-value uses like warehouses and small homes to higher-value uses like residential high-rises.\textsuperscript{18} Meanwhile, the beneficiaries of more housing—potential buyers and renters currently crammed in undersized apartments—are politically disorganized, scattered across the entire jurisdiction without any networks to overcome collective


\textsuperscript{16} For an overview of the concept as an “anti-commons” as property that is under-developed as a result of having too many owners with veto rights over its development, see Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 HARV. L. REV. 621, 621-88 (1998).

\textsuperscript{17} See infra Part III.

\textsuperscript{18} See Qiao & Hills, supra note 14.
action problems or the focused incentives in any particular housing project to exert themselves to lobby for new construction.\(^\text{19}\)

What can be done to break the deadlock? Rather than attempt a frontal assault on the property rights of real estate tycoons and indigenous villagers, we suggest that the government would be better advised to create entirely new property rights around which new interest groups could form. Those new groups could break the bilateral monopoly of officials’ dickering with current owners over the development of specific parcels. Specifically, we propose to give every Hong Kong resident “land options for housing” (LOHs). In such a regime, LOH holders, rather than the government itself, would sell these LOHs to developers and indigenous villagers. Those buyers would compete with each other to purchase LOHs in order to build high-density housing, simultaneously giving the LOH holders a stake in moving land from low-value to high-value uses while providing ample compensation to existing stakeholders.\(^\text{20}\)

The problem posed by Hong Kong’s mix of bilateral monopoly and constituency effects transcends Hong Kong. It is a problem vexing both housing markets and property theory alike. Cities around the world are struggling to find ways to unlock urban real estate’s development with innovative property rights.\(^\text{21}\) Done badly, however, such property tends to be locked in place by the sense of entitlement created by the legal status quo.\(^\text{22}\) Fancy auctions, self-valuation for both tax and eminent domain, and complex liability rules are impressive but useless academic exercises unless one can figure out how to overcome the organizational advantages conferred on the constituents who benefit from the property rights that such rules seek to change. Bilateral monopoly and constituency effects are, in sum, two equations with two unknown variables that must be solved simultaneously.

Hong Kong’s housing crisis illustrates this reciprocal causation between property law and public ordering. Our proposal to allocate

\(^{19}\) See infra Section III.b.ii.

\(^{20}\) Our proposal bears a resemblance to Salim Furth’s proposal to overcome resistance to new housing with “development dividends,” an entitlement to a share of the gains from new development rights to a jurisdiction’s renters. See SALIM FURTH, DEVELOPMENT DIVIDENDS: SHARING EQUITY TO OVERCOME OPPOSITION TO HOUSING 3-6 (2019). Like Furth’s development dividends, our LOHs are designed to create a pro-housing constituency. Unlike Furth’s proposal however, our LOHs are also adapted to deal with the problem of bilateral monopoly.

\(^{21}\) See infra Part V.

\(^{22}\) See infra Part III.
the vertical dimension of property to LOH holders illustrates one such possible solution. By requiring current property owners to bid against each other for the purchase of LOHs, our proposal would simultaneously create a new interest group and eliminate the bilateral monopoly that has stymied land development in Hong Kong. The lessons of LOHs, however, can be extended beyond Hong Kong to any jurisdiction where the influence of existing rightsholders impedes the transfer of an asset to its most valued use.

There is also a larger lesson for property theory at stake in the interaction of bilateral monopolies with constituency effects. Bilateral monopolies are often the product of valuable entitlements that powerfully mobilize constituencies in their defense. “Homevoters,” for instance, dominate zoning processes in much the same way that developers and indigenous villagers dominate buildable land in Hong Kong. The political influence generated by these entitlements prevents politicians from simply reshuffling the deck of private-law property allocations and starting anew because those very allocations define who will effectively lobby, elect, or inform those politicians. Property theory, therefore, needs to integrate institutional politics into its theory of entitlements. Treating the political process or legislative politics as a _deus ex machina_ that can step in to redress the limits of private law ignores the ways that private law limits the political process.

As economist Daren Acemoglu noted almost two decades ago, we need a political Coase theorem to define and overcome the transaction costs that block political reassignments of property rights. The sense of entitlement that existing entitlements generate limits the ability of politicians to design new and more flexible forms of property. There are, in other words, transaction costs generated by property that impede not only economic but also political

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24 See _infra_ Part II.
25 On the need for property law scholarship to take into account the constituency effects of real property rather than assuming that legislatures can re-allocate property rights with a free hand, see Roderick Hills & David Schleicher, _Building Coalitions Out of Thin Air: Transferable Development Rights and “Constituency Effects”_ in _Land Use Law_, 12 J. LEGAL ANALYSIS 79 (2020).
26 Id.
28 Hills & Schleicher, _supra_ note 25.
transactions. Overcoming those transaction costs requires legislative proposals that create new constituencies but are not blocked by the old ones.

The roadmap for our argument starts with a description of Hong Kong’s housing crisis in Part II. In Part III, we diagnose this crisis’s causes in the structure of property law, first by setting out the general theory that links property rights to negotiation-stalling bilateral monopoly in Section III.a, and second, by showing in Section III.b how constituency effects of property defeat some familiar solutions to such monopolies—for instance, liability rules of various stripes, auctions, and self-valuation. In Part IV, we lay out our solution to this gridlock: LOHs, the purchase of which is both necessary and sufficient for the development of high-density residential structures. We will explain how LOHs simultaneously create a constituency for residential development, promote inter-parcel competition, and let bidding guided by self-interested predictions of landowners determine the location of housing. Part V concludes with some lessons for property monopolies in other settings, such as zoning in American cities.

II. THE LANDSCAPE OF THE PROBLEM: HOW PROPERTY LAW HAS FAILED TO CREATE HOUSING IN HONG KONG

Before plunging into any diagnosis, we begin with a description of Hong Kong’s housing problem. For decades, Hong Kong’s government has acknowledged the undeniable fact that Hong Kong’s citizens suffer from a debilitating shortage of housing. Despite numerous efforts to solve the problem, however, land remains locked up in brownfields, small three-story residential structures, and empty grassland and forest, a small fraction of which would suffice to build all of the housing the Hong Kong’s residents need.

29 See infra Part III.
30 See infra Section IV.b.
31 See Zhou Wenmin & Wang Duan, What’s Stopping Hong Kong from Fixing Its Housing Crisis?, THINKCHINA (July 9, 2021), https://www.thinkchina.sg/whats-stopping-hong-kong-fixing-its-housing-crisis [https://perma.cc/F8DJ-9WYJ] (“Improving housing affordability has been the top concern of every Hong Kong government.”).
32 See infra Sections II.a, II.b, and II.c.
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a. How Land in Hong Kong Is Used

The paradox of Hong Kong’s housing shortage is epitomized by the absence of housing in an abundance of buildable land. The total land area in Hong Kong is approximately 1,111 square kilometers. Only 24% is built-up area, while the remaining 76% is non-built-up area, mostly consisting of woodland, shrubland, grassland, or wetland, including many country parks. Only 3.8% is devoted to any sort of non-rural residential uses: 2.3% is private residential land, while 1.5% is public residential land. By contrast, 3.2% is rural settlement or “village-type development land,” including the so-called small-house and Tso/Tong land (祖堂地), also known as ancestral land; 1.5% is warehouse and open storage, mainly classified as “brownfields;” 4.5% is agricultural land, most of which is unfarmed and of which developers own a big portion. In sum, more than twice as much land in Hong Kong is devoted to warehouses, crops, and small village houses as higher-density residential uses.

b. How Land in Hong Kong Is Owned

Under the system of public land ownership inherited from the British colonial period, the Hong Kong government provides for private control of real estate by leasing land to private lessors, usually for a period of ninety-nine years. While the government


34 Task Force on Land Supply, supra note 33, ¶ 2.

35 See Land Utilization in Hong Kong, supra note 12.


37 Id.

reserves the right to “resume” the lease on payment of just compensation for the balance of the lease’s term, these leases operate much like any other private property and are the basis for the lessors’ investment in improvements. Accordingly, we shall refer to such lessors as “lessee-owners” and long-term leases from the government to such owners as “ownership” for the sake of convenience and clarity.

In this system of quasi-private ownership, the vast majority of land suitable for new residential construction is held by private lessee-owners. Such lands include agricultural and brownfield lands, primarily held by land development companies, and “village-type development land” held by indigenous villagers either as households or village associations or reserved by the government for indigenous villagers’ future uses.

\[i. \text{Agricultural Land and Brownfields}\]

“Agricultural land” is a misnomer, describing the zoning rather than the use of the real estate: Of the 4,400 hectares (ha) of “agricultural land” in Hong Kong, only about 700 ha are actively farmed. Whether farmed or fallow, over 80% of this land is in private hands. The four biggest developers in Hong Kong own around 930 ha or 21% of this agricultural land reserve. Because

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39 See Chan & Wan, supra note 38.
40 Land Tenure System and Land Policy in Hong Kong, supra note 38.
42 See supra Section II.a.
44 Land Utilization in Hong Kong, supra note 12, at 56.
45 Lin Yueqian (林樂謙), Mei In: Si Da Di Chan Shang Yong Yu Yi Fang Chi Nong Di Heng Di Zhan Jin Ban (美銀：四大地產商擁逾億方呎農地 恆地佔近半) [Meiyin: Four Biggest Developers Own Agricultural Land of More Than 100 Million

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developers are interested in real estate development, they generally let such land lie fallow, having purchased it at a low price reflecting its low value for agriculture in hopes of eventually rezoning the land for more valuable uses.\footnote{46}

For the same motivation, developers also hold significant amounts of brownfields.\footnote{47} There are about 1,600 hectares of brownfields, more than 80% of which are privately owned, mainly by the major developers.\footnote{48} “Brownfield” is an imported term from the United Kingdom and the United States and generally refers to agricultural land in the New Territories which has been converted to low-cost uses since the decline of agricultural activities.\footnote{49} Current uses include port back-up uses, open storage, logistics operations, vehicle parking, vehicle repair workshops, recycling yards, rural workshops, and construction machinery and materials storage.\footnote{50} These lands occupy relatively flat areas in the New Territories and are often intermingled with villages, squatter structures, and active or fallow farmland.\footnote{51}

\footnote{46} See e.g., Ping Lun Bian Ji Shi (評論編輯室), Fazhanshang Tunji Nongdi Qiangongqin Tudi Kongzhishui Shi Jiejue Liangfang M? (發展商囤積農地過千公頃 土地空置稅是解決良方嗎?) [Developers Have Hoarded Over 1,000 Hectares of Agricultural Land: Would a Land Vacancy Tax Be a Good Solution?], HK01 https://www.hk01.com/01 觀點/308785/發展商囤積農地過千公頃-土地空置稅是解決良方嗎 [https://perma.cc/LJE9-5WLN].


\footnote{48} Land Utilization in Hong Kong, supra note 12, at 22, 56.


\footnote{50} Id.

\footnote{51} TASK FORCE ON LAND SUPPLY, H.K. DEV. BUREAU, PAPER NO. 05/2017, BROWNFIELD SITES ¶ 3 (2017).
Roughly 3,380 hectares of land is zoned as “village-type development land” and held for the current or eventual use by indigenous villagers, either as low-density small-property houses, ancestral temples, or vacant land on which small-property houses will eventually be built.\(^{52}\)

In 1972, the colonial government created a “small house policy” (SHP) modelled on Qing law.\(^{53}\) Under the SHP, a male indigenous villager (“ding”) aged eighteen years old or older who is descended through the male line from a resident in 1898 of a recognized village in New Territories may apply to the Lands Department of the Hong Kong government for permission to build for himself a small house. Such a small house is a residential structure no higher than three stories with each floor limited to 700 square feet built on a suitable site within the applicant’s own village once during his lifetime.\(^{54}\) After the 1997 turnover, such rights to small houses, or ding rights, are protected as indigenous villagers’ “traditional rights” under Article 40 of the Hong Kong Basic Law.\(^{55}\) To be clear, the Hong Kong Basic Law has not mentioned SHP and there have been critiques of SHP and challenges in courts.\(^{56}\) Nevertheless, in 2021, the Court of Final Appeals of Hong Kong SAR decided that “Ding rights were, on a proper construction of BL40, within the NTIs’ lawful and traditional rights and interests covered by that article and were,


\(^{53}\) See Lisa Hopkinson & Mandy Lao Man Le, Rethinking the Small House Policy 31 (2003).


\(^{55}\) “The lawful traditional rights and interests of the indigenous inhabitants of the “New Territories” shall be protected by the Hong Kong Special Administrative Region.” Xianggang Jiben Fa art. 40 (H.K.).

despite their inherently discriminatory nature, entitled to constitutional protection in full.”57

In most cases, the eligible villager builds a small house merely by applying for a building license to construct a structure on the villager’s own land. But villagers also have the right to build a house on government-owned land in exchange for the villager’s property or, if the villager is landless, apply for a Private Treaty Grant on government land purchasable at two-thirds of the land’s market value.58 In today’s Hong Kong, the government has reserved 932.9 ha of “village type development land” to satisfy future claims by indigenous villagers’ to their “small house”, or ding, rights.59 Such reserved land has been left vacant for future claims.

c. How Hong Kong Land Is (Not) Developed: The Failure of Lease Modifications and Land Resumption

With the above 9,380 hectares of land sitting semi-idle, Hong Kong has no shortage of land on which high-density residential building could easily be constructed. It is estimated that the 932 hectares of “village-type development land” currently reserved by the government alone could supply up to 500,000 housing units if ten-floor buildings (rather than the current 3-floor buildings) were permitted on them.60 Moreover, the current occupants of this land are neither satisfied with the status quo nor resistant to their land’s

59 Ping Lun Bian Ji Shi (評論編輯室) [Staff Editor’s Office], Shifang Tudi Zuo Fangwu Guihua Keburonghuan Zhengfu Zhongxu Miandui Dingquan Wenti (釋放土地作房屋規劃刻不容緩 政府終須面對「丁權」問題) [Release of Land for Housing Planning Is Urgent and the Government Will Sooner or Later Face the Problem of Ding Rights], HK01 (Feb. 21, 2019, 7:19 PM), https://www.hk01.com/01 觀點/297875/釋放土地作房屋規劃刻不容緩-政府終須面對-丁權-問題 [https://perma.cc/L5ER-JPL5].
conversion to high-density residential uses. Indigenous villagers in particular seem utterly dissatisfied with their “small house” entitlement that is ostensibly designed for their benefit. Heung Yee Kuk, the organization that represents the indigenous inhabitants’ view, supports high-rise development by using the public-private partnership model.61 The “Kuk’s” view is reinforced by a 2014 survey showing that 88% of the indigenous inhabitants agreed that three-floor small houses were a huge waste of land and supported the development of high-rises.62

How, then, is it possible that the land has not been converted from current uses that none of the land’s current users want? As explained below, the government and these users cannot reach an agreement on the premium that should be charged to the lessees for conversion from low- to higher-value uses. Dickering over this premium has stalled this conversion for decades. In theory, the government could either resume leases after paying just compensation to the lessees or accede to the villagers’ and developers’ view of a proper premium. But the former option is foreclosed by the government’s lack of information, and the latter option is foreclosed by politics. Lease resumption is a slow process made intractable by the predictably persistent litigation of developers with the best knowledge of the land’s actual value. As for giving into villagers and developers, the government is under pressure from “land justice” activists and mortgage holders not to confer windfalls on groups regarded as excessively privileged by many in Hong Kong.63 In contrast with the robust activism to prevent windfalls for villagers and developers, there are few protests seeking to increase the supply of housing. The under-housed are simply missing from the public housing discussion despite hundreds of thousands of under-housed Hong Kong


62 Groups Advocate the Relaxation of the Building of Ten-Storey Small House, supra note 60.

residents who are now crammed into tiny apartments rented at exorbitant prices.\textsuperscript{64}

\begin{itemize}
\item[i.] \textbf{Rezoning and Lease Modification: Endless Haggling Over the Gains from Land Conversion}
\end{itemize}

Because Hong Kong’s system of property rests on the government’s leasing Crown lands to private lessees, any conversion of land from its current uses to high-density residential purposes requires both a regulatory change and a lease modification. The first step requires lessee-owners to apply to the Town Planning Board for a plan amendment—basically, a modification of the land’s zoning.\textsuperscript{65} The second step requires those owners to apply to the Lands Department for a lease modification.\textsuperscript{66} Because the government has a duty to obtain a fair stream of revenue from any lease modification, the second stage requires the government to negotiate a “premium” from the lessee-owner in exchange for the increase in value conferred by broadening the range of permissible uses under the lease.\textsuperscript{67}

Neither of these two stages is easy, but negotiations over that lease premium have been the primary cause of delay in conversion of land.\textsuperscript{68} Regulatory change by itself is also time consuming as a

\textsuperscript{64} See e.g., Nikki Natividad, \textit{What Can be Done About Hong Kong’s Ridiculously Tiny Flats?}, VICE (Mar. 30, 2021), https://www.vice.com/en/article/v7m5md/hong-kong-housing-small-subdivided-apartments [https://perma.cc/Q9SK-87DB] (“A subdivided flat can range from 18 to 160 square feet, with a 100-square-foot unit with a bathroom costing anywhere from HK$4,000 ($516) to HK$5,000 ($645) per month.”).


\textsuperscript{67} See Press release, Gov’t of H.K., \textit{supra} note 65.

larger number of stakeholders have been participating in the plan amendment process. Between 2009 and 2018, filings of public comments have grown from 4,352 to 39,000, peaking at 115,000 in 2014. The growth in public comment has imposed a mammoth burden of the Board as it needs to consider each comment.

The delay imposed by the plan amendment process, however, is compounded by the even more serious delay created by negotiations over the premium payment to the government required by the lease modification. This premium is equal to the difference between the value of land before and after the modification. Premium assessments are centrally processed by the Valuation Section of the Lands Department and are communicated to the applicant by the District Lands Office by way of a binding basic terms offer. If applicants disagree with the premium demanded by the Government, they may launch an appeal against the premium to the Appeal team and seek further judicial review of the Appeal team’s decision on procedural grounds.

The government cannot compel the lessee-owner to accept the government’s terms for lease modification, so the disagreement over...
lease premiums may continue indefinitely without any conclusion being reached.\textsuperscript{74}

Both developers and the Hong Kong government have become frustrated by the time and cost of going through the plan amendment and lease modification process. Developers have manifested such frustration by forgoing lease modification of their own properties and instead bidding in the government’s auctions to acquire entirely new leases.\textsuperscript{75} The government has manifested its frustration with various subtle schemes to speed up the negotiation process.\textsuperscript{76} These schemes, however, have attracted little developer interest as they do not break the gridlock of bargaining between the government which controls the right to develop and developers who control the actual land.

The government’s auctioning off completely new leases of unleased land could, in theory, sidestep the obstacles posed by the lease modification process. In practice, however, the government does not have much land left for such auctions,\textsuperscript{77} whereas it controls about 1,000 hectares of “village-type development land” for generations of indigenous villagers’ future claims to their small-house rights.\textsuperscript{78}


\textsuperscript{78} Staff Editor’s Office, supra note 59; see also Task Force on Land Supply, supra note 54, ¶ 5 (“[T]here are about 700 ‘V’ zones with a total area of about 3,380 hectares..."}
The government has faced analogous obstacles in increasing the permitted densities on the 3,380 hectares of village land held by indigenous villagers or their associations. As noted above, the villagers are eager to convert the land to higher-density residential uses, but other Hong Kong residents are less enthusiastic: only 25% of survey respondents who were not indigenous villagers supported such conversion. Part of the reason for such reluctance might be a popular sense that indigenous villagers already enjoy an unjust windfall in the form of the government’s small house policy. This policy not only discriminates against female villagers (because only male villagers are entitled to a small house under the traditional Qing Dynasty custom), but it also provides a housing windfall to a small group of Hong Kong residents. Motivated by such concerns, a citizen activist, Kwok Cheuk Kin, filed an unsuccessful lawsuit to revoke the policy. Wary about being blamed for colluding with the rich, the government has chosen the safest path by simply maintaining the “small house” status quo. Although this status quo sometimes involves clearly illegal transactions of small house rights involving powerful indigenous politicians and developers, the government continues to insist, in the face of a serious housing shortage, that all such buildings be no taller than three floors.

(ha) mainly distributed across the 642 recognised villages. . . . As at [sic] October 2017, about 60% of land on 'V' zones is under private ownership, while about 40% are [sic] on government land.

Groups Advocate the Relaxation of the Building of Ten-Storey Small House, supra note 60.


See Wu Wanying (吴婉英), Jie 9,878 Zong Yisi Taoding Gean (揭 9,878 宗疑似「套丁」個案) [Uncovering 9,878 Suspected Cases of Illegal Selling of Rights of New Territories], Zhong Xinwen (眾 新 聞) [CITIZEN NEWS] (Jan. 5, 2018), https://www.hkcnews.com/article/9241/套丁-本土研究社-政總署-9248/揭9878宗疑似「套丁」個案-佔新界丁屋總數 23-本土研究社批政府視若無睹. [https://perma.cc/FP5F-SB25]; see also TASK FORCE ON LAND SUPPLY, supra note 54.
ii. Feeble Leviathan: The Failure of Land Resumption in Breaking the Deadlock

The government, of course, need not rely on developers or villagers to produce housing. At least in theory, the government could simply acquire the land over the objections of its current lessee-owners through the forced resumption of leases. The lessee-owners would be entitled to just compensation, but that price would be objectively defined by courts that could, again in theory, sidestep the endless haggling that has stalled lease modifications.

The theoretical possibility of the government acting as an all-powerful Leviathan, however, has been largely a practical failure. The reason seems to be fear on the part of judges and other officials that the government attacking private property rights too aggressively would ruin Hong Kong’s reputation as an enclave protective of investors. The result has been a cautious and glacially slow use of land resumption.

The legal obstacles to quick and aggressive land resumption are baked into the Hong Kong Basic Law and implementing ordinances. Article 105 of the HK Basic Law obliges the Hong Kong government to protect individuals’ and legal persons’ rights to property and compensation for lawful deprivation of their property. Section 3 of the Land Resumption Ordinance further authorizes the Chief Executive to order land resumption only for a “public purpose,” a term that both the government and the courts have

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86 Id.

87 Press Release, Gov’t of H.K., LCQ5: Use of Lands Resumption Ordinance by Government (June 27, 2018), https://www.info.gov.hk/gia/general/201806/27/P2018062700628.htm [https://perma.cc/E7JT-3F4R] (“Hong Kong, which, as a free economy, respects the right of private ownership of property and allows the private market to play to its strengths.”).

88 Id.

89 XIANGGANG JIBEN FA art. 5, § 1 (H.K.).

90 Lands Resumption Ordinance, (1900) Cap. 124, § 3 (H.K.).
construed narrowly to exclude private housing development. While the government has exercised the resumption power authorized under the LRO more than 160 times since the 1997 handover, these resumption cases have been painfully slow: five land resumption for public housing cases in the past 10 years took an average of 7.1 years from publication of the notice in the Gazette until final completion of the project. Moreover, the government has been reluctant to use its resumption power outside a narrow definition of “public purpose,” emphasizing that Hong Kong, “as a free economy, respects the right of private ownership of property.” Accordingly, the government has never used land resumption to create purely private market-rate housing.

The slow pace of land resumption has been reinforced by litigation over the just compensation guaranteed by Section 6 of the LRO. In theory, the compensation rules give the government significant advantages. Director of Lands v. Yin Shuen Enterprises held that Section 10 of the LRO, which bases the amount of compensation on the loss or damage resulting from the resumption of the lease, only provides for the value of land uses permitted by the lessee’s deed, even when it is probable that the deed would be modified by the government absent resumption. This doctrine would theoretically permit the government to acquire land leased to tycoons for agricultural or warehouse purposes at a much lower value than the residential value that the government would earn by resuming the lease and converting the land to residential high-rises. Despite this theoretical capacity for the government to resume leases with minimal compensation, however, there has been frequent and time-consuming litigation over the compensable value of resumed...

91 Id. § 2; Fok Lai Ying v. Governor Council, [1997] 1 H.K.L.R.D. 111;
92 Id.
94 Id.
leases.\textsuperscript{96} For instance, in the case of Nam Chun Investment Co.,\textsuperscript{97} the company, dissatisfied with the statutory compensation awarded in 1999, launched a series of appeals that were not resolved until 2007.

The expense and time required for lease resumption has led the government to use it sparingly. Carrie Lam, then-Hong Kong Chief Executive, advised the Legislative Council during a question-and-answer session that the LRO should not be invoked arbitrarily because “owners whose private ownership is being infringed upon... will apply for judicial review against the Government,” with such lawsuits lasting as long as eight to nine years.\textsuperscript{98} The Wan Chai Outline Zoning Plan (OZP), for example involved multiple judicial review applications since 2011. With follow-up work still in progress, the OZP has yet to be submitted to the Chief Executive in Council for approval, impeding the development of various sites within the district.\textsuperscript{99}

\textit{iii. The Bias of Hong Kong’s Political Process for Locking in the Status Quo}

These failures of voluntary bargaining, land auctions, and lease resumptions to produce housing naturally leads to the question: What about political pressure from Hong Kongers suffering from inadequate, over-crowded, and expensive housing? There has been substantial political activism concerning housing over the last quarter-century, but the activists have opposed rather than supported the construction of new housing.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{96} See 《收回土地條例》補償——土地發展潛力的非黑即白) [Compensation under the “Land Resumption Ordinance” – the Development Potential of Land is Either Black or White], HONG KONG BAR ASSOCIATION (May 2015), https://www.hkba.org/node/13844 [https://perma.cc/5P4B-WUHP] (“The issue of the fair compensable value of the land-owners must be resolved by the courts and the legal world.”).
\item \textsuperscript{99} Id.
\item \textsuperscript{100} See, e.g., Cecilia Chu, The Myths and Politics of Housing in Hong Kong: The Controversy Over the Demolition of the Hunghom Estate, 32 HABITAT INT’L 375, 375-83 (2008).
\end{itemize}
The most dramatic example of such opposition was the defeat of Chief Executive Tung Chee-hwa’s “85,000 Plan” between 1997 and 2000. In his 1997 Policy Address, Tung Chee-hwa announced a plan to build at least 85,000 flats a year in the public and private sectors known as the “85,000 Plan.” The proposal to enlarge housing supply ran aground during the 1997 financial crisis in which a bubble in housing prices that rapidly inflated after 1995, suddenly burst, trapping hundreds of thousands of mortgage buyers in negative equity. The collapse of housing prices in 1997 provoked substantial opposition from the Hong Kong real estate industry and property owners to any proposal to reduce housing prices by increasing supply. The Hong Kong Institute of Real Estate Administration, the professional body representing the real estate sector, urged the government to reduce the housing supply to boost property prices. Likewise, Thomas Kwok Ping-kwong, the vice chairman of Sun Hung Kai Property, warned that bringing 85,000 new units onto the market could cause the bottom to drop out of the housing market. In June 2000, the Liberal Party, a pro-Beijing, pro-business political party, mobilized a substantial protest (1,000 people) in opposition to the 85,000 Policy, with the


102 See id.


104 See, e.g., Wu Xiaobo (吴晓波), Xianggang Zenmele (香港怎么了) [What Happened to Hong Kong], Wu Xiabou de Boke (晓波的博客) [BLOG OF WU XIAOBO] (Mar. 21, 2021), http://wuxiaobo.blog.caixin.com/archives/243818 [https://perma.cc/44X3-QZW7].


107 Zhongchan Nahan Fu Zichan (中產吶喊負資產) [Middle Class Protests of Negative Assets], TELEVISION BROADCAST LTD. (June 26, 2000), http://ifiles.tvb.com/ifiles/20000626/f_more/20000626_445.html [https://perma.cc/DX6C-6XZR].
ostensible aim of protecting people’s assets.\textsuperscript{108} By the summer of 2000, Tung Chee-hwa surrendered to this anti-housing campaign, saying in a June 29th interview that the 85,000 Policy no longer existed.\textsuperscript{109}

The campaign against the 85,000 Plan was self-consciously a narrowly self-interested effort by the real estate industry and mortgage holders to boost land prices by restricting supply.\textsuperscript{110} Other more public-spirited activists have not made promotion of higher land prices their goal. They have instead aimed at protecting non-indigenous farmers from unjust dispossession\textsuperscript{111} and preserving county parks and historic landscapes and buildings.\textsuperscript{112} Regardless of their purpose, however, all these efforts have had the same effect: they prevent the government from enlarging Hong Kong’s housing supply, causing in turn a crisis of housing affordability.

The political strength of anti-development forces is powerfully illustrated both by their vote-getting influence in Legislative Council elections and their capacity to block the government’s development initiatives. Eddie Chu Hoi-dick, the charismatic head of the Land Justice League, won the legislative council election with 84,121 votes


\textsuperscript{110} See Press Release, Gov’t. of H.K., supra note 98.


in 2016, making him Hong Kong’s “King of the Vote.” 113 The development-blocking power of anti-development groups is also well-illustrated by the inability of the government to adjust the boundaries of county parks to provide land for housing development. Country parks cover roughly 40% of Hong Kong’s total land area—more than ten times the total area occupied by any sort of residential use.114 Efforts to convert any parkland to housing, however, has been met with vociferous resistance from environmental groups and neighbors abutting the parks. When the South East New Territories Landfill (SENTL) proposed to use five hectares of land in the Clear Water Bay (CWB) Country Park, for instance, nearby Tseung Kwan O residents and district councils fiercely objected, provoking the Legislative Council to “veto” the proposal despite support from the Chief Executive. 115 Although there was uncertainty over whether the Legislative Council actually had the power to repeal an order of the Chief Executive, 116 the government eventually backed down in the face of such vehement and well-organized opposition.117

The inability of the government to overcome resistance to development of existing land is highlighted by the government preferring to reclaim entirely new land from the ocean despite the gargantuan costs associated with such a quixotic plan. Carrie Lam’s signature project, now apparently abandoned, was to reclaim 1,700 hectares of land from the ocean at a cost of 500 billion Hong Kong dollars.118 Astonishingly, Lam favored this proposal, dubbed “the


114 See supra notes 32-35 and accompanying text; Land Utilization in Hong Kong, supra note 12.


117 H.K. AUDIT COMM’N, PROTECTION OF COUNTRY PARKS AND SPECIAL AREAS ¶¶ 3.7-3.8 3.38 (2013); see also Lin & Bonnie, supra note 115.

118 See Shirley Zhao & Sum Lok-kei, Hong Kong Leader Carrie Lam Bulldozes Ahead with Lantau Island Reclamation Idea . . . but at What Cost?, S. CHINA MORNING POST (Oct. 21, 2018, 6:00 PM), https://www.scmp.com/news/hong-
The government, in sum, is trapped between anti-development activists, powerful developers, and indigenous landowners. The government cannot let developers and indigenous landowners develop their land for free without provoking the activists’ ire as an apparently corrupt giveaway. But the government also cannot induce the developers and indigenous landowners to pay a premium that is acceptable to those activists. As for using its power simply to take over the land using lease resumption, the government is fearful of deterring investors with disrespect for private property rights. Seeking land in which no interest group currently has any stake, the government therefore pinned its hopes on a fantasy of dredging up earth from the ocean. But “the Lantau Tomorrow Vision” turned out to be all too literally described by its name: it was nothing more than an effort to postpone for another day the conundrum by proposing something that cannot be done within the Chief Executive’s own term period.

III. DIAGNOSING THE PROBLEM: HOW BILATERAL MONOPOLY AND CONSTITUENCY EFFECTS TOGETHER BLOCK HOUSING DEVELOPMENT

Here, then, is the mystery in need of explanation. Everyone agrees that Hong Kong faces a colossal crisis in its shortage of affordable housing. Moreover, both the Hong Kong government and the current lessee-owners of the land want to convert three-story small houses, fallow farmland, and warehouses and other brownfield sites into high-density housing. Yet, somehow, neither the negotiations between the lessee-owners and the government nor the politics of Hong Kong will allow for that conversion. Instead, Hong Kong is stuck with “agricultural” land that has never been farmed, tiny rural homes that even their occupants think waste land,
and an eyesore of parking lots, warehouses, and other brownfield sites, which are manifestly less necessary than residential apartments.

What has locked Hong Kong into such a perverse use of its ample real estate? We argue in this section that Hong Kong’s housing predicament is the foreseeable result of some dynamics familiar from property theory. Because the government and lessee-owners negotiate over the zoning and leases of each parcel one at a time, their negotiations are afflicted by bilateral monopoly that encourages each side to misrepresent their actual valuation of current and prospective uses. Calabresi and Melamed, in Property Rules, Liability Rules and Inalienability: One View of the Cathedral, have offered a lot of now-familiar solutions to the problem of bilateral monopoly. 121 An impartial arbiter might, for instance, simply enforce some sort of liability rule, forcing a sale at an objectively determined price. 122 Those liability rules have gotten increasingly exotic: scholars have concocted a dizzying number of fancy mechanisms to force tight-lipped negotiators to reveal how much they actually value an asset (e.g., call options, taxes, auctions). 123 As we explain in Section III.b below, however, all of these solutions assume away the problem of property’s “constituency effects.” The “constituency effects” of a law are the law’s promotion of a politically effective constituency through the creation of a focal point around which that constituency can rally. By creating a sense of common entitlement, property law helps mobilize and organize otherwise politically ineffective constituents to defend that legal assignment. The result of this sense of entitlement is that the exotic mechanisms of self-valuation, auctions, or objective appraisal of assets’ values are, politically speaking, off the table.

Somehow the law must sidestep the power of existing entitlement holders to protect their entitlements in the political process by creating a new constituency capable of breaking the gridlock that paralyzes negotiations over those entitlements. We will offer one such possible solution in Part IV. In this Part, we

122 Id. at 1092.
merely lay out the gravity and pervasiveness of the problem created by the interaction of bilateral monopolies and constituency effects that protect such monopolies from political correction.

a. The Problem of Bilateral Monopoly and Its Theoretical Solutions

Consider, first, how the endless haggling between the government and lessee-owners follows the typical pattern of parties’ concealing their preferences because of a bilateral monopoly. The government and lessee-owners are locked into such a “monopoly” because there are no competing suppliers of the items (uses of parcels, lease modifications) that each is buying or selling. If villagers or real estate tycoons turn down the government’s offer of a lease modification, there are no alternative buyers of lease modifications to which the government can turn. Likewise, if the government demands an extortionate premium to modify a lease, then the lessee-owners cannot seek out another seller of lease modifications who might offer a more reasonable price. Forced to deal only with each other, each side has incentives to bargain deceptively, dragging out negotiations interminably.\textsuperscript{124}

The problem posed by lease modification in Hong Kong is familiar from many other property settings. The assembly of land through eminent domain, for instance, is the product of an identical sort of strategic concealment of valuations. Sellers who know that their parcel is essential for a larger project have incentives to misrepresent the price that they will accept to sell to a land assembler. Buyers who are assembling the land have an incentive to misrepresent the benefits created by assembly in order to exclude the seller from getting a share of those benefits. Because there are not competing buyers and sellers who offer competing offer and

\textsuperscript{124} The problem of bilateral monopoly, a specific case of buying in a thin market where efficient outcomes cannot be insured by purely voluntary bidding between a seller and buyer, is described by Roger B. Myerson and Mark A. Satterthwaite. See Roger B. Myerson & Mark A. Satterthwaite, \textit{Efficient Mechanisms for Bilateral Trading}, 29 J. \textit{ECON. THEORY} 265, 265-68 (1983). Carol M. Rose has characterized such bilateral monopoly as a special form of transaction cost blocking Coasean bargains. Carol M. Rose, \textit{The Shadow of The Cathedral}, 106 YALE L.J. 2175, 2184 (1997) (calling them “Type II Transaction Costs” to distinguish them from the costs of identifying the parties with a legally protected interest in property).
asking prices, negotiations stall and sometimes breakdown entirely.\footnote{125}

Just as the problem of strategic holdouts is familiar, there are lots of familiar solutions to that problem, all of which limit, in one way or another, the absolute power of one or the other side to demand any price they please. Guido Calabresi and Douglas Melamed famously set the terms for all such solutions with the idea of a “liability rule” under which one side could force a sale of the asset at some objectively-determined price. \footnote{126} Eminent domain and nuisance damages are two examples of such liability rules, but in the half-century since Calabresi & Melamed’s seminal article, scholars have proposed a profusion of exotic liability rules to force parties to show their hand. The basic idea underlying all such solutions is that some impartial arbiter will calculate the actual value of the asset to one side, charging that value to the other side who will, by rejecting or accepting it, honestly reveal that they value the asset more or less than the other side does. \footnote{127}

The basic challenge of any liability rule, however exotic, is that determining the actual value of an asset to a person is difficult. If the price is set too high, then it functions just as an injunction, blocking transactions that ought to occur; if the price is set too low, then it forces transactions that ought to be blocked. \footnote{128}

Legal scholars and economists have proposed a variety of cleverly designed liability rules to improve the accuracy of that objectively-determined price. Ian Ayres and Jack Balkin, for instance, laid out a theory of “higher-order liability rules” in which an asset can be purchased by a party who matches the initial price set by an impartial arbiter. \footnote{129} That initial price, in effect, serves as the starting price in an auction between two bidders whose bids improve the accuracy of the initial award. For example, under Ayres

\footnotetext{125}{For an overview of this “holdout” problem, see Thomas W. Merrill, \textit{The Economics of Public Use}, 72 \textit{Cornell L. Rev.} 61, 75 (1986).}

\footnotetext{126}{Calabresi & Melamed, supra note 121, at 1092.}


\footnotetext{128}{See A. Mitchell Polinsky, \textit{Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies}, 32 \textit{Stan. L. Rev.} 1075, 1104 (1980) (setting out this basic challenge).}

\footnotetext{129}{Ian Ayres & Jack M. Balkin, \textit{Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond}, 106 \textit{Yale L.J.} 703, 710-11, 748-49 (1996).}
and Balkin’s proposal, the condemnee who was forced to sell their house to a land assembler for a judicially determined price (the “initial price”) could buy back the right to preserve the house by offering the assembler a higher price, and the assembler could respond in turn with another yet higher price to reacquire the right of assembly, in effect defining liability through an auction mechanism. Economists and legal scholars have also enlisted uncertainty about the consequences of a party’s valuation to improve the valuation’s accuracy. Several such proposals rely on some sort of shared ownership of an asset with an obligation to buy each other’s share at some valuation reflecting both parties’ valuation. Other scholars have suggested that making a self-declared valuation simultaneously the basis for property tax liability as well as compensation in eminent domain would give owners incentives to be honest in their self-valuation of assets because owners who overstated the value of their property for tax purposes would thereby risk losing their property for a low price if it were condemned. Eric Posner and Glen Weyl have generalized from such self-valuation to urge a “common ownership self-assessed tax” (COST) in which owners are taxed on the value that they themselves declare, with that value simultaneously constituting the tax base as

130 See Peter Cramton, Robert Gibbons & Paul Klemperer, Dissolving a Partnership Efficiently, 55 Econometrica 615 (1987) (suggesting a mechanism in which each party would be obliged to purchase the other’s share at an average of the two parties’ bids); Ian Ayres & Eric Talley, Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade, 104 Yale L.J. 1027, 1073–80 (1995) (arguing for, among other possible rules, a probabilistic division of assets, such that each party is uncertain about whether they will be the buyer or seller at a price based on each party’s self-valuation of the asset); see also Ilya Segal & Michael D. Whinston, The Efficiency of Bargaining Under Divided Entitlements, 81 U. Chi. L. Rev. 273 (2014) (offering an overview of division of an entitlement as a way to ensure accurate revelation of preferences). But see Louis Kaplow & Steven Shavell, Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley, 105 Yale L.J. 221, 233 (1995) (criticizing this proposal).

131 The idea of self-valuation by landowners for property taxation in which the government would reserve the option of purchasing the landowner’s land at the value declared by the owner was proposed by Sun Yat-sen in 1905 and later implemented in Taiwan. See Emerson M. S. Niou & Guofu Tan, An Analysis of Dr. Sun Yat-Sen’s Self-Assessment Scheme for Land Taxation, 78 Pub. Choice 103 (1994). It has been revived and refined by, among others, Saul Levmore and Lee Anne Fennell. See Saul Levmore, Self-Assessed Valuation Systems for Tort and Other Law, 68 Va. L. Rev. 771 (1982); Lee Anne Fennell, Revealing Options, 118 Harv. L. Rev. 1399, 1407 (2005) (providing an overview of such self-valuation systems, which she characterizes as “customizable callable calls”).
well as a price at which any buyer, not only the government, could purchase the asset in a forced sale.\footnote{Posner & Weyl, supra note 6, at 21.}

Whatever the details of the particular scheme, all such proposals share the idea that owners and buyers can be prodded into revealing how much they truly value an asset so that it ends up in the hands of the party who values it the most. It is easy, at least in theory, to imagine applying one of these liability rules to the problem of property gridlock in Hong Kong. Indeed, the Hong Kong government’s system of lease resumptions is the most basic form of liability rule: an impartial arbiter sets an objective price for the lessee-owners’ lease, theoretically revealing that the government values the resumption more than the lessee-owner’s value of the lease. Following Ayres and Balkin, this simple liability rule might be refined, for instance by giving the lessee-owners the right to buy back their lease from the government through the offering of a counter-price exceeding the court-defined price. Likewise, the government might invite lessee-owners to declare how much their lease is worth and then raise revenue by imposing a tax of some percentage of that value. Or the government might use the “Texas Shoot-Out” method of a divided entitlement under which the Hong Kong government and lessee-owners would each offer their own estimate of a fair premium for modifying leases to allow high-density housing, and each side would thereby obtain the option to force the other side either to pay the option holder the average of the two premiums or to accept such payment in exchange for surrendering such control.

And so forth. There is no shortage of policies that could theoretically be used to nudge each side into revealing its true valuation of Hong Kong land. So why have none of these clever proposals ever been suggested, let alone used, to break the Hong Kong impasse on housing?

\textit{b. The Problem of Constituency Effects: How Property Rights Create a Sense of Entitlement that Blocks Political Change.}

The reason, we argue below, is the constituency effect created by property law. As a matter of practical politics, it would be impossible to transform existing property rights with these sophisticated liability rules because they would be regarded by one
or another politically powerful constituency as an unjust attack on existing property rights. Put another way, existing property rights have fostered a sense of entitlement among the politically organized part of Hong Kong’s residents that foils such reconfiguration of property law.

To better explain the obstacle posed by constituency effects, we will first review in Section III.b.i how law more generally can create focal points rooted in a sense of entitlement among the law’s beneficiaries. We will then apply this literature in Section III.b.ii to suggest how the sense of entitlement created by Hong Kong’s existing system of property rights makes wholesale adoption of new liability rules extremely unlikely.

### i. How Property Law Can Entrench Itself Through Constituency Effects

Laws create effective constituencies by uniting otherwise unorganized individuals into interest groups with a common stake in defending those laws. This unification of otherwise disorganized individuals occurs through a variety of mechanisms. Simply by singling out one characteristic of individuals as the legal basis for some entitlement, the law can make those individuals identify as members of a group defined by that characteristic. The Social Security Act, for instance, made salient the characteristic of being over the age of sixty-five because this age triggered eligibility for old age insurance under the statute. A law might also create a sense of entitlement by characterizing itself as a contract in which benefits are provided in return for some action from the beneficiaries. Again, the Social Security Act was self-consciously designed as such a contract by linking payment of benefits to covered individuals’ paying payroll taxes while participating in the workforce. The law might also inspire elite communication about benefits or direct education to beneficiaries from governmental officials or procedural mechanisms by which beneficiaries can overcome obstacles to

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collective action, such as notices and hearings especially directed to beneficiaries of the law.\textsuperscript{135}

The legal status quo can also create an effective constituency simply by defining a single focal point around which the beneficiaries of that status quo can rally. Such focal points solve a collective action problem created by a population with multidimensional preferences and, therefore, multiple possible majority coalitions.\textsuperscript{136} In such a population, citizens may waver between numerous possible bundles of benefits without coalescing around any single package. By picking out one such package on which citizens can focus, the legal status quo enables a stable coalition to form in defense of that status quo.\textsuperscript{137} It helps, of course, that such status quo is plausibly defended as morally “correct” according to some widely accepted set of values.\textsuperscript{138} There might, however, be several such “correct” answers: The legal status quo helps people overcome disagreement by picking out one such answer among many as the legally privileged “correct” answer.

Land-use regulation can be a powerful creator of constituencies through all these mechanisms. Landowners—especially homeowners—often have large and undiversified investments in real estate, the value of which is protected by regulations.\textsuperscript{139} By defining a specific set of protections against neighboring uses that could lower property values, zoning regulations give neighbors a common focal point around which they can rally to defend that investment. By entitling persons living close to proposed rezonings


\textsuperscript{136} Peter Ordeshook, Constitutional Stability, 3 CONST. POL. ECON. 137, 148 (1991). The point has been frequently made in the legal literature since the 1990s, especially to justify judicial review. See, e.g., Tom Ginsburg & Richard H. Mc Adams, Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution, 45 WM. & MARY L. REV. 1229 (2004); David S. Law, A Theory of Judicial Power and Judicial Review, 97 GEO. L.J. 723 (2009).


\textsuperscript{138} Id. at 251.

\textsuperscript{139} WILLIAM FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 39-60 (2005).
to posted notice in the neighborhood and to protest land-use changes through a referendum, zoning laws further reenforce a sense of solidarity among homeowners, converting them from a random set of people into “neighborhood defenders” who dominate zoning hearings. The zoned status quo can also be plausibly defended as a morally appropriate focal point around which homeowners can rally because such owners can claim reliance on existing zoning restrictions when they purchase their homes. Thus, zoning is often regarded as a form of de facto property in political discourse, regardless of what constitutional doctrine says.

Constituency effects can make creative liability rules politically impossible to enact. Consider, for example, Eric Posner and Glen Weyl’s “common ownership self-assessed tax,” or “COST.” Their COST would require owners of property to declare a value of such property on the basis of which that property would not only be taxed but also subject to forced sale by any buyer. The history of American real property taxation, however, indicates that it is politically impossible to enact any such tax. Out of deference to the political influence of homeowners, virtually every state in the United States has adopted a system of fractional assessment under which residential real property is under-assessed relative to its actual value. Judicial efforts to alter such favoritism towards residential property have been handily rebuffed by legislatures fearful of provoking anger from homeowners.

140 Hills & Schleicher, supra note 25, at 108-10. The term “neighborhood defenders” was coined and defined in Katherine Einstein, Maxwell Palmer & David Glick, Neighborhood Defenders (2019) (discussing how local institutions, designed to enhance participation, actually empower an unrepresentative group of residents to stop the construction of new housing).

141 Courts occasionally recognize the popular understanding of zoning as a kind of contract in construing state statutes if not in enforcing formal constitutional doctrine. See, e.g., Neighbors in Support of Appropriate Land Use v. Cnty. of Tuolumne, 68 Cal. Rptr. 3d 882, 1009-10 (Cal. Ct. App. 2007) (characterizing zoning as “similar in some respects to a contract” insofar as “each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare”).

142 See Posner & Weyl, supra note 6, at 62-76.

a durable psychological foundation for this political reality: Americans tend to oppose taxation of non-realized capital gains.\(^{144}\) Posner and Weyl devote a few pages to speculations that people might eventually adopt a sort of “optimal Buddhism” that would eliminate their “fetishistic attachment” to property that causes them to resist such forced sales.\(^{145}\) If the reform of property rules depends on such a “Buddhist” change of heart, however, then it hardly seems obvious why the change in property rules would be necessary in the first place: Presumably these “optimal Buddhists” who have such a relaxed attitude towards their possessions also would not strategically exploit private information to outwit the people with whom they bargain.

The same objections apply to other exotic forms of liability rules. To the extent that they contradict a sense of entitlement created by the existing property status quo, they will have no chance at being enacted by any legislature. Forced sales at prices set by novel auctions or liability rules, therefore, have only academic interest unless those sales can somehow be made politically palatable by side-stepping the constituency effects of the very property law that these rules hope to change.

\(^{145}\) POSNER & WEYL, supra note 6, at 79-80.
over just compensation and public purpose has been too time-consuming and expensive. Under existing law, leases cannot be resumed by the government to produce private market-rate housing, because such housing is deemed by courts not to be a “public purpose” under the Land Resumption Ordinance. Even for such public purposes, the government is obliged to pay compensation that is the subject of apparently interminable litigation. Of course, the Legislative Council or the National People’s Congress might amend the Lease Resumption Ordinance or even the Basic Law to modify these rules. The Hong Kong government has, however, been extraordinarily reluctant to play hard ball with lessee-owners, apparently out of deference to Hong Kong’s reputation for having “a free economy” which “respects the right of private ownership of property.” Behind this rhetoric is a sense that land development companies sitting on thousands of acres of now-useless land purchased at low prices nevertheless have a moral expectation of a return on their investment that more aggressive lease resumption would disrupt. Such worries might be framed in terms of moral hazard: By resuming leases in defiance of those developers’ expectations of eventual development, the government would deter further investment in Hong Kong.

Whatever the economic merit of these worries, they are backed by the powerful political influence of the lessee-owners. Developers in particular are politically influential. Since the handover, tycoons with large investments in real estate have in effect controlled about a quarter of the appointments to the election committee that chooses the territory’s top leader. So obvious is this power that a member of the Legislative Council elected by one of the “functional constituencies” that represent a specific business sector has even expressed shame at his role, saying that “I’m a mercenary for the rich.” Such votes may not be sufficient to dictate who is going to be Hong Kong’s chief executive, but they are sufficient to embarrass Beijing, which relies on a stable pro-Beijing coalition to govern. Key

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146 See supra Section II.c.i.
members of that coalition are developers and indigenous villagers. Taking the 2012 Chief Executive Election as an example, the four biggest developers and Heung Yee Kuk, which represent indigenous villagers, backed Henry Tang, who won 390 nomination tickets, much more than the 305 nominations won by Leung Chun-ying, who was backed by Beijing. Lee Ka Shing, the Chairman of CK Holding Limited, said publicly that he supported Henry Tang on the election day. Eventually, with Beijing’s coordination and backing, Leung obtained 689 votes (65.62% of the total number of votes), merely 88 votes higher than the election threshold, whereas Tang obtained 285 votes (27.1% of the total number of electoral vote).

Like Hong Kong’s great land companies, the indigenous villagers are armed with both powerful political rhetoric and political influence against the liability rules that would force any sale of their small house entitlement. As for rhetoric, they invoke a quasi-promise made by the British to respect their traditional rights under Qing law. Like the sense of entitlement felt by old age insurance beneficiaries, this sense that their small house property is backed by a promise mobilizes villagers to act with moral unity and purpose. That motivation is backed by a powerfully ensconced position in Hong Kong politics. Indigenous villagers and their representatives are an important base of the pro-Beijing governing coalition in Hong Kong. The Heung Yee Kuk, a statutory advisory body representing villagers’ interests in the New Territories under Article

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152 See supra Section III.b.i.

40 of the Basic Law, is a powerful organization comprising heads of rural committees. The “Kuk” contributes one functional constituency seat in the Hong Kong Legislative Council, one member in the Executive Council, twenty-seven votes in the Election Committee, and twenty-seven ex officio members in the District Council. In addition, Heung Yee Kuk also has a good network with the largest political parties in Hong Kong, Democratic Alliance for the Betterment and Progress (DAB) of Hong Kong and Business and Professional Alliance for Hong Kong, two bodies with powerful blocs in the Legislative Council. The interconnection between the “Kuk,” the DAB, and the New Territories Association of Societies (NTAS), a pro-Beijing umbrella political group which consists of hundreds of the New Territories community organizations, ensures that the government will not lightly ignore indigenous interests.

The power of existing law to create constituencies by defining a single stable focal point for political activism can be seen in the activism on behalf of the status quo. The Land Justice League has successfully rallied Hong Kong residents to defend existing landscapes and the current possessions of non-indigenous farmers, but the League has not focused much effort on fighting for the construction of new residential buildings. One reason might be that the existing historic buildings, scenic landscapes, or non-indigenous possessions all define a clear focal point around which activists can organize. By contrast, prospective buildings, precisely because they do not yet exist, cannot constitute a stable focal point defining a unified constituency. People who currently pay too much for rent to live in an overcrowded apartment unit have no reason to support one possible residential building over another. Unsurprisingly, because they lack any stake in a particular building, they do not make the effort to march in support of a proposed development in which they might never have any chance of living. By contrast, Hong Kong residents rally in defense of existing county parks’ boundaries because those residents know precisely how


156 Yu, supra note 155.

157 See Chiu, supra note 63.
those parks benefit their particular neighborhoods. Thus, Tseung Kwan O residents will fight fiercely to defeat a small reduction in the size of the nearby Clear Water Bay Country Park because the park’s boundaries form a focal point that can coordinate their resistance to change.

Frontal assaults on existing property rights through novel liability rules, therefore, are politically dead on arrival. However academically clever such systems of forced sales might be for promoting efficient transactions, they all ignore the political influence created by those property rights in need of reform.

IV. USING LAND USE OPTIONS TO BREAK MONOPOLY BY CREATING EFFECTIVE CONSTITUENCIES

Ending bilateral monopolies that are entrenched by constituency effects is no easy task. We are mindful of what Eric Posner and Adrian Vermeule call the “inside/outside fallacy.” We have diagnosed constituency effects as the problem “outside the system” that is blocking the legislature’s enacting creative liability rules as a solution to Hong Kong’s housing crisis. We cannot then turn around to endorse some clever legislative solution that is likely to be blocked by those selfsame constituency effects. Instead, we must somehow devise a mechanism by which new constituencies can be created to fight for new housing without encroaching on existing constituencies’ defense of their existing entitlements. These new constituencies also must somehow break the bilateral monopoly that currently exists between lessee-owners and the government when they bargain, parcel by parcel, over the lease modifications and zoning of specific properties.

In what follows, we will suggest that “land options for housing” (LOHs) could meet these exacting standards as a practically feasible reform. LOHs could sidestep the resistance of existing constituencies because they allocate the vertical dimension of development, an asset that is currently unallocated by the law, and,

158 See Cheng, supra note 113.
159 Lin & Cheng, supra note 115.
161 For discussions on bilateral monopoly, see supra Section III.a. For literature on bilateral monopoly, see Calabresi & Melamed, supra note 121, at 1089.
therefore, is (to use a basketball metaphor) a “jump ball”—an asset that is (literally) up for grabs.\textsuperscript{162} Moreover, because LOHs allocate this dimension to a broad swathe of Hong Kong residents who are currently sitting on the sidelines of the fights over housing, LOHs have the potential to mobilize a new constituency. Finally, our proposal ends bilateral monopoly by requiring existing parcel owners to bid against each other to purchase LOHs from multiple and competing LOH holders. Fostering such inter-parcel competition admittedly is challenging because it requires the government to identify multiple parcels as equally eligible for development, letting the bids to purchase LOHs determine where actual housing is ultimately built. Such a regime, however, produces a benefit: LOH holders rather than the government itself would sell these LOHs to developers and indigenous villagers who would compete with each other to pay LOH holders in return for the right to build high-density housing.\textsuperscript{163}

Critically, our proposal leaves intact existing property rights of lessee-owners. Unlike Posner’s and Weyl’s COST\textsuperscript{164} or Ayres and Balkin’s higher-order liability rules,\textsuperscript{165} such competition does not take anything away from existing stakeholders like developers or indigenous villagers: These constituencies retain their brownfields or fallow farmland untouched, but they gain an extra option that they never before enjoyed—the option of buying air rights from LOH holders for vertical residential construction. By avoiding such a frontal assault on existing entitlements and instead allocating new rights to new constituents, LOHs thereby avoid the constituency effects that have foiled more direct efforts to change the current uses of property.\textsuperscript{166}

\textsuperscript{162} The existing legislative framework in Hong Kong does not have a clearly defined transferable development right. Jun Hou, Dazhi Gu, Sina Shahab, & Edwin Hon-wan Chan, \textit{Implementation Analysis of Transfer of Development Rights for Conserving Privately Owned Built Heritage in Hong Kong: A Transactions Costs Perspective}, 51 GROWTH CHANGE 530, 531 (2020).

\textsuperscript{163} See \textit{infra} Section IV.b.i for further elaboration on the LOH mechanism.

\textsuperscript{164} Posner & Weyl, supra note 6, at 79.

\textsuperscript{165} Ayers & Balkin, supra note 129, at 748-49; supra text accompanying note 129.

\textsuperscript{166} See supra Section III.b.ii on how the constituency effects of Hong Kong Property law lead to land reform in stalemate.
a. The Mechanics of Land Options for Housing

Before defending LOHs, we will outline their mechanics to anchor that defense. In barebones summary, LOHs require lessee-owners of Crown Lands to purchase LOHs from LOH holders as a necessary condition for building residential projects. The LOH holders would bargain for either in-kind or monetary compensation from the landowner in return for agreeing to sell their rights. In-kind compensation would be units in the new project; monetary compensation would be money equal in value to the square footage that the LOH holder transfers to the landowner. As elaborated below, these purchases of LOHs should be designed with a few characteristics in mind to help solve the twin problems of bilateral monopoly and constituency effects.\footnote{167}

i. Creation and Distribution of LOHs

The first step in any LOH program would be the government’s definition of a total number of LOHs and distribution of these LOHs among a set of holders. As a general matter, the government would create enough LOHs to meet the projected housing needs for Hong Kong’s residents over some fixed planning period. This calculation would require an estimate of the number of new dwelling units required to meet that housing need. The total number of LOHs would be calculated as an overall percentage of this denominator, estimated as a uniform percentage of a development’s floor area, the purchase of which would entitle the developer of a project to build the development.\footnote{168}

The distribution of LOHs among Hong Kong’s residents would also reflect the government’s assessment of Hong Kong households’

\footnote{167} For discussions on bilateral monopoly and constituency effects, see supra Sections III.a and III.b, respectively.

\footnote{168} The size of a building in Hong Kong is limited by the allowed plot ratio of gross floor area. According to Building (Planning) Regulation, the gross floor area of a building is defined as “the area contained within the external walls of the building measured at each floor level. . . , together with the area of each balcony in the building, which shall be calculated from the overall dimensions of the balcony. . . and the thickness of the external walls of the building.” Building (Planning) Regulation, (1956) Cap. 123F, § 23(3)(a) (H.K.), https://www.elegislation.gov.hk/hk/cap123F?xpid=ID_1438402647550_001 [https://perma.cc/R8KZ-CAQD].
housing needs. Top priority, for instance, could be given to households who have been on the waiting list for public housing for the longest time or are the most “under-housed” in the sense of occupying the most overcrowded or overpriced housing. The LOH program could, however, also be designed to give influential Hong Kongers a stake in future housing development, by giving away some share of LOHs to middle-class as well as indigent Hong Kong residents. The point would be to give to as many Hong Kong residents as possible a stake in the future housing stock of Hong Kong so as to create a constituency for housing.\(^{169}\)

**ii. LOHs as a Necessary and (Almost) Sufficient Condition for New Residential Construction**

LOHs serve as a certificate of pre-approval for residential development. By “pre-approval,” we mean that the purchase of LOHs would presumptively entitle the purchasers to build residential housing in proportion to the LOHs that they purchased. This presumption would be slightly qualified by a few \textit{ex ante} and \textit{ex post} constraints. Specifically, that (1) the land would be part of Hong Kong’s total inventory of buildable residential land; (2) the purchaser would pay a per-unit fee, defined uniformly in advance for every transaction, to cover the cost of necessary infrastructure; and (3) the government would retain a very limited power to block developments for urgent public necessity. We elaborate each of these three conditions briefly below.

First, in advance of any LOH purchase, the government would undertake a jurisdiction-wide planning process that would, in effect, define Hong Kong’s total inventory of land suitable for high-density residential housing. This inventory could be constrained by a few obvious prohibitions knocking some parcels out of eligibility to purchase LOHs. For example, the government could prohibit construction in environmentally fragile areas and ban tall buildings near the airport. We are confident, however, that these \textit{ex ante} constraints on residential construction would leave ample sites available for new residential construction: As explained above in Section II.a, Hong Kong has plentiful supplies of fallow farmland and brownfields already occupied by warehouses, parking lots, and

\(^{169}\) See \textit{infra} Section IV.b.ii for how LOH will create a new pro-housing constituency.
the like. Such sites are obviously not ecologically sensitive enough to preclude crops or gas stations. There is no reason, therefore, why their location or current use should preclude housing.  

Second, again as part of the process for setting up the LOH system, the government would define a uniform per-unit fee to be charged to every new residential development to cover the average cost of infrastructure required by new housing. This fee would not be negotiated parcel-by-parcel or tailored to specific buildings, but instead would be based only on the government’s best estimate of the total quantity of housing expected to be built using LOHs and the total budget for infrastructure required by all new housing. These projections, like any other sort of budgeting, would necessarily be rough estimates. Shortfalls in fee-based revenue would be covered from Hong Kong’s general revenues.

Finally, the government would retain a limited power to block developments after the lessee-owner purchases sufficient LOHs for urgent public necessity. The reasons justifying such ex post prohibitions would be stringent, resembling the sort of public purpose needed under current doctrine to resume leases and subject, as lease resumption currently is, to robust judicial review. Our LOH proposal thus reverses the burden of inertia now favoring retention of brownfields and fallow farmland: Such inertia would now favor the construction of new housing.

Once a developer presents a document establishing a proposed project’s satisfaction of these minimum ex ante criteria, the proposed development would be placed on an internet platform as an eligible buyer of LOHs. Such listings would include an offer price for LOHs. The price of the LOH would be required to be identical to the price at which dwelling units in the proposed development would be offered. Thus, LOH holders would receive exactly what housing purchasers pay—either a dwelling unit or its equivalent price. Assuming an ample supply of eligible land, lessee-owners would thus bid against each other to purchase LOHs from the total supply

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170 See supra Section II.a; supra notes 33-36.


172 See Press Release, Govt’ of H.K., supra note 87 (indicating that the government of Hong Kong always construes narrowly the definition of “public purpose” in land resumption cases).
conferred by the government on LOH holders. The offering price would reflect the ratio of eligible land to total available LOHs: Too many LOHs chasing too few parcels would cause LOH prices to fall, while an abundance of parcels chasing a limited number of LOHs would cause the price to increase.\textsuperscript{173}

Once a developer acquired a sufficient number of LOHs to build a particular project, then the trading platform would automatically generate a certificate of pre-approval. The government would be given a tight deadline—say, sixty days—by which to approve or reject the pre-approved project. This review would not involve any consideration of the purchase price paid for the LOHs. As noted above, the criteria for disapproval would be urgent health and safety considerations unforeseen through the general planning process that defined the inventory of LOH-eligible land. The question of how the premium from conversion should be divided between lessee-owner and the public would be determined exclusively through the process by which LOH purchases were negotiated. In effect, the bargaining process between lessee-owner and LOH holder would be the substitute for the public participation provided by governmental negotiations.\textsuperscript{174}

\textit{iii. Contingent (and Therefore Risky) Compensation for LOH Holders}

The lessee-owners’ obligation to pay LOH holders would be triggered by the completion of a residential project. The amount of compensation likewise could be keyed to the success of that project. LOH holders, therefore, would bear some of the project’s risk. Those who sell LOHs to unreliable developers, for instance, would bear the risk that the project might go bankrupt because of cost overruns or lack of market demand. In such a case, the LOH seller would not be

\begin{footnotes}
\item[173] The general law of supply and demand determines the price of LOHs because there exists a highly competitive market. See Merrill, \textit{supra} note 125, at 75-78 (arguing that market exchange is efficient in a thick market).
\item[174] Under the Town Planning Ordinance, there are compulsory public consultation procedures. In the process of plan-making, the Town Planning Board will exhibit the relevant plans or amendments for two months for public representations and publish and address public comments after the expiry of the exhibition period. Town Planning Ordinance, (1991) Cap. 131, §§ 6, 6A, 6B (H.K.), https://www.elegislation.gov.hk/hk/cap131!en-zh-Hant-HK?SEARCH_WITHIN_CAP_TXT=Within%20the%20period%20of%202%20months [https://perma.cc/6CFR-UJY9].
\end{footnotes}
paid until the project is eventually built by the foreclosing bank. Likewise, if the initial project turns out to be less profitable than anticipated, then the LOH holders, like any other unsecured creditors, would receive less compensation (smaller units or less money) than they initially expected. LOH holders’ sales of their LOHs should, therefore, reflect an assessment of the project’s viability. Once the sale is made, then the fortunes of LOH holders and the developer who purchased those holders’ LOHs are bound together by the ties of economic self-interest.

iv. Limited Alienability

LOHs would not be alienable prior to being sold to the lessee-owner of a particular parcel of land. Third-party speculators, therefore, could not purchase “unattached” LOHs to resell to lessee-owners. After LOH holders sell their LOHs to a landowner for a particular project, however, anyone can acquire the prospective project (including the LOHs attached to that project) along with the contingent obligation to pay the LOH holders. For instance, a bank might foreclose on the project, including the LOHs that were necessary for the project, if the initial developer ran out of money and could not pay the construction loan. In such a case, the bank would also acquire the obligation to pay the LOH holders if the project were ever completed.

v. LOH Trading Platform

The government would be obliged to create an internet platform on which LOHs can be traded similar to the Hong Kong Futures Exchange. On this platform, everybody would be able to see in real time all updates of supply, demand, and transactions, second by second. Developers seeking to purchase LOHs would submit a development proposal on the government’s LOH trading platform. The proposal would include the location of the parcel to be developed, its inclusion within the area of Hong Kong’s developable land, the total number of dwelling units in the proposal, and the total number of LOHs required to develop those units. The proposal would propose a per-square-foot purchase price for the LOHs as well as the dwelling units. To better inform prospective LOH sellers
about the project’s likelihood of success, the proposal would include a quality report disclosing the project’s financial feasibility, estimated completion date, average duration of the last five projects of the developer making the proposal, any regulatory concerns and infrastructure fees and plans, and any social and environmental impact of a proposed project that might result in *ex post* governmental disapproval. The trading platform, which will be an independent non-for-profit entity, can provide templates for developers to prepare such quality reports. Both the estimated LOH and unit prices and the quality report would be uploaded to the trading platform and accessible to the public before any transaction starts. LOH holders would evaluate competing proposals on the platform, selling LOHs to those developers whose proposals seem most likely to succeed.

b. The Justifications for Land Options for Housing: A Solution to Bilateral Monopolies Entrenched by Constituency Effects

The LOH mechanism described above is presented as a solution to bilateral monopolies and constituency effects that stymie housing production not only in Hong Kong but throughout the world. We have tried to set the bar high for success: As we argued in Part III, it is not enough to either assume or ignore the existence of a constituency capable of championing or thwarting a clever liability rule or auction. Judged according to this stringent standard, how does our proposal stack up?

As we explain in more detail below, LOHs not only break bilateral monopolies in land but also do so without stepping on the toes of existing entitlement holders. The key to breaking bilateral monopolies is that lessee-owners of different parcels compete to buy LOHs from LOH holders who are also competing for high-quality projects in which to invest. The result of such competition is that strategic holdouts lose opportunities to competitors who disclose their true valuation. Unlike the liability rules, taxes, or auctions urged by other scholars, however, this competition leaves intact the property rights of the stakeholders, instead allocating an unallocated asset—air rights—to a new constituency who thereby gains not only property but also an incentive to lobby for more housing.

175 See Calabresi & Melamed, *supra* note 121, at 1089.
The most obvious benefit of a LOH program is its elimination of the bilateral monopoly now afflicting negotiations between the government and lessee-owners. The LOH program pits multiple parcel lessee-owners against multiple LOH holders, forcing each side to moderate their demands to avoid being over—or under—bid by competing buyers and sellers. The lessee-owner who insists on offering a low price for LOHs will risk having a rival lessee-owners outbid them, thereby losing the opportunity to build new and profitable housing. In the extreme case, all available LOHs might be sold to competing parcels if a lessee-owner stalls too long. LOH holders also have an incentive to moderate their demands: Their insistence on a top price for their LOHs could lead them to be under-bid by competing LOH holders willing to take a lower price in return for the chance to invest in high-quality development proposals from reliable developers. Because the LOH holders are bidding against each other, they lack the monopolistic position that allows the government to hold out indefinitely for ever-greater amounts of goodies (revenue, housing, plazas, parks, subway improvements, etc.), exhausting developers’ patience and revenue.\footnote{Such valuation-disclosing competition is a product of the simple, comprehensive planning required by our LOH Program outlined in Section IV.a. By simultaneously classifying as many parcels as possible as eligible for high-density residential uses, the government avoids getting locked into negotiations with a single developer over a single parcel. As one of us has argued elsewhere, although such standardized rules have disadvantages, they avoid the thin market that results from choosing a parcel first and only afterwards.}

bargaining over development rights. \(^{177}\) LOHs instead begin by defining a general inventory of land and needed residential development and then use competition between parcel owners and LOH holders to determine the ultimate location of development. By simplifying development approvals to create a thicker market, LOHs are a species of property emphasizing standardization of rights to reduce information costs and thereby enlarge the market for real estate. \(^{178}\)

LOHs do not merely avert a bilateral monopoly but do so through a kind of descending-price (or “Dutch”) auction that maximizes speed. \(^{179}\) Landowners who have a more pessimistic estimation of Hong Kong’s future housing market can always hold back to observe what LOH transactions reveal about other landowners’ estimation of housing’s future. Because a LOH sale never requires more than one bid, the LOH program also emphasizes transactional speed. By requiring developers to propose identical prices of housing units and LOHs prices in their quality reports, the LOH program allows developers with a more optimistic estimation of the future housing market to participate soonest, creating a “rush effect” that pressures others to follow due to the limited number of LOHs available on the market.

Hong Kong’s poor track record in moving parcels from patently inappropriate uses to housing \(^{180}\) suggests that these benefits of

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\(^{177}\) Hills & Schleicher, supra note 5, at 120, 129-34.

\(^{178}\) See Henry E. Smith & Thomas W. Merrill, The Property/Contract Interface, 110 COLUM. L. REV. 773, 777 (2001) (“[F]ree customization of property forms would create an information-cost externality; mandatory standardization is the legal system’s way of reducing these external costs to an acceptable level.”); Abraham Bell & Gideon Parchomovsky, A Theory of Property, 90 CORNELL L. REV. 531, 551 (2005) (“[T]he creation of idiosyncratic property rights increases the information costs property imposes on third parties. Standardization, on the other hand, reduces them.”).


speedy allocation of residential uses across parcels outweighs the benefits of expert planners trying to determine impartially the ideal location of housing. Hong Kong has tried that expert planning approach for decades with nothing more to show than acres of fallow farmland, small houses, and brownfields. LOHs, by contrast, allow LOH holders and lessee-owners to work out quickly the details of how gains from conversion should be divided and where new housing should be located. By evading the gridlock of bilateral monopoly, that competitive process holds promise of outperforming the Hong Kong government’s past practice of parcel-by-parcel negotiations.

**ii. Creating a New Pro-Housing Constituency**

Our proposed LOH program would be worth little if current entitlement holders would likely block it from ever being enacted. LOHs, however, hold the promise of harnessing, rather than being defeated by, the constituency effects of property law. In particular, LOHs (1) respect existing entitlements and thereby avoid being defeated by current owners’ opposition and (2) create a new constituency of LOH holders with the clout to lobby for new housing.

First, consider how a LOH program sidesteps opposition from existing entitlement holders that rival proposals invite. As explained in Section III.a, the innovative approach proposed by Ian Ayres and Jack Balkin, Lee Anne Fennell, and Posner & Weyl all rearrange property in ways that directly assault current owners’ sense of entitlement. LOHs, however, change no lessee-owners’ current entitlements: Their rights to maintain and use small houses, farmland, and brownfields do not include any right to build residential high-rises. To the extent that villagers rest their entitlement to small houses on Qing Dynasty property customs,

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181 See supra Section II.c.i.
182 See Ayres & Balkin, supra note 129; supra text accompanying note 129.
183 See Fennell, supra note 131, at 1407.
184 See Posner & Weyl, supra note 6.
for instance, that sense of entitlement does not include any expectation to build higher than three stories.186 Turning this right to the vertical dimension of land over to the permanent residents of Hong Kong, therefore, should not trigger any sense of injustice that would mobilize incumbent owner-lessees to resist the innovation. It is revealing that innovative auctions have been used mostly to allocate forms of property like radio spectrum, offshore wind rights, or mineral rights on public land, where the property rights are initially defined and held by the government free from incumbent owners who might be motivated by a strong sense of entitlement to block the auction process.187 LOHs likewise allocate an asset, air rights, that is undefined by any law and that no one currently is entitled to exploit.

Second, consider how a LOH program can create new expectations that will lead LOH holders to defend the development of new housing. The idea that unallocated interests in land belong to the state—the “Crown” in colonial terms—is deeply embedded in Hong Kong’s history.188 This idea overlaps with the communist idea that land is the common property of the people.189 Hong Kong’s commitment to capitalism qualifies this idea to the extent that Crown lands have already been leased out. But air rights that have not yet been allocated seem to belong to everyone equally under the logic of Hong Kong’s preexisting system of property. Beijing has long sought to create a constituency in Hong Kong that has a stake in maintaining the system rather than challenging the regime.190

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188 See Chan & Wan, supra note 38.

189 See generally Shitong Qiao, The Evolution of Chinese Property Law: Stick by Stick?, in PRIVATE LAW IN CHINA AND TAIWAN 182 (2016) (reviewing Chinese property laws and policies over the past three decades as well as the meaning of public land ownership under the current system).

There is no better way to accomplish this goal than by making the majority of the residents holders of entitlement that will not be fulfilled without stability or development. Although Beijing has long relied on business groups, particularly developers, to govern Hong Kong, Beijing elites have started reexamining this approach. RElying on the majority of permanent residents, rather than a handful of tycoons, seems consistent with this new strategy.

Once the LOH program is up and running, LOH holders’ effectiveness as a property-defending constituency is likely strengthened by their focused interests in specific development projects. Homeowners with undiversified interests in a particular building have greater incentives to defend that building’s value through the political process than prospective buyers and renters have in potential buildings. Because the value of LOHs is tied to particular buildings in which LOH holders have invested their LOHs, LOH holders have a similarly focused incentive to lobby on behalf of development. If a proposed development fails, then those LOH holders lose their entire investment. The political clout of the LOH holders will help, therefore, with those necessary permissions that remain even after a parcel is pre-approved for construction because it has acquired sufficient LOHs.

LOH holders’ incentives to defend housing development authorized by LOHs are further enhanced by the implicit promise contained in a LOH program. As Paul Romer has noted, “people . . . will be willing to incur a cost to punish someone who has made and broken a promise.” The LOH program, once enacted, contains an implicit promise to LOH holders that their selling LOHs to otherwise eligible developers will result in the completion of a building from which LOH holders will receive compensation in the form of housing or money. For the government to renege on this implicit promise “induces a taste for punishing the offender” from the LOH holders. The ad hoc negotiations between the government and current lessee-owners, by contrast, do not create any such sense of implicit promise because the specific terms under

192 Romer, supra note 134, at 199.
193 Id.

https://scholarship.law.upenn.edu/jil/vol44/iss1/5
which development will be permitted have not been defined in advance. Although the government issues requests for proposals (RFPs) to develop leased Crown lands to which tycoons respond by offering some mix of amenities, revenue, and housing, the government reserves the right not to accept any of the bids or even to add conditions after a bid is accepted. By contrast, the government’s turning over the decision to accept a bid to LOH holders makes it hard for the government to renege approval of the housing project on which the landowner and LOH holder agree because the existence of the program creates an implicit promise that pre-approved projects will not be lightly blocked.

iii. What About Government Officials as an Interest Group?

The description of constituency effects above leaves out one potentially enormous interest group: the Hong Kong or Chinese governments themselves. Do governmental officials themselves constitute a constituency that would fight to retain the land status quo? As we shall explain in more detail below, LOHs have a feature likely to be attractive to the Chinese Communist Party, which is the practical ruling decision maker in Hong Kong: LOHs supply information to the rulers about what Hong Kong’s residents want without risking resistance to the Party’s rule that might emerge from democratic elections.

Hong Kong’s semi-authoritarian system presents a special challenge to land use scholarship that has typically assumed the existence of a liberal democratic system in which politicians are simply transmission belts for interest groups. Even Neil Komesar’s account of land-use “dictators,” for instance, imagined that such “dictators” would have no interests of their own but instead either disinterestedly maximize the value of all real estate or, alternatively, become the captive of the most influential interest groups.

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Likewise, the “growth machine” and “homevoter” models, the two leading depictions of land-use politics in American land-use scholarship, both take as their starting point elected politicians who cater to interest groups. The “growth machine” model assumes interests favoring construction like real estate brokers and building trades unions,\(^{196}\) while the “homevoter hypothesis” imagines that homeowners favoring maximization of home values rule the roost.\(^{197}\) But both imagine that the interests of the politicians themselves merely reflect whichever group can best mobilize at the polls.\(^{198}\)

Hong Kong’s semi-authoritarian system defies traditional land use models. Unlike those models, Hong Kong’s government answers ultimately to the leadership of the Chinese Communist Party (CCP). The CCP is undoubtedly an authoritarian system capable of ignoring the interests of Hong Kong residents. The CCP, however, still needs a mechanism to solve the “dictator’s dilemma” of obtaining information about citizen’s preferences without creating electoral threats to the dictator’s rule.\(^{199}\) Without such information, the CCP leadership could lose citizens’ willing cooperation, incur productivity losses from quiet slowdowns, and even suffer sudden flare-ups of rebellion from smouldering but undetected resentments. The overwhelming defeat of CCP-backed candidates in the 2019 district council elections made it clear to the CCP’s leaders that their unaided guesses about public opinion were not equal to the task of inferring what Hong Kong citizens really wanted.\(^{200}\) Eliminating “unpatriotic” candidates from contention in local elections might eliminate open resistance to the CCP, but such crackdowns do not remedy the CCP’s lack of information about


\(^{197}\) **Fischel, supra** note 139, at 18.

\(^{198}\) For overviews of the “growth machine” and “homevoter” models as rival accounts of land-use politics, see Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 230-34 (2014).

\(^{199}\) For an overview of dictators’ need for information-sharing from their subjects and the dilemma that poses for rulers fearful of rebellion sparked by citizens’ negative judgments of the regime, see generally **Bruce J. Dickson, The Dictator’s Dilemma: The Chinese Communist Party’s Strategy for Survival** (2016); **Ronald Wintrobe, The Political Economy of Dictatorship** (1998).

local preferences or the potential embarrassment from popular hostility manifested by low voter turnout.\textsuperscript{201}

LOHs provide such a mechanism. Like housing purchases by homebuyers in mainland China, LOHs enable LOH holders to express their housing preferences with their sales of LOHs to the developers of prospective projects.\textsuperscript{202} In both cases, those purchases or sales are akin to “votes” insofar as they express the purchasers’ or sellers’ desire to live in, and bear the default risk associated with, a particular structure. Unlike votes for candidates, however, those sales do not produce officeholders who might resist the CCP. LOHs, therefore, can be expected to win CCP support insofar as they provide information about citizens’ preferences at low political risk to the CCP.

LOHs also serve the expressed interest of CCP leaders in building more housing in Hong Kong as a means of building more widespread popular support for the CCP.\textsuperscript{203} CCP leaders have

\begin{itemize}
\item On the ways in which a land market reveals the preferences of homebuyers not only for structures but also local amenities and reliability of local government, see generally Roderick M. Hills, Jr. & Shitong Qiao, \textit{Voice and Exit as Accountability Mechanisms: Can Foot-Voting Be Made Safe for the Chinese Communist Party?}, 48 COLUM. HUM. RTS. L. REV. 158 (2017).
\item As Han Zheng, vice premier and a standing member of the politburo in charge of Hong Kong affairs, has stated, the “Hong Kong housing problem must be solved.” Zhou Wenmin (周文敏), Han Zheng; Xiang Gang De Zhu Fang Wen Ti Yao Jie Jue [韩正：香港的住房问题要解决] [Han Zheng; Hong Kong’s Housing Problem Must Be Solved], CAI XIN (Mar. 8, 2021, 5:40PM), https://topics.caixin.com/2021-03-08/101672514.html [https://perma.cc/QFZ9-APVF]. The director of the Central Government Liaison Office in Hong Kong expressed the urgency of the CCP’s commitment to increasing housing supply by visiting a poor public housing unit to show Beijing’s concern about the Hong Kong housing problem. Luo Hui Ning Fang Xiang Gang Long Wu Zhu Hu: Qin Yan Ji Jie Me Ji Po De Ji Zhu Tiao Jian Xin Xin (骆惠宁访香港笼屋住户：亲眼见到这么拥挤的居住条件，心情十分沉重) [Luo Huining Visited Cage-House Residents: Seeing the
acknowledged that the massive 2019 public protests triggered by the Hong Kong government’s proposal of an extradition law were manifestations of deep discontent with the Hong Kong government, but they have attributed such discontent to material rather than political deprivations—in particular, the high cost and scarcity of housing. Whatever the balance of economic and political factors, there is little doubt about the widespread dissatisfaction with housing in Hong Kong. The CCP’s own account of the legitimate sources of public anger, therefore, commits it to solving the housing crisis. By unlocking land from the paralysis of gridlock, LOHs allow the CCP to meet this commitment without embracing electoral democracy that it deems threatening to the CCP’s rule.

Given the CCP’s likely posture, it is unlikely that Hong Kong officials would have any self-interested reason to impede the expansion of housing. Under the terms of the Basic Law, the Hong Kong Chief Executive must negotiate among rival Hong Kong groups represented among the various interests in the Election Committee and Legislative Council. By creating a new constituency of LOH holders to press for development, LOHs give the Hong Kong officials the political cover necessary to accept development proposals that might otherwise inspire popular resentment as corrupt giveaways to established interests.

Apart from acting as the broker for local Hong Kong interests, the Hong Kong leadership has an incentive to meet the CCP’s expectations, because the CCP leadership ultimately controls appointment to Hong Kong’s political offices. There is little doubt that Hong Kong’s chief executives have all struggled to satisfy the CCP leadership’s call for more housing with measures ranging from revision of Hong Kong’s tenant protection law to the unveiling of.


the 2021 North Metropolis plan’s proposed 350,000 additional residential units.\textsuperscript{207} As explained in Section II.c.iii above, however, these initiatives have yielded little fruit in the past and are unlikely to break the land gridlock in the future.

One might understandably suspect that some ulterior motive explains such persistent failure to follow through on proclaimed commitments to create more housing. One such possible motive is commonly termed “fiscal illusion”—the illusion allegedly suffered by governmental officials that only programs that increase public revenue are worthy of official effort.\textsuperscript{208} Fiscal illusion, however, is not a law of nature: Assuming that it exists, it is contingent on specific facts that would give governmental officials an incentive to maximize revenue of the organization that employs them.\textsuperscript{209} The Hong Kong government might have such an incentive from the revenues that they derive from lease modifications, revenues that it would have to surrender to LOH holders under our proposal. That revenue, however, is purely theoretical if gridlock prevents rezoning and lease modification. Precisely because gridlock freezes up the process of lease modification, the amount of revenue derived from land premiums is surprisingly small. Based on numbers provided on the Hong Kong government’s website, land premiums contributes to 22.3\% (2016-2017) to 26.6\% (2017-2018) of Hong Kong government revenue in the last 10 years.\textsuperscript{210} Given that the Hong Kong government has been repeatedly running budget surpluses


and keeping a significant amount of fiscal reserve, it would be surprising that governmental officials would reject a solution to the salient political crisis of housing for the sake of such paltry cash, especially since they have publicly committed to spending many times more to reclaim land from the ocean to solve that crisis.

The more likely explanation is not an obsession with revenue but rather an inability to figure out an acceptable price. Hong Kong’s leadership is vulnerable to accusations of “government-business collusion” if they allow lease modification for an insufficiently high price, but the prices that they demand are too high to win over reluctant owner-lessees. Trapped without a price-revealing market, everyone sits on their existing rights, maintaining a status quo unsatisfactory to everyone. By using a market mechanism to set prices of lease modification, LOHs remove this paralyzing blame about “government-business collusion,” unlocking land for housing that everyone wants.

Aside from the CCP leadership in Beijing and the Hong Kong leadership in the Admiralty, the last set of officials who might oppose LOHs is the Hong Kong planning bureaucracy. They might argue that our trading mechanism jeopardizes the integrity of urban planning, where “urban planning” is understood as a science that urban planning bureaucrats apply to decide where to build and what should be allowed. If city planning is understood as the expert specification of where structures ought to be built, then we plead guilty. We share the skepticism of critics ranging from Jane Jacobs to Kenneth Kolson about the capacity of expert planners to meet the informational demands required for the micromanagement of complex systems like cities.

Hong Kong’s track record illustrates

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211 Twinnie Siu & Clare Jim, *Hong Kong Plans Lower Budget Deficit as Economy Expected to Recover*, Reuters (Feb. 24, 2021, 12:45 AM), https://www.reuters.com/article/us-hongkong-economy-budget/hong-kong-plans-lower-budget-deficit-as-economy-expected-to-recover-idUSKBN2AO0GB [https://perma.cc/2KBL-48AM] (stating that “Hong Kong usually runs balanced budgets or surpluses, since its pegged currency system commits it to fiscal prudence. Its fiscal reserves are expected at HK$902.7 billion at the end of March 2021 and fall to HK$775.8 billion by end-March 2026”).

212 See JANE JACOB, THE DEATH AND LIFE OF THE GREAT AMERICAN CITIES 3 (1961) (stating that “this book is an attack on current city planning and building”); KENNETH L. KOLSON, BIG PLANS: THE ALLURE AND FOLLY OF URBAN DESIGN 187 (2002) (summarizing the history of city planning disasters by noting that “our conception of city planning, a vestige of baroque regimentation and display, has been destructive of urban order”); MELVILLE C. BRANCH, CONTINUOUS CITY PLANNING: INTEGRATING MUNICIPAL MANAGEMENT AND CITY PLANNING (1981) (discussing the tie between land use and municipal administration); John Rahenkamp, Land Use Management: An Alternative to Controls, in FUTURE LAND USE 191, 191-92 (Robert W.
the inadequacies of expert planning: Despite voluminous plans, nothing gets built, and land sits idle as fallow farmland, warehouses, and parking lots—uses that are obviously inappropriate by any planning criteria.

As explained in Sections IV.a.1 and 5 above, the LOH system requires both a comprehensive inventory of all parcels suitable for residential development and a trading platform through which LOHs are traded. Both of these tasks require planning expertise provided by Hong Kong’s urban planning officials. These officials not only would work closely with the Hong Kong Futures Exchange to create and administer a new LOH trading platform but also would provide guidance to developers preparing the quality reports for individual development proposals. Urban planning officials would also determine which parts of Hong Kong should be included or excluded from the inventory of potentially buildable residential land. This task of creating an inventory would indeed become more expert-based insofar as it would be rooted in hard-edged baseline rules about safety and environment rather than endless dickering between different groups about the division of real estate value. To the extent that planners have an open mind, both their skills and self-interest suggest that they could support LOHs not only as a better mechanism for creating housing but also a guarantee of job security in which their skills will still be valued even as they play a different type of planning role.213

V. BEYOND HONG KONG: LAND OPTIONS AS MOTIVATIONS FOR PRO-HOUSING CONSTITUENCIES ACROSS THE GLOBE

Housing shortages afflict cities across the globe. Can land options like the LOH program be adapted to deal with such shortages in places other than Hong Kong? As we explain in this final Part, customized land options do not have any magical power to break bilateral monopolies or promoting pro-housing

Burchell & David Listokin eds., 1975) (noting that “the best master planners we have in the country inevitably are failures when it comes to prognosticating over a long period of time”).

213 Hong Kong’s planners can learn a lesson from officials across the border in the career benefits of such a change in roles. In the 1980s and 1990s, Chinese local officials were competing with each other to sell locally controlled state-owned enterprises (SoEs). See Yutao Huang, Solve the Problem or Escape the Responsibility? The Politics of Chinese Privatization Reform, 4 CHINESE POL. SCI. REV. 1, 13 (2019).
constituencies. In fact, land options superficially similar to our proposed LOH program can actually exacerbate these problems or, at least, do little to solve them. Hong Kong’s colonial land exchange entitlement, for instance, did little beyond making Hong Kong’s real estate tycoons even richer, because it did not break their land monopoly. Likewise, Israel’s TAMA 38 program, while initially promised as a way to increase housing supply, was foiled by its failure to create a sufficiently powerful constituency to protect the program from repeal.

Land options cannot break bilateral monopolies and create new pro-housing constituencies unless they address three simple propositions: (1) Bargaining frameworks in which a single (usually local) government negotiates with a single land developer invite the gridlock of bilateral monopoly in which each side conceals their actual valuation of the land conversion; and (2) changing this bargaining framework can be impeded by the constituency effects of existing property entitlements; but (3) allocating new property rights to third parties—in our proposal, LOH holders—can break the gridlock by allowing new constituencies to bargain competitively over the gains from land conversion. To illustrate these principles, we will take a brief look below at some land option failures as well some experiments with land options that hold more promise for success.

a. Two Failed Land Option Systems in Colonial Hong Kong and Israel

Colonial Hong Kong and Israel have both created new forms of property to stimulate housing production or renovation. Colonial Hong Kong’s land-exchange entitlements, however, promoted housing at an exorbitant cost by turning over enormous land rents to the real estate tycoons who ended up purchasing those entitlements. Viewed more abstractly, Colonial Hong Kong’s land-exchange entitlements failed to solve the information-blocking problem of bilateral monopoly. Israel’s TAMA 38 program, by contrast, stimulated housing production without such a maldistribution of land wealth, but it never created a constituency effective enough to protect the program from the hostility of mayors and neighbors.
Between the Communist takeover of mainland China in 1949 and the early 1960s, Hong Kong was deluged with over a million refugees driven to the colony by famine and fear of persecution and in need of housing. To meet this new demand, the colonial government of Hong Kong needed housing, and the natural location for hundreds of thousands of necessary units was the mostly agricultural New Territories. Lacking cash to compensate the villagers who occupied this land, the government instead issued New Territories land exchange entitlements, commonly known as Letters A/B, between 1960 and 1983. Those Letters A/B were land options entitling their holders to exchange their old land for new land on which new residential structures could be built. Accordingly, the exchange ratios for the letters varied depending on whether the land taken by the government had been used for residential as opposed to farming purposes: Letters A were issued for residential land that could be exchanged for new land at a ratio of 1:1, while Letters B were issued for farmland that could be redeemed at a ratio of 2.5, reflecting its much lower value. The lower value of agricultural land was also reflected in the obligation of Letter B holders to pay a lease premium equal to the difference, at the time that the land was surrendered to the government, between the value of the agricultural land that they surrendered compared to the residential land that they received.

This formula contained within it the seeds of an extraordinary windfall for the compensated owner, because the land premium was calculated based on the year that the old land was surrendered, not the year in which the new land was acquired. If the new land appreciated significantly between the time of surrender and the time

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215 LUI RUNHE (劉潤和), XINJIE JIAN SHI (新界簡史) [BRIEF HISTORY OF NEW TERRITORIES] 94-103 (Sanlian Shudian (三聯書店) 1999).
217 Id.
that the new land was acquired, then the owner would have received 100% of this appreciation. Letters A/B thus became profitable investment tools for those who could afford to wait to acquire new land until the latter appreciated far higher than the land premium charged by the government. For independent landowners or small developers, the need for immediate cash led them either to sell their Letters A/B on the secondary market or develop their new land prematurely. Developers with larger cash reserves, by contrast, purchased the letters as investments, holding them until the land appreciated far higher than the land premium demanded by the government. By 1980 the government had issued land-exchange entitlements valued at more than 36 million square feet of land. Lacking sufficient land with which to redeem these letters, the government ended the policy in 1983, requiring in a 1984 ordinance that outstanding Letters A/B be redeemed with either cash or land at 1984 market rates.

Letters A/B thus contributed to the land oligopoly from which Hong Kong still suffers. The value of those land-exchange entitlements was far in excess of the loss incurred by the New Territories’ lessee-owners, and the form of this compensation insured that most of those landowners would transfer the greater share of this value to developers with the cash reserves to hold on to the letters as an investment. In effect, the Hong Kong government arbitrarily turned over an enormous appreciation in real estate value to speculators for no better reason than its inability to more accurately calculate compensation. While this exchange had the advantage of eventually producing housing in the New Territories’

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219 Id.

220 Id.

221 Zhaoping, supra note 216.


new towns, the policy did so at an exorbitant cost that deprived the mass of Hong Kong citizens of any share of the wealth created by real estate appreciation. In recent years, developers and scholars have suggested readopting the land-exchange model to promote development. All such proposals, however, either allow developers to monopolize future land rents as the old policy had done, or they do not provide a clear mechanism for pricing land bonds.

**ii. How Israel’s TAMA 38 Program Failed to Create a Pro-Housing Constituency**

In contrast with colonial Hong Kong’s land-exchange entitlements, Israel’s TAMA 38 program was not initially aimed at producing new housing. The program was instead an effort to harness land values to renovate and strengthen buildings against risk of earthquakes. Enacted in 2005 as “National Outline Plan Number 38” (“TAMA” being the Hebrew acronym), TAMA 38 gave a new land option to the owners of old buildings defined as having been constructed before 1980. On agreement by a super-majority of such buildings’ owners, the owners could collectively sell air rights over their building to developers in return for the developers’ strengthening the building’s earthquake resilience. The quantity of air rights eligible for such sale varied during the life of the program.

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225 For various proposals, see sources cited supra note 224.

ranging from a single story in 2005 to up to 3.5 stories by 2016.\textsuperscript{228} Likewise, the required super-majority of apartment owners within a building required to authorize reconstruction or even total demolition and rebuilding a structure ranged from 66-80%. Abstracting away from such details, however, the general character of TAMA 38 was a definition of a new property entitlement that was given to existing apartment owners for sale to developers in exchange for building improvement and enlargement.\textsuperscript{229}

Because it distributed the new land option to a broad set of stakeholders, TAMA 38 was vastly superior to colonial Hong Kong’s land-exchange entitlement as a mechanism for producing housing and distributing land wealth. Rather than having the government arbitrarily concoct a price for land options like the ratios in Hong Kong’s Letters A/B, TAMA 38 simply handed over the new entitlement to a broad group of competing landowners, allowing the land market to work out a distribution of the gains from development between buyers and sellers. TAMA 38 also discouraged speculative purchases by requiring the developers to improve buildings and enlarge existing units by up to twenty-five square meters each as a condition of their purchase.\textsuperscript{230} To cover the cost of these improvements, developers immediately began adding stories of housing rather than sit on their entitlement as a speculative investment, as the Hong Kong developers did after acquiring land-exchange entitlements. TAMA 38, in short, eliminated bilateral monopoly between individual owners and the government by turning over the land option to a competitive market for development rights.

An unforeseen but beneficial side-effect of the TAMA 38 program was the creation of significant new housing in high-demand areas of Israel like Tel Aviv. Since at least 2011, Israel has

\textsuperscript{228} Moshe Shamai & Ravit Hananel, Urban Renewal or Earthquake Preparedness: Lessons from Israel’s National Master Plan for Earthquake Preparedness (TAMA 38), 23 \textsc{Cityscape} 381, 388-90 (2021).

\textsuperscript{229} For an analysis of TAMA 38 as a value recapture mechanism, see generally Nir Mualam, Eyal Salinger & Sarah Goldberg, Implementing Value Capture in Israel: An Examination of Recent Tools and Policies for Urban Renewal and Earthquake Preparedness 1-3 (Lincoln Inst. Land Pol’y, Working Paper WP20NM1, 2021), https://go.lincolninst.edu/mualam_wp20nm1-rev.pdf [https://perma.cc/AYH3-V79W] (describing the TAMA 38 as a mechanism to achieve public goals of protecting the citizenry from natural disasters through granting economically beneficial building rights to private owners which incidentally results in more structurally sound buildings).

\textsuperscript{230} Shamai & Hananel, supra note 228, at 388.
suffered from an acute housing shortage that has only intensified in recent years. This shortage has been exacerbated by Israel’s public ownership of land. As in Hong Kong, the government—in the form of the Israeli Land Authority (ILA)—owns 93% of Israel’s land, leasing it out for long terms to private “owners” who technically are merely lessees with leases up to ninety-eight years. As in Hong Kong, the process by which the ILA issues and administers public tenders of land is time-consuming and expensive. On top of the ILA’s public tender process, municipalities also have regulatory authority to block new development. By opening up between one to 3.5 extra stories above older buildings to residential development, TAMA 38 promoted infill development in the areas where such development had the greatest value. The number of units thus created was significant: Roughly one-third of all new housing produced in Tel Aviv between 2018 and 2020 was produced through TAMA 38.

Despite these benefits, however, TAMA 38 has attracted widespread opposition. Those extra stories of housing have provoked complaints about excessive density and uncompensated burdens on local services, especially from Israeli mayors who resented TAMA 38’s bypassing their regulatory authority. Because new housing created through TAMA 38 units is generally built in high-demand areas, it tends to be expensive, leading to complaints that such units drive up the price of other housing in the same neighborhood. Having expired in October 2021, it is widely


234 Mualam et al., supra note 229.


237 Shamai & Hananel, supra note 228, at 388–90, 395.
expected that TAMA 38 will be replaced by some alternative program giving local governments more authority to control new projects.\textsuperscript{238}

Why is TAMA 38’s existence in peril despite its successes? The complaints about density and gentrification seem weak. While extra stories obviously increase density, there was nothing magically appropriate about the status quo density before those stories were added. The claim that increasing the supply of market-rate housing raises housing prices contradict the overwhelming evidence that, far from raising rents, extra market-rate housing absorbs demand that would otherwise cause rents to rise even faster.\textsuperscript{239}

Whatever the merits of TAMA 38’s pro-housing policies, however, the program failed to create a constituency capable of sustaining the program. Because it relies on the value of extra stories to subsidize building renovation, TAMA 38 practically operates only in areas where demand for housing is high. In such areas, however, the share of pre-1980 housing stock is relatively low, compared to other parts of Israel.\textsuperscript{240} TAMA 38, therefore, benefits a small share of buildings in wealthy neighborhoods. It was entirely predictable that the neighbors living in such areas would be likely to resent the noise and density accompanying redevelopment of buildings eligible for enlarged air rights under TAMA 38. TAMA 38 also limited the betterment tax that municipalities could impose on new construction, thereby depriving the program of support from municipal officials. Small wonder, then, that this land option is vulnerable to political repeal.

\textit{b. Two Land Option Systems with Promise of Success}

The lesson to be drawn from colonial Hong Kong and modern Israel, then, is that land options help build housing only when they substitute competitive market mechanisms for bilateral monopoly


\textsuperscript{240} Mualam et al., supra note 229, at 75.
while simultaneously creating a constituency that can protect the land options from repeal. In designing land options, therefore, it is prudent to keep both of these goals in mind.

To illustrate how land options might be designed to achieve these twin goals, we turn to two land option programs that show promise of promoting housing in a politically sustainable way: transferable development rights and street- or block-level rezoning (sometimes dubbed “hyper-local zoning”).

i. Transferable Development Rights: Building Coalitions with Air Rights

Transferable development rights (TDRs) give owners of properties where vertical construction above some minimum level is barred by land-use restrictions the right to transfer their unused air rights to other property owners. For instance, the owner of a historically landmarked building might have the right to transfer unused air rights to apartment buildings, located on another parcel, allowing the owners of those buildings to build extra stories. In theory, TDRs provide compensation to owners of heavily regulated properties without requiring expenditure of public revenue. In practice, TDRs are neither necessary nor sufficient for such compensation and actually impose large hidden burdens on taxpayers. Judged by their conventional justifications, therefore, TDRs are failures.241

As one of us has argued elsewhere, however, TDRs nevertheless have political value because they can be used to enlist politically influential constituencies to lobby on behalf of land deregulation that might otherwise be impossible to enact.242 The effect of TDRs on politics can, therefore, be positive to the extent that TDRs strengthen constituencies or land use goals that local politics systematically undercount.

Consider, for instance, how New York City increased residential uses by allowing landmarked theaters to sell air rights to the owners of apartment buildings.243 Ordinarily, neighboring residents have both incentives and political clout to defeat proposals to construct

241 See Hills & Schleicher, supra note 25, at 93-108 (explaining why TDRs are failures).
242 Hills & Schleicher, supra note 25, at 112-17.
243 Id. at 125-27.
higher buildings to accommodate more new residents: Their long-term interests in residential real estate create a constituency sufficient to maintain existing zoning. Theaters, however, are a politically popular cause in New York City. Actors and production crews can be enlisted by TDRs to push successfully for higher buildings over the objections of neighbors. TDRs thereby can build constituencies in favor of goals like housing that otherwise might be slighted by the rival constituency effects of residential zoning.

TDRs do not inevitably have the properties of creating effective pro-housing constituencies. China’s practice of land tickets, which looks similar to TDRs, demonstrates both that TDRs are appealing to any government concerned about equitable development and that, without empowering new constituencies, it is difficult to break the old monopolies and the so-called new entitlements can be a politically convenient excuse. Chinese local governments monopolize the urban land market and the right to develop and transfer rural land (through expropriation), which has resulted in rapid urbanization, but also increasing rural-urban inequality.

Granting Chinese farmers TDRs, or land tickets, was supposed to entitle those farmers to a certain portion of the increased land rents brought by China’s rapid urbanization. In reality, however, Chinese farmers are not granted such rights; instead, local governments use this proposal to reclaim farmers’ land and generate land tickets which are then “sold” to the government-affiliated platforms by farmers who get compensation rather than the market value of their lost development rights. The problem is that, without empowering farmers who are the theoretical primary beneficiaries of this policy, local governments have used this policy to expropriate extra land from farmers, resulting in a reality contradictory to the policy’s original intention.

244 Id.
246 Id. at 22-31.
247 Id. at 4-5, 41-42.
ii. Street- and Building-Level Zoning: Hyperlocal Rights to Waive Zoning

Another way to promote a constituency friendly to housing is to delegate to current property owners themselves the power to waive zoning restrictions on their own property. Dubbed “hyperlocal zoning” by John Myers, such programs allow the residents of a small area like a street or block to vote to allow all the properties included within that area to intensify their current use. Such intensification might include, for instance, the neighbors’ voting to permit accessory dwelling units or duplexes in a single-family zone. Because homeowners would share equally in the value created by such waivers, they would have incentives to support such a program to realize the extra rental opportunities provided by more residential options. TAMA 38 was indeed nothing more than such a waiver program applied to individual apartment buildings. TAMA 38, however, was limited to a small share of buildings in cities like Tel Aviv—those built before 1980. By contrast, city-wide hyperlocal zoning by street or block could build a city-wide constituency because there are large numbers of politically influential homeowners who stand to benefit from such waivers throughout any city.

Hyper-local zoning could also theoretically break up bilateral monopolies between governments and developers to the extent that there are numerous roughly equivalent blocks within a single city, or even neighborhood. To the extent that homebuyers regard city blocks or individual street frontages as roughly fungible, homeowners on those blocks or streets will have an incentive to take

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250 The idea of street-level “block improvement district” was explained and defended in Robert C. Ellickson, New Institutions for Old Neighborhoods, 48 DUKE L.J. 75, 97-109 (1998). For an explanation focusing more directly on zoning waivers, see George W. Liebmann, Devolution of Power to Community and Block Associations, 25 URB. L. 335, 345-48 (1993) (arguing that it is economically beneficial to grant neighbourhood-level associations power of relaxing/waiving zoning requirements). Residents living on a particular street frontage have had the power to waive various regulatory restrictions under various states’ laws since the late-nineteenth century. See, e.g., City of Chicago v. Stratton, 44 N.E. 494, 500-01 (Ill. 1896).

251 Shamai & Hananel, supra note 228, at 388.
actions to enhance their area’s comparative real estate values. If “granny flats” are popular among buyers, then one street’s legalization of such flats will put pressure on competing streets to follow suit, to maximize the resale value of their home. Of course, such decisions will balance resale value against current consumption value: If neighbors really regard accessory dwelling units as a recipe for excessive traffic or crowded sidewalks, then they might decide to resist the market signals being issued by real estate buyers’ brokers and their clients. Because tastes for more density might vary among households, hyperlocal zoning might require a super-majority to reduce risks of intra-street exploitation.

Hyperlocal zoning, however, provides only very limited incentives for large-scale increases in density. It is one thing to allow the space above a garage to be used as an accessory dwelling unit because every house in the zoning district likely has a garage and can share in the value created by that granular change in density. Upzoning a street of detached single-family houses for multi-story apartment buildings, however, would provide immediate benefits only to a parcel that had some prospect of being redeveloped for an apartment building. Unless there was some mechanism for sharing the wealth generated by that redevelopment with the other owners on the street, those owners would likely look askance at a proposal for radically more dense zoning: What’s in it, after all, for them? One could conceivably combine the powers to waive zoning rules with some power to consolidate parcels, selling off all the parcels on the entire block or street for a single project and distributing the gains amongst the parcels’ owners. Unlike the modest zoning waivers contemplated by scholars like Robert Ellickson, however, such a radical empowerment of a single street or block has yet to be proposed, let alone attempted.

CONCLUSION

Hong Kong’s housing is uniquely unaffordable, but its predicament with land is anything but unique. Urban housing crises exist wherever property rights create bilateral monopolies that impede reallocation of land to housing. Those same rights also foster

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252 For a proposal to replace eminent domain with Land Assembly Districts that would give neighbors the power to sell an entire neighborhood, see Michael Heller & Rick Hills, Land Assembly Districts, 121 Harv. L. Rev. 1465, 1488 (2008).
constituency effects that stymie efforts to break the gridlock by rearranging property rights. One possible solution to both problems is to confer new types of property rights on new classes of owners. To the extent that those rights define entitlements in assets that current owners cannot exploit, they evade constituency effects because they do not interfere with current owners’ expectations. To the extent that such rights can be embedded in a bargaining framework where many buyers and sellers compete with each other to purchase or sell that newly allocated asset, the rights also escape the gridlock of bilateral monopoly.

We suggest land options for housing in Hong Kong as one example of such a newly created right that can promote housing by breaking apart old monopolies in property. There are, however, many other types of land options that hold promise as ways to end gridlock between owners and governments bargaining to change current uses of land. Underlying all such ideas is a simple one: Where property rights affect the political process, the solution to gridlock-inducing property rights might be more and different property that fosters economic and political competition.