

Theorizing Constitutional Change in East Asia

John Gillespie*

Abstract

How do constitutions change in response to social problems? This Article explores why constitutions in three East Asian countries, namely Japan, Indonesia, and China, changed rapidly during times of social crisis and then incrementally evolved during periods of stability. It looks for explanations in historical institutionalism, a novel theory developed to understand the factors that give rise to the creation, persistence, and change of political institutions, such as constitutions. Constitutional change in these East Asian countries is explored by examining constitutionally defined eminent domain powers that enable governments to compulsorily acquire land in the public interest. The Article aims to understand whether fundamental constitutional change only occurs through crisis or whether it can also take place gradually by layering new ideational components onto old programmatic ideas, repurposing them to new uses. Drawing on case studies about eminent domain in Japan, Indonesia and China, the Article concludes that although crisis can trigger fundamental change in any political system, incremental reforms are more likely to promote fundamental change where governments are accountable to the public through constitutional courts and/or democratic elections.

* Professor (research), Department of Business Law, Monash University.

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I. INTRODUCTION

Much has been written about how constitutions change in response to social problems.¹ Most commentaries examine Western liberal democracies and discuss how liberal institutions, such as constitutional courts and electorally responsive legislatures, adjust constitutions to changing social, political, and economic conditions.² This Article builds on recent studies that look beyond liberal democracies to explore constitutional change in East Asian countries that lack fully functioning liberal institutions.³ It searches for explanations for constitutional change in historical institutionalism, a novel theory developed to understand the factors that give rise to the creation, persistence, and change of political institutions, such as constitutions.⁴ The Article aims to understand whether fundamental constitutional change⁵ only occurs in periods of social crisis

¹ The literature dealing with Western liberal constitutional change is vast, but *see, e.g.*, HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY (Dawn Oliver & Carlo Fusaro eds., 2011) (reviews constitutional change in liberal democracies); BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS MOVEMENT (2014) (focuses on the link between social mobilization and constitutional courts and democratic institutions); STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION (2013) (discusses the theory of “constitutional orders”); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); MARK TUSHNET, WHY THE CONSTITUTION MATTERS (2010) (develops a regime-based theory of constitutional change that focuses on constitutional courts).

² With a few notable exceptions, studies about constitutional change primarily focus on a limited set of the established liberal constitutional systems of North America and Europe together with a few other states with similar institutional settings. *See* RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 212 (2014); Bui Ngoc Son, *Introduction: The Socialist World in Comparative Constitutional Law*, in CONSTITUTIONAL CHANGE IN THE CONTEMPORARY SOCIALIST WORLD 3–4 (2020) (argues that insufficient scholarly attention has been given to constitutional change in Asia in general and socialist Asian countries in particular).

³ Bui Ngoc Son argues that there has been a recent shift in scholarship that searches for constitutional change beyond liberal institutions, such as judicial review. *See* Bui Ngoc Son, *supra* note 2 at 1–4. *See also* RAN HIRSCHL, *supra* note 2, at 192. For recent examples of studies dealing with constitutional change in illiberal and authoritarian countries, *see* Melissa Crouch, *Constitution Making and Public Participation in Southeast Asia*, in COMPARATIVE CONSTITUTION MAKING 488 (David Landau & Hanna Lerner eds., 2019); NIMER SULTANY, LAW AND REVOLUTION: LEGITIMACY AND CONSTITUTIONALISM AFTER THE ARAB SPRING (2017); Maartje De Visser & Ngoc Son Bui, *Globalised Constitution-Making in the Twenty-First Century: Evidence from Asia*, 8 GLOBAL CONSTITUTIONALISM 297 (2019).

⁴ *See generally* Orfeo Fioretos et al., *Historical Institutionalism in Political Science*, in THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM 3, 3–5 (Orfeo Fioretos et al. eds., 2016). For a discussion about historical institutionalism and constitutional change, *see* Jorg Broschek, *Conceptualizing and Theorizing Constitutional Change in Federal Systems: Insights from Historical Institutionalism*, 21 REGIONAL AND FEDERAL STUDIES 539 (2011).

⁵ Following Vivien Schmidt, fundamental changes are equated to paradigmatic or step-changes in the way government laws and policies regulate social problems. *See* Vivien A. Schmidt, *The Roots of Neo-Liberal Resilience: Explaining Continuity and Change in Background Ideas in Europe’s Political Economy*, 18 BRITISH J. OF POL. & INT’L REL. 318, 325–27 (2016). *See also* Wolfgang Streeck & Kathleen Thelen, *Introduction: Institutional Change in Advanced Political Economies*, in BEYOND CONTINUITY:

or whether it can also take place gradually by layering new ideational components onto old programmatic ideas, repurposing them to new uses.⁶

In *The Future of Liberal Revolution*,⁷ Bruce Ackerman pioneered the analysis of constitutional change through crisis. He attributed foundational changes in the U.S. Constitution to “constitutional moments” when revolutions and other political crises generated “a high degree of . . . salience, engagement, mobilization, energy, and concern.”⁸

Drawing on Ackerman’s work, Stephen Griffin more explicitly engaged with historical institutional theory to understand constitutional change.⁹ He argued that institutions that constitute and surround the state are crucial in determining the outcomes of political struggles—especially those influencing constitutional change. Griffin concluded that “the state does not simply provide the arena in which various interests struggle for dominance. The state also writes the rulebook, polices the field, decides the winners, or even changes the game in the middle of play.”¹⁰ He directs our attention to the key role played by states in the political and social struggles that shape the background ideas¹¹ that inform constitutional change. This focus will prove useful in our study of state-directed constitutional change in East Asia.¹²

Building on Griffin’s work, this Article draws on recent advances in historical institutionalist theory that broaden the analytical gaze from constitutional change during periods of crisis to include incremental change

INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 9 (Wolfgang Streeck & Kathleen Thelen eds., 2005).

⁶ A core theoretical debate in historical institutionalism is how does government policy change without social disruption generated by crises? See James Mahoney & Daniel Schensul, *Historical Context and Path Dependence*, in *THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS* 454, 466 (R.E. Goodin & C. Tilly eds., 2006); Jacob Hacker et al., *Drift and Conversion: Hidden Faces of Institutional Change*, in *ADVANCES IN COMPARATIVE-HISTORICAL ANALYSIS* 180, 184–200 (J. Mahoney and K. A. Thelen eds., 2015).

⁷ See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 3–4 (1992) (although Ackerman did not explicitly use the term historical institutionalism, he argues that periods of crisis enabled fundamental constitutional change during 1789, 1866, and 1933).

⁸ Daniel Taylor Young, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modelling to Evaluate Bruce Ackerman’s Theory of Constitutional Change*, 122 *YALE L. J.* 1990, 2002 (2013).

⁹ See Stephen Griffin, *Constitutional Theory Transformed*, 108 *YALE L. J.* 2115, 2163 (1999) [hereinafter Griffin, *Constitutional*]; see also Stephen Griffin, *Understanding Informal Constitutional Change* 1–20 (Tulane Univ. Sch of L.: Pub. L. and Legal Theory, Working Paper No. 16–1, 2016).

¹⁰ Griffin, *Constitutional*, *supra* note 9, at 2117.

¹¹ Background ideas are the unquestioned epistemic assumptions through which state and non-state actors make sense of the world. See Schmidt, *supra* note 5, at 320, 327–28.

¹² See ROSALIND DIXON & TOM GINSBURG, *INTRODUCTION IN COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 1, 2 (Rosalind Dixon & Tom Ginsburg eds., 2014) (arguing that constitutional change in East Asia is generally top down and state directed).

during periods of policy stability.¹³ The Article explores constitutional change in three key East Asian countries, namely China, Japan, and Indonesia. These countries were selected not only because they are the most populous nations in East Asia,¹⁴ but because they epitomize different types of constitutional and political systems. China¹⁵ is classified as an authoritarian¹⁶ Leninist state, Indonesia¹⁷ is categorized as a transitional democracy, while Japan¹⁸ is considered a mature East Asian democracy.

Constitutional change in these countries is explored by examining constitutionally defined eminent domain powers that enable governments to compulsorily acquire land in the public interest.¹⁹ Eminent domain powers provide a promising lens to understand constitutional change because they straddle the politically sensitive fault line between a government's desire to acquire land for public purposes and the rights of individuals and communities to enjoy their property.²⁰ This tension is on full display when governments in China,

¹³ See generally Fioretos et al., *supra* note 4 at 13–15; Kathleen Thelen & James Conran, *Institutional Change*, in THE OXFORD HANDBOOK OF HISTORICAL INSTITUTIONALISM 51, 63–67 (Orfeo Fioretos et al. eds., 2016).

¹⁴ For the purposes of this Article, East Asia includes Southeast Asia. In 2023, China was the most populous country in East Asia, followed by Indonesia and Japan. See *Asian Countries by population*, WORLDOMETER, <https://perma.cc/MA8Y-WXZN>.

¹⁵ For a discussion that classifies China as an authoritarian polity, see Wanlin Lin, *Garnering Sympathy: Moral Appeals and Land Bargaining Under Autocracy*, 18 J. OF INSTITUTIONAL ECON. 767, 769 (2022); Hualing Fu, *What Does Wukan Offer? in RESOLVING LAND DISPUTES IN EAST ASIA; EXPLORING THE LIMITS OF LAW* 173, 176–78 (John Gillespie & Fu Hualing eds., 2014).

¹⁶ Following Levitsky and Ziblatt, the indicators of authoritarian behavior include rejection or weak commitment to democratic rules, rejecting or deemphasizing political plurality, coupled by the use of strong central power to further political objectives. See Steven Levitsky & Daniel Ziblatt, *HOW DEMOCRACIES DIE* 7–8 (2018); see also Lin, *supra* note 15, at 769.

¹⁷ See generally Marcus Mietzner, *Authoritarian Innovations in Indonesia: Electoral Narrowing, Identity Politics and Executive Illiberalism*, 27 DEMOCRATIZATION 1021 (2020) (discussing increasing authoritarianism in Indonesian democratic politics).

¹⁸ According to some scholars, Japan is not a fully functioning liberal democracy, because it supports a political culture that stresses authoritarian values. See Antonio Benasaglio Berlocchi & Airo Hino, *Still Valuable? Reconsidering the Role of Authoritarian Values among Japanese Voters*, 23 JAPANESE J. OF POL. SCI. 129, 134–36, 37–42 (2022); see also Tom Ginsburg, *Asia's Illiberal Governments*, in ROUTLEDGE HANDBOOK OF ILLIBERALISM 713, 717 (Andras Sajó et al. eds., 2021) (arguing that Japan is not quite a liberal democracy).

¹⁹ See generally SUSAN REYNOLDS, *BEFORE EMINENT DOMAIN. TOWARD A HISTORY OF EXPROPRIATION OF LAND FOR THE COMMON GOOD* 3–7, 85–110 (2010) (discussing the origins of eminent domain); see also Carol Rose, *Property and Expropriations: Themes and Variations in American Law*, UTAH L. REV. 1, 18, 23 (2000) (developing a typology for distinguishing different types of land takings related to exercise of eminent domain powers).

²⁰ For a discussion about the historical tensions that gave rise to eminent domain powers see Reynolds, *supra* note 19, at 7–8; Rose, *supra* note 19, at 18–23.

Indonesia, and Japan²¹ draw on constitutional eminent domain powers to take private property in the public interest.²²

Land takings are increasing in East Asia as urbanization and industrialization intensify the demand for farmland and urban spaces.²³ For example, in China, large areas of farmland have been compulsorily acquired to build new urban areas, industrial parks, and transport infrastructure.²⁴ It is estimated that between 2005 and 2015 land was expropriated from 100,000 to 500,000 farmers every year.²⁵ To provide some measure of the scale of compulsory acquisitions in China, three of the largest post-war U.S. land takings that occurred in Mill Creek Valley (St. Louis), Pittsburgh's Golden Triangle, and the West End in Boston dispossessed approximately 68,000 people.²⁶

A core question explored in this Article is how do governments in East Asia balance eminent domain powers enshrined in constitutions with rapidly changing social and economic expectations regarding private property? In liberal democracies, constitutional courts and democratic processes continually adjust eminent domain powers to accommodate changing social and economic claims to property rights.²⁷ For example, due to the difficulty in formally amending the U.S.

²¹ For constitutional eminent domain powers in China, Indonesia, and Japan see XIANFA art. 10 (2004) (China); UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945 [CONSTITUTION], August 11, 2002, art. 33 (Indon.); NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan).

²² See generally THE LAWS OF LAND GRABS IN ASIA PACIFIC FRIENDS OF THE EARTH ASIA PACIFIC 8–9 (Rebecca Melepie & Shamila Ariffin eds., 2018); see also *infra* Parts III, IV and V and accompanying text.

²³ The literature on land takings in East Asia is vast, see also Antonio B. Quizon, 2020 *Land Conflict Monitoring Report for Six Asian Countries: Land Conflicts and Human Rights Violations Amidst a Pandemic*, in ASIAN NGO COALITION FOR AGRARIAN REFORM AND RURAL DEV. (ANGOC) 23, 24–25 (2021) (discussing how lockdowns in response to the COVID-19 epidemic exacerbated land disputes in Bangladesh, Cambodia, Nepal, Philippines, Indonesia, and India); Julie Gilson, *ASEAN and Regional Responses to the Problem(s) of Land Grabbing*, 24 GLOBAL GOVERNANCE 41, 42–44 (2018) (discussing increasing land taking disputes in ASEAN countries); see also Christopher Heurlin, *Fighting for Every Inch of Land: Greed and Grievance in Petition Mobilization in Zhejiang*, 46 MOD. CHINA 400, 401–02, 405–06 (2020) (arguing that land takings have become the main source of social conflict in China); John Gillespie & Hualing Fu, *Introduction*, in RESOLVING LAND DISPUTES IN EAST ASIA: EXPLORING THE LIMITS OF THE LAW 3, 8 (John Gillespie & Hualing Fu eds., 2014) (discussing increasing land disputes in China and Vietnam); Ben White et al., *The New Enclosures: Critical Perspectives on Corporate Land Deals*, 39 J. OF PEASANT STUD. 619 (2012).

²⁴ It is estimated that over fifteen million acres of land in China were taken from farmers between 1978 and 2014. See CHUN PENG, RURAL LAND TAKINGS IN MODERN CHINA 6–7 (2018).

²⁵ See Shitong Qiao, *Rights-Weakening Federalism*, 102 MINN. L. REV. 1671, 1683 (2017). It is estimated that in 2020, there were 410 land disputes in Indonesia that involved 87,000 families. See Ahmad Dhiaulhaq & Ward Berenschot, *A 150-year-old Obstacle to Land Rights*, INSIDE INDONESIA (Sep. 18, 2020), <https://perma.cc/7SWU-RPKX>.

²⁶ See THOMAS J. CAMPANELLA, THE CONCRETE DRAGON: CHINA'S URBAN REVOLUTION AND WHAT IT MEANS FOR THE WORLD 166 (2008).

²⁷ See generally Marissa L.L. Lum, *A Comparative Analysis: Legal and Cultural Aspects of Land Condemnations in the Practice of Eminent Domain in Japan and America*, 8 ASIAN-PAC. L. & POL'Y J. 456, 472–79 (2007)

Constitution,²⁸ constitutional change in the U.S. primarily takes place through adjustments in the Supreme Court's interpretation of constitutional provisions.²⁹ In *Kelo v. City of New London*,³⁰ the Supreme Court allowed a state government to use its eminent domain powers to take private property for a private development—providing the project generated economic growth. This shift in the constitutional interpretation of what constitutes the public interest provoked a media and public backlash that convinced forty-three state legislatures to pass legislation that limited the exercise of eminent domain powers for private developments.³¹

Kelo raises questions about how governments in East Asia that lack fully functioning liberal democratic institutions, such as active constitutional courts³² and/or democratically responsive legislatures,³³ balance land rights, and eminent domain to accommodate rapidly changing social and economic conditions.

This Article is organized as follows. Part II makes the case for using historical institutionalism to analyze constitutional change in East Asia. In Part III, the discussion outlines four land policies (liberal, customary, social democratic, and socialist) that are used as reference points to examine changes in

(discussing the use of legislation and judicial decisions to balance property rights and eminent domain powers in the U.S.).

²⁸ See Donald Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 363 (1994) (arguing the U.S. Constitution is one of the most difficult constitutions to amend).

²⁹ See Bui Ngoc Son, *Constitutional Mobilization*, 17 WASH. U. GLOBAL STUD. L. REV. 113, 130–31 (2018).

³⁰ 545 U.S. 469, 125 S. Ct. 2655 (2005).

³¹ See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102 (2009); see also David McCord, *The Meaning of 'Public Use' Has Changed Over Time*, 13 POWELL ON REAL PROP. § 79F.03.

³² Of the countries studied, only Indonesia has an active constitutional court. See SIMON BUTT & TIM LINDSEY, *INDONESIAN LAW* 100–08 (2018) (discusses the Indonesian constitutional court). Since 1948, the Japanese Constitutional Court has ruled on the constitution on ten occasions. See YASUO HASEBE, *The Supreme Court of Japan: A Judicial Court, not Necessarily a Constitutional Court*, in CONSTITUTIONAL COURTS IN ASIA 289–310 (Albert Chen & Andrew Harding eds., 2018); David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2008–2009). China lacks a constitutional court with power of judicial review. See Bui Ngoc Son, *China's Comparative Constitution*, 54 VAND. J. TRANSNAT'L L. 1, 27 (2021).

³³ While Japan is generally classified as a mature democracy and Indonesia is an emerging democracy, their governments are arguably not as electorally responsive to social and economic problems as liberal democracies. See Antonio Benasaglio Berlucci & Airo Hino, *Still Valuable? Reconsidering the role of authoritarian values among Japanese voters*, 23 JAPANESE J. OF POL. SCI. 1 (2022) (arguing that Liberal Democratic Party has dominated electoral politics in Japan, creating an authoritarian electoral system in Japan). For a discussion about democracy in Indonesia, see Edward Aspinall & Marcus Mietzner, *Indonesia's Democratic Paradox: Competitive Elections amidst Rising Illiberalism*, 55 BULLETIN OF INDONESIAN ECON. STUD. 295 (2019) (argues that illiberalism has increased despite the competitive electoral system). China is an authoritarian polity without an electoral democracy. See BUI NGOC SON, *CONSTITUTIONAL CHANGE IN THE CONTEMPORARY SOCIALIST WORLD* 31 (2020).

the balance between property rights and eminent domain powers. In Parts IV through VI, the Article develops historical case studies about the constitutional regulation of eminent domain in Japan, Indonesia, and China, respectively. The case studies use historical institutionalism to explore how the regulation of eminent domain in these countries emerges from historical conditions and becomes subject to self-reinforcing dynamics that shape its developmental trajectory.

Part VII analyzes and compares the findings in the case studies to ascertain whether constitutional changes made during periods of crisis are persistent and path dependent. It then examines the role played by legislation as well as judicial and bureaucratic decisions in balancing eminent domain powers and private property rights. This section ends by exploring how constitutional change occurs within authoritarian polities, such as China, that lack electoral accountability and constitutional courts.

The conclusion argues that fundamental constitutional change occurs not only during periods of crisis, but also incrementally during periods of policy stability when regulatory layers generate new ways of understanding eminent domain. It then reflects on the shortcomings of historical institutionalist theory and suggests an analytical framework to advance the study of constitutional change.

II. THEORIZING CONSTITUTIONAL CHANGE IN EAST ASIA

A. Locating Constitutional Change in Social and Political Contexts

To understand how constitutions change in East Asia it is necessary to look beyond formal constitutional texts, judicial interpretations, and legal doctrines.³⁴ Scholars studying constitutional change in authoritarian regimes often advocate for a functional understanding of constitutional change.³⁵ This analytical perspective not only examines variations in constitutional texts and doctrines

³⁴ For a discussion about the shortcomings with understanding constitutional change through constitutional doctrines and judicial analysis, see Bui Ngoc Son, *supra* note 33, at 13–15. See also Griffin, *Constitutional*, *supra* note 9, at 2116–17.

³⁵ One explanation for this approach is that many countries in East and Southeast Asia are hybrid regimes because the formal and informal rules shaping their constitutional governance are interrelated. The analysis of constitutional change thus requires examination of not only formal constitutional institutions and rules, but also informal socially shared rules and precepts. See Bjorn Dressel, *The Informal Dimension of Constitutional Politics in Asia: Insights from the Philippines and Indonesia*, in CONSTITUTIONAL COURTS IN ASIA; A COMPARATIVE PERSPECTIVE 60, 61–63 (A. Chen & A. Harding eds., 2018). See generally Bui Ngoc Son, *supra* note 33, at 13–15 (discusses functional understandings of constitutional change). See generally CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2013); AUTHORITARIAN CONSTITUTIONALISM: COMPARATIVE ANALYSIS AND CRITIQUE (Helena Alviar García & Günter Frankenberg eds., 2019).

described in formal constitutional theory but also explores changes to the background ideas (*i.e.*, epistemic assumptions) that shape how political leaders and state officials interpret and implement constitutional ideas, such as eminent domain powers.³⁶ This Article uses the term “constitutional order” to denote this broad functional understanding of constitutions. Constitutional orders encompass formal institutions, such as constitutional texts, principles, and doctrines, as well as political, economic, legal, and social discourses that shape the background ideas informing the interpretation and enforcement of constitutional texts.³⁷

B. Framing Constitutional Change through Historical Institutionalism

Having placed constitutions into a broad social and political context—the constitutional order—the next concern is determining what constitutes change. According to functional constitutional theory, changes to the constitutional order do not necessarily require formal constitutional amendments or judicial pronouncements. Change can also occur when the background ideas informing the constitutional order alter. What is less clear is whether it is possible to distinguish substantive constitutional change from superficial, merely adaptive, change. Another core inquiry is whether it is possible to detect change in the absence of disruptive events (such as revolutions and economic crises) that fundamentally challenge governments.

Historical institutionalism offers a promising analytical framework to explore these aspects of constitutional change.³⁸ It evolved as a means of examining how critical, political, social, and economic events trigger changes in political and legal institutions, such as constitutional orders.³⁹ Historical institutionalism defines institutions as the social regimes that provide the “building

³⁶ See Richard Albert et al., *The Formalist Resistance to Unconstitutional Constitutional Amendments*, 70 HASTINGS L.J. 639, 670 (2019) (introducing a theory that constitutional change through interpretation should be accorded similar status to constitutional amendments); Bui Ngoc Son, *Discursive Constitutionalism*, CHI. J. INTL. L., 342, 353 (2023) (discusses how discourse can shape the ideation [*i.e.* background ideas] that influence constitutional thought); see also GRETCHEN RITTER, *THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER* 7 (2006) (argues that constitutional discourse shapes functional understandings of constitutional orders).

³⁷ See Stephen Tierney, *Crystallizing Dominance: Majority Nationalism, Constitutionalism and the Courts*, in DOMINANT NATIONALISM, DOMINANT ETHNICITY 87, 93–95 (Andre Lecours & Genevieve Nootens eds., 2009) (directs attention to the uncoded informal conventions and practices that are external to, but shape the meaning of, constitutional texts, principles, and judicial pronouncements); see also Broschek *supra* note 4, at 544–45.

³⁸ The literature is vast but see Hacker et al., *supra* note 6, at 180–208; see also Mahoney & Schensul, *supra* note 6, at 4–10; Fioretos et al., *supra* note 4, at 3.

³⁹ See Hacker et al., *supra* note 6, at 180–92.

blocks of social order” and “collectively enforced expectations.”⁴⁰ This definition is sufficiently broad to apply to changes in the constitutional orders governing eminent domain in East Asia.

Historical institutionalism has been deployed in a wide range of disciplines, including political governance, urban planning,⁴¹ and economic development.⁴² Surprisingly few studies have used historical institutionalism to understand constitutional change.⁴³ Further narrowing the literature, studies using this theory have explored liberal democracies, leaving constitutional change in East Asia understudied.⁴⁴ This is a missed opportunity because historical institutionalism offers a promising framework in which to analyze how struggles between political elites and social forces have shaped constitutional change in this rapidly changing region.

1. Changing Constitutional Orders During Critical Junctures.

Historical institutional theory attributes fundamental changes in constitutional orders to critical junctures, such as economic shocks and revolutions that punctuate constitutional equilibriums.⁴⁵ As Mahoney observed, “[c]ritical junctures are choice points when a particular option is adopted from among two or more alternatives. These junctures are ‘critical’ because once an option is selected, it becomes progressively more difficult to return to the initial point when multiple alternatives were still available.”⁴⁶

Critical junctures open “windows of opportunity” that encourage political leaders to search for new approaches and radical shifts in the background ideas informing systems of governance.⁴⁷ Once choices have been made, the new ideas become entrenched and difficult to change.⁴⁸ For example, this Article argues that

⁴⁰ See Streeck & Thelen, *supra* note 5, at 9.

⁴¹ See, e.g., Philip Booth, *Culture, Planning and Path Dependence: Some Reflections on the Problems of Comparison*, 82 TOWN PLANNING REV. 13 (2011).

⁴² See, e.g., Nathan Nunn, *The Importance of History for Economic Development*, 1 ANN. REV. OF ECON. 65 (2009).

⁴³ For exceptions, see Griffin, *Constitutional*, *supra* note 9, at 2115–63; Broschek, *supra* note 4, at 539; see also Rosalind Dixon & Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 AM. OF J. COMP. L. 145 (2019).

⁴⁴ There is a burgeoning literature dealing with constitutional law in authoritarian polities, but these works do not use historical institutionalism. See generally CONSTITUTIONS IN AUTHORITARIAN REGIMES, *supra* note 35; Mark V. Tushnet, *Authoritarian Constitutionalism*, 2 CORNELL L. REV. 391, 461 (2015); see also Bui Ngoc Son, *supra* note 2, at 3–4 (arguing that little scholarly attention has been given to constitutional change in Asia in general and socialist countries in particular).

⁴⁵ See Broschek, *supra* note 4, at 540, 542–43; see generally Thelen & Conran, *supra* note 13, at 53–56.

⁴⁶ JAMES MAHONEY, THE LEGACIES OF LIBERALISM: PATH DEPENDENCE AND POLITICAL REGIMES IN CENTRAL AMERICA 6–7 (2001).

⁴⁷ *Id.*

⁴⁸ See Fioretos et al., *supra* note 4, at 10–12.

the revolution in China displaced existing constitutional orders with Marxist-Leninist institutions and background ideas, which survived the introduction of mixed-market reforms during the late 1970s.

A theoretical framework that relies exclusively on revolutions and other crises risks overlooking incremental constitutional change that occurs during periods of policy stability.⁴⁹ Recent developments in historical institutionalism suggest that processes of layering, conversion, and drift explain incremental changes to constitutional orders that occur without critical inflection points caused by crises.⁵⁰

2. Constitutional Layering.

Layering occurs when new constitutional provisions, legislation, and administrative rulings overlay existing regulatory practices.⁵¹ It creates a complex web of processes and background ideas that shapes not only the goals of constitutional policy and the kind of instruments that can be used to realize them, but also the perception of the very problems they are meant to be addressing.⁵² Over time, accumulated regulatory layers create their own trajectory that influences how political and legal actors conceptualize constitutional orders.⁵³ Significantly for our study, layering can erode the operational logics of entrenched constitutional orders and produce new constitutional orders.⁵⁴ Layering suggests ways that eminent domain powers may adapt in East Asia to rapidly changing social and economic forces without critical junctures that change the formal constitutional settings.

3. Constitutional Conversion.

In contrast to constitutional layering, which includes intended and unintended change, constitutional conversion encompasses intentional action that catalyzes constitutional change.⁵⁵ Constitutional conversion takes place when formal constitutional settings remain unchanged but are interpreted by officials

⁴⁹ For a historical institutionalist discussion about gradual policy change, see Thelen & Conran, *supra* note 13, at 63–66; see also Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L. J.* 2009, 2051–52 (1997) (arguing that constitutional change in former communist countries has occurred gradually without revolutionary crises).

⁵⁰ See Broschek, *supra* note 4, at 547–49.

⁵¹ *Id.*; Streeck & Thelen, *supra* note 5, at 22–24.

⁵² See Sally E. Merry & Susan Coutin, *Technologies of Truth in the Anthropology of Conflict*, 41 *AM. ETHNOLOGIST* 1, 11–15 (2014).

⁵³ The emphasis in historical institutionalism on epistemic ideas shaping change differs from theories of change based on rational choice theory that focus on the calculus of costs and benefits used to negotiate change. See Thelen & Conran, *supra* note 13, at 57–62.

⁵⁴ See Broschek *supra* note 4, at 547–48, 556; see generally Mahoney & Thelen, *supra* note 38, at 15–18.

⁵⁵ See Broschek *supra* note 4, at 553–55; see generally Thelen & Conran, *supra* note 13, at 64–67; Hacker et al., *supra* note 6, at 187–89; Streeck & Thelen, *supra* note 5, at 26–29.

and/or judges to achieve new objectives.⁵⁶ Conversion is most likely to occur where institutional policies are difficult to change and where officials and judges have discretionary power.⁵⁷ It emerges in response to new social challenges that require regulatory responses, such as the mobilization of social opposition to constitutional settings.⁵⁸ For example, landholders in Indonesia triggered constitutional conversion by challenging eminent domain powers in the Constitutional Court.⁵⁹

4. Constitutional Drift.

Constitutional drift occurs where formal constitutional settings do not change but the environment shifts in ways that alter the operation of established rules.⁶⁰ The failure to adapt formal constitutional settings to external change might result from fixed ideological positions that prevent formal recognition of constitutional change.⁶¹

Historical institutionalism offers insights into constitutional change. It suggests reasons why constitutional orders might change rapidly during critical junctures and incrementally through layering, conversion, and drift. Four research questions have been drawn from these theoretical insights. One, have critical junctures in China, Indonesia, and Japan changed the constitutional order governing property rights and eminent domain? Two, how entrenched are the background ideas informing constitutional property rights and eminent domain powers? Three, has constitutional layering, conversion, and drift incrementally changed constitutional orders governing property rights and eminent domain in the East Asian countries? Four, what role has public discourse and/or social mobilization played in changing the balance between property rights and eminent domain? This final inquiry offers granular level insights into societal influences over constitutional change.

⁵⁶ See Broschek *supra* note 4, at 552–55.

⁵⁷ See generally Mahoney & Thelen, *supra* note 38, at 15–18.

⁵⁸ *Id.*; Streeck & Thelen *supra* note 5, at 26–27.

⁵⁹ See *infra* Part IV.E accompanying text for case examples of this behavior.

⁶⁰ See Broschek *supra* note 4, at 553–55; see generally Thelen & Conran, *supra* note 13; Mahoney & Thelen, *supra* note 38, at 15–18.

⁶¹ See Thelen & Conran, *supra* note 13, at 64–67; Hacker et al., *supra* note 6, at 184–87.

III. MAPPING THE POLICY SETTINGS THAT SHAPE EMINENT DOMAIN

To identify continuities and changes in eminent domain powers in China, Indonesia, and Japan, we need some baseline reference points. Four core land policies are used to map different policy approaches to eminent domain.⁶² The policies can be positioned along a continuum, with liberal land policies advocating weak eminent domain powers at one end of the continuum and socialist land policies promoting strong eminent domain powers at the other end.

A. Liberal Land Policy

Liberal land policy assumes that as far as possible owners should make decisions regarding the uses and disposal of their property.⁶³ In liberal democracies, such as the U.S., this policy is predicated on the belief that private property supports democracy and liberty.⁶⁴ In other democratic polities such as Japan, liberal land policies place less importance on democracy and liberty and instead stress the civil law notion that property ownership is exclusive and that compulsory acquisition consequently requires strong justification.⁶⁵ A unifying theme in liberal land policies is the belief that eminent domain powers should be restricted to circumstances in which it is absolutely necessary for the state to own or control property and where market processes for property acquisition are unavailable.⁶⁶ Debates in liberal land policy focus primarily on what public purposes justify compulsory land acquisition and what constitutes appropriate compensation for land owners.⁶⁷

B. Customary Land Policies

Customary land policies occupy the next position on the continuum because they constrain the capacity of states to compulsorily acquire land that is subject to

⁶² For a discussion about liberal and social democratic land policies, see Carol M. Rose, *Privatization—The Road to Democracy?*, 50 SAINT LOUIS UNI. L. J. 691, 700–01 (2006); Reynolds, *supra* note 19, at 111–38. For a discussion about socialist land policies, see Chun Peng, *Theoretical Foundations of Land Taking Powers in China: Competing Traditions and Common Legacy*, 3 PEKING U. L. J. 87 91–105 (2015). For a discussion about customary land policies, see Eric Dannenmaier *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine*, 86 WASHINGTON UNIV. L. REV. 53, 55–59 (2008).

⁶³ See generally Peng, *supra* note 62, at 112–16; Tom Allen, *Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights*, 59 INT'L & COMPAR. L. Q. 1054, 1056–58 (2010).

⁶⁴ See Rose, *supra* note 62, at 700–01.

⁶⁵ See Lum, *supra* note 27, at 459–61.

⁶⁶ See Peng, *supra* note 62, at 112–16; Allen, *supra* note 63, at 1056–58.

⁶⁷ *Id.*

informal land claims.⁶⁸ Customary land claims arise from “unique or distinctive connection to the land with deep social, cultural, and spiritual meaning.”⁶⁹ Customary land is often linked to the notion of living customary law, a term used to describe customary practices that are relatively coherent and independent from state-sponsored norms and processes, such as land titling systems and eminent domain.⁷⁰

Customary land policies present a quandary for many states because they are predicted on legal pluralism—a doctrine that enables state land laws to co-exist with, but not overrule, the non-state norms and practices that govern customary land.⁷¹ Customary land policies treat customary land rights as natural and given and, consequently, rights that are not derived from the state.⁷² Although many East Asian constitutions acknowledge a right to customary culture in general,⁷³ or language more specifically,⁷⁴ few states accord formal constitutional recognition to customary land policies.⁷⁵ Formal constitutional recognition of customary land rights might disrupt the nexus between the legal recognition of property rights and state territorial authority and thus constrain the power of governments to draw legal boundaries around the resources and people within particular territories.⁷⁶ States often react to the assertion of customary land claims by failing to recognize the claims, rendering property confiscation invisible.⁷⁷ As we will see,

⁶⁸ See generally Dannenmaier, *supra* note 62, at 55–56; see also Tapuwa W. L. Nzara, *Communities' Role in Securing Customary Land Tenure in Zambia*, AFR. J. OF LAND POL'Y & GEOSPATIAL SCI. 22, 24–25 (2018) (discusses the meaning of customary land tenure in Zambia).

⁶⁹ Dannenmaier, *supra* note 62, at 55–56.

⁷⁰ See generally Anthony Diala, *The Concept of Living Customary Law: A Critique*, 49 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (2017) (defines the concept of living customary law); T.W. Bennett, *Re-introducing African Customary Law into the South African Legal System*, 57 AM. J. COMP. L. 1 (2009).

⁷¹ See Gordon Woodman, *Legal Pluralism in Africa: The Implications of State Recognition of Customary Laws Illustrated from the Field of Land Law*, ACTA JURIDICA 35, 36–37, 38–43 (2011); Katharina Holzinger et al., *The Constitutionalizing of Indigenous Group Rights, Traditional Political Institutions, and Customary Law*, 52 COMPAR. POL. STUD., 1775, 1776–79 (2019).

⁷² See Woodman, *supra* note 71, at 10–21.

⁷³ See, e.g., XIANFA art. 4(1) (2004); HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM [CONSTITUTION], 2013, art. 5 (Viet.); รัฐธรรมนูญแห่งราชอาณาจักรไทย [CONSTITUTION], 2017, § 289 (Thai); CONSTITUTION OF THE REPUBLIC OF SINGAPORE, 2016, art. 152.

⁷⁴ See, e.g., МОНГОЛ УЛСЫН ҮНДСЭН ХУУЛЬ [CONSTITUTION], 2001, art. 8(2) (Mong.).

⁷⁵ The constitutionalizing of indigenous rights, such as customary land, is most prominent in sub-Saharan Africa. See Holzinger et al., *supra* note 71, at 1784–1809.

⁷⁶ For a discussion about the implications of recognizing a pluralistic land tenure system, see Woodman, *supra* note 71, at 36–37, 38–43.

⁷⁷ See, e.g., John Gillespie, *Transforming Land-Taking Disputes in Socialist Asia: Engaging an Authoritarian State*, 39 L. & POL'Y 280 (2017) (providing an example of land taking where the state does not recognize constitutionally customary land rights).

Indonesia provides a rare exception of an East Asian state that accords constitutional recognition to customary land rights.⁷⁸

C. Social Democratic Land Policies

Social democratic land policies occupy a central position on the continuum. They are less comfortable with allowing property markets to order society than liberal policies and, accordingly, are more favorably disposed to compulsory land acquisition in the public good.⁷⁹ Social democratic policies maintain that much of the value of land is generated by community action rather than individual labor.⁸⁰ Consequently, land is accorded a social function that aims to balance individual rights with the state's obligation to ensure that land serves the public good.⁸¹ Social democratic policies support public interest regulatory controls (such as urban planning) that impinge upon the value of land, without actually taking land ownership.⁸²

D. Socialist Land Policies

Further along the policy continuum, socialist land policies favor state ownership and control over land.⁸³ Constitutions in East Asian socialist states (China, Vietnam, Laos, and the Democratic People's Republic of Korea) establish different types of state control, such as state and collective land ownership in China⁸⁴ and people's ownership in Vietnam.⁸⁵ Socialist land policies support strong eminent domain powers.⁸⁶ For example, during the high socialist period (1949–1982) in China, eminent domain powers enabled expropriation of land

⁷⁸ UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945 [Constitution], August 11, 2002, art. 18(B)(2) (Indon.). *See* Butt and Lindsey, *supra* note 32, at 135–38.

⁷⁹ *See* RACHAEL WALSH, PROPERTY RIGHTS AND SOCIAL JUSTICE: PROGRESSIVE PROPERTY IN ACTION 1–4 (2021); Allen, *supra* note 63, at 1058–60.

⁸⁰ *See* Allen, *supra* note 63, at 1060, 1076.

⁸¹ *See generally id.*, at 1060; *see also* Reynolds, *supra* note 19, at 111–38 (discussing the origins of the social function of land).

⁸² *See generally* Allen, *supra* note 63, at 1060–61 (explaining that social democratic policies recommend compensating landowners for the inflated value created by the rezoning of land).

⁸³ *See* Chenglin Liu, *The Chinese Takings Law from a Comparative Perspective*, 26 WASH. UNIV. J. OF L. & POL'Y 301, 305–06 (2008) (discussing the Marxist basis for socialist land policies in China); *see also* Lei Chen, *Legal and Institutional Analysis of Land Expropriation in China*, in *RESOLVING LAND DISPUTES IN EAST ASIA: EXPLORING THE LIMITS OF LAW* 59, 69–73 (Hualing Fu & John Gillespie eds., 2014).

⁸⁴ XIANFA art. 10 (2004); *see generally* CHUAN HUI WANG, *THE CONSTITUTIONAL PROTECTION OF PRIVATE PROPERTY IN CHINA: HISTORICAL EVOLUTION AND COMPARATIVE RESEARCH* 45–97 (2016).

⁸⁵ *See* HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM [Constitution], 2013, art. 17 (Viet.).

⁸⁶ *See generally* Peng, *supra* note 62, at 90–99.

without compensation.⁸⁷ Socialist land policies do not treat compulsory acquisition as an extraordinary event that should be limited but, rather, as a routine administrative process used to advance state objectives.⁸⁸ Land taking does not alter land ownership because the state already owns the land.⁸⁹ Socialist land policies differ from liberal and social democratic policies as they give governments regulatory powers to take land without much legal scrutiny regarding the adequacy of compensation and the reasons for the taking.⁹⁰

These four land policies are used in Parts IV to VI to identify continuity and change in the eminent domain regimes in Japan, Indonesia, and China.

IV. CHANGING EMINENT DOMAIN IN JAPAN

Although the formal constitutional provisions establishing eminent domain powers in Japan closely resemble those found in liberal democracies, such as the U.S., they produce quite different outcomes.⁹¹ Paradoxically, for a country that has historically used strong central administrative powers to plan economic and social development,⁹² eminent domain powers in Japan are weak.⁹³ The government struggles to compulsorily acquire land for development projects.⁹⁴ For example, decades after the Tokyo Narita Airport opened in 1978, land owners who rejected acquisition offers continued to farm land adjacent to the runways.⁹⁵ This Part explores how a series of historical critical junctures have entrenched liberal land policies into the Japanese constitutional order.

⁸⁷ *Id.*, at 100–05.

⁸⁸ See Liu, *supra* note 83, at 317–20; Eva Pils, *Resisting Dignity Takings in China*, 41 L. & SOC. INQUIRY, 888, 894 (2016).

⁸⁹ See Pils, *supra* note 88, at 892; Shu Jiao & Yashu Yang, *Land Expropriation and Compensation in China*, in LAND LAW AND DISPUTES IN ASIA: IN SEARCH OF AN ALTERNATIVE FOR DEVELOPMENT 128, 129 (Yuka Kaneko et al. eds., 2022).

⁹⁰ See *infra* Part V for a more detailed discussion. See generally Wenzheng Mao & Shitong Qiao, *Legal Doctrine and Judicial Review of Eminent Domain in China*, 46 L. & SOC. INQUIRY, 826, 830–34, 841–43 (2021).

⁹¹ See Lum, *supra* note 27, at 457–58, 471.

⁹² See, e.g., John Ohnesorge, *Law and Development Orthodoxies and the Northeast Asian Experience*, in LAW AND DEVELOPMENT IN ASIA 7, 16–30 (Gerald McAlinn & Caslav Pejovic eds., 2012).

⁹³ See generally Lum, *supra* note 27, at 457–58; see also Gavin Parker & Marco Amati, *Institutional Setting, Politics and Planning: Private Property, Public Interest and Land Reform in Japan*, 14 INT'L PLANNING STUDIES 141, 151–53 (2009).

⁹⁴ See Lum *supra* note 27; Parker & Amati, *supra* note 93, at 151–53.

⁹⁵ See Justin Hayward, *The Sanrizuka Struggle: Why Farmland Exists in the Middle of Tokyo Narita Airport*, SIMPLE FLYING (Sep. 3, 2020), perma.cc/TA5K-2SEA; see also Colin P. A. Jones, *Narita Airport and the Japanese Constitution: A Case Study*, 24 LAW IN JAPAN 39, 42–46 (1991).

A. The Meiji Critical Juncture and the Origins of Strong Property Rights in Japan

Although pre-modern legal texts in Japan regulated land ownership,⁹⁶ it was not until the Meiji Imperial period (1868–1912) that the first formal constitutional expressions of property rights emerged.⁹⁷ A critical juncture occurred in Japan during the Meiji period when the government was forced to open its borders to foreign colonial powers.⁹⁸ Japanese leaders concluded that the existing feudal political and institutional structures offered inadequate solutions to external threats (most notably from Russia and the U.S.) and searched for new ways to modernize their governmental structures and economy.⁹⁹ The Japanese government turned to Europe—especially Germany—for inspiration.¹⁰⁰

Land and property rights were among the first areas reformed.¹⁰¹ Under the feudal regime, land belonged to the emperor and could not be bought or sold.¹⁰² To unlock the economic potential of land, the Meiji reforms legalized property markets and reallocated farmland from feudal lords to peasant farmers.¹⁰³ A series of statutes enacted during the 1870s established the basis of a modern property law system, with clear ownership rights and freedom to buy, sell, and mortgage land.¹⁰⁴ Japan followed the European civil law doctrine that treated property as “exclusive, single, and theoretically indivisible in function and time.”¹⁰⁵ This concept of strong private ownership rights was considered critical to the modernization reforms introduced to protect Japan from colonization.¹⁰⁶ Strong

⁹⁶ See generally MIKISO HANE & LOUIS PEREZ, MODERN JAPAN, STUDENT ECONOMY EDITION: A HISTORICAL SURVEY 4, 31 (5th ed. 2016) (discussing how premodern codes stipulated land tenure rights).

⁹⁷ See SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 7–10 (2011).

⁹⁸ *Id.*; see also Frank Upham, *Property Rights, Commodification and Land Disputes*, in RESOLVING LAND DISPUTES IN EAST ASIA: EXPLORING THE LIMITS OF THE LAW 37, 41–43 (John Gillespie & Hualing Fu eds., 2014).

⁹⁹ See Parker & Amati, *supra* note 93, at 141–45, 160 (2009); KYOKO INOUE, MACARTHUR’S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 45–48 (1991).

¹⁰⁰ See Matsui, *supra* note 97, at 7–10 (2011); KENNETH L. PORT & GERALD PAUL McALLIN, COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 29, 32 (2d ed. 2003).

¹⁰¹ See Andre Sorensen, *Land, Property Rights and Planning in Japan: Institutional Design and Institutional Change in Land Management*, 25(3) PLANNING PERSPECTIVES 279, 283 (2010); Upham, *supra* note 98, at 42–43.

¹⁰² See Sorensen, *supra* note 101, at 283.

¹⁰³ See Sorensen, *supra* note 101, at 284; see generally Inoue, *supra* note 99.

¹⁰⁴ See Sorensen, *supra* note 101, at 284–85.

¹⁰⁵ See Lum, *supra* note 27, at 460.

¹⁰⁶ Kenneth Colegrove, *The Japanese Constitution*, 31 AM. POL. SCI. REV. 1027, 1045–49 (1937).

property rights legitimized and cemented power in the political elite and minimized public interest claims that might jeopardize private development.¹⁰⁷

In 1889, the Meiji Constitution formalized the radical land reforms of the 1870s.¹⁰⁸ It contained a strong statement of property rights. Article 27 provided that the right of property is “inviolable,” but “measures necessary to be taken for the public benefit shall be provided by law.”¹⁰⁹ Commentaries about the Meiji Constitution of 1889 explained that although property rights were inviolable, they could be taken for the public benefit provided that a reasonable indemnity was paid and the takings were authorized by law.¹¹⁰ Consistent with liberal land policies, eminent domain powers were confined to the rare instances where market mechanisms could not acquire land.¹¹¹ In practice, however, eminent domain powers in Japan were weaker than in other countries, such as the U.S., where liberal land policies also informed the constitutional order.¹¹² Background ideas based on strong property rights and weak eminent domain powers shaped the constitutional order beyond the next critical juncture that followed Japan’s defeat during the Second World War.¹¹³

B. The Post-War Critical Juncture and the Continuation of Strong Property Rights

The Meiji Constitution of 1889 cast a shadow over the postwar Japanese constitution. Following Japan’s defeat in 1945, American advisers in the occupation administration sought to democratize the constitution by strengthening public interest controls over private property rights.¹¹⁴ Japanese authorities resisted this reform. As Ukai and Nathanson observed, strong eminent domain provisions “were not accepted by the Japanese government on the ground that they were too close to nationalization of land and natural resources.”¹¹⁵ Invoking the liberal land policies that informed the 1889 Meiji Constitution,

¹⁰⁷ See Sorensen, *supra* note 101, at 284–85.

¹⁰⁸ *Id.*, at 284–87.

¹⁰⁹ See generally Johannes Siemes, *Hermann Roesler’s Commentaries on the Meiji Constitution*, 17 *MONUMENTA NIPPONICA* 1, 52–55 (1962).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See Lum, *supra* note 27, at 480–83.

¹¹³ See generally JUNJI BANNO, *THE ESTABLISHMENT OF THE JAPANESE CONSTITUTIONAL SYSTEM* (1992); Matsui, *supra* note 97.

¹¹⁴ See JOHN DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 67, 364 (1999); Inoue, *supra* note 99, 74–103 (1991).

¹¹⁵ Nobushige Ukai & Nathaniel L. Nathanson, *Protection of Property Rights and Due Process of Law in the Japanese Constitution*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS 1947–67*, 239, 251 (D.F. Henderson ed., 1969).

Japanese authorities believed that strong public interest controls would hinder postwar reconstruction.¹¹⁶ A compromise provision introduced into the 1946 Constitution limited public interest claims.¹¹⁷ It echoed the strong property rights found in the Meiji Constitution 1889 by providing in Article 29 that “The right to own or to hold property is inviolable. Property rights shall be defined by law, in conformity with the public welfare.”¹¹⁸ Article 29 went on to say that private property can only be taken for public use upon payment of just compensation.

The 1951 Expropriation of Land Act no. 219 (hereafter the ELA) established the legislative framework for land takings. Article 3 stipulated forty-nine activities that constituted public interest takings for which land could be expropriated or used, such as public infrastructure developments—especially railways, roads and electric and gas utilities.¹¹⁹ As a precondition for expropriation, the ELA required the Minister of Construction to confirm “that the project promotes the public interest.”¹²⁰ Compulsory acquisition for private purposes were only permitted under the ELA if they directly or indirectly benefited the public at large.¹²¹

C. Rebalancing Eminent Domain and Private Property Rights

1. Statutory Layering and Strengthening Eminent Domain Powers.

Without formally amending the 1946 Constitution and the ELA, evidence suggests that public controls over private property rights have incrementally increased in Japan over the last half century. It is argued that much of this change has taken place through constitutional layering. One of the first acts of layering took place with Law no. 172 of 1962, which amended the Act Concerning the Development of Suburban Consolidation Zones and Urban Development Zones of the National Capital Region no. 98 of 1958. Law no. 172, increased eminent domain powers by allowing land expropriation for private industrial parks.¹²² Legislators enacted Law no. 98 to expropriate land to construct satellite cities for the rapidly growing postwar population—a purpose that fell within the public benefit definition in the Constitution and the ELA.¹²³ Law no. 172, on the other hand, authorized land taking for privately owned industrial parks—a purpose that

¹¹⁶ *Id.* at 251.

¹¹⁷ *See generally* Port & McAllin, *supra* note 100, at 593.

¹¹⁸ NIHONKOKU KENPŌ [KENPŌ] [Constitution], art. 29 (Japan).

¹¹⁹ *See* Narufumi Kadomatsu, *Takings for Private use/private Interest and Livelihood Compensation in Japan, in* LAND LAW AND DISPUTES IN ASIA: SEARCH FOR AN ALTERNATIVE FOR DEVELOPMENT 73, 74–75 (Yuka Kaneko et al. eds., 2022).

¹²⁰ *See* Port and McAllin, *supra* note 100, at 613–14.

¹²¹ *See* DAVID L. CALLIES & TSUYOSHI KOTAKA, *TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES* 147–48 (2002).

¹²² *See* Kadomatsu, *supra* note 119, at 75–82, 84.

¹²³ *Id.*

did not clearly advance the public interest.¹²⁴ Commentors supporting Law no. 172 argued that private industrial parks conformed to the public interest definition because they promoted economic development that indirectly benefited the general public.¹²⁵ Through a process of constitutional layering, Law no. 172 strengthened eminent domain powers by expanding the meaning of public purposes in Article 29 of the Constitution to include compulsory acquisition for private developments.

The Law on Special Measures Concerning the Facilitation of the Use of Land of Unknown Owners no. 49 of 2018 added another legislative layer that has further strengthened eminent domain.¹²⁶ Due to a declining population in Japan, the amount of unclaimed rural land is increasing.¹²⁷ Beneficiaries in deceased estates frequently decline bequests where the transactional costs of inheritance exceed the value of the bequeathed land.¹²⁸ In these cases, the estates remain unclaimed and unallocated. Law no. 49 makes it easier for prefectural governments to repurpose such unclaimed land for public purposes. Article 3 of the Law no. 49 provides that land users taking “unused land” should “contribute to the increased common welfare and/or convenience of the local community.”¹²⁹ Through a process of layering, Law no. 49 expanded the public interest justification for expropriation to include the “shared welfare of the local community,” thereby increasing eminent domain powers without amending the 1946 Constitution and the ELA.¹³⁰

2. Statutory Layering and Strengthening Planning Controls over Land.

Historically, the Japanese Government has been reluctant to use urban planning laws to curb private property rights.¹³¹ Although urban planning does not constitute land taking for the purposes of Article 29 of the 1946 Constitution, it provides another legal mechanism through which the state can limit private property rights for public purposes.

Reflecting the strong property rights in the Meiji Constitution of 1889, the City Planning Law and Urban Buildings Law of 1919, which remained in force

¹²⁴ *Id.*

¹²⁵ *Id.* at 75–82.

¹²⁶ See Kadomatsu, *supra* note 119, at 82–85; Gakuto Takamura, *Vacant Properties in Japan: A New Challenge for the Study of the Commons and Land Laws in Asia*, in *LAND LAW AND DISPUTES IN ASIA: SEARCH FOR AN ALTERNATIVE FOR DEVELOPMENT* 149–51 (Yuka Kaneko et al. eds., 2022).

¹²⁷ See Kadomatsu, *supra* note 119, at 82–85 (2022). See also Narufumi Kadomatsu, *Legal Management of Urban Space in Japan and the Role of the Judiciary*, in *COMPARATIVE ADMINISTRATIVE LAW* 497, 504–10 (Susan Rose-Ackerman et al. eds, 2d ed. 2017).

¹²⁸ See Kadomatsu, *supra* note 119, at 82–85.

¹²⁹ *Id.*

¹³⁰ See Takamura, *supra* note 126, at 158–62.

¹³¹ See generally Sorensen, *supra* note 101, at 279; Parker & Amati, *supra* note 93, at 141–60.

until the 1960s, established a comparatively weak urban land zoning regime.¹³² In contrast to U.S. planning laws, in Japan, most land uses were permitted in urban areas.¹³³ Drafters of the Planning Law of 1919 began with a far more restrictive agenda that would have prevented non-conforming land usage in residential zones and required private land developers to contribute toward public infrastructure costs.¹³⁴ These measures were opposed within the government on the grounds they might compromise strong constitutional property rights and hinder economic development.¹³⁵

One explanation for the weak planning laws is the embryonic civil society in Japan during the post-war period.¹³⁶ In liberal democracies, civil society actors have historically played a key role in promoting the notion that planning and development controls should subordinate private land interests to the public good.¹³⁷ It was not until the 1960s that an active civil society slowly emerged in Japan. During this period an environmental crisis catalyzed activism and political opposition to strong private property rights.¹³⁸ Activists characterized the environmental crisis as a failure of the state to use planning and land development controls to curb industrial pollution and unplanned urban sprawl.¹³⁹ To retain power, the ruling Liberal Democratic Party (LDP) changed course and enacted the City Planning Law no. 100 of 1968 to control untrammelled private land use.¹⁴⁰ This was the first in a succession of urban planning laws that have incrementally strengthened public interest claims over private land.¹⁴¹

Another round of constitutional layering occurred in response to the bubble economy that emerged when land and stock prices soared during the late 1980s, before crashing in 1990.¹⁴² Lax planning and development laws were widely

¹³² See Junichi Hasegawa, *Drafting of the 1968 Japanese City Planning Law*, 29(2) PLANNING PERSPECTIVES, 231, 231–32 (2014); Sorensen, *supra* note 101, at 291.

¹³³ See Parker & Amati, *supra* note 93, at 145–48.

¹³⁴ See Sorensen, *supra* note 101, at 291.

¹³⁵ *Id.*

¹³⁶ See David Edgington, *Comprehensive Planning in Japanese Large Cities*, 34(1) PLANNING PERSPECTIVES 115, 121 (2019); Sorensen, *supra* note 101, at 290.

¹³⁷ *Id.*

¹³⁸ See generally Andre Sorensen, *The Developmental State and the Extreme Narrowness of the Public Realm: The 20th Century Evolution of Japanese Planning Culture*, in COMPARATIVE PLANNING CULTURES 223, 223–58 (B. Sanyal ed., 2005).

¹³⁹ See Ellis S. Krauss & Bradford Simcock, *Citizens' Movements: The Growth and Impact of Environmental Protest in Japan*, in POLITICAL OPPOSITION AND LOCAL POLITICS IN JAPAN 187, 190–220 (K. Steiner et al. eds., 1980).

¹⁴⁰ See Junichi Hasegawa, *supra* note 132, at 232–34, 236. See generally E.S. Krauss & B. Simcock, *supra* note 139, at 187.

¹⁴¹ See Sorensen, *supra* note 101, at 279; Parker & Amati, *supra* note 93, at 154–56.

¹⁴² See generally Sorensen, *supra* note 101, at 293.

blamed for the rampant land speculation and subsequent economic stagnation.¹⁴³ In response to public opposition, the government enacted Basic Land Law no. 84 of 1989, which declared, “[i]n a small country such as Japan, land is a limited resource and a basic necessity of life that is common to all the people, thus the use of land enters the public domain and as such is subject to public restrictions.”¹⁴⁴ This provision codified the notion derived from social democratic land policy that land has a social function.¹⁴⁵ Three years later, in 1992, the government amended the 1968 City Planning Law to include more prescriptive zoning controls and public participation in the formation of city master plans.¹⁴⁶ Each new statutory layer strengthened planning policies and moved the constitutional order further away from the strong property rights encoded in the 1946 Constitution.

D. Constitutional Conversion and Eminent Domain Powers

The discussion so far has mustered compelling evidence that constitutional layering incrementally weakened property rights and strengthened eminent domain powers in Japan. There is less evidence that constitutional conversion has changed the constitutional order.¹⁴⁷ Japan is a much less litigious society than the U.S. and consequently lacks a strong tradition of judicial interpretation.¹⁴⁸ In the rare instances where courts have adjudicated land taking cases, they tended to weaken eminent domain powers by requiring authorities to pay “full compensation” for land—an “equivalent standard to that they enjoyed to the land prior to expropriation.”¹⁴⁹ This line of decisions reflects liberal land policy, which requires compensation to indemnify disposed owners, restoring them to their pre-

¹⁴³ See generally Y. Inamoto, *The Problem of Land Use and Land Prices*, in *THE POLITICAL ECONOMY OF JAPANESE SOCIETY: INTERNATIONALIZATION AND DOMESTIC ISSUES* Vol. 2, 229–64 (Junji Banno ed., 1998); Michael Wegener, *Tokyo's land market and its impact on housing and urban life*, in *PLANNING FOR CITIES AND REGIONS IN JAPAN* 92–112 (P. Shapira et al. eds., 1994).

¹⁴⁴ Reproduced from a translation reproduced in Sorensen, *supra* note 101, at 293.

¹⁴⁵ See Allen, *supra* note 63, at 1060, 1076.

¹⁴⁶ See Edgington, *supra* note 136, at 122–23; Sorensen, *supra* note 101, at 484.

¹⁴⁷ See Kadomatsu, *supra* note 127, at 506–11 (arguing that the role of courts in land taking cases is limited by the government's “minimum intervention principle”). See also Parker & Amati, *supra* note 93, at 151–52.

¹⁴⁸ See generally Robert Kagan, *Introduction: Comparing National Styles of Regulation in Japan and the United States*, 22 *L. & POL'Y* 225, 226–28 (2000).

¹⁴⁹ See Kadomatsu, *supra* note 119, at 85–91; See also, e.g., Saikō Saibansho [Sup. Ct.] June 11, 2002, 1998 (Gyo-Tsu) 158, 56 [MINSHŪ] No. 5, perma.cc/BV5D-MJE9.

taking position.¹⁵⁰ Full compensation for land sets a high financial hurdle for authorities and limits the exercise of eminent domain powers.¹⁵¹

Government officials play a more active role in interpreting eminent domain powers than courts. For example, studies suggest that officials at local government levels are reluctant to enforce compulsory acquisition orders.¹⁵² Officials are aware that land condemnation without agreement from landowners often generates protracted disputes and accordingly favors negotiation and consensus to resolve disputes.¹⁵³ The violent protests against the land condemnation required to develop Narita Airport and the government's decision to avoid expropriation illustrate the cultural importance placed on consensus and respect for the wishes of landowners.¹⁵⁴ Consensus generally benefits landowners who frequently group together and collectively bargain for higher compensation payments.¹⁵⁵

This historical overview has shown how a critical juncture during the Meiji Restoration entrenched strong property rights in the Japanese constitutional order. Liberal land policies influenced what constitutional change was considered possible, and the values informing change. During the postwar period constitutional layering incrementally weakened constitutional property rights and increased public interest powers, resulting in stronger eminent domain and urban planning powers. Without amending the Constitution of 1946 and the ELA, the government introduced layers of legislation that gradually changed land policies to reflect public demands for more extensive environmental and planning controls over private land. The findings suggest that constitutional layering has incrementally shifted the liberal land policies informing the Constitution of 1946 toward social democratic policies that accord land a social function.

Constitutional conversion has played a less prominent role in rebalancing property rights and eminent domain powers because judges are often unwilling to challenge established constitutional doctrines.¹⁵⁶ Conversion is more evident in the flexible enforcement of eminent domain powers by local government officials. Constitutional drift is also suggested by increasing demands by civil society actors for more public interest controls over the exercise of private property rights. In the next section, the discussion explores how constitutional conversion is a more potent catalyst for changing eminent domain powers in a country with an active constitutional court.

¹⁵⁰ See Tom Allen, *The Right to Property in Asia*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 250, 263 (Rosalind Dixon & Tom Ginsburg eds., 2014).

¹⁵¹ See generally Parker & Amati, *supra* note 93, at 152.

¹⁵² Port & McAllin, *supra* note 100, at 607.

¹⁵³ *Id.*

¹⁵⁴ See Colin P. A. Jones, *supra* note 95, at 607; see also Port & McAllin, *supra* note 100, at 607.

¹⁵⁵ See Port & McAllin, *supra* note 100, at 617.

¹⁵⁶ See generally Law, *supra* note 32.

V. CHANGING EMINENT DOMAIN IN INDONESIA

Constitutional change in Indonesia is moving in the opposite direction from Japan—private property rights are increasing in strength at the expense of eminent domain powers. This section explores the critical junctures in Indonesia that initially entrenched strong eminent domain powers and then changed the constitutional order by extending more protection to landholders. It then examines the struggle between the government and the Constitutional Court to extend eminent domain powers over customary land rights.

A. The Plural Colonial Land Tenure System

Prior to Dutch colonial intervention in Indonesia during the sixteenth century,¹⁵⁷ the *adat* village system bound rural communities and the land together.¹⁵⁸ *Adat* is commonly translated as “customary law.”¹⁵⁹ Land occupation rights (*bak milik*) under *adat* were created when farmers cultivated unused land (*bak ulayat*).¹⁶⁰ Occupation rights (*bak milik*) lapsed when land was left uncultivated, and the unused land reverted back to community control.¹⁶¹ In this pre-industrial society, there was no concept of land as a commodity or of private property rights. As Franz and Keebet von Benda-Beckmann observed, *adat* treats “property relations as only one aspect or strand of more encompassing categorical relationships, in which kinship relations, property relations and relations of political authority are largely fused in a many-stranded or multiplex relationship.”¹⁶²

During the early nineteenth century, the Dutch colonial government established a statutory land tenure system that extended Dutch land law to the main urban centers and industrial plantations, while leaving *adat* to govern rural

¹⁵⁷ The Dutch United East India Company established trading centers in what is now called Indonesia during the sixteenth century, and the Dutch Government assumed control with the abolition of the East India Company in 1796. *See generally*, MERL C. RICKLEFS, A HISTORY OF MODERN INDONESIA SINCE C.1200, 131–44 (4th ed. 2008); Michael Leaf, *Land Rights for Residential Development in Jakarta, Indonesia: The Colonial Roots of Contemporary Urban Dualism*, 17 INT’L J. FOR URB. & REG’L RSCH. 477, 479–83. (2009).

¹⁵⁸ *See* Leaf, *supra* note 157, at 480–83.

¹⁵⁹ *See* Butt & Lindsey, *supra* note 32, at 127–30.

¹⁶⁰ *See generally* HERMAN SLAATS & KAREN PORTIER, TRADITIONAL DECISION-MAKING AND LAW 99–110 (1992).

¹⁶¹ For a description of this process, see generally FRANZ VON BENDA-BECKMANN & KEEBET VON BENDA-BECKMANN, POLITICAL AND LEGAL TRANSFORMATIONS OF AN INDONESIAN POLITY: THE NAGARI FROM COLONISATION TO DECENTRALISATION 57–59 (2013); Slaats & Portier, *supra* note 160, at 99–110.

¹⁶² *See* Franz von Benda-Beckmann & Keebet von Benda-Beckmann, *Multiple Embeddedness and Systemic Implications: Struggles over Natural Resources in Minangkabau since the Reformasi*, 38 ASIAN J. OF SOC. SCI. 172, 175 (2010).

areas.¹⁶³ The colonial government could override this system of legal pluralism by exercising eminent domain powers through *domein verklaring*.¹⁶⁴ According to this doctrine, “all land not held under proven ownership, shall be deemed the domain of the state.”¹⁶⁵ *Domein verklaring* gave the government powers to resume unused *adat* land (*bak ulayat*) that was not subject to customary land occupation rights (*bak milik*).¹⁶⁶

B. Integralism and the Anti-Colonial Critical Juncture

After declaring independence from the Netherlands on August 17, 1945, the leaders of the anti-colonial movement hastily prepared a new constitution.¹⁶⁷ They faced a critical juncture in repurposing institutions designed for a colonial state to meet the needs of a newly independent nation.¹⁶⁸ Constitutional drafters needed to reconcile the *domein verklaring* system inherited from the Dutch with the vague and fluid *adat* land system.¹⁶⁹ Their approach to this problem owes much to the home-grown concept of “Indonesian socialism.”¹⁷⁰ Professor Raden Soepomo, the architect of the Indonesian 1945 Constitution, imagined a regulatory system based on a traditional village community—a theory of state and law that became known as *integralism*.¹⁷¹ This highly corporatist understanding of state-society relationships subordinated the private legal sphere, including *adat* land rights, to state interests.¹⁷² Article 33 of the 1945 Constitution reflected *integralism* where it stated that “land, the waters and—the natural riches contained therein shall be controlled by the state and exploited to the benefit of the people.”¹⁷³ Article 6 of the Basic Agrarian Law no. 5 of 1960 (BAL) codified Article 33 of the Constitution

¹⁶³ See Leaf, *supra* note 157, at 479–85. See generally MICHAEL BARRY HOOKER, ADAT LAW IN MODERN INDONESIA, 120–28 (1978).

¹⁶⁴ See Hooker, *supra* note 163, at 120–28.

¹⁶⁵ See Dhialulhaq & Berenschot, *supra* note 25, at 1; PETER BURNS, THE LEIDEN LEGACY: CONCEPTS OF LAW IN INDONESIA 89 (2004).

¹⁶⁶ See generally Peter Burns, *The Netherland East Indies: Colonial Legal Policy and The Definition of Law*, in 2 LAWS OF SOUTH-EAST ASIA, EUROPEAN LAWS IN SOUTH-EAST ASIA 147 (M.B. Hooker ed., 1988).

¹⁶⁷ See Butt & Lindsey, *supra* note 32, at 3–5.

¹⁶⁸ See generally Ricklefs, *supra* note 157, at 248–70.

¹⁶⁹ See Dhialulhaq & Berenschot, *supra* note 25, at 1; SIMON BUTT & TIM LINDSEY, THE CONSTITUTION OF INDONESIA: A CONTEXTUAL ANALYSIS 7–12 (2012).

¹⁷⁰ See Butt & Lindsey, *supra* note 169, at 7–12.

¹⁷¹ See *id.*

¹⁷² See Dhialulhaq & Berenschot, *supra* note 25, at 2; Butt & Lindsey, *supra* note 32, at 4–6.

¹⁷³ See generally Giri Ahmad Taufik, *The Interpretation of Article 33 of the Indonesian Constitution and Its Impact on Independent Regulatory Agencies*, 2 AUSTL. J. ASIAN L. 1, 5 n.17 (2020); Hooker, *supra* note 162, at 115–20.

1945 in providing that all rights to land have a social function¹⁷⁴—a provision that owed more to socialist than social-democratic land policies.

Officials used *integralist* policies to subordinate *adat* land rights to state interests—rendering property confiscation invisible.¹⁷⁵ For example, officials used BAL and the Forestry Law no. 5 of 1967 (FL) to restrict personal land claims (*bak milik*) over *adat* land.¹⁷⁶ In order to claim land rights, *adat* farming communities were required to prove they still followed traditional customs and governed land with *adat* institutions.¹⁷⁷ This stipulation effectively blocked the application of *adat* land claims in peri-urban areas where expanding cities had subsumed village land.¹⁷⁸

Compounding the difficulties in claiming *adat* land rights, the government could draw on the extensive eminent domain powers in BAL and the FL to resume uncultivated *adat* land (*bak uluyuk*).¹⁷⁹ BAL froze the creation of new cultivation rights over land (*bak milik*) and farmers occupying uncultivated land (*bak uluyuk*) could not register their land interests or prevent resumption by the state.¹⁸⁰ Since the state only compensated land takings for registered *bak milik* land, farmers using *bak uluyuk* land faced dispossession without compensation.¹⁸¹

C. Land Taking and the New Order Government

The next critical juncture occurred in 1965, when a military coup violently purged the left leaning Guided Democracy Government.¹⁸² Although the New Order Government led by President Soeharto (1968–1998) radically changed the economic settings and encouraged capitalist development, it continued the

¹⁷⁴ See Butt & Lindsey, *supra* note 169, at 7–12; Butt & Lindsey, *supra* note 32, at 150–52.

¹⁷⁵ See Adriaan Bedner & Yance Arizona, *Adat in Indonesian Land Law: A Promise for the Future or a Dead End?*, 20 ASIA PAC. J. ANTHROPOLOGY 416, 419–22 (2019); Butt & Lindsey, *supra* note 32, at 133–34, 143–46.

¹⁷⁶ Law No. 20 on the Revocation of Rights to Land and Objects on the Land 1961 formalized the government's powers to expropriate *adat* land. See Butt & Lindsey, *supra* note 32, at 133–34, 143–46.

¹⁷⁷ See Adriaan Bedner, *Indonesian Land Law: Integration at Last? And for Whom? in THE LAND AND DEVELOPMENT IN INDONESIA: SEARCHING FOR THE PEOPLE'S SOVEREIGNTY* 63, 65–66, 68 (John F. McCarthy & Kathryn Robinson eds., 2016).

¹⁷⁸ See Bedner, *supra* note 177, at 65–66; Leaf, *supra* note 157, at 483–89.

¹⁷⁹ See Bedner & Arizona, *supra* note 175, at 420–21; von Benda-Beckmann & von Benda-Beckmann, *supra* note 161, at 131–34.

¹⁸⁰ See Bedner, *supra* note 177, at 65–66; Bedner & Arizona, *supra* note 175, at 419–22.

¹⁸¹ See Jamie Davidson, *Eminent Domain and Infrastructure Under the Yudboyono and Widodo Administrations*, in *THE LAND AND DEVELOPMENT IN INDONESIA: SEARCHING FOR THE PEOPLE'S SOVEREIGNTY* 167, 169–70, 173–74 (John F. McCarthy & Kathryn Robinson eds., 2016).

¹⁸² See generally Ricklefs, *supra* note 157, at 322–43.

integralist approach to land.¹⁸³ Land developers with connections to the President used the combination of weak *adat* land rights and strong eminent domain powers to control vast forest areas.¹⁸⁴ Farmers with *bak milik* rights were relatively secure from land grabs; however, those occupying *bak ulayat* (unused forest land) were dispossessed without compensation.¹⁸⁵ Eminent domain powers enabled the government to draw legal boundaries around *adat* communities and fence off customary land, turning landholders into trespassers.

Under the New Order Government, the executive exercised broad discretionary powers to substitute administrative edicts for legal rights and principles enshrined in the 1945 Constitution and legislation.¹⁸⁶ Courts largely ignored the constitutional hierarchy of laws, instead following executive orders issued by government agencies.¹⁸⁷ Constitutional doctrines were slow to develop because the executive rather than the courts determined the meaning of law.¹⁸⁸

D. The Revival of Adat Land Rights and the *Reformasi* Critical Juncture

A critical juncture developed in 1997 when the East Asian Financial Crisis bankrupted the Indonesian state.¹⁸⁹ To resolve the crisis, the *reformasi* (reform) movement pressed for wide-ranging political and legal changes.¹⁹⁰ Following President Soeharto's resignation in 1998, resistance to government land taking gained momentum and many farmers reoccupied land that had previously been taken from them.¹⁹¹ The incoming Habibie Government (1998–1999) responded to calls for radical reforms by introducing institutional and structural changes that

¹⁸³ See Taufik, *supra* note 173, at 321–22; Bedner, *supra* note 177, at 65–66.

¹⁸⁴ See John McCarthy & Moira Moeliono, *The Post-Authoritarian Politics of Agrarian and Forest Reform in Indonesia*, in ROUTLEDGE HANDBOOK OF SOUTHEAST ASIAN POLITICS 242–59 (Richard Robison ed., 2012); Bedner, *supra* note 177, at 69–71.

¹⁸⁵ See Bedner & Arizona, *supra* note 175, at 420–22; Butt & Lindsey, *supra* note 32, at 150–52.

¹⁸⁶ See Bedner, *supra* note 177, at 68.

¹⁸⁷ See generally Daniel Lev, *Comments on the Course of Law Reform in Modern Indonesia*, in INDONESIA: THE COMMERCIAL COURT AND LAW REFORM IN INDONESIA 48–67 (Tim Lindsey ed., 1999).

¹⁸⁸ See SEBASTIAAN POMPE, *THE INDONESIAN SUPREME COURT: A STUDY OF INSTITUTIONAL COLLAPSE* 425–67 (2005).

¹⁸⁹ See Ricklefs, *supra* note 157, at 263–81; Dewi Fortuna Anwar, *Indonesia's Transition to Democracy: Challenges and Prospects*, in INDONESIA: THE UNCERTAIN TRANSITION 3–16 (Damien Kingsbury & Arief Budiman eds., 2001).

¹⁹⁰ *Id.*

¹⁹¹ See Bedner, *supra* note 177, at 71–72; Afrizal & Patrick Anderson, *Industrial Plantations and Community Rights: Conflicts and Solutions*, in LAND AND DEVELOPMENT IN INDONESIA: SEARCHING FOR THE PEOPLE'S SOVEREIGNTY 297, 304 (John McCarthy & Kathryn Robinson eds., 2016).

gave farmers more political and legal avenues to assert *adat* land claims against developers—a process informed by customary land policy.¹⁹²

A broad social consensus, which included public intellectuals, retired state officials, religious organizations, academics, journalists, and social activists argued for the abolition of *intergralism*.¹⁹³ Beginning with constitutional reforms in 1999, and accelerating with more far-reaching constitutional reforms in 2000 and 2002, the shadow of Soepomo and the *integralist* state began to fade in post-Soeharto Indonesia.¹⁹⁴ Three key constitutional amendments enabled landholders to claim *adat* land rights and challenge eminent domain powers.

First, the 1945 Constitution was amended in 2000 to recognize the rights of *adat* communities. Article 18B(2) provides that “[t]he state recognizes and respects *adat* law communities and their traditional rights . . .” Successive legislative layers¹⁹⁵ have limited land rights by requiring *adat* land claims to comply with the national interest¹⁹⁶ and *adat* communities to maintain their traditions.¹⁹⁷

Second, Article 28I(3), added to the 1945 Constitution in 2000, provides that “[t]he cultural identity and rights of traditional communities are respected in line with the development of the times and civilization.” Law No. 6 on Villages of 2014 codified this amendment by protecting *adat* rights, institutions, and processes.¹⁹⁸ In practice, only *adat* communities that are formally recognized by state authorities are accorded protection.¹⁹⁹

Third, constitutional amendments enacted in 2002 authorized the formation of a constitutional court.²⁰⁰ Established in 2003, the Court quickly demonstrated that it was both competent and independent from government policy, and

¹⁹² See Bedner & Arizona, *supra* note 175, at 421–24.

¹⁹³ See Marcus Mietzner, *Sources of Resistance to Democratic Decline: Indonesian Civil Society and its Trials*, 28 DEMOCRATIZATION 161, 161–62, 164–65 (2021).

¹⁹⁴ See Butt & Lindsey, *supra* note 169, at 19–23; Ruby Lukman, *Securing Adat Rights in Indonesia*, in LAND LAW AND DISPUTES IN ASIA: IN SEARCH OF AN ALTERNATIVE FOR DEVELOPMENT, 166–67 (Yuka Kaneko et al. eds., 2022); DONALD L. HOROWITZ, CONSTITUTIONAL CHANGE AND DEMOCRACY IN INDONESIA 20–29 (2013).

¹⁹⁵ See, e.g., Art. 9 Law No. 18 on Plantations 2004 (Indon.); Art. 62(1) Law No. 32 on Environmental Protection 2009 (Indon.).

¹⁹⁶ See Butt & Lindsey, *supra* note 32, at 136–37.

¹⁹⁷ *Id.*

¹⁹⁸ Law No. 6 elaborates upon Article 111(2) of the Regional Autonomy Law No. 22 of 1999, which provided that all district level regulations must take the rights, origins, and *adat* traditions into account.

¹⁹⁹ By 2015, only five *adat* land communities had been officially recognized. See Bedner, *supra* note 177, at 78; Butt & Lindsey, *supra* note 32, at 136–37, 141–42.

²⁰⁰ UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN 1945 [Constitution], August 11, 2002, art. 24C (Indon.). See generally STEFANUS HENDRIANTO, LAW AND POLITICS OF CONSTITUTIONAL COURTS: INDONESIA AND THE SEARCH FOR JUDICIAL HEROES 41–42, 44–48 (2018); Butt and Lindsey, *supra* note 169, at 103–35.

through a process of constitutional conversion, has played a major role in rolling back the layers of government legislation that sought to increase eminent domain powers over *adat* land.²⁰¹

E. Constitutional Layering is Strengthening Eminent Domain

Powerful oligarchs working with the executive government have been slowly chipping away at the constitutional reforms that strengthened customary land rights.²⁰² For example, to encourage infrastructure development, the Yudhoyono Government (2004–2014) issued Presidential Decree no. 36 of 2005 on Land Acquisition to Realize Development in the Public Interest.²⁰³ Article 1(5) of the Decree gave the government powers to compulsorily acquire land in the “interest of the majority of society.”²⁰⁴ This sweeping public interest definition aimed to subordinate *adat* land rights to state-sponsored economic development.²⁰⁵ Widespread public opposition resulted in amendments to the Decree that limited the scope of compulsory acquisition.²⁰⁶

Following re-election in 2009, the Yudhoyono Government once again sought to weaken *adat* land rights and increase eminent domain powers.²⁰⁷ After intense negotiations with the government, the Majelis Permusyawaratan Rakyat (People’s Consultive Assembly) passed Law no. 2 on Land Acquisition for Development in 2012.²⁰⁸ Article 1(6) of the Law reflects a compromise between the government’s desire for rapid economic development and public support for *adat* land rights.²⁰⁹ It defined the public interest as “interests of the nation, the state and the society” that benefit “to the greatest extent possible the prosperity of the people.” A coalition of civil society actors unsuccessfully sought to challenge this vaguely worded definition, claiming that the Law preferred the interests of development over the interests of society.²¹⁰

²⁰¹ Since its formation in 2003, the Constitutional Court has made twenty-five judgements concerning *adat* land rights. See Lukman, *supra* note 194, at 169–70. See also Butt & Lindsey, *supra* note 32, at 100–101 (discussing the competency of the Constitutional Court); *id.* at 138–42 (discussing Constitutional Court decisions regarding *adat* land claims).

²⁰² See Mohammad Agus Yusoff Asrinaldi & dan Zamzami Abdul Karim, *Oligarchy in the Jokowi Government and its Influence on the Implementation of Legislative Function in Indonesia*, 7 ASIAN J. OF COMP. POL. 189, 191–92 (2022).

²⁰³ See Davidson, *supra* note 181, at 169–70.

²⁰⁴ *Id.*

²⁰⁵ See *id.* at 170–75.

²⁰⁶ See *id.*

²⁰⁷ See Davidson, *supra* note 181, at 177–79.

²⁰⁸ See Butt & Lindsey, *supra* note 32, at 148–50.

²⁰⁹ See *id.*

²¹⁰ For two discussions about attempts by civil society actors to weaken eminent domain powers, see Davidson, *supra* note 181, at 177–80; Bedner, *supra* note 177, at 74.

F. Constitutional Conversion is Weakening Eminent Domain

At the same time the government has used constitutional layering to strengthen eminent domain powers, the Constitutional Court has strengthened *adat* land claims. In the 2013 *Traditional Forest Community* case,²¹¹ customary law communities argued that the state had ignored their *adat* rights to cultivate forestland and, thus, infringed Article 18B(2) of the 1945 Constitution.²¹² The claimants reasoned that the Forestry Law no. 41 of 1999 defined unused forestland as “state forest”—a classification that allowed the state to grant private developers rights over customary *adat* land without obtaining permission from traditional communities or providing compensation.²¹³ In finding for the claimants, the Court decided the 1999 Forestry Law was unconstitutional insofar as it denied traditional communities access to forestry resources they had enjoyed for generations.²¹⁴ The Court held that:

[t]he members of a traditional community have the right to clear their customary forests and to control and use them to fulfil their individual needs and those of their families. Therefore, it is not possible for the rights held by customary law community members to be extinguished or frozen, provided they meet the requirement of the traditional community as referred to in Article 18B(2) of the Constitution 1945.²¹⁵

The Court rejected the *integralist* policy that gave the government unfettered eminent domain powers over “unused” forestland. It decided that the Forestry Law 1999 violated Article 18B(2) of the 1945 Constitution because it extended state territorial authority over unused forest land (*bak ulayat*) that was subject to *adat* land claims. This decision qualifies as constitutional conversion, because it interpreted the 1945 Constitution in ways that strengthened customary land policies and challenged socialist land policies that subordinated customary land rights to state-sponsored development.

This review of the post-Soeharto era shows how *reformasi* triggered a critical juncture that unleashed political pressure for constitutional reforms that recognized *adat* land rights. Pushing against this new constitutional order, successive post-Soeharto governments have used constitutional layering to strengthen eminent domain and incrementally erode *adat* land rights. As the country transitioned from the authoritarian New Order Government to the post-Soeharto experiment with democracy, civil society actors have resolutely defended

²¹¹ Decision, Reviewing Law No. 41 of 1999 on Forestry, 35/PUU-X/2012 at 3.13.1 (Constitutional Court, May 16, 2013).

²¹² See Lukman, *supra* note 194, at 169–74; Butt & Lindsey, *supra* note 32, at 138–42.

²¹³ Hendrianto, *supra* note 202, at 192–94.

²¹⁴ See Constitutional Court Decision 35/PUU-X/2012 at 3.13.1.

²¹⁵ *Id.* at 3.13. See also Butt & Lindsey, *supra* note 32, at 141.

the spirit of *reformasi* and enlisted the Constitutional Court to resist government efforts to strengthen eminent domain powers.

VI. CHANGING EMINENT DOMAIN IN CHINA

A series of critical junctures over the last century have radically changed eminent domain powers in China.²¹⁶ This section shows how liberal land policy which advocated weak expropriation powers briefly gained support during the late Qing Dynasty (1880–1911). By the 1920s, the nationalist revolution replaced liberal policies with social democratic land policies that legitimized large-scale land appropriation. The communist revolution went much further in adopting socialist land policies that abolished private land ownership and enabled nationalization without compensation.²¹⁷ During the late 1970s, the Chinese Communist Party (CCP) responded to a political and economic crisis by introducing a mixed-market economy. These radical reforms raise the question of whether it is possible to reconcile socialist land policies with private land markets that require strong property rights and moderated eminent domain powers.

A. The Qing Dynasty Critical Juncture

A critical juncture occurred during the late Qing Dynasty (1880–1911).²¹⁸ Much like Japan during the Meiji Restoration, late nineteenth-century China needed to modernize to counter territorial encroachment by European colonial powers.²¹⁹ China followed Japan in adopting European laws and institutions to resist foreign interference. For example, the Qing Dynasty developed a constitutional monarchy and adopted the trappings of a modern legal system.²²⁰ In 1908, the government enacted the Principles of the Constitution, which were closely modelled on the Meiji Constitution in Japan.²²¹ The Qing Dynasty used the 1908 Constitution and the 1911 Draft Civil Law of the Great Qing²²² to distinguish between criminal and civil law and provide legal rights for property.²²³ Article 6 in the 1908 Constitution stated that “[t]he property and dwellings of

²¹⁶ See generally Peng, *supra* note 62, at 121–24.

²¹⁷ Although the CCP defeated the Nationalist Government in 1949, the revolutionary land reforms began earlier in communist controlled territory. See JOHN KING MERLE FAIRBANK, CHINA: A NEW HISTORY 294–305, 343–367 (1997).

²¹⁸ See Fairbank, *supra* note 217, at 220–24, 244–47; JINFAN ZHANG, THE HISTORY OF CHINESE LEGAL CIVILIZATION: MODERN CHINA (FROM 1840 TO 1949) 299, 304, 308–09 (2020).

²¹⁹ *Id.*

²²⁰ See Zhang, *supra* note 218, at 450–53.

²²¹ See *id.* at 299, 304, 308–09.

²²² See *id.* at 453.

²²³ See *id.* at 453–54.

subjects shall not be disturbed without cause,”²²⁴ and Part Three of the Draft Civil Law established strong property rights that reflected the liberal concern with limiting state expropriation to exceptional cases.²²⁵

B. The Nationalist Revolutionary Critical Juncture

In 1911, the Qing Dynasty was overthrown by the nationalist Kuomintang (KMT) political movement,²²⁶ which went on to form the Republic of China (RoC).²²⁷ From its inception, the new government struggled to control the country, fighting, in turn, warlords, Japanese militarists, and the CCP.²²⁸ The government initially continued and extended the Qing Dynasty’s liberal reforms.²²⁹ A shift in land policy followed the KMT’s first national conference in 1924.²³⁰ KMT leaders decided that the liberal land policies adopted by the Qing Government would inhibit their ambitious land redistribution program.²³¹ Following the conference, the 1928 Land Expropriation Law replaced liberal land policies with social democratic policies that supported land expropriation for the public good.²³² The Law also changed the basis for determining compensation from market valuations to pre-development valuations.²³³ This revision aimed to make condemnation more affordable by preventing landowners from deriving windfall profits from land rezoning.²³⁴

In advocating social democratic land policies, Sun Yat-sen, the first president of the RoC, argued that private land ownership generated injustice because land belonged equally to everyone.²³⁵ To promote development and social equality, Sun advocated the redistribution of land—a land to tiller program.²³⁶ Property in the RoC was accorded a social function²³⁷ that balanced individual property rights

²²⁴ *Id.* at 453.

²²⁵ *See* Zhang, *supra* note 218, at 441–43, 446–68; Peng, *supra* note 62, at 121.

²²⁶ The KMT was the Chinese Nationalist Party that governed the RoC. *See generally* Fairbank, *supra* note 218, at 279–83 (discussing how Sun Yat-sen formed the KMT (*Guomindang*)).

²²⁷ *See* Fairbank, *supra* note 217, at 250–53, 259–68.

²²⁸ *See id.*

²²⁹ *See* Peng, *supra* note 62, at 95–105; Zhang, *supra* note 218, at 450–52.

²³⁰ *See* Peng, *supra* note 62, at 105–57, 116–17.

²³¹ *See id.*

²³² *See id.*

²³³ *Id.* at 104–09 (explaining that Sun Yat-sen did not want landowners to receive the windfall value of land created through rezoning and development).

²³⁴ *Id.* at 116.

²³⁵ Peng, *supra* note 62, at 105–06; Zhang, *supra* note 219, at 522–25.

²³⁶ Peng, *supra* note 62, at 106–07.

²³⁷ Reynolds, *supra* note 19, at 111–38.

with the public good.²³⁸ The government did not aim to abolish private land ownership but, rather, alleviate the negative consequences of private land ownership through land redistribution. During the next critical juncture, the communist revolution replaced social democratic land policies with socialist land policies that aimed to abolish private land ownership.

C. The Revolutionary Critical Juncture

A critical juncture triggered by the communist revolution during the 1940s and 1950s radically changed the regulation of land ownership and eminent domain in China.²³⁹ During the initial revolutionary period (1949–1953), the CCP followed the Soviet example and redistributed land appropriated from landlords to peasant farmers.²⁴⁰ As the revolution consolidated after 1954, the CCP implemented socialist land policies that expropriated farmland and established agricultural collectives.²⁴¹ Private land ownership gradually disappeared, and by 1958, most urban and rural land was under state and collective ownership.²⁴²

Article 13 of the 1954 Constitution authorized the state to “buy, requisition or nationalize land.” This provision was interpreted from a Marxist perspective.²⁴³ Marx rejected the notion underpinning liberal land policies that private land ownership is a natural right giving rise to private interests.²⁴⁴ Instead, he argued that the abolition of private land ownership was necessary for the advancement of human society. Following Marx, the CCP treated land as a critical economic resource that authorities could allocate and requisition to fulfill economic plans.²⁴⁵

D. The Mixed-Market Critical Juncture

Following the chaos of the Cultural Revolution (1966–1976), the CCP began a series of radical mixed-market regulatory reforms that legalized private commerce without proclaiming the end of socialism.²⁴⁶ Fearing a challenge to national sovereignty and party legitimacy, party leaders incrementally dismantled the command planned economy and experimented with a mixed-market

²³⁸ Peng, *supra* note 62, at 104–09.

²³⁹ *Id.* at 87, 91, 100.

²⁴⁰ See Zhaohui Hong & Yi Sun, *Power, Capital, and the Poverty of Farmers' Land Rights in China*, 92 LAND USE POLICY 104471, 104472 (2020); Peng, *supra* note 62, at 87–91, 100.

²⁴¹ Hong & Sun, *supra* note 240, at 104472.

²⁴² Peng, *supra* note 62, at 100.

²⁴³ *Id.* at 104–05.

²⁴⁴ *Id.* at 95–105.

²⁴⁵ *Id.* at 104–05.

²⁴⁶ See Fairbank, *supra* note 217, at 406–10, 419–27.

economy.²⁴⁷ There are grounds for crediting this critical juncture with shifting the constitutional order more in favor of private land interests, whilst constraining eminent domain powers.

During the initial reform period in the early 1980s, Article 10 of the 1982 Chinese Constitution established a dual system of land tenure—specifically, state ownership over urban land and collective ownership over rural land.²⁴⁸ At this time the state retained extensive powers to expropriate and requisition land to further state economic plans.²⁴⁹ As the market reforms gained momentum, pressure mounted to curtail eminent domain powers and increase private land rights.²⁵⁰ The CCP began searching for ways to create property rights that might accommodate market forces without abandoning their ideological commitment to state and collective land ownership.²⁵¹ This Article argues that the CCP used statutory layering to reconcile these competing objectives.

E. Incremental Changes through Constitutional Layering

1. Constitutional Layering and Strengthening Private Land Rights.

During the early reform period, foreign investment generated demand for transferable land use rights that could marketize land.²⁵² To encourage foreign investment, legislation enacted in 1987 recognized the transfer of land use rights in the Shenzhen Special Economic Zone.²⁵³ This provincial sub-law violated Article 10 of the 1982 Chinese Constitution, which at the time stated that “no organization or individual may appropriate, buy, sell, or unlawfully transfer land.”²⁵⁴ The following year, in 1988, the People’s Congress amended the 1982 Constitution and the 1986 Land Administration Law to recognize the transferability of urban but not rural land.²⁵⁵ This fundamental reform did not displace the core socialist trope of state and collective land ownership.²⁵⁶

²⁴⁷ See Edmund Malesky & Jonathan London, *The Political Economy of Development in China and Vietnam*, 17 ANN. REV. OF POL. SCI. 395, 408–11 (2014). See also Fairbank, *supra* note 218, at 406–10.

²⁴⁸ See Peng, *supra* note 24, at 160–69; Jiao & Yang, *supra* note 89, at 129–30.

²⁴⁹ Peng, *supra* note 24, at 169–75.

²⁵⁰ Jiao & Yang, *supra* note 89, at 130–32; Donald Clarke, *China’s Stealth Urban Land Revolution Citation*, 62(2) AM. J. COMPAR. L. 323, 328–29 (2014).

²⁵¹ Jiao & Yang, *supra* note 89, at 130–32; Clarke *supra* note 250, at 328–29.

²⁵² See Jieming Zhu & De Tong, *Land Reform from Below: Institutional Change Driven by Confrontation and Negotiation*, 8 J. OF URB. AFF. 1, 5–10 (2022); Shitong Qiao, *The Politics of Chinese Land: Partial Reform, Vested Interests, and Small Property*, 29 COLUM. J. ASIAN L. 70, 80–85 (2015).

²⁵³ Qiao, *supra* note 252, at 82–84.

²⁵⁴ *Id.* at 82–84.

²⁵⁵ See Jiao & Yang, *supra* note 89, at 131; Clarke, *supra* note 250, at 329–33.

²⁵⁶ See Peng, *supra* note 24, at 214–18, 222; Jiao & Yang, *supra* note 89, at 131.

Reflecting the political sensitivities concerning rural land, it took another thirty years before the CCP was prepared to countenance nationwide markets for rural land.²⁵⁷ During the 1980s and 1990s, southern cities such as Guangzhou and Shenzhen rapidly expanded into the surrounding rural land.²⁵⁸ Unable to legally rent or transfer rural land, village authorities developed informal land markets to accommodate demand for housing.²⁵⁹ Large areas in these cities developed through informal markets that converted collectively owned rural land into informal titles for residential houses and apartments.²⁶⁰

Initially, authorities tacitly accepted the informal land markets because they provided affordable housing.²⁶¹ As the informal areas increased in size, local governments wanted to impose town planning and construction controls and enacted a series of sub-laws that incrementally legalized the transfer of rural land.²⁶² For example, in 2005, the Guangdong Provincial Government promulgated a decree that enabled village authorities to lease and sell rural land used for non-agricultural purposes, such as housing.²⁶³ In 2018, the Shenzhen City Government issued the Shenzhen Urban Village (Old Village) Renovation Master Plan (2018–2025), which extended legal recognition to informal titles derived from rural land.²⁶⁴ Two years later, in 2020, the central government amended the 1986 Land Administration Law to legally recognize the transfer of rural land.²⁶⁵ Through incremental legislative reforms, constitutional layering transformed rural land from a collectively owned socialist commodity into a transferable marketable commodity.

2. Constitutional Layering and Limits to Eminent Domain Powers.

In tandem with legislative changes to land rights, constitutional layering has gradually limited eminent domain powers in China. In 1982, the Standing Committee of the National Party Congress issued a resolution entitled “Requisition of Land by the State for Construction” that empowered local and national governments to requisition and convert agricultural land for any purpose

²⁵⁷ See generally Zhu and Tong, *supra* note 252, at 10–12; Qiao, *supra* note 252, at 70, 90–108.

²⁵⁸ Qiao, *supra* note 252, at 105–09.

²⁵⁹ Peng, *supra* note 24, at 191–96.

²⁶⁰ Qiao, *supra* note 252, at 105.

²⁶¹ See Zhu & Tong, *supra* note 253, at 5–6.

²⁶² See *id.* at 6–8; Qiao, *supra* note 252, at 105–09.

²⁶³ See Zhu & Tong, *supra* note 252, at 6–8; Qiao, *supra* note 252, at 105–11.

²⁶⁴ *Id.*; see also Jiao & Yang, *supra* note 89, at 136.

²⁶⁵ See Zhu & Tong, *supra* note 252, at 10–12.

defined by the state.²⁶⁶ In what Annette Kim termed “fiscal socialism,”²⁶⁷ local governments in China used their requisitioning powers to acquire inexpensive rural land that could be profitably developed into infrastructure projects and housing.²⁶⁸ The 1982 Constitution was amended in 2004 to allow the state, “in the public interest and in accordance with the provisions of law, to expropriate or requisition land for its use.”²⁶⁹ It is estimated that land expropriation by local governments has dispossessed over seventy million farmers.²⁷⁰

As the Chinese land boom intensified during the 1990s and 2000s, the incentive for local governments to requisition rural land for industrial and commercial development increased.²⁷¹ Revisions to the Land Administration Law enacted in 2004 were intended to clarify the meaning of taking land in the public interest, but they did little to prevent wide-spread abuses by local governments.²⁷²

Responding to mass protests by farmers, in 2011, the government enacted the Regulation on Expropriation and Compensation (REC) to control unauthorized land taking.²⁷³ Article 8 of the REC established broad public interest categories such as infrastructure and public utilities, as well as ambiguous categories such as cultural projects, science and technology parks.

As protests by dispossessed farmers continued, the government gradually tightened controls over eminent domain powers.²⁷⁴ For example, Article 45 of the 1986 Land Administration Law (LAL) was amended in 2019 to narrowly define the “public interest” to projects required for military and diplomacy; infrastructure construction organized by the government; welfare undertakings; and the alleviation of poverty and relocation of the poor.²⁷⁵ This amendment prevented local governments from compulsorily acquiring land for commercial developments such as hotels and shopping malls.²⁷⁶

²⁶⁶ See Qiao, *supra* note 253, at 77.

²⁶⁷ See Annette M. Kim, *Talking Back: The Role of Narrative in Vietnam’s Recent Land Compensation Changes*, 48 URB. STUD. 493, 494–95 (2011).

²⁶⁸ See Peng, *supra* note 24, at 227–33; Wanlin Lin, *Garnering Sympathy: Moral Appeals and Land Bargaining under Autocracy*, 18 J. INST. ECON. 767, 769 (2022).

²⁶⁹ Chao Zhou & Dan Banik, *Access to Justice and Social Unrest in China’s Countryside: Disputes on Land Acquisition and Compensation*, 6 HAGUE J. ON THE RULE OF LAW 254, 257 (2014).

²⁷⁰ There are few available accurate statistics detailing the expropriation of farmland, but see generally Peng, *supra* note 24, at 7–9.

²⁷¹ See Qiao, *supra* note 253, at 73, 73 n.9.

²⁷² See Jiao & Yang, *supra* note 89, at 132–33; see also Heurlin, *supra* note 23, at 406–08 (discussing illegal land takings in China).

²⁷³ See Jiao & Yang, *supra* note 89 at, 132–33. For a discussion about land disputes in China, see generally Fu, *supra* note 16, at 180–90.

²⁷⁴ See Lin, *supra* note 268, at 768–69, 779–82.

²⁷⁵ See Jiao & Yang, *supra* note 89, at 136–37. Also see Chen, *supra* note 83, at 73–79.

²⁷⁶ See Jiao & Yang, *supra* note 89, at 136–37.

Constitutional layering has also incrementally changed the method of calculating compensation for dispossessed farmers.²⁷⁷ Article 10 of the 1982 Constitution was originally silent on the question of compensation.²⁷⁸ Commencing with the 1982 Land Acquisition Measures for National Construction Regulations, a series of statutes recognized that governments should compensate land expropriation.²⁷⁹ During the 1990s, local governments in the coastal provinces in China experimented with different approaches to compensation, such as monetary compensation and resettlement.²⁸⁰ Eventually, in 2004, Article 10 of the 1982 Constitution was amended to require the payment of compensation for land expropriation.²⁸¹

Because Article 10 did not elaborate the standards governing compensation, it was left to constitutional layering to fill the regulatory vacuum.²⁸² For example, Article 2 of the 2011 Regulation on Expropriation of Building on State Land stipulated that the expropriation of urban land required a fair standard of compensation.²⁸³ Article 19 of the Regulations went on to state that fair compensation must correspond to the market value of comparable real estate.²⁸⁴ It was not until LAL was amended in 2019 that fair and reasonable compensation was extended to the expropriation of rural land.²⁸⁵

VII. CONSTITUTIONAL CONVERSION AND EMINENT DOMAIN

Chinese courts have been reluctant to interpret the meaning of eminent domain powers.²⁸⁶ Studies have found that courts are prepared to review due process issues, such as procedural compliance, but are unwilling to interpret substantive issues, such as the public interest and compensation standards.²⁸⁷

²⁷⁷ *Id.* at 136–42.

²⁷⁸ See Zhu Qian, *Land acquisition compensation in post-reform China: Evolution, structure and challenges in Hangzhou*, 46 LAND USE POL'Y 250, 250–51 (2015). See also Chen, *supra* note 83, at 71–73.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See Jiao & Yang, *supra* note 89, at 137; See generally Peng, *supra* note 24, at 253–64.

²⁸² See Jiao & Yang, *supra* note 89, at 140.

²⁸³ *Id.* at 141.

²⁸⁴ See Chen, *supra* note 83, at 79–80.

²⁸⁵ Land Administration Law of the People's Republic of China, art. 48 (1986) [hereinafter Land Administration Law]; Civil Code of the People's Republic of China, art. 243 (2021) [hereinafter Civil Code]; See also Jiao & Yang, *supra* note 89, at 137–38.

²⁸⁶ See Mao & Qiao, *supra* note 90, at 830–34, 841–43. See also Jiao and Yang, *supra* note 89 at 134–36.

²⁸⁷ See Mao & Qiao, *supra* note 90, at 830–34, 852 (empirical research showed the success rate for due process litigation was 27.22%, while the rate for public interest litigation was 0.38% and compensation litigation was 3.30%).

Further limiting the relevance of courts, litigation rates in China are low.²⁸⁸ As Fu Hualing observed, landholders “. . . cannot trust the courts for remedies because there is no judicial independence.”²⁸⁹

With courts unwilling or unable to review the merits of expropriation, dispossessed land holders have petitioned local government officials for redress.²⁹⁰ It is estimated that approximately fifty percent of China’s land petition cases are related to government land takings.²⁹¹ Studies suggest that coordinated public demonstrations associated with petitions sometimes increase the chance of changing land taking decisions.²⁹² For example, landholders in “nail house” protests lock themselves into their homes to prevent eviction.²⁹³ A prominent illustration of this protest method occurred in Chongqing in 2007 when landholders resisted bulldozers working to demolish their home.²⁹⁴ After weeks of protest that attracted widespread media attention, they gained more compensation, but were ultimately unable to prevent eviction.²⁹⁵

In another land protest in 2011, villagers in Wukan forced the entire local government out of the village.²⁹⁶ The protests erupted after local officials sold village land to real estate developers without properly compensating the villagers. These protests occurred before the LAL was amended in 2019 to extend fair and reasonable compensation to the expropriation of rural land.²⁹⁷ Despite the legal uncertainty regarding compensation, the mass protests had an immediate impact as the Guangdong Provincial Government dismissed the village officials, opening the way for newly elected leaders to manage the land more equitably.²⁹⁸

Landholders in China turn to public protest because they cannot trust the law to protect their property rights.²⁹⁹ In circumventing the legal system, protesters sometimes extracted concessions from local officials, such as increased

²⁸⁸ *Id.*

²⁸⁹ Fu, *supra* note 15, at 192.

²⁹⁰ See Fu, *supra* note 15, at 178–180; Peng, *supra* note 24, at 253–61.

²⁹¹ Heurlin, *supra* note 23, at 404–46 (arguing that illegal land seizures are the most commonly reported grievance in petitions).

²⁹² See Eva Pils, *Ownership in Urbanizing China*, in *RESOLVING LAND DISPUTES IN EAST ASIA: EXPLORING THE LIMITS OF THE LAW* 165, 165–72, 194, 202–03 (John Gillespie & Fu Hualing eds., 2014). See also Fu, *supra* note 15, at 190–93.

²⁹³ See Lin, *supra* note 268, at 772–76; Steve Hess, *Nail-Houses, Land Rights, and Frames of Injustice on China's Protest Landscape*, 50 *ASIAN SURVEY* 908, 908–09, 920–25 (2010).

²⁹⁴ See Lin, *supra* note 268, at 777–78; Hess, *supra* note 294, at 920–23.

²⁹⁵ *Id.*

²⁹⁶ See Fu, *supra* note 15, at 180–82; Pils, *supra* note 292, at 164–65.

²⁹⁷ Land Administration Law art. 48 (1986), *supra* note 285; Civil Code art. 243 (2021), *supra* note 285; see generally Jiao and Yang, *supra* note 89, at 137–38.

²⁹⁸ Fu, *supra* note 15, at 185–90.

²⁹⁹ See generally Fu, *supra* note 15, at 177–80; Pils, *supra* note 292 at 164–203.

compensation payments, but were rarely successful in cancelling condemnation orders.³⁰⁰ Public protests at the local level have produced extralegal, ad hoc administrative responses that left the legal and policy settings unchanged.³⁰¹ In contrast, the central government has responded to widespread social unrest by enacting legislation that incrementally strengthened private property rights and constrained eminent domain powers.³⁰²

VIII. UNDERSTANDING CONSTITUTIONAL CHANGE: ANALYSIS

A. Critical Junctures and Path Dependencies

A central claim in historical institutional theory is that although critical junctures open “windows of opportunity” for new constitutional orders, over time the new orders become embedded and difficult to change, creating path dependencies.³⁰³ Consistent with this theory, critical junctures in Japan, Indonesia, and China triggered new constitutional orders that rebalanced property rights and eminent domain powers. Once stability returned to these countries, the new constitutional orders proved relatively inflexible and path dependent.

For example, the Meiji reforms in Japan during the late nineteenth century embedded the background idea that strong property rights were necessary for rapid economic development.³⁰⁴ This epistemic belief was further entrenched by a later critical juncture that followed Japan’s defeat during World War II. Suggesting path dependency, during Japan’s post-war economic boom (1950–1990), the government promoted property rights and rarely exercised eminent domain powers. Beginning in the 1970s and then gaining impetus after the end of the bubble economy in 1990, civil society actors eventually compelled a reluctant government to revise the background beliefs informing the constitutional order. Bottom-up pressure gradually eroded liberal land policies and opened space in the constitutional order for social democratic land policies.

A similar pattern of enduring constitutional principles is discernable in Indonesia.³⁰⁵ Following the anticolonial critical juncture in 1945, a socialist belief in strong eminent domain powers and weak property rights became embedded in the constitutional order. It was not until the *reformasi* movement in 1998 challenged socialist land policies that the government limited eminent domain powers over

³⁰⁰ See generally Lin, *supra* note 268, at 768–69, 779–82; Fu, *supra* note 15, at 177–80; Pils, *supra* note 292, at 164–203.

³⁰¹ See generally Lin, *supra* note 268, at 767, 768–82.

³⁰² See *supra* Part V.E. for case detailed studies. See also Lin, *supra* note 268, at 768–69, 779–82 (2022); Jiao & Yang, *supra* 89, at 133, 136.

³⁰³ See Broschek *supra* note 4, at 540, 542–43; see generally Mahoney, *supra* note 46, at 6–7.

³⁰⁴ See *supra* Part IV and accompanying text for case studies to support this discussion.

³⁰⁵ See *supra* Part V and accompanying text for case studies to support this discussion.

customary land rights. Suggesting the path dependency of socialist land policies, the *reformasi* movement did not entirely displace government support for strong eminent domain powers and the struggle to defend customary land rights from state encroachment continues.

During the 1950s, the revolutionary critical juncture in China displaced the pre-existing constitutional order by abolishing private rights in land and giving the state sweeping expropriation powers.³⁰⁶ Socialist land policies encountered a critical juncture during the late 1970s when the CCP introduced mixed-market reforms. Rather than entirely displacing socialist land policies, mixed-market reforms recognized private rights to use but not own land, while constraining eminent domain powers. Suggesting path dependency, the constitutional order continues to resolutely advocate socialist land policies. For example, incremental increases in land-tenure rights have not disrupted constitutional support for state and collective land ownership. Further indicating path dependency, although land expropriation now attracts market compensation, eminent domain powers are still considered administrative actions that landholders must obey.³⁰⁷

B. Using Constitutional Layering and Conversion to Bypass Formal Constitutional Change

The procedures governing formal constitutional amendment in the countries studied were, to varying degrees, designed to prevent frequent change.³⁰⁸ Formal constitutional amendments require support from legislatures, while some countries additionally require majority votes in referendums.³⁰⁹ For constitutional amendments to succeed, reformers need to muster broad-based political support in legislatures and as well as popular support where referendums are required.³¹⁰ Such constitutional hurdles give political actors multiple opportunities to block change, forcing reformers to look beyond formal constitutional amendments for ways to change the constitutional order.³¹¹

³⁰⁶ See *supra* Part VI and accompanying text for case studies to support this discussion.

³⁰⁷ See Peng, *supra* note 24, at 237–38; cf. Clarke, *supra* note 250, at 335–45. In contrast, expropriation in social democratic land policy involves a special sacrifice on the part of land holders.

³⁰⁸ See *supra* Part VI.B and accompanying text for specifics about constitutional amendment processes.

³⁰⁹ For example, constitutional amendments in China require a two-thirds majority vote in the National People's Congress. See XIANFA art. 64 (1982) (China). Constitutional amendments in Indonesia require a simple majority in the MPR. See INDONESIA CONST. art. 3. Constitutional amendments in Japan require a super majority vote of two-thirds in both houses of the Diet and in addition a majority vote in a public referendum. See NIHONKOKU KENPO [KENPO] [Constitution], art. 96 (Japan).

³¹⁰ See generally CHRISTOPHER HEURLIN, RESPONSIVE AUTHORITARIANISM: LAND, PROTESTS AND POLICY MAKING 19–20 (2016).

³¹¹ *Id.* (discussing institutional veto players whose agreement is required to change government policies).

In a core finding, this Article suggests that reformers can bypass formal constitutional amendments by employing implicit modes of change such as layering, conversion, and drift.³¹² The findings show that the rules governing legislative reform (constitutional layering), and judicial and bureaucratic interpretation (constitutional conversion), were often comparatively flexible in the countries studied. This regulatory malleability gave reformers opportunities to change the meaning and application of eminent domain while avoiding the political impediments associated with formal constitutional change.

1. Changing Constitutional Orders Through Layering.

Political and civil society groups discussed in the case studies used constitutional layering to circumvent formal constraints to constitutional change. Constitutional layering can progressively change land policies that were entrenched during critical junctures. Layering changed the constitutional order by elaborating constitutional rules and principles in more concrete forms, and by filling in the gaps by creating rules and processes that are absent in the formal constitutional order.

Take, for example, changes in land policies in Japan. The 1946 Japanese Constitution entrenched liberal land policies that favored strong property rights and weak eminent domain powers. Without formally changing Article 29 of the 1946 Constitution, successive legislative layers have gradually eroded the strong expression of property rights by supporting eminent domain and urban planning powers. Layering has broadened the public interest grounds for compulsory acquisition to include taking land for private economic developments as well as the acquisition of “unused land.”³¹³ It has changed the constitutional order by promoting background ideas associated with social democratic land policies, especially the notion that property has a social function.

It would have been difficult to effect this change through formal constitutional amendments.³¹⁴ According to Article 96 of the 1946 Constitution, amendments require a supermajority of two-thirds of both houses of the Diet, as well as a simple majority in a popular referendum. It has proved difficult in practice to muster political support for constitutional change in the Diet, and the public is generally unreceptive to constitutional change.³¹⁵

Another hurdle facing formal constitutional amendment is the lack of a political appetite in Japan to publicly champion a shift from liberal to social

³¹² See Broschek, *supra* note 4, at 554.

³¹³ See Kadomatsu, *supra* note 119, at 74–82.

³¹⁴ See Matsui, *supra* note 97, at 258–65 (2011); Dixon & Baldwin, *supra* note 43 (discussing the difficulty of changing the Japanese Constitution).

³¹⁵ See Nobuhisa Ishizuka, *Constitutional Reform in Japan*, 33 COLUM. J. ASIAN L. 5, 25–27 (2019); Matsui, *supra* note 97, at 263–65.

democratic land policies. From the end of World War II, one political party, the LDP, has ruled almost continuously.³¹⁶ As a pro-development party, the LDP was reluctant to weaken the strong expression of property rights in the 1946 Constitution.³¹⁷ Eventually, public pressure compelled the party to strengthen eminent domain and urban planning powers. Unwilling to invest the political capital required to formally amend the Constitution, the LDP used constitutional layering to attach a new policy framework onto the formal constitution.³¹⁸ Legislation increased eminent domain powers and urban planning powers without publicly declaring a change to the 1946 Constitution.

Formal constitutional change is less constrained in Indonesia than in Japan. In contrast to the 1946 Japanese Constitution, which has remained unchanged for over seventy years,³¹⁹ the 1945 Indonesian Constitution has undergone numerous revisions.³²⁰ Article 3 of the 1945 Indonesian Constitution gives the MPR powers to amend the constitution through a simple majority vote. Despite the comparative ease of formal constitutional change, amendments have generally occurred during the critical junctures that reshaped the Indonesian polity.³²¹ For example, the last round of amendments in 1999, 2000, and 2002 followed the *reformasi* critical juncture that triggered profound democratic and civil society reforms.³²²

As previously discussed, successive post-Soeharto governments have attempted to strengthen eminent domain powers over the *adat* land rights enacted in the 2000 constitutional amendments.³²³ Although the post-Soeharto governments have enjoyed strong majorities in the MPR, the broad social consensus that supported *reformasi* has so far prevented the government from amending the Constitution to strengthen eminent domain powers and weaken *adat* land rights.³²⁴

While politically constrained from formally amending the Constitution, the post-Soeharto governments have used constitutional layering to advance development projects and gain control over *adat* land. For example, the 2016 Law

³¹⁶ See Sorensen, *supra* note 101, at 480; Matsui, *supra* note 97, at 258–65.

³¹⁷ See Sorensen, *supra* note 101, at 480.

³¹⁸ See *supra* Part III for more details. See also Sorensen, *supra* note 101, at 486–68 (argues that a combination of strong veto players and a lack of political discretion only allowed incremental change to property rights).

³¹⁹ See Ishizuka, *supra* note 315, at 5.

³²⁰ See Butt & Lindsey, *supra* note 32, at 3–9.

³²¹ *Id.*

³²² See Butt & Lindsey, *supra* note 169, at 19–23.

³²³ See Butt & Lindsey, *supra* note 32, at 136–37.

³²⁴ See Davidson, *supra* note 181, at 177–80. See also Marcus Mietzner, *Sources of Resistance to Democratic Decline: Indonesian Civil Society and its Trials*, 28(1) DEMOCRATIZATION 161, 161–62 (2021).

no. 6 on Villages established restrictive processes that limited access to *adat* land claims.³²⁵ Further constraints appeared in laws that subordinated *adat* land rights to the national interest and limited land claims to applicants who could prove they belonged to traditional *adat* communities.³²⁶ At the same time, statutes were enacted that strengthened eminent domain rights. For example, the 2012 Law no. 2 on Land Acquisition for Development expanded the constitutional principle of eminent domain.³²⁷ What this suggests is that although the government was politically unable to amend the Constitution, it sought to change the constitutional order through constitutional layering.

Formal constitutional change is comparatively easy in China.³²⁸ Article 64 of the 1982 Chinese Constitution requires a two-thirds majority of the National People's Congress (NPC) to amend the constitution. As the CCP maintains a monopoly over political power, marshalling supermajority votes in the NPC is rarely an obstacle to constitutional change.³²⁹ Although there are few formal barriers to constitutional change, there is a political perception that frequent constitutional change signals instability and is consequently undesirable.³³⁰

The Chinese Government has used constitutional layering to reconcile constitutional principles concerning eminent domain with rapidly changing social and economic conditions.³³¹ Yan Lin and Tom Ginsburg have referred to this process as the “invisible” mechanism of constitutional change in China.³³² In some cases, constitutional layering has preceded formal constitutional change. For example, legislation in Shenzhen during the late 1980s recognized private land transfers before private land markets were constitutionally legalized.³³³ In other cases, layering has injected new meaning into the terse wording in formal constitutional provisions. For example, although constitutional amendments in

³²⁵ See Butt & Lindsey, *supra* note 32, at 137.

³²⁶ See, e.g., Art. 9 Law no. 18 *supra* note 195; Art 62(1) Law no. 32 on Environmental Protection 2009 (Indon.).

³²⁷ See Davidson, *supra* note 181, at 169–70. See also Butt & Lindsey, *supra* note 32, at 148–50.

³²⁸ Since its enactment in 1982 the Chinese Constitution has been amended five times. See Bui Ngoc Son, *supra* note 32, at 1, 23.

³²⁹ For example, the constitutional amendments in 2018 that abolished presidential term limits passed “with essentially no opposition at all.” Mila Versteeg et. al., *The Law and Politics of Presidential Term Limit Evasion*, 120 COLUM. L. REV. 173, 207–08 (2020).

³³⁰ China's Constitution has only been amended five times since 1982. Bui Ngoc Son argues that each change corresponds to shifts in policy settings. See Bui Ngoc Son, *supra* note 32, at 1, 23. See also Yan Lin, *Constitutional Evolution Through Legislation: The Quiet Transformation of China's Constitution*, 13 INT'L J. CON. L. 61, 81–82 (2015).

³³¹ *Id.* at 65–66, 81–83 (discussing the importance of using statutes to interpret and expand the constitution in China).

³³² See generally Yan Lin & Tom Ginsburg, *Constitutional Interpretation in Lawmaking: China's Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMPAR. L. 467 (2015).

³³³ Qiao, *supra* note 252, at 82–84. See also *supra* Part V.E for a discussion to support this argument.

1988 recognized land transfers, they were silent about the rights attached to private land tenure.³³⁴ Over the following decades legislators gradually responded to the demands of an emerging propertied class by adding statutory layers that eventually created a facsimile of private land ownership in urban areas.³³⁵

Constitutional layering has also weakened eminent domain powers. For example, legislation has gradually limited the grounds for public interest land takings³³⁶ while increasing compensation payments.³³⁷ Without displacing the socialist land policies announced in the 1982 Chinese Constitution, constitutional layering has brought the constitutional order closer to social democratic land policies.

C. Changing Constitutional Orders through Conversion

Constitutional conversion can incrementally change constitutional orders by reinterpreting the meaning of constitutional principles and rules.³³⁸ In contrast to liberal democracies, where constitutional courts often assume a central role in interpreting constitutions,³³⁹ active constitutional courts are comparatively rare in East Asia.³⁴⁰ This study suggests that constitutional conversion in countries without active constitutional courts primarily takes place in the discretionary powers exercised by government officials.

Japan lacks an active constitutional court,³⁴¹ and China does not have a constitutional court, leaving Indonesia as one of the few East Asian countries with a court that is prepared to creatively interpret constitutional principles.³⁴² Further limiting the role of courts, the countries studied have civil law systems where judicial decisions by superior courts are treated as persuasive rather than the binding authority found in common law jurisdictions.³⁴³

³³⁴ *Id.*

³³⁵ See Jiao & Yang, *supra* note 89, at 130–32; Clarke, *supra* note 251, at 328–29.

³³⁶ See Jiao & Yang, *supra* note 89, at 136–37; see also Chen, *supra* note 83, at 73–79.

³³⁷ See Jiao & Yang, *supra* note 89, at 136–42.

³³⁸ See Broschek, *supra* note 4, at 547–49; Streeck & Thelen, *supra* note 5, at 26–27.

³³⁹ See generally, Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L., ECON., & ORG. 587 (2013).

³⁴⁰ See generally Tom Ginsburg, *Constitutional Courts in East Asia*, in COMPARATIVE CONSTITUTIONAL LAW IN ASIA COMPARATIVE CONSTITUTIONAL LAW 47 (Asia Rosalind Dixon & Tom Ginsburg eds., 2014) (arguing that Taiwan, South Korea, Indonesia, and to a lesser extent Thailand and Mongolia are the few East Asian countries with active constitutional courts).

³⁴¹ See generally Law, *supra* note 32, at 1545.

³⁴² See generally Ginsburg, *supra* note 340, at 47.

³⁴³ See generally Sorensen, *supra* note 138, at 472 (discussing civil law courts in Japan); Butt & Lindsey, *supra* note 32, at 73–76 (discussing civil courts in Indonesia); RANDALL PEERENBOOM, *THE LONG MARCH TO THE RULE OF LAW IN CHINA* 281, 286–88 (2002) (discussing civil law courts in China).

As previously discussed, the Indonesian Constitutional Court has played an important role in protecting *adat* land rights from government attempts to reassert eminent domain powers.³⁴⁴ The Court deemphasized the *integralist* origins of the 1945 Constitution—a doctrine that subordinated private land rights to eminent domain powers.³⁴⁵ To counter *integralism*, the Court emphasized customary land policy introduced in constitutional amendments enacted during 2000. This policy recognized social, cultural, and spiritual connections to *adat* land.³⁴⁶ More importantly, it treated *adat* land rights as natural and given, and thus antecedent to, and not derived from, the state.³⁴⁷ In applying customary land policy, the Court struck down government legislation that claimed eminent domain powers over *adat* land rights.³⁴⁸

Bureaucratic discretion provides another channel for constitutional conversion.³⁴⁹ As the case studies show, constitutional and statutory rules governing eminent domain are often vague and do not specify all possible circumstances, opening opportunities for interpretation by enforcing agents. Where the rules allow a wide range of possible interpretations, eminent domain powers can change without constitutional layering or judicial interpretation, simply through changes in the way officials interpret and implement eminent domain policies.³⁵⁰ This type of constitutional conversion was evident in each country studied.

Local government officials in Japan rely on negotiation and consensus to convince landowners to accept compensation payments for compulsory land takings.³⁵¹ In comparing government administration in the U.S. and Japan, Robert Kagan observed that “[r]egulatory programs in Japan, in contrast, have a reputation for relying on more informal, non-legalistic ways of exercising state authority.”³⁵² Bureaucratic discretion is manifest in the flexible approach taken by Japanese officials in enforcing eminent domain powers.³⁵³

³⁴⁴ See Bedner, *supra* note 177, at 78–89.

³⁴⁵ See Dhialulhaq & Berenschot, *supra* note 25, at 2; Butt & Lindsey, *supra* note 32, at 4–6.

³⁴⁶ See generally Dannenmaier, *supra* note 62, at 55.

³⁴⁷ See Woodman, *supra* note 71, at 10–21; Butt & Lindsey, *supra* note 32, at 136–42.

³⁴⁸ See *supra* Part IV.E for a discussion to support this argument.

³⁴⁹ See Mahoney & Thelen, *supra* note 6, at 18.

³⁵⁰ See generally Andre Sorensen, *Taking Path Dependence Seriously: An Historical Institutionalist Research Agenda in Planning History*, 30(1) PLANNING PERSPECTIVES, 17, 29–31 (2015) (discussing the role official discretion plays in enabling incremental change of policies).

³⁵¹ See Port & McAllin, *supra* note 100, at 617.

³⁵² See Kagan, *supra* note 148, at 228.

³⁵³ See Port & McAllin, *supra* note 100, at 607.

Indonesian officials also exercise broad discretionary powers over eminent domain.³⁵⁴ During negotiations with landholders, officials determine whether eminent domain powers should prevail over *adat* land claims and when condemnation occurs, officials establish the appropriate standards of compensation.³⁵⁵ Through a combination of interpretation and flexible enforcement, officials add new meanings to eminent domain powers.

Similarly, Chinese officials interpret eminent domain powers. As previously discussed, landholders routinely use petitioning and public protest to protect their property from expropriation.³⁵⁶ During negotiations with landholders, officials flexibly apply eminent domain powers to ease social friction.³⁵⁷ Negotiated agreements sometimes adjust compensation payments and prevent the illegal exercise of condemnation powers.³⁵⁸ Through this process of constitutional conversion, officials reinterpret the meaning of eminent domain powers on a case-by-case basis.

What the case studies suggest is that informal behind-the-scenes interactions between officials and landholders reinterpreted eminent domain powers. Officials adjusted eminent domain standards and procedures to suit local conditions without formal constitutional or legislative changes that would have attracted public scrutiny. They can sidestep the strong policy support at central levels for particular property rights and eminent domain settings and craft outcomes that are sensitive to local contexts. Local officials use their discretionary powers to paper over cracks in the presumption of national unity, uniformity, and homogeneity that underpins notions of constitutionalism.³⁵⁹

To summarize the findings, layering and conversion have repurposed constitutional rules and principles entrenched during critical junctures and reapplied them to new situations. Each new statutory layer and bureaucratic/judicial decision was a composite of prior norms and epistemic assumptions about the appropriate way to regulate eminent domain. Constitutional layering and conversion have not entirely displaced land policies

³⁵⁴ See, e.g., Afrizal & Anderson, *supra* note 191, at 309–12.

³⁵⁵ See, e.g., Laurens Bakker, *Which Authority Whose Land: Access to Land in Paser East Kalimantan* 4–6, 18–20 (Leiden Univ., Working Paper 2012); Afrizal & Anderson, *supra* note 191, at 305–12.

³⁵⁶ See generally Heurlin, *supra* note 23, at 401–06; Fu, *supra* note 15, at 177–80.

³⁵⁷ See Changdong Zhang & Christopher Heurlin, *Power and Rule of Law in Rural China*, in *RESOLVING LAND DISPUTES IN EAST ASIA* 248, 264–69 (Hualing Fu & John Gillespie eds., 2014) (discusses the use of mediation and negotiation as methods of maintaining stability). See also Fu, *supra* note 15, at 177–80.

³⁵⁸ See Heurlin, *supra* note 23, at 406–08.

³⁵⁹ For a discussion about the assumptions underlying constitutionalism, see Boaventura de Sousa Santos, Sara Araújo & Orlando Aragón Andrade, *The Constitution, the State, the Law and the Epistemologies of the South*, in *DECOLONIZING CONSTITUTIONALISM: BEYOND FALSE OR IMPOSSIBLE PROMISES* 5–8 (Boaventura de Sousa Santos et al. eds., 2023).

adopted during critical junctures, because officials and judges implementing eminent domain powers still reflexively return to these path-dependent policies. Although past land policies have guided developments in the future, over time new regulatory layers have fused into a repurposed version of eminent domain.

D. Authoritarianism and Constitutional Change

Studies about land taking in East Asia often emphasize authoritarian governance and focus on power asymmetries between governments and landholders.³⁶⁰ Changes to eminent domain regimes are then attributed to top-down political processes rather than to bottom-up responses by civil society actors.³⁶¹ This study implies that changes in eminent domain powers cannot be entirely ascribed to elite domination. Narratives of discontent are part of the process that negotiates and shapes contests over property rights and eminent domain.

Changes in constitutional property rights and eminent domain powers in Japan and Indonesia indicate that authoritarian polities are less responsive to social pressure than democratic polities. During the authoritarian periods in these countries, the constitutional order governing eminent domain remained largely unchanged. For example, strong property rights went unchallenged in the authoritarian polity that ruled before Japan's defeat in World War II.³⁶² In the postwar period, the public initially accepted strong property rights as the cost of rapid economic development. Over time this consensus eroded as mounting environmental harm and unplanned urban development galvanized social protest. Eventually civil society actors persuaded the ruling LDP to strengthen eminent domain powers and recognize that land possesses a social function.

In Indonesia, the authoritarian New Order Government (1965–1998) ignored demands for *adat* land rights and maintained strong eminent domain powers. Change did not occur until the critical juncture in 1998 unleashed civil society actors and pathed the way for an activist constitutional court.³⁶³ The post-Soeharto governments have been less authoritarian³⁶⁴ and consequently more

³⁶⁰ This approach is especially evident in studies about China. See, e.g., Zhong Sheng, *Rural Land Consolidation in China*, in CHINA'S GREAT URBANIZATION, 191, 197–99 (Zheng Yongnian et al. eds., 2017); Lin, *supra* note 268, at 767–68.

³⁶¹ See generally Upham, *supra* note 98, at 41–42. See also Tom Ginsburg & James Melton, *Does the Constitutional Amendment Rule Matter at All?: Amendment Cultures and the Challenge of Measuring Amendment Difficulty*, 13 INT'L J. OF CONST. L. 686 (2015) (arguing that most constitutional change in East Asia is attributable to elite forces).

³⁶² See *supra* Part III for a discussion to support this argument.

³⁶³ See generally Bedner and Arizona, *supra* note 175, at 416–18.

³⁶⁴ See Mietzner, *supra* note 324, at 161–62.

responsive to public claims for stronger customary land rights and limits to eminent domain powers.

It is more difficult to discern a clear relationship between authoritarianism and public influence over eminent domain powers in China. The findings show that even without the political liberalizations that occurred in Japan and Indonesia, the Chinese Government has responded to public demands for increased property rights from a resurgent urban middle class and aggrieved farmers.³⁶⁵ The government has progressively weakened eminent domain powers in favor of private land tenure rights; at the same time the political space for social organization and public discourse has remained unchanged or, according to some, has become more constrained.³⁶⁶

The findings suggest that two institutional processes have sensitized Chinese government officials to public pressure. First, officials use discretionary powers to flexibly respond to petitions and public protests concerning land takings.³⁶⁷ Regulatory flexibility encourages a fluid application of laws and government policies to avoid inflicting hardship that might generate civil unrest.³⁶⁸ It also enables officials to deny private land claims an official status, while providing latitude to decide when to suppress or tolerate land claims. While regulatory flexibility offers ad hoc solutions to land taking disputes, studies show that local officials rarely respond to land protests by changing policies and laws.³⁶⁹

Second, provincial governments have experimented with property laws and eminent domain powers to deal with local social and economic problems.³⁷⁰ For example, the Guangdong Provincial Government incrementally increased rural land use rights to ease a housing shortage during the land boom in the late 1990s and early 2000s.³⁷¹ In some instances, provincial experiments with eminent domain and property rights have been adopted into national law.

The degree of official responsiveness in China is puzzling because landholders lack the democratic structures available in Japan and Indonesia to hold the government accountable. Landholders in Japan and Indonesia can mobilize civil society organizations, publicly criticize governments, and ultimately vote them out of office. Christopher Heurlin argues that China represents a case

³⁶⁵ See generally Heurlin, *supra* note 310, at 1–4; Pils, *supra* note 292, at 141–50.

³⁶⁶ See generally Pils, *supra* note 88, at 897–902 (discusses the illiberal methods used by the state in land takings).

³⁶⁷ See generally Heurlin, *supra* note 310, at 2–4 (argues that Chinese officials respond to protests).

³⁶⁸ See Lin, *supra* note 268, at 767–69.

³⁶⁹ See *supra* part V.F. for case studies to support this argument. See also Heurlin, *supra* note 310, at 4–5.

³⁷⁰ See Qian, *supra* note 278, at 251–56.

³⁷¹ See Zhu and Tong, *supra* note 252, at 10–12; Qiao, *supra* note 252, at 105–09.

of responsive authoritarianism.³⁷² By this he means “a regime that proactively monitors citizen opposition to state policies and selectively responds with policy changes when it gauges opposition to be particularly widespread.”³⁷³ Heurlin concludes that the degree of responsiveness is greater in China than other comparable authoritarian regimes.³⁷⁴

This study found few programmatic differences in the way governments in China, Japan, and Indonesia used constitutional layering in response to social pressure. Where China differed from Japan and Indonesia related to the substantive nature of the responses. As discussed in more detail in the Conclusion, unlike Japan and Indonesia, constitutional layering and conversion in China have not fundamentally changed the land policies informing eminent domain. In another difference, arguably, the Chinese Government, more than the Japanese and Indonesian governments, uses extralegal discretionary powers to resolve land-taking disputes.³⁷⁵ For example, mediation is extensively used in China to resolve land disputes. Studies show that court-based mediation³⁷⁶ and grand mediation³⁷⁷ of land taking disputes privileges political stability over upholding legal norms. The extensive use of extralegal discretionary power to resolve land-taking disputes in China is significant, because unlike constitutional layering and judicial conversion, extralegal responses are not grounded on legal norms and, accordingly, are easily reversed when politically expedient. As Susan Whiting and Hua Shao concluded in a study about land mediation in China:

[w]hile in principle mediation by trained mediators can be conducted in the ‘shadow of the law,’ in these cases, in which the mediators were village cadres and local government officials tasked with maintain political stability, law does not appear to have cast a very long shadow.³⁷⁸

³⁷² See Heurlin, *supra* note 310, at 2–3.

³⁷³ *Id.* at 2.

³⁷⁴ *Id.* at 3. Studies suggest that even in advanced industrial democracies social movements can only influence government policy making fifty to seventy percent of the time. See generally Edwin Amenta et al., *The Political Consequences of Social Movements*, 36 ANN. REV. OF SOCIO. 287, 292–95 (2010).

³⁷⁵ For a discussion about the extensive use of discretion in resolving land-taking disputes in China, see Zhang and Heurlin, *supra* note 357, at 264–69 (2014); Fu, *supra* note 15, at 185–92. Although bureaucrat discretion plays an important role in Japan and Indonesia in mediating land-taking disputes, the case studies suggest that decisions are framed within governmental structures in contrast to the extra-legal party structures evident in China. See *supra* Parts III and IV for a discussion about administrative discretion in Japan and Indonesia.

³⁷⁶ See Susan Whiting & Hua Shao, *Courts and Political Stability*, in RESOLVING LAND DISPUTES IN EAST ASIA 222, 243–46 (Hualing Fu & John Gillespie eds., 2014).

³⁷⁷ Grand mediation is an administrative rather than judicial process organized by state agencies. See Zhang & Heurlin, *supra* note 357, at 257–58.

³⁷⁸ *Supra* note 376, at 247.

IX. CONCLUSION

A core question posed in this Article is whether fundamental constitutional change requires critical junctures. For the purposes of this discussion, a fundamental constitutional change requires a paradigmatic or step change in the background ideas that influence the constitutional order.³⁷⁹ One way of distinguishing fundamental from merely adaptive changes in background ideas is to search for displacement of the land policies that inform eminent domain powers. Fundamental constitutional change is possible in these circumstances because new sets of land policies have the potential to transform the interpretation and implementation of eminent domain powers.

The findings show that critical junctures generated by revolutions and economic crises have excited fundamental constitutional changes in the countries studied. During periods of crisis, governments displaced pre-existing land policies with new approaches to property rights and eminent domain regimes. For example, the communist revolution in China replaced social democratic land policies with socialist policies that abolished private land ownership. Similarly, the newly independent Indonesian Government displaced colonial land policies with Indonesian socialist policies that subordinated customary *adat* land rights to state eminent domain powers. While in Japan, the Meiji Restoration displaced feudal land policies with liberal land policies that favored private property rights.

Moreover, the findings show that new land policies entrenched during critical junctures become path-dependent and difficult, though not impossible, to change.³⁸⁰ Over time new land policies become embedded in institutional thinking and constrain constitutional change. New land policies entrenched tacit understandings about the appropriate balance between private property rights and eminent domain powers. These new sets of background ideas informed both the formal rules structuring constitutional change and the goals and imaginaries of the various actors involved. The enduring influence of background ideas adopted during critical junctures is evident in the continued strength of property rights in Japan, eminent domain powers in Indonesia and socialist land policies in China.

If background ideas entrenched during critical junctures are path-dependent, can fundamental constitutional change occur without crisis and revolution? It turns out that constitutional layering and conversion enabled fundamental constitutional change in some, but not all, of the countries studied. In Japan and Indonesia everyday contests over eminent domain powers produced small amendments to and defections from existing practices that over time fundamentally changed the constitutional order. Successive regulatory layers

³⁷⁹ See Schmidt, *supra* note 5, at 325–27.

³⁸⁰ See generally Mahoney, *supra* note 46, at 6–7.

generated incremental change where new rules and processes reshaped the meaning of previous layers.³⁸¹

Fundamental constitutional change through layering is more evident in Japan than in Indonesia. Constitutional layering gradually shifted the background ideas informing eminent domain in Japan from liberal land policies when the Constitution was enacted in 1946 to social democratic land policies today.³⁸² A more qualified case can be made that constitutional layering generated fundamental policy changes in Indonesia. Over the previous two decades, successive governments have used legislation to displace customary land policies with socialist land policies that aim to subordinate *adat* land rights to state eminent domain powers. Layering has not yet fully realized this ideational objective because the Constitutional Court is upholding the constitutional amendments that inserted customary land policies into the 1945 Constitution.³⁸³

Evidence that constitutional layering has fundamentally changed land policies in China is more tenuous. There are grounds for arguing that constitutional layering has gradually limited eminent domain powers and strengthened private land rights. But these legislative reforms are better characterized as adaptive rather than fundamental changes to the constitutional order. Layering has ameliorated eminent domain powers to minimize social unrest without displacing the underlying socialist land policies. More specifically, layering has not changed the socialist land policies that treat expropriation as an administrative order that landholders must obey.³⁸⁴ Support for the argument that layering has adjusted without displacing social land policies is found in the behavior of courts dealing with land-taking disputes. Courts are prepared to review due process issues but do not recognize the emergence of proprietary rights in land that might challenge state eminent domain powers.³⁸⁵

It is interesting to speculate about the role China's authoritarian polity has played in limiting fundamental change to the constitutional order. Unlike the ruling parties in Japan and Indonesia, the CCP aims to monopolize ideological discourse.³⁸⁶ Socialist land policies, especially state and collective land ownership, are among the core ideological tropes used to legitimize CCP rule.³⁸⁷ Socialist policies treat land taking as an administrative process, because the state already

³⁸¹ See Merry & Coutin, *supra* note 52, at 11.

³⁸² See generally Reynolds, *supra* note 19, at 111–38.

³⁸³ See *supra* Part IV.E for a case study explaining this point.

³⁸⁴ See Peng, *supra* note 24, at 237–38. Cf. Clarke, *supra* note 250, at 335–45.

³⁸⁵ Research shows that litigants cannot use private land use rights to challenge eminent domain powers. See Mao and Qiao, *supra* note 90, at 830–34, 841–43.

³⁸⁶ See *supra* Introduction for a discussion that distinguishes China's polity from governance in Japan and Indonesia.

³⁸⁷ See Peng, *supra* note 62, at 95–105.

owns the land. Eminent domain powers in China are thus firmly tethered to party ideology—an arrangement that allows experimentation and adaptive change but prevents fundamental policy shifts.³⁸⁸

Finally, it is worth reflecting on the utility of historical institutionalist theory in generating insights into constitutional change. The theory enables distanced and aggregated analysis about constitutional change over long temporal spans. It not only directs our attention to the inflection points where new ideas dramatically transform constitutional orders, it also sheds light on the subtle incremental changes created by layering and conversion. It directs our attention to the contests over the background ideas that inform constitutional orders, as well as the bottom-up social pressures that generate slow-moving processes of incremental change.

From this perspective, the appearance of uniformity, immutability, and coherence suggested by formal constitutional theory begins to unravel.³⁸⁹ Historical institutionalism challenges the fictionalized portrayals in constitutions of social inclusion, homogeneity, and representation. Far from being monolithic and homogeneous, historical institutional analysis depicts constitutional orders as multi-dimensional, protean systems comprising regulatory layers that have different historical origins that often embody incompatible logics and epistemic assumptions.

A shortcoming with historical institutionalist theory is that it lacks the analytical tools required to explore the dialogical interactions between state and non-state actors that generate much constitutional change. The findings in this study provide glimpses of the interactive process, by and through which social actors communicate new ideas to regulators.³⁹⁰ This discourse appears to influence both the range of possible constitutional changes and the values and goals of those negotiating the changes.³⁹¹ Other studies have shown the importance of public

³⁸⁸ Bui Ngoc Son makes a similar argument where he discusses the limits to constitutional change in Vietnam that might challenge the core ideological interests of the communist party. *See* Bui Ngoc Son, *supra* note 29, at 113, 173–75.

³⁸⁹ *See* Boaventura de Sousa Santos et al., *supra* note 359, at 5–11.

³⁹⁰ For a discussion about how discourse influences regulatory change, *see generally* Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority* 108 *AM. J. OF SOCIO.* 1328, 1342–46 (2003) (using narrative theory to analyze regulatory change through discourse); John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 41 *N.Y.U. J. INT'L L. & POL.* 658, 679–88 (2008) (using systems theory to analyze regulatory change through discourse).

³⁹¹ For a discussion about how dialogue influences constitutional change, *see* Bui Ngoc Son, *supra* note 29, at 132–37.

discourse in influencing constitutional change in authoritarian polities³⁹² as well as liberal democracies.³⁹³

A recent branch of historical institutionalism, sometimes called discursive institutionalism, offers a promising framework in which to analyze how public discourse shapes constitutional orders.³⁹⁴ This theory recognizes that discourse not only represents ideas but is also an interactive process by and through which actors generate and convey ideas.³⁹⁵ It focuses attention on the discourse that shapes how governments conceptualize social problems and formulate appropriate constitutional responses.³⁹⁶ Discourse is presented as a dynamic process through which background ideas influencing the constitutional order are presented, disseminated, and contested through dialogue.³⁹⁷ Studies using this theory show how bureaucrats and civil society groups use background ideas as ideological “weapons” to mobilize support for policy change.³⁹⁸ This focus on specific dialogical exchanges suggests a research framework for further studies about constitutional change in East Asia.

³⁹² E.g., Bui Ngoc Son, *supra* note 36, at 342, 336–73 (discussing how public discourse influences constitutional change in China); John Gillespie, *Public Discourse and Constitutional Change: A Comparison of Vietnam and Indonesia*, 11 ASIAN J. OF COMP. L., 209, 211–17 (2016) (contrasts dialogical constitutional change in Indonesia and Vietnam).

³⁹³ See, e.g., Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205, 208–10 (2008).

³⁹⁴ See Vivien Schmidt, *Discursive Institutionalism: The Explanatory Power of Ideas and Discourse*, ANN. REV. OF POL. SCI. 11, 303, 303–5 (2008). See also Vivien Schmidt, *Theorizing Ideas and Discourse in Political Science: Intersubjectivity, Neo-Institutionalism, and the Power of Ideas*, 29 CRITICAL REV. 248, 250–51 (2017). The notion that discourse both constitutes and conveys the epistemic ideas that shape governance is also found in sociolegal theories. See, e.g., MARIA TZANAKOPOULOUS, RECLAIMING CONSTITUTIONALISM: DEMOCRACY, POWER AND THE STATE 125–38 (2018) (discussing Foucauldian discourse theory). See also Jiai Paiban, *Constitutional Imaginaries and Legitimation: On Potentia, Potestas, and Auctoritas in Societal Constitutionalism*, 45 J. OF L. & SOC'Y 30, 30–51 (2018).

³⁹⁵ See Schmidt, *supra* note 393, at 303–05.

³⁹⁶ See Martin B. Carstensen & Vivien A. Schmidt, *Power Through, Over and in Ideas: Conceptualizing Ideational Power in Discursive Institutionalism*, 23 J. OF EUR. PUB. POL'Y, 318, 323–26, 329–33 (2016).

³⁹⁷ Schmidt, *supra* note 393, at 309 (arguing that discourse is a more versatile and overarching concept than analysis based on ideas).

³⁹⁸ MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY 39–40 (2002) (discussing the use of ideas as weapons to change political policies).