Condominium Law as Path Dependent Institution:
Contingent critical junctures, evolutionary pathways and urban property rights

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Abstract
Condominium is one of the fastest growing forms of property ownership in countries around the world. The creation of new legal frameworks regulating condominium property in many jurisdictions during the 1960s provides a valuable natural experiment that enables a comparative examination of different pathways of institutional evolution and change, and the development of comparative urban institutional theory. Similar condominium laws were introduced to Florida, Ontario, and Japan in the 1960s, into different legal and administrative settings, and condominium law in each jurisdiction has since followed a distinct evolutionary trajectory, so each jurisdiction produces differently specified forms of condominium property ownership, risks, and benefits. The paper suggests that the application of a historical institutionalist conceptual framework provides a valuable way of understanding developmental pathways of evolutionary change of property institutions. The larger hypothesis is that such differentiated institutions and path dependent processes are widespread in cities, and that studying them from a comparative perspective provides valuable insights not only into the differentiated specification of condominium property development and ownership in different jurisdictions, but also yields valuable tools for comparative research and theory-building about the production of urban space.

1. Condominium and the production of urban property
There is no doubt that the creation of new property rights in land is one of the most significant of the multiple processes that occur in cities, and that the systems established to manage the creation of property, and to define, record, and protect new property rights are fundamental to urbanization processes. Maintaining cadastral records of land ownership was one of the earliest functions of government, and has been a key responsibility of municipal governments since the chartered merchant towns of the European middle ages. But systematically regulating the creation of new real property rights is a more recent function of governments, becoming common only in the 19th century, with the widespread adoption of building codes, land use regulation with zoning plans, and minimum
infrastructure and design standards for the conversion of non-urban land at the fringe into urban parcels (Bromley 1991; Needham 2006).

Planning is premised on understanding and managing processes of land development and the creation of new rights in landed property, but these processes are surprisingly neglected as a focus of planning theory. Most work on the production of urban space focuses either on the macro level of global theories and flows of capital (Harvey 1982; Smith 1984; Harvey 2010), on Lefebvre’s concept of the social and cultural production of urban space and the spatial practices and representations that produce and reproduce it (Lefebvre 1991; Soja 1996), or on the micro scale of the actors involved, their incentives, networks, decision-making, and impacts (Weiss 1987; Healey and Barrett 1990; Healey 1992; Fainstein 1994). As noted by Krueckebberg (1995) and Jacobs and Paulsen (2009) little attention has been paid to planning as a middle-range practice that structures the creation of property, even though that is one of its central functions.

The suggestion here is that an examination of the details of middle-range processes of producing and defining landed property is revealing of important aspects of urban property creation, particularly for comparative study. The legal systems specifying the rules and conditions that shape the creation of new urban property, and the precise specification of the rights and duties of ownership are middle range processes which turn out to be very important in shaping both market behavior and social-political incentives associated with property ownership. The invention of new forms of property such as condominium is therefore a significant political act.

This paper examines the creation and subsequent evolution of three examples of condominium law, in Japan, Florida, and Ontario, in different political, legal and administrative settings. Condominium here is defined broadly as all cases where ownership includes both private ownership of an individual housing unit, and shared ownership of common spaces and facilities. In densely populated areas the built form of condominium is typically high-rise, while in lower density areas ground related housing and ‘gated communities’ are more common. The intent here is not simply an analysis of condominium law, but to use the case of condominium to
examine the regimes of property institutions that are essential to the production and maintenance of urban space.

Even more than in other spheres, markets in landed property depend on the sustained engagement of the state in defining, mapping, recording, evaluating, guaranteeing, and servicing property and property ownership. The examples of condominium law examined here show that the fine-grain detail of the institutionalization of property by the state is fundamental to the differentiation of urban property, which is a core feature of contemporary urbanism. I argue that the specific institutionalization of these practices is profoundly contingent and path-dependent, differentiated by place, political culture, history and timing, and that in practice different planning regimes produce landed property that varies in ways that are consequential for both use value and exchange value. Understanding the divergent ways in which property systems regulate the production of new urban property, and the differentiated landscapes of property that result, is of profound importance, therefore, for both planning theory and planning practice.

This diversity of institutions and processes of creating new urban spaces is significant, not least because of the breakneck pace of global urbanization. Over the next 35 years it is projected that global urban population will double from 3.5 to 7 billion (UNDESA 2008), and that over the 20 years from 2010 to 2030 the global urban area will double, if the pace of recent urbanization continues (Angel 2012). Even if the rate of urbanization slows, that is a lot of new urban property, yet our understanding of these processes still has major gaps, particularly in comparative perspective. The production of urban property is also increasingly central to the global economy, both as a repository of capital, and as a value-creating industry in its own right.

Urban forms created during processes of urbanization are well known to be long lasting, but the urban property rights created during land development processes may be even more durable. I argue that the imprint of the system regulating processes of land division and property creation, structured by its specific menu of property options and the specific and varied restrictions and requirements to
permit the creation and registration of new property, is all but indelible, as it becomes embedded in title deeds and the patterns and specifications of sets of urban property. This does not mean that future change is blocked, and is of little consequence if all property has similar bundles of property rights. But condominium is a significant innovation in property, that generates quite different bundles of property rights than traditional freehold property. I suggest that this differentiation of property, both within and between jurisdictions, has important consequences.

The fundamental suggestion here is therefore that the fine-grain of regulatory-administrative processes that secure and enable investment in urban space, and structure the production of new urban property is a major issue that demands better understanding. And that condominium is an important example of such regulatory processes. This paper compares the development of condominium law in Ontario, Florida, and Japan, showing that starting from similar concepts, condominium law in the three jurisdictions is significantly differentiated, both by initial specification, and by subsequent processes of institutional change. This results in distinct legal regimes, and the production of different forms of condominium property in each jurisdiction, and increasingly heterogeneous landscapes of property. I argue that these systems for the production of urban property are at once diverse, contingent, and highly path dependent, displaying the branching patterns of institutional development characteristic of path dependent institutions. The basic argument is, therefore, that the institutions that structure the production of urban space are diverse in structure, efficacy and product in different places, and that this diversity is likely to persist.

The next section briefly outlines the reasons for suggesting that condominium is a significant innovation in property that produces new relationships and incentives of property ownership. Part three sketches a historical institutionalist approach to the analysis of urban property regimes. Part four section reviews the development and evolution of condominium law in three jurisdictions, Florida, Japan, and Ontario, and a concluding section draws together the main findings.
2. Condominium as a distinct property institution
The literature on condominium, both by advocates and by critics, shows that condominium generates quite different social and political relations and ownership incentives than traditional forms of fee-simple ownership. Webster, Glastz and Franz (2002) suggest that varied motives exist for the emergence of condominium, from security from crime in post-apartheid South Africa (Jürgens and Gnad 2002) and Latin America (Coy and Pöhler 2002; Coy 2006), rehabilitation of distressed social housing estates in Britain (Webster 2001; Blandy 2006), or insulation from the poor in Jakarta (Silver 2008). Webster et al (2002) are also careful to point out that although clearly influenced by US practice, different motivations, institutional and management rules have developed in different countries, and so the function, property specifications, and meanings of condominium property can be subtly different in different countries.

The focus here is on those characteristics that generate different logics of the creation, use, and reproduction of urban property. Unsurprisingly, very different interpretations of these changes exist. Many see the emergence of gated communities and condominiums as a clear expression of neoliberalization, linking privatization, the decline of public services and the hollowing out of the local state (Davis 1990; Low 2003; Mitchell 2003; Kohn 2004). Davis (1990) examined the links between privatization of public space, exclusion of unwanted populations, and increased security and surveillance in Los Angeles. Kohn (2004) takes this argument further, showing that the routine failure to create public spaces as cities grow is a major constraint on democratic participation.

Another prominent claim is that private communities generate powerful logics of fragmentation and segregation that serve to increase hostility and suspicion of others (McKenzie 1994; Low and Smith 2006; Dredge and Coiacetto 2011). Particularly powerful are the logics of surveillance and securitization associated with private communities (Davis 1990; Blakely and Snyder 1997; Sorkin 2008). It is argued that as people increasingly withdraw into private realms, the sense of risk
associated with public space also grows. Increased security induces heightened paranoia, rather than a feeling of safety, and influences behavior (Caldeira 1996). This is corrosive of a shared sense of public responsibility, and while perhaps most extreme in gated communities, is also seen in private communities of all sorts, as the ‘public spaces’ of condominium are actually private shared ownership, not true public spaces.

Finally, a defining characteristic of condominium is that it provides an alternative mechanism for the finance, delivery, maintenance of, and policy-making for community infrastructure. It therefore generates different political logics of infrastructure provision, public goods, and ultimately of municipal government itself (Fischel 2001; Graham and Marvin 2001; Webster 2002; Nelson 2005). Much of the literature describes condominiums as clubs that provide shared amenities to like-minded residents, and is very positive about the potential efficiencies of condominiums in providing specific sets of amenities to residents (Fischel 2001; Webster and Lai 2003; Nelson 2005; Lee and Webster 2006). But although this reduces some of the upfront costs of growth for municipalities, condominiums usually continue to depend on local governments for some key infrastructure, while often seeking and sometimes gaining reduced tax burdens, so the actual balance of costs and benefits is less clear (Warner 2011). Others simply see the privatization of infrastructure provision as generating serious social equity problems, and a ‘splintering city’ in which those who cannot buy in to the new model increasingly lose out (Graham and Marvin 2001).

The key point here is that urban space is therefore increasingly differentiated, not just by the visible differences of land use, socio-economic status, housing type, location and infrastructure quality, but also by increasingly differentiated geographies of property. This heterogeneity of property specification is largely invisible, as the built forms of these different sorts of property can be quite similar. Yet the meanings of such differentiated property types, their production, regulation, political dynamics, and the incentives and behaviours they give rise to can be profoundly different.
3. Path Dependence and urban property regimes

The basic insight of historical institutionalism is that some institutions tend to be enduring, become harder to alter over time, and have long-lasting impacts on trajectories of institutional development. There are many definitions of institution, but one of the most widely cited is that of Peter A. Hall, who defined institutions as “the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and economy” (cited in Thelen and Steinmo 1992). So institutions include not just sets of formal rules, but also the ways that they are enforced, and shared understandings and norms of behavior. The suggestion is that institutions sometimes are enduring, not because there are no other options, nor because they are the best option, but because positive feedback effects encourage continuity. Positive feedback exists in situations where an institution generates political and/or economic resources and incentives to ensure that the institution continues (see Sorensen 2014). A famous example of positive feedback is that of pay-as-you-go pensions, where over time those paying in to the system grow more numerous, have been paying contributions longer, and therefore have growing incentives to ensure that the system continues and they receive their pensions when the time comes (Skocpol 1992; Pierson 1994).

The core idea of path dependence is that where positive feedback effects are present continuity is much more likely. And where institutions are increasingly costly to change over time, small choices early on can have significant long-term impacts. The idea of path dependence is too often understood to mean either that a particular institution or rule gets ‘locked in’ or frozen, or simply that ‘history matters’, and that earlier choices influence later options. Neither of these interpretations is very productive. In fact most path-dependent institutions continue to evolve, but in ways that are structured by the particular choices made when they were first established, by the nature of the positive feedback that exists, and by the rules structuring change processes and actors. This is a much stronger claim than simply that history matters.
Pierson usefully defines path-dependent processes as ‘social processes that exhibit positive feedback and thus generate branching patterns of historical development’ (Pierson 2004: 21). This image of branching patterns of development is valuable, as it indicates continuing evolution, but along pathways that are shaped by earlier decision points. Path dependence means that once institutions become established, branching processes of institutional evolution are likely, where particular choices lead to further steps along the same branch. Over time, reverting to a previously available possibility often becomes increasingly costly. In such cases the critical junctures of institution formation become particularly important, as the contingent moments when new branches are initiated.

The moments of institution formation and major change referred to as critical junctures are of great interest, because the specific conditions, timing, actors, power relations, and institutional settings of institution formation influence the choices that are made (Collier and Collier 1991; Capoccia and Kelemen 2007). We must ask: Who was involved in the decision process? Why were certain choices made and not others? How does governance setting shape the particular choices that are made in different cases? Institutions can privilege certain players and courses of action over others, so can serve to replicate patterns of institutional advantage. As Lowndes puts it: ‘institutional rules embody power relations by privileging certain positions and certain courses of action over others – they express “patterns of distributional advantage”’ (Lowndes 2009: 95). The political dynamics associated with critical junctures, and the rules established to regulate institutional change are therefore critical.

Much recent institutionalist research explores patterns of institutional change of path dependent institutions, emphasizing the contested nature of institutions, and the ways in which incremental change is structured by the characteristics of the institutions themselves (Thelen 2003; Mahoney and Thelen 2010; Lowndes and Roberts 2013). This further diverges from the static conception of institutions suggested by early interpretations of path-dependent ‘lock-in'.
I argue that condominium is path dependent in two distinct ways. The most important, and the focus of this paper, is path dependence of the legal and regulatory system that permits and structures the governance rules for shared property. In the three case studies detailed in the next section, each law was established in the 1960s, but with slightly differing international influences, legal framing, and political context. Further, in each case, different problems have been associated with condominiums, place-specific political discourses and players have argued for revisions of law and of practice, and the mechanisms and practices of legal reform and policy action vary, generating different opportunities for, and pacing of, reform. In each case choices dating from the inception of the law have continued to shape outcomes, but in each case also legislative and policy changes have occurred, albeit at very different speeds and with different actors. The result is three clear examples of path dependent institutional evolution.

The second aspect of path dependence is with regard to the property that is produced. This has two elements, one concerns the timing of particular developments, and the other is generated by desires for stability of residential property. With regard to timing, in each system, as the regulatory structure of condominium evolves, the property that is produced at different times is encoded with the then-current set of rules. And the rules for particular developments are often hard to change, even if the legislation is subsequently revised. For example, in both the Florida and Japanese cases, legislators explicitly refused to consider retroactively applying proposed changes to already existing condominium property, reasoning that property rights conferred at a particular time could not be retroactively changed without the consent of all property owners. Best practice ideas and legislative requirements for condo bylaws and management structures have changed over time, but are usually difficult to change for particular condominiums because of super-majority decision structures. Condominium property developed at any particular time is structured by the then-current legal framework and institutional design ideas.
Secondly, normative conceptions valuing the stability of residential property are also significant. Property rights configurations created in processes of urbanization have particularly high levels of path dependence in the US because over the 20th century the practice of residential planning embraced the imperative of creating physical and institutional designs that were explicitly designed to resist incremental change. The fear of blight, slums, mixed uses, visible minorities, and declining property values provided powerful incentives for single-use residential developments with highly restrictive zoning, deed restrictions, minimum lot sizes, winding and looping roads that block through traffic, green buffers insulating houses from other land-uses, and other such strategies (Goldsmith 1995; Weir 1995; Sies 1997; Hayward 2009). In the United States, the practice of racially restrictive covenants was declared unenforceable by the Supreme Court in a ruling in 1948, but the practice of racial exclusion did not disappear. Lasner argues that one attraction of co-ops and condominiums was that they permitted screening of new residents, usually under the guise of ensuring financial viability of prospective co-owners (Lasner 2012).

Condominium ownership forms are particularly powerful because co-owners cede individual rights to alter their property except in specified ways, and implicitly and/or explicitly agree to police the behavior of other owners. Restrictive ‘Covenants, Conditions and Restrictions’ (CC&Rs) permanently embedded in title deeds and ownership contracts with the Association regulate a wide variety of behavior (Warner 2011:159). Condominium ownership structures are thus intentionally designed to be hard to alter, in order to protect the long-term value of the property. This creates a highly path-dependent set of institutions that are not only explicitly designed to resist significant change, but also provide enforcement mechanisms to enable the surveillance and punishment of those attempting incremental changes to their own units, or who fail to follow the rules. This shift from public enforcement of property rights and obligations to private enforcement creates powerful enforcement mechanisms and a much stronger bias towards continuity, compared to traditional freehold and leasehold property forms.
The suggestion is therefore that the rules that regulate landed property in cities are an important case for comparative institutional study as the property rights and patterns established during processes of land development tend to be enduring, and have powerful social, economic, and political impacts. Even more important, condominium legal frameworks demonstrate path dependent characteristics, where the initial legal framing and context has significant long-term impacts on subsequent evolutionary change.

4. Three distinct systems

This section examines the history of condominium law and property in Japan, Florida, and Ontario, with particular attention to the initial law and subsequent legal and practice reforms, and the issues they were meant to address. Even though the basic goals of condominium law in each jurisdiction is the same, to enable a new form or property ownership which combined individual ownership of units with shared ownership of common spaces and facilities, and in each case legislators borrowed from precedents elsewhere, for a number of reasons the laws and practice show lasting differences. Three major sources of difference stand out: governance settings, the political cultures of legislative reform, and differing legal systems. The main differences between jurisdictions concern the ways in which condominium property management is regulated, how decision-making is structured, and how reform processes occur.

The differences in governance setting are clear: Japan is a unitary state, with a single national law regulating condominium throughout the country, whereas Florida and Ontario are each sub-national states within federal systems of government where property law is the responsibility of the state, not federal level of government. This had profound implications both for the initial legislation and subsequent reforms.

In 1960, Japan’s population was 92.5 million, far larger than the other two jurisdictions examined here. With large populations for each member of the national parliament, and small numbers of condo units, there was little political incentive for political engagement in issues of condo ownership. Reform of condominium law was
simply not on the political agenda until after 1995 Kobe earthquake, and even now is a relatively minor political issue. In Japan the main actors in reform of condo law have consistently been within the national bureaucracy, and the policy process is characterized by inter-ministry conflict and bargaining between the Ministries of Justice and Construction (now Land, Infrastructure and Transport), with specific proposals developed by policy consultative councils (shingikai) composed primarily of ministry officers, industry representatives, and academics (see Schwartz 1998). Infrequent policy proposals are almost always passed by the government with few changes.

In the US property law is a state matter, and each state passed its own legislation, almost all in the 1960s. Florida was a small state, with a population of just less than 5 million in 1960. The first condo law was passed in 1963 during a development boom, when real estate development and tourism were key economic drivers, and developers were politically and economically powerful. The initial law simply enabled this new form of property, without placing many restrictions on developers, or providing much guidance about subsequent management of projects. And state legislator’s districts were and are fairly small, so small groups of disgruntled condominium owners could get the attention of their representatives, with a result of frequent legislative revision. Rule changes were generated by legislators, the civil service, and owners groups, but also by the high volume of litigation in court cases, some of which served to clarify and set precedents for the interpretation of existing rules. Constant legislative revision and civil litigation has resulted in a complex and voluminous legal framework of over 170 pages and 74,000 words, which covers even minor issues in great detail.

Ontario – Canada’s largest province by population, with 6 million in 1961 – is similar to the case of Florida, but with a British Westminster parliamentary system of government, usually working with majority governments. Ontario has had a tradition of frugal, fiscally conservative governments, and careful urban planning with a high level of provincial involvement in managing urban growth motivated in part by concerns about the infrastructure costs of growth. The province saw
condominium as a way to extend ownership to lower income households, while limiting the costs to government. Ontario had the advantage of being the last of the three jurisdictions to pass a condo law, as drafters of the legislation were aware and keen to avoid the problems experienced in the US states where weak regulations had resulted in many court cases. Ontario had many precedents to follow, and drew primarily on New South Wales in Australia, and British Columbia legislation.

Differing legal systems have also been important in shaping condominium law. Japan has a civil code legal system, so compared to common law countries, legal change is much less influenced by the precedents set by court cases, and is more structured by changes to legislation. In Japan, key provisions of the condo law of 1960 were carried forward from the civil code law regulating traditional shared ownership dwellings of the urban poor, and as shown below created major problems for condo owners until the law was finally revised in 1983.

Finally, each jurisdiction has very different processes of legal reform. In Japan, the Ministry of Justice and the Ministry of Construction took the lead, conducting research, discussions with involved parties, proposing and advocating for reforms. Reforms agreed between ministries, particularly in technical/legal areas, are almost always passed unchanged by the legislature. In Florida, condominium proved to be exceptionally controversial and politicized, in part because of widespread chicanery by developers. Well organized lobby groups and responsive politicians in then thinly populated Florida meant that legislative revisions were passed almost every year from the initial legislation of 1963 to the mid 1990s. Many of these were hasty and ill-conceived, resulting in contradictory and unworkable approaches, and necessitating further revision. The common-law tradition also meant that the large volume of court cases was constantly producing new precedents and shaping interpretations of existing law. Ontario shared this common-law tradition, but the prevailing Westminster parliamentary system produced much less frequent legislative activity, more similar in pacing to Japan. Reform was infrequent, but tended to be undertaken with thorough research, public consultation, and engagement of industry and consumer groups.
As shown in Table 1, which summarizes some of the main findings of the case studies below, major differences between jurisdictions include the frequency and timing of major legal revisions, the rules for decision-making by condominium associations, and the legal requirements for condominium management, accounting, and financial reserves.

**Table 1 Major Characteristics of Three Condo Laws (about here)**

<table>
<thead>
<tr>
<th></th>
<th>Japan</th>
<th>Florida</th>
<th>Ontario</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Date first passed</strong></td>
<td>1962</td>
<td>1963</td>
<td>1967</td>
</tr>
<tr>
<td><strong>Initiator</strong></td>
<td>Ministry of Justice Japan</td>
<td>Florida Bar Association Members</td>
<td>Ontario Law Reform Commission</td>
</tr>
<tr>
<td><strong>Legal system</strong></td>
<td>Civil Code</td>
<td>Common Law</td>
<td>Common Law</td>
</tr>
<tr>
<td><strong>Precedents</strong></td>
<td>Germany, France</td>
<td>Puerto Rico, Hawaii, California (draft), New York (draft)</td>
<td>New South Wales, British Columbia, US states</td>
</tr>
<tr>
<td><strong>Initiator of reform processes</strong></td>
<td>Ministry of Justice (1979) Ministry of Construction</td>
<td>Florida Legislature</td>
<td>Governing party</td>
</tr>
<tr>
<td><strong>Ownership</strong></td>
<td>Underlying land Private Units Common facilities Leases</td>
<td>Private Units Common Facilities</td>
<td>Private Units Common Facilities</td>
</tr>
<tr>
<td><strong>Voting requirements for changes to shared spaces</strong></td>
<td>100% (75% if changes entailed no significant cost) Revised 1983 – 75%</td>
<td>It is not permitted to sell common elements No statutory rule about voting requirement for changes to bylaws, but practice is unanimous consent for changes</td>
<td>80% dissenters may demand to be bought out</td>
</tr>
<tr>
<td><strong>Voting requirements for creation, changes, or abolition of bylaws</strong></td>
<td>100% Revised 1983 – 75%</td>
<td>No statutory rule, to be determined by the bylaws</td>
<td>66%</td>
</tr>
<tr>
<td><strong>Voting requirements for changes to management</strong></td>
<td>50% +1</td>
<td>No statutory rule, to be determined by the bylaws</td>
<td>80%</td>
</tr>
<tr>
<td><strong>Voting requirements for termination</strong></td>
<td>100% Revised 2013 – 80%</td>
<td>100%</td>
<td>Automatic if building is destroyed, if the damage is greater than 25% of value of building, 80% majority can vote to terminate</td>
</tr>
<tr>
<td><strong>Requirements for building management bylaws, initial legislation</strong></td>
<td>None, voluntary, drafted by developer, until MOC Law of 1982</td>
<td>Provisions for non-profit or for-profit associations to manage buildings, rules for common expenses, mandatory link between units and common property</td>
<td>Statutory requirement for governance bylaws, template set out in first legislation</td>
</tr>
<tr>
<td>Major problems driving reform</td>
<td>Poor management rules, complex ownership patterns, limited sanctions available for non-compliance with bylaws, lack of transparency, hard to achieve unanimous agreement among unit owners</td>
<td>Shoddy workmanship, price gouging by developers, liens for unpaid fees, poor financial record keeping, inadequate reserve funds</td>
<td>Conflicts over governance, maintenance reserves, transparency, delays to declaration</td>
</tr>
</tbody>
</table>

**Japan**

The first Japanese condominium law (The Act for Sectional Building Ownership, hereafter Condo Law) was enacted in 1962 in response to a rapid growth in the number of modern shared-ownership residential buildings during the 1950s. As there was no specific legal provision for condominium ownership, developers were using a provision of the Civil Code for ‘sectional’ ownership of buildings that had been created primarily for traditional single story terraced wooden housing for the urban poor (*nagaya*) (Sorensen 2002). Compared to the traditional *nagaya*, however, modern buildings tended to have more complex and larger shared spaces, as unit owners shared not only walls and columns (as was the case in nagaya) but also hallways, stairs, elevators and water and wastewater systems. The civil law proved inadequate to regulate the complicated relationships in condos where owners had individual ownership of units, but shared ownership of common facilities. The civil code section on sectional ownership also lacked provisions regulating building management, as earlier shared dwellings tended to be very simple one-story wooden dwellings with ground-level access. The development of the 1962 Condo Law was led by the Ministry of Justice, as it was responsible for the Civil Code, and had actively been working on revising that law in the 1950s, including the property ownership sections, when the issue of condominium arose (Kawashima 1962).

The 1962 Condo Law defined the types of building that it applied to, clarified the boundaries of shared space and private space, addressing their implications for ownership, and outlined responsibility and rules for management. The drafters looked at examples from several countries but borrowed mainly from German and French law, which were seen as more suited to Civil Code traditions of Japan than
American approaches. One issue, that only became apparent later, is that German property law treats buildings and the land they sit on as a single ownership, but these had always been treated separately in Japanese land law. This was found to create special problems in the case of condominiums, as three separate forms of ownership emerged. The first two were familiar: individual unit ownership, and shared ownership of the common spaces in the building. But in Japan, unit holders also had a separate shared ownership of the underlying land, that in some cases became separated from the unit and common space ownership (Interview Asami, Nov. 2011). A second issue was that housing lease laws are exceptionally favorable to lessees in Japan for historical reasons. House leases renew indefinitely, so once leased, it is virtually impossible to remove a sitting tenant (Haley 1992). Quasi-permanent occupancy by lessees is effectively a form of ownership, but was not accounted for in the 1962 law, and created problems with decision-making later.

Crucially for later developments, the 1962 law had three key articles pertaining to voting provisions: 1) making changes to shared space required unanimous agreement of all owners (with the exception that agreements of only three quarters was required for improvements without significant cost); 2) a majority vote would suffice for decisions related to management of shared space; and 3) the unanimous agreement of all owners in writing was necessary for establishing, changing, and abolishing management bylaws. The first two provisions were carried forward from the civil code’s articles regarding shared ownership. The third was new, and was created because it was felt that the management bylaws included important issues related to the rights and duties of shared ownership. On the other hand, another article stipulated that management rules – for establishing bylaws, electing a building manager, and rules for convening decision-making meetings – were understood as necessary but were optional and to be determined by each development (Kawashima 1962). Most buildings adopted standard building management bylaws provided by developers, but there were no requirements for, or legal support for, these bylaws in the 1962 Condo Law. It was only with the passage of the Condominium Standard Management Bylaw by the Ministry of
Construction in 1982 that legal requirements and standards for such management bylaws were passed (interviews, Fukui, Yamagishi 2011).

After the passage of the 1962 Condo Law the number of new condominium units grew slowly until the famous ‘condo boom’ of the early 1970s, when the total number of units went from 80,000 in 1970 to 440,000 by 1974, and 940,000 by 1980. Condominium housing went in a decade from a tiny share of housing to a major new part of the housing market. During the same period the number of conflicts and court cases over condo management mushroomed, leading to increasing concern within the ministries responsible. In response, the Civil Code Study Subcommittee of the Legislative Review Council, an advisory body to the Ministry of Justice, initiated a review of the law in 1979.

As explained by the Ministry of Justice in its 1983 guidance notes about the legal revisions, the main problems were first that as land ownership was separate from unit ownership, and some units were leased to non owners, ownership rights became increasingly complex over time, and the convoluted land registry records (maintained by the Ministry of Justice) made it very difficult to identify who actually had property rights when major decisions had to be made. Second, and closely related, as the number of people with property rights increased, unanimous agreement on changes to shared space, and unanimous written agreement on changes to building management articles became increasingly difficult to obtain. Also, there were no effective rules to compel people follow management bylaws apart from going to court. All of these issues made it very difficult to do major maintenance projects, and some of the earlier buildings were getting older (Japan Ministry of Justice 1983).

This review, and concerns about building management and maintenance led to the involvement of the Ministry of Construction (MOC), which was responsible for planning law, development control and the building code, and was deeply involved in regulating condominium construction because of controversies over high-rise residential construction during the 1970s (Sorensen 2011). The MOC passed a new ‘Mid-to-High-Rise Housing Standard Management Law’ in 1982. This law was
designed to give guidance and create legal standards for condominium building management. The law defined different levels of consent required to do different degrees of rebuilding. For minor repairs, a simple majority was sufficient. For major damage equal to or greater than half the value of the building, 75% in favor of renovation was necessary. In cases where a complete rebuilding was necessary, 80% had to be in favor.

In 1982 the Ministry of Justice review subcommittee publicly announced their proposed revisions and called for feedback from stakeholders. In 1983 the Ministry of Justice drafted a bill for revising the sectional ownership law according to the report, and for revision of the Real Property Registration Act. The “Bill for Partial Revision of Act for Sectional Ownership, etc. of Building and Real Property Registration Act” was submitted to the Diet and the bill passed in its original form in May of that year. Also in 1983 the MOC drafted and passed revisions to the 1982 Condo Management Law to ensure that the two laws matched.

The main revision of 1983 was to move from unanimous agreement to 75% agreement for significant changes or investments in buildings, and from 80% agreement to 75% agreement for the creation, changes, or abolition of building management agreements. This overcame the problem of a single hold-out being able to block decisions about significant investments, but a 75% supermajority was still considered effective protection against ill-considered decisions (Interviews Fukui, Yamagishi, Asami 2011). Complete demolition and rebuilding or other renovations that would require ‘excessive’ costs still required 80% agreement to proceed. The new Act also merged the property ownership right for units with the property ownership right to all shared spaces, but underlying land ownership remained separate. Finally, the new law recommended that unit owners should organize a management association and should have membership in that organization. The new MOC law provided details about how such organizations should be run and decisions made, and set accounting standards, requirements for capital reserves, etc. but these were still on a voluntary basis.
There were still serious issues with these legal frameworks, however, as the volume of court cases over management, renovations, unpaid condo fees, etc. continued to increase (Interview Fukui, 2011). Yet the building of condominium housing units continued to accelerate, reaching 1 million by 1980, 2 million by 1990, 3 million by 1995 and over 4 million by 2000. The event that forced another round of legislative reform was the Great Hanshin Earthquake of 1995, which devastated one of the main metropolitan areas of Japan, stretching from Kobe to Kyoto. Thousands of condominium buildings were damaged or destroyed, but in many cases agreement could not be reached, and buildings took a long time to rebuild, delaying overall reconstruction.

In arguing for another major revision to the law in the late 1990s, the Ministry of Construction made three main arguments. First they pointed to the growing numbers of disputes over condominium management. The second issue was the rapid increase in the numbers of condominiums more than 30 years old (120,000 by 2000, and 930,000 by 2010), while the third issue was that buildings damaged in the Great Hanshin Earthquake were taking a very long time to repair or rebuild (Yoshida 2003).

Debate over condominium law and regulation continues today, as the number of older condominiums that need significant renovations continues to increase. The Ministry of Land, Infrastructure and Transport has a standing Council on Old Condominiums that is trying to make it easier to renovate and repair ageing condominium buildings. The major priority is still to change the decision-making rules. For example, a recent report (Fukui 2011) proposed that the 80% agreement requirement for rebuilding be weakened to less than 66% agreement; allow rebuilding on a different site so owners don’t have to move twice, revision of the price calculation for buying out owners who refuse to participate in rebuilding; create a system to extinguish leases of renters when rebuilding agreements are reached; weaken the 66% agreement requirement for rebuilding buildings that are part of an estate with many buildings; allow the dissolution of condominium properties with a simple majority vote; allow more freedom for condo associations
to determine their own mandatory rules, etc. (Fukui 2011). In 2013 the decision threshold for demolishing a condominium was reduced from 100% to 80%, but the proposal to reduce the requirement for consent for rebuilding of non-damaged buildings from 80 to 66% was not approved. Clearly, obstacles to rebuilding and major maintenance projects remain, reducing the long-term viability and property values of many condominiums in Japan.

**Florida**

The first condominium law in Florida was passed in 1963. Although there had been several developments that had used private contracts to create condo-like ownership developments, it had proven difficult for buyers to get mortgages and other loans, so a major goal of the law was to ensure a clear legal and tax status for the new form of property ownership (McCaugan). The Florida law was one of the first in the US, but drew on precedents in Hawaii and Puerto Rico, as well as draft laws of California and New York. The act attempted to intervene as little as possible in private property, while leaving most of the detail to each condominium's own documents (McCaughan 1964-5: 4).

The major articles of the act defined the structure of individual ownership of units and shared ownership of common facilities, prohibited further sale of common facilities or sale of units without a share of common facilities, defined the rules for common expenses and how assessments for common expenses such as for maintenance were to be assessed and collected including authorizing the use of liens against the property to enforce collection of debts. The act established associations as the operator/manager of the property, and these were permitted to be incorporated either as for-profit or non-profit bodies, or left unincorporated, and established separate taxation of units so that other owners did not become liable for taxes of their neighbor (McCaughan 1964-5). Apart from these provisions, the details of management agreements and decision-making were left to individual contracts, usually established by the developer in advance of sale. No guidance or requirements for management agreements or bylaws were provided in legislation.
The minimalist approach created ample opportunities for conflict, and condominium management rules and legislation have been exceptionally contentious in Florida since the passage of the first condo legislation in 1963. The main initial problems with condominium in Florida were associated with the fact that it was initiated during a building boom, yet the law required little transparency about building standards, completion times, or costs. Weak building inspection regimes meant that in some cases developments that did not satisfy building code requirements were given ‘certificates of occupancy’ which were incorrectly understood by consumers as a state certificate of the soundness of the building. Particularly problematic was the fact that the Florida law did not require disclosure of management contracts, and other long-term costs such as long-term leases of shared recreational facilities with high built-in cost escalators. Weaknesses in the legislation allowed some developers to maintain long-term control over condo associations. Unrealistic completion times, substandard building practices, and hidden long-term costs led to large numbers of court cases, and eventually to calls for increased regulatory oversight and for revisions to the law (Poliakoff 1992: 474).

Poliakoff suggests that the responsiveness of the Florida legislature to the political demands of condominium residents “is evidenced by the fact that the Florida Condominium Act has been amended nearly every year since its inception in 1963” (Poliakoff 1992: 473). Problems resulted both from the initial weaknesses in the framing of the law, and from the chaotic real estate market in the Florida of the early 1960s, with vastly more demand than supply of housing, and a willingness of buyers to buy units based on little more than promises and artists’ renderings of future development. Abuses were widespread.

The Florida Legislature passed amendments in 1971 to the Condominium Act to allow unit owners to cancel management contracts set up by the developers. In 1972 a condominium commission was established, which subsequently made a wide range of proposals for revisions to the law, including requirements for full disclosure by developers of ground leases and leases for shared recreational facilities, provisions to end control of associations by developers, and mandatory
open condominium board meetings and access to records. That revision also introduced provisions for mandatory reserves for repairs, clear accounting standards, arbitration of disputes and removal of board members (Poliakoff 1992: 475-6). After a particularly contentious period in the early 1970s, when condominium owners groups had brought large numbers of cases before the courts and had repeatedly succeeded in demands for changes to the legislation, in 1975 the Florida legislature required the then Florida Law Revision Council to revise the Condominium Act to eliminate the ambiguities and inconsistencies produced by repeated revisions during the early 1970s (Poliakoff 1992: 476).

The 1980s saw continuing activity in the courts, with a large number of decisions in appeals courts providing guidance in areas where the law was not clear or did not specify rules. But there were still increasing conflicts between condo owners and boards over management, and difficulties in removing board members. In 1990 a Condominium Study Commission was established to again collect information and prepare for the revisions to the Condominium Law that were passed in 1991. The big concerns in the early 1990s were about unit owner participation in and influence of condo board meetings and decisions. Unit owners were given the right to speak to all agenda items at board meetings and annual meetings. Regulations were created to ensure fair and democratic elections for positions on condo boards, and restricting the use of proxy votes that had allowed some boards to control membership of the board seemingly indefinitely (Poliakoff 1992-3: 478). Also, kickbacks from people providing goods and services to condominiums were prohibited, and strengthened rules about competitive bidding procedures, guarantees of access to accounting books and records of the association, rules about compulsory shared services such as bulk cable TV contracts, stronger provisions for enforcement of rules and fines for tenants and guests of unit owners, all went into the 1992 act. An ombudsman for condominiums was also created to help with complaints and disputes.

Adams shows that the 1992 law did not initially reduce the number of disputes. On the contrary, while he describes the early 1990s as the zenith of legislative
micromanagement of condominium affairs, he shows that volumes of case law continued to be high (Adams 1996). The volume of disputes in the courts was reduced by the creation of an ombudsman in 1992, however, with substantial reductions by the early 2000s (Adams 2002). Legislative activity in 2011 was motivated primarily by the 2008 financial crisis, and resulting weak finances of many condo associations due to foreclosures and non-payment of dues.

Poliakoff argues that the strength of the US system is its adaptability and flexibility. Through legislative reform, common-law legal evolution through court decisions, and political processes of consultation and dispute, the law evolves continuously, and contributes to the development of a body of law that ensures the continued viability of the condominium concept (Poliakoff 1992-3: 513).

**Ontario**

Ontario, the largest Canadian province by population, enacted its first condominium law in 1967. The Condominium Act, 1967 is subtitled “an Act to facilitate the division of properties into parts that are to be owned individually and parts that are to be owned in common and to provide for the use and management of such properties”, a title which accurately describes its primary goals (Fanjoy 1968).

Ontario was relatively late in drafting its condominium law, and so when the Ontario Law Reform Commission was instructed to prepare a condominium law in 1965, it had many examples to draw upon. Almost all US states already had laws, which had generated a considerable amount of litigation, so many of the more contentious issues were already known. The Ontario Condominium Act of 1967 clearly borrowed from US examples and experience, but was particularly indebted to the New South Wales (NSW) Act of 1961, as many aspects of the law, including the definition of private units and of common elements follow the simpler approach of the NSW act, where individual units are defined, and everything else is common (Risk 1968: 24).

As elsewhere, the law addresses a number of core issues. First, it defines the portions of the property that were individually owned, and those that were owned
in common. Second, it ensured that taxes for both the individual portions and the shared portions were owed entirely by the individual property owners, so that non-payment does not become a liability of the other owners. Third, both collective and individual insurance were required. Fourth, rules regulating decisions about changes to bylaws, internal management arrangements, and termination were set out.

Whereas the NSW and BC acts explicitly permit only high-rise condominium, this provision was left out of the Ontario act, and in practice a significant percentage of condominium units in Ontario are ground-related townhouses, not high-rise. And while some US acts allowed owners of leased land to create condominium corporations on that land, the NSW and Ontario acts permitted condominium only on land that was owned outright (fee simple).

The Ontario act was explicit about rules for decision-making for changes to bylaws, internal management arrangements, and termination. Specifically, to change the bylaws of the corporation required votes in favour by members owning at least 66% of the common property. At any time the owners can vote to terminate the condominium if 80% or more of the ownership votes in favour, but those who vote against can demand to be bought out at full market value (Fanjoy 1968: 184)

As with other condominium acts, many unforeseen problems arose that generated conflicts between condominium owners and managers, and major revisions to the act became necessary. After two years of study by the Ontario Residential Condominium Study Group (the Kealey Commission) which held public hearings and received written submissions, a 100-page report was filed March 1978 outlining the major issues (Ontario Ministry of Consumer and Commercial Relations 1978). This led directly to draft revision of the Act on June 1, 1978. Many of the issues were similar to those seen in Florida: protecting condo buyers in the pre-declaration stage, before they received title to their new property, regulating unscrupulous builders and construction deficiencies, strengthening the powers of condominium managers to ensure efficiency and making them more accountable, and requiring audited statements and defined minimum reserve funds (Hansard 1978 : 3013).
McLellan also suggests that the reform was prompted by problems with the quality of construction, delays in registering new condominiums by developers during which they continued to control governance, questions about the voting rights of absentee unit owners, problems with procedures for making and amending bylaws, problems with property management companies, and difficulties collecting fees for common expenses, (McLellan 1978). The other major proposal, however, was to create a new arms-length non-profit corporation, called Condominium Ontario, to be financed by a small levy on all condominium owners, to mediate disputes and educate about the benefits and obligations of condominium ownership and management (Hansard 1978: 3014). This act passed in 1978 with only minor amendments.

Apart from a few more minor amendments in 1979, the Ontario Condominium Act then remained unchanged until significant amendments in 1998. Three bills had been drafted in the early 1990s, but none had passed because of changes in government before they could be read in parliament. In 1996 the government of the day again started to prepare for a significant reform of the act, prompted in part by a boom of condo development in the 1980s, and increasing numbers of disputes in the courts. The main issues were disclosure of information to potential buyers, the old issue of construction deficiencies, setting more stringent qualifications for condominium managers, and clearer guidelines about owners rights in cases where the condominium developer is still in control of the project.

A major change in 1998 was the introduction of a mandatory “Alternative Dispute Resolution’ system of mandatory mediation and arbitration that came into force in 2001, three years after the bill passed. A primary goal was to get many minor cases out of the courts, but arbitration and mediation can still be very expensive, as both sides usually hire lawyers, and also have to pay for the mediator. This bill was eventually passed in 1998, a full 20 years since the last significant revision. Another revision to the act was started in 2012, with public hearings and extensive stakeholder engagement and consultation. As of 2014 revisions are still pending.
5. Discussion and Conclusions

The examples of condominium law presented here support three major claims: First, the examination of the evolution and application of condominium law in three countries shows that the systems that produce new property rights are diverse, and in several regards maintain important differences. Second, these systems are clearly highly path dependent, both in terms of the sets of rules themselves, and in terms of the landscapes of property they produce. Third is that the nature of property rights produced in processes of urbanization evolve over time, with different patterns of property rights produced at different times, because of evolving legal frameworks. I suggest that this differentiation of urban space through the differentiation of property is a fundamental characteristic of contemporary urbanization, which should be better understood.

The evolving legal frameworks for condominiums are illustrative of several important issues relevant to understanding the global spread of condominiums. Although such property types have spread around the world during the last 50 years in part by deliberate borrowing of legal forms, the three cases suggest that the particular property rights specifications that are created are contingent, varying not only in details, but also in fundamentals, and produce quite different property rights regimes in different places. While the initial legislation adopted in Florida, Japan, and Ontario was fundamentally similar, they have maintained important differences over time. This is for two main reasons: first is that national traditions and specifications of property are very different, and condo law is embedded in existing systems of property rights and norms. Second is that once enacted, the political setting, drivers and processes of reform of condominium legal frameworks are quite different.

In Japan, the legacy of the Civil Code provision requiring unanimous consent for changes to shared spaces, changes to bylaws, or termination made condominium governance and especially major maintenance difficult, and is understood to result in drastically lower resale values for most condominium property. At the same time, the national level condominium law has meant that there is little political interest in
condominium law or regulations, and we see infrequent legislative revision, largely internal to ministries, with the Ministry of Justice consistently reluctant to allow significant change, and the Ministry of Construction keen to encourage major repairs and rebuilding where necessary. In Florida weak rules regulating building permits, management rules, association governance, long-term maintenance contracts, and accounting allowed significant irregularities, and major conflicts, which often resulted in court cases, and has contributed to a near constant evolution of condominium law and practice. In Ontario a slightly later passage of the initial law resulted in a more robust legal framework, and careful legislative review systems and consumer-oriented governments have produced infrequent but thorough legal revisions that have created relatively strong condominium management and accounting standards, while not eliminating complaints. Notwithstanding superficially similar legal frameworks and built forms, underlying variations in legal context deriving from historically contingent processes of institutional development and borrowing, and different political systems produced profoundly different outcomes in different places.

This study provides a clear example of path dependence in urban property institutions. Each of the three systems examined have continued to change, and evolve, but the initial configurations of the systems established, the settings into which they were established, and the particular sets of actors with significant interests who became engaged in negotiating change are different in each case. Contingent moments of institution building by actors attempting to adapt global practice to specific legal and political situations created differentiated condominium property rights in each country. Those specifications then underwent different processes of change. Influenced by global discourses and analysis, but always within the particular constraints established locally.

The condominium example makes visible a profound characteristic of urban property, that the system of institutions structuring the creation of property has significant consequences for the property that is produced. Urban property is produced according to the rules in place at the moment of creation of new title
deeds, and those rules determine multiple aspects of the bundle property rights that are created. Those sets of rules vary in different jurisdictions, and evolve in different ways over time. So not all property is the same, but is differentiated both in space, and by time. Where the rules governing the creation of new property change over time, then place and time become decisive factors shaping differentiated landscapes of property.


