NATURAL RESOURCE GOVERNANCE IN QING CHINA: LINEAGE INSTITUTIONS AND THE MAKING OF COMMON PROPERTY REGIMES

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ABSTRACT

Historically, common property is one of the dominant forms of ownership through which natural resources—*e.g.*, forests, pastures, and fisheries—are managed. However, their decline across societies due to marketization and privatization has prompted intense debates. This Article seeks to answer the following questions: (1) Why did some common property regimes dissipate quickly, while others resisted the forces of privatization for generations? (2) What explains the divergent trajectories that societies took in governing common resources? Building on the classic Coasean and Demsetzian law-and-economics principles, this Article highlights two additional dimensions—institutional capacity and social embeddedness of property—to explain how "hidden" social costs impacted the stability of common property regimes.

Using forest commons in Qing China (1644-1912) as a historical case study, this Article argues that lineage institutions—a form of organized kinship—created conditions for the longevity of common property regimes in China due to three factors: (1) as a result of the Qing state's laissez-faire attitude towards property, lineages assumed key administrative functions in regulating property relations at the locality; (2) lineages took advantage of the laws and institutions of the

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Qing state, which were designed to protect entrenched local interests rather than to maximize economic welfare; and (3) the organizational features of lineages allowed them to provide extra-legal solutions to disputes arising from contested access to common resources, largely displacing the roles of formal legal institutions. These factors illustrate the degree to which organized kinship groups were able to adopt sophisticated institutional arrangements that co-opted, resisted, and even competed with the state in crafting the rules of the game.

Although the longevity of kinship-based common property regimes is certainly unique to China's historical experience, this case study carries vital policy implications, both for China today and for the broader developing world. First, kinship organizations may provide effective bulwarks against disruptive change, allowing local communities to adjust to new economic realities. Second, their resource-pooling features can provide a safety net for individual households that fail to make the adjustment. Finally, kinship organizations can control negative spillover effects that would have led to the degradation of common property regimes.

TABLE OF CONTENTS

I. INTRODUCTION

A. *Why Common Property Regimes?*

To manage the access and enjoyment of natural resources—*e.g.*, fisheries, forests, and pastures—societies have historically adopted common property regimes as the institutional solution. In the past century, however, there has been a gradual disappearance of common property regimes around the world.[1] As societies embraced what seemed to be the indomitable force of marketization, private property emerged as the dominant institutional mode for resource distribution. Glossing over this broad historical trend, one may conclude that private property is more efficient than public and common property arrangements and that the legal rights enshrining private property should

1 *See* Margaret A. McKean, *Common Property Arrangements for the Contemporary World*, Conference on New Perspectives on Human-Oriented Ecosystems (Mar. 16, 1998).

be the cornerstone of long-term economic development.[2] In contrast, common property, given its dissipation in developed countries, is viewed as having no place in a rapidly progressing future.

However, the transition from common to private property in many societies has neither been smooth nor teleological. Some have dissipated overnight, while others persisted to this day. In fact, in recent years, there has been a revival of common property regimes in both developing and developed societies. The re-emergence of common land ownership in rural Western Europe, in response to shifts in agricultural production, sparked interest in common property as a means for local economic readjustment.[3] More recently, anxieties about climate change have driven both academics and policymakers to study how common property regimes provide sustainable alternatives for the governance of natural resources.[4] This challenges the conventional wisdom that private property is the only efficient mode of resource allocation.

While discussions on common property have re-entered the public scene, there has been scarce attention cast on the institutional underpinnings of common property regimes, since they are incidental to the keen scholarly interest in questions of efficiency. As such, current literature tends to treat common property as a whole; they rarely

2 Daron Acemoglu and James Robinson argue that clearly delineating private property rights in the 17th century was the central cause of Western Europe's long-term economic growth and divergence from the rest of the world. This is because strong protection of private property divested power away from the ruling elites, constrained arbitrary state power, and facilitated market predictability and transparency, creating profit motives that were conducive to long-term capital accumulation. *See* Daron Acemoglu & James A. Robinson, *Rents and Economic Development: The Perspective of Why Nations Fail*, 181 PUB. CHOICE 13, 23-26 (2019). Strong private property rights protection across the broad population is an example of an inclusive economic institution that is conducive to sustainable economic growth. *See also* Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369, 1401 (2001).

3 *See* Katrina M. Brown, *Common Land in Western Europe: Anachronism or Opportunity for Sustainable Rural Development*?, IASCP European Conference: Building the European Commons: from Open Fields to Open Source (Mar. 23, 2006); *see also* Stefan Dorondel, *Common Forest, Private Benefits: Access to State and Politics in a Village in Post-socialist Romania*, IASCP European Conference: Building the European Commons: from Open Fields to Open Source (Mar. 23, 2006).

4 *See*, *e.g.*, Carla Roncoli, Christine Jost, Carlos Perez, Keith Moore, Adama Ballo, Salmana Cissé & Karim Ouattara, *Carbon Sequestration from Common Property Resources: Lessons from Community-Based Sustainable Pasture Management in North-Central Mali*, 94 AGRIC. SYST. 97-109 (2007).

venture beyond abstract debates about how to overcome "collective action problems" and prevent the "tragedy of the commons."[5] Those that do pay attention to the institutional factors only barely scratch the surface of the interactions between local communities, governments, and market participants in which each played indispensable roles in the creation of common property regimes.[6]

B. *Historical Puzzle: Forest Commons in Qing China*

First, this Article seeks to answer the following question: why did some common property regimes dissipate quickly, while others resisted privatization for generations? According to conventional law-and-economics theories, private property displaces common property regimes when the benefits of capturing a resource's value through private property rights exceed the costs of excluding competing users.[7] This happens when intense resource competition incentivizes the resource users to exclude others from the commons, which would ultimately lead to its degradation. Consequently, private property emerges as a solution to the depleting commons problem by creating a stable regime of enforceable legal interests that places and internalizes the burden on users who value the resource most highly.[8]

This theory, however, fails to explain the persistence of forest commons in Qing China. During the Qing dynasty (1644-1912), China had come to rule vast territories encompassing diverse forest ecosystems. Roughly one-fourth of China's landmass consisted of forests and uncultivated meadows.[9] Less than 13% of China's land was arable.[10]

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5 *See*, *e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2-4, 8-10, 12-16, 18-21 (1990); *see also* Elinor Ostrom & Vincent Ostrom, *A Theory for Institutional Analysis of Common Pool Problems*, *in* MANAGING THE COMMONS 157-72 (Garret Hardin & John Baden eds., 1977).

6 *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167, 283 (1991).

7 *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1-3, 6-8, 13-19 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

8 Demsetz, *supra* note 7.

9 He Fanneng, Ge Guansheng, Dai Junhu & Rao Yujuan, *Forest Change of China in Recent 300 Years*, 18 J. GEOGRAPHICAL SCI. 59, 67 (2008) (Table 2).

10 From 1961 to 2020, the percentage of arable land in China fluctuated from 11.0% to 12.7%. *See generally* Arable land (% of land area) – China, WORLD BANK DATA (last visited Nov. 19, 2022), https://data.worldbank.org/indicator/AG.LND.ARBL.ZS?end=2020&locations=CN&start=1961. For historical data, *see generally* Lijuan Miao, Feng Zhu, Zhanli Sun, John C. Moore & Xuefeng Cui,

Much of this forested land was managed as common property, with village collectives claiming ownership of large parts of it and exercising usufruct rights on other portions.[11] In the High Qing period (1683-1799), rampant deforestation occurred in various forest ecosystems across the empire due to the unprecedented demand for timber resulting from rapid infrastructural development in the imperial heartland.[12] However, not only did private property fail to develop, but the forest commons also continued to thrive.[13] This phenomenon defies the basic intuition of conventional law and economics.

This Article argues that the key omission of these conventional theories is that of two aspects: (1) the role of the state; and (2) the social embeddedness of property. A property regime does not spontaneously materialize when cost-benefit conditions are ripe. There must be a state that is willing to establish those rights and capable of maintaining an effective administrative and legal system to enforce them. Moreover, the state must consider the possibility that privatization could disrupt vital property relations embedded in the socio-political dynamics of local communities. Undermining these relations could result in social instability or even political turmoil. In law-and-economics terms, state capacity[14] and social embeddedness[15] suggest that privatization will almost always generate "hidden" social costs.

Building on existing law-and-economics principles, this Article introduces institutional choice as a conceptual tool to explain the paradox of forest commons in Qing China. It argues that private property will displace common property regimes only if states: (1) have enough

China's Land-Use Changes During the Past 300 Years: A Historical Perspective, 13 INT'L J. ENV'T. PUB. HEALTH 847 (2016).

11 MENG ZHANG, TIMBER AND FORESTRY IN QING CHINA: SUSTAINING THE MARKET 87, 96-97 (2021).

12 *See id.* at 5, 9-10.

13 *See infra* Section III.A.

14 *See generally* Noel D. Johnson & Mark Koyama, *States and Economic Growth: Capacity and Constraints*, 64 EXPLORATIONS IN ECON. HIST. 1, 2 (2017) ("State capacity describes the ability of a state to collect taxes, enforce law and order, and provide public goods.").

15 *See generally* José Miguel Lana Berasain & Iñaki Iriarte Goñi, *The Social Embeddedness of Common Property Rights in Navarra (Spain), Sixteenth to Twentieth Centuries*, *in* CONTEXTS OF PROPERTY IN EUROPE: THE SOCIAL EMBEDDEDNESS OF PROPERTY RIGHTS IN LAND IN HISTORICAL PERSPECTIVE 83-84 (Rosa Congost & Rui Santos eds., 2010) (arguing that the diversity in management models of common property is a result of "both the environmental and socio-cultural contexts in which economic decisions were embedded").

institutional capacity[16] to punctuate the entrenched interests of local communities that were embedded in the common property regimes; and (2) are willing to accept the costs of disrupting social relations at the locality.[17] If either of the two elements is absent, states often fare better leaving common property regimes undisturbed, even when the cost-benefit conditions tilt in favor of privatization.

C. *Explanatory Mechanism: Propertied Lineages as Vehicles for Common-Pool Resource Governance*

This leads to the second question of this Article: who were the institutional actors in the forest commons in the Qing dynasty, and what were the institutional dynamics that contributed to the longevity of these common property regimes? To answer this question, this Article examines the multi-dimensional interplay between the state, the state's agents, the informal authorities in local communities, and the market participants themselves.

This Article argues that the answer lies in one key institution: lineages (宗族). A lineage is a form of organized kinship marked by the following characteristics: (1) controlled membership based on the recognition of patrilineal descent from a common ancestor, usually embodied by a common surname;[18] and (2) group identification with a particular local community, typically expressed through sociocultural practices that reify congregational solidarity.[19] From the mid-14th century to the early 20th century, lineages were the dominant form of organized kinship in Southern and Southeastern China. Variations of the lineage—such as agnatic villages and clan associations—also proliferated in Northern and Southwestern China, albeit with varying degrees of influence at the locality.[20] Despite regional

16 For further analysis of what institutional capacity means, *see infra* Sections II.C.1 & III.B.1.

17 *See infra* Section II.B.2.

18 *See* Michael Szonyi, *Lineages and the Making of Contemporary China*, *in* MODERN CHINESE RELIGION II: 1850-2015 433, 436 (Jan Kiely, Vincent Goossaert & John Lagerwey eds., 2015). For further information on debates over the definition of "lineage," *see*, *e.g.*, James L. Watson, *Chinese Kinship Reconsidered: Anthropological Perspectives on Historical Research*, 92 CHINA Q. 589 (1982); MYRON L. COHEN, KINSHIP, CONTRACT, COMMUNITY AND STATE: ANTHROPOLOGICAL PERSPECTIVES ON CHINA (2005).

19 *See* Szonyi, *supra* note 18, at 433, 436. For further information on debates over the definition of "lineage," *see*, *e.g.*, Watson, *supra* note 18; COHEN, *supra* note 18.

20 Patrilineal lineages can be subdivided into two categories: agnatic and associational. Lineages organized under agnatic kinship base their unity on the successions of eldest sons from the founding ancestor and are secured by the system of

differences, all lineages shared the common features of patrilineality and homogenous group identity.[21] These features made lineages excellent vehicles for pooling common resources and policing community boundaries.[22]

Although lineages were not intended to be economic institutions, they became intertwined with the welfare of common property regimes due to three historical factors.

First, because of the Qing state's lack of intervention in local affairs, lineages assumed central administrative roles in local governance—filling the vacuum left by the state. Lineages took advantage of both the Qing laws' laissez-faire attitude towards the economy,[23] and the Qing magistrates' (知縣) reliance on lineages to advance their own economic interests and ward off hostile claimants of common resources.[24] At the same time, lineages relied on the magistrates' administrative and judicial deference to entrench their economic preferences into norms that preserved the local status quo.[25] The symbiosis between the lineage and the state was a product of the unique structure of the Qing bureaucracy that rewarded laissez-faire-minded magistrates and punished activist ones.[26]

Second, with respect to property, the laws and judicial institutions of the Qing state were designed to protect entrenched local interests and prioritize local peacemaking over economic value. The supreme law of Qing China—the Great Qing Code (大清律例)—did not

primogeniture. In contrast, associational kinships based their unity on perceived common descent through rituals that create a collective identity. In associational kinships, lines of descent are all viewed to have equal statuses and membership is contingent on the members' compliance with lineage rules and willingness to participate in various cultural practices that reinforce the lineage's collective identity. *See* Myron L. Cohen, *Lineage Organization in North China*, 49 J. ASIAN STUD. 509, 510 (1990).

21 Watson, *supra* note 18, at 593-95.

22 *See infra* Section III.C.2.

23 Madeleine Zelin argues that, though the Qing state asserted its authority over the adjudication of debt, its codified law otherwise concerned itself only with keeping markets open to all and prices fair, without separating different categories of economic law or spelling out the standards of adjudication. *See* MADELEINE ZELIN, *A Critique of Rights of Property in Prewar China*, *in* CONTRACT AND PROPERTY IN EARLY MODERN CHINA 17, 18 (Madeleine Zelin, Jonathan K. Ocko & Robert Gardella eds., 2004).

24 *See generally* PHILIP C. C. HUANG, CHINESE CIVIL JUSTICE PAST AND PRESENT 34 (2010); Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201 (1966).

25 *See infra* Section III B.3.

26 *See infra* Section III.B.1.

recognize an enforceable property interest in resources.[27] Instead, the Code perceived property as an instrument to police the statuses, hierarchies, and relations between resource owners according to Confucian moral values.[28] The magistrates and officials who applied the Code to their judicial practices often prioritized the prevention of risks to social stability over the economic value of optimal resource allocation.[29] As such, the Qing state refrained from privatizing common resources, the lineages enjoyed local autonomy, and the common property regimes remained intact with little external intervention.[30]

Third, the organizational features of the lineage were conducive to the long-term stability of common property regimes. These features include congregational ancestral worship, sophisticated mediation procedures, and lineage rules disciplining recalcitrant members.[31] Like many successful norm-based common property orders around the world, lineage-based common property regimes shared the following features: (1) member homogeneity; (2) regular interaction between members; and (3) shared informational availability amongst users of the common resource.[32] But, common property regimes based on lineages were far more stable than those based on other close-knit communities due to their proto-corporate form and self-regulatory capacity.[33] Not only were lineages able to provide extra-legal solutions to property disputes, but they also offered avenues for informal adjudication to disputing parties—even substituting for formal legal recourse.[34] The lineage's ability to subject non-members of the local

27 *See generally* THE GREAT QING CODE (William C. Jones trans., 1994). *See also* Lihong Zhang & Neng Dong, *A New Reading on Great Qing Code: A Comparative and Historical Survey*, 11 HISTORIA ET IUS 1, 6, 8 (2017) (arguing that that "the most distinctive character of [the] Code is its strong morality" which "consists [of] a rigid hierarchy of personal status," and that the Code did not delineate enforceable rights).

28 *See infra* Section III.B.2.

29 *Id.*

30 *See infra* Sections III.B.3, III.C.1 & III.C.3.

31 *See infra* Sections III.C.1 & III.C.2.

32 *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167, 283 (1991).

33 *See* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1623-25, 1668-70 (2000) (discussing the "proto-corporate" characteristics of kinship-based household economies and the centrality of clan-based conceptions of fiduciary duties in the management of common property).

34 *See infra* Section III.C.1.

community to their informal jurisdiction also sets them apart from most close-knit communities around the world.[35]

D. *Analytical Roadmap*

The rest of this Article is as follows. Part II clears up the conceptual nebula regarding the attributes, origins, and evolution of common property regimes. Section II.A sets the theoretical stage by discussing the distinctions between common goods and common property. Section II.B outlines the core components of common property regimes and uses institutional dynamics to explain why many premodern states did not privatize common resources. Section II.C seeks to enrich current law-and-economics models by introducing a more nuanced model of institutional capacity that considers the social embeddedness of property.

Part III introduces the lineage as the paradigmatic informal institution in Qing China. Section III.A lays out the historical puzzle of forest commons in the Qing period that the rest of the sections aim to explain. Section III.B analyzes the legal architecture of the Qing state's policy of non-interference that gave rise to significant local autonomy. Section III.C discusses how lineages became intertwined with the welfare of common property regimes in the context of local autonomy and outlines the organizational features of lineages that were conducive to the long-term stability of these regimes.

Part IV discusses the implications of China's historical experience for contemporary debates on common property. Section IV.A argues that, despite their historical resistance to privatization, common property regimes are in fact compatible with—rather than antagonistic to—market forces. Section IV.B asks what lessons can be drawn from the kinship-based common property regimes in Qing China, and how they can be used to solve difficult policy problems in comparative contexts. Part V concludes the Article by summarizing its key findings and implications.

II. COMMON PROPERTY REGIMES: THEORTICAL FRAMEWORK

Before proceeding to investigate how lineages functioned as makers and enforcers of common property, it is necessary to clarify some foundational concepts due to the long history of confusing term usage in the field that clouds understanding. For example, the term

35 *See infra* Section III.C.2.

"common-pool resources" is often used conterminously with "common property regime"—or simply "common property"—when it actually refers to a type of economic good rather than a form of property ownership.[36] The concept also frequently gets mixed up with "open-access resources," which, in fact, describes the absence of property rather than any form of ownership.[37] Layers of meaning are often piled on terms without parceling out how they relate to one another.

This Part intends to clear up the conceptual cloud. Section II.A sets the theoretical stage by discussing the distinctions between common goods and common property. Section II.B outlines the core components of common property regimes and uses institutional dynamics to explain why many premodern states did not privatize common resources. Section II.C builds on and departs from current law-and-economics models by introducing a more nuanced model of institutional capacity that considers the social embeddedness of property.

A. *Common Goods and Common Property*

The first task is to distinguish between the types of goods subject to division by various forms of property ownership. Based on whether a good is excludable and rivalrous in consumption, economists typically subdivide goods into four categories: public goods (non-excludable and non-rivalrous), common goods (non-excludable and rivalrous), club goods (excludable and non-rivalrous), and private goods (excludable and rivalrous).[38] Table 1 visualizes the different categories of goods into four quadrants:

36 Elinor Ostrom & Charlotte Hess, *Private and Common Property Rights*, *in* THE ENCYCLOPEDIA OF LAW AND ECONOMICS 332, 337 (Gerrit De Geest ed., 2d ed., 2008).

37 Margaret A. McKean, *Common Property: What Is It, What Is It Good for, and What Makes It Work?* in PEOPLE AND FORESTS: COMMUNITIES, INSTITUTIONS, AND GOVERNANCE 27, 30 (Clark C. Gibson, Margaret A. McKean & Elinor Ostrom eds., 2000).

38 *See*, *e.g.*, Roy D. Adams & Ken McCormick, *Private Goods, Club Goods, and Public Goods as a Continuum*, 45 REV. SOC. ECON. 192, 199 (1987); Raphael Zeder, *The Four Different Types of Goods*, QUICKONOMICS (Oct. 15, 2016), https://quickonomics.com/different-types-of-goods/ [https://perma.cc/D6BY-CE5J].

Table 1. The Four Types of Goods: Public, Common, Club, and Private

	Non-excludable Or very costly to exclude	Excludable Or relatively easy to exclude
Rivalrous Or competitive in consumption	Common goods *e.g.*, forests, pastures, fisheries, navigable waters, minerals, and other natural resources	Private goods *e.g.*, crops, apparel, household consumables, merchandise, and land sold as commodities
Non-rivalrous Or non-competitive in consumption	Public goods *e.g.*, national defense, clean air, public health, famine relief, inflation, and goods with positive externalities[39]	Club goods *e.g.*, dikes, private hunting grounds, private roads, and other goods that have artificial scarcity[40]

The subject of this Article, common goods,[41] is often confused with public goods because they both appear to be non-excludable.[42] But, only the former is susceptible to rivalrous consumption—meaning that the benefits consumed by one user subtract from the benefits

39 From the 1720s to the 1790s, the Qing empire set up "ever-normal" granaries (常平倉) to distribute excess grains to the market in anticipation of bad harvests and to counteract inflation through adjusting grain supply. Famine relief programs and counter-cyclical inflation-mitigation systems are examples of non-excludable, non-rivalrous public goods in premodern China. *See* R. Bin Wong, *Coping with Poverty and Famine: Material Welfare, Public Goods, and Chinese Approaches to Governance*, *in* PUBLIC GOODS PROVISION IN THE EARLY MODERN ECONOMY: COMPARATIVE PERSPECTIVES FROM JAPAN, CHINA, AND EUROPE 130 (Masayuki Tanimoto & Roy Bin Wong eds., 2019).

40 For a further economic analysis of club goods, *see* James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1, 14 (1965). *See also* Masayuki Tanimoto, *Toward the Public Goods Provision in the Early Modern Economy*, *in* PUBLIC GOODS PROVISION IN THE EARLY MODERN ECONOMY: COMPARATIVE PERSPECTIVES FROM JAPAN, CHINA, AND EUROPE 2, 3 (2019).

41 "Common goods" and "common pool resources" are the same. To avoid confusion, this Article will use the term "common goods" for the remainder. This Article will use "common pool resources" only when referring to citations that explicitly used this term.

42 McKean, *supra* note 37, at 28-29.

available to the others.[43] Users of common goods such as forests, pastures, fisheries, and navigable waters typically experience great difficulty excluding noncontributing beneficiaries (*i.e.*, free riders) from consuming these resources.[44] Though theoretically possible, the costs of excluding users of common goods are often prohibitively high. This is because the uncertainty and multiplicity of competing claims over the common good create a collective action problem that inhibits informational flow and coordination between the resource's incumbent, hostile, non-contributing, and future claimants.[45] Due to high coordination costs between different claimants of the common good, incumbents often find it hard to contractually arrange solutions to these collective action problems. Even if the incumbents can mobilize enough resources to enforce bargains between hostile and non-contributing claimants, they cannot enforce bargains against future claimants (who are unidentifiable by definition) without the help of an external coercive force.[46] The difficulty of exclusion, therefore, motivates everyone to pursue short-term, unsustainable consumption behavior. The resultant effect of resource depletion, overuse, and overconsumption is what is typically called the "tragedy of the commons."[47]

However, the fact that excludability is a function of the user's cost-benefit calculation suggests that common goods can morph into other types of goods under certain conditions. If a resource is plentiful and competition is weak, users may find it unnecessary to spend time, energy, and effort to exclude others—making the common good public-like.[48] Alternatively, if competition is fierce but an external

43 Ostrom & Ostrom, *supra* note 5, at 158-59.

44 *See* Amnineh Ghorbani & Giangiacomo Bravo, *Managing the Commons: A Simple Model of the Emergence of Institutions Through Collective Action*, 10 INT'L J. OF THE COMMONS 200, 202 (2016) ("[T]he expression of common-pool resource refers to a class of goods defined by two characteristics: a difficult excludability of potential beneficiaries and a high degree of subtractability.").

45 *See generally* Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSPS. 137, 148-49 (2000).

46 To simplify Ostrom's game-theoretical model of collective action in the context of common goods exclusion, this Article reframes the players in a collective action situation as "incumbent," "hostile," "non-contributing," and "future" claimants of resources. Ostrom's theory presumes that all players are rational individuals whose aim is to maximize self-interest. *See id.* at 139-43.

47 *See* OSTROM, *supra* note 5, at 13.

48 In relation to land, for example, abundance and weak competition allow a cultivator to use a plot until its fertility is exhausted; and then move to another plot for further cultivation without fearing that the process will be interrupted by another. In this case, there is no need to assert ownership over any plot of land, and there is no unsustainable depletion of resources. *See* Daniel Fitzpatrick, *Evolution and Chaos*

coercive force (*e.g.*, the state) artificially blocks certain channels of excludability by conferring a right or entitlement to a private entity, the common good obtains attributes of a club good. But, transforming a common good into a club good may not be the optimal solution because it might confer upon the private party a right to capture a windfall that would have otherwise been a positive spillover for the broader community. Having "too many" property rights over a common resource, therefore, creates a bilateral monopoly that bars more efficient future users from fully optimizing the potential value of the resource.[49] The resultant effect is underinvestment and underutilization—the usual symptoms of the "tragedy of the anticommons."[50]

The dual tragedies[51] have led many scholars to theorize institutional solutions to overcome collective action problems embedded in the production, use, and consumption of common goods.[52] However, less attention is devoted to studying the relationship between common

in Property Rights Systems: The Third World Tragedy of Contested Access, 115 YALE L.J. 996, 1003 (2006).

49 "Too much" property rights occur when each "stick" in the "bundle" of property rights is being held by different parties having a property interest in the same resource. For example, the rights to sell, receive income, lease, determine the use, and occupy a resource could be separately held by different parties. When a party only has one stick in the bundle of rights, she will likely not be able to exploit the value of the resource fully and optimally, since any reasonable economic usage may involve two or three sticks in the bundle. However, with so many parties essentially owning a stick in the bundle, the costs of coordination between parties will be prohibitively high. It will also take multiple transfers and transactions for one party to gain ownership of multiple sticks of enough rights to fully use and enjoy the property. *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 639 (1998).

50 *Id.* at 678 (conventional property theory distinguishes between "the tragedy of the commons" (*i.e.*, overconsumption resulting from the absence of property rights over common resources), and 'the tragedy of the anticommons" (*i.e*., chronic underinvestment resulting from too many property rights over an essential public resource)); *see also* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 72-89 (3d ed. 2016).

51 Referring to the parallel tragedies of the commons and the anticommons. *See*, *e.g.,* OSTROM, *supra* note 5, at 12-16, 18-21; *see also* James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 1-3 (2000).

52 *See*, *e.g.*, ELINOR OSTROM, ROY GARDNER & JAMES WALKER, RULES, GAMES, AND COMMON-POOL RESOURCES (1994) (exploring how mechanisms of endogenous institutional development were involved to solve common-pool resource dilemmas, using analytical tools of game theory and institutional analysis); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (2015) (using game theory to explain how, in the absence of a strong coercive state, voluntary self-enforcement organizations can solve collection action problems embedded in the common-pool resource dilemma).

goods and the property institutions that societies chose to govern them. Seeking to fill this gap, the following sections lay out the theoretical foundations for the rest of the Article by making two arguments. First, common property regimes prevailed across premodern societies because premodern states often lacked the institutional capacity to enforce private property rights and manage the commons themselves. Second, the institutional choices that societies made to govern common goods are both products of economic incentives and results of historical path dependencies. The nature of a good is that it describes the economic relations of use and consumption underpinning the physical attributes of a resource, whereas property is a legal fiction invented to justify these relations.[53] Because each society possesses a unique understanding of what economic relations are important, societies often develop different approaches to similar incentive problems arising from the contested access to common goods, leading to divergent resource management systems to govern the commons.

B. *Common Property Regimes: What Are they? Why Do They Exist? What Causes Their Decline?*

1. *Common Property in Comparative and Historical Perspectives*

Common property regimes are social arrangements of property ownership regulating the access, preservation, maintenance, and consumption of a common good.[54] Their defining economic feature is that they privatize the individual's right to extract income from the flow of resource units, without partitioning the resource stock into privately-owned parcels.[55] (*See* Table 2). Around the globe, communities have adopted a wide variety of common property regimes to manage forests, fisheries, pastures, and other depletable natural resources for long-term benefit.[56] These communities ensure that individual extraction of depletable resources would not compromise their long-term benefits by leaving the common ecosystem intact.[57]

53 *See* McKean, *supra* note 37, at 27-28.

54 *Id.* at 27.

55 *Id.* at 36-37.

56 *Id.* at 34.

57 *See id.* (stating that common property regimes are "used by communities to manage forests and other resources for long-term benefit").

Table 2. Generalization of the Core Attributes of Different Property Regimes

	Private Property (Governing private and club goods)	Common Property (Governing common goods)	Public Property (Governing public goods)
Rights to Resource Flow	Divided	Divided	Undivided
Rights to Resource Stock	Divided	Undivided	Undivided

Today, most common property regimes are in decline, either because communities have found more efficient substitutes due to technological advancement or simply because governments have legislated them out of existence.[58] They disappeared as the modern state apparatus expanded into previously self-sufficient local societies, often by upending their existing social relations of resource management through land reforms[59] or formalizing property rights.[60] Still, many common property regimes persisted in developing countries where states had limited institutional capacity to implement land reforms, enforce property rights, or transform the economic infrastructure of local societies.[61]

58 *See id.* at 34-35.

59 Though land reforms are typically seen as instruments of socialist regimes, governments at both ends of the ideological spectrum have embraced land reforms as a method to reorient the economic relations of the societies they govern and expand state power into their frontiers. *See*, *e.*g., Malcolm H. Dunn, *Privatization, Land Reform, and Property Rights: The Mexican Experience*, 11 CONST. POLITICAL ECON. 215, 217 (2000); LEE J. ALSTON, GARY D. LIBECAP & BERNARDO MUELLER, TITLES, CONFLICT AND LAND USE: THE DEVELOPMENT OF PROPERTY RIGHTS AND LAND REFORM ON THE BRAZILIAN AMAZON FRONTIER (2010). Land reforms are typically carried out abruptly, following a regime change in the government, and aimed at transforming the fundamental economic relations of landownership at an enormous scale.

60 Other than land reforms, governments also pursue incremental legal change as a means to transform the underlying economic relations of the local society. In the context of landownership, this is achieved through legislating title registry systems. In the context of environmental resources, this is achieved through granting government licenses. *See* Fitzpatrick, *supra* note 47, at 1020-21.

61 *See id.* at 1011, 1042-43.

Historically, common property regimes were the dominant system for the management of natural resources, given that premodern states had limited institutional capacity to police these resources themselves.[62] In the 1861 treatise *Ancient Law*, English jurist Henry Sumner Maine observed "that joint-ownership, and not separate ownership, is the really archaic institution."[63] Drawing from Georg Ludwig von Maurer's studies on premodern Germanic village communities and Maine's own research on India, Maine concluded "that the forms of property which will afford us instruction will be those that are associated with the rights of families and of groups of kindred."[64] This makes sense, as premodern states generally lacked the sophistication to mobilize and deploy institutional resources to police vast areas of common forests and fisheries; and, in the context of state incapacity, it is reasonable for people to turn to their kin to negotiate and safeguard access to these vital resources. Maine's observation challenged the then-consensus that property originated from the single proprietorship of land, which was largely informed by John Locke's labor theory of property entitlement.[65] Though Maine's observation was centered largely on the Western European experience,[66] it carries broad implications globally. It suggests that, in Western and non-Western societies alike, common property regimes existed before any

62 *See*, *e.g.*, S. V. Ciriacy-Wantrup & Richard C. Bishop, *"Common Property" As a Concept in Natural Resources Policy*, 15 NAT. RES. J. 713, 717-20 (1975) (arguing that common property institutions have played historically beneficial roles in the management of natural resources, using the case studies of Ugandan communal hunting tribes and common pastures in England and Wales); Timothy Besley & Torsten Persson, *The Origins of State Capacity: Property Rights, Taxation, and Politic*s, 99 AM. ECON. REV. 1218, 1219-21 (2009) (discussing the economic relationship between the enhancement of redistributive power and the emergence of the modern state).

63 HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS 259 (1861).

64 *Id. See also* Ostrom & Hess, *supra* note 36, at 333.

65 The dominant view at the time amongst Anglo-American jurists was that property originated from the individual's exertion of labor upon natural resources. Informed largely by the philosophy of John Locke, this view led to the notion that entitlement should vest in the party who extracts economic value from natural objects. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690). The Lockean labor theory justified both the colonial homestead principle and the legal doctrine of first possession. *See* K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1138 (2022).

66 *See* MAINE supra note 62, at 259.

state tried to privatize or nationalize common goods through legislation and law enforcement.[67]

2. *Dissipation of Common Property Regimes: Law-and-Economics Perspective*

The notion that common ownership is prevalent in the premodern world finds support in law-and-economics theories, which suggest that private property was not the default property regime;[68] instead, private property likely evolved because of institutional choice. In his 1967 classic *Toward a Theory of Property Rights*, economist Harold Demsetz argued that private property rights emerged when the benefits captured by a single proprietorship exceeded the costs of excluding competing users.[69] In Demsetz's words, "property rights develop to internalize externalities when the gain of internalization becomes larger than the costs of internalization."[70] Demsetz's conceptualization of property rights as a mechanism to harmonize private and social costs is heavily influenced by Ronald Coase's idea that property law—alongside tort and contract law—should aim to internalize externalities hindering the optimal allocation of resources.[71]

67 Property is, in a sense, "pre-political" in that it existed before any society adopted formal property rights. However, the idea that it was common property—rather than private property—that existed in the pre-political era challenged many philosophies that were based on the Lockean principle. Locke envisioned property to be the foundational right upon which all other civil rights and liberties exist, as property starts from plain folks and from their activities in appropriating the natural resources around them. *See* LOCKE, SECOND TREATISE OF GOVERNMENT (1690). Formal property rights emerged to provide legality to the present order of resource allocation that existed on the ground. *See* Carol M. Rose, *Property as the Keystone Right?* 71 NOTRE DAME L. REV. 329, 334 (1996).

68 *See generally* Demsetz, *supra* note 7.

69 *See id.* at 350.

70 *Id.*

71 *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1-3, 6-8, 13-19 (1960) (arguing that in an ideal world without transaction costs, parties affected by externalities would negotiate with the offending resource users to either receive compensation or induce changes in the patterns of resource usage). The Coasean theorem suggests that the bargaining process, if unimpeded by transaction costs, would leave the resource in the hands of the parties who valued the resource the most. This would incentivize the parties who value the resource the highest to monitor resource use, exclude offending users, and bear the risks and liabilities for the externalities—thereby internalizing the externalities. The policy implication is that, since this is an imperfect world with transaction costs, states should aim to remove those transaction costs so that the parties can optimize resource allocation themselves through bargaining.

Although Demsetz did not focus on common property, his theory offers insight into how private property emerged from the dissipation of common property regimes.[72] When increasing competition in the rivalrous consumption of a common good result in its scarcity, the demand for the resource would rise, driving up the resource value.[73] Consequently, as the resource's value exceeds the costs of exclusion, users who fear the rapid depletion of the common resource would not be content only having a right to the flow of resource units.[74] Instead, the self-interested user would be incentivized to assert a claim over the resource stock, thereby partitioning the previously undivided common good into private parcels.[75] To enforce a private claim on the common good, users either seek help from an external power (*e.g.*, legal redress, political force, or judicial intervention) or resort to self-help.[76]

Before any state attempted to formalize private property rights in natural resources, self-help was the only viable avenue for users to enforce their private claims on a common good. Users invest time, energy, and labor in a wide range of exclusionary activities, such as hiring third-party personnel to channel brute force, conveying threats through displays of hostility, or installing fences and bulwarks to repel outsiders.[77] Naturally, the successful resource claimant bears all costs associated with the exclusionary activity; in this way, the claimant internalizes externalities generated by wasteful resource usage and unsustainable competition over the common good.[78] However, self-help generates additional social costs borne by other members of society since it increases the risks of violence and damages the social basis for the orderly and efficient resolution of property disputes. The emergence of formal private property rights, therefore, shifts the costs of exclusion from the individual user to the state, as the state would need

72 Demsetz, *supra* note 7, at 350.

73 *See id.* at 355.

74 *See id.*

75 *See id.*

76 In the absence of property rights, a self-interested claimant of resources will assert an exclusionary right, either through physical or technological means or through bargaining. Historical examples of such technological innovations include the development of barbed wire, the invention of the axe, and the introduction of state-sponsored land-titling or other registry systems. *See*, *e.g.*, Peter S. Menell & John P. Dwyer, *Approaches to Teaching Property: Reunifying Property*, 46. ST. LOUIS UNIV. L.J. 599, 605 (2002); Lee J. Alston, Edwyna Harris & Bernardo Mueller, *Property Rights and the Preconditions for Markets: The Case of the Amazon Frontier*, 151 J. INST. & THEORETICAL ECON. 89 (1995).

77 *See* Fitzpatrick, *supra* note 48, at 1005.

78 *Id.*

to maintain private proprietorship through the clear demarcation and enforcement of property rules. This cost-shifting dynamic relieves the individual of the need to pursue self-help, thereby reducing the risks of violence and instability.[79]

Two important implications follow from the Demsetzian theory. First, competition over the common good destabilizes the pre-existing social arrangements of common ownership by incentivizing individuals to divide the common resource stock into privately-owned parcels.[80] Second, to successfully establish formal private property rights over a common good, it must be less costly for the state to maintain the administrative and legal institutions that are necessary to enforce those rights than to let individual users and communities bear the costs of exclusion themselves.[81] The first condition gives rise to individual incentives to exclude others from the common resource.[82] The second condition gives the state an incentive to establish private property rights over the common resource.[83] If either one of the two conditions is absent, common property regimes will likely maintain their current forms, as neither the state nor the users have the incentive to deviate from common ownership.

While the first condition could be satisfied simply through economic development, very few premodern states were able to meet the second condition.[84] This is because displacing existing common property regimes with single proprietorship would typically require states to possess resources and technologies beyond their institutional capacities.[85] To create an effective system of property rights means that the

79 *See* Demsetz, *supra* note 7, at 350.

80 *See id.* at 347.

81 *See id.*

82 *See id.* at 348.

83 *See id.* at 350.

84 *See generally* Leonor Freire Costa, Antonio Henriques & Nuno Palma, *Anatomy of a Premodern State*, UNIV. OF MANCHESTER ECON. DISCUSSION PAPER SERIES EDP-2208 (2022) ("State capacity is a proximate cause of why some societies have better economic performance than others."); Johnson & Koyama, *supra* note 14, at 2 ("State capacity can be thought of as comprising two components. First, a high-capacity state must be able to enforce its rules across the entirety of the territory it claims to rule (legal capacity). Second, it has to be able to garner enough tax revenues from the economy to implement its policies (fiscal capacity).").

85 These technologies include social-scientific knowledge pertaining to the efficient extraction of tax revenue and the development of information systems used for the recordkeeping of property titles. *See* Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 128 (2001) ("Technology, either in law or in a more conventional sense, allows increasingly sophisticated definition of

state must mobilize and deploy significant legal and administrative resources to enforce those rights.[86] Not only does this entail investing human capital into the training of judges and officials capable of adjudicating private property disputes, but it also requires a sophisticated law enforcement body capable of dispensing those judgments without causing great disruptions in the locality.[87] With regards to common goods such as natural resources, the premodern state faced an additional technological hurdle—without accurate cartography and surveying methods, mapping boundaries of forests, pastures, and waterways entail significant information costs.[88] Keep in mind that these are difficult tasks even for a modern state, not to mention the hurdles that a premodern state would need to surmount in establishing private property rights over a common good.[89]

From the state's perspective, the optimal solution is to leave local systems of common resource management undisturbed. One could speculate plenty of reasons why a premodern state would want to leave the regulation of common goods to the local communities themselves. For one, common goods are notoriously difficult to manage from the top-down—their boundaries fluid, their forms malleable, their value untraceable, and their participants unidentifiable. Premodern states were also likely preoccupied with other state-building priorities and devoted their limited institutional attention to taxation, warfare, and regime stability.[90] Moreover, local communities are often better at

property rights and allocation of particular sticks [within the bundle] to either private property owners or public entities. Registration of deeds is a comparatively recent property rights technological innovation from 1640, and it allows certainty of title—enabling complex financial dealings based on land as collateral.").

86 Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RSCH. OBSERVER 1, 1-3 (1998).

87 *Id.* at 4-5, 9.

88 *See generally* Fitzpatrick, *supra* note 48.

89 In many parts of Africa today, such as Sudan, Ethiopia, Cameroon, Senegal, Kenya, and Tanzania, common property regimes proved resilient against the state's efforts to privatize common goods in forestry and pasturing. There were chronic conflicts between local foresting communities and the state's license holders, often resulting in violence and disruption of social stability. These tragedies occurred because the state, while adamant in upending common property regimes through privatization, often lacked the institutional capacity to enforce government licenses and other private rights of access. As a result, government licensees and individual proprietors often found themselves directly in conflict with local communities. *See id.* at 1020-21, 1032.

90 *See generally* CHARLES TILLY, COERCION, CAPITAL, AND EUROPEAN STATES, AD 990-1992 (1990); Richard von Glahn, *Modalities of the Fiscal State in Imperial China*, 4 J. CHINESE HIST. 1, 1-29 (2020); Taisu Zhang & John Morley, *The Modern*

managing natural resources than their "weak" governments because communities have better access to the information necessary for making decisions about the usage, disposal, and consumption of resources.[91] For example, local communities are generally more familiar with their surroundings, better at tracking the whereabouts of local participants, and have greater access to local knowledge pertaining to the preservation of environmental ecosystems.[92] As a result, premodern states often find it more efficient to leave common property regimes intact than to disrupt them through formalizing property rights.

C. *Common Property from the Lens of Institutional Choice*

1. *The Paradox of Institutional Capacity*

While the Demsetzian model provides valuable insight into why premodern states would be inclined to leave common property regimes undisturbed, it does not explain why some common property regimes dissipated quickly while others lasted for generations. If Demsetz's thesis is correct, it should be observed in similar processes of degradation of common property regimes across the world as states modernize their institutions and grow their economies—given that rising resource value and competition would change the cost-benefit conditions, incentivizing both the state and the users to deviate from the common property arrangements.[93]

Yet, many societies—particularly those in the non-West—did not follow this trajectory. Common lands and forestry communities which were once widespread in Tokugawa Japan (1600-1867) did not survive the land reforms during the Meiji period (1867-1912),[94] whereas similar regimes found in Qing China (1644-1912) resisted legal

State and the Rise of the Business Corporation, YALE L.J. (forthcoming Feb. 18, 2022).

91 Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945).

92 *See id.*

93 *See* Fitzpatrick, *supra* note 47, at 998.

94 *See* Margaret A. McKean & Thomas R. Cox, *The Japanese Experience with Scarcity: Management of Traditional Common Lands*, 6 ENV'T REV. 63 (1982); *see also* Margaret A. McKean, *Conflict Over the Contemporary Fate of Common Lands in Japan*, ASS'N ASIAN STUD. (Mar. 26, 1993), https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5350/Conflict%20over%20the%20contemporary%20fate%20of%20common%20lands%20in%20japan.pdf?sequence=1 [https://perma.cc/AD7F-MMNM].

modernization during the Republican period (1912-1949).[95] Some even persisted into the socialist era and adapted into People's Communes despite the nationalization of all lands and natural resources during the early years of the People's Republic of China (1949-present).[96] Even as recent as the 1990s, common property regimes proliferated in parts of rural and peri-urban China given the ambiguous status of property rights in Chinese law.[97]

The discrepancies between theory and historical reality suggest that the Demsetzian model requires further explanation. Obviously, one could argue that common property regimes survived in China but not in Japan because the Meiji Japanese state was stronger than the Republican Chinese state in terms of institutional capacity. But, institutional strength alone does not explain why common property regimes declined in early-modern Japan and Western Europe but survived in modern China.[98] As such, blanket statements about institutional capacity rarely withstand historical scrutiny given that the state's institutional capacity tends to vary along temporal and spatial dimensions.[99] The state's capacity to penetrate local society may be

95 *See generally* XU XIAOJUN, TRIAL OF MODERNITY: JUDICIAL REFORM IN EARLY TWENTIETH-CENTURY CHINA, 1901-1937, 331, 332 (2008) (arguing that Republican China's vision of legal modernity—guided by notions of such as the rule of law, judicial independence, and due process—was detached from local society where the reform mandates were viewed as unreasonable by both county officials and the local people; and that Republican legal mandates failed to penetrate local society because they were inconsistent with local survival strategies and power struggles); Larissa Noelle Pitts, *Unity in the Trees: Arbor Day and Republican China, 1915-1927*, 13 J. MOD. CHINESE HIST. 296-318 (2019) (discussing how the officials of Republican China sought to mobilize various strata of local society to engage in communal reforestation but failed to achieve their national goal of fostering a modern sense of environmental culture and ecological stability).

96 *See*, *e.g.*, Zhang Yiwen & Shashi Kant, *Partitioning Commons and Devolving Them from Communal to Sub-Communal Groups: Evidence from China's Community Forest Management Organizations*, 14 INT'L J. OF THE COMMONS 44-60 (2020); Peter Ho, *Credibility of Institutions: Forestry, Social Conflict and Titling in China*, 23 LAND USE POL'Y 588, 589, 594-96 (2005).

97 *See* Yiming Wang & Jie Chen, *Privatizing the Urban Commons Under Ambiguous Property Rights in China: Is Marketization a Remedy to the Tragedy of the Commons?*, 80 AM. J. ECON. SOCIO. 503 (2021).

98 In fact, there is sufficient evidence indicating that common property regimes are reviving in many parts of peri-urban China, in regions where they once dissipated. Even in some cities, "urban commons" arose as solutions for neighborhoods to manage common resources in parks. *Id.* at 504-05.

99 Both historical and empirical studies reveal that state capacity is the dynamic result of multiple factors rather than a static description of regime strength. *See*, *e.g.*, Mark Dincecco & Yuhua Wang, *State Capacity in Historical Political Economy*, *in* OXFORD HANDBOOK OF HISTORICAL POLITICAL ECONOMY 3-5 (Jeffery Jenkins &

stronger in some regions than others. The degree to which the state's presence is felt by members of local society may fluctuate over time depending on the actions of the state's agents who dispensed justice in the state's name. Individual participants of common property regimes may react to resource competition and the risks of depletion differently, depending on the availability of alternatives and resources at their disposal. In short, incentives created by resource competition are hardly uniform. These factors challenge the original Demsetzian assumption that private property rights would simply displace common property regimes in response to changing cost-benefit conditions that favor privatizing common goods.

Like many economic theories, the Demsetzian model overlooks what many anthropologists have long asserted—that private property rights are both a result and cause of resource conflicts.[100] Private property solutions to the commons problem likely emerged from the dynamic processes of confrontation, contestation, negotiation, and compromise between multiple market participants, rather than from the unilateral implementation of property rules by a central legal authority.[101] Anthropologists who study property relations emphasize the social embeddedness of property rights that informed the interactions between laws, norms, customs, and institutions.[102] For many market participants in common property regimes, collective ownership meant more than just economic income—they are conduits of social capital through which individuals anchor their identities in the village

Jared Rubin eds., forthcoming 2022) (dissecting state capacity into various institutional components, including fiscal, informational, administrative, and infrastructural capabilities.); Cullen S. Hendrix, *Measuring State Capacity: Theoretical and Empirical Implications for the Study of Civil Conflict*, 47 J. PEACE RSCH. 273, 282 (2010) (arguing that state capacity is characterized by three factors: (1) "*rational legality*, [which] captures bureaucratic and administrative capacity," (2) "*rentier-autocracticness*, [which] captures a continuum bounded by high-revenue at the high end and low-revenue, resource-poor democracies at the lower end," and (3) "*neo-patriomoniality*, [which] capture[s] aspects of state capacity that cut across theoretical categories[,]" such as the extent to which "the monarch is the direct beneficiary of the country's natural resource wealth").

100 *See* Fitzpatrick, *supra* note 48, at 1008-09.

101 *See id.* at 1008.

102 *See generally* LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY (1971) (discussing the theory of social embeddedness of rights to property); THE DYNAMICS OF RESOURCE TENURE IN WEST AFRICA 1 (Camilla Toulmin, Philippe Lavigne Delville & Sambra Traore eds., 2002) ("[A]llocation of rights is not a matter of applying a series of specific rules, but of negotiation on the basis of general principles, and following a socially recognized procedure.").

collective.[103] As such, the disruption of existing arrangements of common property ownership endangers vital networks that maintain the social fabric of relationships at the locality. In law-and-economics terms, this means that the process of reallocating common goods through privatization would create additional deadweight losses in the form of social conflict and instability. This explains why states that prioritize stability would be inclined to keep common property regimes intact even if the cost-benefit analysis tilts in favor of privatization.

2. *Social Embeddedness of Property Rights*

The social embeddedness of property rights has three important implications for law-and-economics models of common property. First, common property regimes do not necessarily dissipate when the gains from privatizing common resources outweigh their costs.[104] Where social relations central to the maintenance of local communities are embedded in the organizational structures of common resource management, states typically find it more beneficial not to intervene through the legal instruments of resource redistribution.[105]

103 Even for private property regimes in the modern West, property rights are "embedded" in the social relations of parties who are affected by their use. Property rights define the rightsholder's perceived status, relations, and standing in the local community where the effects of enforcing property rights are felt by multiple stakeholders who may or may not be in privity with the rightsholder. *See* Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VAND. L. REV. 98 (2012) (discussing the personhood values of property rights that are derived from the arrangements and allocation of resources).

104 *See* Demsetz, *supra* note 7, at 350, 355. *But see* Lubna Hasan, *Revisiting Commons—Are Common Property Regimes Irrational?* 13-14 (IDEAS WORKING PAPER SERIES FROM REPEC 2022), https://mpra.ub.uni-muenchen.de/8316/1/MPRA_paper_8316.pdf [https://perma.cc/27ST-M7HP] (refuting Demsetz by pointing out that, in India and Brazil, "privatization of resources has not served as a panacea for their conservation[;] in fact, in many cases it has contributed to a faster destruction of resources").

105 Premodern states tend to possess little information about how common property regimes are managed since they are not recorded in the state's centralized title registry systems. Thus, from the state's perspective, common property is either inefficiently exploited or fiscally barren, as they generate little tax revenue. *See* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 23 (1998). Although states have the incentive to privatize common property regimes to increase tax revenue, untangling the thicket of common property requires substantial investment in technologies of title recordation and tax enforcement, which can create more net-costs than benefits. *See id.* at 36. Moreover, in order to establish enforceable systems of freehold land tenure, states need to undertake cadastral surveys which were both time-consuming and expensive. They often met strong resistance or backlash from local elites. *See id.* at 38.

Second, local communities are not passive recipients of rules dispensed by the state authority; oftentimes, these communities are active interlocutors, negotiators, and makers of informal rules that at times defied the state's power.[106] Initial conditions of governmental neglect may create opportunities for informal, extra-legal authorities in local communities to entrench their powers in the locality by influencing the operational aspects of common property regimes. As their interests become more intertwined with both the local communities' interests and the welfare of the commons, common property regimes become more resistant to the state's legal and political attempts to reallocate resources. Occasionally, local communities even thwarted the state's redistributive attempts when the state's interests were antagonistic to those of important members of local society who operated the resource systems on the ground.[107] States may end up yielding to local interests even as the cost-benefit conditions would favor otherwise.

Third, the dynamic interaction between states and local communities over the management of common resources transforms both the state and local society.[108] Once a state commits to local peacekeeping and compromise, it may become increasingly dependent on local communities to manage natural resources.[109] The state may devote its institutional resources elsewhere, as there will be little incentive to change what is already working well.[110] In response, informal

106 *See generally* MICHAEL SZONYI, THE ART OF BEING GOVERNED: EVERYDAY POLITICS IN LATE IMPERIAL CHINA (2017) (discussing how lineage institutions in local communities engaged in regulatory arbitrage activities to maximize their benefits of meeting government demands for taxation and manpower, while finding ways to co-opt the government's rhetoric and game the system in ways that advance local interests at the expense of the state).

107 *See id.*

108 *See generally* Wang & Chen, *supra* note 97.

109 *See*, *e.g.*, Anne M. Larson & Fernanda Soto, *Decentralization of Natural Resource Governance Regimes*, 33 ANN. REV. ENV'T & RES. 213, 214 (2008) ("The common property literature, in particular, has made it clear that local governance structures often already exist to manage local resources."); Fred P. Saunders, *The Promise of Common Pool Resource Theory and the Reality of Commons Projects*, 8 INT'L J. OF THE COMMONS 636, 639 (2014) ("In Africa, at least, [commons projects] are rarely, if ever, entirely initiated or endogenously managed and usually involve some form of management agreement between government and local communities.").

110 *See* Arielle Levine, *Staying Afloat: State Agencies, Local Communities, and International Involvement in Marine Protected Area Management in Zanzibar, Tanzania*, 5 CONSERVATION & SOC'Y 562, 578 (2007) ("The peripheralization of the state in these community-based conservation programmes also provides government agencies little incentives to work [. . .] for independent participation in natural [resource management] . . . Under these circumstances, the state has a perverse

authorities in the locality would be emboldened to take up more responsibilities in managing and policing common resources.[111] Filling the vacuum left by the states, these informal authorities would assume important roles as adjudicators, enforcers, and protectors of common property regimes.[112] During this process, the states may try to recapture these powers through occasional political and legal reforms aimed at limiting the autonomy of local communities.[113] But it is exactly this struggle for managerial power over common resources that constantly re-defines center-local relations. This mutually transformative dynamic explains why, in many premodern societies, governments often tolerated common property regimes to operate in the shadow of the law.[114]

However, these three implications do not suggest that cost-benefit conditions and institutional capacity are irrelevant—quite the opposite. Incentives still largely dictate whether there will be demands from private users to deviate from common ownership structures. They are also relevant to a state's decision to push for institutional changes in the management of common resources. But, the important lesson here is that the presence of incentives for change does not mean that change will automatically ensue. Whether the change will materialize depends on a host of factors such as political will, degree of

incentive to work to maintain a degree of village dependency, thus guaranteeing its own role as a 'gatekeeper' and the associated access to donor resources.").

111 As the central state authority retreats from local society, informal institutions entrenched in local communities must necessarily fill the power vacuum to maintain order in the locality. *See* June Y. T. Po, Arlette S. Saint Ville, H. M. Tuihedur Rahman & Gordon M. Hickey, *On Institutional Diversity and Interplay in Natural Resource Governance*, 32 SOC'Y & NAT. RES. 1333 (2019) ("Informal institutions often become habitual and integrated into everyday practice for social actors and tend to operate through more decentralized social pressure designed to subordinate individual self-interest to other socially accepted values, such as cooperation and loyalty . . . Gaining legitimacy or 'practical authority' within informal institutions often involves an accumulation of capacity and recognition for problem solving, relational trust, and experimental success over time."). *See also* Wenjuan Bi, *Divisive Elites: State Penetration and Local Autonomy in Mei County, Guangdong Province, 1900s-1930s*, 312 (2015) (unpublished Ph.D. dissertation, The Ohio State University) (on file with the Graduate School of The Ohio State University Library) ("As the local gentry deepened and institutionalized their control of local communities, the government gradually lost its leverage in the negotiation with the local gentry.").

112 *See id.* at 1335-36. *See also infra* Section III.C.1.

113 *See* Larson & Soto, *supra* note 109, at 225 ("Although there is a great variety of groups, those involved in natural resource management are often subject to top-down control, are upwardly accountable, and may simply co-opt civil society rather than foment real participation in decisions.").

114 *See* McKean, *supra* note 37, at 34-35.

resistance, and hidden social costs.[115] These factors may or may not be part of the state's cost-benefit calculations. But, they do shift the cost-benefit conditions for privatizing common goods in ways that are often unanticipated by the state. Whether or not a state can anticipate these factors, control these risks, and adjust its cost-benefit calculations to materialize the change depends on the state's institutional capacity.[116]

What this means is that there should be an expansion of the understanding of what institutional capacity is. It is necessary to consider institutional capacity in relational, rather than absolute, terms. Even if a state possesses enough resources to maintain an effective legal and administrative body to enforce private property rights, it is still relatively "weak" if local communities, in charge of the operation and management of common property regimes, are strong enough to defy the state's institutional logic.[117] Moreover, institutional capacity is an amalgamation of both economic and non-economic factors. What this Part attempts to highlight are the mutually transformative processes of institutional change and the indirect costs of resource allocation that are typically omitted in existing law-and-economics explanations of why common property regimes prevailed.

III. CASE STUDY: KINSHIP AND COMMONS IN QING CHINA

Common property regimes are almost always governed by informal institutions.[118] No matter how sophisticated or long-standing, common property regimes were never codified or recognized by the formal legal system.[119] This is probably a result of the fluidity of the natural resource systems upon which the common property regimes rest.

A similar pattern exists in China. The absence of formal property rights in the Qing legal system meant that communities and market participants often needed to resort to informal institutions at the locality to resolve property disputes.[120] Rights arising from the usage and

115 *See* Posner, *supra* note 86, at 8.

116 *Id.*

117 For further analysis of what institutional weakness means, *see infra* Section III.B.1.

118 *See* McKean, *supra* note 37, at 34.

119 *Id.*

120 *See generally* PHILIP C. C. HUANG, CHINESE CIVIL JUSTICE PAST AND PRESENT (2010); Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1221 (1966).

consumption of common resources were protected primarily through extra-legal means. The puzzle, however, is why common property regimes in China persisted despite the cost-benefit conditions shifting in favor of privatization.

This Part introduces the lineage as the paradigmatic informal institution in Qing China. Section III.A lays out the historical puzzle of forest commons in the Qing period that the rest of the sections seek to explain. Section III.B analyzes the legal architecture of the Qing state's policy of non-interference that gave rise to significant local autonomy. Section III.C discusses how lineages became intertwined with the welfare of common property regimes in the context of local autonomy and outlines the organizational features of lineages that were conducive to the long-term stability of these regimes.

A. *Historical Context: Timber and Forest Commons in the High Qing Period*

The resilience of common property regimes—particularly those based on forests and timber resources—in Qing China presents an empirical challenge to the conventional Demsetzian and Coasean models of property rights. From the 1700s to the 1860s, the Qing economy experienced a series of demographic and economic transformations that created intense resource competition.[121] Historians have characterized this period as a time of "involutionary growth"[122] and

121 *See* William Lavely & R. Bin Wong, *Revising the Malthusian Narrative: The Comparative Study of Population Dynamics in Late Imperial China*, 57 J. ASIAN STUD. 714, 726-29 (1998). The high-Qing demographic explosion created unprecedented resource pressure that tore the socio-economic fabric of Chinese society. *See id*. at 725. In the late eighteenth century, China experienced the White Lotus Rebellion (1793-1805), a conflict involving more than 100,000 rebel troops that "cost the [Qing] government 120 million taels to suppress." *Id*. at 727. In Southwest China, a group of religious fanatics composed of vagrants and landless tenant farmers initiated the Taiping Rebellion (1850-1864), as a result of "growing competition for land" exacerbated by the "state's [in]ability to adjudicate alternative claims to resources." *Id.* In North China, the Nian Rebellion (1851-1864) "arose out of a fragile ecology in which poor peasants and more marginal folk habitually turned to banditry to help sustain themselves." *Id.* at 727-28.

122 Involution means the phenomenon of inefficient development, particularly in agriculture, where population growth and an increase in economic output did not result in a growth in productivity or advancement towards a more efficient mode of production. *See*, *e.g.*, PHILIP C. C. HUANG, THE PEASANT FAMILY AND RURAL DEVELOPMENT IN THE YANGZI DELTA, 1350-1988 (1990); Philip C. C. Huang, *Review: Development or Involution in Eighteenth-Century Britain and China? A Review of Kenneth Pomeranz's "The Great Divergence: China, Europe, and the Making of the Modern World Economy,"* 61 J. ASIAN STUD. 501-38 (2002).

"widespread social conflict."[123] According to conventional law-and-economics theories, such conditions would result in either the tragedy of the commons or the establishment of property rights.[124] Either by dissipation or replacement, common property regimes would be expected to decline. Yet, neither occurred in China. The following sections explain this paradox by illustrating the example of forest commons in Southern and Southwestern China.

1. *Forest Commons Under Resource Pressure*

By the 1700s, China experienced explosive population growth.[125] A flurry of new development generated unprecedented demand for a wide range of natural resources.[126] Among them, the most coveted resource was timber.[127] As the "premodern equivalent of reinforced concrete," timber was the literal building block of Chinese cities and the foundation of China's economic infrastructure.[128] Historian Meng Zhang described the spike in timber demand during the High Qing period in the following words:

> The voluminous timber trade, which brought at least five million logs annually to the lower Yangzi valley by the eighteenth century, supplied the construction of theaters, guild chambers, temples, ancestral halls, brothels, restaurants, teahouses, and other iconic architectures of early modern urban life in the hundreds of cities and market towns that dotted this most prosperous region of the empire. Similar processes of commercialization and urbanization featured the middle, and to a lesser extent, upper reaches of the Yangzi River system as well, which also drew from this network of trade for timber supply.[129]

123 *See* THOMAS M. BUOYE, MANSLAUGHTER, MARKETS, AND MORAL ECONOMY: VIOLENT DISPUTES OVER PROPERTY RIGHTS IN EIGHTEENTH-CENTURY CHINA (2000).

124 *See supra* Section II.B.2.

125 In the period from 1730 to 1790, China's population rose from about 100 million to almost 300 million. By 1830, China's population reached 400 million. *See* Keng Deng, *China's Population Expansion and Its Causes During the Qing Period, 1644-1911*, 7 (London Sch. of Econ. & Pol. Sci., Econ. Hist. Working Paper No: 219/2015) (2015), http://eprints.lse.ac.uk/64492/1/WP219.pdf [https://perma.cc/2RUZ-TVN9].

126 MENG ZHANG, TIMBER AND FORESTRY IN QING CHINA: SUSTAINING THE MARKET 4 (2021).

127 *Id.* at 3.

128 *Id.*

129 *Id.* at 3-4.

In response to the booming demand, a bourgeoning interprovincial timber market emerged.[130] While the market's geographic locus was in the highly developed cities of the lower Yangzi River Delta, it created a centrifugal force that pulled all corners of the empire into an interconnected network.[131] In the Southwest, the market extended its value chains to the forest communities in the Guizhou-Yunnan frontier—places that were once remote from any form of imperial influence.[132] The once self-sufficient communities of the borderlands became subsumed into the market division of labor.[133] Over the course of the next couple of centuries, this network would evolve into a complex chain of institutions sustaining each node of production, harvest, transportation, investment, transaction, taxation, and consumption of timber goods that lived longer than the Qing dynasty itself.[134]

So was the rapid depletion of natural forests. In remote antiquity, the forest coverage of China was once estimated to be as high as 49.6%.[135] Another estimated the coverage to be 56%.[136] By 1700, the empire-wide forest coverage rate dropped to 25.8%.[137] By 1750, the forest coverage dropped to 24.2%; by 1800—22.5%; by 1850—

130 *Id.* at 172.

131 *Id.* at 3-4, 14, 56 ("Nanjing was the axis of the whole timber market connected by the Yangzi River and its tributaries.").

132 ZHANG, *supra* note 124, at 10. *See also* Sung Hee Ru, *The State Formation of Late Qing China within Global Geopolitical Dynamics*, 22 SUNGKYUN J. E. ASIAN STUD. 87, 99 (2022) ("The Qing government did not rule Yunnan's borderlands directly, though these border territories belonged to Qing China. In place of direct rule, the Qing government gave the leaders of indigenous tribes a degree of administrative autonomy . . . In this regard, Yunnan's borderlands could be seen as 'a dynamic overlapping border that was continuously remolded by a fluid web of power relations at the local level.'").

133 *See id.* at 79 ("Although the impetus of market demand slackened in the first half of the nineteenth century, the incorporation of frontier forests into the mass timber market remained steady . . . [S]uccessful timber merchants . . . marched upstream the Yangzi River toward the southwest in search of new supplies of timber. With the increasing incorporation of Hunan and Guizhou into the interregional timber trade, Hankou rose to be the largest timber market in the middle Yangzi area in the nineteenth century.").

134 *See id.* at 3-4.

135 Ling Daxie (凌大燮), *Woguo Senlin Ziyuan de Bianqian* (我國森林資源的變遷) [The changes of forest resources in China] 2 ZHONGGUO NONGSHI (中國農史) 26-36 (1983).

136 ZHAO GANG (趙岡), ZHONGGUO LISHI SHANG SHENGTAI HUANJING ZHI BIANQIAN (中國歷史上的生態環境之變遷) [Environmental Changes in China's History] 105-06 (1996).

137 He Fanneng (何凡能), Ge Quansheng (葛全勝), Dai Junhu (戴君虎) & Lin Shanshan (林珊珊), *Jin 300 Nianlai Zhongguo Senlin de Bianqian* [Forest change of China in recent 300 years], 62 ACTA GEOGRAPHICA SINICA 33, 67 (2007).

19.6%; by 1949—only 11.4%.[138] Part of this significant decline during the High Qing period can be attributed to the territorial expansion of the Qing, through which the empire incorporated its territory into new frontiers such as modern-day Xinjiang, Mongolia, and Tibet—areas covered mostly by unforested steppes.[139] But, the main reason for the decline is deforestation.[140] The two most important factors for deforestation are: (1) the expansion of agriculture; and (2) the marketization of the Qing economy.[141] As forest reserves everywhere in the Qing empire declined (with the notable exception of forested lands in Manchuria),[142] subsistence foresting communities suddenly needed to cope with the reality that the ecosystems on which their livelihoods depend were exhaustible.[143]

The effects of the timber crisis were unevenly distributed.[144] The booming demand for timber exerted immense price pressures on the value of trees in forested communities all around China.[145] But the pressure was most strongly felt by the inhabitants of the Upper Yangzi River region (*e.g.*, Hubei, Hunan) and ethnic minority groups inhabiting the Southwestern Chinese frontier (*e.g.*, Guizhou, Yunnan), where most of the commoditized timber was harvested.[146] As a result,

138 *Id*. at 67.

139 *Id*. at 62.

140 Deforestation was not the only form of human conduct that led to ecological degradation. For instance, the degradation of the North China plains was caused by a combination of long-standing deforestation and the building of the Grand Canal. *See* ROBERT B. MARKS, CHINA: AN ENVIRONMENTAL HISTORY 272 (2017). However, in most areas, the loss of forest and woodland coverage was attributable to intentional deforestation rather than natural erosion. *See id*. at 279, 285-87.

141 *See generally* NICHOLAS K. MENZIES, FOREST STABILITY AND DECLINE: A DELICATE BALANCE 35-37, 52 (1994).

142 *See infra* Section III.A.4.

143 *See* ZHANG, *supra* note 126, at 91 ("The prosperous timber trade gradually exhausted the natural forests. By the second quarter of the nineteenth century, virgin forests had disappeared in the easily accessible areas of the Yuan River basin. But deforestation was not the whole story. Potential profits from timber trade motivated market-oriented tree plantations after the natural vegetation was depleted.").

144 After the Qing government's suppression of rebellions and incorporation of the southwestern borderlands into the imperial terrain, the government's need for reconstruction created persistent demands for timber resources, giving rise to a timber tribute system aimed to sustain the supply for timber for the booming urban centers in the imperial heartland. Under this tribute system, natural forests in the hinterlands of lower Yangzi valley became quickly exhausted. The demand for a reliable supply of timber resources motivated reforestation practices in the Southwestern mountainous regions while pushing the extension of the timber market to tap resources from farther-away forests. *See id.* at 27-28, 46-47.

145 *See id*. at 34.

146 *See id.* at 91-92, 106, 108.

resource pressure gave rise to individual incentives to deviate from the common property ownership structure. This is evident in the volume of timber conveyance contracts, collective bargaining agreements, and local steles showing a rising tension between members of the forest commons and perceived outsiders in the archives, which will be discussed further in the next section.

Under the Demsetzian model, these common property regimes would face an existential crisis. The dual pressures of deforestation and rising resource value generated incentives for privatization, but many communities found alternative ways to handle such pressure. To prevent common property regimes from degradation, local communities exercised one of the following options in response to the risk of resource depletion: (1) reducing competitive resource pressure through reforestation practices (*i.e.*, planting trees); (2) bargaining with offending resource users and competing claimants to internalize the harms; and (3) establishing norms that regulate the conduct of the resource users.[147]

2. *Dealing with Resource Pressure: Contested Access to Forested Mountains*

Many communities in these affected timber-harvesting regions experienced varying degrees of disruption in their social ties, customs, and economic lives.[148] For example, in the lower Qingshui valley (清水江) area, which was mostly inhabited by the Miao (苗族) people, inhabitants adopted Han-Chinese-style contracts and engaged in direct timber transactions with the Han-Chinese merchants visiting from other regions.[149] In Mianning County (冕寧縣), where members of the Han-Chinese (漢族) majority and the Yi (彝族) ethnic minority commingled, a similar pattern occurred. Members of the Yi kinship group adopted the Han-Chinese contract-drafting customs, such as boilerplates that indicated adherence to Confucian norms.[150] These

147 *See infra* Section III.A.2.

148 *See* ZHANG, *supra* note 126, at 91-93, 108.

149 *See id.* at 91-92.

150 Most contracts adopted boilerplate language such as "all three parties agree" (三面言議) and "notify the public" (同眾言明). Contracts were typically envisioned to be of an *in-rem* nature. The Han Chinese custom was to think of contracts not as obligations between two parties in privity, but as notices to the public about the existence of a transaction. The "third" party mentioned in the contract was usually the guarantor of the transaction or other informal authority of good reputation and standing who oversaw the transaction taking place. *See* Li Hongtao (李洪濤) & Chen Guocan (陳國燦), *Hehe er Tong: Lun Zhongguo Gudai Qiyue de Guihe Sixiang* ("

adaptations were aimed at facilitating transactions and formalizing dispute resolution between the Yi minorities and their Han-Chinese cohabitants.[151]

However, inhabitants also started to claim exclusionary rights over the forested lands and mountains themselves, as they were no longer content only owning the harvested timber. One case in Mianning County illustrates the rising exclusionary pressure. In the year Daoguang 6 (1826), Yi ethnic elders from the Bailu clan (白露營) pooled resources amongst their kin to erect a stele that proclaimed an exclusionary right over the access to a forested mountain.[152] The stele publicized a magistrate's decision to prevent loggers and vagrants from other counties from entering the ancestral mountains held by the Yi kinship groups.[153] The stele reveals the existence of a prior agreement between the Yi elders and the Han-Chinese village constables to prohibit migratory loggers (from neighboring prefects or counties) from entering the protected area.[154] The text also shows that the Yi and Han communities reached a consensus to share the resources in Baisantun mountain.[155] Both considered the outside logger's unauthorized access to the forest mountain as a threat to the status quo and petitioned the magistrate to uphold their agreement.[156] This event was later recorded in a stele erected by the Lu family from the Bailu clan in the year Daoguang 30 (1850), which narrates the history of how local Yi people fought outsiders to protect the integrity of their ancestral lands.[157]

和合而同" 論中國古代契約的 "貴和" 思想) [On the Notion of "Gentle and Harmonious" in Premodern Chinese Contracts] 4 ZHONGGUO JINGJISHI YANJIU (中國經濟史研究) 67, 74-76 (2018), http://zgjjsyj.ajcass.org/UploadFile/Issue/zdapb0nn.pdf [https://perma.cc/QG22-C38D].

151 *See* Zhang Xiaobei (張曉蓓), *Qingdai Mianning Suzhuang yu Xinan Shaoshu Minzu Diqu de Jiufen Jiejue Jizhi* (清代冕寧訴狀與西南少數民族地區的糾紛解決機制) [Qing Dynasty Civil Complaints and Dispute Resolution Mechanisms in the Ethnic Minority Regions in Southwestern China] 4 FAXUE YANJIU (法学研究) 174, 181 (2009).

152 *See* Long Sheng (龍聖), *Mingqing Shuitian Yi de Guojiahua Jincheng Jiqi Zuqinxing de Shengcheng: Yi Sichuan Mianning Yizu Weili* (明清水田彝的國家化進程及其族群性的生成: 以四川冕寧彝族為例) [Nationalization Process and Formation of "Shuitian" Yi Ethnicity during Ming and Qing: A Case Study of the Yi Ethnic Group In Bailu Ying] 37 SHEHUI (社會) 127, 143 (2017).

153 *See id.* at 143-44.

154 *See id.* at 144.

155 *Id.*

156 *Id.*

157 *Id.* at 147-48.

Two other local steles in the Daoguang era highlight how the elders of the Yi community dealt with the Han-Chinese local gentry when there was a dispute over the access to forested lands.[158] A stele dating to the year Daoguang 23 (1843) revealed that some of the Bailu clansmen who made side bargains with outside loggers without first consulting the Yi chieftain and the local constables were disciplined by their elders.[159] Another stele in the same region, erected in the year Daoguang 30 (1850), shows that members of the Bailu clan requested the magistrate to adjudicate the dispute because this time their opponents were backed by the local constable, who garnered support from a lineage elder of a prominent Han-Chinese line from a neighboring county.[160] The inscription on the Daoguang 30 stele states that the Bailu clansmen voluntarily offered to have their ancestral land (originally exempt from taxation) taxed by the local government in exchange for the government's acknowledgment of the Yi people's exclusionary right.[161]

The cases in Qingshui and Mianning illustrate the transformative impact of resource pressure on forest commons.[162] There are notable similarities between the two counties. Both were inhabited by two or more competing organized kinship groups; both experienced social disruptions caused by timber marketization and the influx of outsiders (*e.g.*, timber merchants and migrant loggers).[163] The local communities in these regions also responded similarly to the resource pressure. First, in both regions, there was a trend toward homogenization of social norms.[164] Both the Yi inhabitants in Mianning and the Miao people in Qingshui adopted Han-Chinese commercial customs to minimize transaction costs associated with the timber trade.[165] Second, informal local authorities such as lineage elders, chieftains, and constables oversaw the process of these bargains.[166] Kinship groups preferred conflict mediation within their own community structures most

158 Long, *supra* note 152, at 144-49.

159 *Id.* at 144.

160 *Id.* at 146.

161 *See id.* at 146-47. *See also* COMMENTARY ON LIANGSHAN HISTORICAL STELES, LIANGSHAN YI AUTONOMOUS PREFECTURAL MUSEUM & LIANGSHAN YI AUTONOMOUS PREFECTURAL CULTURAL RELICS ADMINISTRATION, LIANGSHAN LISHI BEIKE ZHUPING (涼山歷史碑刻注評) (2011).

162 *See* Long, *supra* note 152, at 151-53.

163 *Compare id.* at 143-49 *with* ZHANG, *supra* note 126, at 91-108.

164 *Compare* Long, *supra* note 152, at 143 *with* ZHANG, *supra* note 126, at 91.

165 *See* Li & Chen, *supra* note 150, at 67, 74-76.

166 *See* Long, *supra* note 152, at 144, 146.

of the time.[167] But, they allowed recourse to the formal legal system (*e.g.*, petitioning the magistrate to enforce bargains) when activities of perceived outsiders (*e.g.*, unauthorized logging) threatened to disrupt existing bargains between the dominant kinship groups.[168] Third, these communities sought to control the risks of resource depletion through collective bargains with perceived outsiders, rather than individual deals.[169] Members of lineages and kinship groups who deviated from the norm were socially sanctioned, ostracized, and disciplined.[170]

Responses to resource pressure by kinship groups in Qingshui and Mianning differed from those in Han-dominated regions such as Huizhou (徽州), where a few lineages controlled access to most timberlands.[171] Prior to the High Qing timber boom, lineages such as the Doushan Chengs in Huizhou possessed uncontested claims over the forested commons.[172] Forest property contracts during the 16th and 17th centuries in Huizhou revealed a distinction between topsoil and subsoil.[173] For example, lineages often granted topsoil "work portions" to tenants of forested mountains, while retaining ownership of the subsoil and the resource stock of the forested mountains.[174] The proceeds from the tenancy and the timber sale were typically collected by the lineage elders, held in lineage trust, and distributed to the lineage members according to their rank and share of the common property.[175] Lineages seldom managed the forest mountains themselves and were often lax in collecting proceeds from tenants.[176] This changed in the 1750s, when intensive commercialization of Huizhou timber led to the influx of migrant loggers and widespread tenant-outsider conflict caused by unauthorized logging activities.[177] To control

167 *Compare* Long, *supra* note 152, at 143 *with* ZHANG, *supra* note 126, at 91.

168 *See* Long, *supra* note 152, at 143-44.

169 *See id.*

170 *See id. See also* Po, Saint Ville, Tuihedur Rahman & Hickey, *supra* note 111, at 1333 ("[D]ecentralized social pressure designed to subordinate individual self-interest to other socially accepted values . . . can manifest as gossip, hostile remarks, ostracism, or even extrajudicial violence.").

171 Many villages in Huizhou consisted of household-collectives from a single surname. Typically, everyone from the village was a member of the same lineage. *See generally* JOSEPH P. MCDERMOTT, THE MAKING OF A NEW RURAL ORDER IN SOUTH CHINA: II. MERCHANTS, MARKETS, AND LINEAGES, 1500-1700 (2020).

172 *See id.* at 68, 78, 81, 99, 110.

173 *See* ZHANG, *supra* note 126, at 108.

174 *See id.*

175 *See id.* at 108-09.

176 *See id.* at 107-09.

177 *Id.*

resource conflicts, the Huizhou lineages started to take a more proactive role.[178] Like those in Qingshui and Mianning, the lineages in Huizhou disciplined recalcitrant members who deviated from the common ownership structure.[179] But in Huizhou, the lineages also disciplined uncooperative tenants who were not members of the lineage through eviction and threats. Additionally, Huizhou lineages invested significant capital to reforestation[180] and the replenishment of tree stocks in these mountains.[181]

Comparing Huizhou with Qingshui and Mianning provides a snapshot of the various strategies local communities adopted to handle the resource pressure resulting from the timber boom. To protect their common property regimes against external disruption, some of the kinship groups crafted new social ties, while others strengthened old networks.

3. *"Privatization" and "Ownersip" of Natrual Resources in the Qing Policyscape*

The consequences of resource pressure generated intense discussions among policymakers and judicial officials on what should be the proper system of resource management.[182] In Fujian, one prefect from the Funing Prefecture (福寧府) named Li Ba (李拔) discussed in his memorial (奏疏) to the emperor the problem of resource waste and degradation, caused by the rampant unrestricted logging of common and public forested mountains.[183] He suggested privatization as a potential solution:

> Because many mountains are *guanshan* (官山) ["state-owned" public mountains], there are no restrictions [on] logging. Whenever some branches and twigs grow out, they are immediately cut off. Even the roots are sometimes dug out as firewood for cooking. Without proper regeneration, the mountains become barren. As for privately-owned mountains, industrious owners all plant pine, fir, bamboo, tung, and other trees, making a big profit. Slothful owners, only seeing the recent and making no long-term plans, cannot wait to use their axes whenever some small trees appear on their

178 *Id.*
179 *See* ZHANG, *supra* note 126, at 107-09.
180 *See id.*
181 *See id*.
182 *See id*. at 83-91.
183 *Id.* at 86.

> mountains; as a result, good timber [does] not grow, only weeds flourish. Sometimes, on the same mountain, one area is lovely forested, while another area is lamentably wasted. Such are the divergent results of diligence and laziness [;] the mountains did not become bleak themselves. I propose banning premature cutting and developing profits from the barren mountains. . . . This way, regeneration will propose, and trees will grow into forests in some years. Timber will be inexhaustible. This is a way to provide for the people.[184]

Li Ba's proposal was not implemented into policy.[185] But, his memorial offers a rare window for modern observers to peek at the policy debates around forest commons in the Qing. The problem that Li Ba remarked as the "lamentabl[e] waste" of forested mountains caused by unrestricted logging was analogous to what a modern observer would call "the tragedy of the commons."[186] Li's policy justification—to ensure the sustainable regeneration of common resources and to punish the slothful owners motived by short-term interests—is strikingly similar to the modern-day policy discussions regarding environmental regulation in the developed West.[187]

Perhaps Li Ba's ideas were too radical for his time. Unlike Li, Qing lawmakers and judicial officers typically did not think in terms of externality or efficiency when it comes to environmental ecosystems.[188] Although many local officials did not share the same thoughts on privatization, many shared Li's sensibilities of practical realism. In Heping County (和平縣) of Eastern Guangdong, for example, the magistrate used the notion of state-owned mountains (官山) to assert government "ownership" over degrading forest resources.[189] The

184 *Id.* at 86-87 (citing QIANLONG FUNING FU ZHI, JUAN 12 (《乾隆福寧府誌》卷 12) [Prefectural Gazetteer of Funing Prefecture, Book 12] 739-41 (1726) (Meng Zhang trans., 2021).

185 *See* ZHANG, *supra* note 126, at 87.

186 *Compare id.* at 86 *with* Ostrom & Ostrom, *supra* note 5.

187 *See*, *e.g.*, Anne A. Riddle, *Timber Harvesting on Federal Lands*, CONG. RSCH. SERV., R45688 (July 28, 2021) (discussing the statutory frameworks and policy goals for sustainable timber harvesting in Federal forests, woodlands, and timberlands); Katie Hoover & Anne A. Riddle, *U.S. Forest Ownership and Management: Background and Issues for Congress*, CONG. RSCH. SERV., R46976 (Nov. 24, 2021) (internal quotation marks omitted) (citing 36 C.F.R. § 217.1(c) ("[R]egulations stipulate that forest plans guide management of [National Forest System] lands so that they are ecologically sustainable and contribute to social and economic sustainability . . . and have the capacity to provide people and communities . . . a range of social, economic, and ecological benefits for the present and into the future.")).

188 *See infra* Section III.A.4.

189 ZHANG, *supra* note 126, at 85.

proclamation that the forested mountains belong to the government disallowed private exclusionary claims on the mountains based on the customary practice of long-standing norms.[190] But the magistrate permitted exclusionary claims on ancestral mountains (祖山) and communally-owned mountains (公山). The rationale for claiming government "ownership" is reflected in the magistrate's memorial:

> There are plenty of arable areas in the mountains, which have been scarcely cultivated to date. The old customs of this county were such that the owners of the agricultural lowlands extended control to the mountains nearby. Even when someone else was interested in cultivating the mountains, the residents nearby either claimed that the mountains had belonged to their ancestors or demanded tribute from the potential settlers. The poor people were afraid of causing disputes, and nobody dared to make a move. Having examined the tax and corvee registers, I know that these are all *guanshan* (官山). Therefore, it should be broadly proclaimed to the people that nobody should obstruct reclamation. Able cultivators are free to make profits from growing taros, beans, pine, fir, tea, and tung. Poor people can [also] rely on them for a living.[191]

While far less radical than Li's suggestion for privatization, this magistrate's suggestion of government ownership revealed a similar market-oriented sensibility. The memorial indicated that it would be more beneficial for the collective's welfare to allow free access to the mountain's rich resources than to confer the resource to a narrow group of individuals.[192] The idea was that free access would ensure the optimal allocation of resources to those who had the knowledge regarding best resource usage—so that "able cultivators" would be "free to make profits from" a wide range of planting and harvesting activities.[193] Instead of pursuing the radical route of privatization, the magistrate harnessed the local government's power to proclaim state-owned property to create a system of free access. The effect was the use of government claims to trump customary claims over the forest mountains.[194] But, that power was limited—the local government could not claim ownership of ancestral mountains and communally-

190 *See id.*

191 *See id.* at 85-86 (citing QIANLONG HEPING XIAN ZHI, JUAN 2 (《乾隆和平縣誌》卷 2) [County Gazetteer of Heping County, Book 2] 155 (1753) (Meng Zhang trans., 2021)).

192 *See id.* at 86.

193 *See id.*

194 *See id.* at 85 ("The proclamation of these mountains as *guanshan* delegitimized any customary claims as illegal and cleared the ground for new owners[.]").

owned mountains that had historically been in the hands of lineages and kinship groups for generations which would create more social unrest than quell existing ones.[195]

The notion of "state-owned" mountains deserves further elaboration. When the Qing officials mentioned "state ownership," they did not mean that the government had the full rights to exclude, derive income, alienate, possess, transfer, or control the property—although some "sticks" in the "bundle of rights" may certainly be present.[196] Rather, they were referring to a vague idea of fluid ownership, rooted in the Classical Confucian notion that all which was under the heavens were "king's soil, king's people" (王土王民思想).[197] Based on this idea, some scholars argue that all non-government rights in lands, fixtures, and natural resources in Qing China were usufructuary (*i.e.*, right of use and enjoyment without ownership).[198] This argument draws support from Confucian classics, such as the Book of Songs, which outlines the basic principle that "sage king" (*i.e.*, the emperor) owned "[all] under the wide heaven," including the lands and people residing on them.[199] In practice, however, this "ownership" was nothing more than a symbolic claim of universal sovereignty, rather than ownership in the legal or economic sense. In the case of Qing China, the sticks in the bundle were never absolute. Since Qing laws never recognized the legal possibility of creating a property interest, the individual sticks that one may typically think of as constituent elements of property rights may shift after their creation or conveyance.[200] This means that the terms of "state-ownership" may shift depending on the

195 ZHANG, *supra* note 126, at 88-89.

196 Those who are familiar with the "bundle of sticks" analogy would know that what we typically identify as "property rights" is, in fact, an amalgamation of multiple legal rights, with each "stick" in the bundle being subtractable from the whole. In fact, any form of property right short of fee simple absolute ownership will likely miss a stick or two in the bundle. These "sticks" include: (1) right of exclusion; (2) right of income derivation; (3) right of disposition; (4) right of possession; (5) right of control.

197 *See* Mio Kishimoto, *Property Rights, Land, and Law in Imperial China*, *in* LAW AND LONG-TERM ECONOMIC CHANGE: A EURASIAN PERSPECTIVE 68, 82-83 (Debin Ma & Jan van Zanden eds., 2011).

198 *Id.* at 73.

199 SHIJING: XIAOYA: BEISHAN ZHISHI: BEISHAN (詩經·小雅·北山之什·北山) [Book of Songs: Minor Odes of the Kingdom: Decade of Bei Shan: Bei Shan], https://ctext.org/book-of-poetry/bei-shan/zhs [https://perma.cc/P5B8-TTNQ] (China).

200 This would defy the basic legal principle of *nemo dat quod non habet* (*i.e.*, "no one can give what they don't have") in Anglo-American property law. *See* MERRILL & SMITH, *supra* note 50.

moral and political circumstances that require government action. In this regard, it may be more useful to think of government ownership in terms of residual ownership—*i.e.*, anything that is not given to the people (by contract or custom) is reserved to the state—rather than absolute ownership.

As a result, there was no clear boundary between what was "state-owned," "communally-owned," "kinship-owned," and "privately-owned."[201] Sometimes the same piece of forested mountain property was simultaneously labeled both as "state-owned," and "communally-owned."[202] Sometimes it may be referred to as "state-owned" today but "communally-owned" tomorrow.[203] As the following table (*see* Table 3) shows, often there were significant overlaps between these categories. This suggests the malleable nature of forest property.[204]

Table 3. Categories of Forested Mountains and Forest Property[205]

Name of Category	**Descriptions & Examples**
State-owned mountains (官山)	Designated forested mountain regions where the government forbade or restricted entry. Unclaimed land available for free access and private claims of exclusionary rights. Open-access forests (*i.e.*, the absence of property).
Communally-owned mountains (公山)	Communal and jointly owned forest commons, administered by lineage or kinship groups. Sometimes shared between more than one group. Forests owned by temples or religious associations. Open-access forests (*i.e.*, the absence of property).
Ancestral mountains (祖山)	Forest commons owned by a single lineage. Forest property owned by "corporate" lineage trust. A lineage member's share in the forest common's resources when the entire forested mountain is owned by a single lineage.

201 *See* ZHANG, *supra* note 126, at 88-90.

202 *See id.* at 89-90.

203 *See id.* at 90.

204 *See id.*

205 The contents of Table 3 are substantially inspired by Table 3.1 ("Categories of forested mountains") in Meng Zhang's book. The categories and features of forest property described in Table 3 are based on Zhang's compilation of historical sources. *See id.* at 90-91.

4. *"Wilderness" and "Sacred Sites" in the Imperial Landscape*

While it is important to uncover all the debates about privatizing resource commons in the Qing, note that the idea of "privatization" had no legal basis in the Qing laws. When the prefects and magistrates talked about "privatization" and "free access," they did not mean the establishment of private property rights over the resource.[206] Instead, what they meant were discrete acts and policies of officials to redistribute resources to fulfill a moral, rather than economic, imperative.[207]

The official edicts and codes of the Qing empire did not reflect the balance of interests inherent in any type of resource redistribution.[208] The Qing state did not formally recognize any enforceable legal interest in the private ownership of resource systems.[209] However, the lack of legal recognition of ownership interest in the commons does not mean that the Qing did not protect environmental ecosystems. A host of policies, directives, edicts, and laws were implemented to protect forests and pastures.[210]

The Qing state protected two types of natural ecosystems: (1) the "wilderness" that reflects the "imperial origin";[211] and (2) the "sacred

206 *See supra* Section III.A.3.

207 Although premodern Chinese intellectuals and officials were constantly engaging in dialogues concerning resource management, the concept of "economy" did not exist in the Chinese-speaking world until the late 19th Century. The modern notion of "economy"—which presupposes rational self-interest and seeks to achieve efficiency—is different from the native Chinese notion of "wealth," which is more concerned with putting resources in the hands of those who could better utilize them to achieve the moral goals of the community. *See* Pablo A. Blitstein, *Administering Wealth: The Concept of "Economy" and the Epistemic Foundations of Nationalism in Late-Imperial China (Late-Nineteenth-Early-Twentieth Century)*, 18 INT'L J. ASIAN STUD. 185, 189 n.8 (2021).

208 *See* THE GREAT QING CODE, *supra* note 27.

209 *See supra* Section III.A.3.

210 The Qing state did not protect natural environments out of efforts to conserve habitats or prevent them from human-caused degradation, since the notion of sustainability was not yet invented. Nor was the Qing state concerned with the economic utility of allocating scare natural resources. It did so out of desires to police the boundaries of social hierarchy which, in the Qing imperial lexicon, closely parallels boundaries in the physical realm. The Qing state's association of social status and spatial restrictions is consistent with its treatment of property as a vessel for social power in the Great Qing Code. *See infra* Section III.B.2.

211 Large parts of the forested landscape in Manchuria (*i.e.*, Northeastern China) were designated as forbidden zones. Through the creation of specialized policies, texts, and rituals, Manchuria attained a quasi-mythical status as the "origin of the dynasty" (國朝發祥之地) and the "revered land from which the dragon emerged" (龍興之地). *See* Larissa Noelle Pitts, *Seeing the Forest from the Trees; Scientific*

sites" of ceremonial significance reflecting the dynasty's moral and political legitimacy.[212] Under these policies, the Qing empire designated large portions of "wilderness" as forbidden zones and "sacred sites" as restricted zones; but both were directly under the imperial family's domain.[213] Though rich reserves of natural resources lie within these zones, resource extraction was strictly prohibited for both government officials and civilians. This baseline policy remained largely unchanged for almost 300 years.

The Qing empire's policy of preserving the pristine conditions of both the "sacred sites" and the forbidden "wilderness" was codified into law. With regards to the "wilderness," the Qing Code forbade access entirely.[214] With regards to "sacred sites," the Code permitted access, but prohibited the harvesting of firewood, timber, or pasturing of

Forestry and the Rise of Modern Chinese Environmentalism, 1864-1937, 107 (2017) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with University of California, Berkeley Library).

212 The criminalization of trespasses, unauthorized accesses, and acts destroying "sacred sites" was a tradition followed by dynasties prior to the Qing. Article 6 of the Tang Code (唐律) categorized any plot to destroy ancestral temples or tombs as a crime against Heaven. *See* Zhangsun Wuji, *Selections from The Great Tang Code: Article 6, "The Ten Abominations," in* SOURCES OF CHINESE TRADITION, 2D ED. 549-52 (Theodore de Bary & Irene Bloom eds., 1999), http://afe.easia.columbia.edu/ps/cup/zhangsun_wuji_great_tang_code.pdf [https://perma.cc/826E-9W7T]. The Ming Dynasty expanded the protection of "sacred sites" by criminalizing unauthorized entry into forests or mounds near imperial graves. This prohibition was codified in Article 286 of the Great Ming Code (大明律). *See* JIANG YONGLIN, THE MANDATE OF HEAVEN AND THE GREAT MING CODE 78 (2011). The Qing Dynasty further expanded the scope of "sacred site" protection by designating large areas of imperial pastures as ancestral land. Each imperial dynasty protected the lands and forests of ritualistic significance to legitimize their rule as embodying the Mandate of Heaven.

213 These designated "forbidden zones" were most heavily concentrated in Manchuria. The forested steppes in the Northeast held a special place within the imperial order—for both strategic and ideological reasons. They had value, "first, as military buffers between neighboring states, such as Russia and Korea," that would provide a defensive deterrent against invasion. Second, they had unique stature as the homelands of the ruling Manchurian elites. "The emperors took pride in their origins in the Manchu homeland," and members of the Eight Banners derive aristocratic identity with historic ties with the forbidden forests. *See* JONATHAN SCHLESINGER, A WORLD TRIMMED WITH FUR: WILD THINGS, PRISTINE PLACES, AND THE NATURAL FRINGES OF QING RULE 8 (2017).

214 *See id*. at 146-47 ("The court enforced these rules with the same methods it used to police other 'restrict space' in Mongolia, like hunting grounds, and the productive spaces of the Northeast . . . . All trespassers were to be arrested. If someone built a home, it was to be razed . . . . Migrants and vagrants caught there were to be repatriated to their 'native place'; no licensed travel was allowed. As at holy mountains and hunting grounds, guardsmen had standing orders to 'purify the borderland.'").

livestock in terrains near the vicinity of sacred structures.[215] Article 160 protects "[a]ll the tombs of the emperors and kings of former dynasties as well as the tombs of ancient saints and sages, of loyal officials, and of martyrs [of the former dynasties]" from trespass, conversion, and destruction.[216] Article 263 provides that "everyone who steals trees from the Emperors' tombs will (*without distinction between principal and accessory*) be sentenced to 100 strokes of the heavy bamboo and penal servitude for three years."[217]

The bifurcated approach of designating "forbidden" versus "restricted" zones reflects the Qing state's unique attitude towards environmental governance—that "wilderness" and "sacred sites" are protected because they serve different (but complementary) ideological functions in the Qing imperial order.[218] For the Manchu rulers of the Qing, the "wilderness" in Manchuria was their mythical homeland, the markers of their nomadic origin.[219] The Han-Chinese denizens from the agricultural societies of China proper would not be allowed to access these lands at all because access was a *per se* transgression of the physical boundaries that mark the ethnic differences between ruler and subject.[220] The purpose of this regulation was to protect the lands and natural terrains themselves from human interference.[221]

In contrast, the "sacred sites" reflect a common heritage shared by both the Han Chinese and the Manchu elites.[222] Since the Qing's Manchu rulers projected themselves as adherers to the Confucian benevolent rule, these "great sites of rites and sacrifice" were of identical ideological significance to all subjects of the Qing empire.[223] For this reason, it would be not only insensible but also undesirable, for the Qing rulers to prohibit access to these sites completely.[224] The Qing state's protection of the tombs and gravesites of both the present and past dynasties reflect a historical continuity from previous empires

215 *See* THE GREAT QING CODE, *supra* note 27, at 173 ("It is not permitted to gather firewood or to till the lands on them, or to pasture cattle, sheep, or other animals on them.").

216 *Id.* ("ART. 160. The Tombs of the Emperors and Kings of Former Dynasties").

217 *Id.* at 242-43.

218 *See generally* SCHLESINGER, *supra* note 213.

219 *See* Pitts, *supra* note 202, at 107.

220 *See* SCHLESINGER, *supra* note 213, at 7-8, 21-22, 28.

221 *See id.* at 147, 157.

222 *See* THE GREAT QING CODE, *supra* note 27, at 173. *See also* MARK C. ELLIOT, THE MANCHU WAY: THE EIGHT BANNERS AND ETHNIC IDENTITY IN LATE IMPERIAL CHINA 23, 26-27 (2001).

223 *See* THE GREAT QING CODE, *supra* note 27, at 171-72, 240.

224 *See id.*

from whom the Qing state received the "mandate of heaven."[225] The main thrust of the Qing's regulation, therefore, was to prohibit the disturbance and injurious impacts on the protected structures on these lands, rather than the lands themselves.

Outside of these two contexts, the Qing state did not formally regulate access to forested lands and ecosystems at all. Resource extraction of non-restricted foresting commons was virtually unregulated by the Qing government, except for limited circumstances when they involve political questions of local peacekeeping or the risks of social unrest.[226] As will be shown in the following sections, the reason for this can largely be attributed to: (1) the Qing's overarching legal structure of non-interference with sub-county local governance; and (2) the Confucian ideology of seniority and status protection, which was codified into Qing law.

The following sections discuss: (1) the reasons why the Qing imperial state adopted a laissez-faire attitude toward resource extraction; (2) how the Qing Code envisioned property in the formal legal regime; and (3) institutional mechanisms that allowed lineage institutions to fill in the vacuum left by the non-interventionist Qing imperial state.

B. *Legal Architecture: Qing Law's Laissez-Faire Attitude Towards Property*

1. *Institutional Foundations of Center-Local Relations*

Despite ruling over a vast terrain, the Qing empire had a relatively "weak" state.[227] It taxed lightly,[228] its fiscal conditions were in

225 *See id.*

226 Taisu Zhang, *The Ideological Foundations of the Qing Fiscal State*, CORNELL E. ASIA PROGRAM (Apr. 15, 2019), https://ecommons.cornell.edu/handle/1813/76945 [https://perma.cc/DR4V-EFB4].

227 *See* Yale Ctr. Beijing, *Yale Professor Taisu Zhang: Why Was the Late Imperial Chinese State So Weak?*, YOUTUBE (June 22, 2021), https://www.youtube.com/watch?v=ITRR65iykKI [https://perma.cc/GTJ4-PKHG].

228 In 1685, the Qing state's tax revenue was sufficient to feed only 9.5% of the Chinese population. This fell to 7.7% in 1724, 5.4% in 1753, and 2.3% in 1848. *See* Tuan-Hwee Sng, *Size and Dynastic Decline: The Principal-Agent Problem in Late Imperial China 1700-1850*, 54 EXPL. ECON. HIST. 107, 119 (2014). The conventional explanation is that low taxation is a direct consequence of its adherence to the Confucian ideal of benevolent rule. Mencius (372-289 B.C.E.), one of the first Confucian "sages" to propose the concept of benevolent rule, recommended a tax rate of one-ninth for agriculture and one-tenth for commerce. But the Qing state's tax revenue was too small to be explained by ideological beliefs since it was smaller even than those of previous Chinese dynasties that held Confucian beliefs. One explanation is that taxes had to be kept low due to the Qing emperor's weak oversight of his

constant shambles,[229] and local rebellions and border conflicts occurred regularly.[230] Except for highly urbanized regions (*e.g.*, lower Yangzi River delta) and cities within the vicinity of the imperial capital, the Qing state struggled to extend its political control beyond gaining nominal recognitions of imperial authority.[231] Part of the reason for the Qing's "weakness" can be attributed to its size—the size of the Qing empire was more than twice of its predecessor dynasty, the Ming,[232] and it encompassed diverse territories where previous Han-Chinese empires had never exercised meaningful control.[233] As the imperial court struggled to deploy its limited institutional resources to monitor the acts of its magistrates and officials at the locality, this created a severe principal-agent problem that constrained the empire's power.[234]

Although the Qing encountered diverse governance problems of an entirely different nature (compared to its predecessors), the Qing empire largely inherited the legal and administrative structures of the Ming.[235] The Qing dynasty retained the "Six Ministries" (六部) as its

agents and the need to keep corruption in check. *See* Yeh-chien Wang, *The Fiscal Importance of the Land Rax During the Ch'ing Period*, 30 J. ASIAN STUD. 829 (1971); YEH-CHIEN WANG, LAND TAXATION IN IMPERIAL CHINA, 1750-1911 (1973).

229 The dominant political belief among Qing elites was that increasing agricultural taxes would trigger severe social unrest among the rural population and must therefore be avoided out of basic political self-preservation. Compared to previous dynasties, the Qing empire's fiscal policymaking was unusually pragmatic and "realist" because there was greater risk of social unrest due to Qing empire's size and its constant need to create political ideology as an "outsider state." *See* Zhang, *supra* note 225.

230 *See generally* PHILIP A. KUHN, REBELLION AND ITS ENEMIES IN LATE IMPERIAL CHINA: MILITARIZATION AND SOCIAL STRUCTURE, 1796-1864 (1980); ELIZABETH J. PERRY, REBELS AND REVOLUTIONARIES IN NORTH CHINA, 1845-1945 (1980).

231 *See* Sng, *supra* note 228, at 107-09.

232 BRITANNICA, *Qing Dynasty*"", https://www.britannica.com/topic/Qing-dynasty [https://perma.cc/43M5-7JRZ] (last visited Aug. 22, 2022) ("Under the Qing the territory of the empire grew to treble its size under the preceding Ming dynasty (1368-1644), the population grew from some 150 million to 450 million.").

233 *See generally* PETER C. PERDUE, CHINA MARCHES WEST: THE QING CONQUEST OF CENTRAL EURASIA (2010). *But see* Debin Ma & Jared Rubin, *The Paradox of Power: Understanding Fiscal Capacity in Imperial China and Absolutist Regimes* 3 (London Sch. of Econ. & Pol. Sci. Working Papers No. 261, 2017) ("[W]eaker administrative capacity associated with large size could therefore be a *choice* made by the ruler, as the payoff of a weaker external threat would have been more than worth the "cost" of weaker administrative capacity.").

234 *Id.* at 108.

235 But it is noteworthy that the Qing did not inherit all the legal and administrative structures of its predecessor dynasty. As a multi-ethnic empire, the Qing departed significantly from its Han-Chinese predecessor dynasties with regard to the governance of military institutions and ethnic relations. One of the Qing's innovations was

own foundational government structure without modifications.[236] A substantial portion of the statutes codified in the Great Qing Code (大清律例) were directly inherited from those of the Great Ming Code (大明律).[237] Most institutional innovations in the Qing were relatively modest, as the Qing rulers sought to project their images as benevolent Confucian sovereigns inheriting the mandate of heaven from the past dynasties of China proper.[238] To maintain political legitimacy, Qing rulers emphasized historical continuity over institutional innovation.[239]

Perplexingly, the Qing empire maintained an "absolutist" political and legal structure.[240] Compared to emperors of the previous dynasties, Qing emperors concentrated more power—both administrative and judicial—in their own hands.[241] From 1644 to 1850, all major decisions had to be approved by the emperor personally, with the aid and advice of the Grand Council.[242] The emperor oversaw all significant official appointments through the Board of Civil Appointments, from

merging administrative and military governance through the institution of the "Eight Banners" (八旗). The "Eight Banners" was a unique Manchu system of social and military organization that has close ties with the Manchurian aristocracy. However, even though the "Eight Banners" was originally designed for the purpose of conquering the Ming dynasty, in peace times the "Eight Banners" absorbed elements of Confucian bureaucracy and struggled to maintain its distinct Manchu identity. *See generally* MARK C. ELLIOTT, THE MANCHU WAY: THE EIGHT BANNERS AND ETHNIC IDENTITY IN LATE IMPERIAL CHINA (2001).

236 *See generally* LI KONGHUAI (李孔懷), ZHONGGUO GUDAI XINGZHENG ZHIDUSHI (中國古代行政制度史) [The History of Administrative Systems in Ancient China] (2006).

237 Moreover, about 40% of the provisions in the Great Qing Code were derived from the Tang Code (唐律), which also shared substantial similarities with that of the Ming Code. This suggests significant historical continuity between the legal structures of the Qing and its predecessor dynasties. *See* Zhang & Dong, *supra* note 27, at 1. Although the Qing rulers were originally nomads of the Manchurian steppes, after the conquest of the Ming, they adapted Confucian customs and positioned themselves as benevolent Confucian sovereigns. *See* Sng, *supra* note 217, at 119.

238 *See* Zhang & Dong, *supra* note 27, at 7.

239 *See id.* at 1 ("[A] very strong continuity can be found between the Qing Code and the Tang Code."). *See also* Lawrence C. Chang, *Soft Power and the Qing State: Publishing, Book Collection, and Political Legitimacy in Eighteenth-Century China* 7, 9, 10-14 (2013) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with University of Illinois at Urbana-Champaign Library) (arguing that Qing rulers appealed to the cultural values of the Han populace to create political legitimacy).

240 *See* Sng, *supra* note 217, at 122.

241 *See id.*

242 *See id.* at 110.

the central government all the way down to the county magistrate.[243] All death sentences made across the empire required the emperor's review through the Board of Punishments.[244] Moreover, through the obligatory review system, the emperor would exercise plenary oversight over all major judicial decisions involving penalties more severe than beating with heavy bamboo and imposed strict liability on magistrates for miscarriages of justice.[245]

How does one reconcile the fact that the Qing state was simultaneously "weak" and "absolutist"? For one, the mismatch between power and capacity meant that severe information asymmetries existed at various administrative levels of the Qing empire.[246] Under the direct supervisory structure in the Qing bureaucracy, officials directly above the magistrate in the line of official duty—prefects (知府), judicial commissioners (按察使), and provincial governors (巡撫)—not only heard cases through the obligatory review, but also had affirmative duties to report any wrongdoing of officials underneath them.[247] In this system, each official was only politically accountable to superiors on the vertical chain of hierarchy; each administrative unit was isolated from another, making horizontal checks and balances impossible.[248] However, inferior officials down the hierarchical chain could leverage one vital resource—local information.[249] Because the information was almost always aggregated from the bottom up, magistrates could game the system through selective reporting, telling half-truths, or taking advantage of the information delay to maximize their discretion.[250] As officials at each level were incentivized to do the same,

243 *Id.*

244 *See* T'UNG-TSU CH'U, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING 7 (1962).

245 *See* William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180, 1227 (1984).

246 *See generally* R. KENT GUY, QING GOVERNORS AND THEIR PROVINCES: THE EVOLUTION OF TERRITORIAL ADMINISTRATION IN CHINA, 1644-1796 (2010).

247 *See* Alford, *supra* note 245, at 1228.

248 *See id.* at 1229.

249 County magistrates can leverage their informational asymmetries against their superior legal officers by filtering information they obtained from the local communities. A county magistrate would typically rely on local elites and administrative staff to perform his judicial functions. Yet, county magistrates are still "outsiders to local society, while his county runners were local men rooted in local power networks and controlled by local elites." *See* XIAOQUN XU, HEAVEN HAS EYES: LAW AND JUSTICE IN CHINESE HISTORY 45 (2020).

250 *See* Bradly W. Reed, *Bureaucracy and Judicial Truth in Qing Dynasty Homicide Cases*, 39 LATE IMPERIAL CHINA 67, 76 (2018) ("Magistrates did not provide superior court officials with the unprocessed results of their investigations—lists of

information that was transferred to the very top of the chain—the emperor's chambers—was bound to be inaccurate.[251] In this regard, one could surmise that Qing emperors felt the need to exert greater oversight over the judicial process to compensate for the state's weak monitoring capacity and inability to eliminate information asymmetries.[252]

Furthermore, information asymmetries embedded in the Qing's legal-administrative structure have profound implications for center-local relations. First, given the unique incentives created by the Qing state's obligatory review system, the judicial practices of the county magistrates primarily followed a political, rather than legal, logic.[253] To prevent social unrest, county magistrates would prioritize local peacekeeping and collective welfare over individual fairness in deciding cases.[254] Consequently, magistrates tended to favor the preservation of the local status quo.[255]

Second, county magistrates would be incentivized to ally with powerful informal authorities in the locality to control the channels of information flow. For career-minded magistrates, local information was a valuable asset that they could leverage against their superiors.[256] Since magistrates were almost always outside appointees,[257] they

physical evidence, chronological but otherwise disconnected descriptions of events, or verbatim transcriptions of interrogations or testimony. Rather, the magistrate fashioned such raw material of a case into a narrative framework that rendered his account both comprehensive and persuasive.").

251 *See id.* at 72, 74-75, 97.

252 *See* XU, *supra* note 249, at 71 (discussing "the gap between ideal and reality and of the inevitable conflict of interest between the principal and his agents").

253 *See* Alford, *supra* note 245, at 1235 ("The problem of undue political influence further hindered the formal legal process by minimizing the possibility that well-connected officials would receive punishments, thus reducing their incentive to follow closely the many rules designed to govern their behavior."). *Cf*. Reed, *supra* note 250, at 98 ("[L]egal formalism rests upon the creation of laws based on the application of generalized principles that remain independent of external moral or political considerations.").

254 *See* Philip C. C. Huang, *Between Informal Mediation and Formal Adjudication: The Third Realm of Qing Civil Justice*, 19 MOD. CHINA 251, 287-88 ("The magistrate's opinion . . . was expressed within an ideology that deferred to informal justice, so long as that justice worked within the boundaries set by the law. Thus[,] peacemaking compromise settlements worked out by community and kin mediators were routinely accepted by the magistrate in preference to continuing on to court adjudication.").

255 *See id.*

256 *See id.* at 287 ("Even in the majority instances of a clear-cut ruling by law, the court might also take into consideration community or kin ties.").

257 County magistrates mostly gained their posts by passing the Civil Examination System. After passing the exam, they were appointed by the imperial court. Some magistrates became eligible for appointment because they had purchased equivalent

relied on clan elders, local gentries, and lineage elites to gather information and punish the recalcitrant members of local communities who circumvented the magistrate's jurisdiction by directly bringing a case to the prefects' attention.[258]

Finally, and most importantly, this system punished activist magistrates and rewarded laissez-faire-minded ones. Magistrates who were too eager to implement the central government's laws and policies would quickly lose the support of the local community.[259] Even if they could advance the empire's goals through innovative means, they would lack the channel to report their merits directly to the top because their immediate superiors control the process of reporting.[260] In contrast, magistrates who preserved the old ways gained access to local

qualifications through extra-legal means. To become a Qing official at any administrative level, one needs to be educated in the Confucian classics. Practical knowledge of governance was not required for passing the Civil Examination. A magistrate acquired specialized governance skills only after assuming office. Magistrates were usually rotated to different counties, under the Qing state's belief that long-term entrenchment would create conditions for nepotism and corruption. *See* GUY, *supra* note 246. *See also* Xueguang Zhou, *The Separation of Officials from Local Staff: The Logic of Empire and Personnel Management in the Chinese Bureaucracy*, 2 CHINESE J. SOCIO. 260, 265 (2016) ("In the Ming and Qing Dynasties, the government required that the appointed officials take up positions in other provinces rather than their home provinces. On the contrary, the subordinate staff were local people.").

258 The formal system enabled individuals to appeal cases, provided that: (1) the case was completed at the magistrate level; (2) the case was appealed to a provincial official with the responsibility for the official whose decision was being challenged or to special governmental bodies in Beijing; and (3) the underlying issue prompting a review must be a serious one. *See* Alford, *supra* note 245, at 1209 n.184. However, informally, magistrates could mobilize local personnel and resources to prevent individuals from appealing a case. *See id*. at 1198 n.108 ("[M]embers of the local gentry could involve themselves in judicial matters to which they were not a party[.]"). The tendency of legal officials in Beijing to remand appeals back to lower officials who had previously heard them also discouraged individuals from accessing the formal appeals system. *See id.* at 1232.

259 *See id.* at 1236 (describing a case study where a county magistrate who was at odds with the local gentry was abruptly removed from office due to the local gentry's undue political influence over the formal criminal justice process). *See also* XU, *supra* note 249 at 45.

260 *See* Reed, *supra* note 250, at 75 ("To safeguard compliance with [the] procedure [of factual reporting], Qing administrative as well as penal law came to include a dizzying array of statutes and regulations covering every aspect of a magistrate's judicial responsibilities: rules guiding the performance of initial request, time limits within which various types of reports were to be submitted, deadlines for the apprehension of suspects and the conclusion of cases, rules guiding investigation and interrogation of witnesses in specific types of cases . . . Sanctions for violation of these regulations could be severe, ranging from fines, suspension of salary, demotion, dismissal, or in some instances, beating or even death.").

information, reported better performances, and advanced political careers further than others.[261]

2. *Property in The Great Qing Code*

Not only does the Qing bureaucratic system incentivize laissez-faire administrative practices, the supreme law of Qing China—The Great Qing Code—also reflects a laissez-faire attitude towards markets, private transactions, and resource allocation.[262] With regards to property, the Code demonstrates little interest in property's economic value and makes no effort to summarize the legal principles of ownership. But, the Code places significant emphasis on property as a vessel for status, hierarchy, and group identity.

Perhaps the proper way to understand the Code is to read it as a document embodying Confucian morality through the language of law, rather than as a compilation of legal principles.[263] Although the Code is filled with references to the term *caichan* (財產)—which is translated roughly to the word "property" in modern Chinese—it does not equate with the modern concept of property rights.[264] The Code did not distinguish between civil, administrative, and criminal laws. Where property was mentioned in the Code, it appeared only in the context of criminal conduct—such as theft, the unauthorized partition of households, illegal entry into state-owned lands or private houses, and the destruction of ancestral or ceremonial property.[265] Violation of the property provisions of the Code always results in punishment (either corporal and pecuniary, or both) or penal servitude of the offender, rather than the compensation of the property owner.[266] In short, the Code did not recognize a legal interest in property, whether

261 *See id*.

262 *See* ZELIN, *supra* note 23, at 21.

263 Zhang & Dong, *supra* note 27, at 164 (internal quotation marks omitted) ("[R]esearchers of this code must learn how to look at it as the Chinese did.").

264 Neither imperial China's legal codes nor its lawmakers spoke of "property rights." The language of "rights" did not even appear until China's encounter with the West in the late 19th century. *See* Man Bun Kwan, *Custom, the Code, and Legal Practice: The Contracts of Changlu Salt Merchants in Late Imperial China*, *in* CONTRACT AND PROPERTY IN EARLY MODERN CHINA 269, 270 (Madeleine Zelin, Jonathan K. Ocko & Robert Gardella eds., 2004).

265 Xie Jing (謝晶), *Daolü yu Caichan Fanzui: Gujin Xingfa de Jiazhi Bianqian* (盜律與財產犯罪：古今刑法價值的變遷) [The Law on Theft and Property Crimes: Changing Values in Past and Present Criminal Laws] RUJIA WANG (儒家網) (Aug. 9, 2021), https://www.rujiazg.com/article/21159 [https://perma.cc/7R3G-BSKP].

266 *See generally* William P. Alford & Eric T. Schluessel, *Legal History*, *in* A COMPANION TO CHINESE HISTORY 277, 281 (Michael Szonyi ed., 2017).

it is held in private, public, or common. Instead, property was only relevant to the legal system when the associated conduct amounted to an affront to the Confucian values of social hierarchy and natural order (*see* Table 4).[267]

Table 4. Categories of Property Crimes in The Great Qing Code

Categories of Property	State-Owned Property (Including property owned by the government and property owned by the imperial family)		Other Property (Including personal, familial, ancestral property, and property owned by religious organizations)	
	Property of ceremonial significance	**Property for ordinary economic use**	**Property of ceremonial significance**	**Property for ordinary economic use**
Examples of Objects in this Category	Sacred objects devoted to the great sacrifices,[268] written imperial orders,[269] seals,[270] royal pastures, trees from emperors'	Infrastructural projects (*e.g.*, dikes,[273] roads)[274] property from the imperial treasury,[275] government land and structures[276]	Religious sites (*e.g.*, private shrines, temples, and convents),[277] ancestral burial mounds and graves[278]	Household property (*e.g.*, betrothal property, family inheritances), land and fixtures,[279] uncultivated

267 *Id.*

268 *See* THE GREAT QING CODE, *supra* note 27, at 240 (discussing "ART. 257. Stealing Sacred Objects Devoted to the Great Sacrifices").

269 *See id.* (discussing "ART. 258. Stealing Written Imperial Orders").

270 *See id.* at 241 (discussing "ART. 259. Stealing a Seal").

273 *See id.* at 411(discussing "ART. 433. Secretly Breaching Dikes").

274 *See* THE GREAT QING CODE, *supra* note 27, at 412 (discussing "ART. 435. Occupying the Public Ways" and "ART. 436. Repairing Bridges and Roads").

275 *See id.* at 241 (discussing "ART. 260. Stealing Property from the Imperial Treasury").

276 *See id.* at 118 (discussing "ART. 94. Purchase of Fields and Houses in the Administrative Unit in which [an Official] is Stationed").

277 *See id.* at 105 (discussing "it is not permitted to construct or add to [existing Buddhist and Taoist temples] without authorization [under ART. 77)]").

278 *See id.* at 260 (discussing "ART. 276. Uncovering Graves").

279 *See id.* at 116-17 (discussing "ART. 92. The Lands of Meritorious Officials" and "ART. 93. The Theft and Sale of Fields and Houses").

	tombs,[271] tombs of emperors and kings of former dynasties[272]			land,[280] harvested produce,[281] equipment
Categories of Criminal Conduct	Theft, destruction, trespass, unauthorized possession	Fraud,[282] destruction, unauthorized possession[283]	Unauthorized usage,[284] destruction, trespass, theft	Trespass,[285] theft, burglary, robbery,[286] fraud[287]

As shown in the table above, property crimes in the Code were categorized according to the nature of the property involved. For example, the act of illegally cutting timber belonging to a private owner would be treated as a "non-manifest theft" and subject to at most fifty strokes of light bamboo.[288] Whereas the same conduct involving trees from an imperial tomb would be treated as an offense committed against the state, and subject to 100 strokes of heavy bamboo and three

271 *See id.* at 242-43 (discussing "ART. 263. Stealing Trees from the Emperors' Tombs").

272 *See id.* at 173 (discussing "ART. 160. [Destroying] The Tombs of the Emperors and Kings of Former Dynasties").

280 *See* THE GREAT QING CODE, *supra* note 27, at 119 (discussing "ART. 97. Uncultivated Lands").

281 *See id.* at 120 (discussing "ART. 98. Discarding and Destroying Tangible Personal Property, Growing Crops, Harvested Produce, etc.").

282 *See id.* at 257, 407 (discussing "ART. 274. Obtaining Property from the Government or an Individual by Deceit and Cheating" and "ART. 427. Fraudulently Taking Excessive Materials [for one's own benefit in the construction of public works]").

283 *See id.* at 54, 412 (discussing "ART. 24. Restitution and Confiscation of Illegally Obtained Property" and "ART. 435. Occupying Public Ways").

284 *See id*. at 105, 241 (discussing "ART. 269. Non-Manifest Theft" and ART. 259. Stealing a Seal).

285 *See id*. at 64, 251, 263 ("trespass means the non-manifest theft of property"), (discussing "ART. 277. Entering Another's House at Night Without Good Cause").

286 *See* THE GREAT QING CODE, *supra* note 27, at 246 (discussing "ART. 266. Theft with Force").

287 *See id.* at 120, 257 (discussing "ART. 98. Discarding and Destroying Tangible Personal Property, Growing Crops, Harvested Produce, etc." and "ART. 274. Obtaining Property from the Government or an Individual by Deceit and Cheating").

288 *See id.* at 119, 120; *See also id.* at 251 ("non-manifest theft").

years of penal servitude.[289] Conversely, if the offender was a descendant from the line of a meritorious official, the Code would allow for separate treatment or a lighter sentence;[290] the Code would also treat the crimes of the offender differently if she is a woman or junior member of the household.[291] Scienter was not required for a number of crimes deemed offensive under Confucian values.[292] For crimes where intent mattered, a presumption of intent is built into the social status of the offender.[293] The Code also did not separate guilt determination from sentencing. As such, the idea of *cuique suum* was absent in the Code because the Qing emperor never treated his subjects as holders of equal rights and personal dignity.[294] In essence, the spirit of the Code was to exercise control and imperial power over the citizens, preserve the Confucian vision of social hierarchy, [295] instead of

289 *See id.* at 241-42.

290 *See id.* at 109 ("[I]f it is a meritorious official who permits the concealment [of persons from compulsory service], a provisional sentence will be prepared in accordance with the law, and a memorial will be sent to the emperor requesting a decision.").

291 *See id.* at 399 (discussing "ART. 420. When Women Commit Offences").

292 Qing lawmakers were aware of the concept of scienter and adapted it throughout the Code. *See* THE GREAT QING CODE, *supra* note 27, at 19 ("[W]hen the wrongdoer acted unintentionally as opposed to intentionally, his sentence was usually reduced."). However, the scienter requirement is dispensed with crimes involving the disturbance of sites of ritual significance. For example, authorized entry into the gates of the temple of ancestors of the emperor, even if unintentional, is subject to punishment. *See id.* at 187. In addition, making a mistake in preparing medicine for the emperor, making a mistake in the sealing and addressing of a memorial, or accidentally making substandard boats and ships for imperial use were considered to be one of the "Ten Great Wrongs" that were subject to the heaviest criminal punishment without regard to intent. *See id*. at 35.

293 Article 22 of the Code provides for the diminished liability for those who are very young or very old, or seriously or critically disabled. Nothing was said about mental illness or other conditions affecting mental capacity, but the same article stated that those over ninety and under seven incur no liability for their crimes. *See id.* at 52.

294 *See* Zhang & Dong, *supra* note 27, at 8.

295 Qing legislators were simultaneously Confucian scholars. They did not categorize property torts as one of the formal subjects of law. Classical Confucian legal thought is primarily concerned with crime, punishment, sovereign-subject relationships, and the state's use of force. Classical Confucian jurists envisioned morality to play a much larger role than law to regulate unneighborly behavior, as the emphasis was to cultivate senses of shame, decorum, compassion, and righteousness so that disputes would be prevented. *See generally* CONFUCIUS, ANALECTS BOOK 12:13 ("In hearing litigations, I am like any other body. What is necessary, however, is to cause the people to have no litigations."). Although Neo-Confucianism expanded the scope of formal law to include matters concerning public welfare such as taxation, property and contract were largely excluded from the scope of formal law.

delineating equality among the citizens.[296] Property, as a result, only is a feature in the Code as an instrument of status control rather than a legally protected right.

Consequently, Qing magistrates who administered the Code would not be able to find a legal basis for deciding property cases that did not involve criminal conduct. The vast majority of property disputes in a typical Qing-era village did not implicate matters of a criminal character.[297] Instead, they involved daily conflicts over who owned what, and who had access to disputed resources.[298] Naturally, without legal guidance from the Code, the magistrates would seek guidance elsewhere. Activist magistrates, for example, would adjudicate cases according to the Confucian principles they had learned through years of Confucian education required to pass the Civil Examination.[299] Laissez-faire-minded magistrates, in contrast, would decide cases in ways that align with the local interest—drawing legitimacy from local customs and norms.[300]

It would be a mistake to assume that the Qing legislators were not sophisticated enough to anticipate the gap between the Code and judicial practice. In fact, with the little information they possessed about the locality, the Qing legislators expected such legal uncertainty and decided to bake into the Code provisions that granted magistrates broad administrative and judicial discretion.[301] Article 44 Clause 1 of the Code provides that, "in deciding on a punishment, [if] there is no precise article [to provide a legal basis]," the magistrate may "cite [another] law and decide the case by analogy."[302] But, the article did not

296 *See* Zhang & Dong, *supra* note 27, at 8.

297 For example, "pure" property disputes constituted more than two-thirds of the total cases recorded in the Baxian County Archive. *See* PHILIP C. C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING 118 (1996).

298 *See generally* Madeleine Zelin, *The Rights of Tenants in Mid-Qing Sichuan: A Study of Land-Related Lawsuits in the Baxian Archives*, 45 J. ASIAN STUD. 499 (1986); Xiaoqun Xu, *Law, Custom, and Social Norms: Civil Adjudication in Qing and Republican China*, 36 L. & HIST. REV. 77 (2017).

299 Activist magistrates, who were adamant in applying the doctrines of Confucian classics, often adjudicated property disputes by framing them as questions implicating Confucian morality. *See generally* CH'U T'UNG-TSU, LAW AND SOCIETY IN TRADITIONAL CHINA (1965).

300 *See id.*

301 *See* Chen Yu (陳煜), *Lun Daqing Lüli zhong de Buqueding Tiaokuan* (論《大清律例》中的不確定條款) [On the Articles Dealing with Uncertainties in the Great Qing Code] (Feb. 27, 2012), https://www.aisixiang.com/data/50592-2.html [https://perma.cc/A7HJ-T7YN].

302 THE GREAT QING CODE, *supra* note 27, at 74 ("ART. 44. Deciding a Case Without a Precise Article").

provide a legal standard for how magistrates should conduct their analogies.[303] Clause 2 installs a statutory check on the magistrates' discretion by requiring them to submit proposed penalties to their superiors; it also imposes criminal liability on magistrates who "decide in [an] arbitrary manner that results in mistakenly awarding a sentence that is excessive or deficient."[304] However, the overbroad prohibition of Clause 2 could not provide a meaningful check on magistrates' discretion because the Code did not define what constituted an excessive or deficient sentence. Moreover, the magistrates could circumvent the requirements of Article 44 Clause 2 by invoking the "catch-all" provision in Article 386. Article 386 authorizes the magistrate to sentence a beating of forty strokes of light bamboo or eighty strokes of heavy bamboo (if the crime is serious) for "[doing] that which ought not be done."[305] Nowhere in the Code defines what "[doing] that which ought not be done" means.[306] However, considering the statutory language of similar provisions elsewhere in the Code, a sensible reading of Article 386 is that it was likely intentionally left vague to handle uncertain legal situations.[307] These provisions in the Code, designed to

303 *Id.*

304 *Id.*

305 *Id.* at 359 ("[Doing] that which ought not be done.").

306 *Id.*

307 *See id.* at 74 ("All the laws and rules together do not completely provide a basis for deciding every [possible] case."). Some cases compiled in the Conspectus of Penal Cases (刑案匯覽) provide some context about when magistrates invoke Article 386. *See id.* at 359 (ART. 386). In one case, the magistrate cited Article 386 as the legal basis for his decision:

> [This case involved the transfer of ceremonial property that the transferor did not know and had no reason to know it was fabricated in violation of the Code.] Wei, the alleged offender, is a resident of Fujian province. Wei possessed a merit medal (*i.e.*, ceremonial object in remembrance of an ancestor who was a meritorious official of the dynasty) from a deceased owner known by the name Chen. In the year Guangxu 7 (1881), Wei pledged the merit medal as collateral to the pawnshop to secure a new loan for the repayment of an antecedent debt. However, it was later discovered that this merit medal was illegally fabricated, and that the original owner Chen was not in fact from a meritorious family line. Since the merit medal is a special object of ceremonial significance, Wei was arrested and held in custody. During the criminal investigation, it was revealed that Wei did not know that the merit medal was fabricated, did not intend to defraud the authorities, and had possessed the merit medal through legal means. The wrongdoer, Chen, was long deceased. However, although Wei had no knowledge of the illegal fabrication, the object was of vital ceremonial significance to the dynasty and the fabrication itself was deemed a violation of the dynastic rites. There was also no similar Article in the Code that the magistrate could analogize to. To

protect magistrates' discretion, suggest that the Qing legislators likely envisioned discretion to play an important role in the administration of the Qing legal system, rather than an impediment to the imperial rule.

3. *Property in the Qing Magistrates' Judicial Practice*

The absence of *de jure* property rights in the Qing Code does not imply the absence of *de facto* property protection in the everyday administration of justice. In fact, a rich body of historical research has confirmed the existence of private property protection in many parts of Qing China.[308] The current literature identifies two mechanisms through which private property was protected: (1) through appeal to practical moralism and (2) through linkage to political power. This section briefly discusses both theories, and analyzes their applicability to common property.

The first theory posits that private property was protected through the resource claimant's appeal to Confucian morality in litigation.

> resolve this dilemma, the magistrate ruled that Wei's conduct constituted a violation of Article 386.

See Chen, *supra* note 301, at 4 (citing XING'AN HUILAN QUANBIAN ZHI XINZENG XING'AN HUILAN 273 (《刑案匯覽全編》之《新增刑案匯覽》卷十四) [Full Edited Collection of the Conspectus of Penal Cases, New Edition, Book 14] (2007) (Jason J. Wu trans., 2022)). In another case, Article 386 was invoked when the case involved a minor dereliction of duty by a lower government official in the context of the Civil Examination:

> The alleged offender is a government clerk known by the name Chen. In the year Guangxu 9 (1883), Chen's official duty was to transcribe the exam answers from candidates of the Civil Examination [for the official review by the imperial examiner]. Chen mis-transcribed one of the candidate's answers. As a result, the candidate failed the exam. Although the affected candidate did not file a lawsuit against Chen, his mistake was later discovered by Chen's superiors and the judicial officer determined that Chen's actions amounted to a dereliction of duty. But the judicial officer acknowledged that Chen's mistake was unintentional and minor. Because there was no exact article in the Code which the judicial officer could analogize to, he ruled that Chen's actions constituted a violation of Article 386.

See id. (citing XING'AN HUILAN QUANBIAN ZHI XINZENG XING'AN HUILAN 274 (《刑案匯覽全編》之《新增刑案匯覽》卷十四) [Full Edited Collection of the Conspectus of Penal Cases, New Edition, Book 14] (2007) (Jason J. Wu trans., 2022)).

308 *See generally* Kenneth Pomeranz, *Land Markets in Late Imperial and Republican China*, 23 CONTINUITY AND CHANGE 101 (2008); CONTRACT AND PROPERTY IN EARLY MODERN CHINA (Madeleine Zelin, Jonathan K. Ocko & Robert Gardella eds., 2004); Sucheta Mazumdar, *Rights in People, Rights in Land: Concepts of Customary Property in Late Imperial China*, 23 EXTRÊME-ORIENT, EXTRÊME-OCCIDENT 89 (2001).

Given that the Code did not recognize a legal interest in property, the language of morality was the primary device through which the magistrates, litigants, and imperial court itself understood the nature of the conduct being litigated.[309] Litigants seeking to enforce their private interests in property through the formal legal system would frame the issue as one that involves the violation of a Confucian moral principle.[310] Although these cases typically originate from "pure" property disputes, the litigants' strategic framing allowed magistrates to exercise jurisdiction and cite supporting legal authority from the Code.[311] Through this process, a *de facto* property right is established despite that the Code did not recognize such a right.[312]

According to legal historian Philip Huang, this process of property protection is reflective of a core characteristic of the Qing civil justice system—the operation of civil justice through the "systemic coupling of moralistic representations with practical actions."[313] This mode of judicial practice—which Huang described as "practical moralism"—reflects two balancing interests.[314] On the one hand, the will of the sovereign ruler, as expressed in the stipulations of the Code, was meant to embody the "universal and unchanging moral principles" that would serve as a guide to legal praxis.[315] On the other hand, Confucian morality possessed a certain degree of autonomy from arbitrary state power because the actual adjudication process was determined largely by common sense and peacemaking compromise to preserve the status quo in local kinship communities.[316] Since the moral norms on the ground were largely insular and independent from the practice of imperial power, parties were able to protect themselves from arbitrary expropriation, leading to *de facto* protection of property.[317]

309 *See generally* HUANG, *supra* note 297.

310 *See* Philip C. C. Huang, *Civil Adjudication in China, Past and Present*, 32 MOD. CHINA 135, 142 (2006).

311 *See id.* at 144 ("[M]agistrates generally adjudicated outright according to codified law. The litigants' filing of pledges of willing acceptance of the court's judgements was simply a formality.").

312 *See id.* at 139 ("[T]he Qing code never advanced the principle of the inviolability of property rights in the abstract, in the manner of the German Civil Code of 1900 . . . Rather, it used concrete situations to illustrate the principle of property "rights," almost always in terms of punishments for their violation.").

313 *See* HUANG, *supra* note 297, at 3.

314 *See* Huang, *supra* note 310, at 143, 149, 152, 173-74.

315 HUANG, *supra* note 297, at 225.

316 *Id.* at 110.

317 *Id.* at 15.

If the theory of practical moralism is true, this meant that the property protected through moral appeal would be vulnerable to two challenges: (1) the malleability of moral ideals; and (2) its susceptibility to political capture. The dynamic nature of morality meant that it was susceptible to different interpretations—leading to battles over orthodoxy.[318] This is evident in the state's constant struggles to eliminate heterodoxy both within and outside the Confucian literati class.[319] Moreover, given that Confucian moral reasoning places emphasis on perceptions of the common experience, the praxis of morality was dependent on localized cultural values—leading to fragmentation of the moral landscape. Intuitively, the practical moralism thesis leads to the following conclusion: if the dominant avenue to protect property under the formal legal system was through moral appeal, this meant that property was less secure in places that are culturally fractured than in places with a high degree of cultural homogeneity.[320] However, there is little empirical support to this hypothesis.

In contrast, the second theory posits that private property was protected out of administrative necessity. As outside appointees, magistrates were temporary visitors to the county.[321] A new magistrate is appointed every three years.[322] Once the magistrates' term expires, they are either promoted or relocated to a different county.[323] In contrast, local communities stay for generations, and in some remote regions of the empire, such as in the Southern and Southwestern

318 *See generally* Michael Szonyi, *Making Claims about Standardization and Orthopraxy in Late Imperial China: Rituals and Cults in the Fuzhou Region in Light of Watson's Theories*, 33 MOD. CHINA 47 (2007).

319 *See* Howard Giskin, *Heterodoxy, Heteropraxy, and History*, 13 CHINA REV. INT'L 13, 19 (2006).

320 *But see* Jerome Bourgon, *Uncivil Dialogue: Law and Custom did not Merge into Civil Law under the Qing*, 23 LATE IMPERIAL CHINA 1 (2002) (criticizing Huang's theory of *de facto* property protection on the basis that it confuses fact and norms). Bourgon argues that the fact that people enjoyed some form of property ownership outside of the law (and without state intervention) does not mean that local property customs were recognized by the state. Just because both litigants and the courts invoked Confucian morality does not mean that they communicated on the same terms or meant the same values. Huang's theory of morality-based property protection falls apart if there is contrary evidence suggesting that property customs never hardened into widespread norms that were sanctioned by the Confucian ideology. But more recent evidence seems to support Huang's intuition. For discussion of evidence that supports Huang's intuition. *See* Cohen, *supra* note 20, at 510; *infra*, Section III.C.2; ZELIN, *supra* note 23, at 17-18.

321 *See* XU, *supra* note 249, at 45.

322 *See* Bradly W. Reed, *Money and Justice: Clerks, Runners, and the Magistrate's Court in Late Imperial Sichuan*, 21 MOD. CHINA 345, 375 (1995).

323 *See id.*

hinterlands, local communities may be rooted for centuries; their history extended even longer than the reigning dynasties themselves.[324] Thus, the transient presence of magistrates incentivizes them to prioritize continuity over change. A magistrate's self-preservation instincts would tell them that the easiest way to do their job was to keep local communities content by maintaining the present distribution of status and resources. The last thing a magistrate would want to do is to expropriate the local elites.[325]

However, things might look different in another locality where the Qing empire's institutional capacity is stronger. A key assumption of the administrative necessity thesis is that the empire's agents would protect property if the entrenchment of local interests works in favor of their political careerism. Essentially, this is a theory of political compromise.[326] Yet, compromise may not be necessary in regions where the Qing state held strong influence—such as counties close to the imperial capital.[327] In these regions, the Qing state had enough

324 *See* DAVID FAURE, EMPEROR AND ANCESTOR: STATE AND LINEAGE IN SOUTH CHINA 17, 362 (2007). *See also* Zhou, *supra* note 257, at 265.

325 *See* Zhou, *supra* note 257, at 281, 289.

326 A bourgeoning literature on state capacity, comparing Qing China with the absolutist states in Western Europe such as France and Spain, illustrates the importance of state-elite bargaining in the creation of private property regimes. *See* JEAN-LAURENT ROSENTHAL & R. BIN WONG, BEFORE AND BEYOND DIVERGENCE: THE POLITICS OF ECONOMIC CHANGE IN CHINA AND EUROPE 93, 167 (2011). In the comparative context of Early America, the Framers of the U.S. Constitution also held the idea that broad landownership—supported by a robust private property system—could disperse political power throughout the population and constrain the power of the Federal Government (and previously, the English Crown). Whereas, in Europe, one justification for power of a landed aristocracy was that it served as an essential counterweight to tyranny. *See* CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA (2021). However, this theory is inapplicable to the Chinese case because the Qing imperial court strictly controlled the Civil Examination process—which is the only way an ordinary Chinese person in the Qing could become an elite. Accordingly, the Chinese elites were averse to bargaining with the emperor because they never had independent control over their membership.

327 During the High-Qing period, emperor Yongzheng (1722-1735) developed a formal governance designation system to prioritize some local jurisdictions over others. The system maps all counties into four broad categories: (1) thoroughfare—"places at busy highways," (2) troublesome—"places with numerous and complex official business," (3) wearisome—"places prone to tax arrears," (4) difficult—"places where population is wicked, where customs are violent, and where cases of theft are numerous." The Qing empire prioritized large-scale infrastructure building and retained a stronger presence in counties designated as "thoroughfare" and "troublesome" than counties marked as "wearisome" and "difficult." *See* Daniel Koss, *Political Geography of Empire: Chinese Varieties of Local Government*, 76 J. ASIAN STUD. 159, 165 (2017).

presence to disregard local interests that were antagonistic to those of the imperial court.[328] Instead, property protection was dependent on the state's hierarchy of status allocation.[329] Members of local communities were averse to bargaining with agents of the Qing state since the only avenue to gain upward mobility was through the civil examination system (科舉制度)[330]—a channel strictly monitored and controlled by the imperial court.[331] Consequently, property protection was unevenly enforced across social strata, leading to what legal historian Deng Jianpeng presents as the "fundamental dilemma of property rights in China."[332] According to Deng, the absence of formal property rights incentivized owners to seek custody under political power.[333] Yet, despite enhanced property safety from local banditry or trespass, property generated through political power was not anchored in the locality and therefore at a greater risk of being expropriated by the state.[334]

328 Counties along the Grand Canal were the priorities of the Qing government due to their centrality in connecting commercial networks, interprovincial transport, and navigation. Given their strategic importance to the empire's fiscal health, counties along the Grand Canal were most in need of carefully chosen magistrates who could perpetuate lasting imperial influence in the locality and execute systemically important policy goals. *See id*. at 164.

329 *See* TAISU ZHANG, THE LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PRE-INDUSTRIAL CHINA AND ENGLAND 1 (2017).

330 The civil examination system was designed to test and select the most learned candidates for appointment as bureaucrats in the imperial Chinese government. *See* Kallie Szczepanski, *What Was Imperial China's Civil Service Exam System?*, THOUGHTCO., https://www.thoughtco.com/imperial-chinas-civil-service-exam-195112#:~:text=The%20civil%20service%20exam%20system,the%20world's%20longest%2Dlasting%20meritocracy [https://perma.cc/9MPQ-JN6J] (June 10, 2018). For geographic distribution of civil officials appointed through the civil exam, *see* Bijia Chen, Cameron Campbell, Yuxue Ren & James Lee, *Big Data for Study of Qing Officialdom: The China Government Employee Database-Qing (CGED-Q)*, 4 J. CHIN. HIST. 431 459 (2020) ("Zhejiang accounted for 12.95 percent of officials, Jiangsu accounted for 8.16 percent, and Shuntian accounted for 7.75 percent. Jiangsu and Zhejiang together accounted for more than 20 percent of officials, even though they accounted for only 11.85 percent of the population of China . . . Shuntian was overrepresented because of its special status in the civil service exam.").

331 *See* Debin Ma, *Law and Economy in Traditional China: A 'Legal Origin' Perspective on the Great Divergence*, *in* LAW AND LONG-TERM ECONOMIC CHANGE: A EURASIAN PERSPECTIVE 59 (Debin Ma & Jan Luiten van Zanden eds., 2011).

332 DENG JIANPENG (鄧建鵬), CAICHAN QUANLI DE PINKUN: ZHONGGUO CHUANTONG MINSHIFA YANJIU (財產權利的貧困：中國傳統民事法研究) [Deficiency in Property Rights: A Study of Traditional Chinese Civil Law] 69, 155 (2006).

333 *See id.*

334 *See id.*

Both mechanisms probably coexisted to some extent. Activist magistrates would prefer to protect property through the practice of practical moralism, whereas laissez-faire-minded magistrates would refrain from expropriation to gain local support.[335] In fact, both mechanisms find support not only in the administrative context but also in the Qing Code itself. The Code envisioned property as a proxy to regulate the status and hierarchies of participants involved in its distribution. This is evident in the fact that virtually every article of the Code that mentions property does so in the context of criminal conduct.[336] Given that the concept of "rights" was not introduced to the Chinese legal lexicon until the late 19th century,[337] it would be absurd to suggest that market participants at the locality somehow possessed a separate idea of "property rights" (or its rough equivalent) that recognized an enforceable property interest of the *in rem* nature. The litigants and magistrates probably also conceptualized their interests in property in relation to the statuses, hierarchies, and identities of the property's users or owners—the same way it was envisioned in the Code.

With regards to common property, however, it is more likely that the administrative necessity thesis is the applicable mechanism. Common property was virtually absent from the Code. The Code mentioned the possibility of "owning" resource units in the form of tangible, movable property—such as trees (as fixtures), timber (as commodities), and animals (as *ferae naturae*).[338] But, owning entire resource systems—including both the units (flow) and reserve (stock) of the resource—was not conceivable under the Code.[339] Since resource systems were categorically absent from the Code, neither litigants nor magistrates would be able to frame the issue as a violation of Confucian morals (except for the very limited circumstances when resource conflicts over the use of the commons result in violence, injuries, or breaches of public peace).[340] This meant that most disputes

335 *Compare* HUANG, *supra* note 297, at 15, 110 *with* Zhou, *supra* note 257, at 281, 289.

336 *See* Huang, *supra* note 310, at 139. *See also* Alford & Schluessel, *supra* note 266, at 277, 281.

337 *See* Kwan, *supra* note 264, at 270.

338 *See* THE GREAT QING CODE, *supra* note 27, at 120, 158-59, 218.

339 The Qing Code does not have a section governing the transfer of title or usage rights concerning natural resources (e.g., riparian rights, mineral rights, forestry licenses). But the Code does mention property ownership in limited contexts, such as property crimes and tax revenue. *See id.* at 114-22.

340 *See generally* THOMAS M. BUOYE, MANSLAUGHTER, MARKETS, AND MORAL ECONOMY: VIOLENT DISPUTES OVER PROPERTY RIGHTS IN EIGHTEENTH-CENTURY CHINA (2000).

over common resources would not be litigated—instead, they would be mediated by neighbors, villagers, and members of the same kin.[341] Where mediation failed, disputes would be adjudicated by lineage elders and local constables in lineage buildings and ancestral halls, rather than in the magistrate's office (縣衙).[342] There, the magistrate's job is to oversee, rather than to intervene.[343]

C. *Sources of Lineage Influence Over the Commons*

1. *Lineages as Sites of Mediation, Adjudication, and Extra-Legal Enforcement*

As the examples of Qingshui, Mianning, and Huizhou from Section III.A.2 illustrate, lineages and kinship groups played central roles in shaping the local communities' responses to disruptive market forces. Section III.B examines the legal-administrative context that gave rise to the Qing state's laissez-faire attitude towards property and local governance in general. This section aims to answer the following question: through what mechanism did lineages become the adjudicators, enforcers, and protectors of common property?

The answer, this section argues, lies in the lineage's control of market participants via customs. In many local communities, lineages elders and elites adopted customs that allowed them to exert influence over the interpretation and enforcement of contracts.[344] For example, contract boilerplates that contain the phrase "all *three* parties have negotiated and agreed" (三面言議) and "notified the public clearly" (同眾言明) reflect the customary view that contracts were more than agreements between two parties in privity.[345] Rather, they were viewed as communications to the public; they also bind the "middle person" (中人) who, on behalf of the community, participate as the negotiator and guarantor of the contractual obligations of both parties.[346] These boilerplates signal the local community's commitment to maintaining neighborly relations in dispute resolution. Moreover,

341 *See* Huang, *supra* note 254, at 267, 274-75, 289.

342 *See infra* Section III.C.1.

343 *Id.*

344 *See* Li & Chen, *supra* note 150, at 67-68.

345 Li Zhuhuan (李祝環), *Zhongguo Chuantong Minshi Qiyue Zhong de Zhongren Xianxiang* (中國傳統民事契約中的中人現象) [The Phenomenon of Middle-persons in Civil Contracts in the Chinese Tradition], 6 FAXUE YANJIU (法學研究) 138, 141 (1997).

346 *Id.* at 143-44.

the middle persons were given the power to interpret and enforce a contract.[347] Typically, lineage elders and elite clansmen were selected to be middle persons due to their reputation and standing in the local community.[348] Members of the local gentry—*e.g.*, wealthy clansmen, retired officials, and learned persons in the community—were also called upon to serve this role, but only after consultation with and approval by the lineage authorities.[349] Magistrates often penalized parties who brought their cases directly to the magistrates' offices instead of bringing them to the middle persons, viewing them as local troublemakers.[350]

Lineages also adopted norms regulating the market participants' access to justice. Some even crafted explicit lineage rules barring lawsuits amongst lineage members. In Jiangsu, one lineage had rules stating:

> When quarrels arise in the *tsu* [lineage] out of . . . disputes about landed property . . . the parties are to go to the ancestral hall and hand in a petition. . . . Should anyone bring action against another person by bypassing the head of the *tsu*, without petitioning him first, this person is to be fined five ounces of silver to be added to the public funds of the ancestral hall.[351]

Any clansmen who bypassed the lineage authority would be subject to punishment by the lineage "for having forgotten that the other party who has wronged him is a fellow clan member and a descent from the same origin."[352] The purpose of these rules is to discourage lineage members from seeking formal legal recourse and to pressure them to submit to the jurisdiction of lineages as much as possible.[353] In the rare instances when cases were submitted directly to the magistrate's offices, the magistrates who were either overburdened with work or laissez-faire minded (or both) were typically glad to defer to lineage rules and sent back disputing clansmen who had sought to bypass the lineage.[354]

347 *Id.* at 143.

348 *Id.*

349 *Id.*

350 *Id.*

351 HSIEN CHIN HU, THE COMMON DESCENT GROUP IN CHINA AND ITS FUNCTIONS Appx. 26 (1948).

352 Jerome A. Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1217 (1966).

353 *Id.* at 1217-18.

354 *Id.* at 1218.

Even in disputes involving members of multiple lineages or an outsider, lineages continued to operate as the informal sites of adjudication. The resolution of contractual disputes regarding conveyances of land often required the participation of the "middle person"—who were either the lineage elders and elite clansmen themselves or acting under the auspices of such.[355] Property torts were resolved through collective mediation efforts between neighborhood representatives, lineage elders, and the local gentry—*i.e.*, the important stakeholders of the local community.[356] Cases submitted to the lineage authorities were heard by a panel of local elites who were selected based on reputation, advanced age, status, and combined learning.[357] Although questions about impartiality were sometimes raised (especially when the disputing parties came from different communities), the parties have no choice but to rely on the same group of elites because only they possessed the requisite qualities to be effective mediators. If the magistrates were interested in the case, they would appoint representatives to the panel or instruct clerks to report the case for official recordkeeping even if the magistrates did not exercise jurisdiction.[358]

With regards to common property, this means that the welfare of the commons is intertwined with the interests of the lineage. As long as common property regimes remain vital for the management of resources at the locality, lineages would be incentivized to keep them undisturbed. Members and tenants of the lineage enjoyed access to the commons under the aegis of the lineage institution; the lineages, in exchange, gained authority, as well as the right to collect fees for the maintenance of ancestral halls and the policing of the resource systems' natural boundaries.[359] As such, any disruption to the status quo—including the privatization of the common resources—would not be in the lineage's favor unless the lineage could capture more rents through privatization than through managing the resource as common property.

355 *See id.*

356 *See id.*

357 *See id.*

358 This refers to *Yamen* (衙門) runners and administrative aides of the county magistrate (衙役). Unlike modern law clerks, *Yamen* clerks did not conduct legal research or assist the magistrates in decision-making. Their main functions were to act as spokespersons of the magistrate and agents of law enforcement. Traditional historiography tends to portray *Yamen* clerks as agents of extortion who profit from exploiting information asymmetries between the courts and the local community. *See* HUANG, *supra* note 297, at 116, 172.

359 *See* MCDERMOTT, *supra* note 171, at 63, 83, 95-96.

However, it is important to note that the dominance of social norms is not unique to Qing China. Across societies, legal institutions have relied on social norms to adjudicate disputes between members of a local community. In New England, whaling communities have developed elaborate systems to identify ownership of whale carcasses that drifted ashore, and their customs typically gained the recognition of the courts.[360] Historically, in Western Europe and the United States, a large part of the commercial law originated from the customs of merchants and guilds, which were privately enforced by arbitration and equivalent informal methods before they were adopted by the courts.[361] The Uniform Commercial Code was in part an attempt to codify commercial practices.[362]

What was unique to Qing China was: (1) the extent to which lineages were able to mold social norms to their favor;[363] and (2) the degree of social control they exerted over the common property regime.[364] Unlike most close-knit communities that relied on social norms to manage common property, lineages had an unusual degree of centralization of authority—hence a greater control over social norms.[365] Lineage elders and elite clansmen functionally controlled the processes of contract negotiation, interpretation, and enforcement due to their roles as "middle persons."[366] In the context of forest commons, most local transactions involving the sale of timber or transfer of timber-harvesting rights would require the approval (either implicit or explicit) of lineage authorities.[367] Transactions that violated the norms and rules of the lineage would be functionally unenforceable because any disputing party who brought the case to the magistrate's office would likely be sent back to the lineage's jurisdiction, which would be void under the lineage's rules.[368] Outsiders (*e.g.*, timber

360 *See* Ghen v. Rich, 8 F. 159 (D. Mass. 1881) (deferring to the local customs of the whaling community to determine whether a fisherman who first killed a whale but left the carcass in the ocean has exercised sufficient control to claim ownership for the purpose of first possession).

361 *See* Posner, *supra* note 86, at 6.

362 *Id.*

363 *See* Xiaoqun Xu, *Law, Custom, and Social Norms: Civil Adjudications in Qing and Republican China*, 36 L. & HIST. REV. 85, 86-87, 92 (2017).

364 *See* MCDERMOTT, *supra* note 171, at 68, 78, 81, 99, 110.

365 *See id.*

366 *See* Li, *supra* note 345, at 138, 141.

367 *See generally* MCDERMOTT, *supra* note 171.

368 Magistrates were typically motivated to send these cases back to the lineage's jurisdiction for the following reasons: (1) The magistrate's prioritization of local peacekeeping. (2) The Qing Code did not provide a specific legal remedy for most

merchants and migrant loggers) who ignored or refused to deal with the lineage authorities would find themselves unwelcomed by the community and excluded from the commercial benefits that were accorded to those who cooperated with the lineage.[369]

Chinese lineages also differed from most close-knit communities in that they controlled access to formal legal recourse even for non-members of the community.[370] Many close-knit communities around the world could "mix and match" local norms with formal law in sophisticated ways.[371] But, most will allow formal legal recourse in three situations: (1) when resorting to legal remedies facilitate economies of scale; (2) when formal law enables "the externalization of administrative costs" (of dispute resolution within the group); and (3) when "the dispute involves high stakes and social distance between the parties."[372] Members who circumvented the community's dispute resolution system without the community's consent would be socially sanctioned by shaming, ostracizing, and even "moderate acts of violence."[373] But, in Qing China, lineages exerted strong influence even beyond their communities because of their direct roles in contract enforcement and their capacities to operate complex systems of adjudication and mediation that were open to non-members as well.[374] Those who wanted to do business in the region or wished to gain access to the common resource would have no choice but to submit to the lineage's informal jurisdiction.[375]

2. *Lineages as Social Organizations of Resource Management*

In addition to social norms and informal adjudication, lineages exerted control over the management of common property regimes through their institutional functions at the locality.[376] Given the context of local autonomy and governmental neglect, lineages came to assume functions that, in other societies, would belong to the state.

situations arising from competing claims of resource ownership. (3) Magistrates were incentivized to keep good relations with the lineage authorities to perpetuate their rule during their 3-year tenure at the county. *See supra* Section III.B.1.

369 *See id.*

370 *See supra* Section III.A.2.

371 ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167, 283 (1991).

372 Fitzpatrick, *supra* note 48, at 1030.

373 *Id.*

374 *See* Li, *supra* note 345, at 138, 141.

375 *See id.*

376 *See* Szonyi, *supra* note 18, at 433, 437.

Table 5 summarizes some of the core functions and responsibilities of the lineage typically performed at the sub-county level:

Table 5. Functions of the Lineage Conducive to Promoting Local Welfare

Function	**Description & Examples**
Trust financing and managing resources	Pooling resources for investment purposes.[377] Lending money to lineage members.[378] Holding communal funds in the form of lineage trust.[379] Managing access to common property (*e.g.*, ancestral mountain lands and forests).[380]
Peacekeeping and Common defense	Cultivating trust and good faith among neighbors and lineage members.[381] Cultivating political loyalty to the state while preserving local autonomy (through bargains with state agents).[382] Protecting lineage members from the outsiders; privately organizing local defense groups.[383]
Facilitating transactions	Acting as guarantors to transactions between members of the same lineage.[384] Appointing "middlemen" to draft, negotiate, and enforce contracts between members of the same lineage.[385] Setting standards of fair and honest market practices.[386]
Redistribution	Preventing the seizure of collateral pledged by elder lineage members upon an event of

377 *See id.*

378 MCDERMOTT, *supra* note 171, at 310.

379 *Id.* at 311.

380 *Id.* at 326.

381 *See* David Faure, *The Lineage as a Cultural Invention: The Case of the Pearl River Delta*, 15 MOD. CHINA 4, 16 (1989).

382 *See generally* FAURE, *supra* note 324.

383 Song Chen, *The State, the Gentry, and Local Institutions: The Song Dynasty and Long-Term Trends from Tang to Qing*, 1 J. CHIN. HIST. 141, 148 (2017).

384 *See* MCDERMOTT, *supra* note 171, at 101.

385 *See* Prasenjit Duara, *Elites and the Structures of Authority in the Villages of North China*, *in* CHINESE LOCAL ELITES AND PATTERNS OF DOMINANCE 264, 266-67 (Joseph W. Esherick & Mary Backus Rankin eds., 1990).

386 Fu-mei Chang Chen & Ramon H. Myers, *Customary Law and the Economic Growth of China During the Ch'ing Period*, 3 CH'ING-SHIH WEN-T'I 4-27 (1978).

	default.[387] Using common resources and money from the lineage trust to take care of weaker and low-income households of the lineage.[388]
Developing infrastructure	Building dikes, changing waterways, building irrigation infrastructure, and land reclamations.[389] Providing public goods to the community in the situations of government neglect or state failure.[390]

Especially in Southern and Southeastern China, lineages functioned as *de facto* governments of the natural village.[391] The near-omnipotent presence of lineages in the locality owes much to the fact that the Qing empire's bureaucratic structure did not extend downward beyond the county level.[392] This is due to a multitude of factors such as the high replacement rates of magistrates,[393] the irreplicable status of lineages in local administration,[394] and the general laissez-faire attitude of the Qing state towards matters of local governance.[395]

One important aspect of lineages is that they were typically organized in the proto-corporate form.[396] Although lineages did not enjoy

387 ZHANG, *supra* note 329, at 160-61, 182.

388 *Id.* at 160.

389 *See* FAURE, *supra* note 324, at 51-53.

390 *See* LILY L. TSAI, ACCOUNTABILITY WITHOUT DEMOCRACY: SOLIDARITY GROUPS AND PUBLIC GOODS PROVISION IN RURAL CHINA 148, 186 (2007).

391 In Huizhou, some lineages were able to control village collectives, which extend beyond the regular boundaries of a natural village. *See* MCDERMOTT, *supra* note 171.

392 Qin Hui (秦暉), *Chuantong Zhonghua Diguo de Xiangcun Jichu Kongzhi* (傳統中華帝國的鄉村基層控制) [Basic Control of the Village-Level Locality in the Traditional Chinese Empire] 2003(1) ZHONGGUO XIANGCUN YANJIU (中國鄉村研究) 1, 2 (2003) ("國權不下縣, 縣下唯宗族, 宗族皆自治, 自治靠倫理, 倫理造鄉紳.") [summarizing the structure of Qing administrative hierarchy as "state power does not extend below the county; the lineage manages sub-county affairs; lineages were self-autonomous; local autonomy depends on moral governance; moral governance creates the local gentry"].

393 *See* Reed, *supra* note 322, at 375.

394 *See supra* Section III.C.1.

395 *See supra* Section III.B.1.

396 *See* Ruskola, *supra* note 33, at 1605. For socio-economically and culturally oriented analyses of the law of corporations, *see* Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253 (1999); Caroline Bradley, *Trans-Atlantic Misunderstandings: Corporate Law and Societies*, 53 U. MIAMI L. REV. 269 (1999).

limited liability like modern corporations, lineage members were able to obtain shares and transfer (though not freely) cash dividends to the lineage shareholders;[397] senior members of the lineage could become joint residual claimants of the lineage's assets.[398] In other words, lineages retained aspects of a collective business enterprise.[399] The proto-corporate form likely developed in response to the rising demand for efficiency and insularity. Though far less complex than corporations of the industrialized West in the same period,[400] the lineage's structure was sophisticated enough to finance capital-intensive entrepreneurial

397 *See* Myron L. Cohen, *Lineage Development and the Family in China*, *in* THE CHINESE FAMILY AND ITS RITUAL BEHAVIOR 210, 211 (Hsieh Jih-chang & Chuang Ying-chang eds., 1985) ("[T]he benefits of lineage membership could include the cash dividends paid [to] shareholders in lineage corporations.").

398 *See generally* Watson, *supra* note 18, at 594. *But see* DAVID FAURE, EMPEROR AND ANCESTOR: STATE AND LINEAGE IN SOUTH CHINA (2009) (arguing that lineage institutions should not be analogized to the modern corporate form because lineage institutions did not separate ownership and management). Faure argued that Chinese lineages were more similar to business partnerships than to corporations due to the following features: unlimited liability, shared profits and losses, joint management responsibilities, and members being residual claimants of lineage-generated wealth. Nevertheless, it is uncontested that lineages possessed certain qualities of the corporate form.

399 *See*, *e.g.*, RUBIE S. WATSON, INEQUALITY AMONG BROTHERS: CLASS AND KINSHIP IN SOUTH CHINA 12 (1985) (describing a lineage as "a landholding corporation"); David Faure, *The Lineage as a Business Company: Patronage Versus Law in the Development of Chinese Business*, *in* CONFERENCE ON MODERN CHINESE ECONOMIC HISTORY (SECOND) 347 (1989); P. Steven Sangren, *Traditional Chinese Corporations: Beyond Kinship*, 43 J. ASIAN STUD. 391 (1984); James L. Watson, *Hereditary Tenancy and Corporate Landlordism in Traditional China: A Case Study*, 2 MOD. ASIAN STUD. 161, 162 (1977) (describing "landowning corporations embedded in complex lineages").

400 There is a consensus among treatise writers on four conventional criteria of corporation: (1) limited investor liability, (2) freely transferrable ownership interests, (3) legal personality, and (4) centralized management. *See generally* ROBERT CHARLES CLARK, CORPORATE LAW § 1.1 (1986); LEWIS D. SOLOMON & ALAN R. PALMITER, CORPORATIONS 4 (1990). *Cf.* Ruskola, *supra* note 33, at 1649 ("In the conventional [Western] view, the separation of management from ownership and the resultant agency problem constitute the key features of the modern business corporation. In the traditional Chinese family, the ritual structure of kinship indeed provided for the ownership of family property by the entire patrilineage and its management by patriarchal authority."). *See also id.* at 1652 ("[But] the imperial state never conferred the legal abstraction of 'personality' on clan corporations."). *Id.* at 1654. ("[T]here is little evidence of wide transferability of ownership in clan corporations, which obviously provided limits to their ability to raise capital[.]"). *Id.* at 1655-56 ("At a minimum, the British colonial administration in Hong Kong interpreted Chinese customary law as providing for limited liability . . . that an ancestral trust may register as a legal person[.]").

ventures, such as building dikes, changing waterways, and land reclamations.[401]

But, in comparing lineages with other non-corporate close-knit communities around the globe that were managing common resources (*e.g.*, 18th century English whaling communities, lobster gangs of Maine, and cattle ranchers of Shasta County, California),[402] lineages had far more institutional complexity. Lineages are hierarchically structured with defined loci of central decision-making.[403] They had mature systems of power delegation to allocate responsibilities within their own administrative strata.[404] Lineages also adopted both explicit and implied rules protecting the seniority status of elders as well as those mandating the reciprocity between members.[405] But, regardless of their degrees of sophistication compared to Western counterparts, the bottom line is clear: all successful common property regimes had the following characteristics: (1) member homogeneity; (2) regular interaction between members; and (3) shared informational availability amongst users of the common resource.[406]

The stability and longevity of many common property regimes in Qing China owe much to the organizational features of the lineage. With regards to the first factor, member homogeneity,[407] lineage members were highly conscious of themselves as a group in relation to outsiders and maintain group consciousness through celebrating ritual unity.[408] Lineages are homogenous by default given that membership was based solely upon "demonstrated descent from a common ancestor."[409] Group consciousness was maintained through the regular practices of ancestral worship that created a strong ingroup mentality against perceived outsiders.[410] Although lineage identity was not a

401 *See* FAURE, *supra* note 324.

402 *See* Fitzpatrick, *supra* note 48, at 1030.

403 *See* Ruskola, *supra* note 33, at 1649 (discussing the centralized management features of lineages).

404 *See id.* at 1649-51.

405 Lineages protect the seniority status of elders because the collective identity of the lineage stems from ancestral worship, which favors individuals who are more senior in their common lines of descent. *See* Watson, *supra* note 18, at 593-95.

406 *See* Fitzpatrick, *supra* note 48, at 1030 (citing ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 167, 283 (1991)).

407 *See id.*

408 *See* Watson, *supra* note 18, at 594-95.

409 *Id.* at 594.

410 *Id. But see* MICHAEL SZONYI, PRACTICING KINSHIP: LINEAGE AND DESCENT IN LATE IMPERIAL CHINA (2002) (arguing that kinship in the Fuzhou region was a form

prerequisite for the access to common resources (evidenced by the fact that non-members could also rent property from the lineage and contract with its members[411]), it created the sociocultural basis for organizational unity that allowed lineages to mobilize resources and personnel to respond to external threats to the status quo.

With regards to the second factor, regular interaction,[412] village assemblies held by lineages ensured frequent interaction between members and a liquid flow of information.[413] Whenever the lineage elders decide to build a new infrastructural project or celebrate a religious tradition, members would be assembled at the ancestral hall to hear the announcements.[414] Outside of the congregational context, lineage members also frequently exchanged goods, equipment, and financial resources amongst each other to support individual household projects.[415] The fact that lineages were organized primarily as kinship groups determined that more interaction would occur within lineages than outside since it is natural for people to entrust their kin more than they rely on outsiders.

Regarding the third factor, shared informational availability,[416] the involvement of lineage authorities in the drafting and negotiation process of contracts as "middle persons" allowed them to embed their presence in the daily economic transactions of the locality.[417] Their presence reduced the informational costs of bargaining because usually the same group of lineage elders and elite clansmen oversaw the negotiation process and applied the same norms of contract interpretation for most transactions within the community.[418] Although non-

of strategic practice that was always flexible and negotiable since lineage members often appropriated kinship ideals to serve their own purposes).

411 The case studies from Mianning and Qingshui counties demonstrate that members of a clan frequently often transacted with people outside their kinship groups, such as timber merchants and lineage members from neighboring localities. Lineage institutions rarely imposed rules prohibiting members from transacting with or renting property to non-members since doing so would be contrary to their economic intersts. *See supra* Section III.A.2.

412 *See* Fitzpatrick, *supra* note 48, at 1030.

413 *See* Szonyi, *supra* note 18, at 473 (discussing the persistence of congregational solidarity of lineage and clan associations in modern-day China).

414 *See generally* FAURE, *supra* note 324.

415 *See* Ruskola, *supra* note 33, at 1631 ("In these [ancestral] trusts, the property was to remain intact over generations and the resulting income was to be used for ancestral halls for worship as well as 'welfare funds' providing grants to needy members of the family.").

416 *See* Fitzpatrick, *supra* note 48, at 1030.

417 *See* Li, *supra* note 345, at 138, 141.

418 *See id.*

affiliates of the lineage (such as timber merchants and loggers from other counties) were under no obligation to comply with the lineage norms, they were incentivized to do so because non-compliance would entail: (1) higher costs of obtaining required information to make sound business judgments; (2) greater risks of alienating important business stakeholders; and (3) possibility of being unwelcomed by the local community.[419]

Note a crucial caveat—the prevalence of lineages does not suggest that the lineage was the only way to organize common property in Qing China. Other common property regimes, such as those based on fishing communities, non-patrilineal village collectives, and nomadic groups, existed around the same time lineages became a dominant form of organized kinship.[420] These regimes exhibited varying levels of sophistication and were each important players in their respective geographies.[421] Nevertheless, lineage-based common property regimes are worthy of scholarly attention because the institutional insularity of the lineage, together with its dominance and transformative capacities in the local society, provides a rare opportunity for scholars to understand how informal property institutions can create and maintain optimal resource distributions from the bottom up.[422] Lineage-based common property regimes were also among the most stable and long-lasting forms of common property ownership.[423]

419 *See id.*

420 *See generally* DAVID A. BELLO, ACROSS FOREST, STEPPE, AND MOUNTAIN: ENVIRONMENT, IDENTITY, AND EMPIRE IN QING CHINA'S BORDERLANDS 116-68 (2016) (discussing the nature of imperial and common pastoralism in Southern Inner Mongolia.); MICAH S. MUSCOLINO, FISHING WARS AND ENVIRONMENTAL CHANGE IN LATE IMPERIAL AND MODERN CHINA 36-63 (2009) (discussing resource conflicts over the depletion of common fisheries in Zhejiang and Fujian during the late Qing period).

421 *See*, *e.g.*, BELLO, supra note 420, at 116-68; MUSCOLINO, supra note 420, at 36-63.

422 Bottom-up property formation refers to the Hayekian view that property institutions generate optimal resource allocation when they allow decisions regarding resource usage, disposal, and possession to be made by those with local knowledge rather than by a central authority. This theory is often used to explain why custom-based property orders may substitute for formal property law. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526 (1945).

423 *See generally* KINSHIP ORGANIZATION IN LATE IMPERIAL CHINA, 1000-1940 (Patricia Buckley Ebrey & James L. Watson, eds., 1987) (explaining how Chinese kinship organizations and lineage institutions evolved over the past millennium). *See also* Yuhua Wang, *Blood is Thicker Than Water: Elite Kinship Networks and State Building in Imperial China*, 116 AM. POL. SCI. REV. 896, 897 (2022) (arguing that elite kinship networks have been resilient over the past one-thousand years of

It is also important to distinguish between the purpose and function of the lineage. The purpose of the lineage is primarily sociocultural—it originated from ancestral worship and evolved into a social organization intended to preserve, celebrate, and pass on patrilineal group identity from one generation to the next. Members likely associated their lineages with ancestral halls housing tablets representing the spirits of their common ancestors, rather than with jointly owned investment vehicles or enforcers of property.[424] The economic function of lineages as makers and enforcers of common property is probably incidental to their primary purpose as sociocultural institutions of organized kinship. The lineage's economic functions may have evolved out of necessity because, in the absence of formal property rights, people turned to their kin to pool capital and entrusted their lineages to protect access to common forests, fisheries, waters, and other resources on which their livelihoods depended. This may have been a function of residential proximity that is reflective of the nature of kinship ties in general, rather than a unique function of lineages.[425] Regardless, the fact that the economic functions of the lineage were largely unintended did not prevent lineages from becoming one of the most important economic actors in the locality, and, on some occasions, providers of public goods.

3. *The Qing Code's Protection of Kinship Ties and Seniority Status*

Lineages protect the seniority status of elder clansmen for three primary reasons. First, the collective identity of the lineage stems from the manifested patrilineal descent from the common ancestor.[426] Lineage elders, who were living embodiments of the patrilineal heritage, enjoyed special privileges and immunities under lineage rules.[427] Second, Confucian norms of filial piety and harmony forbid transgressions of established hierarchies of seniority status.[428] These moral values were enshrined in Qing laws as inviolable principles.[429] Third,

Chinese history because they were able to adopt sophisticated approaches to both cooperate and compete with the state in crafting the "rules of the game.").

424 Szonyi, *supra* note 18, at 433.

425 *Id.* at 437.

426 *See* Szonyi, *supra* note 18, at 433, 436.

427 *See* Di Wang, *Study on Family Rules in the Ming and Qing Dynasties*, 2 OPEN J. OF SOC. SCIS. 132, 134 (2014).

428 *See id*. at 133.

429 *See* Zhang & Dong, *supra* note 27, at 17 ("Ancient philosophers (古聖 *gusheng*) researched and summarized the principles of these complicated relations in order that people could live in peace and amity. Only these principles can

seniority and experience were perceived by the local community as attributes of effective leadership.[430] Lineage elders who possessed both had valuable social capital which could be converted into political power through their dominance in local administrative affairs. The Qing Code provided the legal foundations for all three.

Formal legal challenges to the sociopolitical domination of lineage elders over junior lineage members were categorically impossible since the Qing Code itself expressly upheld the inviolability of sociopolitical hierarchies based on kinship ties. Two of the "Ten Great Wrongs" (十惡)—the most heinous crimes in Qing society—involved acts disrupting the sociopolitical hierarchy of the patriarchal, patrilineal kinship. Article 2 Clause 7 of the Code forbids "establish[ing] a separate household registration and separat[ing] one's property [from that of the head of the family]" while one's paternal grandparents or parents are living.[431] Clause 8 of the same article defines "bringing suit against one's husband, or superior or senior relatives of the third degree and above, or superior relatives of the fourth degree and above" as the great crime of "discord."[432] Violation of any one of the ten great wrongs is deemed to an utmost affront to the Confucian moral order.

The Code also protects the integrity of kinship ties by implementing a system of collective responsibility—and, indeed, collective criminal liability—based on the household unit.[433] For instance, Article 25 allows members of the same household to conceal crimes for each other.[434] Clause 2 of the article describes three situations in which an offender would be deemed to have constructively confessed to a crime: (1) "[i]f (although the offender himself does not confess,) he sends another to represent him in confessing"; (2) if the "offender's relatives or other members of the household confesses [for him]"; or

guarantee the harmony and peaceful coexistence of human beings. Hence, [the] legislators' mission is to impose moral principles to his subjects in the form of law. In general, law must be identical to morality and vice versa.").

430 *See* Cohen, *supra* note 24, at 1218.

431 *See* THE GREAT QING CODE, *supra* note 27, at 35 ("The seventh [great wrong] is called Lack of Filial Piety") (note that "[from . . . family]" is part of the actual quote).

432 *Id.* at 36 ("The eighth [great wrong] is called Discord").

433 *See* TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW 83 (2013) ("That the imperial state never conferred the legal abstraction of 'personality' on clan corporations reflects a Confucian social epistemology in which the family was the most fundamental, real, and natural unit . . . [t]he theory of indivisible patrilineage on which Chinese kinship is founded makes corporate personality the normative ideal and individual personality the deviation.").

434 *See* THE GREAT QING CODE, *supra* note 27, at 56-57 ("ART. 25. The Perpetrator of an Offence who Confesses").

(3) if members of the same household reveal the crimes by incriminating each other.[435] The effect of a confession is the offender would be absolved of legal liability.[436] If the crime is committed by more than one person in the same household or extended kin (within the fourth degree of patrilineal relationship or below), a confession by any member of the household or extended kin would absolve all members of liability.[437] Moreover, the Code imposes a duty on people to hide their kin from arrests by law enforcement organs.[438] This idea of collective responsibility may be foreign to those who are familiar with the misprision of felony in the Anglo-American common law system.[439] But, as the Code was intended to be the embodiment of timeless Confucian principles through the expression of law, these provisions installing a legal regime of collective responsibility reflect the Confucian ideal of treating the household as the foundational—and inseparable—unit of Chinese society.[440]

However, the lack of formal legal challenges to lineage dominance does not mean that the magistrates never processed legal cases

435 *Id.*

436 *Id.*

437 *Id.* at 66 ("ART. 32. Relatives Who [May] Conceal Each Other").

438 *Id.* The Code contains a notable exception for offences such as plotting rebellion, treason, and high treason. The relevant text of the provision is as follows:

> In the case of those who are in the fourth degree of relationship or below, who mutually hide one another and divulge information [on impending arrests], reduce the [penalty] from that for ordinary people by three degrees. If they are relatives outside the degrees of mourning, reduce it one degree. (This means relatives of the fourth degree and below who live separately.)
>
> If the offence is plotting treason [art. 255] or above, do not use this law. (This means that although they are relatives within the degrees of mourning [and hence may conceal the offender], if the offence is plotting rebellion, high treason [art. 254] or treason [art. 255] and they hide him and do no turn him in, they are sentenced according to the law. Therefore [the text] says, do not use this law.).

439 *Compare id.* at 66-67 [ART. 32 of the Qing Code] *with* 18 U.S.C. § 4 (the U.S. federal statute codifying the crime of misprision of a felony). The relevant text of the U.S. statute is as follows (18 U.S.C. § 4):

> [Misprision of felony—] Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

440 *See* CONFUCIUS, ANALECTS BOOK 13:18 ("Confucius answered, 'in our village those who are straight are quite different. Fathers cover up for their sons, and sons cover up for their fathers. In such behavior is straightness to be found as a matter of course.'").

in which people were accused of disrespecting the lineage elders.[441] Despite the Code's prohibition against bringing lawsuits against elders, the Qing historical archives show that such lawsuits did exist—although they were certainly rare.[442] But the baseline is clear—such accusations were adjudicated by the magistrates only on their factual basis.[443] The litigants were able to make factual defenses, such as arguing that the accuser mistook the identity of the accused or that the underlying conduct was not of a disrespectful character.[444] However, litigants never challenged the legitimacy of the sociopolitical hierarchies of kinship and seniority. The Code also disallowed legal challenges to any of the provisions on either procedural or substantive grounds.[445] Arguing against the hierarchy itself was therefore contrary to the interests of litigants, as they would not only certainly lose the case but also be subjected to punishment by the magistrates and social sanctioning by the local community.

Finally, the Code entrenches the Confucian hierarchy of kinship and seniority into the administrative structure of local governance at the sub-county level. Article 83 provides the basic procedure for the selection of constables from the village community.[446] Unlike the

441 *See* ZHANG, *supra* note 329, at 187-88.

442 *Id.* at 188 (citing Long Quan Archive M003-01-14737 (1920); M003-01-9857 (1912); M003-01-13283 (1949)).

443 *Id*.

444 *Id.*

445 The legal authority of the Code stemmed directly from the Qing emperor himself and the statutes were deemed by him to embody immutable and perpetual principles. Although litigants could appeal a magistrate's ruling on the basis that the magistrate's judicial conduct was improper or a dereliction of duty, litigants could not challenge the legality of the Code provisions themselves. Bringing such a challenge would be equivalent to brining a direct challenge to the emperor's authority. *See* Zhang & Dong, *supra* note 27, at 2.

446 *See* THE GREAT QING CODE, *supra* note 27, at 109-10 ("prohibition against [improper creation of community heads] and dismissal of the heads of Bao [constables]"). The relevant legal text of this provision is as follows:

> In every populated location, for every hundred households, one community head and ten tithing chiefs will be chosen by discussion [among the villagers] to serve for one year to supervise the collection of money and grain [taxes] and assist in [taking care of] public functions. If there is one who falsely calls himself a Head of a Bao [i.e., the local constable] . . . or a Zhu shou (the senior tithing chief) or the like, who does something that annoys and harasses the people, he will receive 100 strokes of the heavy bamboo and transportation [i.e., exile].
>
> As to the appointment of the village elders, it is permitted to select them from among the inhabitants in the village who are elderly and virtuous and who are trusted by the villagers. It is not permitted to select a person who is a retired or dismissed clerk or runner, or a person who has been

magistrates, who were shifted in and out of the locality every three years, the constables (保長) must be selected from reputable senior members of the village community.[447] They were treated as the representatives of the local interests, and the Code vests in them the authority to assist in tax collection, providing moral exhortation, monitoring social relations, and organizing local defense.[448] As Article 83 provides, the only selection criteria for a constable is good standing in the locality.[449] This is in contrasts with the complex civil examination system through which the magistrate was chosen. The Qing state recognized the importance of having well-connected, entrenched persons in the locality to manage the day-to-day business of local governance, who perform functions that were largely complementary to those of the magistrate. In practice, villagers often ended up choosing the lineage elders as their governing constables.

IV. LESSONS AND IMPLICATIONS

What historical lessons can be drawn from the longevity of lineage-based common property regimes? This Part discusses the implications of China's historical experience for contemporary debates on common property. Section IV.A argues that, despite their historical resistance to privatization, common property regimes are in fact compatible with—rather than antagonistic to—market forces. Section IV.B asks what lessons we can draw from the kinship-based common property regimes in Qing China, and how they can be used to solve difficult policy problems in comparative contexts.

> convicted of an offence, to do this work. A violation is punished with 60 strokes of the heavy bamboo (and dismissal). The said official or clerk [who supervises and selects wrongly] will receive 40 strokes of the light bamboo.

447 *See* XU, *supra* note 249, at 44 ("[T]ownship leaders and constables either belonged to or were behold to local elites who were often from entrenched lineages. As 'natural leaders,' local elites were most concerned about maintaining the legal and moral order in local society as a 'public' matter, and they would either volunteer or be asked to mediate and settle civil disputes without involving the magistrates.").

448 *See* Wei Guangqi (魏光奇), *Qingdai Xiangdi Zhidu Kaolüe* (清代鄉地制度考略) ["Xiang-Di" Administrative System in the Qing Dynasty], 5 BEIJING SHIFAN DAXUE XUEBAO SHEHUI KEXUEBAN (北京師範大學學報社會科學版) 64 (2007) http://www.iqh.net.cn/080729user/upload-files/2009101/20091017162922_59362.pdf [https://perma.cc/Z57P-AZPM].

449 *See* THE GREAT QING CODE, *supra* note 27, at 109 (ART. 83).

A. *Is Common Property Compatible with Market Forces?*

A large part of this Article has framed the history of lineage-based common property regimes in China as that of resistance against privatization. One may be tempted to conclude that common property is therefore antagonistic to market forces. However, it must be emphasized that resistance to privatization does not imply incompatibility with market forces—in fact, quite the opposite.

Although private property is the dominant form of ownership in most market economies today, private property is not a necessary condition for the existence and operation of markets. Conceptually, markets are the aggregation of all publicly available pricing information of resources that allow participants to exchange them in the form of goods and services. Markets exist regardless of whether the legal constructs of private property rights are established. In fact, societies that do not have private property rights have both historically and presently maintained robust markets to meet the diverse demands of their participants.[450]

As this Article has demonstrated, societies without formal property rights could still create sophisticated systems of resource allocation to adjust supply and demand. When formal rules regulating the use and ownership of property are absent, local market participants rely on commercial customs and social norms of kinship groups to internalize externalities. Historical examples of the lineage's involvement in contract enforcement and mediation of property torts demonstrate how organized kinship groups can optimize resource allocation through the adoption of customs and norms that lowered transaction costs, regulate market conduct, and incentivize compliance.[451]

A related question is whether kinship-based common property regimes are antagonistic to change. Given that lineages took advantage of the Qing state's weak institutional presence in the locality and

450 *See e.g.*, Xiaobo Zhang, *Asymmetric Property Rights in China's Economic Growth*, International Food Policy Research Institute Development Strategy and Governance (DSGD) Discussion Paper No. 28, 2-3 (Jan. 2006) ("In developing and transition countries, a lack of well-defined formal property rights and legal system is the norm rather than the exception . . . The rapid growth of the town village enterprises (TVEs) in China in the 1980s and 1990s illustrates the above point. Although TVS did not have clearly defined property rights, the sector has achieved remarkable growth."); Annette M. Kim, *A Market Without the 'Right' Property Rights: Ho Chi Minh City, Vietnam's Newly-Emerged Private Real Estate Market*, 12 ECON. OF TRANSITION, 275, 300 (2004) ("Although most houses did not have legal title, in the face of housing shortages, buyers were willing to buy houses without property rights.").

451 *See supra*, Section III.C.2.

laissez-faire attitude towards local governance to protect the status quo, one might assume that kinship groups are a reactionary force. However, as the historical examples of Qingshui, Mianning, and Huizhou lineages demonstrate, kinship groups are not only responsive to market changes but also adaptive to the changed circumstances.[452] The fact that ethnic minority kinship groups adopted Han-Chinese contract drafting customs and crafted new social ties shows that kinship groups can change long-standing customs.[453]

B. *Policy Lessons from China's Historical Experience*

The compatibility between markets and kinship-based common property regimes carries important policy implications for China today. Much of contemporary China's rural land is owned by village collectives as common property by constitutional mandate. Section 1 Article 10 of the PRC Constitution states that "[all] land in cities [is] owned by the state," and "land in rural and suburban areas is owned by [the] collective except for that which belongs to the state as prescribed by law."[454] But, residents can transfer land-use rights according to the relevant statutory provisions.[455] A 1996 survey of land resources found that 53% of China's territory was owned by the state, and 46% owned by village collectives.[456] In 2005, collectively owned forests account for 58% of China's total forest area and 32% of total timber volume.[457] Given that so much of China's forested land is already governed by village collectives, one may wonder whether the kinship institutions that contributed to the stability of common property regimes in the Qing period can be replicated in the contemporary era.

The question of replicability should be approached with caution. While it is true that many lineages continue to exist in all parts of

452 *See supra* Section III.A.2.

453 *Id.*

454 *See* 憲法 [CONSTITUTION] art. 10, § 1 (2018) (China).

455 *Id.*

456 Daquan Huang, Yuncheng Huang, Xingshuo Zhao & Zhen Liu, *How Do Differences in Land Ownership Types in China Affect Land Development? A Case from Beijing*, 9 SUSTAINABILITY 1, 3 (2017).

457 *See*, *e.g.*, State Forestry Administration (SFA), China Forest Resource Statistics (The 6th National Forest Inventory) (2005); Jintao Xu, *Collective Forest Tenure Reform in China: What has Been Achieved So Far?*, POL'Y DIALOGUE (2010), http://policydialogue.org/files/events/Xu_collective_forest_tenure_reform.pdf [https://perma.cc/M5R6-K5QE].

China today (especially in Southern and Southeastern China),[458] conditions that have given rise to their dominance in the local communities have changed dramatically. Today, the laws and regulations of the PRC no longer harbor a laissez-faire attitude towards property—lineages no longer control the enforcement of contracts; customs and norms are hardly relevant to judicial determinations of ownership. Moreover, the functions of state and society have substantially merged under the supervision of the Chinese Communist Party;[459] the government's presence at the sub-county level is strong and penetrating.[460] Due to these changed circumstances, it is impossible to conclude whether kinship-based common property regimes would have the same vitality today as they had in the past.

Nevertheless, useful policy lessons can be drawn from China's historical experience. First, kinship organizations may provide effective bulwarks against disruptive change, allowing local communities to adjust to new economic realities. Communities can harness the benefits of low transaction costs and frequent information exchange within kinship organizations to mobilize resources and personnel for the purpose of providing a common cushion against turbulent external forces. Second, resource-pooling systems based on kinship organizations can provide a safety net for individual households that fail to make the adjustment. Communities can utilize the re-distributive functions of organized kinship groups to ensure against common risks and disperse costs among contributing members of the kinship community. Third, kinship organizations can control resource pressures and mitigate negative spillover effects that would have led to the degradation of common property regimes. Coasean and Demsetzian law-and-economics principles predict that rising resource value caused by intense competition generates incentives to deviate from the common property ownership structure.[461] But, as the history of forest commons in Qing China demonstrates, kinship organizations can prevent the

458 Lineages were formally eliminated in 1949 by the Chinese Communist Party. But many of them were revived during the period of market opening and reform (1978-2001). In Southeastern China, the reappearance of formal lineages in the form of ancestral halls, rituals, and genealogies, was rapid. In a single county of Zhejiang, almost 500 halls were reportedly rebuilt by 1987, and over 2000 by 1994. Similarly, in the rural areas of Ruichang in Jiangxi, 60% of villages had either rebuilt ancestral halls or genealogies by the mid-1990s. *See* Szonyi, *supra* note 18, at 466.

459 *See* Nis Grünberg & Katja Drinhausen, *The Party Leads on Everything*, MERCATOR INST. FOR CHINA STUD. (MERICS) (Sept. 19, 2019), https://merics.org/en/report/party-leads-everything [https://perma.cc/JLF4-P8RG].

460 *See* TONY SAICH, GOVERNANCE AND POLITICS OF CHINA xiii (4th ed. 2015).

461 *See supra* Section II.B.2.

degradation of common property regimes by internalizing externalities within the kinship structure, crafting new social ties, and adopting practices that counteract the disruptive impacts of resource competition.

The lessons of China may also carry policy implications for similar problems arising in other developing societies. In many parts of Sub-Saharan Africa,[462] South America,[463] and Southeast Asia,[464] most natural resources continue to be managed as common property. Legal scholar Daniel Fitzpatrick describes the phenomenon of open access in many parts of the "developing world" as a direct consequence of "incomplete or deadlocked" attempts by local communities to exclude offending resource users and outsiders.[465] Fitzpatrick argues that the states' tendencies to excessively grant private licenses without adequate enforcement generated violent conflicts between the state's license-holders and the resource claimants in the local communities—resulting in deadlocked exclusionary attempts.[466] However, kinship ties and organizations may provide a remedy to these kinds of situations. As China's historical experience illustrates, robust kinship networks can enable local resource claimants to form coalitions that reduce the risks of social conflict. The presence of a dominant kinship group in the locality may also incentivize non-local market participants to comply with the implicit rules of the local community, given

462 *See, e.g.*, Steven W. Lawry, *Tenure Policy Toward Common Property Natural Resources in Sub-Saharan Africa*, 30 NAT. RES. J. 403, 405-10 (1990); Andrew Ainslie, *When 'Community' is Not Enough: Managing Common Property Natural Resources in Rural South Africa*, 16 DEV. S. AFR., 375, 376-77 (1999).

463 *See, e.g.*, Michael Richards, *Common Property Resource Institutions and Forest Management in Latin America*, 28 DEV. & CHANGE 95, 98 (1997); Antonio Carlos Diegues, *Commons and Protected Areas in Brazil*, The Eighth Conference of the International Association for the Study of Common Property: Constituting the Commons; Crafting Commons in the New Millennium 2, 10-12 (May 31, 2000); Raymond Noronha, *Common-Property Resource-Management in Traditioal Societies*, *in* THE ENVIRONMENT AND EMERGING DEVELOPMENT ISSUES: VOL. 1, 48-70 (Partha Dasgupta & Karl-Göran Mäler eds., 2000).

464 *See, e.g.*, Chusak Wittayapak, *Local Institutions in Common Property Resources: A Study of Community-Based Watershed Management in Northern Thailand*, The Fifth Annual Common Property Conference of the International Association for the Study of Common Property 1-2, 8-11 (May 28, 1995); Michelle Ann Miller, Carl Middleton, Jonathan Rigg & David Taylor, *Hybrid Governance of Transboundary Commons: Insights from Southeast Asia*, 110 ANNALS OF AM. ASS'N OF GEOGR. 297, 299-303 (2020).

465 Fitzpatrick, *supra* note 48, at 1033.

466 *Id.* at 1043.

that non-compliance would entail higher transaction costs and lost commercial opportunities.[467]

V. CONCLUSION

This Article has explored the institutional and sociopolitical factors that explain why some common property regimes resisted privatization while others dissipated. Using the forest commons in Qing China as a historical case study, this Article has contended that lineages—as a form of organized kinship—created conditions for the longevity and stability of common property regimes through complex systems of resource management, personnel control, and interaction with the agents of the Qing state. A combination of factors led to the rise of lineages as makers of the common property regime: (1) local autonomy; (2) limited state capacity; and (3) adaptability of kinship groups. Although some of the factors that have historically contributed to the longevity and stability of lineage-based common property regimes are no longer present, the historical experience of China remains highly relevant to the pressing policy problems of environmental governance today—both for China and the broader developing world.

467 *See supra* Section III.C.2.