

Governing the Post-Socialist Transitional Commons: A Case from Rural China

Shitong Qiao*

ABSTRACT

When the collective declines, who manages the collective-owned land? When the socialist state fails, who possesses the state-owned river? This Article concerns the governance of land and natural resources that are still owned by collectives or the state in rural China. No effective community governance has evolved in rural China to fill the authority vacuum left by the dissolution of the people's commune system. As a result, such land and natural resources have become real commons. In describing these I use the term "transitional commons" to indicate both the crucial influence of the transitional political legal environment in their emergence and evolution and their inherently transitional character. Transitional commons are often in crisis. The tragedy of the commons occurs when the cost of exclusive use is too high. When the benefit of exclusive use exceeds the cost, competing property claims arise over the

* J.S.D. Candidate, Yale Law School; Visiting Faculty and Director of Advanced Legal Studies, Peking University School of Transnational Law (2011–12 academic year). E-mail: shitong.qiao@yale.edu. The author wishes to express particular thanks to Professor Robert Ellickson, whose scholarship inspired this Article and whose diligent supervision improved it immensely, and to Professor Susan Rose-Ackerman, whose many suggestions were extremely on-point. In addition, discussions with Professor Paul Gewirtz, Noah Messing, Tian Lei, Wang Zhiqiang, Mickey Hyman, Noelle Lyle, and Liu Xiaotang contributed much to the development of this Article. Carol Pang, Xuan Gui, and Thomas Huang helped edit the language of earlier versions of this Article. The author is also indebted to Qiao Mingmu, Qiao Mingrong, Qiao Shiwu, Hu Yuanbao, and many other villagers and local officials of Songzi County, Hubei province, for their cooperation and help with the fieldwork of this research. The fieldwork of this research received financial support from the Allen & Overy 2008 University Scholarship, which the author appreciates. Earlier drafts of this Article have been presented at the JSD Colloquium of Yale Law School and the Eighth Annual Brigham-Kanner Conference at Tsinghua University Law School. The views expressed herein, along with any errors, are mine alone.

common resources. I argue for an integrated approach to govern the transitional commons from the ground. Successful management of the transitional commons requires more than choosing the right property institution. A capable state and a well-functioning community are necessary to make the property institution, whichever it is, work. Rule of law is necessary to define the basic structure of a society and to guarantee the normal operation of the community self-governance. Self-governance can increase social capital for the local community to develop local consensus on property arrangements.

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I. INTRODUCTION

When the collective declines, who manages the collective-owned land? When the socialist state fails, who possesses the state-owned river? The weakness of the state and lack of social capital in post-socialist countries have generated extensive discussion,¹ but not in the scholarship of property rights and commons. Although the external environment has been singled out as an element in various models for governing the commons, specific study of this aspect is still needed. The focus in existing literature has remained on the internal structure of the governance mechanism or the bundles of property rights.² It is still unclear how the external political legal environment impacts the emergence and evolution of the commons.³ The influence of the external environment is critical to the governance of natural resources in post-socialist countries experiencing political and legal changes.

This Article concerns the governance of land and natural resources that are still owned by collectives or the state in rural China.⁴ In the people's commune period, land in rural China was truly collectively owned and managed.⁵ After the people's commune system collapsed in the early 1980s, rural China is still collectively owned in name. But, with the establishment of the Household Responsibility System ("HRS"), each rural household has acquired use rights to a plot to live on and several

1. See, e.g., BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION (Janos Kornai & Susan Rose-Ackerman eds., 2004); CREATING SOCIAL TRUST IN POST-SOCIALIST TRANSITION (Janos Kornai et al. eds., 2004).

2. See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 153–206 (2000); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001).

3. See Arun Agrawal, *Sustainable Governance of Common-Pool Resources: Context, Methods, and Politics*, 32 ANN. REV. ANTHROPOLOGY 243, 250 (2003). The only paper that I found with a similar topic to my research is Thomas Sikor, *The Commons in Transition: Agrarian and Environmental Change in Central and Eastern Europe*, 34 ENVTL. MGMT. 270 (2004).

4. The collective usually refers to the village or sub-village entity. Loren Brandt et al., *Land Rights in Rural China: Facts, Fictions and Issues*, CHINA J., Jan. 2002, at 67, 73.

5. For more details about the collective ownership under the people's commune system, see Greg O'Leary & Andrew Watson, *The Role of the People's Commune in Rural Development in China*, 55 PAC. AFF. 593, 593 (1982).

pieces of land to farm.⁶ However, scholarship has long overlooked that substantial parts of rural land and natural resources were not distributed and were supposed to be continually managed by the collectives or the state. Unfortunately no effective community governance has evolved in rural China to fill the authority vacuum left by the dissolution of the people's commune system.⁷ As a result, such land and natural resources have become real commons.⁸ In describing these, I use the term "transitional commons" to highlight both the crucial influence of the transitional political legal environment in their emergence and evolution and their inherently transitional character. The tragedy of the commons occurs when the cost of exclusive use is too high. When the benefit of exclusive use exceeds the cost, competing property claims arise over the common resources. Different property claims prevail in different situations, resulting in temporary property arrangements. The temporary nature of property arrangements is further destabilized by the uncertain political and legal environment in which the transitional commons are embedded.

I first realized the existence of transitional commons in my exploration, in the summer of 2008, of the Dianpai River, one of the numerous small rivers in rural Hubei in central China. There was a tragedy of the commons taking place in regards to the river resources. But surprisingly, different property claims arose to the land on either bank of the river. The three different destinies of the river water and the two riverbanks piqued my interest. From then to the summer of 2010, I visited the Dianpai River several times to investigate the reasons for their different destinies.⁹

6. Justin Yifu Lin, *The Household Responsibility System Reform in China: A Peasant's Institutional Choice*, 69 AM. J. AGRIC. ECON. 410, 410 (1987).

7. Xu Wang, *Mutual Empowerment of State and Peasantry: Grassroots Democracy in Rural China*, 25 WORLD DEV. 1431, 1433 (1997); Jude Howell, *Prospects for Village Self-Governance in China*, 25 J. PEASANT STUD. 86, 86, 89 (1998).

8. See James Kai-sing Kung, *Common Property Rights and Land Reallocations in Rural China: Evidence from a Village Survey*, 28 WORLD DEV. 701 (2000).

9. Qiao Fieldwork (2008). Much of the information in this Article concerning the Dianpai River area comes from fieldwork I performed from 2008 to 2010. I began my fieldwork in the summer of 2008 when I interviewed government officers of the Nanhai Township and Bureaus of Water Administration and Environmental Protection of the Songzi County, managers of the pumping station, village heads and elders in both Yongfu village and Lajiadu village, and other ordinary villagers. I participated in villagers' social activities and tried to ask questions in casual conversations. I have maintained contact with two senior villagers who are very familiar with the history of the river and the villages. I conducted three phone interviews with these two senior villagers in the process of writing this Article. I also asked them to do brief investigations for me,

In Part I, I discuss in detail how the governance of the Dianpai River collapsed when Chinese rural society experienced a great transformation, through Mao's collectivization and Deng's marketization. I discuss the evolution of property arrangements over the river in Part II, with an emphasis on the basis for different property rights claims. In Part III, I develop a model for analyzing transitional commons, identifying the crucial factors that affect the rise and survival of property rights claims. In Part IV, I explore how to overcome the crisis of transitional commons. I argue for an integrated approach to govern the transitional commons from the ground. First, community distinctions mean that no external uniform resolution works for all transitional commons. The effort to build an ideal nationwide property institution cannot avoid the tragedy of the transitional commons on the ground. A decentralized approach, with respect for institutional diversity, is essential to overcome the crisis of the transitional commons. Second, the successful management of the transitional commons requires more than choosing the right property institution. A capable state and a well-functioning community are necessary to make the property institution, whichever it is, work. To achieve this, I argue for rule of law as a means to safeguard local "order without law"¹⁰ and to build social capital through self-governance of the local community. The rule of law is necessary to define the basic structure of a society and to guarantee the normal operation of the community self-governance. Self-governance can increase social capital for the local community to develop local consensus on property arrangements. The formal institutions are the foundation of the development of local rules.

to clarify factual questions I was concerned about when writing the Article. In the summer of 2010, I returned to Songzi County. I stayed in a farmer's house and had two in-depth interviews with Mr. H (a villager to be introduced later). I also went to the Bureau of Archive of the Songzi County to verify significant events regarding the river and villages.

The primary source of data was interviews, which ranged from a thirty-minute interview with a busy and uninterested government officer to a three-hour discussion with Mr. H. I made notes during the interviews and on two occasions, I employed a local high-school graduate to help me with that. These notes, which were written in Chinese and not standardized, helped me recover my memory in the writing process. When something appeared unclear from the notes, I also called the two senior villagers for clarification. I maintain records of the notes I used for this Article and they are available upon request.

10. ROBERT C ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

II. COMMONS IN TRANSITION: AFTER COLLECTIVIZATION, ENDURING MARKETIZATION

A. Traditional Governance: “Heaven is High and the Emperor is Far Away”

Before the establishment of the Communist regime, the state had never succeeded in directly controlling rural China.¹¹ The distance between Chinese emperors and their subjects was characterized by the proverb “Heaven is high and the emperor is far away.” With this gap between the rulers and the ruled, seemingly dictatorial rulers in fact ruled by allowing rural self-governance.¹² With considerable autonomy from the state, the local community itself maintained internal order and settled disputes between its members.¹³

In the pre-1949 period, the Dianpai River was not yet in existence. In Songzi County, Hubei Province of central China, there were only several medium-sized irregularly-shaped lakes and the Songzi River, a branch of the Yangtze River, which flowed alongside the lakes. The Songzi River and the lakes were the main sources of drinking water and fish for villagers in the surrounding areas. The villagers relied mainly on farming but fished in the lakes and the Songzi River occasionally. The simplicity of fishing instruments and the small population limited fishing to a sustainable level. While land was privately owned, the lakes were kept as commons. There were no written rules on the use of lake water; the management of the lakes depended on the authority of lineages and social norms based on villagers’ mutual familiarity.¹⁴

Before 1949, lineages were very developed in this area. Surviving lineage books, ruins of ancestral shrines, and elders’ memories about lineages provide evidence of the past existence of traditional authority in the area.¹⁵ Lineages and sub-lineages formed the basic divisions that

11. FEI XIAOTONG, *FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY* 113 (Gary G. Hamilton & Wang Zheng trans., 1992).

12. *Id.*

13. MICHAEL TAYLOR, *COMMUNITY, ANARCHY, AND LIBERTY* 35 (1982).

14. Qiao Fieldwork, *supra* note 9.

15. *Id.* For a general discussion on lineages in traditional China, see MICHAEL

managed administrative and other public activities of rural society.¹⁶ A complete lineage kept a book to record its members, had its own rules to regulate the behavior of its members, and owned and operated ancestral shrines.

Moreover, social norms based on mutual familiarity played an important role in regulating rural people's behavior.¹⁷ The basic unit of Chinese rural society was the village, members of which could belong to one or more lineages.¹⁸ Residents in the same village constituted an "acquaintance society (*shuren shehui*),"¹⁹ a society based totally on familiarity, which developed "through frequent and repeated interactions occurring over a long period of time."²⁰ In an acquaintance society, formal laws played very limited roles. Instead, rites and customs defined what was and was not acceptable in the villagers' daily interactions.²¹ Because the villagers lived and worked in the same village, any use of the water that may have significantly reduced water quality would have been censured by the other villagers. For example, if a villager discharged a lot of waste into the lakes, other villagers would view him as "*quede*" (lacking morality). Informal social sanctions against a villager with a bad reputation would make his livelihood difficult.²²

SZONYI, PRACTICING KINSHIP: LINEAGE AND DESCENT IN LATE IMPERIAL CHINA (2002).

16. See PRASENJIT DUARA, CULTURE, POWER, AND THE STATE: RURAL NORTH CHINA, 1900–1942, at 87 (1988).

17. FEI, *supra* note 11, at 41.

18. See Allen Chun, *The Lineage-Village Complex in Southeastern China: A Long Footnote in the Anthropology of Kinship*, 37 CURRENT ANTHROPOLOGY 429 (1964).

19. See FEI, *supra* note 11, at 41–42. "Acquaintance society" is a more precise translation of *shuren shehui* than "society without strangers."

20. Traditional rural China was a society where people lived in the same place from birth to death. Every child grew up in everyone else's eyes, and in the child's eyes everyone and everything seemed ordinary and habitual. Life in traditional rural society was very parochial. Villagers restricted the scope of their daily activities: they did not travel far; they seldom made contact with the outside world; they lived solitary lives; and they maintained their own isolated social circle. See XIAOTONG, *supra* note 10, at 41.

21. *Id.* at 43.

22. In private retaliation, each individual (or family) tacitly promises to retaliate against injury, or non-contribution, to public goods. A variety of informal social sanctions may be made against those who do not contribute to the collective good: shaming, gossip, ridicule, accusations of sorcery and witchcraft, and ostracism and withdrawal of reciprocal aid. See TAYLOR, *supra* note 8, at 82–89; Daniel Little gave a very similar example in discussing this point, noting that "[m]embers of a closed community who consistently pollute the water supply will be detected, and social disapprobation will result." DANIEL LITTLE, UNDERSTANDING PEASANT CHINA 44 (1989).

B. Mao's Collectivization: The Almighty Party-State

Mao's collectivization eliminated private property and transformed traditional peasants into members of the people's commune.²³ An important purpose of collectivization was to build a system in which the party-state was the sole authority.²⁴ Therefore, in order to be successful, collectivization first had to destroy the socioeconomic and cultural basis of traditional authority—the lineage. The socialist education movement of the same period portrayed the lineage as incompatible with communism and something to be discarded.²⁵ The state also deliberately mobilized the masses to destroy the symbols of the lineage, such as ancestral shrines.²⁶ As a result, the authority of the lineages became severely curtailed, if not completely eliminated.²⁷

Chairman Mao did not, however, succeed in replacing the traditional intimacy between villagers with socialist comradeship.²⁸ Even in the people's commune period, social norms based on familiarity in traditional rural society played an important role in regulating villagers' behaviors.²⁹ One explanation for this is that the prohibition of free migration and the elimination of the market economy in the Maoist period strengthened, rather than weakened, the parochialism and closeness of Chinese rural society.

In the 1950s, the Yonghe People's Commune was established in what would later become Nanhai Township in Songzi County. Two brigades, Yongfu ("Y") and Lajiadu ("L"), both operating under the

23. For general discussion about Mao's collectivization, see YU JIANRONG, YUECUN ZHENGZHI [POLITICS OF YUE VILLAGE] 259–82 (2001); WU YI, CUNZHI BIANQIAN ZHONG DE QUANWEI YU ZHIXU [AUTHORITY AND ORDER IN THE EVOLUTION OF VILLAGE GOVERNANCE] 86–101 (2002).

24. Shen Yansheng, *Cunzhebng de Xingshuai yu Chongjian [The Decline and Reconstruction of Village Governance]*, ZHANLUE YU GUANLI [STRATEGY AND MANAGEMENT], Dec. 1998, at 1, 11; WU YI, *supra* note 22, at 95.

25. See Liang Zhiping, *Xiangtu Shehui zhong de Falv yu Zhixu [Law and Order in Rural Society]*, in XIANGTU SHEHUI DE ZHIXU, GONGZHENG YU QUANWEI [ORDER, JUSTICE AND AUTHORITY IN RURAL SOCIETY] 415, 418 (Wang Mingming & Wang Sifu eds., 1997). See also Ezra F. Vogel, *From Friendship to Comradeship: The Change in Personal Relations in Communist China*, CHINA Q. 46 (1965).

26. Liang, *supra* note 25, at 418–19.

27. *Id.*

28. Thomas B. Gold, *After Comradeship: Personal Relations in China Since the Cultural Revolution*, 104 CHINA Q. 657, 674 (1985) ("What we see then, in the P.R.C., is the strength of certain traditional patterns of behaviour despite a concerted assault on them dating back to the May 4th Movement.")

29. Liang, *supra* note 25, at 420.

egis of the Yonghe People's Commune,³⁰ jointly governed the lakes that would later become part of the Dianpai River. Each brigade sent one member to guard these lakes. Large-scale private fishing was prohibited. Instead, the brigades organized fishing in the lakes at the end of every year and distributed the fish to all the members of the brigades.

The Dianpai River was a fruit of the people's commune system. From the winter of 1978 to the spring of 1979, the Songzi County government organized the peasants to construct a pumping station and the Dianpai River, which would connect the lakes with the Songzi River.³¹ This was done to prevent the lakes from flooding the farmlands in the summer.³² Between the lakes and the Songzi River are Y village and L village, with the Dianpai River acting as a boundary in the middle. It was not clear which entity should be responsible for the management of the river. When everything was publicly owned, any state agency appeared to have the authority to stop villagers' improper use of the river. Such agencies included: the two brigades, which could regulate affairs within their own jurisdictions; the pumping station, which had authority to ensure that the river remained passable as a complementary canal; and other agencies that had authority over other aspects of the river. Y village, for example, planted trees on the left riverbank in the name of preventing soil erosion.

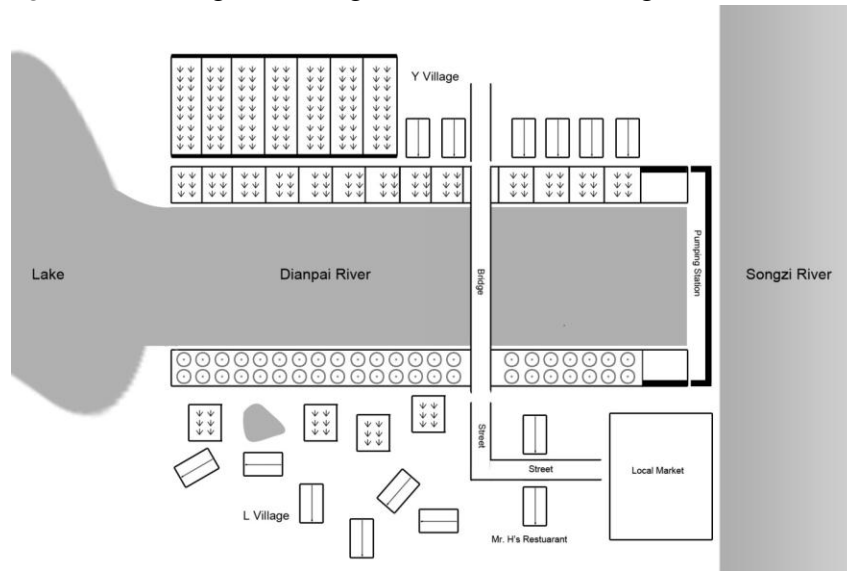
30. The "people's commune consisted of three echelons: the commune, the production brigade and the production team. ..." The reforms initiated in 1978 by Deng Xiaoping dismantled the communes. Generally, the township (*xiang/zhen*) replaced the commune, the village (*cun*) replaced the brigade, and the villagers' group (*cunmin xiaozu*) replaced the production team. Peter Ho, *Who Owns China's Land? Policies, Property Rights and Deliberate Institutional Ambiguity*, 166 CHINA Q. 394, 404-05 (2001).

31. SHULI JU SHULI ZHI BIANXIE ZU, SONGZI SHULI ZHI [HISTORY OF WATER ADMINISTRATION IN SONGZI] (1985).

32. *See id.*

Figure 1 is a visual representation of the facts I have described above, which I drew based on my fieldwork in this area.³³

Figure 1. Y Yillage, L Village, and the Surrounding Area.



C. Deng's Marketization: Unorganized Homo Economicus

The overreaching of the state in rural China proved to be costly, inefficient, and unsustainable.³⁴ In 1983, the Yonghe People's Commune was dismantled and the Nanhai Township was established. The brigades were also dismantled and Villagers' Committees ("VC") were organized.³⁵ According to Chinese law, a VC is a self-governance

33. A Google Map of this small area in rural China is unavailable. In my visits to Songzi County, I failed to find a map that showed the river and the two villages clearly.

34. See ZHANG LETIAN, GAOBIE LIXIANG: RENMIN GONGSHE ZHIDU YANJIU [FAREWELL IDEAL: STUDY ON PEOPLE'S COMMUNE] 415–46 (1998).

35. "The earliest villagers' committees . . . emerged in the Guangxi Autonomous Region in 1980. Formed without the knowledge of the local authorities, these organizations were created by village elders, former cadres and community-minded villagers. The intention was to address a decline in social order and a broader political crisis as production brigades and teams stopped functioning at the grass-roots level. Within months, local officials had reported this development to the central government. The National People's Congress (NPC) leaders encouraged experiments with this new form of organization. In 1982, VCs were written into the constitution as elected mass

organization that manages the public affairs of the village.³⁶ In contrast to the commanding relationship between the commune and the brigade in the people's commune era, only the newly restored township—the lowest governmental unit—guides the VC.³⁷ The VC is not a level of government and its members are not governmental officials.³⁸ Unfortunately, the self-governance of villagers was not well protected. The party branch at the village level was granted the power to *fahui lingdao hexin zuoyong* (play the role of leading nucleus).³⁹ Through the top-down party system, the county and township government could intervene in, and most times actually exercise effective control over, village affairs. The VCs, under the lead of the party branch, have essentially become an arm of the local government. At the same time, the local government provides almost no financial or human resources to the VCs because they are not a formal level of the bureaucratic system.⁴⁰ As a result, the VC is an impotent hand.⁴¹

Deng's marketization reform has proved to be much more successful than Mao's people's commune in modernizing rural China.⁴² Marketization has transformed a closed rural society, built on the mutual-

organizations of self-government (article 111)." *China: Village Committee Elections: First Steps on a Long March*, THE ELECTORAL KNOWLEDGE NETWORK, http://aceproject.org/ace-en/topics/es/esy/esy_cn (last visited Oct. 27, 2012). For the nationwide decommunization, see, for example, Vivienne Shue, *The Fate of the Commune*, 10 MOD. CHINA 259 (1984).

36. Organic Law on the Villagers Committees of the People's Republic of China, Nov. 4, 1998, art. 2, available at <http://www.china.org.cn/english/government/207279.htm> [hereinafter OLVC].

37. *China: Village Committee Elections: First Steps on a Long March*, *supra* note 34, at 409.

38. See OLVC, *supra* note 36, art 2.

39. OLVC, *supra* note 36, art. 3 ("The primary organization of the Communist Party of China in the countryside shall carry out its work in accordance with the Constitution of the Communist Party of China, *playing its role as a leading nucleus*; and, in accordance with the Constitution and laws, support the villagers and ensure that they carry out self-government activities and exercise their democratic rights directly." (emphasis added)).

40. Ray Yep, *Can "Tax-for-Fee" Reform Reduce Rural Tension in China? The Process, Progress and Limitations*, 177 CHINA Q. 42, 49, 60 (2004).

41. See e.g., Xiang Jiquan, *Duanque caizheng xia de xiangcun zhengzhi fazhan: Jianlun zhongguo xiangcun minzhu de shengcheng tujing* [Political Development under the Financial Shortage in Rural China: A Reflection on the Logic of Chinese Rural Democratization], ZHONGGUO NONGCUN GUANCHA [CHINA RURAL SURVEY] 50 (2002).

42. See ANITA CHAN ET AL., CHEN VILLAGE UNDER MAO AND DENG 267-309 (Regents of the Univ. of Cal. 2d ed. 1992).

familiarity of villagers, into an open society of significant mobility.⁴³ Traditional connections based on mutual familiarity, while still playing a role in the management of village affairs, have been greatly weakened by Deng's marketization reforms.⁴⁴ Market forces have penetrated rural society and distanced people from traditional opinions and values. This has transformed many peasants into businessmen or migrant workers who prefer business rules to rural customs.⁴⁵ Material benefits frequently overcame familiarity in villagers' relationships. Many villagers now make their living in big cities as migrant workers and only go back to their villages during the Chinese Spring Festival. Thus, the interactions and familiarity between villagers has greatly decreased. Business and migrant workers, who have taken on market values, care less about other villagers' opinions than their forefathers did because such opinions are not as important as they once were to their survival. When such people use the river, they are more likely to ignore other villagers' interests. For example, in olden times other villagers' censure would effectively deter villagers from discharging waste into the river. Now, those villagers, who only stay in the village for one or two months every year, simply do not care about such censure. Such villagers only care about how to find jobs in cities or how to make more money through their hard work in urban factories, to which the village community does not matter at all. Thus, the village community has very limited influence over such villagers with respect to their use of the common river.

Neither Y village nor L village is entirely free from the impact of marketization, although L village has experienced the impact much more significantly. L village has experienced a larger impact because there is a big rural market next to L village and many villagers have been proprietors there for a long time. L village has also exported migrant workers much earlier than Y village.

43. Kam Wing Chan & Li Zhang, *The Hukou System and Rural-Urban Migration in China: Processes and Changes*, 160 CHINA Q. 818, 831 (1999).

44. See He Xuefeng, *Shichang Jingji xia Nongmin Hezuo Nengli de Tantaotao* [Peasants' Ability to Cooperate under Market Economy], TANSUO YU ZHENGMING [EXPLORING AND FREE VIEWS] 18 (2004); He Xuefeng & Liu Tao, *Zai Xiangtu Zhongguo yu Xiandai Zhongguo zhijian* [Between Rural China and Modern China], ZHONGGUO TUSHU PINGLUN [CHINA BOOK REVIEW] 79, 83 (2009).

45. See, e.g., YUNXIANG YAN, PRIVATE LIFE UNDER SOCIALISM: LOVE, INTIMACY, AND FAMILY CHANGE IN A CHINESE VILLAGE, 1949-1999, at 142-89 (2003).

D. State-Owned Commons

Article 6 of the 1954 Chinese Constitution provided for state-ownership of rivers.⁴⁶ This provision has been kept despite frequent changes to the macro political and legal system in the early history of the People's Republic of China.⁴⁷ Even when the HRS replaced the people's commune in the management of rural land, ownership of rivers in rural China remained with the state. In the people's commune period, state-ownership of rivers could be exercised through the bureaucratic hierarchy of the people's communes. However, when the state retreated from the countryside, state-ownership became much more an ideology than a real right to land.⁴⁸ State-owned rivers became commons.⁴⁹

Theoretically the state's grassroots bureaucracy, including the county and township-level governments, can still exercise the state's ownership rights. However, the Songzi (county-level) and Nanhai (township-level) governments are neither able nor willing to manage a small rural river such as Dianpai. At the county level, the Bureau of Water Administration ("BWA"), the Environment Protection Agency ("EPA"), and the Bureau of Agriculture ("BOA") are the main agencies that have legal authority to regulate the use of the river. However, none of the agencies appeared to take their respective responsibilities to the river seriously. I first went to the BWA where the officials told me that river management was an environmental issue and should be the responsibility of the EPA. Then I went to the EPA and was advised to query the BOA because it was a rural river. At the office of the BOA, the officials tried to help me contact the BWA.⁵⁰

46. XIANFA art. 6 (Sept. 20, 1954) (China), *available at* http://heinonline.org/HOL/Page?handle=hein.cow/perepc0001&div=1&g_sent=1&collection=cow.

47. *See id.*; XIANFA art 6 (Mar. 5, 1978) (China); XIANFA art. 9 (Dec. 4, 1982) (China); General Principles of Civil Law of the People's Republic of China (Apr. 12, 1986), art. 81; Property Rights Law of the People's Republic of China (Mar. 16, 2007), art. 46.

48. Joshua Muldavin, *The Paradoxes of Environmental Policy and Resource Management in Reform-Era China*, 76 *ECON. GEOGRAPHY* 244, 254 (2000).

49. *See* Sonja Schiller, *Avoiding the Problem of the Commons in a Communist Society: The Role of Water Rights in the Enforcement of Environmental Law in China*, 29 *WASH. U. J.L. & POL'Y* 349, 360 (2009).

50. I got access to the county officials in the three bureaus through personal connections. I could see from my conversations with them that they were sincere in communicating with me. The officials also looked up official archives relevant to the management of Dianpai River for me. But, all the documents I got were dated back to the construction of the pumping station and river, during the people's commune period. Qiao

I contacted, through personal connections, the deputy head of the government agency responsible for water administration at the township level, and he told me frankly that no management plan over small rural rivers ever existed. The most likely explanation for there being no management plan over small rural rivers is the lack of resources on the part of the township-level government. Within Nanhai Township, there are nine rivers of similar size spreading over an area of 171.3 square kilometers. There should be at least one head of the township government and five deputy heads. Yet when I went to the township office building on a business day, I could not find even one formal official to talk to. None of the government heads were in the office that day. When the state retreats from the countryside, its local regime is neither able nor willing to exercise state ownership. At the village level, the traditional authority and connections that used to regulate villagers' exploitation of common resources have declined due to the shocks of both the people's commune movement and the later marketization. The VCs have not been able to effectively manage the river due to lack of financial resources and authority among villagers.⁵¹ Consequently, real commons emerged in the post-socialist transition of rural China.

III. PROPERTY RIGHTS CLAIMS TO THE TRANSITIONAL COMMONS

A. The Rise of Property Rights Claims

The rise of property rights claims over the riverbank land was a classic Demsetzian process triggered by the increase in the value of the riverbank land.⁵² In the 1990s, after more than a decade of wealth accumulation, the villagers developed a trend of building new houses.⁵³

Fieldwork, *supra* note 9.

51. Zhou Feizhou, *Cong Jiqu xing Zhengquan dao Xuanfu xing Zhengquan: Shuifei Gaige dui Guojia yu Nongmin Guanxi zhi Yingxiang* [Rural Fee Reform and the Changing Relationship between State and Peasant], SHEHUI XUE YANJIU [SOCIOLOGICAL STUDIES] 1 (2006).

52. According to Demsetz, the emergence of new property rights takes place in response to the desires of the interacting persons for adjustment to new benefit-cost possibilities. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (1967).

53. Building a new home is widely recognized as the most important achievement in the life of a Chinese peasant.

The trees Y brigade planted in the name of preventing soil erosion suddenly became valuable as the need for timber rose. Most of the trees had died or withered due to lack of care, and the vacant riverbank land was open for cattle grazing. The villagers, however, tended some of the trees in front of their houses, and those trees grew well. When these villagers needed timber to build houses, they found no reason why they could not cut down riverbank trees that were planted only about ten meters from their doors. Such property rights claims to the trees were never especially asserted, but the villagers gave mutual recognition to each other's claim. Every villager knew that the trees were planted by the village (brigade at that time) on the state-owned riverbank, but such knowledge did not prevent them from cutting down those trees. No villagers protested such exploitation. The VC could not and did not take any substantial action to stop the exploitation of trees that "belonged to the villagers collectively."⁵⁴

The villagers of Y did not make further use of the land on the riverbank until the mid-1990s when agricultural taxes and fees on the farmland reached their peak, making farming very costly.⁵⁵ According to several villagers, their agricultural investment, including fertilizer and agricultural taxes and fees, often exceeded the farmland's output during those years.⁵⁶ Villagers had to find other ways to support themselves, and they looked to the cultivation of the riverbank land. While the riverbank land was not particularly fertile, it was never counted as taxable land and

54. As introduced in Part I, trees were planted by the people's commune and thus "belonged to the villagers collectively."

55. VCs collected agricultural taxes for the government, which were distributed between the central government and local (province, prefecture, county, and township) governments. VCs collected fees for their normal operation and to provide public goods. In reality, the government collected so much agricultural tax that Chinese peasants could not bear it. VCs were often not able to collect enough money to pay the taxes to the government, not to mention the money needed for providing public goods. Readers might wonder how the taxes and fees could reach a peak when the state retreated in the post-socialist period. The answer is that the state shirked its responsibility to provide public goods, but it did not give up exploiting resources from the peasants. Although the state lost its ability to penetrate into villagers' daily lives with the dismantling of the people's communes, it is still able to extract resources from the countryside. This burden of taxes and fees aroused wide resistance in rural China in the mid-1990s. For more details about agricultural tax burden and rural resistance in China, see, for example, Yep, *supra* note 40; Lu Xiaobo, *The Politics of Peasant Burden Reform in China*, 25 J. PEASANT STUD. 113, 117-121 (1997); Zhou Feizhou, *supra* note 51, at 1.

56. This phenomenon was also reported in other provinces of China. See, e.g., Cao Zhoufeng, *Tudi heyi biancheng le nongmin de fudan?* [Why has land become burden to peasants?], ZHONGGUO GAIGE [CHINA REFORM] 41 (2001).

thus more profitable to cultivate. Cultivation of the riverbank land increased gradually. In the beginning, only a few villagers planted some crops (including wheat, cotton, and rape, etc.) on the riverbank. After two or three seasons of impressive harvests without substantial interventions from the VC or any other institutions, more and more villagers devoted time and money to cultivate the riverbank. The villagers' faith in their property rights to the riverbank became stronger year after year through repeated use of the land. Indeed, such faith in property rights to the riverbank even exceeded the villagers' faith in their property rights to their farmland because the farmland was subject to occasional redistribution.⁵⁷

Property rights claims that arose over the bank on the other side of the river, in L village, differed from those recounted above, but the process was still consistent with the Demsetz thesis. The riverbank in L village was also being cultivated in the mid-1990s, but mostly by old and poor villagers. Their cultivation was not as continuous, extensive, and successful as the cultivation in Y village. The riverbank in L village could essentially be viewed as being open to all until 2000 when it was grabbed by a local bully, Mr. H, for large-scale tree planting. Mr. H, well-known for his cruelty and talent in speculation, was a successful proprietor in the rural market next to L village. He had engaged in several different kinds of business, such as running restaurants and retailing chemical fertilizer. Stimulated by the booming timber market, he decided to invest in planting trees. The riverbank land was an excellent place to implement his plan. The legal basis of Mr. H's possession of the land was dubious, but his use of the land provoked no objection from the township government or the VC. By 2008, the saplings he had planted had already grown into big trees. The success of

57. The fact that the villagers had more faith in their property rights to the riverbank was highlighted by the fact that several villagers chose to locate their families' tombs on their portion of the riverbank. From the middle 1990s until now, three out of five old people who passed away in Y village were buried in the riverbank fields. The traditional Chinese culture emphasizes that the dead should rest in peace. It will offend the ghost of the dead and bring bad luck to the living to move the grave from one place to another. So, the villagers are very serious about the location of tombs and would definitely prefer to bury the dead family members in their own land. In addition, burying ancestors in their own land makes it much more convenient for villagers to offer sacrifices to ancestors during festivals, which are often carried out before ancestors' tombs. So, the tombs on the riverbank fields can be viewed as symbols of private property. In the mind of the villagers, the riverbank fields belong to them forever, just as the bones of their ancestors, who will be sleeping under the field until the end of the world. Qiao Fieldwork, *supra* note 9.

Mr. H's investment was unquestionable. Some villagers viewed it as an illegal occupation of state-owned land, but they did nothing other than complain casually.

The exploitation of the land on both sides of the river generated significant economic gains, which caught the attention of the state-owned pumping station. The pumping station asserted its ownership over the whole riverbank by arguing that the river had been designed as a complementary canal to the pumping station. However, the pumping station did not take substantial actions to enforce its assertion, and only a small portion necessary for the normal operation of pumping machines fell into its control.

In the following Subpart, I will discuss the bases of the above property rights claims in detail. In addition, the absence of property rights claims over the river water resources will be briefly described.

B. Egalitarianism

Egalitarianism is a tenet of traditional Chinese agrarian morality.⁵⁸ According to Confucius, a nation or a family need not worry about scarcity, but should worry about unequal distribution.⁵⁹ Egalitarianism continues to influence the behavior of Chinese people. In the Maoist period, the Communist Party aimed to eliminate inequality in China, which obviously strengthened Chinese belief in egalitarianism. Although Deng's reform encouraged "let[ting] some people get rich first,"⁶⁰ egalitarianism still has substantial moral weight in Chinese society.⁶¹ In rural society, egalitarianism still significantly affects villagers' behavior, despite the fact that the traditional authority and custom have been greatly weakened by both Communism and marketization.⁶² For example, peasants care much more about their relative situation to others

58. THE ANALECTS OF CONFUCIUS 115 (Burton Watson trans., Columbia Univ. Press 2007).

59. *Id.*

60. Barry Naughton, *Deng Xiaoping: The Economist*, 135 CHINA Q. 491, 501 (1993).

61. Koen Rutten, *Social Welfare in China: The role of equity in the transition from egalitarianism to capitalism* 22-24 (Asia Research Ctr., Copenhagen Bus. Sch., Copenhagen Discussion Papers, Paper No. 32, 2010), available at <http://openarchive.cbs.dk/bitstream/handle/10398/8018/Koen.pdf?sequence=1>.

62. HE XUEFENG, SHENME NONGCUN, SHENMEN WENTI [WHAT IS COUNTRYSIDE, AND WHAT IS ITS PROBLEM] 172-76 (2008).

than their absolute situation.⁶³

The emergence of property rights in Y village demonstrates the dominance of egalitarianism.⁶⁴ Villagers generally think that “nobody should enjoy more than me” when it comes to the use of common resources. The distribution of the riverbank land in Y village has conformed to egalitarianism. Although no authority or written rules regulated the rise of property rights claims to the vacant land on the riverbank, there were no serious disputes or conflicts among villagers in the whole process. Each household got the exclusive right to the land in front of their home. For lands to which no household was adjacent, each household got a piece of equal size.

C. “*Might Makes Rights*”

According to Umbeck, “all private ownership rights are ultimately founded upon the ability to forcefully exclude potential competitors.”⁶⁵ “Force, not fairness, determines the distribution of wealth in a society.”⁶⁶ Umbeck’s hypothesis seems inconsistent with the egalitarian distribution of the riverbank in Y village, but it finds ample support in what happened to the riverbank in L village.

Mr. H, a villager of L and a proprietor, had a well-known reputation as a bully. He believed in the power of violence and never hesitated to

63. *Id.*

64. For example, there was an unsuccessful effort by the VC of Y village to build a public water supply system. The original plan had been that each household should share equally the cost of construction and the operation of that system. All the villagers would have benefited a lot from such a system, if successfully built. Most villagers had made the initial payment. However, this system failed because the majority of the villagers were frustrated by the few villagers who did not pay. Those who did not pay felt it was unequal and refused to pay the remaining sum. The final result was that many households built their own system to get clean underground water for drinking, the total cost of which went far beyond that of a public water supply system. Qiao Fieldwork, *supra* note 9.

65. John Umbeck, *Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights*, 19 *ECON. INQUIRY* 38, 57 (1981). Zerbe and Anderson hold a different view and emphasize that cultural concepts of fairness served to create property norms and institutions. See Richard O. Zerbe Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 *J. ECON. HIST.* 114 (2001). The differences between the property arrangements in Y and L villages were discussed earlier in this Part. One reason for the different property arrangements is the difference in cultural norms, in which villagers might prefer fairness to efficiency or vice versa.

66. Umbeck, *supra* note 65.

use it when necessary to pursue his view of justice.⁶⁷ Mr. H's father was a chief cook of the people's commune government and had extensive connections with local officials. He was also a long-term leader of an informal gang of jobless young people, whose goal was to "get rid of trouble for people." Mr. H's restaurant was one of the best in the local market and a popular destination for L village's VC members; he faced no intervention from the VC when he grabbed the land on the riverbank. According to Mr. H, he signed a contract with the VC to use the riverbank for ten years. The contract fee for the three-mile-long strip is 2,000 RMB per year.⁶⁸ The gross income from growing crop trees on the land, according to the calculations of Mr. H, will be more than 600,000 RMB by the end of the contract term.⁶⁹ In Mr. H's view, it was unreasonable for the VC to charge so little for a business of great profit. Mr. H's explanation was that this investment was his idea and helped remedy VC's trouble of how to effectively manage the riverbank. Mr. H was the only man who could exercise effective management of the riverbank because he employed a credible threat of violence. There was also a wide-spread rumor that Mr. H bribed the VC members to secure their acquiescence. Whether a contract existed or not, Mr. H's might in the local community was the key to gaining exclusive control of L village's riverbank. Other villagers were unable to unite together to resist his exclusive possession. His wealth and brutality deterred potential dissenters.

Mr. H would be able to reap a big profit from his wise investment. His exclusive possession for ten years, despite its suspicious origin, strengthened his claim to the land. Mr. H's might appeared to create rights for him. However, the principle that might makes rights is far from accepted in Chinese society.⁷⁰ Might-based rights, although very prevalent in China, are still in the gray zone of legitimacy.⁷¹

Like Mr. H, people with might often try to justify their rights by claiming efficiency.⁷² It is true that private exclusive use is often much

67. Qiao Fieldwork, *supra* note 9.

68. I was not able to see the contract in my two-day visit to the village in the summer of 2010. However, Mr. H promised to show it to me next time I go there.

69. Qiao Fieldwork, *supra* note 9.

70. See, e.g., Andrew Sheng, Geng Xiao & Yuan Wang, *Property Rights and 'Original Sin' in China: Transaction Costs, Wealth Creation, and Property Rights Infrastructure*, in *POLICY REFORM AND CHINESE MARKETS: PROGRESS AND CHALLENGES* 97 (Belton M. Fleisher et al. eds., 2008).

71. *Id.*

72. *Id.*

more efficient than the former state ownership.⁷³ This justification, however, has not been widely accepted by the Chinese populace for various reasons.⁷⁴ Mr. H's might-based rights can exist only as long as he can forcefully exclude those who do not agree.

D. Historical Connections

The Communist past is an inescapable inheritance of the transitional commons. Historical connections to the land, established in the Communist period, can also be a basis of property rights claims.⁷⁵ Here, the pumping station had such historically-based claims. The station justified its claim by recalling that the river was built as a complementary canal to the pumping station in the people's commune period. The fruits of the people's labor should, therefore, be managed by the state-owned pumping station.⁷⁶ Due to its limited ability to enforce its claim, the pumping station ultimately only controlled a small part of the adjacent riverbank.

Although the pumping station did not succeed, historical connections could be a strong basis of property rights. Transitional commons were state-owned in the Communist period. Their creation and operation as part of the planning economy often involved the efforts of more entities and people than they do now. In other words, transitional commons were "fruits of the people's collective effort." Any private-property-rights claim to them can easily be labeled as stealing the people's wealth. In contrast, the claims by governmental entities, such as state agencies and state-owned enterprises, seem to be ideologically sound. In a state like China, where the socialist ideological orthodoxy has not been completely discarded, historical connections still have some limited moral strength. In addition, governmental entities that claim rights to these transitional commons often have prior connections to them, which increase the credibility of their claims.

However, the governmental entities are not working to benefit the public or the state but instead to promote their own separate interests.⁷⁷

73. Harold Demsetz, *Toward a Theory of Property Rights II: The Competition Between Private and Collective Ownership*, 31 J. LEGAL STUD. S653, S665 (2002).

74. Sheng, Xiao & Wang, *supra* note 70.

75. For example, in Russia, a wide variety of state and quasi-state organizations were the main actors in the privatization process and claimed property rights to the state-owned real estate. See Heller, *supra* note 2, at 635–39.

76. Qiao Fieldwork, *supra* note 9.

77. See, e.g., K.K. Wong & X.B. Zhao, *The Influence of Bureaucratic Behavior on*

For example, the pumping station, although still state-owned, had to provide on its own for the salary and benefits of its employees. The pumping station charged for its pumping services in order to do so. The pumping station's claim to the riverbank, therefore, was not actually advanced for the better management and operation of the river and the pumping station, as asserted, but rather to seize potential benefits from the cultivation of the riverbank.⁷⁸ In my interview with the manager of the pumping station, the manager did not even try to disguise this real intention. As he said, the villagers had no right to possess the riverbank and all the uses of the riverbank should be authorized by the pumping station. The claimed power of authorization was used as a pretext for charging the villagers.

E. Tragedy of the Commons

In contrast to the various property-rights claims to the riverbank land, no similar claims arose regarding the use of the river water and the fish resources. A classic tragedy of the commons took place.⁷⁹ With no public garbage-disposal facilities in the area, the river water became a dumping ground for villagers to discharge production and household wastes. Everyone could discharge waste into the river and the cost of deterioration was shared by all. A rational villager would calculate that his share of the loss of discharging waste into the river is less than the cost of purifying his waste before releasing it. Because everyone had the same cost-benefit calculation, the villagers were locked into a system where they were fouling their own nest.⁸⁰ The river water, as a result, was seriously polluted. For the same reason that the river water was polluted, fish resources were exhausted due to overfishing. The villagers fell into a vicious competition to fish, using destructive fishing instruments.⁸¹

Land Apportionment in China: The Informal Process, 17 ENV'T & PLAN. C: GOV'T & POL'Y 113, 117-19 (1999).

78. Qiao Fieldwork, *supra* note 9.

79. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968).

80. *Id.* at 1245.

81. Villagers spread the fishing net from one side of the river to the other and as a result, any fish of significant size swimming along that part of the river cannot escape. In the three-mile long river, there were fourteen sets of such fishing nets. Qiao Fieldwork, *supra* note 9.

IV. A MODEL FOR ANALYZING TRANSITIONAL COMMONS

In this Part I explore the reasons for the different destinies of the river water and the two riverbanks. Drawing upon existing models,⁸² I classify variables that affect the governance of commons into four categories: (i) the characteristics of the common resources; (ii) the community and the people that exploit the resources; (iii) the relationship between common resources and human exploiters; and (iv) the external political and legal environment to which the human exploiters are subject. Transitional commons are distinct from other kinds of commons because of the disintegrated local communities that govern them and the changing external political and legal environment to which they are subject. I shall next describe the variables in my model in relation to their application to the Dianpai River system.

A. Characteristics of the Common Resources

Resource characteristics such as size, mobility, and divisibility and their potential uses determine the available methods of exploitation and place inherent constraints on resource management.⁸³ Previous empirical studies of commons always concentrated on a single resource, such as timber, water, fish, or lobster.⁸⁴ My study, on the other hand,

82. Different models of exploring the institutional arrangements over common resources have been developed. These models identify a series of variables that influence the success or failure of common resource management. However, as Agrawal has pointed out, scholars of commons have discovered far more variables that potentially affect resource management than are possible to analyze carefully. Agrawal's review of the three most careful studies of the commons found that Wade, Ostrom, and Baland & Platteau jointly identify 36 important variables relevant to the successful management of common resources. If one eliminates the common variables across the three studies, 24 different variables still remain. Further, because the effects of some variables may depend on the state of other variables, any careful analysis of the commons needs to incorporate interaction effects among variables. As a result, scholars confront tremendous analytical problems in using their models. See Agrawal, *supra* note 3; OSTROM, *supra* note 2; JEAN-MARIE BALAND & JEAN-PHILIPPE PLATTEAU, HALTING DEGRADATION OF NATURAL RESOURCES: IS THERE A ROLE FOR RURAL COMMUNITIES? (1996); ROBERT WADE, VILLAGE REPUBLICS: ECONOMIC CONDITIONS FOR COLLECTIVE ACTION IN SOUTH INDIA (1994).

83. Agrawal, *supra* note 3, at 248, 253.

84. See, e.g., OSTROM, *supra* note 2, at 58–87, 143–81; JAMES M. ACHESON, CAPTURING THE COMMONS: DEVISING INSTITUTIONS TO MANAGE THE MAINE LOBSTER INDUSTRY 2 (2003).

comprehensively explores an entire river resource system, which includes water, fish, and land on the riverbank. This allows for measuring how the resource characteristics variable affects resource management. The opposite outcomes, in terms of which type of property institution governs the two riverbanks and the river, are testaments to the importance of resource characteristics in governing the commons.

First, resource characteristics affect the costs and benefits of the exclusive use of that resource. If the cost of exclusion is high and the benefit is trivial, the probability that someone will develop exclusive property rights claims will be low and the probability of a tragedy of the commons will be high. If the cost of exclusion is low and benefit is substantial, the opportunity for profit will drive exploiters to find ways to claim exclusive use. In the Dianpai River case, the cost of exclusive use of land is much lower than the cost of exclusive use of water or fish. The riverbank easily can be divided into small pieces with clearly defined boundaries.⁸⁵ A villager can easily detect trespasses to his land. In contrast, it is difficult to achieve exclusive use of a part of a three-mile-long river. The only feasible way seems to be to gain control over the whole three-mile-long river. The cost of monitoring and defending the exclusive use will be higher because it is much more difficult to detect and prevent fishing and the discarding of waste into the river than to stop others from squatting on the riverbank.⁸⁶ The benefit of exclusive use of land is also much higher than that of water or fish. For peasants who rely almost entirely on land to make a living, land is a basic need. The dense populations in the villages along the river make land a scarce resource. Fish, on the other hand, is just a luxury item for most villagers. Only a few villagers make their living by fishing. In a rainy area with many lakes, water is much less valuable than land.

Second, resource characteristics affect the exploiters' evaluation of the risk of exhaustion. The deterioration of water and extinction of fish took place gradually. Any single instance of fishing or discarding wastes into the water did not bring significant and immediate damage to the

85. Informal fences, such as a tree or even just several stones, define the boundaries between plots. Outsiders do not necessarily know the boundaries between different plots, but they do know the boundary between public land and crop plots by seeing the crops planted. No complicated wire fences are needed because the numbers of big livestock in the wild are very limited. The situation is different from the American West, as described in the writing of Anderson and Hill. See Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163, 171-72 (1975).

86. Development of technology might reduce the prohibitively high cost of exclusive use attributed to resource characteristics. See *id.* at 171-72, 175.

river, but the accumulation of such behavior unavoidably lead to the destruction of the river water resources. The tragedy of the commons is not just the result of a collective action problem involving the villagers' inability to cooperate effectively but is also a consequence of the limited rationality of human beings, who tend to value immediate gains much more than future losses.⁸⁷ The possibility of resource depletion in the future is not enough to encourage villagers to change their behavior and establish either effective collective management or private individual rights over the river.⁸⁸ From the villagers' perspective, inaction (maintaining the status quo) is the best choice until the resources are completely destroyed. In contrast, a plot of land cannot be cultivated by many villagers at the same time. A villager must either claim a plot or lose it. The welfare effect of such a choice is significant. Inaction means that he will lose the plot. A villager therefore has strong incentives to claim his rights over the land through either might or consensus with other villagers. The short-sightedness of human beings is always a factor, but its negative impact is much more significant in the exploitation of resources that deteriorate gradually.

B. Community and the People that Exploit the Resources

One of the biggest accomplishments of the scholarship on overcoming the tragedy of the commons has been to successfully shift the focus of research from the choice between the leviathan and the market to the self-governance of the local community.⁸⁹ There has been abundant research on communal governance of common resources.⁹⁰ However, empirical studies often assume that researched communities are well-structured and have functioning institutions, clear community rules, or at least explicit social norms regarding the management of the

87. “[A] person is apt to regard a marginal change as more momentous when the change occurs around a reference point than away from it ...” Robert Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 36 (1989).

88. Short-sightedness is a symbol of bounded willpower. See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1479 (1998); Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1555 (1998).

89. See OSTROM, *supra* note 2, at 8–18.

90. See *e.g.*, THE DRAMA OF THE COMMONS (Ostrom et al., eds. 2001); BALAND & PLATTEAU, *supra* note 82; WADE, *supra* note 82; OSTROM, *supra* note 2.

commons.⁹¹ What scholars have to investigate in these cases is simply whether the institutions, rules, or norms function effectively or why they fail to. The local communities surrounding the Dianpai River, however, are communities without any well-functioning institutions or explicit norms regarding the river.⁹² To understand how property rights claims arose and survived in such communities, we need to investigate the communities' internal power structures, population composition, and value preferences.

The rise and survival of a property claim depends largely on the position of the claimer within the power structure of the local community. This position is critical to the claimer's ability to make exclusive use of the common resources.⁹³ The difference in property arrangements between the two riverbanks provides a good illustration. Mr. H's overwhelming private power plays an important role in his exclusive use of the riverbank of L village. Mr. H is a very distinctive figure in the community of L village, with no analog in the community of Y village. Mr. H is a hybrid of entrepreneur and bully.⁹⁴ Only Mr. H has both the intelligence and the power to cultivate the riverbank land exclusively. Without him, the riverbank on the side of L village would have remained a commons or been cultivated by the peasants.⁹⁵ Mr. H's unique position in the local power structure decides the property arrangement over the riverbank of L village. No individual in Y village could mobilize resources like Mr. H to exclude all other villagers from using the riverbank on the side of Y village.

The different compositions and value preferences of the two villages also contributed to the different property arrangements. The impact of marketization was much more significant in L village than in Y

91. See e.g., Agrawal, *supra* note 3; OSTROM, *supra* note 2; BALAND & PLATTEAU, *supra* note 82; WADE, *supra* note 82.

92. See *supra* Part I.

93. See Demsetz, *supra* note 52, at 357.

94. Mr. H is strong, smart, and very sensitive to social and political change. Unlike ordinary villagers, he enters into different businesses and travels around, never hesitating to take an opportunity to make a profit. He believes in the power of wealth and violence, rather than law and rules. He keeps good relations with village committee members and local government officials. He has been in jail before, which actually strengthens his influence with the gangs. He frequently resorts to violence but never abuses it. In his words, he is "not violating the common sense of the local community." Mr. H realized the profitability of planting crop trees on the riverbank land and invested resources to put this idea into practice. Qiao Fieldwork, *supra* note 9.

95. *Id.*

village.⁹⁶ More villagers from L than from Y were proprietors and migrant workers whose behaviors were likely closer to those of a homo economicus.⁹⁷ These more rational villagers preferred efficiency to equality⁹⁸ and might have more sympathy for Mr. H's efficiency justification than the villagers of Y. The emergence of a number of proprietors and migrant workers also increased the heterogeneity of the village community. Wealth and power were more concentrated than in Y village. The greater mobility brought by migrant workers further weakened the coherence of the village and thereby increased the cost of collective action.⁹⁹ It was under such circumstances that Mr. H successfully claimed the whole riverbank in L village without suffering substantial objection. In contrast, the wealth and power in Y village were still broadly and equally distributed. The traditional value of egalitarianism was relatively influential. As a result, mutual recognition of claims to equal possession was the most efficient resolution for villagers of Y. Mr. H's doctrine of "might makes rights" would encounter much more resistance in Y village than in L village because Y villagers valued egalitarianism much more than L villagers.

C. Relationship Between Common Resources and Human Exploiters

The relationship between transitional commons and human exploiters include both physical and socioeconomic aspects. The physical relationship between transitional commons and potential users, such as their geographical relationship, is an important factor in determining the cost of exclusive use of the common resources. The socioeconomic relationship, such as the socioeconomic value of the transitional commons to potential users, decides the incentives for exclusive use.

The different geographical relationships between the river and potential users in the two villages can explain the different property claims to the two riverbanks: in Y village, the average distance from users' homes to the river is only a few meters, while in L village, it is

96. See *supra* Part I.C.

97. See Joseph Henrich et al., *In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies*, 91 AM. ECON. REV. 73-78 (2001).

98. *Id.*

99. For impact of mobility on community coherence, see ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 204-15 (2000).

about 800 meters. Moreover, the villagers' houses and distributed farmland in Y are lined up parallel to the riverbank; the villagers' houses in L are spread out randomly.¹⁰⁰ Such differences mean that the cost of defining and defending claims to the riverbank is much higher in L village than in Y village.

Given the proximity of the villagers' homes to farmland and the riverbank, the daily activities of the Y villagers around their houses and distributed plots naturally extended to the riverbank, where they get water for irrigation and drinking. Villagers in Y established a closer relationship with the specific part of the riverbank that neighbors their houses or distributed land. This natural connection was recognized among the villagers and provided a convenient blueprint by which property rights could be recognized. Generally, peasants in Y village got the plot of the riverbank adjacent to their houses or distributed farmland. The Y villagers' daily activities around their claimed plots allowed them to monitor and effectively deter potential intruders. Any other property arrangements inconsistent with such natural connections would incur great monitoring cost. Mr. H did not take over the riverbank in Y village, in part because of the difficulty in monitoring and stopping neighboring villagers' trespass. According to Mr. H, "it's unreasonable to stop people loitering around their houses or going through the bank land to the river."¹⁰¹

In contrast, there was no such connection between the riverbank and villagers in L village.¹⁰² As a result, it was much more costly for the villagers to define any claimed rights to a plot on the riverbank. A villager of L would have to spend extra time and energy to monitor potential intruders. L villagers could only overcome the higher cost of exclusive use of the riverbank through economies of scale, which was partly why Mr. H succeeded in seizing the whole riverbank for planting trees. Fragmentary cultivation of part of the riverbank in L village could not generate enough profits to offset the relatively higher cost of defining and protecting the claimed property rights. Mr. H's investment in the

100. See Figure 1, *supra* Part II.B.

101. Qiao Fieldwork, *supra* note 9. According to Ellickson, "[a] key advantage of individual land ownership is that detecting the presence of a trespasser is much less demanding than evaluating the conduct of a person who is privileged to be where he is." But in the case of an easement, it would also be difficult to detect whether a person has overstepped the boundary of his easement. Robert Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1327 (1993).

102. See Figure 1, *supra* Part II.B.

riverbank not only reduced the cost of exclusive use per unit but also generated more profits to offset the cost.

Another reason for the different property arrangements over the two riverbanks is the different socioeconomic value of the riverbank land to villagers in the two villages. As discussed above, L village underwent more extensive and deeper marketization and had a larger population of proprietors and migrant workers who made their living mainly from non-agricultural activities. The riverbank was much less important to them than to ordinary peasants. As a result, Mr. H's exclusive use of the whole riverbank in L village encountered much weaker resistance than it would have in Y village.¹⁰³

The land's lower socioeconomic value relative to the pumping station also explains its reluctance to take any substantial action to enforce its property rights claim to the riverbanks. Not only had the pumping station not claimed property rights to the riverbanks before the villagers' cultivation, but even after the villagers cultivated the land the value created was still too limited to prompt substantial action from a state-owned entity like the pumping station.

D. External Political and Legal Environment

The transitional commons is a product of the changing external political and legal environment. The sensitivity to the external environment can easily be discerned in the management of transitional commons. Transitional states are often struggling for a balance between the market and the state.¹⁰⁴ The political and legal systems are still in experimental stages.¹⁰⁵ The property regime has not been solidified. Mutually-contradictory principles direct the transitional process, depending on the specific time and situation.¹⁰⁶ The external political and legal environments contextualize the drama of the commons and define the possible property claims that can arise from the commons. Any

103. This is different from Demsetz's example, in which private property rights emerged in response to the raised fur value caused by the European fur trade. In his case, fur was equally valuable to all Indians in the region. In my case, the lower evaluation of the land by the majority of L village reduced Mr. H's cost of excluding them and promoted the emergence of private property. *See* Demsetz, *supra* note 52, at 351–53.

104. JON ELSTER, ET AL., INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA 4 (1998).

105. *See id.* at 63–155.

106. *Id.* at 247–70.

changes in the external environment would affect the decisions of resource exploiters.

In the case at hand, China's gradual reform has undergone a tortuous process. The market economy was only officially recognized in 1993, nearly fifteen years after the initiation of the 1978 reforms.¹⁰⁷ One year later, the Standing Committee of the People's Congress incorporated property law into its legislative plan.¹⁰⁸ It was not until 2004 that the Constitution was amended to guarantee respect for private property.¹⁰⁹ The new Chinese property law came into effect in 2007, highlighting the disputes about the market and private property instead of resolving them.¹¹⁰ Private property accumulated in the reform years is attacked as being stolen from the state and the people.¹¹¹ Rapid wealth concentration has aroused popular animosity towards private entrepreneurs.¹¹² Nevertheless, liberal economists continue to call for further privatization and deregulation in the national economy with scant regard for actual circumstances.¹¹³ China has been moving in the direction of a market economy, but it has done so under the shadow cast by its collectivist past. The disputes in the macro-external environment have not only persisted on the ideological level, but they have also affected the specific decision-making processes of individuals and entities that are managing the resources formerly controlled by the state.¹¹⁴

107. Yingyi Qian & Jinglian Wu, *China's Transition to a Market Economy: How Far across the River?* (Ctr. for Research on Econ. Dev. & Policy Reform of Stanford Univ., Working Paper No. 69, 2000), available at <http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/credpr69.pdf>.

108. *Zhongguo wuquan lifa lichen [The History of Chinese Property Law]*, SOUTHERN WEEKEND, March 22, 2007, at A1.

109. The amendment says "legally obtained private property of the citizens shall not be violated." See XIANFA art. 13 (2004) (China).

110. Songyan Sui, *New Property Law Shakes Up China*, BBC NEWS (March 8, 2007, 13:10 GMT), <http://news.bbc.co.uk/2/hi/asia-pacific/6429977.stm>.

111. See e.g., Li Nan, *Siyou Caichan Qingxi Ruxian, Caifu Yuanzui Youdai Qiujie [Constitutional Protection of Private Property and the Original Sin of Wealth]*, XINWEN ZHOUKAN [NEWS WEEKLY], Jan. 5, 2004, available at <http://news.sina.com.cn/c/2004-01-05/18172552266.shtml>.

112. *Id.*

113. James A. Dorn, *Mao Yushi Wins the Cato Institute's 2012 Milton Friedman Prize for Advancing Liberty*, FORBES (April 5, 2012, 4:24 PM), <http://www.forbes.com/sites/realspin/2012/04/05/mao-yushi-wins-the-cato-institutes-2012-milton-friedman-prize-for-advancing-liberty/>.

114. See Hongbin Li et al., *Why Do Entrepreneurs Enter Politics? Evidence from*

The story of the Dianpai River exemplifies the transitional process of China's political and legal systems. The evolution of property arrangements over the river resources has paralleled the development of a market economy in China. The emergence of the property rights claims over the riverbank in Y village in the mid-1990s accompanied the official recognition of the market economy. Mr. H's successful exclusive use of the whole riverbank in L village would not have been possible without the progress China had made in recognizing and protecting private property in the following years. It was in 2004 when a constitutional amendment guaranteed the protection of private property that Mr. H went to the village committee members and the pumping station to seek their *de facto* acknowledgement of his exclusive control over the riverbank. In my interview with him, he demonstrated familiarity with, and sensitivity to, the changes in China's external political legal environment.¹¹⁵

V. WHITHER THE TRANSITIONAL COMMONS?

A. *The Crisis of the Transitional Commons*

Most writings on the commons implicitly define successful institutions as those that last over time, constrain users to safeguard the resource, and produce fair outcomes.¹¹⁶ No such institutions exist to govern the transitional commons.¹¹⁷ As a result, the tragedy of the commons occurs when the cost of exclusive use is too high. When the benefit of exclusive use exceeds the cost, property claims arise over the common resources. However, this equation by nature changes over time. The temporary nature of property arrangements is further destabilized by the uncertain political and legal environments in which the commons are embedded. Moreover, the distribution of resources is decided by the power structure within the local community, thus fairness cannot be guaranteed.¹¹⁸ The crisis of the transitional commons can be illustrated through what happened to the Dianpai River.

China, 44 *ECON. INQUIRY* 559 (2006).

115. Qiao Fieldwork, *supra* note 9.

116. Arun Agrawal, *Common Resources and Institutional Sustainability*, in *THE DRAMA OF THE COMMONS* 41, 44 (2002).

117. ELSTER, ET AL., *supra* note 104.

118. See the example of Mr. H, *supra* Part II.C.

Due to the absence of any effective management, the quality of river water deteriorated seriously and the fish became almost extinct, demonstrating a classic tragedy of the commons. Contested claims exist as to the riverbank of L village.¹¹⁹ Mr. H maintained his exclusive control by his advantageous position in the local power structure.¹²⁰ However, “the strongest,” in Rousseau’s oft-quoted phrase, “is never strong enough to be always the master.”¹²¹ In a community of any complexity, the power structure is always a dynamic and changing process.¹²² The unequal distribution of resources brought about by Mr. H’s exclusive use of the riverbank land of L village made his property claims more vulnerable.¹²³ The changing and unpredictable political and legal environments in China render any property claims to the river resources uncertain. For example, it is conceivable that one day the local government will decide to protect state-ownership and help the pumping station to recover its control over both riverbanks, as local governments around China have done in other industries.¹²⁴ In sum, the transitional commons are in a state of resource deterioration, unequal distribution, and potential conflicts.

119. *See supra* Part II.

120. *See supra* Part II.C.

121. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT & DISCOURSES* 8 (G.D.H. Cole trans., 1920).

122. SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 9 (1968).

123. *See supra* Part II.B (discussing egalitarianism in China).

124. The current restoration of state-ownership in coal, oil, and steel industries serves as a reminder of this possibility. In Shanxi, the province government shut down all small private coal mines in the name of safety. They were then forced to merge into big state-owned coal mines. *See* Xu Yiping, *Zheshang Shangshu Zhi Shanxi Meigai Weixian* [*Zhejiang Merchants Petitioned that the Coal Industry Reform in Shanxi Was Unconstitutional*], available at <http://news.163.com/09/1110/10/5NOJE8OA000120GR.html> (last visited August 13, 2011). In Shandong, Shandong Steel, an inefficient company owned by the province government, acquired Rizhao Steel, a private profitable company. *See, e.g.*, Ye Tan, *Kuisun Guoqi Pingshenme Neng Binggou Yingli Guoqi* [*How Can An Inefficient State-Owned Enterprise Acquire A Profitable Private Enterprise*], available at <http://finance.ifeng.com/topic/news/rzgt/news/opinion/cjpl/20090805/1041412.shtml> (last visited Oct. 24, 2012). In Shaanxi, private oil companies were expropriated by the local county government and private entrepreneurs were arrested during their struggle against the expropriation. *See Shaanbei Shiyou Shijian* [*Shaanbei Oil Incident*], <http://zh.wikipedia.org/wiki/%E9%99%95%E5%8C%97%E7%9F%B3%E6%B2%B9%E4%BA%8B%E4%BB%B6> (last visited Oct. 24, 2012); *see also* Xie Peng, *Guojin Mintui: Jidang 2009* [*Surging 2009: The State Moved Forward and The People Drew Back*], <http://www.infzm.com/content/39154> (last visited Oct. 24, 2012) (providing a comprehensive comment on the trend of the restoration of state-ownership).

Three ways have been proffered to avoid the tragedy of the commons: private property, public ownership, and, as Ostrom showed, community governance.¹²⁵ According to Ostrom, one of these three alternatives should work.¹²⁶ It is widely held that the best approach to adopt in transitional countries is to choose the most appropriate alternative and impose it nationwide from above.¹²⁷ Unfortunately, none of the three ways is likely to overcome the crisis of the transitional commons because transitional commons emerge after the failure of the state and the disintegration of local community. Whatever the property regime, no property rights can be defined and enforced effectively in this situation. In contrast to the conventional approaches, I propose: (1) a decentralized way to deal with the transitional commons problem and (2) an integrative approach to govern the transitional commons.

B. Community Differences and Institutional Diversity

Each common resource system has its own distinctive features in the resource characteristics, the local community of exploiters, or the relationship between them. It is almost impossible for the state government to gain the local knowledge of various communities; the information cost is too high. Moreover, the distinctive features of local communities mean that no single solution exists for the governance of all common resources. Community differences and institutional diversity have received wide recognition in scholarly discussions on the management of the commons, and they have been considered in many countries' commons-related policy-making.¹²⁸ However, the influence of conventional thinking is powerful and tends to overshadow theory based on community differences and institutional diversity, that it is worthwhile to deepen and strengthen our understanding of community differences and institutional diversity through empirical studies.

In the case of China, collectivization and marketization have impacted villages differently as we have seen from the comparison between the two villages along the Dianpai River. The community structure and micro-politics differ from village to village as a result of varying factors, such as tradition, custom, historical incidents, economic development, and population mobility. The authority of traditional and

125. *See generally* OSTROM, *supra* note 2.

126. *Id.*

127. *Id.*

128. Agrawal, *supra* note 3, at 246.

official entities has also declined to different degrees in different communities.

In addition to the village-to-village variation found within localized geographic areas, there are substantial differences between the south and the north, the west and the east, in geographic, economic, political, and almost all other aspects that influence the management of natural resources.¹²⁹ This has a direct influence on the ability of the villagers to self-govern.¹³⁰ The various property claims that arise to the transitional commons depend on specific situations. There is no general rule as to which kind of property claims should be recognized or rejected. Private property may be easily accepted in one village while widely resisted in another.¹³¹ In Ostrom's words, "the capacity of individuals to extricate themselves from various types of dilemma situations *varies* from situation to situation."¹³²

Chinese scholars have raised contested proposals for how to govern the rural common resources, which generally fall into three categories: private, communal, and government property.¹³³ Privatization and governmental control are the two prescriptions most-widely recommended by scholars to manage the commons.¹³⁴ The advocates of governmental control presume that a central authority must assume continuing responsibility to make unitary decisions for a particular resource.¹³⁵ In the specific situation of rural China, this proposal requires building powerful grassroots governments to fill the void created by the decline of the traditional authority and custom and the post-communist retreat of the state.¹³⁶ The privatization advocates presume that a central authority should parcel out ownership rights to the resource and then

129. Shuming Bao et al., *Geographic Factors and China's Regional Development Under Market Reforms, 1978–1998*, 13 *China Econ. Rev.* 89, 94–97 (2002).

130. See LILY L. TSAI, *ACCOUNTABILITY WITHOUT DEMOCRACY: SOLIDARY GROUPS AND PUBLIC GOODS PROVISION IN RURAL CHINA* (2007).

131. See Zhou Pei, *Nongcun Shequ Fazhan Daolu yu Moshi Bijiao Yanjiu: yi Huaxi Cun, Nanjie Cun and Xiaogang Cun Weili* [*Comparative Study of Different Models of Village Community Development*], *NANJING SHEHUI KEXUE* [SOCIAL SCIENCE IN NANJING], Oct. 2000, at 59. See also DU RUNSHENG, *ZHONGGUO NONGCUN TIZHI BIANGE ZHONGDA JUECHE JISHI* [AUTOBIOGRAPHY OF DU RUNSHENG: THE HISTORY OF REGIME CHANGE IN RURAL CHINA] 116–20 (2005).

132. OSTROM, *supra* note 2, at 14 (emphasis in original).

133. See PETER HO, *INSTITUTIONS IN TRANSITION: LAND OWNERSHIP, PROPERTY RIGHTS, AND SOCIAL CONFLICT IN CHINA*, 157–85 (2005).

134. See *id.* at 8–15.

135. *Id.* at 14.

136. See He, *supra* note 44, at 167–83.

allow individuals to pursue their own self-interests within a set of well-defined property rights.¹³⁷ Both of these proposals accept as a central tenet that institutional change should be externally imposed on the individuals affected.¹³⁸ Even the supporters of communal property are no exception to this point. Instead of taking community distinctions and institutional diversity seriously, they seek to justify the superiority of communal property on a theoretical and abstract level by arguing for its advantages in scale economy and risk-spreading.¹³⁹

These external solutions suffer from several common limitations. The biggest is that they assume a unified solution for all common resources, be it public control or privatization. However, instead of there being a single solution to a single problem, many solutions exist to cope with many different problems.¹⁴⁰ Local diversities generally exist. Imposing a uniform solution incompatible with a specific situation would make its implementation very difficult and costly. The collapse of the people's commune in rural China¹⁴¹ and the failure of developing countries in building private property regimes¹⁴² are evidence of the costs. In addition, imposing reform from above would inhibit the development of self-governance of the local community. This has been demonstrated by the many failures of governing the commons. For example, Acheson found that top down management policies worked against developing effective rules, which led to cheating, a "gold rush mentality," and overexploitation in the New England ground fishery.¹⁴³

Also, these external solutions ignore the risk of hasty nationwide institutional reform. "Getting the institutions right" is a difficult, time-consuming, and conflict-invoking process.¹⁴⁴ It is a process that requires reliable information about time and place variables, as well as a broad repertoire of culturally acceptable rules.¹⁴⁵ These premises are not present in the context of transitional commons. As opposed to the

137. See OSTROM, *supra* note 2, at 14.

138. *Id.*

139. See HE XUEFENG, DIQUAN DE LUOJI: ZHONGGUO NONGCUN TUDI ZHIDU XIANG HECHU QU [THE LOGIC OF LAND RIGHTS: WHITHER CHINA'S RURAL LAND REGIME] (2010).

140. See OSTROM, *supra* note 2, at 14.

141. See ZHANG, *supra* note 34, at 415–46.

142. See DE SOTO, *supra* note 2, at 153–206.

143. James Acheson, *Rational Choice, Culture Change and Fisheries Management in the Gulf of Maine*, 21 RES. IN ECON. ANTHROPOLOGY 133 (2002).

144. See OSTROM, *supra* note 2, at 14.

145. *Id.*

communal resources of a stable society, transitional commons are often in a rapid evolutionary process. General consensus about property arrangements over the commons has not emerged, which makes it difficult to decide the proper property arrangements for them. Moreover, from the macro perspective, the political and legal system of transitional states is still unsettled. Any institutional reform is “rebuilding the ship at sea.”¹⁴⁶ It would be much more prudent to wait for the results of local experiments of different property arrangements before replacing them with one theoretically workable resolution. “New institutional arrangements do not work in the field as they do in abstract models unless the models are well specified, empirically valid, and the participants in a field setting understand how to make the new rules work.”¹⁴⁷ So, even if unified reform ultimately proved to be necessary, it would be more prudent to do it after the full development of local informal institutional arrangements.¹⁴⁸

In short, because of community distinctions, no external uniform solution works for all transitional commons. The effort to build an idealistic property institution nationwide cannot avoid the tragedy of the transitional commons at the local level. A decentralized approach, with respect for institutional diversity, is essential to overcome the crisis of the transitional commons.

C. Governing the Transitional Commons: An Integrated Approach

The top-down approach aside, one important question remains: How are the transitional commons to be governed from below? Three choices come naturally: state, communal, and private property.¹⁴⁹ Unfortunately, in a country of weak government and disintegrated community, none of these is a viable option.¹⁵⁰ The choice of state property is a typical centralized approach, the limitation of which I have discussed in the previous Part. Moreover, in the situation of the

146. See ELSTER ET AL., *supra* note 117.

147. See OSTROM, *supra* note 2, at 14.

148. This is actually a successful experience of China's economic reform. See BARRY NAUGHTON, *GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM, 1978-93* (1995).

149. See David Feeny et al., *The Tragedy of the Commons: Twenty-Two Years Later*, 18 *HUM. ECOLOGY* 1, 4-5 (1990).

150. See Wang Shaoguang, *The Problem of State Weakness*, 14 *J. DEMOCRACY* 36, 38 (2003), for a discussion of state weakness in China.

transitional commons, the state is weak and struggling to support itself. Its symbolic existence in rural areas is not strong enough to sustain direct control over the local commons.¹⁵¹ The success of communal property relies on the existence of a community, in which local norms of mutual trust and reciprocity help regulate its members' behavior in order to manage the commons.¹⁵² In rural China, traditional communities have collapsed under the attack of collectivization and, later, marketization.¹⁵³ New communities have not developed.¹⁵⁴ Peasant communities have disintegrated into atomized individuals, acting out the logic of collective action and competing with each other, which lead towards the tragedy of the commons.¹⁵⁵ For private property, no credible authority or mechanism exists to define and enforce rights.¹⁵⁶ Individuals may fall into endless conflicts with each other over the ownership and distribution of common resources. In the absence of third-party control, a group of isolated exploiters cannot establish any stable institutions, including private property.¹⁵⁷

The successful management of the transitional commons requires more than choosing the right property institution. No matter what institution is chosen, a capable state and a well-functioning community are necessary to support it. The remaking of the Leviathan in rural China does not mean the revival of Mao's all-mighty government in rural China. Instead, I define a capable state as a state that can protect individual liberty of choices, rather than as one that makes choices for the people. Nor is the reconstruction of a well-functioning community a return to the traditional peasant community. Such natural order has gone forever.¹⁵⁸ A heterogeneous village with significantly mobile members needs organized institutions more than before.¹⁵⁹ To achieve the objects

151. *See supra* Part I.D.

152. For characteristics of a successful community, see Taylor, *supra* note 12, at 26–33.

153. *See supra* Part I.

154. *See id.*

155. *See id.*

156. *See id.*

157. This is a Hobbesian view of the world. *See* THOMAS HOBBS, *LEVIATHAN* (2010).

158. *See* DOUGLASS NORTH ET AL., *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* (2009).

159. *See* HUNTINGTON, *supra* note 121, at 10. (“Men are often reluctant to give up the image of social harmony without political action. But the truth is that the degree of community in a complex society depends on the strength and scope of its political institutions.”)

of state-making and community reconstruction, we need: (1) rule of law to respect and protect the development of “order without law”¹⁶⁰ in rural China and (2) a system that builds social capital through the self-governance of villagers. This integrative approach is discussed further below.

1. Rule of Law to Protect the Development of “Order Without Law”

The first question is whether the state and law is necessary in developing local property arrangements. Ellickson found in California that norms instead of legal rules are the basic sources of entitlements.¹⁶¹ Voluntary order can be developed and works well in the absence of law. Scholars studying common resource management also favor local property arrangements.¹⁶² Their studies of local resource management provide many cases of successful local management of common-pool resources.¹⁶³ In their view, the community is an integral and indispensable part in governing the common resources.¹⁶⁴ Resource users often create, by themselves, institutional arrangements and management regimes that help them define their rights and govern the commons effectively.¹⁶⁵ In contrast, titles promulgated by a centralized authority unaware of local conditions often make the situation worse than continued dependence on local-level common property rules.¹⁶⁶ To these scholars who advocate local property arrangements, property rights without law are not only possible but also necessary in some situations.¹⁶⁷ On the other hand, many legal scholars believe that property rights are inseparable from law. As Bentham said, “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.”¹⁶⁸ Holmes and Sunstein call a right a “child of law.”¹⁶⁹ Posner takes “right” to mean “a claim or

160. ELLICKSON, *supra* note 10.

161. *Id.*

162. See Agrawal, *supra* note 116, at 43–44.

163. See e.g., BALAND & PLATTEAU, *supra* note 82; WADE, *supra* note 82; OSTROM, *supra* note 2.

164. See Agrawal, *supra* note 116, at 43.

165. *Id.*

166. Carlisle Ford Runge, *Common Property and Collective Action in Economic Development*, 14 *WORLD DEV.* 623, 624–25 (1986).

167. *Id.*

168. JEREMY BENTHAM, *THE THEORY OF LEGISLATIONS* 52 (1978).

169. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY*

entitlement normally enforceable through courts or equivalent agencies.”¹⁷⁰

There are similar discussions in the Chinese scholarship on village governance. Some scholars are critical of the penetration of the state and the market into the rural society, and instead argue for the importance of traditional customs and local rules in village governance.¹⁷¹ Some of their studies rely on Ellickson’s “order without law” to criticize the effort of formal institution building in rural society but pay no attention to the limits of social norms.¹⁷² In contrast, other scholars argue that the decline of traditional authority and local rules is unavoidable in the modernization of the state.¹⁷³ They hold that rule of law and a formal property system should be established from the top down in rural society.¹⁷⁴ They also argue either for the privatization of rural land or for a strong presence of the state in rural society—even the nationalization of rural land.¹⁷⁵ The newest amendment of The Organic Law of Villagers’ Committee reflects this view, which seeks to strengthen the control of the state over the VCs.¹⁷⁶

DEPENDS ON TAXES 17 (1999).

170. Richard Posner, *The Cost of Rights: Implications for Central and Eastern Europe – and for the United States*, 32 TULSA L. J. 1, 2 (1996).

171. See e.g., SULI, FA ZHI JI QI BEN TU ZIYUAN [THE RULE OF LAW AND ITS LOCAL RESOURCES], ZHONGGUO ZHENGFA DAXUE CHUBANSHE [PRESS OF CHINA UNIVERSITY OF POLITICAL SCIENCE & LAW] (1996).

172. See Suli, *Wuxu Falv de Zhixu* [Book Review: *Order without Law*], HUANQIU FALV PINGLUN [CASS JOURNAL OF FOREIGN LAW], Feb. 2004, at 118.

173. *Id.* See also ERIC A. POSNER, LAW AND SOCIAL NORMS 218 (2000) (“[T]he general trend over hundreds of years has been away . . . from partnerships between law and social norms, and toward the rule of pure law.”).

174. See e.g., WANG HUNING, DANGDAI ZHONGGUO CUNLUO JIAZU WENHUA [THE LINEAGE CULTURE IN CONTEMPORARY CHINESE VILLAGES] (1991); ZHANG JING, JICENG ZHENGQUAN: XIANGCUN ZHIDU ZHU WENTI [PROBLEMS OF RURAL LEVEL GOVERNANCE IN CHINA] (2000); Xu Yong, *You Nengren dao Zhifa: Zhongguo Nongcun Jiceng Zhili Moshi Zhuanhuan* [From Rule by Man to Rule by Law: The Transformation of Grassroots Governance in Rural China], HUAZHONG SHIFAN DAXUE XUEBAO [JOURNAL OF CENTRAL CHINA NORMAL UNIVERSITY], Aug. 1996, at 1.

175. For a brief summary of the discussions, see Cai Jiming & Fang Cao, *Dui Nongdi Zhidu Gaige Fangan de Bijiao Fenxi* [Comparative Study of Rural Land Reform Proposals], SHEHUI KEXUE YANJIU [SOCIAL SCIENCE RESEARCH], Aug. 2005, at 28, available at http://www.china001.com/show_hdr.php?xname=PPDDMV0&dname=T3QUK21&xpos=299 (last visited Oct. 31, 2012).

176. Wang Weibo, *Cunmin weiyuanhui zuzhifa ni qianghua cun dangzhibu lingdao yin guanzhu* [The New Organic Law of Villagers’ Committees Tries to Strengthen the Leadership of the Party], <http://www.chinanews.com/fz/2010/07-15/2404366.shtml> (last

Local property arrangements and formal institutions are not mutually exclusive. Local property arrangements based on the consensus of the governed community have their advantages over rules promulgated by a centralized government. This voluntary order, however, still needs the recognition and endorsement of the state.¹⁷⁷ We should respect “the order without law” while at the same time adhering to the critical role of law in defining the basic structure of a society.¹⁷⁸ In a state with the rule of law, self-governance of the local community is usually recognized by the formal system.¹⁷⁹ The formal laws, including criminal, constitutional, and many other laws, also guarantee the normal operation of the community self-governance by preventing and punishing violation of individual liberty and basic rules of the society. The state often leaves the choice of property arrangements over commons to relevant individuals and gives official recognition to it. For example, the U.S. Supreme Court struck down a number of states’ attempts to regulate behavior in the home and the composition of co-occupant groups.¹⁸⁰ Generally, the state does not interfere with local property arrangements, but instead provides acquiescent recognition to such arrangements.¹⁸¹ This type of state recognition promotes the predictability and stability of local property arrangements. The formal institutions enforcing these local arrangements are the foundation of the development of local rules.

“Most organizations in all societies function with the explicit support of the state.”¹⁸² The calamity brought about by Mao’s all-mighty state has made any effort of state-building in rural China suspect.¹⁸³ But it is necessary to remake the Leviathan in rural China.¹⁸⁴ As Walter Lippmann said, “there is no greater necessity for men who live in communities than that they be governed, self-governed if possible, well-governed if they are fortunate, but in any event, governed.”¹⁸⁵ These words apply to a far greater extent to transitional countries, where the

visited Oct. 24, 2012).

177. ROBERT C. ELLICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* 13–22 (2008).

178. *Id.*

179. *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 1945).

180. ELLICKSON, *supra* note 177, at 116.

181. *Id.*

182. NORTH ET AL., *supra* note 158, at 7.

183. DALI YANG, *REMAKING THE CHINESE LEVIATHAN* (2004).

184. *Id.*

185. HUNTINGTON, *supra* note 122, at 2 (citing Walter Lippmann, N.Y. HERALD TRIB., Dec. 10, 1963, at 24.).

community is fragmented and where political institutions have little power.¹⁸⁶

Rule of law to protect the development of “order without law” is different from the Maoist comprehensive penetration into the countryside. It means only that the uncertainty rooted in transitional commons should be eliminated through formal institutional solutions. The state should respect the local property arrangements but should also provide official recognition to such arrangements in order to rid them of their transitional nature. Governments are established to secure rights, including property rights.¹⁸⁷ The state cannot just pretend to overlook what is happening in the far countryside and comfort itself by calling the anarchy “order without law.”¹⁸⁸

In the case of the transitional commons in China, local consensus on property arrangements has generally yet to be formed.¹⁸⁹ Conflicting property rights claims to the transitional commons cannot co-exist forever.¹⁹⁰ Yet, it does not mean that the state should make property arrangements for the local community, nor does it mean that there is nothing for the state to do. The role of the state is to guarantee the real self-governance of the local community, through which local consensus on the property arrangements can be achieved in the long run. The role of the state and law in the self-governance of the local community will be discussed in the following Subpart.

2. A Liberal Community: Building Social Capital Through Self-Governance

There are different proposals to address the disintegration of traditional community. One way is to revive tradition. But this atavistic notion could only succeed if history was reversed, modernization undone, and the level of human organization reduced to family and hamlet.¹⁹¹ Traditional Chinese villages were closed and homogeneous, and within them power was broadly dispersed and members had continuing face-to-face interactions with one another.¹⁹² Trust was

186. *Id.*

187. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these rights, Governments are instituted among Men.”)

188. See ELLICKSON, *supra* note 177, at 284.

189. See *supra* Parts I, II.

190. See *supra* Part IV.A.

191. See HUNTINGTON, *supra* note 122, at 10.

192. See *supra* Part I.A.

thereby developed, which was conducive to cooperation.¹⁹³ However, this pastoral life has gone forever. Both Mao's collectivization and Deng's marketization are part of the effort to modernize traditional rural China.¹⁹⁴ Successful or not, the closed villages have been opened to the state and the outside world.¹⁹⁵ Increasing mobility and heterogeneity of the population have broken what used to be close-knit communities in traditional Chinese villages.¹⁹⁶ The question is whether a community can be kept close-knit but not closed. A close-knit community requires that: (1) power is broadly dispersed; (2) members have continuing face-to-face interactions; and (3) members actively participate in the public affairs of the community. Is it possible to satisfy such requirements in an open community with mobile and heterogeneous members? If yes, how can we realize such a possibility?

The answer is simple: a liberal community of self-governance. A liberal community is a voluntary association free from both external and internal coercion, which requires both the self-refraining and endorsement of state power. Externally, the supreme power of the state tends to encroach on the autonomy of the local community.¹⁹⁷ The state must restrict itself in order to prevent external coercion.¹⁹⁸ This might be difficult, especially in an authoritarian state, but this is necessary for making a community close-knit. People participate actively in public affairs of the community only when they feel they are free to do so and their participation makes a difference. Because, as Tocqueville commented on the democracy in New England townships, "without power and independence a town may contain good subjects, but it can have no active citizens."¹⁹⁹ Only when the community is independent and free, will its members be incentivized to participate in its public affairs, a process that gives them the opportunity to have continuing face-to-face interactions.²⁰⁰ Internal coercion comes from the heterogeneity of the

193. *Id.* In other words, traditional Chinese villages were close-knit communities. For definition of a close-knit group, see Ellickson, *supra* note 101, at 1320.

194. *See supra* Part I.B., I.C.

195. *See supra* Part I.B., I.C.

196. *See supra* Part I.C.

197. *See DE TOCQUEVILLE, supra* note 179, at 60. ("The immunities of townships, which have been obtained with so much difficulty, are least of all protected against the encroachments of the supreme power. They are unable to struggle, single-handed, against a strong and enterprising government.")

198. In Eric Posner's words, "to refrain from interfering with the internal governance of the community." Posner, *supra* note 173, at 215.

199. DE TOCQUEVILLE, *supra* note 179, at 66–67.

200. The ideal type of a liberal community is de Tocqueville's New England

community. Human beings are born to be unequal in physical and mental strength. This inequality can be greatly magnified by the market economy.²⁰¹ A community member with significant social and economic advantages over others tends to coerce other people to his or her will.²⁰² With “one person, one vote,” members of a liberal community are given equal rights in participation and decision-making, offsetting their physical, social, or economic inequality. The state should also make and enforce laws that protect individual liberty and safety against private coercion and guarantee each member’s free voting rights. Community-level democracy is a way to make sure that power is broadly dispersed in a heterogeneous community for the purpose of making the community close-knit.

A liberal community is also a community with free exit, which is at the core of the idea of voluntary associations.²⁰³ Free exit not only provides a way to escape from internal coercion but also makes sure that “people who join are people who trust.”²⁰⁴ First-party control, which is necessary to achieve social control, would be much more effective in a society where people can control their own membership.²⁰⁵ In this sense, free exit (and the accompanying horizontal mobility) would increase the social capital of a liberal community. In contrast, as we have seen in the case of Chinese traditional villages, mobility brought by the market economy greatly weakens the traditionally close-knit communities. The reason for this weakening of communities is that in those communities, members rely on “particularized trust” to communicate with each other and to participate in public affairs. “Particularized trust” means the type of trust that exists only between people who are close to each other; people outside closed networks are viewed with suspicion.²⁰⁶ It often takes a long time for an individual to develop his or her own closed

township: “The native of New England is attached to his township because it is independent and free: . . . He takes a part in every occurrence in the place; . . . he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.” *Id.* at 68.

201. See, e.g., Dwayne Benjamin et al., *The Evolution of Income Inequality in Rural China*, 53 *ECON. DEV. & CULTURAL CHANGE* 769 (2005).

202. WU YI, XIAO ZHEN XUAN XIAO [A SMALL TOWN OF CHAOS] (2007).

203. See Dagan & Heller, *supra* note 2.

204. Kenneth Newton, *Social Capital and Democracy*, 40 *AM. BEHAV. SCIENTIST* 575, 577 (1997).

205. An actor who imposes rules and sanctions on himself is exercising first-party control. There is broad agreement that the overall system of social control depends on achieving cooperation through self-enforcement. See ELLICKSON, *supra* note 10, at 126.

206. ERIC M. USLANER, *THE MORAL FOUNDATIONS OF TRUST* 21 (2002).

network.²⁰⁷ Thus, it is difficult to sustain particularized trust in a community with great horizontal mobility. But, in a liberal community, the self-governance mechanism is the source of trust and provides a credible platform for members to interact with each other. Inter-personal trust is developed through participation in self-governance.²⁰⁸

In sum, self-governance can make an open community close-knit by promoting the broad dispersal of power, by providing a credible mechanism for individual members to communicate with each other, and by transforming silent subjects into active citizens. People trust and participate because it is a liberal community.

The VCs in rural China were designed to be institutions of self-governance by peasants, rather than as a level in the governmental hierarchy.²⁰⁹ But at the same time, the party branch at the village level was granted power to “play the role of leading nucleus.”²¹⁰ Through the top-down party system, the county and township governments can interfere with villagers’ self-governance and often exercise effective control over village affairs.²¹¹ This includes the election of VC members.²¹² As a result, the village-level self-governance organization, under the lead of the party branch, became a hand of the local government. Conflicts between villagers and VC members occurred frequently before the abolishment of agricultural tax, which had greatly jeopardized the stability of rural society.²¹³ After 2000, when the local government no longer needed the VCs’ help with administrative affairs and tax-collection, the VCs disappeared from the public space of villages.²¹⁴ The conflicts and disconnection between villagers and villagers’ committees seem to be two opposite phenomena but actually share the same origin: the VC is not a real self-governing institution. Due

207. Marcel Fafchamps & Bart Minten, *Returns to Social Network Capital Among Traders*, 54 OXFORD ECON. PAPERS 177 n.7 (2002) (stating that “socializing is time consuming”).

208. CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 105 (1976).

209. *See supra* Part I.C.

210. OLVC, *supra* note 36, art. 4.

211. Kevin J. O'Brien & Lianjiang Li, *Accommodating “Democracy” in a One Party State: Introducing Village Elections in China*, 162 CHINA Q. 465, 446–89 (2000).

212. Tianjian Shi, *Village Committee Elections in China: Institutional Tactics for Democracy*, 51 WORLD POL. 385, 385–412 (1999).

213. *See generally* Yep, *supra* note 40.

214. *See* Zhou Feizhou, *Cong Jiqu xing Zhengquan dao Xuanfu xing Zhengquan: Shuifei Gaige dui Guojia yu Nongmin Guanxi zhi Yingxiang* [Rural Fee Reform and the Changing Relationship between State and Peasant], SHEHUI XUE YANJIU [SOCIOLOGICAL STUDIES], June 2006, at 1.

to the lack of legitimacy, it cannot represent villagers in public affairs, coordinate collective action of villagers, or arbitrate their disputes. Instead, it often deteriorates into an instrument that the powerful villagers utilize to exploit other members of the local community.²¹⁵ The transitional commons emerged partly because no real self-governance mechanisms existed to coordinate villagers' behaviors.²¹⁶ The VC did not succeed in changing that situation. The terrible financial situation of the VCs is one indication of its inability to overcome the logic of collective action;²¹⁷ because the VC does not really represent villagers, it cannot make a credible promise that its money will be properly used for public purposes. As a result, no villagers would take the risk to invest in it.²¹⁸

The real solution is to let villagers govern themselves and make the village a liberal community free from both external and internal coercion. This requires the reform of the current Organic Law of the Villagers' Committee (OLVC).²¹⁹ First, the relationship between the village-level party branch and the VC should be changed. As a self-governance institution, VC should be the supreme power organ of the village, and it should not be subject to the lead of any other institution. The village-level party branch may monitor, but not lead, the activities of the VC.²²⁰ Second, the government of the township or any upper-level should refrain from intervening in the internal affairs of a village, especially village elections. With the relationship between the VC and the village-level party branch being changed, the external coercion from the government can be greatly weakened.

215. Tan Tongxue, *Xiangcun Huihua de Lujing yu Shehui Jichu: Yi Hunan mou Xian Jin Yin Zhen wei Li* [*The Graying of Rural China: Case Studies of Two Townships of Hunan*], SANNONG ZHONGGUO [PEASANT CHINA], No. 8 (2006); Chen Bofeng, *Xinnongcun Jianshe bixu ezhi Xiangcun Huisehua Qushi* [*Prevent Graying of Rural China*], SANNONG ZHONGGUO [PEASANT CHINA], No. 8 (2006).

216. *See supra* Part I.

217. *See supra* note 50.

218. *Id.*

219. For a comprehensive proposal on the revision of the OLVC, see Xiong Wei, *cun min wei yuan hui zu zhi fa xiu gai xu yao lun zheng de 22 ge wen ti* [*22 Problems to Discuss in the Revision of the Organic Law of Villagers' Committee*], CITIZEN XIAONG BLOG (OCT. 25, 2011, 10:00), <http://blog.qq.com/qzone/622006594/1288940453.htm>.

220. Unfortunately, the 2010 amendment to the OLVC went in the opposite direction. In the 1998 OLVC, the party branch was to play the role of "leading nucleus" (*ling dao he xin*), which was not further elaborated. OLVC, *supra* note 36, art. 3. In the 2010 amendment, the role of leading nucleus was specified as being: to *lead* and support the villagers' committee. Organic Law on the Villagers Committees of the People's Republic of China, 2010, art. 4.

At the same time, the government should also enforce laws that prevent external and internal coercion in village affairs, especially in village elections.²²¹ Elections have been implemented in many Chinese villages and many problems arose, which has led some to argue that grassroots democracy might not work for Chinese peasants.²²² Those problems originated either in the external coercion of the government, such as designating the VC candidates and denying some dissenting villagers' candidanship, or in the internal coercion of influential individuals, who used their wealth or violence to disrupt the villagers' free voting.²²³ These problems do not disprove the utility of self-governance. Instead, their existence calls for real self-governance of villagers under and protected by rule of law. The government should refrain from intervening in village self-governance, and it should protect the free voting rights of villagers against private coercion.²²⁴

To make a village a liberal community also requires free exit rights of villagers, which consist of freedom of movement and free alienation of real property in the village.²²⁵ The corresponding *hukou* (household registration) system and property laws should be revised to grant villagers free exit rights.²²⁶ Many villagers work in big cities for more than ten months each year.²²⁷ Without rights to exit the villages and to become a legal resident of the cities where they work, they are irresponsible stakeholders in both places. This decreases social capital and causes social problems, including the crisis of transitional commons discussed in this Article. Reform of property laws is necessary to realize villagers' free exit rights. This does not necessarily mean privatization

221. See, e.g., *supra* note 36, arts. 11, 17.

222. See e.g., Daniel Kelliher, *The Chinese Debate over Village Self-Government*, 37 CHINA J. 63 (1997).

223. Guan Xiaofeng, *Min Zheng Bu: cun wei hui xuan ju hui xuan he bao li xing wei zeng duo* [Ministry of Civil Affairs: Bribery and Violence Increase in Elections of Villagers' Committees], CHINA DAILY WEBSITE (July 10, 2007) <http://news.qq.com/a/20070710/000430.htm>.

224. See e.g., Qingshan Tan & Qiushui Xin, *Village Election and Governance: Do Villagers Care?*, 16 J. CONTEMP. CHINA 581 (2007).

225. See Dagan & Heller, *supra* note 2.

226. Kam Wing Chan & Li Zhang, *The Hukou System and Rural-Urban Migration in China: Processes and Changes*, 160 CHINA Q. 818 (1999); Klaus Deininger et al., *Moving Off the Farm: Land Institutions to Facilitate Structural Transformation and Agricultural Productivity Growth in China*, (World Bank, Working Paper No. 5949, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988037.

227. Rachel Connelly et al., *The settlement of rural migrants in urban China – some of China's migrants are not 'floating' anymore*, 9 J. OF CHINESE ECON. & BUS. STUD. 283 (2011).

and free alienation of rural land, but instead means letting the local community choose the property arrangements that they like. If a village chooses communal property, villagers should at least be free to alienate their share in the communal property.

A freely-elected villagers' committee will play a central role in managing public affairs, including governing the commons. A liberal community will be able to provide a public forum for villagers to discuss the ownership and distribution of resources. Villagers will be able to make credible promises to each other under the institutional framework of the liberal community. They could, therefore, find some way to overcome the crisis of the transitional commons together. In Y village, villagers might desire to consolidate, formalize, and legalize their individual occupation of the plots on the riverbank. In L village, individual entrepreneurs could be encouraged and respected so long as they do not become a source of coercion against other members of the community. Mr. H's might-based rights will not be recognized unless he can get his actual possession of the riverbank accepted by the other villagers, either by compensation to the community or by investing in the improvement of the river's ecological system. In both villages, the VCs can provide a forum for villagers to discuss the rules and norms and the cooperation between the two villages and the pumping station regarding the use of the river water resources. Expectably, increasing social capital may result in a cooperative mechanism to govern the use of the common resources.