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## Explaining China's Legal Flexibility: History and the Institutional Imperative

Justin W. Evans

*Parker College of Business, Georgia Southern University, juwevans@alumni.iu.edu*

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# EXPLAINING CHINA'S LEGAL FLEXIBILITY: HISTORY AND THE INSTITUTIONAL IMPERATIVE

Justin W. Evans\*

## ABSTRACT

*China's legal system appears to harbor a major tension, or even a paradox. Certainty in law facilitates economic progress, which most observers agree the Communist Party requires to maintain its power—yet the Party has opted for a flexible legal system that often impedes predictability. Prior studies explain China's legal system as a product of certain constraints and as an expedient that allows for policy adjustments. These factors undoubtedly are at work but do not fully explain the rationale for a legal design seemingly at odds with the Party's economic goals. To obtain a fuller view, it is necessary to consult the historical circumstances in which the designers of China's legal system were embedded. This Paper argues that the Party's reformers achieved a percipient historical insight: the Party would require an ongoing competitive advantage in institutional entrepreneurship to survive after Mao. Moreover, the reformers understood this competency to embody not only the substance of policy, but also, crucially, the Party's institutional stewardship. Of its many advantages, flexible law reinforces the Party's dominance in institutional entrepreneurship, enabling the Party to impede rival entrepreneurs without disrupting the broader economic frameworks in place.*

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\*Assistant Professor of Legal Studies, Parker College of Business, Georgia Southern University (juwevans@alumni.iu.edu). I presented this paper at the ALSB annual meeting in Savannah, Georgia (August 2017) and at the Seventeenth Huber Hurst Research Seminar at the University of Florida (February 2018), and thank the Hurst Seminar participants for their detailed feedback: Robert Bird, Leora Eisenstadt, Robert Emerson, Stephanie Greene, Stephen Park, Robert Prentice, Michael Schuster, Abbey Stemler, Robert Thomas, Jeff Todd, and Deepa Varadarajan. Larry DiMatteo's feedback was particularly extensive and insightful, and I am grateful to have had his guidance. I am indebted to Chris Brkich for his comments on a later draft. I thank Jennifer, Anna, and Emma for their love and support. Any errors are mine.

*Institutions with strategic functions emerge and viewed thusly, the economic tradeoffs inherent in China's flexible laws are not the paradox that they seem. The Paper briefly considers the implications of this historical context for multinationals' strategies in China and for states' strategic uses of flexibility in international legal institutions.*

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*Even before seeking the common good, the first objective of power is to continue to exist . . .*

— Li Ma<sup>1</sup>

*[I]t is not the most intellectual of the species that survives; it is not the strongest that survives; but the species that survives is the one that is able best to adapt and adjust to the changing environment in which it finds itself.*

— Leon C. Megginson<sup>2</sup>

## I. INTRODUCTION

Legal predictability facilitates economic growth by enabling businesspeople to act confidently and efficiently.<sup>3</sup> Western models present legal predictability as a critical support for civil society. Conversely, Western perspectives typically hold only negative views toward flexible legal institutions—those whose meanings and applications are substantially open to question, such that regulated parties cannot easily predict the legal treatment of their actions.<sup>4</sup>

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<sup>1</sup> Li Ma, *A Comparison of the Legitimacy of Power Between Confucianist and Legalist Philosophies*, 10 ASIAN PHIL. 49, 50 (2000).

<sup>2</sup> Leon C. Megginson, *Lessons from Europe for American Business*, 44 S.W. SOC. SCI. Q. 3, 4 (1963) (summarizing Darwin's *Origin of Species*).

<sup>3</sup> See Justin W. Evans & Anthony L. Gabel, *Legal Competitive Advantage and Legal Entrepreneurship: A Preliminary International Framework*, 39 N.C. J. INT'L L. & COM. REG. 333, 349–56 (2014) (noting also, *inter alia*, that observers have long searched for the optimal balance between legal certainty and predictability on one hand, and legal flexibility and adaptability on the other).

<sup>4</sup> Legal flexibilities, then, are the features of a legal system that impose uncertainty on regulated parties as to the permissibility of their contemplated actions. See *id.* at 367–88 (noting that legal flexibility exists in degrees and discussing flexibility as the features of law that complicate one's ability to predict consistently and accurately the legal ramifications of one's actions); *id.* at 382–88 (observing that while some degree of flexibility exists in every legal system in the world, those that promote relatively high degrees of predictability can be labeled “high rule of law” jurisdictions, whereas those that entail relatively substantial degrees of flexibility and uncertainty are “low rule of law” jurisdictions). Other works characterize the broader but related concept of “institutional flexibility” as a mechanism by which states can change rules, and this sense of the term is inherent in the one adopted here. See, e.g., Lewis S. Davis, *Institutional Flexibility and Economic Growth*, 38 J. COMP. ECON. 306, 307 (2010) (defining *institutional flexibility* as “the propensity to develop new economic institutions in response to

Flexible legal regimes impose relatively high degrees of uncertainty on regulated parties, and hence tend to raise the transaction costs and risks of doing business.<sup>5</sup> On average then, the more flexible a country's law, the less efficiently its markets operate.<sup>6</sup>

For these reasons, the legal system of the People's Republic of China ("PRC") presents a major tension, or even a paradox.<sup>7</sup> To begin, most Western observers do not ordinarily associate formal law (in its Western sense, anyway) with authoritarian societies, for the obvious reason that legal rules must prevail over the whims of political authorities in order for law to be reasonably predictable—and such an arrangement is inherently at odds with authoritarianism. Nevertheless, the Chinese Communist Party ("CCP" or the "Party") chose to construct a formal legal system beginning in the late 1970s. Most observers have accepted that in order for China to achieve major economic progress, it would have to attract foreign investment and protect incentives for economic activity, and hence, formal law assumed a heightened stature in post-Mao China. Still, the tension between authoritarian rule and formal legality pervades the PRC business environment.<sup>8</sup>

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changing economic conditions"); Christopher Marcoux, *Institutional Flexibility in the Design of Multilateral Environmental Agreements*, 26 CONFLICT MGMT. & PEACE SCI. 209, 211 (2009) (defining *institutional flexibility* as "various formal and informal mechanisms by which states can change the terms of their cooperation" with one another); see also Part III.A (discussing the types of legal flexibilities).

<sup>5</sup> See Evans & Gabel, *supra* note 3, at 349–56.

<sup>6</sup> *Id.*; accord LINDA YUEH, ENTERPRISING CHINA: BUSINESS, ECONOMIC AND LEGAL DEVELOPMENTS 61 (2011); see also Yi Feng, *Political Freedom, Political Instability, and Policy Uncertainty: A Study of Political Institutions and Private Investment in Developing Countries*, 45 INT'L STUD. Q. 271 (2001) (finding, *inter alia*, that policy uncertainties adversely affect private investment in a country).

<sup>7</sup> See, e.g., Peter Howard Corne, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369, 375 (2002) (noting the "contradiction" between the economic benefits of certainty and the political benefits of flexibility in the law).

<sup>8</sup> Gil Lan, *American Legal Realism Goes to China: The China Puzzle and Law Reform*, 51 AM. BUS. L.J. 365, 368 (2014) (arguing that China's informal institutional arrangements have sometimes yielded sufficient certainty for economic actors, such that "[t]he picture that emerges from China is not a simplistic dichotomy of having formal law or not").

Stranger than the existence of the PRC's formal law is its considerable flexibility. As noted above, China must experience satisfactory economic growth in order for the CCP to maintain social stability and, in turn, its political monopoly.<sup>9</sup> Given the importance of economic growth to the CCP's own welfare and the support that predictable legal rules lend to economic performance, one might suspect that the CCP would find appealing the sort of stable and predictable legal regimes associated with Western economies. Yet the PRC possesses one of the most flexible legal systems among the world's major economies. China is not the only country noted for its legal flexibility—but some countries marked by flexible law can do no differently.<sup>10</sup> In contrast, the CCP has *embraced* legal flexibility,<sup>11</sup> despite the stultifying economic consequences that accompany institutional uncertainty.<sup>12</sup>

What can account for this choice? Why is the PRC's legal system so flexible when economic success is so important to its creators? Scholarly explanations have varied over time. Some drivers of flexible law are not a choice, but a product of the CCP's constraints. For instance, human language is inherently indeterminate, such that it is impossible to remove all ambiguity from law.<sup>13</sup> And sometimes the language of a law is made flexible or ambiguous to attract the requisite support needed for passage in the legislative process.<sup>14</sup> Others factors, however, reflect a choice:

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<sup>9</sup> See *infra* Part III.C (discussing how the CCP's legitimacy is now more reliant upon economic factors than on ideology).

<sup>10</sup> Evans & Gabel, *supra* note 3, at 385–86.

<sup>11</sup> See *infra* Part III.A. This is not to say that PRC law is infinitely flexible; some measure of certainty and clarity exist. There are occasions when the CCP rationally limits its own flexibility. *E.g.*, Lan, *supra* note 8, at 401–02 (discussing banking regulations designed to promote certainty against state expropriation as an example). Padgett and Answell argue that “[a]mbiguity and heterogeneity, not planning and self-interest, are the raw materials of which powerful states and persons are constructed.” John Padgett & Christopher Answell, *Robust Action and the Rise of the Medici, 1400-1434*, 98 AM. J. SOC. 1259, 1259 (1993). This Paper agrees that ambiguity is useful in building a strong state, but urges that planning and self-interest can also be coordinated with the state's use of ambiguity.

<sup>12</sup> Evans & Gabel, *supra* note 3, at 389–90.

<sup>13</sup> See, *e.g.*, Lan, *supra* note 8, at 418–19.

<sup>14</sup> *Id.*

flexible law conserves the “maneuverability” the CCP must have in order to respond to rapidly developing social and economic circumstances.<sup>15</sup> This explanation is often framed in terms of China’s status as a developing economy.<sup>16</sup>

This Paper integrates these views into its own account of PRC legal flexibility. But these prior explanations do not tell the whole story. A focused examination of history has not been brought to bear on this topic, nor has institutional theory. History and institutionalism reveal another fundamental explanation for why the PRC’s law is so flexible. Flexibility was a strategic imperative for the CCP’s reformers because they had achieved a critical historical insight that their predecessors lacked. While China’s prior rulers had failed due to many complex factors, chief among these was their ineffectiveness as institutional entrepreneurs.<sup>17</sup> The reformers were determined not to commit the same error. The CCP would need to remain entrepreneurial with respect to the substance of policy (which it had long been doing), but a further step was needed. The CCP’s legal institutions would have to permit the existence of potential competitors for power—that is, other institutional entrepreneurs—while disallowing these actors from eclipsing the Party’s influence. And this would have to be accomplished without major disruptions to China’s nascent market institutions or to the CCP’s own legitimacy.

This logic, however, spawned its own dilemma. A formal legal system would be required to attract the foreign investment necessary to finance a state strong enough to reclaim China’s security in a menacing global environment. Yet China’s own history suggested that an entrenched formal law would either constrain the CCP’s ability to rule (if the Party itself were to actually

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<sup>15</sup> Corne, *supra* note 7, at 375.

<sup>16</sup> Hence, this explanation often implies that the PRC’s legal flexibilities will invariably dissipate as the country’s economy progresses, until such time that the PRC legal system, like those of the West, is highly predictable. This Paper will argue, however, that there are limits to just how certain and predictable—how entrenched—the CCP can allow law to become. *See infra* Part III.

<sup>17</sup> *See infra* Part III; *see also* JOSEPH FEWSMITH, *THE LOGIC AND LIMITS OF POLITICAL REFORM IN CHINA* 9–10 (2013) (noting that “institutional creation is often glossed over” in the literature). Recent scholarship examines institutional creation in authoritarian contexts. *Id.*

observe the law), or would force the CCP regularly to disregard the law in maintaining control over society (in which case the Party would have enacted an institution destined to eviscerate its own legitimacy). Of course, neither such scenario would maximize the Party's utility. And in either event, the mere existence of formal legal institutions would enable rival institutional entrepreneurs who might seek to bend the law to their interests at the expense of the CCP's control. This very real threat was heightened considerably as economic reforms legitimized private wealth—and with it, the new sources of influence that non-Party actors would wield as a function of their wealth.<sup>18</sup>

The resolution to this dilemma was a system of formal law—but one that is highly flexible. Indeed, legal flexibility is the linchpin of the CCP's post-Mao survival strategy. Of the many benefits of flexibility for the CCP, the most significant is that, in contrast to China's past rulers, each generation of authorities must now actively manage the PRC's institutions *continuously* and *strategically*, in form as well as in substance—to shape China's institutions on the Party's terms, despite the vast array of potential institutional rivals that inevitably arise in the presence of formal law. The CCP's corresponding economic goal is thus seen not as economic growth per se, but rather, as growth commensurate with the Party's ongoing rule.<sup>19</sup>

What emerges, then, are institutions with important strategic functions. More generally, flexible legal institutions can represent critical strategic assets for authoritarian political incumbents attempting to survive modern global pressures.<sup>20</sup> Yet this holds as well for multinational companies ("MNCs") operating in lower rule of law jurisdictions.<sup>21</sup> While flexible law is perceived as an institution from society's perspective, it can function as a resource for the state and, in different ways, for the adroit MNC. How such

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<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Parts III, V.

<sup>20</sup> See *infra* Parts II–III; see also DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY 40–41 (2009) (explaining that globalization can encourage democratization, and thereby pressure authoritarians).

<sup>21</sup> See *infra* Part V.

legal institutions come to exist is the principal focus of this Paper. Legal flexibilities are sometimes deployed strategically as a means to foster the political survival of their creators. This is what has occurred in the PRC. Using a historical event sequencing methodology, this Paper interprets the PRC's legal flexibility as one of the CCP's most crucial institutional efforts at self-preservation.<sup>22</sup>

The PRC makes an excellent case study for this international phenomenon of the strategic uses of legal flexibility. This is because the CCP's survival turns upon its adeptness in directing and responding to the evolution of Chinese society by using, among other mechanisms, the country's legal system. For all of the critiques that China's legal institutions inspire from the West—often for goals or measured by standards that they were never intended to embody<sup>23</sup>—the PRC's legal order can supply some measure of security and predictability while also providing a fertile ground for the entrepreneurial lawyers who guide MNCs' legal strategies.<sup>24</sup>

This Paper offers a Western interpretation<sup>25</sup> of China's legal environment as ordered by a blending of logics,<sup>26</sup> some unique to

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<sup>22</sup> See *infra* Part III. Party control of the military is its other most crucial institutional support. See JAMES C.F. WANG, *CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION* 238–62 (7th ed. 2002).

<sup>23</sup> Scholars note the futility of imposing Western assumptions on China. See, e.g., Larry Catá Backer, *Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT'L L.J. 331, 339 (2012); PHILIP C.C. HUANG, *CHINESE CIVIL JUSTICE, PAST AND PRESENT* xi–xviii (2010); PHILIP RICHARDSON, *ECONOMIC CHANGE IN CHINA, C. 1800-1950*, at 2–3 (1999).

<sup>24</sup> See *infra* Part V.

<sup>25</sup> Taisu Zhang, *Beyond Methodological Eurocentrism: Comparing the Chinese and European Legal Traditions*, 56 AM. J. LEGAL HIST. 195, 206 (2016) (urging that comparisons of legal systems, and studies of one legal system by scholars who inhabit dissimilar jurisdictions, “should be performed with care, and preferably with some sense of methodological self-awareness.”).

<sup>26</sup> See *infra* Part III; Patricia H. Thornton & William Ocasio, *Institutional Logics and the Historical Contingency of Power in Organizations: Executive Succession in the Higher Education Publishing Industry, 1958–1990*, 105 AM. J. SOC. 801, 804 (1999) (stating that institutional logics are “the socially constructed, historical pattern of material practices, assumptions, values, beliefs, and rules by which individuals . . . provide meaning to their social reality”); accord W. RICHARD SCOTT, *INSTITUTIONS AND ORGANIZATIONS: IDEAS INTERESTS, AND IDENTITIES* 90 (4th ed. 2013).

China and others more transcendent in nature. The PRC's legal apparatus, like any nation's,<sup>27</sup> is a product of both these universal notions and the conditions unique to its elites.<sup>28</sup> This Paper contributes to our understanding of the PRC in its own right, but there is an added benefit to the institutional approach: MNCs can apply the lessons of history to their operations in the PRC. By understanding how the PRC's legal context came to exist,<sup>29</sup> Western enterprises will be better positioned to integrate Chinese law into their strategic decision-making processes.<sup>30</sup> In addition, this study suggests certain similarities relating to flexibilities in international legal institutions.<sup>31</sup> The Paper adopts an interdisciplinary approach to these topics, drawing from law, history, and business.<sup>32</sup> In doing so, the Paper contributes to law and strategy ("LAS"), a growing research stream within the broader business law scholarship that seeks to understand how legal competencies and resources should

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<sup>27</sup> For instance, homogenous transnational elements and unique domestic factors both shape emergent constitutional orders. Kevin L. Cope, *The Intermestic Constitution: Lessons from the World's Newest Nation*, 53 VA. J. INT'L L. 667 (2012).

<sup>28</sup> Lan, *supra* note 8, at 386 (noting that the law's designers "will undoubtedly be informed by their own local, cultural understandings"); *see also id.* at 390 (noting that a "context-sensitive approach is important in understanding" PRC law).

<sup>29</sup> *See infra* Parts II–III; *see* Klaus E. Meyer & Mike W. Peng, *Theoretical Foundations of Emerging Economy Business Research*, 47 J. INT'L BUS. STUD. 3, 8 (2016) (noting that context remains important in international business because the legal convergence that some scholars have predicted appears illusive); *accord* Evans & Gabel, *supra* note 3, at 347; Joan Enric Ricart et al., *New Frontiers in International Strategy*, 35 J. INT'L BUS. STUD. 175, 178 (2004) (contending that the fundamental question in international strategy is "why do countries differ?"); Patrick Regnér & Jesper Edman, *MNE Institutional Advantage: How Subunits Shape, Transpose and Evade Host Country Institutions*, 45 J. INT'L BUS. STUD. 275, 276–77 (2014) (noting that "context has a direct influence on the strategies of MNEs").

<sup>30</sup> *See infra* Part V; Geoffrey Jones & Tarun Khanna, *Bringing History (Back) Into International Business*, 37 J. INT'L BUS. STUD. 453 (2006).

<sup>31</sup> *See infra* Part IV.

<sup>32</sup> Robert C. Bird, *Special Report: Legal Scholarship in Business Schools*, 53 AM. BUS. L.J. 9, 11–12 (2016) (noting that law is inherently interdisciplinary).

inform business strategy.<sup>33</sup> The Paper expands the LAS analysis to show one means by which governments can approach law strategically, and proposes future research on the implications of China's historical context for the MNC's strategic approach to China's legal uncertainties. The Paper does not normatively endorse the PRC's political structure. Rather, it suggests that when Western attorneys and businesspeople ascribe only negative potential to the PRC's legal flexibilities, their belief is self-defeating.<sup>34</sup> Astute actors can harness such flexibilities to their own benefit.<sup>35</sup>

Scholars' assumptions have inspired numerous debates over the role of law in Chinese society.<sup>36</sup> The key assumption in this analysis is that the CCP's most basic priority is its own survival as a political monopoly.<sup>37</sup> The CCP is thus assumed to act for its own interests and its monopoly is taken as non-negotiable.<sup>38</sup> The benefits accruing to monopolists are considerable,<sup>39</sup> and thus Party members are generally incentivized (albeit imperfectly) to act in furtherance

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<sup>33</sup> Robert C. Bird, *The Many Futures of Legal Strategy*, 47 AM. BUS. L.J. 575, 575 (2010); *see also infra* Part V.

<sup>34</sup> *See* Lan, *supra* note 8, at 369 (illustrating that observers might misunderstand an unfamiliar legal system on account of subtle contextual factors); *see infra* Part V (noting that, similarly, Western firms should not discount the potential strategic value of China's flexible legal system simply because it deviates from Western norms).

<sup>35</sup> *See generally* Evans & Gabel, *supra* note 3.

<sup>36</sup> JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION 10 (9th ed. 2014).

<sup>37</sup> Many others invoke this assumption as well. *See, e.g.*, Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 77 (2006).

<sup>38</sup> This precept has been codified: China is "under the leadership of the Communist Party." XIANFA pmbl. (1982) (P.R.C.). For economists, "the real question is whether [legal markets] are efficient." PATRICK A. McNUTT, POLITICAL ECONOMY OF LAW 17 (2010). This Paper is less concerned with the efficiency of China's legal institutions (clearly, more efficient alternatives could be implemented) and instead focuses on their effectiveness, as measured by the goals of those who designed them. *See infra* Part III.

<sup>39</sup> *See, e.g.*, ANDREW G. WALDER, CHINA UNDER MAO: A REVOLUTION DERAILED 118 (2015); Bruce J. Dickson, *Dilemmas of Party Adaptation: The CCP's Strategies for Survival*, in CHINESE POLITICS 22 (Peter Hays Gries & Stanley Rosen eds., 2010).

of their monopoly. Such acts include the institutional maintenance of the Party-state.<sup>40</sup>

Part II discusses the theoretical lens of institutional theory and the analytical method of historical event sequencing that will be used to assess why PRC law is so flexible. Part III then applies these tools to argue that a system of flexible formal legality is strategically optimal for the CCP in its role as institutional entrepreneur.<sup>41</sup> Part IV considers the circumstances under which the implications gleaned from China can be applied to international legal institutions. Part V concludes the Paper and argues that MNCs can better strategically account for the vicissitudes of the PRC's legal flexibilities by viewing in context the historical reasons that these flexibilities exist in the first place.

## II. INSTITUTIONAL DYNAMISM AND HISTORICAL EVENT SEQUENCING

This Part discusses the theoretical lens of institutional theory and analytical method of event sequencing to be utilized in answering the question of why the PRC legal system is so flexible. These frameworks inform the analysis in Part III, *infra*.

### A. Core Ideas of Institutional Theory and Entrepreneurship

Institutional theory concerns the impact of context on human phenomena<sup>42</sup> and explains how one's embeddedness within an environment matters—that is, “how institutions constrain and structure action” and thereby “create regularities and stability.”<sup>43</sup>

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<sup>40</sup> PRC law is deemed to be instrumentalist. See, e.g., Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 20, 37–38 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., 2015). The question then becomes what value flexibility contributes to this instrumentalism.

<sup>41</sup> Evans & Gabel, *supra* note 3, at 372–87.

<sup>42</sup> Marie Laure Djelic, *Institutional Perspectives—Working Towards Coherence or Irreconcilable Diversity?*, in *THE OXFORD HANDBOOK OF COMP. INSTITUTIONAL ANALYSIS* 15, 16 (2010).

<sup>43</sup> *Id.* An institution's adaptability can also promote its stability. TERESA WRIGHT, *PARTY AND STATE IN POST-MAO CHINA* 2 (2015) [hereinafter *PARTY*

The theory examines how “organizations better secure their positions and legitimacy by conforming to the rules and norms of the . . . environment.”<sup>44</sup> Institutionalism thus emphasizes “regulatory, social, and cultural influences that promote [the] survival and legitimacy of an organization rather than focusing solely on efficiency-seeking behavior.”<sup>45</sup>

*Institution* “broadly refers to the formal rule sets . . . less formal shared interaction[s] . . . and taken-for-granted assumptions . . . that organizations and individuals are expected to follow.”<sup>46</sup> Institutions are thus “‘the humanly devised constraints that structure human interaction’ . . . and include formal rules and laws as well as informal influences like cultural norms.”<sup>47</sup> The law, then, is a formal institution,<sup>48</sup> and countries are ‘configurations’ of interacting sets

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AND STATE]. Stability “results when . . . dominant groups reproduce their power.” Neil Fligstein, *Social Skill and the Theory of Fields*, 19 SOC. THEORY 105, 109 (2001).

<sup>44</sup> Garry D. Bruton et al., *Institutional Theory and Entrepreneurship: Where Are We Now and Where Do We Need to Move In the Future?*, 34 ENTRE. THEORY & PRAC. 421, 422 (2010). Scholars agree “that legitimacy is necessary for organizational continuity and success.” Tammy L. MacLean & Michael Benham, *The Dangers of Decoupling: The Relationship Between Compliance Programs, Legitimacy Perceptions, and Institutionalized Misconduct*, 53 ACAD. MGMT. J. 1499, 1500 (2010). Legitimacy is “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.” *Id.* (quoting Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995)).

<sup>45</sup> Bruton et al., *supra* note 44, at 422.

<sup>46</sup> *Id.*; accord Djelic, *supra* note 42, at 26 (noting a popular definition of *institutions* as the “rules of the game providing stability and meaning”) (internal citation and quotation marks omitted); *Institution*, BLACK’S LAW DICTIONARY 801 (7th ed. 1999) (defining in the legal context as “an elementary rule, principle, or practice”).

<sup>47</sup> Sheila M. Puffer et al., *Entrepreneurship in Russia and China: The Impact of Formal Institutional Voids*, 34 ENTRE. THEORY & PRAC. 441, 444 (2010) (internal citation omitted).

<sup>48</sup> See, e.g., Friederike Welter & David Smallbone, *Institutional Perspectives on Entrepreneurial Behavior in Challenging Environments*, 49 J. SMALL BUS. MGMT. 107, 109 (2011); Desirée F. Pacheco et al., *The Coevolution of Institutional Entrepreneurship: A Tale of Two Theories*, 36 J. MGMT. 974, 981–85 (2010).

and subsets of institutions in which the legal system is a key formal institution.<sup>49</sup>

Several variants of institutional theory exist.<sup>50</sup> Some view institutions as so powerful that individuals are assumed to lack free will,<sup>51</sup> while others posit that institutions are instead one of many factors influencing individuals' behaviors.<sup>52</sup> This Paper adopts the latter variant since "institutional theory can accommodate interest-seeking, active organizational behavior when organizations' responses to [institutions] are not assumed to be invariably passive and conforming across all institutional conditions."<sup>53</sup> Accordingly, formal institutions—including legal systems—can be designed consciously and deliberately.<sup>54</sup> As such, rules are the most basic

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<sup>49</sup> Bruce Kogut, *Qualitative Comparative Analysis of Social Science Data*, in THE OXFORD HANDBOOK OF COMP. INSTITUTIONAL ANALYSIS 139, 140 (2010). Inter-institutional systems are also important to explaining changes in institutional logics. Patricia H. Thornton & William Ocasio, *Institutional Logics*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 99, 117 (Royston Greenwood et al. eds., 2008); see also *infra* Part III.B.4 (discussing the logics of the Maoists and reformers).

<sup>50</sup> See generally Djelic, *supra* note 42; Paul DiMaggio, *The New Institutionalisms: Avenues of Collaboration*, 154 J. INSTITUTIONAL & THEORETICAL ECON. 696 (1998); W. Richard Scott, *The Adolescence of Institutional Theory*, 32 ADMIN. SCI. Q. 493 (1987).

<sup>51</sup> See, e.g., John W. Meyer, *Reflections on Institutional Theories of Organizations*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 790, 794–95 (2008) (discussing the phenomenological version of sociological institutionalism).

<sup>52</sup> Christine Oliver, *Strategic Responses to Institutional Processes*, 16 ACAD. MGMT. REV. 145, 146 (1991) [hereinafter *Strategic Responses*]; accord Raghu Garud et al., *Institutional Entrepreneurship as Embedded Agency: An Introduction to the Special Issue*, 28 ORG. STUD. 957, 961 (2007).

<sup>53</sup> *Strategic Responses*, *supra* note 52, at 146; Regnér & Edman, *supra* note 29, at 278. MNCs possess institutional agency. Xavier Martin, *Institutional Advantage*, 4 GLOBAL STRAT. J. 55, 61–66 (2014) (observing that MNCs possess institutional agency). "[I]nstitutional influences and firm discretion are truly complementary concepts." Martin, *supra*, at 66.

<sup>54</sup> Robert E. Bedeski, *The Evolution of the Modern State in China: Nationalist and Communist Continuities*, 27 WORLD POL. 541, 543 (1975); Michael Byers, *International Law*, in THE OXFORD HANDBOOK OF INT'L RELATIONS 612 (Christian Reus-Smit & Duncan Snidal eds., 2010). Both "rule makers" and "rule takers" try to influence institutions. See Wolfgang Streeck & Kathleen Thelen, *Introduction: Institutional Change in Advanced Political*

component of institutions and “regulate organizational action.”<sup>55</sup> Rules are “shaped by constructive interpretations embedded in a history of language, experience, memory, and trust.”<sup>56</sup> Still, this “openness in interpretation means that while institutions structure . . . governance and create a certain ‘bias,’ they ordinarily do not determine a political behavior or outcomes in detail.”<sup>57</sup> The power of institutions can be attenuated by, *inter alia*, individuals’ ignorance of which rules exist, or what a rule prescribes for specific actors in specific situations; moreover, “[t]here may be competing rules and competing interpretations of rules and situations.”<sup>58</sup> Historical institutionalists “view institutions first and foremost as the political legacies of concrete historical struggles.”<sup>59</sup> Accordingly, institutions are seen as “distributional instruments laden with power implications”<sup>60</sup> in which ambiguity is a permanent feature.<sup>61</sup> Institutions thus partly represent actors’ strategic

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*Economies*, in BEYOND CONTINUITY 1, 13–14 (Wolfgang Streeck & Kathleen Thelen eds., 2005) (detailing institutions as regimes with rules intermediating between rule makers and rule takers); *see also* Streeck & Thelen, *supra*, at 27 (observing that “actors are strategic and even those not involved in the design of an institution will do everything in their power to interpret its rules in their own interest or circumvent or subvert rules that clash with their interests”).

<sup>55</sup> James G. March & Johan P. Olsen, *Elaborating the “New Institutionalism”*, in THE OXFORD HANDBOOK OF POL. INSTITUTIONS 3, 8 (R.A.W. Rhodes et al. eds., 2006). *Rules* “refer to prescriptions commonly known and used by a set of participants to order repetitive, interdependent relationships,” while *prescriptions* “refer to which actions (or states of the world) are required, prohibited, or permitted.” Elinor Ostrom, *An Agenda for the Study of Institutions*, in POLYCENTRIC GAMES AND INSTITUTIONS 89, 91–93 (M.D. McGinnis ed., 2000).

<sup>56</sup> March & Olsen, *supra* note 55, at 8.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*; *accord* Scott, *supra* note 50, at 500–01; *see also* Evans & Gabel, *supra* note 3, at 371–82 (noting other sources of institutional attenuation).

<sup>59</sup> James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, in EXPLAINING INSTITUTIONAL CHANGE 7–8 (James Mahoney & Kathleen Thelen eds., 2010); *accord* Elizabeth Sanders, *Historical Institutionalism*, in THE OXFORD HANDBOOK OF POL. INSTITUTIONS 39, 39 (R.A.W. Rhodes et al. eds., 2008).

<sup>60</sup> Mahoney & Thelen, *supra* note 59, at 7–8.

<sup>61</sup> *Id.* at 11.

choices.<sup>62</sup> When “institutions are capable of being understood in more than one way, gaps between institutionalized expectations . . . and strategic action must be filled,” and “[t]hese gaps allow scope for creative interpretation, application, and enactment[.]”<sup>63</sup>

To summarize—institutions are the formal and informal rules that an organization must observe to be deemed “legitimate,” and while they thereby influence organizational behaviors, rarely are institutions so powerful as to deprive actors of their agency.<sup>64</sup> This allows for the importance of entrepreneurship as both an expression of free will despite one’s institutional embeddedness and as a method or strategy for coping with institutions. The entrepreneurship construct means more than the creation of new business ventures.<sup>65</sup> *Entrepreneurship*, broadly construed, “is the process of creating value by bringing together a unique combination of resources to exploit an opportunity.”<sup>66</sup> *Entrepreneurs*, then, “are people with vision who create new things.”<sup>67</sup> Entrepreneurship is exercised in various contexts “to bring about new economic, social, institutional, or cultural environments,”<sup>68</sup> such that entrepreneurs “create value where there was none before,” “within organizations and . . . in the marketplace.”<sup>69</sup>

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<sup>62</sup> Gregory Jackson, *Actors and Institutions*, in THE OXFORD HANDBOOK OF COMP. INSTITUTIONAL ANALYSIS 63, 64–65 (2010).

<sup>63</sup> *Id.* at 78.

<sup>64</sup> *Agency* is “an actor’s ability to have some effect on the social world” such as “altering the rules[.]” SCOTT, *supra* note 26, at 94 (noting also that “[t]he presence of agency presumes a nondeterminant, ‘voluntaristic’ theory of action”); accord Julie Battilana, *Agency and Institutions: The Enabling Role of Individuals’ Social Position*, 13 ORG. 653, 657 (2006).

<sup>65</sup> DONALD F. KURATKO, ENTREPRENEURSHIP: THEORY, PROCESS, AND PRACTICE 3 (10th ed. 2014); see also Scott Shane & S. Venkataraman, *The Promise of Entrepreneurship as a Field of Research*, 25 ACAD. MGMT. REV. 217, 218 (2000) (discussing the focal points of the entrepreneurship domain).

<sup>66</sup> MICHAEL H. MORRIS ET AL., CORPORATE ENTREPRENEURSHIP & INNOVATION 9 (3rd ed. 2011) (internal citation and quotation marks omitted).

<sup>67</sup> Fligstein, *supra* note 43, at 107.

<sup>68</sup> Elco van Burg & A. Georges L. Romme, *Creating the Future Together: Toward a Framework for Research Synthesis in Entrepreneurship*, 38 ENTRE. THEORY & PRAC. 369, 369 (2014).

<sup>69</sup> MORRIS ET AL., *supra* note 66, at 9.

*Institutional entrepreneurs*<sup>70</sup> are individuals or organizations who create, transform, or destroy institutions.<sup>71</sup> Hence, *institutional entrepreneurship* “refers to the ‘activities of actors . . . who leverage resources to create new institutions or to transform existing ones.’”<sup>72</sup> Institutional entrepreneurship can thus be viewed not only as an extension of institutional theory (with its emphasis on constraints), but also as an extension of entrepreneurship (with its emphasis on agency despite one’s constraints).<sup>73</sup> Its products include new regulatory schema, organizational forms, practices, and identities.<sup>74</sup> One key motive for trying to change institutions is to legitimize the entrepreneur’s existence and activities<sup>75</sup>—a topic addressed in Part III with respect to the CCP’s attempt to legitimate its ongoing political monopoly after Mao, in part through a new legal system.

Institutions and entrepreneurship are thus linked.<sup>76</sup> Because the context in which it occurs is crucial to our understanding of entrepreneurship,<sup>77</sup> this nexus of entrepreneurship and institutions is also linked to *history*.<sup>78</sup> Historical analysis can “help us understand how managers and other actors may go against prevailing practices,

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<sup>70</sup> Pacheco et al., *supra* note 48, at 981.

<sup>71</sup> Julie Battilana et al., *How Actors Change Institutions: Towards a Theory of Institutional Entrepreneurship*, 3 ACAD. MGMT. ANNALS 65, 66, 72 (2009).

<sup>72</sup> Cynthia Hardy & Steve Maguire, *Institutional Entrepreneurship and Change in Fields*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 261, 261 (Royston Greenwood et al. eds., 2nd ed. 2017).

<sup>73</sup> See Nelson Phillips & Paul Tracey, *Opportunity Recognition, Entrepreneurial Capabilities and Bricolage: Connecting Institutional Theory and Entrepreneurship*, 3 STRATEGIC ORG. 313, 316–18 (2007).

<sup>74</sup> Hardy & Maguire, *supra* note 72, at 273.

<sup>75</sup> Lynne G. Zucker, *Institutional Theories of Organization*, 13 ANN. REV. SOC. 443, 451 (1987); accord Pacheco et al., *supra* note 48, at 980.

<sup>76</sup> José María Veciana & David Urbano, *The Institutional Approach to Entrepreneurship Research: Introduction*, 4 INT’L ENTREP. & MGMT. J. 365 (2008).

<sup>77</sup> Welter & Smallbone, *supra* note 48, at 107.

<sup>78</sup> R. Daniel Wadhwani, *Entrepreneurship in Historical Context: Using History to Develop Theory and Understand Process*, in A RESEARCH AGENDA FOR ENTREPRENEURSHIP AND CONTEXT 65 (Friederike Welter & William B. Gartner eds., 2016).

break the rules-of-the game, or invent new ones”<sup>79</sup>—that is, how actors become institutional entrepreneurs. With these connections in mind we now turn to the analytical methods relevant to assessing the flexibility of Chinese law, and the purposes and uses of that flexibility by the CCP.

### *B. Strategy in Context and the Historical Event Sequencing Methodology*

The significance of entrepreneurship to our topic was noted above. An equally important concept is *strategy*<sup>80</sup> in that the CCP has used flexible legal institutions at the heart of its post-Mao survival strategy. These institutions, in turn, now set the context for MNCs’ strategies in China.<sup>81</sup> More specifically, the PRC’s flexible legal institutions have enabled the CCP to maintain a competitive advantage in institutional entrepreneurship across time.<sup>82</sup>

Studies should account for the historical embeddedness of strategy,<sup>83</sup> but few do.<sup>84</sup> *Historical embeddedness* refers to “the ways in which strategic processes and practices . . . are embedded in

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<sup>79</sup> Eero Vaara & Juha-Antti Lamberg, *Taking Historical Embeddedness Seriously: Three Historical Approaches to Advance Strategy Process and Practice Research*, 41 ACAD. MGMT. REV. 633, 644 (2016).

<sup>80</sup> *Strategy* in the political context refers to how actors accumulate and deploy power. ROBERT MACINTOSH & DONALD MACLEAN, STRATEGIC MANAGEMENT: STRATEGISTS AT WORK 13–14 (2015). *Strategy* in the MNC context concerns “how the multi-national creates value across countries[.]” DAVID COLLINS, INTERNATIONAL STRATEGY 4 (2014).

<sup>81</sup> See *infra* Parts III, V.

<sup>82</sup> This Paper imports several concepts from business and argues that they are applicable in the PRC’s legal and political contexts. *Competitive advantage*, for instance, is typically defined in business as the capabilities and resources that give a firm an advantage over its rivals and that result in higher profits. See, e.g., Benjamin Maury, *Sustainable Competitive Advantage and Profitability Persistence: Sources versus Outcomes for Assessing Advantage*, 84 J. BUS. RES. 100, 101 (2018). In this paper, the CCP’s competitive advantage refers to the capabilities and resources that give the Party an advantage against any group that might compete with it for power. The flexibility of the PRC’s legal system (a resource) affords the CCP its competitive advantage in institutional entrepreneurship (a capability).

<sup>83</sup> See generally Vaara & Lamberg, *supra* note 79.

<sup>84</sup> *Id.* at 636.

and defined by sociohistorical environments.”<sup>85</sup> Strategy thus “shapes and is shaped by its context”<sup>86</sup> and is both enabled and constrained by institutions.<sup>87</sup> Even activities not traditionally seen as “strategic” may come to be viewed as such in their historical context.<sup>88</sup> Hence, “analysis of historical embeddedness adds to our understanding of the construction of organizational strategies or their emergence in context.”<sup>89</sup> Vaara and Lamberg “call for specific applications of historical analysis” to questions of strategy.<sup>90</sup> This Paper will use event sequencing to explore the issue of institutional entrepreneurship in the CCP’s historical context.

The strategy of *any* organization—including a political one—is better understood in its historical context.<sup>91</sup> History—like institutions—forms a crucial element of context. Historical analysis “can highlight how strategic practices are enacted” and “how actors make use of them[.]”<sup>92</sup> Answering why the PRC’s legal institutions are so flexible will allow Part III below to illuminate the strategic value of such institutions to the CCP, given its historical context.<sup>93</sup> Moreover, it is in this very context that MNCs in China today find themselves embedded, and thus, firms might approach the law strategically through a type of embedded agency<sup>94</sup> called *legal entrepreneurship*.<sup>95</sup> The interrelationships of these ideas and their overlap with this Paper’s organization are depicted in Figure 1.

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<sup>85</sup> *Id.* at 634.

<sup>86</sup> *Id.* at 636.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 641.

<sup>89</sup> *Id.* at 649.

<sup>90</sup> *Id.* at 650.

<sup>91</sup> *See generally* STEVEN J. KAHL ET AL., HISTORY AND STRATEGY (Steven J. Kahl et al., 2012).

<sup>92</sup> Vaara & Lamberg, *supra* note 79, at 644.

<sup>93</sup> This is essential in China, where history has diffused strategy as a core cultural element. HONG LIU, THE CHINESE STRATEGIC MIND 135–40 (2015).

<sup>94</sup> Vaara & Lamberg, *supra* note 79, at 641–42 (“By embedded agency, we mean the historical and contextual influence exercised by top executives . . . [over] the strategies of the organization.”).

<sup>95</sup> *See infra* Part V.

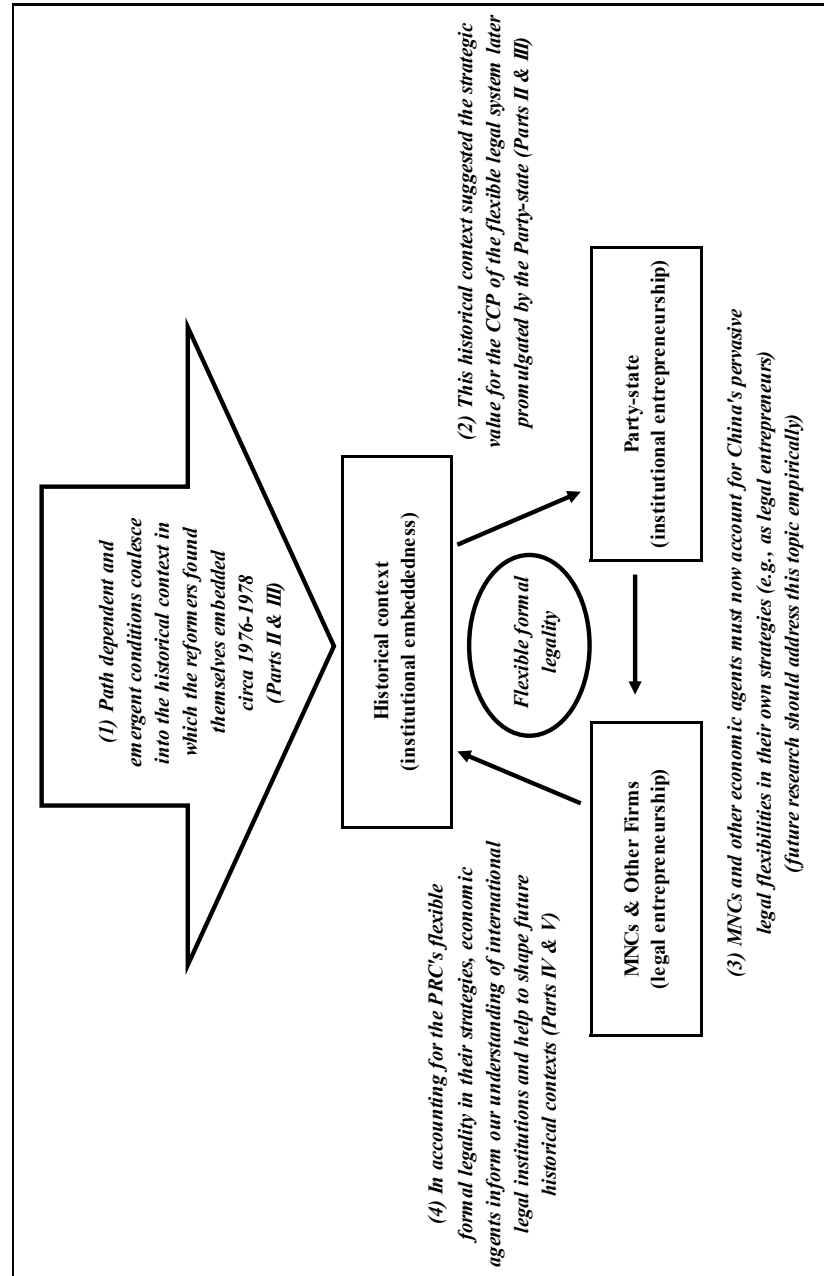


Figure 1. The interconnectedness of this paper's major themes and their overlap with the paper's organization.

A framework is thus needed that accounts for both institutions and their historical context. *Historical event sequencing* is a methodology for examining the processes and causes of institutional change by taking “into account the temporal effect and sequencing of actions.”<sup>96</sup> The works of Sewell, Thornton et al., and Nasra and Dacin elaborate the contours of this approach. Tracking many tenets of institutional theory,<sup>97</sup> William Sewell argues that *historical events* are “sequences of occurrences that result in transformations of structures” such that an event “becomes a historical event . . . when it touches off a chain of occurrences that durably transforms previous structures and practices.”<sup>98</sup> Such changes are “clustered into relatively intense bursts,” altering social relations “in ways that could not be fully predicted from the gradual changes that may have made them possible.”<sup>99</sup> Some temporal duration exists between a rupture and the resultant structural change.<sup>100</sup> Historical events are significant because they “[alter] the nature of the causal nexus in which social interactions take place.”<sup>101</sup>

Sewell showed how the Bastille came to be regarded as the watershed moment of the French Revolution,<sup>102</sup> utilizing a

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<sup>96</sup> Rasha Nasra & M. Tina Dacin, *Institutional Arrangements and International Entrepreneurship: The State as Institutional Entrepreneur*, 34 ENTRE. THEORY & PRAC. 583, 588 (2010); see also Thornton & Ocasio, *supra* note 49, at 116–17 (defining event sequencing as “the temporal and sequential unfolding of unique events that dislocate, rearticulate, and transform the interpretation and meaning of cultural symbols and social and economic structures”). Related approaches also emphasize processes across time. PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 2–3 (2004).

<sup>97</sup> See William H. Sewell, Jr., *Historical Events as Transformations of Structures: Inventing Revolution at the Bastille*, 25 THEORY & SOC. 841, 842 (1996).

<sup>98</sup> *Id.* at 843.

<sup>99</sup> *Id.* Still, institutions also change gradually. See Mahoney & Thelen, *supra* note 59, at 1. Historical analysis is beneficial because “gradual . . . changes often only ‘show up’ or ‘register’ as change if we consider a somewhat longer timeframe[.]” *Id.* at 2.

<sup>100</sup> Sewell, *supra* note 97, at 845.

<sup>101</sup> *Id.* at 843.

<sup>102</sup> See generally *id.*

narrative<sup>103</sup> to illustrate how the actors interpreted their context,<sup>104</sup> how various groups worked together and why,<sup>105</sup> and how other powerful interests reacted to the events.<sup>106</sup> Event sequencing requires the reconstruction of events and actors' interpretations from a given rupture to the resulting institutional change.<sup>107</sup> Sewell's approach is thus crucially concerned with *processes*. This suggests that to understand why China adopted a system of flexible legality, we must reconstruct the historical processes that produced the legal system and actors' likely interpretations of key events.<sup>108</sup>

Sewell also showed that institutional entrepreneurs are greatly aided by the possession of legitimacy.<sup>109</sup> Victors in a struggle over institutions are usually those who can conflate their position with 'the legitimate view.'<sup>110</sup> Events help to shape the context in which they occur,<sup>111</sup> and are also shaped by that context.<sup>112</sup> Historical events often represent acts of collective creativity in which "new arguments [are] tried out."<sup>113</sup> Their effects must sometimes be sanctioned by the state to achieve longevity.<sup>114</sup>

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<sup>103</sup> *Id.* Historical narratives are "reconstructions, assembled within the virtual laboratories of [historians'] minds, of the processes that produced whatever structure it is we're seeking to explain . . . [W]e ask ourselves, 'How could this have happened?'" JOHN LEWIS GADDIS, *THE LANDSCAPE OF HISTORY: HOW HISTORIANS MAP THE PAST* 105 (2002).

<sup>104</sup> Sewell, *supra* note 97, at 848–49.

<sup>105</sup> *Id.* at 850.

<sup>106</sup> *Id.* at 850–51.

<sup>107</sup> *Id.* at 852.

<sup>108</sup> *See infra* Part III. Historical analysis aims to identify actors' own contemporaneous interpretations. GADDIS, *supra* note 103, at 106–07.

<sup>109</sup> Sewell, *supra* note 97, at 853, 856–58; *see also supra* note 44 and accompanying text (defining legitimacy).

<sup>110</sup> Sewell, *supra* note 97, at 859.

<sup>111</sup> *Id.* at 856.

<sup>112</sup> *Id.* at 862–66.

<sup>113</sup> *Id.* at 867–68.

<sup>114</sup> *Id.* at 874–75.

Thornton et al., examined changes in the organizational governance of certain industries.<sup>115</sup> Building on Sewell,<sup>116</sup> these authors “theorized [historical events] as the occurrences that dislocate, rearticulate, and transform structures,” the sequencing of which “produces more events that reinforce or erode the dominance of the incumbent logic.”<sup>117</sup> The temporal and spatial ordering of events can help to explain *why* they preserve, modify, or destroy institutions. A “[h]istorical sequencing of events provides the temporal framework to understand how structural overlap provides access to different institutional logics and how institutional entrepreneurs . . . turn [these logics] into actions that maintain stability or initiate change.”<sup>118</sup> This approach recognizes the state as a primary actor of interest.<sup>119</sup> Central to this work is the effect of contextual change on the struggle between defenders of existing institutions and their challengers:<sup>120</sup> conflicts between institutional defenders and attackers amount to struggles between rival sets of institutional entrepreneurs.<sup>121</sup> As with Sewell, legitimacy was central to explaining institutional change.<sup>122</sup>

Political historians urge that “we must . . . bring the state back in” because “[s]tate power matters . . . as a force for transforming social structures[.]”<sup>123</sup> Building, in turn, upon Thornton et al., Nasra and Dacin applied historical event sequencing to show how a government can act as an institutional

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<sup>115</sup> Patricia H. Thornton et al., *Institutional Logics and Institutional Change in Organizations: Transformation in Accounting, Architecture, and Publishing*, in 23 RES. IN THE SOC. OF ORGS. 125 (Candace Jones & Patricia H. Thornton eds., 2005).

<sup>116</sup> *Id.* at 130.

<sup>117</sup> *Id.* The competing logics of the Maoists and reformers are detailed in Part III.B.4, *infra*. See also WALDER, *supra* note 39, at 16 (observing that “[p]olitical revolutions can be viewed as a contest between two organizations: the established state and insurgent forces”).

<sup>118</sup> Thornton et al., *supra* note 115, at 131.

<sup>119</sup> *Id.* at 128.

<sup>120</sup> *Id.* at 139, 145.

<sup>121</sup> *Id.* at 146.

<sup>122</sup> *Id.* at 148, 157.

<sup>123</sup> Jon Lawrence, *Political History*, in WRITING HISTORY: THEORY AND PRACTICE 209, 224 (Stefan Berger et al. eds., 2nd ed. 2010) (internal citation and quotation marks omitted).

entrepreneur.<sup>124</sup> Event sequencing implies path dependence: “once a state or political actor proceeds along a certain path, the costs of . . . changing paths progressively increases.”<sup>125</sup> Nasra and Dacin explain how sequenced events facilitated Dubai’s creation of a new legal system.<sup>126</sup> These scholars linked resources and agency to show that “the state [can] simultaneously create and manage multiple institutional frameworks.”<sup>127</sup> Dubai crafted new legal institutions to attract foreign entrepreneurs.<sup>128</sup>

Like Nasra and Dacin’s study, the research presented here concerns the creation of legal institutions.<sup>129</sup> In contrast to Dubai, however, foreign investors generally have engaged the PRC *despite* its legal apparatus, and not because of it.<sup>130</sup> Significantly, “state-business relations within [nondemocratic] contexts are highly contingent on the nature of the institutional environments” in place.<sup>131</sup> As an institutional entrepreneur, Dubai’s chief concern was attracting foreign investment. In contrast, while the CCP certainly desires foreign investment,<sup>132</sup> economic development in China is embraced only to the extent it is perceived not to threaten the CCP’s political monopoly.<sup>133</sup> Following Nasra and Dacin’s

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<sup>124</sup> Nasra & Dacin, *supra* note 96, at 584. Nasra and Dacin’s paper is a seminal work in entrepreneurship. Others have also characterized the PRC state as an institutional entrepreneur. *See, e.g.,* John Child et al., *Institutional Entrepreneurship in Building an Environmental Protection System of the People’s Republic of China*, 28 ORG. STUD. 1013 (2007).

<sup>125</sup> Nasra & Dacin, *supra* note 96, at 588.

<sup>126</sup> *Id.* at 589.

<sup>127</sup> *Id.* at 595.

<sup>128</sup> *Id.*

<sup>129</sup> *See infra* Part III.

<sup>130</sup> YUHUA WANG, TYING THE AUTOCRAT’S HANDS 7–8, 44–45 (2015). Nevertheless, PRC law can represent an asset for legal entrepreneurs. *See generally* Evans & Gabel, *supra* note 3.

<sup>131</sup> Nasra & Dacin, *supra* note 96, at 584.

<sup>132</sup> *See infra* Part III.

<sup>133</sup> *See supra* text accompanying note 37 (noting the key assumption that the CCP’s top priority is the preservation of its political monopoly); *see also infra* Part III. Economic development undeniably *is* a top priority for the Party. Margaret K. Lewis, *Criminal Law Pays: Penal Law’s Contribution to China’s Economic Development*, 47 VAND. J. TRANSNAT’L L. 371, 373–75 (2014). It is tempting, then, to simply conflate development with the Party’s survival. Part III, *infra*, however, suggests that a more nuanced set of boundaries is involved. This

approach, this Paper illustrates the nature of the CCP's institutional entrepreneurship "by tracking the conditions and events that have enabled the creation of"<sup>134</sup> the PRC's flexible formal legality.<sup>135</sup>

In addition to event sequencing, this analysis is also informed by widely recognized guidelines in historical studies. Of course, just because one event happens before another does not mean that the earlier event caused the later one.<sup>136</sup> But effective narrative will combine chronology with causation to show how certain events caused later ones, or facilitated their occurrence.<sup>137</sup>

John Lewis Gaddis' historical analytical approach couples imagination with logic to explain today's observable structures by deducing the past processes that must have produced such structures.<sup>138</sup> This Paper seeks only to explain:<sup>139</sup> the task of historical analysis is to explain the past, and, unlike the social sciences, is not to make predictions about the future.<sup>140</sup> Hence, historians practice "particular generalization,"<sup>141</sup> using theory to show how past processes produced present structures.<sup>142</sup>

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argument is consistent with China's pre-Communist experience: scholars have noted "the primacy of central political control over the subordinated processes of economic growth and cultural diversification" in earlier periods of Chinese history as well. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 126–27 (2d enlarged ed. 2006).

<sup>134</sup> Nasra & Dacin, *supra* note 96, at 595.

<sup>135</sup> See *infra* Part III.

<sup>136</sup> RICHARD MARIUS & MELVIN E. PAGE, A SHORT GUIDE TO WRITING ABOUT HISTORY 36 (9th ed. 2015).

<sup>137</sup> WILLIAM KELLEHER STOREY, WRITING HISTORY: A GUIDE FOR STUDENTS 94 (4th ed. 2013).

<sup>138</sup> GADDIS, *supra* note 103, at 39–41. This is akin to the natural sciences in which thought experiments substitute for laboratory experiments. *Id.*

<sup>139</sup> MARIUS & PAGE, *supra* note 136, at 36–37.

<sup>140</sup> GADDIS, *supra* note 103, at 56–60, 111–15.

<sup>141</sup> *Id.* at 60–63. "Historians generalize . . . but only from the knowledge of particular outcomes." *Id.* at 66. The macro-effect resulting from innumerable actors is difficult to predict. *Id.* at 74–78. A given system can contain both linear and non-linear relationships, such that the system is "simple and complex at the same time." *Id.* at 76.

<sup>142</sup> *Id.* at 60–63. "[S]ystems themselves become entangled in events," and thus, consistently accurate forecasting is frustrated when variables proliferate. *Id.* at 65.

Explanation is the historian's "chief priority."<sup>143</sup> Like lawyers, historians often embrace contingent, rather than categorical, causation in which 'it depends' precedes an analysis.<sup>144</sup> Thus, while we might anticipate that the PRC's flexible legal system will have ongoing value to the CCP and that the CCP will attempt to preserve this system, this Paper makes no prediction on whether it will succeed.<sup>145</sup>

Gaddis' guidelines for establishing causation are noteworthy. Since there is no precise rule for when to stop tracing the causes of an event, the 'principle of diminishing relevance' advises that "the greater the time that separates a cause from a consequence, the less relevant we presume that cause to be."<sup>146</sup> More generally, "[c]auses always have contexts, and to know the former we must understand the latter."<sup>147</sup> The historical analysis needs "points of criticality at which stability becomes unstable"—

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<sup>143</sup> *Id.* at 62.

<sup>144</sup> *Id.* at 64.

<sup>145</sup> See BRUCE J. DICKSON, *THE DICTATOR'S DILEMMA: THE CHINESE COMMUNIST PARTY'S STRATEGY FOR SURVIVAL* 1 (2016) (noting predictions of the Party's downfall, and that these errantly discount the Party's adaptability) [hereinafter *THE DICTATOR'S DILEMMA*]; FEWSMITH, *supra* note 17, at 6 (noting little evidence that interest groups are affecting political reform); PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM* 13–14 (2013) (noting forces promoting the legitimacy of formal law in China). Scholars have pointed to the negative tradeoffs for the Party of its approach to law. See, e.g., Benjamin L. Liebman, *Assessing China's Legal Reforms*, 23 COLUM. J. ASIAN L. 17, 27 (2009) [hereinafter *Assessing China's Legal Reforms*]; Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011); Suli Zhu, *Paradoxes of Legal Development in 20th Century China from the Perspective of Modernisation*, 28 HONG KONG L.J. 429, 435–37 (1998). Still, the assumption that China will inevitably democratize is highly suspect. See generally Gunter Schubert, *One-Party Rule and the Question of Legitimacy in Contemporary China: Preliminary Thoughts on Setting Up a New Research Agenda*, 17 J. CONTEMP. CHINA 191 (2008).

<sup>146</sup> GADDIS, *supra* note 103, at 96.

<sup>147</sup> *Id.* at 97 "[W]hile context does not directly *cause* what happens, it can certainly determine consequences." *Id.* (emphasis in original).

that is, “the point at which these processes took a distinctive, or abnormal, or unforeseen course.”<sup>148</sup>

The analysis in Part III relies mostly upon secondary historical sources.<sup>149</sup> Other institutional works, including Nasra and Dacin, rely solely upon secondary sources.<sup>150</sup> While history is central to the analysis here, the overarching purpose is to explain the institutional evolution of the PRC's legal regime through the application of theory to what is already known to historians, and not to offer an original interpretation of primary historical sources as such. Accordingly, the Paper takes an essentially historiographical approach to the sources underlying the analysis in Part III.<sup>151</sup>

### III. EXPLAINING CHINA'S LEGAL FLEXIBILITIES

The evolution of PRC law has been tumultuous.<sup>152</sup> The institutional origins of the PRC's present legal system began nearly a century-and-a-half before its creation, and hence, the historical circumstances surrounding its creation are vitally important to understanding the rationale for its flexible design. Following Mao Zedong's death in 1976, the CCP's reform factions gained power,<sup>153</sup>

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<sup>148</sup> *Id.* at 98. Or, what Gaddis describes as “punctuations in some existing equilibrium[.]” *Id.* at 99–100. *But see supra* note 99 (discussing endogenous institutional change).

<sup>149</sup> In original works of history, primary sources are best. *See, e.g.,* JIM CULLEN, *ESSAYING THE PAST: HOW TO READ, WRITE, AND THINK ABOUT HISTORY* 23–25 (3rd ed. 2013). But in wider topical treatments, secondary sources are more prominent. ANTHONY BRUNDAGE, *GOING TO THE SOURCES: A GUIDE TO HISTORICAL RESEARCH AND WRITING* 25 (5th ed. 2013).

<sup>150</sup> *See* Nasra & Dacin, *supra* note 96, at 588–89.

<sup>151</sup> Secondary sources “provide a broader perspective,” allowing one “to see [events] in context.” MARY LYNN RAMPOLLA, *A POCKET GUIDE TO WRITING IN HISTORY* 11 (8th ed. 2015). And in historiographical work, one can “evaluate the viewpoints of two or more historians[.]” *Id.* at 40.

<sup>152</sup> For several excellent overviews, *see* JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 31–55 (2008); TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* 34–107 (3rd ed. 2011); Frederick C. Teiwes, *Mao Zedong in Power (1949–1976)*, in *POLITICS IN CHINA* 63–102 (William A. Joseph ed., 2nd ed. 2010).

<sup>153</sup> *See infra* Parts III.B.4, III.C.

and it was these ‘reformers’<sup>154</sup> who constructed a new legal system during the 1980’s and 1990’s.<sup>155</sup> The flexibility of the PRC’s legal system has been attributed to many factors, including its relative newness.<sup>156</sup> While these factors also encouraged the PRC’s legal flexibility, another fundamental force was at work: PRC law is intended to *serve several strategic purposes*, simultaneously shaping the PRC’s broader environment and promoting the CCP’s political monopoly.<sup>157</sup> Legal flexibility is a strategic asset for the CCP.<sup>158</sup> Before exploring in detail *why* the present system was designed in this manner, however, we first clarify *how* flexibility permeates Chinese law.

### A. *How Flexibility Defines the Modern Chinese Legal System*

Mao’s successors constructed the PRC legal system with their own priorities in mind. Like China’s previous rulers, the reformers had discovered the advantages of legal flexibility and

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<sup>154</sup> DREYER, *supra* note 36, at 113–14 (noting that “[t]hose who preferred to break sharply with the Maoist past are generally termed reformers”).

<sup>155</sup> Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for China*, 37 N.Y.U. J. INT’L L. & POL. 423, 423–24 (2005); accord JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 705 (1990) [hereinafter *THE SEARCH*].

<sup>156</sup> See, e.g., Leontine D. Chuang, Comment, *Investing in China’s Telecommunications Market: Reflections on the Rule of Law and Foreign Investment in China*, 20 N.W. J. INT’L L. & BUS. 509, 523–24 (2000).

<sup>157</sup> See, e.g., Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 CHINA Q. 673, 673 (1999). The “PRC legal system reflects the commitment of the Chinese Communist Party to maintaining its monopoly on political power.” *Id.* at 673; accord Sarah Biddulph, *The Production of Legal Norms: A Case Study of Administrative Detention in China*, 20 UCLA PAC. BASIN L.J. 217, 274 (2003) (discussing the Legislation Law as an example); see also *supra* text accompanying note 37.

<sup>158</sup> Nara Dillon, *Governing Civil Society: Adapting Revolutionary Methods to Serve Post-Communist Goals*, in *MAO’S INVISIBLE HAND* 138, 157 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011). This is distinguishable from other contexts in which states have used “strategic ambiguity.” See, e.g., Jeffrey Adam Sachs, “Native Courts” and the Limits of the Law in Colonial Sudan: *Ambiguity as Strategy*, 38 LAW & SOC. INQUIRY 973 (2013). More generally, some flexibility can actually promote an institution’s stability. Claus Offe, *Designing Institutions in East European Transitions*, in *THE THEORY OF INSTITUTIONAL DESIGN* 199, 209 (1996).

were content to retain it.<sup>159</sup> Thus, “[f]lexibility is a key element of the [PRC] legal system,”<sup>160</sup> reflecting a dichotomy between the formal law (as stated officially) and the law in practice (as applied).<sup>161</sup> PRC law retains this flexibility by design,<sup>162</sup> functioning largely to define the parameters within which lower-level officials may act.<sup>163</sup>

Peter Howard Corne’s seminal book on China’s administrative apparatus, *Foreign Investment in China*,<sup>164</sup> stresses the prominence of legal flexibility. “China has opted for a legal system that is in essence as fluid and changeable as the economy and society which it is supposed to regulate . . . [L]aws are

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<sup>159</sup> Franz Michael, *The Role of Law in Traditional, Nationalist and Communist China*, 9 CHINA Q. 124, 143–47 (1962) (illustrating some advantages of flexibility); accord HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* 125 (1950). In contrast to the USSR, the PRC favored extreme fluidity in the 1960s. JOHN N. HAZARD, *COMMUNISTS AND THEIR LAW* 100 (1969). The PRC’s system of administrative specification, discussed in Part III.A, mimics a somewhat similar imperial system. See R. Randle Edwards, *The Role of Case Precedent in the Qing Judicial Process as Reflected in Appellate Rulings*, in UNDERSTANDING CHINA’S LEGAL SYSTEM 180, 180–81 (C. Stephen Hsu ed., 2003); PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 104 (1997).

<sup>160</sup> *Assessing China’s Legal Reforms*, *supra* note 145, at 28; accord David Kennedy & Joseph E. Stiglitz, *Institutional Foundations for the Chinese Market Economy: The State*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS 455, 459 (David Kennedy & Joseph E. Stiglitz eds., 2013).

<sup>161</sup> William C. Jones, *Trying to Understand the Current Chinese Legal System*, in UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 7, 35–36 (C. Stephen Hsu ed., 2003); Evans & Gabel, *supra* note 3, at 372, 377–78.

<sup>162</sup> Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO’S INVISIBLE HAND 165, 172 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011).

<sup>163</sup> CORNE, *supra* note 159. Examples of flexibility and uncertainty in Chinese law are cited often in Western law literature, *see, e.g.*, Rongjie Lan, *A False Promise of Fair Trials: A Case Study of China’s Malleable Criminal Procedure Law*, 27 UCLA PAC. BASIN L.J. 153 (2010); Wu Xiaofeng, Comment, *An Analysis of Wrongful Convictions in China*, 36 OKLA. CITY U. L. REV. 451, 461, 465 (2011); Mei Ning Yan, *China and the Prior Consent Requirement: A Decade of Invasion and Counter-Invasion by Transfrontier Satellite Television*, 25 HASTINGS COMM. & ENT. L.J. 265, 302 n.160 (2003).

<sup>164</sup> See generally CORNE, *supra* note 159.

intentionally made ambiguous to enable flexibility in interpretation and implementation.”<sup>165</sup> Flexibility and ambiguity do not merely exist in the contemporary PRC legal system; they *define* the contemporary PRC legal system.

Flexible law is ideologically palatable in the PRC because it is “consistent with socialism.”<sup>166</sup> But more than philosophy is at work because the CCP enjoys a nearly unlimited range of options to shape or respond to societal developments, and all of its actions plausibly can be described as consistent with the law (and therefore, as *legitimate*).<sup>167</sup> One official summarized that “law should not be too specific lest it tie our hands and feet in the face of the rapidly changing situation.”<sup>168</sup> The CCP’s hope is to maintain its flexibility without sacrificing its legitimacy or social stability.<sup>169</sup> The resultant law-making process is known as *administrative specification*.<sup>170</sup>

Statutes, beginning as high as the National People’s Congress, pronounce policies in deliberately broad language, serving “to provide only a thumbnail sketch of the parameters of regulation.”<sup>171</sup> Legal drafting is characterized by calculated vagueness and ambiguity, undefined terms, broadly worded discretions, omissions, principle-like pronouncements, and general

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<sup>165</sup> *Id.* at 94; *accord* Corne, *supra* note 7, at 376–78. Chinese legal flexibility serves to decouple China’s external goals from its internal ones. *See infra* Part III.C. Authoritarians decouple by giving the impression of public involvement, while “denying tangible policy authority and squelching independent political activity in practice.” *See* Dan Slater, *Altering Authoritarianism*, in *EXPLAINING INSTITUTIONAL CHANGE* 132, 134–135 (James Mahoney & Kathleen Thelen eds., 2010).

<sup>166</sup> CORNE, *supra* note 159, at 93–94.

<sup>167</sup> *Id.* at 94.

<sup>168</sup> Gao Xi-Ching, *Today's Legal Thinking and Its Economic Impact in China*, 52 *LAW & CONTEMP. PROBS.* 89, 113 (1989) (quoting Wang Hanbin’s March 7, 1985 speech).

<sup>169</sup> *See infra* Part III.C.

<sup>170</sup> “Administrative specification is the process by which law and regulations are interpreted, at one level, by State Council departments, and at another level, by local people’s congresses and administrative bodies which apply them to local reality.” CORNE, *supra* note 159, at 104. Otherwise stated, “[a]dministrative specification is the process by which principle-like laws are narrowed down through a succession of enactments so that they can be applied to local reality.” *Id.* at 105.

<sup>171</sup> *Id.* at 95.

catch-all phrases.<sup>172</sup> Lower-level people's congresses likewise enact statutes with these features.

Once a statute is promulgated, administrative bodies such as the State Council—the PRC's national executive body—create rules, interpretations or even informal 'normative documents' to build upon the statute in question.<sup>173</sup> This process cascades downward, as each successively lower level of the state 'specifies' higher-order laws, creating more specific artifacts.<sup>174</sup> Of course, by the time this cascade reaches the bottom rungs of the state, myriad variations appear in the laws across localities. But this diversity is deemed both a natural result of specification and an affirmative good.<sup>175</sup> The specification process empowers local officials to apply national policies to their particular circumstances—in theory, to best

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<sup>172</sup> *Id.* Others have similarly noted that PRC statutes are conspicuously ambiguous—to such an extent that the importance and difficulty of statutory interpretation are greatly heightened. *See, e.g.,* Ji Li, *The Power Logic of Justice in China*, 65 AM. J. COMP. L. 95, 110 (2017) (noting that the PRC Supreme People's Court engages in statutory interpretation “frequently since most Chinese statutes are too vague and ambiguous to apply directly”). Still other scholars have discussed at length the ambiguities in particular PRC statutes. *See, e.g.,* Deng Ruiping & Duan Xiaosong, *Promoting Impartiality of International Commercial Arbitrators Through Chinese Criminal Law: Arbitration by “Perversion of Law”*, 10 BYU INT'L L. & MGMT. REV. 109, 125 (2014) (discussing the 2006 amendments to the PRC Criminal Law and noting that “the Chinese statute is ambiguous”); Gregory Hwa, *Breaking Out of the West, Advancing into Asia: Cultural Considerations for Brand Management in China*, 25 MARQ. SPORTS L. REV. 399, 399–400 (2015) (noting that recent amendments to the PRC “trademark statute have created substantial ambiguity as to how, and if any, safeguards against infringement will actually apply”); Wei Wen, *How American Common Law Doctrines May Inform Mainland China to Achieve Certainty in Land Sale Contracts*, 17 ASIAN-PAC. L. & POL'Y J. 2, 17–20 (2015) (discussing ambiguities in PRC contract and real property laws in the context of land sales).

<sup>173</sup> CORNE, *supra* note 159, at 104–05.

<sup>174</sup> *Id.* at 93–145 (discussing flexibility in the law's creation); *id.* at 189–242 (discussing flexibility in implementation). For more on legal artifacts, *see* Luka Burazin, *Can There be an Artifact Theory of Law?*, 29 RATIO JURIS 385 (2016) (characterizing laws as institutional artifacts in that they owe their existence to human activities and require collective intentionality).

<sup>175</sup> *See* CORNE, *supra* note 159, at 126, 147; *accord* Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.–China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 36–37 (2001).

serve the CCP's interests in each place.<sup>176</sup> It also encourages stakeholders to bargain peacefully within existing institutions, expressing themselves without rebelling against the institutional order.<sup>177</sup> A given statute, rule, regulation or interpretation must be consistent with statements of higher-level authorities and with any applicable CCP policies, which may or may not have been made public.<sup>178</sup>

Earlier, 'flexible legal institutions' were defined as those whose meanings and applications are substantially open to question. Accordingly, those who encounter flexible institutions experience uncertainty as to the institutions' precise meanings, the implications of such institutions for their actions, and even whether the institutions in question apply to them.<sup>179</sup> Three types of flexibility—substantive, enforcement, and systemic—exist to some degree in every legal system.<sup>180</sup> The laws of most nations are reduced to writing. When that writing contains gaps or ambiguities, *substantive flexibilities* arise.<sup>181</sup> Substantive flexibilities impose uncertainties on regulated parties by failing to specify easily and comprehensively the meanings and applications of the rules delineated in official, written form.<sup>182</sup> PRC law today contains high degrees of substantive flexibility, as when a statute or administrative rule is rife with the vagueness or ambiguity, undefined terms,

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<sup>176</sup> "Legal fragmentation is an essential part of China's political system[.]" YONGNIAN ZHENG, CONTEMPORARY CHINA: A HISTORY SINCE 1978, at 140 (2014); accord Gabriella Montinola et al., *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50 (1995).

<sup>177</sup> See, e.g., Philip C.C. Huang, *Divorce Law Practices and the Origins, Myths, and Realities of Judicial 'Mediation' in China*, 31 MOD. CHINA 151, 175–80 (2005) (discussing divorce law and mediation as means to resolve conflicts and thereby disincentivize opposition to the law itself); see also Lan, *supra* note 8, at 426 (noting that legal ambiguity accommodates competing visions and thus discourages overt conflicts between them).

<sup>178</sup> See generally Corne, *supra* note 7 (discussing secretive laws in China); see also Sebastian Heilmann & Nicole Schulte-Kulkman, *The Limits of Policy Diffusion: Introducing International Norms of Anti-Money Laundering into China's Legal System*, 24 GOVERNANCE 639, 653 (2011).

<sup>179</sup> See *supra* note 4 and accompanying text.

<sup>180</sup> Evans & Gabel, *supra* note 3, at 371–82.

<sup>181</sup> *Id.* at 372–77.

<sup>182</sup> *Id.*

broadly worded discretions, omissions, principle-like pronouncements, or general catch-all phrases that are common in written Chinese laws.<sup>183</sup>

Additionally, to the extent that variations or inconsistencies exist in the enforcement of laws, *enforcement flexibilities* exist.<sup>184</sup> Enforcement flexibilities impose uncertainties by raising doubts as to which rules will actually carry the force of law in practice under various circumstances, times, and places.<sup>185</sup> The PRC legal system exhibits considerable enforcement flexibilities; the country's intellectual property laws provide a high-profile example.<sup>186</sup> Finally, the law is a process, consisting of numerous subparts interacting with one another.<sup>187</sup> Interactions between the constituent parts of the rule of law process, the legal system's interactions with the extra-legal forces of its environment, and complexities arising from such internal features as the number and nature of rule-makers, all generate *systemic flexibilities*.<sup>188</sup> This type of flexibility can multiply and amplify the frequency and degree to which regulated parties experience legal uncertainty, whether in conjunction with or independent of the other types of legal flexibility. In the PRC, the state apparatus is pervaded by unclear boundaries of authority and myriad rule makers exist at all levels of the state. These bureaucratic units often act without a clear basis of authority and the resulting legal norms compete and conflict with one another.<sup>189</sup>

Because these three forms of legal flexibility pervade China's legal system, the PRC can be characterized as a 'low rule of

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<sup>183</sup> See *supra* Part III.A.

<sup>184</sup> Evans & Gabel, *supra* note 3, at 377–80.

<sup>185</sup> *Id.*

<sup>186</sup> Although the PRC has recently established specialized courts to address the enforcement of intellectual property, see Daniel C. Fleming, *Counterfeiting in China*, 10 U. PA. E. ASIA L. REV. 14, 29–30 (2015), significant variations persist in practice, see, e.g., JAMES M. ZIMMERMAN, 2 CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 665–68 (4th ed. 2014). More generally, “[l]egal implementation in the PRC tends to be *ad hoc*, haphazard and lacking in consistency.” CORNE, *supra* note 159, at 189.

<sup>187</sup> See Zhu, *supra* note 145, at 432.

<sup>188</sup> Evans & Gabel, *supra* note 3, at 380–82.

<sup>189</sup> DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 188–93 (2nd ed., 2003).

law' jurisdiction that often fails to promote easy predictability for regulated parties.<sup>190</sup> The uncertainties emanating from these flexibilities tend to discourage rather than empower economic actors.<sup>191</sup> Given the importance of economic activity for China's social stability and for the Party's own interests, the question arises why the Party has elected for such a flexible institutional arrangement. History and institutional theory afford new insights into this question, to which we now turn.

### *B. Event Sequencing: Explaining China's Legal Flexibility*

The arrangement described above seems counterintuitive: while economic growth remains a high priority for the CCP,<sup>192</sup> the PRC's legal institutions are plainly inconsistent with the prescription of growth facilitated by legal clarity and certainty.<sup>193</sup> Informal institutions contribute to the PRC's success,<sup>194</sup> but cannot substitute altogether for formal ones.<sup>195</sup> Since "law is . . .

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<sup>190</sup> See Evans & Gabel, *supra* note 3, at 336 (defining *high rule of law jurisdictions* as those with "transparent legal systems that empower firms to plan and act in the economic realm" and, in contrast, *low rule of law jurisdictions* as those "where opaque legal systems create economic uncertainties and risks"); *accord id.* at 382–87 (discussing these terms in the context of the three types of legal flexibility); *see also supra* note 4 (drawing this distinction).

<sup>191</sup> *See supra* Part I.

<sup>192</sup> *See infra* Part III.C.

<sup>193</sup> See Evans & Gabel, *supra* note 3, at 350–56 (discussing the Normative Coase Theorem and related ideas).

<sup>194</sup> For more on the impact of informal institutions, *see generally* Qingxiu Bu, *Will Chinese Legal Culture Constrain Its Corporate Governance-Related Laws?*, 15 J. CORP. L. STUD. 103 (2015); KELLE S. TSAI, *CAPITALISM WITHOUT DEMOCRACY: THE PRIVATE SECTOR IN CONTEMPORARY CHINA* (2007); LILY L. TSAI, *ACCOUNTABILITY WITHOUT DEMOCRACY: SOLIDARY GROUPS AND PUBLIC GOODS PROVISION IN RURAL CHINA* (2007); Lan, *supra* note 8.

<sup>195</sup> *See generally* Kevin J. Fandl, *The Role of Informal Legal Institutions in Economic Development*, 32 FORDHAM INT'L L.J. 1 (2008); *accord* Lan, *supra* note 8, at 421–23, 426 (noting that while informal institutions can substitute for formal ones in certain instances, these situations create problems and thus, formal institutions are often needed). And even where interests (like property) can be secured informally, this usually imposes far greater transaction costs than do formal rules.

inseparable from the state,”<sup>196</sup> more is needed to understand why the CCP came to favor such a flexible legal regime. The PRC's legal flexibility did not come about by accident or solely by path dependence.<sup>197</sup> This section employs historical event sequencing to better understand the CCP's choice of a highly flexible legal system.<sup>198</sup>

Most of China's long history is too remote to map its influence in the creation of the flexible legal system that currently exists.<sup>199</sup> Therefore, the examination of Chinese legal evolution will begin with the first Opium War.<sup>200</sup> Between the start of this conflict in 1839 and the ascension of the reformers in 1978, two parallel sequences of events defined China's experience: first, a chain of immensely disruptive and traumatic calamities imposed by foreign

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<sup>196</sup> Stanley Diamond, *The Rule of Law Versus the Order of Custom*, in *THE RULE OF LAW* 115, 119 (Robert Paul Wolff ed., 1971).

<sup>197</sup> See AN CHEN, *RESTRUCTURING POLITICAL POWER IN CHINA: ALLIANCE & OPPOSITION 1978–1998*, at 157–58 (1999); Slater, *supra* note 165, at 164. In institutional theory, path dependence seeks to explain why institutionalization occurs (that is, why institutions become entrenched over time). More specifically, *path dependence* refers to the effects of positive feedback, such that “[f]urther developments in the same direction are rewarded, whereas the costs of switching to an alternative increase over time.” See SCOTT, *supra* note 26, at 144–45. More formally, “[a]s a theoretical framework, path dependence provides an explanation for potentially problematic long-term outcomes that deliberately decentralizes agency by referring to a system logic of self-reinforcing processes triggered by contingent events.” Leonhard Dobusch & Elke Schüßler, *Theorizing Path Dependence: A Review of Positive Feedback Mechanisms in Technology Markets, Regional Clusters, and Organizations*, 22 *INDUS. & CORP. CHANGE* 617, 618 (2012). Path dependence “implies that history matters in the long-term evolution of” economies, political systems, and so forth. A. Jakimowicz, *Path Dependence in Neoclassical Economic Growth Theory*, 127 *ACTA PHYSICA POLONICA A*-86, A-86 (2015). In the present context, path dependence would imply that the flexibility of China's legal system was ‘inherited’ as an inevitable consequence of certain historical factors that had persisted across time. This Paper argues, however, that China's legal flexibility was introduced by strategic design, more so than by historical happenstance.

<sup>198</sup> See *supra* Part II.B (discussing event sequencing).

<sup>199</sup> See GADDIS, *supra* note 103 (noting the “principle of diminishing relevance”).

<sup>200</sup> Others also designate the first Opium War as the start of China's modern history. See, e.g., ROBERT BICKERS, *THE SCRAMBLE FOR CHINA: FOREIGN DEVILS IN THE QING EMPIRE, 1832–1914*, at 10 (2011).

powers during China's 'Century of Humiliation,' and second, a series of equally scarring misfortunes instigated within China. Following Nasra and Dacin, the analysis segments the relevant historical events into different time periods and traces the major events and the status of the legal system in each. Figure 2 depicts the most salient events, which are discussed throughout the remainder of this section.

Years	1839 - 1870s (Qing rule)	1870s - 1912 (Qing rule)	1912 - 1927 (Nationalist rule)
External	Opium Wars and Unequal Treaties Renegotiated treaties	Sino-Japanese War Further concessions extracted	Continuing foreign domination Rising tensions with Japan
Internal	Anti-British violence Rebellions	Attempted reformation Rising nationalism Boxer Rebellion Fall of the Qing Empire Republic of China established	Warlord rule May Fourth Movement Northern Expedition Rise of rural Soviets
Legal System	Extraterritoriality imposed and developed	Experimentation within Qing legal system	Nationalist legal system developed
Years	1927 - 1949 (Nationalist rule)	1949 - 1976 (PRC; Mao era)	1976 - Present (PRC; reform era)
External	Japanese invasion and war with Japan	Korean War Rift with the USSR Contact with United States	"Opening Up" China joins WTO External investment (e.g., Africa)
Internal	Civil War Establishment of the PRC (Oct. 1949)	Mass Campaigns and Five-Year Plans Anti-Rightist Campaign Great Leap Forward Socialist Education Movement Cultural Revolution Mao dies (Sept. 1976)	Reformers gain power Four Modernizations Special Economic Zones Democracy Movement Broadening of the Party's base Cultural pluralism embraced to a degree
Legal System	Nationalist law nominally in place	PRC legal system begun, then demolished	Contemporary PRC legal system built

**Figure 2.** Event Sequencing: China's modern history as the context for its contemporary legal system.

The PRC has utilized history to shape its institutions. History is also central to how Westerners view China. Robert Bickers states that “[w]e cannot understand the resurgence of China now, and its . . . anger at the world, unless we understand the traumatic century which followed the first opium war . . . For mere history matters in modern China, and the past is unfinished business.”<sup>201</sup> Below, the Paper tracks the major events of China’s recent history (what institutional theory calls its “critical junctures”) to interpret the influences that shaped the reformers who would eventually enact China’s contemporary legal system. This history masks the shrewdness that enabled the reformers first to seize power and then to retain it against seemingly long odds. Their principal weapon of choice in these struggles was institutional entrepreneurship—the very competency in which the reformers sought to establish an enduring competitive advantage for the CCP. To explain, then, why the PRC’s reformers opted for a flexible formal legal system, we begin by examining the final decades of China’s last imperial dynasty—the Qing.

# 1. Final years of the Qing (1839–1912)

Commerce between China and England flourished in the 1700s.<sup>202</sup> The British had accommodated China’s “Canton system,”<sup>203</sup> but subsequently began agitating for broader access to Chinese markets.<sup>204</sup> By the 1830s, relations between China and foreign merchants had been strained for some fifty years, and various cultural factors heightened these tensions.<sup>205</sup> Qing law

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<sup>201</sup> *Id.*

<sup>202</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 195.

<sup>203</sup> *See id.* (“[A]fter 1759 Guangzhou (Canton) was made the sole port open for Europeans.”).

<sup>204</sup> JULIA LOVELL, *THE OPIUM WAR: DRUGS, DREAMS, AND THE MAKING OF MODERN CHINA* 78 (2011).

<sup>205</sup> Cultural factors heightened these tensions. W. TRAVIS HANES III & FRANK SANELLO, *THE OPIUM WARS: THE ADDICTION OF ONE EMPIRE AND THE CORRUPTION OF ANOTHER* 13 (2002). Westerners viewed China as an “alien, hostile nation[.]” LOVELL, *supra* note 204, at 80. The Chinese, for their part, labeled foreigners ‘barbarians.’ PETER WARD FAY, *THE OPIUM WAR 1840–1842*,

played a visible role as Westerners pressed for special legal privileges, and Qing citizens resented perceived concessions.<sup>206</sup> The impetus for the first Opium War involved a dispute of access: “British merchants wanted to sell their goods . . . along the eastern coast” while “the Qing . . . wanted to confine trade to Canton and ban opium.”<sup>207</sup> Opium produced in India was shipped to China,<sup>208</sup> where its sale generated large revenue flows for the British, but resulted in high rates of addiction and a massive outflow of silver as payment.<sup>209</sup> When the Qing government halted the drug’s sale in 1839, in part by destroying foreigners’ inventories, the British navy attacked.<sup>210</sup> China had not industrialized<sup>211</sup> and was soon overrun, resulting in the one-sided Treaty of Nanjing in 1842.<sup>212</sup> Additional ‘unequal treaties’ soon followed as the U.S., France, Russia and others extracted concessions<sup>213</sup> including rights to impose their laws

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at 30–31 (1997). *See also* JOHN KEAY, CHINA: A HISTORY 446–49 (2009) (describing George Macartney’s efforts to open China for the British in 1793); JOANNA WALEY-COHEN, THE SEXTANTS OF BEIJING: GLOBAL CURRENTS IN CHINESE HISTORY 137 (2000) (discussing Chinese jurisdiction over foreigners prior to the Opium War).

<sup>206</sup> THE SEARCH, *supra* note 155, at 123–28. Legal issues within and between China and Britain were immensely influential in Britain’s decision to go to war. *See* LI CHEN, CHINESE LAW IN IMPERIAL EYES: SOVEREIGNTY, JUSTICE, AND TRANSCULTURAL POLITICS 201–42 (2016).

<sup>207</sup> LOVELL, *supra* note 204, at 78.

<sup>208</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 198–99.

<sup>209</sup> *Id.*; *accord* JONATHAN FENBY, THE PENGUIN HISTORY OF MODERN CHINA: THE FALL AND RISE OF A GREAT POWER 1850 TO THE PRESENT 14–15 (2nd ed. 2013) [hereinafter THE PENGUIN HISTORY].

<sup>210</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 200.

<sup>211</sup> DREYER, *supra* note 36, at 42–45; *see also* JUSTIN YIFU LIN, DEMYSTIFYING THE CHINESE ECONOMY 1 (2012) (attributing China’s defeat to its weak economy and inability to fund a stronger military).

<sup>212</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 200.

<sup>213</sup> *Id.* at 201–05.

extraterritorially.<sup>214</sup> These nations effectively colonized China<sup>215</sup> and successfully pursued institutional entrepreneurship even as the Qing Empire imploded.<sup>216</sup> Such indignities began China's 'Century of Humiliation,' which lasted from the 1840s to the 1940s.<sup>217</sup> These events remain politically relevant even today.<sup>218</sup>

The closing decades of Qing history were set against this backdrop. Anti-British violence<sup>219</sup> and rebellions<sup>220</sup> erupted. Several treaties were renegotiated,<sup>221</sup> and as Japan defeated China

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<sup>214</sup> For example, Congress created a United States Court for China that sat in Shanghai and exercised jurisdiction over Americans there. Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217 (2008); see also ZIMMERMAN, *supra* note 186, at 47–56 (discussing the United States' extraterritorial jurisdiction). Nineteen countries ultimately secured extraterritorial privileges in China. ZIMMERMAN, *supra* note 186, at 48–49 n.17.

<sup>215</sup> See generally BICKERS, *supra* note 200; see also DREYER, *supra* note 36, at 47–53; KEAY, *supra* note 205, at 490–91; JONATHAN SPENCE, *THE CHINA HELPERS* 215 (1969) (discussing Nationalists' discontent with foreign military presence) [hereinafter *THE CHINA HELPERS*]; WALEY-COHEN, *supra* note 205, at 167 ("Even though China had not become a formal colony . . . its independence seemed to have become a dead letter" by 1911); Benj. H. Williams, *The Protection of American Citizens in China: Extraterritoriality*, 16 AM. J. INT'L L. 43, 49–53 (1922) (noting resentment among Chinese citizenry of foreign tribunals and observing that "[e]xtraterritoriality is a distinct impairment of sovereignty").

<sup>216</sup> See, e.g., HANS VAN DE VEN, *BREAKING WITH THE PAST: THE MARITIME CUSTOMS SERVICE AND THE GLOBAL ORIGINS OF MODERNITY IN CHINA* 134 (2014) (discussing the transition of China's Maritime Customs Service into "a debt-collection agency for foreign bondholders").

<sup>217</sup> FLEMMING CHRISTIANSEN & SHIRIN RAI, *CHINESE POLITICS AND SOCIETY: AN INTRODUCTION* 27–80 (1996); see generally DAVID SCOTT, *CHINA AND THE INTERNATIONAL SYSTEM 1840–1949* (2008).

<sup>218</sup> In an effort to promote the Party's legitimacy, CCP leaders have kept the Century of Humiliation at the forefront of public memory. Alison A. Kaufman, *The "Century of Humiliation," Then and Now: Chinese Perceptions of the International Order*, 25 PAC. AFF. 1 (2010); Randall Peerenboom, *China Stands Up: 100 Years of Humiliation, Sovereignty Concerns, and Resistance to Foreign Pressure on PRC Courts*, 24 EMORY INT'L L. REV. 653, 654–56 (2010); ZHENG WANG, *NEVER FORGET NATIONAL HUMILIATION: HISTORICAL MEMORY IN CHINESE POLITICS AND FOREIGN RELATIONS* (2012).

<sup>219</sup> *THE SEARCH*, *supra* note 155, at 162.

<sup>220</sup> *Id.* at 170–78, 184–93.

<sup>221</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 201.

in a war to control Korea in 1894-95,<sup>222</sup> Chinese nationalism rose sharply.<sup>223</sup> The empire flirted with acquiring Western technology, but when exposure to Western thought induced an anti-authoritarian sentiment in Chinese students sent to the U.S. for education, Qing officials suspended further exchanges.<sup>224</sup> In 1898, Empress Cixi stifled the progressives' attempts at reform, but by 1901 the need for legal reform was apparent.<sup>225</sup> The Empress asked senior officials to compare Chinese governmental and legal systems with those of the West and to recommend adaptations.<sup>226</sup> It was only in this brief interlude that Qing officials embraced commercial law as a means to restore China's economic sovereignty and to end extraterritoriality.<sup>227</sup> By 1908, officials were laying the groundwork for a constitutional monarchy,<sup>228</sup> but the empire fell before substantial changes could be implemented.<sup>229</sup> Conservatives reinstalled themselves and rejected all changes to the imperial system.<sup>230</sup>

Although Qing officials viewed the economy strategically, they regulated it mostly ineffectually.<sup>231</sup> Significantly, private

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<sup>222</sup> THE SEARCH, *supra* note 155, at 222–24; *see also* KEAY, *supra* note 205, at 484–89 (discussing how Japan's modernization had greatly exceeded China's).

<sup>223</sup> THE SEARCH, *supra* note 155, at 230–38.

<sup>224</sup> *See* YONG ZHAO, WHO'S AFRAID OF THE BIG BAD DRAGON?: WHY CHINA HAS THE BEST (AND WORST) EDUCATION SYSTEM IN THE WORLD 71–92 (2014).

<sup>225</sup> THE SEARCH, *supra* note 155, at 224–27.

<sup>226</sup> HAROLD M. TANNER, CHINA: A HISTORY 406–07 (2009).

<sup>227</sup> William C. Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54 J. ASIAN STUD. 43 (1995).

<sup>228</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 246.

<sup>229</sup> PÄR KRISTOFFER CASSEL, GROUNDS OF JUDGMENT: EXTRATERRITORIALITY AND IMPERIAL POWER IN NINETEENTH-CENTURY CHINA AND JAPAN 175–76 (2012).

<sup>230</sup> *Kang Youwei and the Reform Movement*, in 2 SOURCES OF CHINESE TRADITION 260, 263 (Wm. Theodore de Bary & Richard Lufrano eds., 1999) (noting that “[s]upporters of [Qing] rule [would] resist any . . . tampering with its institutions”); TANNER, *supra* note 226, at 409 (noting that conservatives rose in “storms of opposition” even to “seemingly small” changes.).

<sup>231</sup> Jane Kate Leonard & John R. Watt, *Introduction*, in TO ACHIEVE SECURITY AND WEALTH 1, 2–3 (Jane Kate Leonard & John R. Watt eds., 1992).

entrepreneurs and their guilds became extremely powerful, displacing many local Qing governments as the source of power.<sup>232</sup> This state of affairs taught future CCP leaders to be weary of power derived from private wealth.<sup>233</sup> The Qing's legitimacy was undermined by the sense that "China's destiny now [laid] in the hands of foreigners who bore her little goodwill,"<sup>234</sup> and by the state's own persistent inadaptability.<sup>235</sup> In 1912, the last emperor was ousted and the Republic of China was established<sup>236</sup>—but the optimism greeting this occasion was soon dispelled, as China descended into a period of extraordinary violence from 1912 to 1950.<sup>237</sup>

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The Maoists would later view this degree of economic autonomy as a national weakness. *See infra* Parts III.B.3, III.B.4.

<sup>232</sup> JONATHAN FENBY, *MODERN CHINA: THE RISE AND FALL OF A GREAT POWER, 1850 TO THE PRESENT* 150–51 (2008) [hereinafter *MODERN CHINA*]; MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 148–49 (1982); R. KEITH SCHOPPA, *REVOLUTION AND ITS PAST: IDENTITIES AND CHANGE IN MODERN CHINESE HISTORY* 150–51 (3rd ed. 2011); RICHARD VON GLAHN, *THE ECONOMIC HISTORY OF CHINA: FROM ANTIQUITY TO THE NINETEENTH CENTURY* 395 (2016). The Qing relied upon guilds to deliver services. Andrea McElderry, *Guarantors and Guarantees in Qing Government-Business Relations*, in *TO ACHIEVE SECURITY AND WEALTH* 119, 128–30 (Jane Kate Leonard & John R. Watt eds., 1992); Christine Moll-Murata, *Chinese Guilds from the Seventeenth to the Twentieth Centuries: An Overview*, 53 *INT'L REV. SOC. HIST.* 213, 219 (2008). But in conferring legitimacy, the Qing unwittingly invited the guilds to compete with the state for power. WELLINGTON K.K. CHAN, *MERCHANTS, MANDARINS, AND MODERN ENTERPRISE IN LATE CH'ING CHINA* 234 (1977). One suspects that China's corporatist approach heeds these historical lessons. *See generally* Jonathan Unger & Anita Chan, *State Corporatism and Business Associations in China*, 10 *INT'L J. EMERGING MKTS.* 178 (2015).

<sup>233</sup> *See, e.g.*, BRUCE J. DICKSON, *WEALTH INTO POWER: THE COMMUNIST PARTY'S EMBRACE OF CHINA'S PRIVATE SECTOR* 238 (2008) (discussing the Party's cooptation of capitalists, who now defend Party rule) [hereinafter *WEALTH INTO POWER*]; *see also infra* Part III.C.

<sup>234</sup> RANA MITTER, *A BITTER REVOLUTION: CHINA'S STRUGGLE WITH THE MODERN WORLD* 35 (2004).

<sup>235</sup> *Id.* at 37.

<sup>236</sup> *THE SEARCH*, *supra* note 155, at 267.

<sup>237</sup> KEAY, *supra* note 205, at 499–500.

During this period, China's legal system reflected its long-standing historical features,<sup>238</sup> aligned with Confucian mores<sup>239</sup> such that "the law was . . . but a tool of administration in general."<sup>240</sup> Western powers had imposed extraterritoriality because they viewed Chinese law as "barbaric."<sup>241</sup> Local magistrates rigidly applied Chinese criminal codes.<sup>242</sup> The institutional status of law clearly varied between China and the West. However, officials eventually endorsed reform as the only hope for the Qing's survival,<sup>243</sup> and institutions free from the state's control had begun to emerge in response.<sup>244</sup> Yet China's bureaucratic inertia nevertheless prevailed—this time, at the cost of the regime itself.<sup>245</sup>

## 2. Republic of China (1912–1949)

The Kuomintang ("KMT"), or Nationalist Party, emerged victorious in China's first election in 1913.<sup>246</sup> Following a failed

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<sup>238</sup> See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 23 (1999) (noting that Qing law was addressed to officials and not to the public); THE SEARCH, *supra* note 155, at 123–28 (discussing the status of foreigners under Qing law); see FAIRBANK & GOLDMAN, *supra* note 133, at 155, 183–86 (discussing pre-Qing and Qing laws, respectively).

<sup>239</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 184.

<sup>240</sup> *Id.* at 185.

<sup>241</sup> SCHOPPA, *supra* note 232, at 57.

<sup>242</sup> "If a socially undesirable act did not correspond exactly to one of the Qing Code's precisely-defined offenses, a magistrate could punish it by analogy to an existing offense or under the rule which" provided punishments for "[e]veryone who does that which ought not to be done[.]" TANNER, *supra* note 226, at 357.

<sup>243</sup> See e.g., Kang Youwei, *Memorial on Institutional Reform*, in SOURCES IN CHINESE HISTORY 100–01 (David G. Atwill & Yurong Y. Atwill eds., 2010); THE CHINA HELPERS, *supra* note 215, at 156.

<sup>244</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 257.

<sup>245</sup> The reformers took this lesson seriously. The USSR later fell in part because it faced an entrenched bureaucracy opposed to economic reforms (much like the Qing), and thus, the USSR was forced to introduce political reforms together with economic ones. See SUSAN L. SHIRK, *THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA* 333–34 (1993). In contrast, the reformers' flexibility enabled economic reforms with far fewer political reforms. *Id.*

<sup>246</sup> THE SEARCH, *supra* note 155, at 280. Even so, the early revolutionaries could not articulate their own logics. See DAVID STRAND, AN

attempt by the provisional president and Nationalist rival Yuan Shikai to make himself emperor,<sup>247</sup> the KMT came to dominate the Republican government. Yuan's monarchical efforts diminished the possibility of democracy in China.<sup>248</sup> From Yuan's death in 1916 until the KMT's Northern Expedition ended in 1928, local warlords who ruled small fiefdoms with personal armies controlled most of China.<sup>249</sup>

Foreign states continued to antagonize China, giving rise to the May Fourth Movement following World War I.<sup>250</sup> The Versailles Treaty transferred German colonies in China to Japan, rather than back to China.<sup>251</sup> The May Fourth Movement presaged China's twentieth-century history<sup>252</sup> through the ideas that emerged.<sup>253</sup> A consensus among intellectuals arose "that traditional Chinese culture . . . was largely to blame"<sup>254</sup> for China's lack of sovereignty, finding fault in Confucianism.<sup>255</sup> The Movement combined elements that previously existed only separately: "a sense of real and impending crisis, a combination of . . . ideas aimed at 'saving the nation', and an audience ready to receive, welcome, contest, and adapt these ideas."<sup>256</sup> The KMT failed to articulate a credible new set of logics, even as the public rejected many long-standing assumptions. This was a missed opportunity for institutional entrepreneurship and, ironically, Chinese intellectuals turned to other countries for inspiration. Among the foreign

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UNFINISHED REPUBLIC: LEADING BY WORD AND DEED IN MODERN CHINA 55 (2011).

<sup>247</sup> THE SEARCH, *supra* note 155, at 283–87.

<sup>248</sup> See THE PENGUIN HISTORY, *supra* note 209, at 125–38 (discussing Yuan's rise to the presidency and actions inconsistent with democracy).

<sup>249</sup> TANNER, *supra* note 226, at 429–31.

<sup>250</sup> MITTER, *supra* note 234, at 37.

<sup>251</sup> *Id.* at 3.

<sup>252</sup> *Id.* at 4, 11; accord ALAN LAWRENCE, CHINA SINCE 1919: REVOLUTION AND REFORM 1 (2004).

<sup>253</sup> MITTER, *supra* note 234, at 13. The CCP's first generation of leaders came of age in this era. KEAY, *supra* note 205, at 504.

<sup>254</sup> MITTER, *supra* note 234, at 14–15.

<sup>255</sup> *Id.* at 18.

<sup>256</sup> *Id.* at 23.

concepts that gained traction in this climate were Marxism and Communism.<sup>257</sup>

The CCP's founding in 1921 was thus undertaken amidst great social turbulence.<sup>258</sup> The CCP positioned itself rhetorically as the solution to warlord rule.<sup>259</sup> Because the Republic and the USSR collaborated in the 1920s,<sup>260</sup> and since the KMT and CCP shared the goal of unifying China,<sup>261</sup> the two groups were tenuously allied through the start of the Northern Expedition—the KMT's largely successful military effort to remove the warlords and thereby reunify the country.<sup>262</sup> But this alliance, known as the First United Front, disintegrated quickly when United Front forces retook Shanghai: the KMT blamed the Communists for civil unrest and cracked down on left-wing organizations.<sup>263</sup> For its part, at the behest of the Soviets, the CCP began insurrections in 1927; the Nationalists expelled Communists from government offices,<sup>264</sup> and the Chinese Civil War was thereby inaugurated.<sup>265</sup> Until 1937, the KMT controlled most of China's urban centers and held the advantage as its military pursued and nearly destroyed Communist forces. The CCP elicited support covertly in the cities as well as in the countryside,<sup>266</sup> aiding peasant associations and establishing an agrarian regime called the Jiangxi Soviet.<sup>267</sup> A turning point occurred when Japan, which had seized Manchuria in 1931,<sup>268</sup>

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<sup>257</sup> THE SEARCH, *supra* note 155, at 305–10, 319–25.

<sup>258</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 275–78.

<sup>259</sup> See *First Manifesto of the CCP on the Current Situation* (June 15, 1922), in SOURCES IN CHINESE HISTORY 176 (David G. Atwill & Yurong Y. Atwill eds., 2010).

<sup>260</sup> THE SEARCH, *supra* note 155, at 336.

<sup>261</sup> *Id.*

<sup>262</sup> TANNER, *supra* note 226, at 459.

<sup>263</sup> J.A.G. ROBERTS, THE COMPLETE HISTORY OF CHINA 371–72 (2003).

<sup>264</sup> *Id.* at 372–73; accord MODERN CHINA, *supra* note 232, at 167–96 (detailing the tensions leading to the breakdown of the First United Front).

<sup>265</sup> TANNER, *supra* note 226, at 460–63.

<sup>266</sup> *Id.* at 463–73.

<sup>267</sup> THE SEARCH, *supra* note 155, at 345, 355–57, 370–79.

<sup>268</sup> THE PENGUIN HISTORY, *supra* note 209, at 229–43.

initiated a full invasion of China in 1937.<sup>269</sup> Japan's aggression would prove disastrous for the Nationalists.<sup>270</sup>

The KMT's weaknesses were exposed as it struggled to retain control even of the regions outside of Japan's conquest.<sup>271</sup> Chiang Kai-shek, the KMT's ruler, regarded the CCP as the greater threat, and his allocation of resources against the Communists eroded his popular support,<sup>272</sup> particularly as the Japanese carried out atrocities against Chinese civilians.<sup>273</sup> Chiang eventually agreed to a ceasefire with the CCP—the Second United Front—so that both could combat the Japanese; however, this truce was quickly undone, and the Communists' popularity in China's rural areas surged.<sup>274</sup> In institutional terms, the Communists were not merely providing governmental services in the areas they controlled; they were winning converts to their ideology and asserting new logics, acting as institutional entrepreneurs.<sup>275</sup> Upon Japan's defeat in 1945, the Civil War resumed—this time with a weakened KMT military and a strengthened Communist force.<sup>276</sup> Although worsening economic conditions did not immediately help the Communist cause,<sup>277</sup> the CCP's support continued to grow as it implemented rural land

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<sup>269</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 312.

<sup>270</sup> It is ironic that the CCP benefitted from the aggression of the fiercely anti-communist Japanese. THE PENGUIN HISTORY, *supra* note 209, at 229.

<sup>271</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 314. The KMT's conscriptions, for instance, were unpopular, and the KMT was blamed for China's wartime famines. *Id.* at 314–16.

<sup>272</sup> WALEY-COHEN, *supra* note 205, at 232–33.

<sup>273</sup> See, e.g., SCHOPPA, *supra* note 232, at 261–63.

<sup>274</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 316. China's regions were unevenly developed, affording the CCP the chance to attract rural support. ODD ARNE WESTAD, *RESTLESS EMPIRE: CHINA AND THE WORLD SINCE 1750*, at 176 (2012).

<sup>275</sup> Various works have assessed the CCP's rural appeal. See, e.g., EDGAR SNOW, *RED STAR OVER CHINA* 267–71 (1961) (describing one Nationalist won over by the CCP's efforts).

<sup>276</sup> See JAY TAYLOR, *THE GENERALISSIMO: CHIANG KAI-SHEK AND THE STRUGGLE FOR MODERN CHINA* 321–77 (2009). “The eight-year war with Japan had been an extended body-blow for a regime [the KMT] already shot through with weaknesses.” JONATHAN FENBY, *CHIANG KAI SHEK: CHINA'S GENERALISSIMO AND THE NATION HE LOST* 460 (2003) [hereinafter *CHIANG KAI SHEK*].

<sup>277</sup> TAYLOR, *supra* note 276, at 369.

reforms<sup>278</sup> while Nationalist policies did little to improve the agrarian livelihood.<sup>279</sup> The KMT was also plagued by corruption and incompetence. The KMT's many missteps, coupled with the CCP's strategy of building a power base in the rural areas, moved the public's 'collective memory'<sup>280</sup> to accept and validate the Maoists' institutional logics.<sup>281</sup> The Republic had delayed its fall through nationalism and alliances with other troubled states,<sup>282</sup> but the CCP nevertheless overran the KMT, and Mao declared the founding of the PRC on October 1, 1949.<sup>283</sup>

The KMT had modeled its legal system on Western examples,<sup>284</sup> but the Republican period is noteworthy for how little the law actually functioned in light of extraterritoriality and the KMT's conflicts with the warlords, Japan, and the Communists—suggesting that even when they were militarily successful, the Nationalists were ineffective institutional entrepreneurs. Contemporary observers noted that the Nationalists' "enlightened" law was seldom observed in practice.<sup>285</sup> Nevertheless, this era contributed to the historical context in which the designers of China's contemporary legal system were embedded. China internationalized under the Republic as foreigners encouraged a capitalist bent.<sup>286</sup> It is notable that during the Republic, as in the Qing era, guilds and other economic elites were able to displace local governments and formal law.<sup>287</sup>

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<sup>278</sup> See, e.g., THE SEARCH, *supra* note 155, at 491 (discussing land reform and the Manchurian base).

<sup>279</sup> RICHARDSON, *supra* note 23, at 97.

<sup>280</sup> See William Ocasio et al., *History, Society, and Institutions: The Role of Collective Memory in the Emergence and Evolution of Societal Logics*, 41 ACAD. MGMT. REV. 676 (2016).

<sup>281</sup> The CCP had, for example, offered a more compelling interpretation of China's unequal treaties. DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY 87–95 (2005). The Maoists' institutional logics are considered in further detail in Part III.B.4, *infra*.

<sup>282</sup> WESTAD, *supra* note 274, at 169.

<sup>283</sup> THE SEARCH, *supra* note 155, at 504–13.

<sup>284</sup> WESTAD, *supra* note 274, at 170.

<sup>285</sup> Williams, *supra* note 215, at 57–58.

<sup>286</sup> WESTAD, *supra* note 274, at 171.

<sup>287</sup> See, e.g., MODERN CHINA, *supra* note 232, at 150–51; SCHOPPA, *supra* note 232, at 150–51.

Communist leaders learned to be adaptable and regenerative as the CCP struggled to survive in this era.<sup>288</sup> The reformers who would eventually design China's legal system were embedded in an environment that not only legitimized but necessitated adaptability.<sup>289</sup> The reformers' versatility also foreshadowed their success in positioning the CCP as China's preeminent institutional entrepreneur through legal flexibility.<sup>290</sup>

### 3. People's Republic of China under Mao (1949–1976)

As discussed above, China's experience prior to the establishment of the PRC was tumultuous, violent, and essentially lawless, largely because of what foreign powers were doing—but often also for mistakes among China's own leaders.<sup>291</sup> Upon the CCP's victory in 1949, China was—for the first time in a century—free from coercive foreign influences. Unfortunately, the Maoist era would prove even more destructive than the previous periods, as Mao attempted first to remake China into the world's premiere socialist society, and then, having failed at this, to maintain control of the CCP as pressure for equanimity mounted in the last decades of his life.

Upon taking power, the CCP first confronted the task of constructing a new state.<sup>292</sup> This was Mao's earliest priority: a formal state would legitimize the CCP as China's sole ruling body

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<sup>288</sup> The Party's Long March is often cited as an example of these traits. See, e.g., MODERN CHINA, *supra* note 232, at 252–64. Professor Gaddis states that: “[S]urvivors tend to be those organisms that are required to adapt . . . to the unexpected . . . There is, thus, a balance . . . [at] the edge of chaos . . . where innovation, especially through self-organization, normally occurs. It is no great stretch to suggest that something similar may work in the social, political, and economic world[.]” GADDIS, *supra* note 103, at 87. This is descriptive of the CCP's experience in this era.

<sup>289</sup> The CCP remains highly adaptive even today. RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS 31 (2010).

<sup>290</sup> See *infra* Part III.C.

<sup>291</sup> THE SEARCH, *supra* note 155, at 165.

<sup>292</sup> FRANK DIKÖTTER, THE TRAGEDY OF LIBERATION: A HISTORY OF THE CHINESE REVOLUTION 1945–1957, at 39–152 (2013) [hereinafter THE TRAGEDY]; FAIRBANK & GOLDMAN, *supra* note 133, at 345–51.

(a distinction also claimed by the KMT in Taiwan).<sup>293</sup> Under this early arrangement, the state's authority was shared amongst the Party, the military, and the nascent bureaucracy.<sup>294</sup> The process of state building included the basic functions of government<sup>295</sup> but also involved the rooting out of perceived enemies.<sup>296</sup> Whereas the Qing's enemies had been mostly foreign, the CCP's enemies were internal.<sup>297</sup> Class struggle encouraged citizens to act out against capitalists, landlords, rich peasants, Nationalist sympathizers, and counterrevolutionaries.<sup>298</sup> Even the CCP was purged when it appeared more burdensome than helpful to Mao's ends, presaging the Cultural Revolution a decade later.<sup>299</sup>

During the 1950s, the CCP enjoyed most of the successes it would realize under Mao. China had, for instance, fought the U.S. to a standstill in Korea, collectivized agriculture and industry, implemented its first Five Year Plan of production,<sup>300</sup> and carried out campaigns to imbue citizens with political consciousness.<sup>301</sup> Yet Mao remained anxious to implement socialism. He prepared for this during the Hundred Flowers Movement and Anti-Rightist Campaign of 1956-1957, through which he attempted to eliminate critics in society.<sup>302</sup> Convinced of the success of these efforts, Mao then launched his infamous Great Leap Forward.

The Great Leap ostensibly sought to surpass Great Britain's economic output by collectivizing property and mobilizing China's

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<sup>293</sup> See THE SEARCH, *supra* note 155, at 519–24. A state was also necessary for China to reassert its sovereignty. Bedeski, *supra* note 54, at 546.

<sup>294</sup> THE SEARCH, *supra* note 155, at 519.

<sup>295</sup> THE TRAGEDY, *supra* note 292, at 46.

<sup>296</sup> WESTAD, *supra* note 274, at 321.

<sup>297</sup> *Id.* at 321–22.

<sup>298</sup> WALDER, *supra* note 39, at 113.

<sup>299</sup> THE TRAGEDY, *supra* note 292, at 158–59.

<sup>300</sup> WESTAD, *supra* note 274, at 327; see also THE SEARCH, *supra* note 155, at 541–51 (discussing the Party's first Five-Year Plan).

<sup>301</sup> THE SEARCH, *supra* note 155, at 534–37.

<sup>302</sup> *Id.* at 563–73. Citizens were encouraged to criticize the Party and those who did later faced a crackdown in 1957 to discourage future opposition to the socialist economic transformation.

labor force to meet planned levels of production.<sup>303</sup> Mao's actual ambition, however, was to claim the mantle of socialist leadership by surpassing the USSR,<sup>304</sup> and to repay the debts that China had incurred by accepting Soviet industrial aid.<sup>305</sup> The Great Leap was catastrophic,<sup>306</sup> with an estimated 30 million fatalities:<sup>307</sup> famine was the leading cause of death, while "coercion, terror and systematic violence were [its] foundation[.]"<sup>308</sup>

Even for Mao, the results were difficult to ignore.<sup>309</sup> He retreated from public view in the early 1960s, and other Party leaders "began to reverse some of the worst excesses"<sup>310</sup> of the Great Leap.<sup>311</sup> China remained isolated internationally.<sup>312</sup> As the Party pursued reforms and with his power slipping, Mao launched the Socialist Education Movement, the goal of which was to "reintroduce basic socialist values into Chinese society."<sup>313</sup> Its failure to expunge corruption and abuse from the Party set the stage for Mao's final move, the Great Proletarian Cultural Revolution.

After the Great Leap, the Cultural Revolution was Mao's second attempt to create a model society that would lead the socialist

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<sup>303</sup> FRANK DIKÖTTER, *MAO'S GREAT FAMINE: THE HISTORY OF CHINA'S MOST DEVASTATING CATASTROPHE, 1958–1962*, at ix (2010) [hereinafter *MAO'S GREAT FAMINE*].

<sup>304</sup> FRANK DIKÖTTER, *THE CULTURAL REVOLUTION: A PEOPLE'S HISTORY, 1962–1976*, at 4 (2016) [hereinafter *THE CULTURAL REVOLUTION*].

<sup>305</sup> *THE SEARCH*, *supra* note 155, at 575.

<sup>306</sup> See *THE PENGUIN HISTORY*, *supra* note 209, at 396–439 (discussing the Great Leap and its aftermath).

<sup>307</sup> *Id.* at 415.

<sup>308</sup> *MAO'S GREAT FAMINE*, *supra* note 303, at x–xi; accord WESTAD, *supra* note 274, at 339.

<sup>309</sup> *THE SEARCH*, *supra* note 155, at 590.

<sup>310</sup> WESTAD, *supra* note 274, at 339.

<sup>311</sup> Mao "was happy to . . . let others begin to clear up the mess he had created, though he kept close watch[.]" *Id.*

<sup>312</sup> *Id.* at 333. Mao "had, almost [single-handedly], managed to wreck the Sino-Soviet relationship." *Id.* at 343. Mao resented the USSR's visibility in the global communist movement, disapproval of the Great Leap, and repudiation of Stalinism. *THE PENGUIN HISTORY*, *supra* note 209, at 403, 421–23.

<sup>313</sup> *THE SEARCH*, *supra* note 155, at 591–96. The movement sought to repair the Party's legitimacy by "clean[ing] out . . . abuses in the CCP[.]" *THE PENGUIN HISTORY*, *supra* note 209, at 426–28.

world by supplanting the Soviet Union.<sup>314</sup> Mao's complex motives centered around keeping absolute power<sup>315</sup> and preventing capitalist revisionism.<sup>316</sup> Tensions between Mao and the Party's establishment had been rising for years<sup>317</sup> and, assured of the military's support,<sup>318</sup> Mao declared war on revisionist enemies within the CCP itself.<sup>319</sup> Although Mao was viewed as the father of the CCP,<sup>320</sup> he urged citizens to attack Party authorities deemed to be 'counter-revolutionary.' This reflected Mao's conviction that "only violent conflict could bring about genuine social change and liberate the oppressed."<sup>321</sup> The duration of the Cultural Revolution, from 1966 to 1976, was lawless and violent.<sup>322</sup> Functional government ceased to exist.<sup>323</sup> Unsurprisingly, the Chinese economy suffered. The Maoist economy blended markets and centralization but resulted in a "crippled hybrid."<sup>324</sup> China was

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<sup>314</sup> THE CULTURAL REVOLUTION, *supra* note 304, at xi.

<sup>315</sup> *Id.* at 10–14; William A. Joseph, *Foreword*, in BORN RED: A CHRONICLE OF THE CULTURAL REVOLUTION xv–xvi (Yuan Gao ed., 1987); RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO'S LAST REVOLUTION 3–12 (2006).

<sup>316</sup> TANNER, *supra* note 226, at 519–22. By "capitalist revisionism," Mao meant the "abandonment of the goals of the revolution and acceptance . . . of capitalism." FAIRBANK & GOLDMAN, *supra* note 133, at 384–86.

<sup>317</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 389–90.

<sup>318</sup> *Id.* at 387.

<sup>319</sup> TANNER, *supra* note 226, at 524.

<sup>320</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 385–86.

<sup>321</sup> WALDER, *supra* note 39, at 336.

<sup>322</sup> Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 CHI. J. INT'L L. 257, 287 (2007). Mao's fanatical supporters struggled against "counter-revolutionaries" and sent offenders to labor in the countryside. *See, e.g.*, THE CULTURAL REVOLUTION, *supra* note 304; FAIRBANK & GOLDMAN, *supra* note 133, at 393–95, 401–02; TANNER, *supra* note 226, at 535–36. Many accused of counterrevolution were tortured or executed. FAIRBANK & GOLDMAN, *supra* note 133, at 397–98. An estimated 400,000 to 500,000 people were killed in the Cultural Revolution's three bloodiest years. SCHOPPA, *supra* note 232, at 355.

<sup>323</sup> SCHOPPA, *supra* note 232, at 351–55.

<sup>324</sup> FAIRBANK & GOLDMAN, *supra* note 133, at 398.

languishing in a state of dire traumatization at the time of Mao's death in 1976.<sup>325</sup>

Upon taking power, the CCP had abolished all semblances of Nationalist law<sup>326</sup> and began constructing a new legal system until it was swept away in the Cultural Revolution.<sup>327</sup> The CCP's early efforts at law were intended to transform Chinese culture as envisioned by the Party's elites,<sup>328</sup> but officials were impatient for change. Accordingly, any aspects of the emerging legal order deemed too restrictive for China's hasty revolution were discarded.<sup>329</sup> The CCP's elites instead ruled directly by fiat.<sup>330</sup> Mao repeatedly disparaged the notion of bureaucracy and the stability that it implied, as these were antithetical to continuous revolution (and could also be stubbornly resistant to his will).<sup>331</sup> It is thus unsurprising that Maoist leaders "were never comfortable working or thinking in a legal context."<sup>332</sup> Commensurate with the law's enfeebled state was Mao's political use of ambiguity in his speeches:

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<sup>325</sup> Mao destroyed institutions but did so before substitutes could be formulated. This scenario lent itself to corruption in the resulting institutional vacuum. See Lan, *supra* note 8, at 398 n.159.

<sup>326</sup> ZIMMERMAN, *supra* note 186, at 56–59.

<sup>327</sup> Wang Chenguang, *Introduction: An Emerging Legal System*, in INTRODUCTION TO CHINESE LAW 1, 5–7 (Wang Chenguang and Zhang Xianchu eds., 1997). Soviet law was heavily borrowed in these early years. Yu Xingzhong, Comment, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 32 (1989).

<sup>328</sup> TANNER, *supra* note 226, at 507–08 (discussing as one example the Marriage Law of 1950).

<sup>329</sup> CHOW, *supra* note 189, at 58 (noting that Maoists despised the law because it discouraged their attacks on enemies); THE PENGUIN HISTORY, *supra* note 209, at 397 (discussing Liu Shaoqi's view on this); POTTER, *supra* note 145, at 5–8 (observing that law was criticized for obstructing Mao's policy goals). Eventually Mao found even this nascent law too restrictive and it was disregarded altogether in the Cultural Revolution. BARRETT L. MCCORMICK, POLITICAL REFORM IN POST-MAO CHINA: DEMOCRACY AND BUREAUCRACY IN A LENINIST STATE 96 (1990).

<sup>330</sup> MAO'S GREAT FAMINE, *supra* note 303, at 289–90; Michael, *supra* note 159, at 135–36; Yu, *supra* note 327, at 36.

<sup>331</sup> See FAIRBANK & GOLDMAN, *supra* note 133, at 387; accord Victor H. Li, *The Role of Law in Communist China*, 44 CHINA Q. 66, 74 (1970).

<sup>332</sup> Li, *supra* note 331, at 91.

he concealed his strategies in deliberately vague rhetoric.<sup>333</sup> The reformers who succeeded Mao sought to institutionalize checks against this sort of lawlessness.<sup>334</sup> Nevertheless, the reformers had no desire to constrain the CCP's power, and their approach to legal ambiguity ultimately resembled Mao's tactics far more so than the behaviors of high rule of law states.<sup>335</sup>

In any event, the CCP *had* acted as an institutional entrepreneur—even under Mao.<sup>336</sup> To this end, the CCP employed campaigns and mass movements in which the government and often the whole Chinese population were mobilized toward some common goal.<sup>337</sup> Once the Party determined that formal legality was incompatible with its exercise of institutional entrepreneurship, it turned instead to more chaotic, less formal tactics to attempt its desired institutional changes. One of the reformers' early priorities was to remedy the Maoists' excesses.<sup>338</sup>

#### 4. People's Republic of China under Reform (1976–Present)

Mao's death on September 9, 1976 was a critical juncture. Three rival CCP factions competed to rule China in his wake:<sup>339</sup> (1)

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<sup>333</sup> Mao practiced “ensnaring his enemies with the precision of a trapper.” THE CULTURAL REVOLUTION, *supra* note 304, at xii–xiii. Mao had long employed ambiguity in his speech. *See, e.g.*, THE SEARCH, *supra* note 155, at 594 (noting a typical example). Interestingly, firms *also* use vagueness in their corporate communications when they perceive high threats of entry, thereby discouraging imitation and new competitors. Wei Guo, Tieying Yu & Javier Gimeno, *Language and Competition: Communication Vagueness, Interpretation Difficulties, and Market Entry*, 60 ACAD. MGMT. J. 2073 (2017).

<sup>334</sup> *See infra* Part III.C.

<sup>335</sup> *See* Sebastian Heilmann & Elizabeth J. Perry, *Embracing Uncertainty: Guerrilla Policy Style and Adaptive Governance in China*, in MAO'S INVISIBLE HAND 1, 12–13 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011).

<sup>336</sup> TANNER, *supra* note 226, at 503 (discussing Party efforts to transform China).

<sup>337</sup> *Id.*

<sup>338</sup> *See infra* Parts III.B.4, III.C.

<sup>339</sup> Roderick MacFarquhar, *The Succession to Mao and the End of Maoism*, in 15 CAMBRIDGE HIST. OF CHINA 305 (Roderick MacFarquhar & John K. Fairbank eds., 1991); *accord* HARRY HARDING, CHINA'S SECOND REVOLUTION: REFORM AFTER MAO 40–69 (1987). Factionalism “is innate within

the radicals (ultra-leftists, led by the Gang of Four, who had overseen the Cultural Revolution and advocated continuous revolution); (2) beneficiaries of the Revolution (who rose when their seniors were purged, led by Mao's designated successor Hua Guofeng, whose "whatever faction" attempted to strike a middle position between the radicals and reformers); and (3) the Revolution's survivors (the reformers who ultimately coalesced under the leadership of Deng Xiaoping).<sup>340</sup> Deng had been "rehabilitated"<sup>341</sup> and then purged again in 1976, but survived Mao's last efforts to destroy him.<sup>342</sup>

The Gang of Four inherited what little of Mao's legitimacy proved transferable and sought absolute power rather than collaboration with potential allies.<sup>343</sup> The Gang underestimated Hua,<sup>344</sup> who had them arrested soon after Mao's death.<sup>345</sup> Many Chinese celebrated the Gang's downfall, yet the CCP recognized that its legitimacy was tied to Mao's.<sup>346</sup> Thus, Hua's rhetoric denounced the Gang but not Mao directly. This decoupled citizens' condemnation of Mao's policies from Mao himself.<sup>347</sup> The goal was to acknowledge the CCP's disastrous record without discrediting its political authority.

However, Hua "lacked the institutional clout and political charisma to shore up his power" and "[h]is reluctance to repudiate the Cultural Revolution was out of tune with a widespread desire for change."<sup>348</sup> In institutional terms, Hua adhered too closely to Maoist logics at a time when the reformers were excelling as institutional

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the CCP political system." JING HUANG, *FACTIONALISM IN CHINESE COMMUNIST POLITICS* 21 (2000).

<sup>340</sup> MacFarquhar, *supra* note 339, at 336–38, 357–58.

<sup>341</sup> *Id.* at 347–58.

<sup>342</sup> JUNG CHANG & JON HALLIDAY, *MAO: THE UNKNOWN STORY* 606–09 (2006).

<sup>343</sup> MacFarquhar, *supra* note 339, at 358.

<sup>344</sup> THE CULTURAL REVOLUTION, *supra* note 304, at 315.

<sup>345</sup> MacFarquhar, *supra* note 339, at 367–70.

<sup>346</sup> THE CULTURAL REVOLUTION, *supra* note 304, at 316.

<sup>347</sup> *Id.*; see also MacFarquhar, *supra* note 339, at 372–77.

<sup>348</sup> THE CULTURAL REVOLUTION, *supra* note 304, at 317. Rhetorically, Hua "had persisted with the slogans of the Cultural Revolution." MacFarquhar, *supra* note 339, at 387.

entrepreneurs.<sup>349</sup> Hua's alignment with Maoist logics undermined his already tenuous legitimacy.<sup>350</sup> Moreover, Hua made little effort at institutional entrepreneurship; he acted as a modest policy innovator within Maoist logics, but not entrepreneurially with respect to the logics themselves.<sup>351</sup> As a product rather than a victim of these logics, Hua was evidently unable or unwilling to disembed himself from them. The reformers, recognizing that public sentiment favored a paradigm shift, won the struggle for power through their prowess as institutional entrepreneurs.<sup>352</sup>

In the ambiguity of the interregnum from 1976 to 1978, during which the Hua and Deng factions' logics clashed, Hua's incumbency was the more difficult position since a "somewhat contradictory image of change combined with continuity had to be conveyed."<sup>353</sup> This task could not be accomplished under Maoist logics, since 'change' in the context of the reformers' emergent legitimization had come to mean *abandoning Maoism*. Hua and his predecessors had neglected the historical lesson that the reformers embraced as their governing thesis: though a political monopolist may appear to hold absolute power at any given moment, it must nevertheless work to legitimate and then to defend its logics, requiring constant adaptation and the ability to shape society's adaptations; otherwise, credible competitors for power will emerge.<sup>354</sup>

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<sup>349</sup> See *infra* Part III.C. For more on the Maoists' logics, see *infra* Part III.B.4.

<sup>350</sup> See MacFarquhar, *supra* note 339, at 377 (discussing Hua's fidelity to Maoist logics and resulting legitimacy problem).

<sup>351</sup> See MAURICE MEISNER, *MAO'S CHINA AND AFTER: A HISTORY OF THE PEOPLE'S REPUBLIC* 428 (3rd ed. 1999) (discussing Hua's cautious attempt to abandon the policies of the late Maoist period and return to those of early Maoism).

<sup>352</sup> HARDING, *supra* note 339, at 39; accord WALDER, *supra* note 39, at 343.

<sup>353</sup> MacFarquhar, *supra* note 339, at 371.

<sup>354</sup> This reflects the fact that the meanings, significance and desirability of particular institutions are always intrinsically contestable, and that an institution's existence signals an invitation to stakeholders to contest the institution for their own self-interests. As such, the threat of the institutions' displacement—and with them, the incumbent's—is always real. One means to combat this threat is through institutional design: flexibility enables elites to

Moreover, as the incumbent, Hua was blamed for the conditions underlying society's discontent. This burden of incumbency was well-understood by the reformers but not by Hua. His status quo response was similar to the Qing government's resistance to change, which had made China susceptible to foreign powers while rendering the Qing's legitimacy vulnerable to the institutional entrepreneurs represented by the Nationalists.<sup>355</sup> Yuan Shikai's brief regime then collapsed reverting to discredited imperialist logics.<sup>356</sup> Subsequently, the Nationalists witnessed their legitimacy crumble as they took the blame for the problems of their era, vitiating them against the institutional entrepreneurial efforts of the CCP.<sup>357</sup> And the consequences of the Maoists' policies had left their logics susceptible to displacement once Mao himself was gone.<sup>358</sup> Hua now found himself vulnerable—on account of his incumbency, frail legitimacy, and imploding logics—to the institutional entrepreneurs led by Deng. As the reformers' logics gained traction,<sup>359</sup> Hua “would discover that position conferred prestige and privilege, but power had deeper roots.”<sup>360</sup>

The Qing, Yuan Shikai, the Nationalists, the Maoists and Hua Guofeng—each had failed when the burdens of incumbency eroded their legitimacy, leaving them vulnerable to actors more agile in institutional entrepreneurship.<sup>361</sup> It is in this historical context that the CCP's reform leaders designed the country's new legal order. Scholars attribute to the reformers a strong desire to avoid another Cultural Revolution.<sup>362</sup> But the reformers desired *more*—they sought an institutional reality that would stabilize their

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‘referee’ institutional contests with a minimal corresponding ‘cost’ to the elites’ legitimacy. *See infra* Part III.C.

<sup>355</sup> *See supra* Part III.B.1.

<sup>356</sup> *See supra* Part III.B.2.

<sup>357</sup> *See supra* Part III.B.2.

<sup>358</sup> *See supra* Part III.B.3.

<sup>359</sup> *See* MacFarquhar, *supra* note 339, at 378 (noting that Deng mobilized elite opinion through the press, and this was likely crucial to his victory over Hua).

<sup>360</sup> *Id.* at 371.

<sup>361</sup> *See infra* Figure 3. This is not to discount the role of the military, but rather highlights the vital support that institutional entrepreneurship contributed to the CCP's military successes.

<sup>362</sup> *See infra* notes 420–25 and accompanying text.

incumbency without restraining it—to imbue the CCP permanently not only with the prerogative but with the imperative of entrepreneurial adaptability. The reformers sought to avoid becoming vulnerable to more adept institutional entrepreneurs, as their predecessors had been. A system of flexible formal legality would be their principal tool of choice.

Ruler	Description	Outcome
Qing	Attempted reforms only at the last minute; otherwise, <u>extremely resistant to change</u>	Overthrown by a coalition led by Yuan Shikai
Yuan Shikai	Attempted to revert to a then-discredited set of <u>institutional logics (the monarchy)</u>	Died amidst opposition and the <u>abdication of his failed monarchy</u>
KMT (Chiang Kai-Shek)	Unable to establish rule firmly amidst great social upheaval; ineffective as institutional entrepreneur; supplanted by the CCP's military effort, of which its institutional entrepreneurship <u>was a vital element</u>	Fell to the CCP in 1949; fled to Taiwan
Maoists	Effectuated change as institutional entrepreneurs, but these changes were substantively corrosive; embraced continuous revolution and a corresponding lack of formal law; these factors, together with the disastrous consequences of the Maoists' economic policies and Mao's unwillingness to abandon his old, rigid ideas, left the Maoists' logics disparaged and the <u>Party's legitimacy in grave doubt</u>	Collapsed upon Mao's death; fell to Hua Guofeng
Hua Guofeng	Adhered too closely to Maoist logics at a point when they were no longer viable; outmaneuvered by the institutional entrepreneurs embodied in the reformers; did not attempt to compete as an <u>institutional entrepreneur</u>	Displaced by the reformers
The reformers	Understood from this history that monopolist rulers must not only adapt, but adapt <i>continuously</i> ; promulgated a system of flexible formal legality <u>partly in response to this insight</u>	In power from 1978 to the present

**Figure 3.** China's rulers, their varying approaches to institutions, and their respective fates.

In sum, the highly uncertain environment following Mao's death led to a power struggle the outcome of which belonged to the faction championing the more compelling set of institutional logics.<sup>363</sup> In this particular confluence of history and emergence, power was grounded in one's agility as an institutional entrepreneur—a role at which the reformers excelled.<sup>364</sup> Mao had attempted institutional entrepreneurship, even in the Cultural Revolution, the goal of which was “to change the nature of the Chinese people.”<sup>365</sup> Ironically, Mao's opportunism ensured the Party's adaptability through experimentation, even after the Party had repudiated Maoism generally.<sup>366</sup> The reformers would retain Mao's institutionalization of experimentation as a core Party logic,<sup>367</sup> but the overall results of Mao's efforts were far more destructive than creative, and left the CCP's legitimacy in shambles.<sup>368</sup> The competing logics of the Maoists and the Deng reformers are summarized in Figure 4.<sup>369</sup>

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<sup>363</sup> See Battilana et al., *supra* note 71, at 82 (noting that institutional entrepreneurs advance new institutional logics or modify, defend, or destroy old ones).

<sup>364</sup> The reformers wielded their ideas as weapons. See Leonard Seabrooke, *Transnational Institutions and International Regimes*, in THE OXFORD HANDBOOK OF COMP. INSTITUTIONAL ANALYSIS 253, 263 (2010) (discussing the use of ideas as weapons); MARK BLYTH, GREAT TRANSFORMATIONS 45 (2002) (characterizing ideas as “profoundly important political resources”).

<sup>365</sup> MacFarquhar, *supra* note 339, at 305.

<sup>366</sup> ORVILLE SCHELL & JOHN DELURY, WEALTH AND POWER: CHINA'S LONG MARCH TO THE TWENTY-FIRST CENTURY 392 (2013).

<sup>367</sup> Experimentation enabled by flexibility remains central to PRC law. Chenggang Xu, *The Fundamental Institutions of China's Reforms and Development*, 49 J. ECON. LIT. 1076, 1111 (2011).

<sup>368</sup> See *infra* Part III.C.

<sup>369</sup> See *supra* Part I (defining institutional logics).

	Maoists' Logics	Reformers' Logics
Aspirational ideal	Extreme fluidity within the Party and society: continuous revolution or "liberation"	Stability within the Party and society: law and order
Manifested artifacts	Absolute Party flexibility to prioritize, pursue, and preserve ideological dogmas	Party commitments, even if vague, are embodied in the law, in part to foster stability
General goals and consequences	Pure socialism and collectivization / lower standard of living	Quasi-capitalism (including foreign investment) / gradual privatization and rising standard of living
Guiding philosophy	Mao Zedong Thought	Socialist democratic dictatorship
Guiding precept	Ideological purity	Pragmatism
Views on foreign economic forces	Uninterested in foreign investment; attempted self-sustenance amid celebrating the end of foreign influence in China	Foreign direct investment viewed as a vital component for China's economic rise and, eventually, for the country's sovereignty
Views on foreign political forces	Largely isolationist; China's sovereignty equated with strict limits on foreign influence	Desire to engage global institutions; desire for China to have a "seat at the table"
Approach to foreigners	Limited engagements with the USSR, and then with the US, as Mao's sensibilities dictated	Selective embrace of foreign elements and eventual decoupling through legal flexibility
Political implications for citizenry	Direct involvement of the masses in political movements (e.g., class struggle)	More selective involvement of citizens enabled by a stable, formal legal system (e.g., the A/L)
General institutional frameworks	Only one amorphous institutional framework, consisting of informal institutions driven by the Party's shifting rhetoric and fiat	The CCP today navigates multiple institutional frameworks, including complex global and domestic frameworks, which must be managed
Resulting legal frameworks	Formal legal system established but discarded before much development; informal institutions (Party policy and rhetoric) predominate: rule by Party fiat, especially Mao's fiat	Flexible, formal legality established; formal legal system now plays an important role, though informal institutions remain relevant as a function of the formal system's flexibility
Institutional implications for the law	Formal legality was almost entirely superfluous; highly fluid informal institutions (including the Party's shifting ideological rhetoric) guide the country's affairs almost entirely; greater role for the military eventually emerges out of the chaos of the Cultural Revolution	Flexible law decouples China's multiple institutional frameworks, balancing the CCP's legitimacy and its prerogative to preserve its monopoly; legal system attempts to provide a political substitute for democracy by absorbing, preempting, and responding to social pressures; Party control of military

Figure 4. Competing institutional logics and institutional consequences of the Maoists and the reformers.

The reformers emerged victorious at the Third Plenum of the Eleventh Central Committee in December 1978.<sup>370</sup> Like Hua, Deng realized that the Party's legitimacy (and his own) depended upon repudiating the Cultural Revolution without delegitimizing Mao,<sup>371</sup> leading to the trial and conviction of the Gang of Four.<sup>372</sup>

In 1981, the CCP issued a formal revisionist statement of its own history.<sup>373</sup> The resolution declared Mao mostly a success (but also acknowledged his failures) and positioned Deng as the paramount leader.<sup>374</sup> With their version of history secured, the reformers then turned to reshape China in a pragmatic vein<sup>375</sup> by institutionalizing their logics.<sup>376</sup> The reformers enacted their changes aware that China's own path dependence had enabled Mao's excesses.<sup>377</sup> Like most institutional entrepreneurs, the reformers were determined to change the status quo from which they had emerged. The reformers' legal system would confer some measure of permanence upon their logics<sup>378</sup> at a time when the

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<sup>370</sup> MacFarquhar, *supra* note 339, at 377–82.

<sup>371</sup> *Id.* at 389–90.

<sup>372</sup> THE CULTURAL REVOLUTION, *supra* note 304, at 318–19.

<sup>373</sup> *Id.* at 319; *see also* MacFarquhar, *supra* note 339, at 389–93. The Party has produced numerous official histories. PHILIP P. PAN, OUT OF MAO'S SHADOW 85–86 (2008).

<sup>374</sup> THE CULTURAL REVOLUTION, *supra* note 304, at 320. History is a crucial strategic resource in Chinese culture, *see* LIU, *supra* note 93, at 135–40, so it is unsurprising that the reformers would seek to ensconce their version of events. “The Chinese people take history much more seriously than their Western counterparts,” LIU, *supra* note 93, at 136, and thus, history is a source of legitimacy in China. *Accord* Diana Lary, *The Uses of the Past*, in THE CHINESE PARTY-STATE IN THE 21ST CENTURY 130, 131 (André Laliberté & Marc Lanteigne eds., 2008).

<sup>375</sup> For example, Deng's cooperation with the U.S. reflected his pragmatism. *See* WESTAD, *supra* note 274, at 373.

<sup>376</sup> This requires the proponent of the institutions to establish and maintain their meanings, which are always contestable. John L. Campbell, *Institutional Reproduction and Change*, in THE OXFORD HANDBOOK OF COMP. INST. ANALYSIS 87, 105 (2010).

<sup>377</sup> In particular, the Party's 1981 resolution asserted that “Chinese feudal autocracy” had allowed Mao to undermine the authority of law. MacFarquhar, *supra* note 339, at 392.

<sup>378</sup> *See infra* Part III.C.

PRC's legal system was in need of dramatic reform.<sup>379</sup> The legal reforms were intended to institutionalize an equilibrium between stability and adaptability, erring on the side of the flexibility needed to ensure the CCP's authoritarian prerogative.<sup>380</sup> By promulgating flexible law, the reformers sought to use path dependence to their advantage.<sup>381</sup> future CCP leaders would be forced to attentively oversee the interface between Party and society, thereby necessitating the CCP's ongoing role not merely as *an* institutional entrepreneur, but as the PRC's *paramount* institutional entrepreneur.<sup>382</sup>

The CCP and state were thus rebuilt.<sup>383</sup> The reformers began constructing China's contemporary legal system in the 1980s, in large measure to provide the stability needed for foreign investment.<sup>384</sup> Although the reformers borrowed substantially from Western legal systems, they did not desire Western law institutionally.<sup>385</sup> Thus, while post-Mao reforms signaled "an understanding that the unbridled power of the Party ultimately threatened everyone,"<sup>386</sup> the state nevertheless remained immensely powerful.<sup>387</sup> Senior CCP leaders continue to "stand constant guard against [any] encroachment on the Party's power" that a Western

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<sup>379</sup> TANNER, *supra* note 226, at 551.

<sup>380</sup> See *infra* Part III.C. *Stability* refers to the public's assent (even if passive) to the Party's ongoing rule. See Benjamin L. Liebman, *China's Law and Stability Paradox*, in CHINA'S CHALLENGES 157, 161–62 (Jacques deLisle & Avery Goldstein eds., 2015).

<sup>381</sup> See PIERSON, *supra* note 96, at 10–11 (discussing path dependence).

<sup>382</sup> See Hal Blanchard, *Constitutional Revisionism in the PRC: "Seeking Truth from Facts,"* 17 FLA. J. INT'L L. 365, 373–74 (2005) (noting some of the Party's advantages in legal flexibility).

<sup>383</sup> MacFarquhar, *supra* note 339, at 393–401; DALI L. YANG, REMAKING THE CHINESE LEVIATHAN 65 (2004) (noting that the reformers' downsizing of government was intended to make it more effective, and the Party more secure).

<sup>384</sup> SCHOPPA, *supra* note 232, at 370–71.

<sup>385</sup> See William Partlett & Eric C. Ip, *Is Socialist Law Really Dead?*, 48 N.Y.U. J. INT'L L. & POL. 463, 510–11 (2016) (warning that China's increasing legal formality does not portend an institutional convergence with Western legal systems).

<sup>386</sup> MacFarquhar, *supra* note 339, at 400.

<sup>387</sup> *Id.* The PRC state remained powerful for an additional reason: even private relationships such as contract depend upon state power. Lan, *supra* note 8, at 383.

rule of law system would represent.<sup>388</sup> This view has endured, most tragically reflected at Tiananmen Square, where the Party sent “a signal that still pulsates to this day: do not query the monopoly of the one-party state.”<sup>389</sup> To the extent that the PRC’s legal institutions might imply self-restraint by the Party, it holds only so long as the Party believes that it can zealously protect its power. The legal system is not viewed as an avenue to a democratic state, but as a means to legitimize and enhance the stability of the CCP as the source of all political power.<sup>390</sup> While the formalism of this arrangement may represent a stronger rule of law than at any other time in China’s history, law is primarily used to defuse tensions,<sup>391</sup> maintain order, and sustain the CCP’s monopoly.

There are two important implications of the evolution of the PRC’s legal system as discussed above. First, the reformers came to power with the realization that if they and the CCP were to survive, institutional entrepreneurship would be a vital feature of their governance.<sup>392</sup> China’s prior rulers had either waited until conditions were bad to attempt institutional entrepreneurship (treating it as a discrete tool to be applied only selectively), or hardly attempted it at all.<sup>393</sup> The reformers saw the need for institutional entrepreneurship as a tool to be applied continuously rather than intermittently. China’s system of flexible legality reflects this

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<sup>388</sup> One senior leader asserted in 2007 that the PRC’s enemies “were trying to use the law to undermine and divide China.” MCGREGOR, *supra* note 289, at 25; accord Liebman, *China’s Law and Stability Paradox*, *supra* note 380, at 173. “The correct political stand,” this member reiterated, “is where the Party stands.” MCGREGOR, *supra* note 289, at 25.

<sup>389</sup> THE CULTURAL REVOLUTION, *supra* note 304, at 322; *see also* Lubman, *supra* note 37, at 77 (discussing the CCP’s unwillingness to place itself within the reach of the law).

<sup>390</sup> Legal and political reforms “were not meant as stepping-stones toward . . . multiparty democracy: the goal of reform was to preserve and enhance the stability of the single-party state.” TANNER, *supra* note 226, at 553; *see also supra* text accompanying note 37.

<sup>391</sup> TANNER, *supra* note 226, at 568.

<sup>392</sup> Indeed, the Party’s “continued . . . rule derives from [its] successful adaptation to changing economic and social conditions.” TERESA WRIGHT, *ACCEPTING AUTHORITARIANISM: STATE-SOCIETY RELATIONS IN CHINA’S REFORM ERA* 26 (2010) [hereinafter *ACCEPTING AUTHORITARIANISM*].

<sup>393</sup> *See supra* Figure 3.

realization. Second, history provides practical insights for MNCs doing business in China today. While the PRC's legal system emerged out of the CCP's self-interested effort to conserve its legitimacy and role as institutional entrepreneur, that very system now affords MNCs with the opportunity, if not the imperative, to engage in legal entrepreneurship. The flexibility of the PRC's legal system supplies a conducive context for doing so.<sup>394</sup>

The next section concludes the analysis of why the PRC's legal system is so flexible by examining the nearly insurmountable tensions that the reformers had to accommodate through institutional design.

### *C. History, Strategy, and the Logic of Chinese Law: CCP as Institutional Entrepreneur*

By the early 1980's, the CCP's *Fundamental Dilemma* was apparent: how to establish the requisite stability for economic growth, thereby making China strong internationally, without sacrificing the Party's legitimacy or strength domestically. Whatever the solution, it would have to account for potential challengers to the CCP's monopoly, spectacular pressures on the CCP's legitimacy, and the trade-off between the economic need for predictability and the CCP's need for discretion.<sup>395</sup> The reformers were thus faced with a seemingly intractable dilemma with no obvious solutions. Yet the Party *has* devised a solution—through legal flexibility—and this solution is working,<sup>396</sup> at least for now.

For most American observers, “[t]he primary Chinese motivation for undertaking legal reform . . . is economic,” but it is clear to both U.S. government officials and non-governmental experts that China's “leadership wants to prevent reforms from seeping into the political sphere, and does not want any reforms that would undermine the central leadership's decision-making

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<sup>394</sup> See *infra* Part V.

<sup>395</sup> See RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW 21 (1994) (discussing the necessity of predictability and unity within the law).

<sup>396</sup> The CCP “survives because both the elites and the people perceive it as successful.” Ivan Krastev, *Paradoxes of the New Authoritarianism*, 22 J. DEMOCRACY 5, 8 (2011).

authority.”<sup>397</sup> Flexible law facilitates economic reform without the need for substantial political reforms, and the analysis above suggests that while economic liberalization was clearly one of the reformers’ major goals, their *top* priority was the preservation of the CCP’s power.<sup>398</sup> Economic reforms were pursued because a rising standard of living was the factor most likely to repair the CCP’s legitimacy after Mao.<sup>399</sup> Hence, the typical assumption—that China’s legal reforms were intended simply to spur economic growth—greatly oversimplifies the CCP’s actual motives. The implementation of economic and legal reforms does not explain the flexibility of the PRC’s legal system when certainty and predictability (that is, the objective and transparent application of formal rules) are considered the accepted model for stable economic growth.<sup>400</sup> Had the top priority been simply to grow the economy, the Party would have attempted a legal system affording maximum predictability and the minimization of transaction costs.<sup>401</sup> The analysis above reveals a more complex set of motives in which the CCP intended not merely to reform the PRC economy, but to do so

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<sup>397</sup> Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored ‘Rule of Law’ Reform Projects in the People’s Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 77 (2000).

<sup>398</sup> Economic expansion alone hardly guarantees the Party’s success. Zhengxu Wang, *Political Trust in China: Forms and Causes*, in LEGITIMACY: AMBIGUITIES OF POLITICAL SUCCESS OR FAILURE IN EAST AND SOUTHEAST ASIA 113, 138 (Lynn White ed., 2005).

<sup>399</sup> Mao’s ideological and charismatic authority enabled him to circumvent the historical lesson that his successors could not: a ruler’s legitimacy is generally tied to its delivery of public goods and promotion of the public welfare. VON GLAHN, *supra* note 232, at 85, 398–99.

<sup>400</sup> FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 371 (2014) (noting that most China observers have focused on economic reforms while neglecting political institutions).

<sup>401</sup> Clearly, the CCP has not opted for a legal system of maximum predictability. *See, e.g.*, Katherine R. Xin & Jone L. Pearce, *Guanxi: Connections as Substitutes for Formal Institutional Support*, 39 ACAD. MGMT. J. 1641, 1643 (1996) (noting that China’s “institutional instability . . . make[s] market exchanges uncertain and costly”); *see also supra* Part III.A.

on its own terms.<sup>402</sup> “Dictators are inherently insecure,”<sup>403</sup> and flexible law can help to promote the dictator’s stability while still allowing for the private economic activity that finances the dictator’s government.<sup>404</sup> Western expectations that other stakeholders’ interests will independently drive legal reform in China are misplaced.<sup>405</sup>

Legitimacy lends itself to abstractions, but its actual manifestation is vitally important to political actors. Professor Lipset states “most sociologists would agree that stable authority is *power plus legitimacy*.”<sup>406</sup> As discussed previously, the CCP’s purity of ideology had sustained its legitimacy for most of Mao’s rule, but its destructive record eventually eroded its credibility.<sup>407</sup> By the end of Mao’s reign, it appeared as though the CCP was careening toward the same fate as its predecessors.<sup>408</sup> To prevent the Party’s own self-destruction, the reformers created institutions that could accommodate an array of conflicting demands,<sup>409</sup> institutionalizing the flexibility essential to the CCP’s ongoing

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<sup>402</sup> Hence, China’s legal formalization does not yield “increasing autonomy from the dictates of party policy.” Biddulph, *supra* note 157, at 224.

<sup>403</sup> Stephen Haber, *Authoritarian Government*, in THE OXFORD HANDBOOK OF POL. ECONOMY 693, 694 (Barry R. Weingast & Donald A. Wittman eds., 2006).

<sup>404</sup> See *id.* at 698–99 (noting that a lack of property rights undercuts an authoritarian by depriving it of a reliable tax base).

<sup>405</sup> China’s legal institutions are accomplishing exactly what they were designed to do. Dillon, *supra* note 158, at 186; Benjamin L. Liebman, Essay, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181, 244–45 (2013).

<sup>406</sup> SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 22 (1963) (emphasis added).

<sup>407</sup> See *supra* Part III.B. Still, ideology does impact the Party’s legitimacy. See Bruce Gilley & Heike Holbig, *The Debate on Party Legitimacy in China: A Mixed Quantitative/Qualitative Analysis*, 18 J. CONTEMP. CHINA 339 (2009).

<sup>408</sup> See *supra* Figure 3 (summarizing China’s modern rulers and their respective fates).

<sup>409</sup> China’s formal law has accommodated myriad informal institutions. Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103 (2006); Mary Szto, *Strengthening the Rule of Virtue and Finding Chinese Law in “Other” Places: Gods, Kin, Guilds, and Gifts*, 35 SUFFOLK TRANSNAT’L L. REV. 1 (2012).

entrepreneurship without ossifying the institutions themselves. The CCP's mechanism for accomplishing these ambitious goals would be its flexible legal regime—an immensely adaptive system distinctively resistant to institutionalization, designed to ensure the CCP's primacy amongst China's institutional entrepreneurs even while tolerating power outside of the Party.

The reformers' rationale for formal law was straightforward. Deng and the reformers harbored a deep psychological need to restore the PRC's strength internationally—an imperative long shared by the Chinese public.<sup>410</sup> So long as the PRC's sovereignty was tenuous,<sup>411</sup> the CCP's legitimacy would remain vulnerable to attack.<sup>412</sup> The reformers also understood that affluence was key to restoring the PRC's strength<sup>413</sup>—only a freer market could finance a government strong enough to enforce China's territorial and economic integrity.<sup>414</sup> In turn, however, the PRC's development

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<sup>410</sup> R. Lufrano, *Yan Jiaqi: "How China Can Become Prosperous"*, in 2 SOURCES OF CHINESE TRADITION 523, 524 (Jane Kate Leonard & John R. Watt eds., 1992) (noting that "the question of how China is to achieve wealth and power goes back to the self-strengthening movement of the 1860s . . ."); see also *supra* Part III.B; DREYER, *supra* note 36, at 6; Heilmann & Schulte-Kulkman, *supra* note 178, at 641; Kaufman, *supra* note 218, at 2; Peerenboom, *supra* note 218, at 654–55.

<sup>411</sup> While China was under no immediate threat at this time, many elites then, like today, perceived that the PRC's autonomy and very existence were threatened by a "world order dominated by 'hegemonic' Western powers . . . ." EDWARD VICKERS & ZENG XIADONG, EDUCATION AND SOCIETY IN POST-MAO CHINA 324 (2017).

<sup>412</sup> The Communists themselves had gained traction in the civil war by convincing the public that the Nationalists were responsible for China's baleful state. See e.g., DREYER, *supra* note 36, at 82–84; CHIANG KAI SHEK, *supra* note 276, at 348–49, 484–86 (2003); ROBERTS, *supra* note 263, at 412.

<sup>413</sup> Peerenboom, *supra* note 218, at 654–56 (observing that the reformers' focus has been "economic development and political stability"). "Political stability" here refers to the preservation of the CCP's political monopoly. See *supra* text accompanying note 37.

<sup>414</sup> The goals of development and order are central to all states. Nasra & Dacin, *supra* note 96, at 586–87. Rulers must have an effective tax system to fund their military and other public goods. Donald F. Kettl, *Public Bureaucracies*, in THE OXFORD HANDBOOK OF POL. INSTITUTIONS 366, 367 (R.A.W. Rhodes et al. eds., 2006). Western powers had dramatically weakened the Chinese government's financial base during the Century of Humiliation, see VON GLAHN, *supra* note 232, at 397, so the voluntary re-introduction of foreign economic

would depend, at least initially, upon foreign investment—and a reasonably stable legal system was a prerequisite to attracting such investment.<sup>415</sup> Before the PRC's standing could be strengthened internationally,<sup>416</sup> a private marketplace and salutary legal system were needed domestically.<sup>417</sup> The twin goals of political stability and economic growth required the exercise of institutional entrepreneurship to provide the proper context for their achievement.<sup>418</sup> Thus, institutional entrepreneurship in legal reform became central to the CCP's survival.<sup>419</sup> The goals of stability and growth, informed by the need for foreign capital, favored a stable and predictable legal order.

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actors was a sensitive issue for the reformers. The Qing had even recognized “commercial warfare” as key to reclaiming China's sovereignty, VON GLAHN, *supra* note 232, at 378, and viewed the economy strategically, Jane Kate Leonard, *The State's Resources and the People's Livelihood* (Guoji Minsheng): *The Daoguang Emperor's Dilemmas about Grand Canal Restoration, 1825*, in TO ACHIEVE SECURITY AND WEALTH 47, 50–51 (Jane Kate Leonard & John R. Watt eds., 1992).

<sup>415</sup> Li, *supra* note 172, at 73; see also Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 717 (1994). Clearly, China's law has been stable enough to attract foreign investment in the reform era. Some scholars attribute foreign capital to saving the Party's monopoly. See, e.g., Mary E. Gallagher, “Reform and Openness,” 54 WORLD POL. 338, 372 (2002).

<sup>416</sup> Flora Sapio, *The Invisible Hand of Government: The Conceptual Origins of Social Management Innovation*, in THE POLITICS OF LAW AND STABILITY IN CHINA 244–45 (Susan Trevaskes et al. eds., 2014).

<sup>417</sup> An authoritarian “government's imperative is sustaining state power. Economics and markets are tools to do so.” JOHN D. DANIELS ET AL., INTERNATIONAL BUSINESS 98 (14th ed. 2013).

<sup>418</sup> See Zhu, *supra* note 145, at 429; Bruce Gilley, *Legitimacy and Institutional Change: The Case of China*, 41 COMP. POL. STUD. 259, 260 (2008) (linking institutions and legitimacy). Mao had “failed to deliver on the long-standing promise of all Chinese revolutionaries since the early twentieth century—building a prosperous China strong enough to protect its national interests in a dangerous world.” Jacques deLisle & Avery Goldstein, *China's Challenges: Reform Era Legacies and the Road Ahead*, in CHINA'S CHALLENGES 1, 3–4 (Jacques deLisle & Avery Goldstein eds., 2105). Today's Party claims credit for ending the Century of Humiliation as part of its legitimacy. WANG, *supra* note 218, at 127–29.

<sup>419</sup> Many scholars argue that China's capitalism has reinforced rather than eroded its political system. See, e.g., ACCEPTING AUTHORITARIANISM, *supra* note 392, at 22–23.

The PRC's internal traumas supplied the reformers with at least three additional reasons to favor a stable, formal legal system. First, so ineffectual was the PRC's initial law that Mao had encountered virtually no institutional resistance to a war against his rivals within the CCP.<sup>420</sup> Legal order might discourage political instability.<sup>421</sup> Moreover, the Party's survival would require the peaceful resolution of intra-Party strife, particularly as new factions were invited into the fold.<sup>422</sup> Factional monopolies require *particularly* strong institutions.<sup>423</sup> The reformers recognized this reality:<sup>424</sup> the right legal system would promote the CCP's durability from within.<sup>425</sup>

Second, the reformers understood the market imperative for law. Economic development was needed to finance the PRC's strength. Therefore, a new legal system was needed to maintain order and foster economic incentives,<sup>426</sup> and would also, conversely,

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<sup>420</sup> TANNER, *supra* note 226, at 550–51 (“Many senior Party officials and their families had endured terrible personal suffering during the Cultural Revolution.”).

<sup>421</sup> Keller, *supra* note 415, at 713; *accord* YANG FENGCHUN, CHINESE GOVERNMENT 61 (2004).

<sup>422</sup> Factions pervade the Party. *See* Ben Hillman, *Factions and Spoils: Examining Political Behavior within the Local State in China*, 64 CHINA J. 1, 3 n.9 (2010) (listing major scholarly works addressing CCP factionalism); *see generally* Victor Shih et al., *Getting Ahead in the Communist Party: Explaining the Advancement of Central Committee Members in China*, 106 AM. POL. SCI. REV. 166 (2012) (arguing, *inter alia*, that factional ties drive promotions in the PRC bureaucracy).

<sup>423</sup> *See* DOUGLASS C. NORTH ET AL., VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 155 (2009) (noting the value for political incumbents of laws that can be enforced across sundry power dynamics).

<sup>424</sup> *See* MILAN W. SVOLIK, THE POLITICS OF AUTHORITARIAN RULE 92–117 (2012) (arguing that authoritarians can benefit from institutionalizing the rules of power-sharing among elites and showing that China's reformers did this to prevent another Maoist personality cult). “[B]y being less likely destabilizing from within, regimes that institutionalize power-sharing may be even more successful at confronting mass challenges.” *Id.* at 117.

<sup>425</sup> *See* RONALD COASE & NING WANG, HOW CHINA BECAME CAPITALIST 101–02 (2012) (noting that the reformers' legal system was intended to prevent another personality cult).

<sup>426</sup> Wang, *supra* note 327, at 12 (observing that the reformers viewed the law as a necessary means to maintain economic development); CHEN, *supra* note

facilitate social order through economic growth.<sup>427</sup> The CCP would not adopt Western models wholesale, but would instead develop “socialism with Chinese characteristics”<sup>428</sup>—that is, growth commensurate with the CCP’s continuing rule.<sup>429</sup>

Third, as noted above, the CCP was facing a legitimacy crisis when Deng took power, and the reformers were acutely aware of this.<sup>430</sup> Mao’s reign yielded extreme hardship for most citizens.<sup>431</sup> As pragmatists, the reformers realized that “[l]egitimacy is at the basis of power”<sup>432</sup>—that “[e]ven communist and authoritarian single

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152, at 97 (noting that reforms are “aimed at creating a stable social order for smooth economic development”); DREYER, *supra* note 36, at 5 (noting that Deng supported the introduction of “the rule of law” but that “[h]is rationale . . . was less civil libertarian than a result of his belief that a legal system was necessary to resolve disputes . . . before the wheels of production could turn smoothly”).

<sup>427</sup> Susan Trevaskes et al., *Framing the Stability Imperative*, in *THE POLITICS OF LAW AND STABILITY IN CHINA* 268, 272–73 (Susan Trevaskes et al. eds., 2014); YUEH, *supra* note 6, at 9–13.

<sup>428</sup> DREYER, *supra* note 36, at 5–6 (noting that while no definitive definition of “socialism with Chinese characteristics” has been established, it includes the ability to increase one’s wealth, which in turn requires some degree of individual freedom and incentive).

<sup>429</sup> See *supra* text accompanying note 37 (noting the assumption that the CCP’s top priority is its own survival as a political monopoly).

<sup>430</sup> FEWSMITH, *supra* note 17, at 1; accord *THE CULTURAL REVOLUTION*, *supra* note 304, at 321; MACFARQUHAR & SCHOENHALS, *supra* note 315, at 1–3; see also YICHING WU, *THE CULTURAL REVOLUTION AT THE MARGINS: CHINESE SOCIALISM IN CRISIS* 219 (2014) (arguing that China’s legal system represents both a developmental strategy and a “response . . . to continuously developing crises”).

<sup>431</sup> See, e.g., *Victims*, in *CHINESE CIVILIZATION: A SOURCEBOOK* 458–69 (Patricia Buckley Ebrey ed., 1993) (recounting one family’s experiences); see also HUANG, *supra* note 23, at 23–24. “The evident political bankruptcy of the [Maoist] leadership . . . allowed a resurgence of [the reform factions, who prioritized] economic development over social transformation.” Charles Burton, *China’s Post-Mao Transition: The Role of the Party and Ideology in the “New Period,”* 60 PAC. AFF. 431, 431 (1987). The Maoists had failed to meet society’s expectations. *Id.* at 435. Reform policies would “in large part [be] a response to the ‘crisis of faith’ in Marxism-Leninism and Mao Zedong Thought which became a widespread phenomenon.” *Id.*; see also Cohen, *supra* note 155, at 423–24.

<sup>432</sup> Li, *supra* note 1, at 49; accord Gilley, *supra* note 418, at 269.

party-states require popular legitimacy to sustain their rule.”<sup>433</sup> Mao “left China in a quiet crisis”—in such a bad state that he unwittingly “gave his successors the opportunity for a new start.”<sup>434</sup> The reformers saw the implementation of a flexible legal system as a sort of pressure release valve,<sup>435</sup> allowing the Party to address demands for justice, without committing to a uniform response that would constrain the CCP’s future options.<sup>436</sup>

Among other benefits, such as legitimizing power, formal law enabled the CCP to be more responsive to the public.<sup>437</sup> Hence, the reformers began consciously using formal law as a means to promote the CCP’s legitimacy.<sup>438</sup> The reformers set out to establish a new political culture—stable yet flexible, accommodating of private interests but with the CCP firmly ensconced.<sup>439</sup> Under Mao, officials attempted to discredit every other conceivable source of authority (including China’s history and traditions) in an effort to

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<sup>433</sup> DAVID SHAMBAUGH, CHINA’S COMMUNIST PARTY: ATROPHY AND ADAPTATION 2–3 (2008); accord ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 45 (2001).

<sup>434</sup> WALDER, *supra* note 39, at 341–42 (noting that the early reformers enjoyed an opportunity “outside the narrow limits of Maoist doctrine”).

<sup>435</sup> See Gallagher, *supra* note 415, at 372 (arguing that the CCP promotes law both to assert control over society and to stave off demands for democratization); Slater, *supra* note 165, at 140–41 (noting that the collapse of authoritarian states is usually punctuated since their institutions tend to be unresponsive to public pressures).

<sup>436</sup> See, e.g., Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 75 LAW & SOC. INQUIRY 75 (2006) (showing how flexibility enables local PRC courts to maintain their legitimacy despite conflicting global institutional pressures).

<sup>437</sup> PARTY AND STATE, *supra* note 43, at 180; COASE & WANG, *supra* note 425, at 102 (arguing that formal legality protects the Party from reckless leaders and mass participation).

<sup>438</sup> Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 51, 79–80 (2002); see generally Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 CHINA Q. 325 (1994).

<sup>439</sup> This was crucial to the reformers because “[p]olitical legitimacy is conceptualized and contested through the medium of political culture.” MLADA BUKOVANSKY, LEGITIMACY AND POWER POLITICS: THE AMERICAN AND FRENCH REVOLUTIONS IN INTERNATIONAL POLITICAL CULTURE 2 (2002); see also WENFANG TANG, POPULIST AUTHORITARIANISM: CHINESE POLITICAL CULTURE AND REGIME SUSTAINABILITY 2–5 (2016).

command citizens' total loyalty.<sup>440</sup> The reformers' political culture became more complex.<sup>441</sup> Establishing a new political culture is challenging.<sup>442</sup> By the time the reformers took power, "[t]he instability of the legal framework cultivated a social cynicism toward law and order in China[.]"<sup>443</sup> Still, some semblance of continuity was fabricated to facilitate reform.<sup>444</sup> As a result, the CCP continued to wield total control based upon the fusion of cultural, economic and political power that enables today's officials to defend their legitimacy within the broader institutional framework.

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<sup>440</sup> See, e.g., Mary Lynne Calkins, *Censorship in Chinese Cinema*, 21 HASTINGS COMM. & ENT. L.J. 239, 271 n.170 (1999) (noting that during the Cultural Revolution, Mao "led a violent political assault on China's cultural traditions ..."); Bruce J. Dickson, *The Survival Strategy of the Chinese Communist Party*, 39 WASH. Q. 27, 37 (2016) (observing that "[w]hen the CCP first came to power in 1949, it was committed to eradicating Confucian traditions"); Erin E. Douglas, *The Chinese Communist Party and Western Values Clash*, 29 DENV. J. INT'L L. & POL'Y 151, 162 (2001) (noting, in an example typical of the era, that Mao tested the loyalty of intellectuals during the Hundred Flowers Campaign); Orville Schell, *China's Cover-Up*, FOREIGN AFF., Jan.-Feb. 2018, at 22 (noting, *inter alia*, the CCP's efforts to "'rectify' young people's thinking" under Mao and its subsequent efforts to control the official historical record surrounding its existence); Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT'L & COMP. L.J. 1, 56–57 (2010) (stating, *inter alia*, that "[i]n Mao's era, the obligation-based theme [that is, the Confucian expectation of loyalty] had become a political force").

<sup>441</sup> FEWSMITH, *supra* note 17, at 2.

<sup>442</sup> *Id.* Some Maoist logics were well-entrenched and resistant to change, even though many citizens welcomed political moderation and reform. See, e.g., Foreign Broadcast Information Service, *What is Wrong with Being Red and Expert?*, in CHINA SINCE 1919: REVOLUTION AND REFORM 214–15 (2004) (excerpting an article in which reformers countered the "Red but not expert" Maoist logic of the Cultural Revolution); see also MICHAEL DUTTON, *POLICING CHINESE POLITICS: A HISTORY* 263–64 (2005) (discussing the importance of formal law in the reformers' creation of a new political culture).

<sup>443</sup> DING LU, *ENTREPRENEURSHIP IN SUPPRESSED MARKETS: PRIVATE-SECTOR EXPERIENCE IN CHINA* 158 (1994).

<sup>444</sup> TANG, *supra* note 439, at 11–12; see also WU, *supra* note 430, at 220 ("[B]y preempting popular challenges . . . [market reforms] posed less of a threat to the position of the ruling elite. All these measures were, after all, conducted within the calculated political limits of maintaining the existing structure of power.").

Threats to an authoritarian regime can arise from other elites, the public, and from foreign powers; and the incumbent's response will depend upon the nature of the threat.<sup>445</sup> The reformers inaugurated the creation of a private marketplace and the establishment of a Chinese rule of law in tandem.<sup>446</sup> Today, the CCP's survival strategy entails carrots in the form of economic opportunity and appeals to symbolic authorities (such as nationalism, the selective invocation of China's traditional heritage, and co-optation), as well as sticks (the repression of perceived threats).<sup>447</sup> The legal system implemented by the CCP was intended to serve (and in fact *has* served) the CCP's strategy of buttressing a socialist rule of law, promoting the economy, and repairing the elites' legitimacy.<sup>448</sup>

This discussion illustrates why the reformers favored a *formal* legal system: to prevent another Maoist personality cult; provide a foundation for the economic growth that would finance the PRC's restoration of its global status; and repair the CCP's legitimacy by conditioning the rising affluence of everyday citizens upon its continuing rule. Yet these factors do not explain the PRC's high degree of legal flexibility, which is generally viewed as antithetical to such goals as stability and commerce. More is needed to show why the CCP came to favor such a *flexible* formal legal system: we must also consider the most daunting challenges accompanying legal reform within the historical context established in Part III.B.<sup>449</sup>

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<sup>445</sup> BRUCE BUENO DE MESQUITA ET AL., *THE LOGIC OF POLITICAL SURVIVAL* 23 (2003).

<sup>446</sup> THE SEARCH, *supra* note 155, at 704. The reformers "saw legal reform . . . as a useful instrument not to promote democratic governance but to improve the means of Party control over society." CHEN, *supra* note 152, at 169. Rapid economic change facilitates and mutually supports institutional adaptability. Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 587–97 (2009).

<sup>447</sup> See, e.g., THE DICTATOR'S DILEMMA, *supra* note 145, at 2–3.

<sup>448</sup> See CHEN, *supra* note 152, at 156–58.

<sup>449</sup> China's legal flexibilities enable controlled experiments to test ideas before implementing them widely. The reformers adopted a strategy—"take one step and then decide on the next step"—which "allows the CCP a high degree of political responsiveness" by "constantly . . . readapt[ing] its governance . . . to

The reforms first prompted yet *another* legitimacy crisis, the irony of which was palpable. Radical socialism had failed<sup>450</sup> and the CCP turned to capitalist reforms. But as policies jettisoned pure socialism in favor of “socialism with Chinese characteristics,” little remained to distinguish the CCP from alternative political groups.<sup>451</sup> “If China’s ‘socialist cause’ were endangered, so too would be the legitimacy of the CCP’s national rule.”<sup>452</sup> The shift from socialism to quasi-capitalism suffered from a “complete lack of reliance on any theoretical rationalization for the change.”<sup>453</sup> Moreover, corruption pervaded the Communist bureaucracy in the 1980s.<sup>454</sup> In denying these problems, the CCP’s continued use of socialist rhetoric confused the average citizen, who observed a largely free marketplace in daily life.<sup>455</sup> The resulting dichotomy between rhetoric and reality further eroded the CCP’s credibility.<sup>456</sup> Certain human factors associated with the transition, including incompetence, also undercut the CCP’s standing.<sup>457</sup> And early in reform, most bureaucrats were still Maoists critical of the reformers’ agenda.<sup>458</sup> Balance, pragmatism, and flexibility were essential to

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meet . . . emerging demands.” Burton, *supra* note 431, at 445–46. This strategy is commensurate with the reformers’ realization of the need for a continuous competitive advantage in institutional entrepreneurship. This incremental strategy “implicitly acknowledges no ideological ‘truths’ or preconceived political ends at all.” *Id.* at 445.

<sup>450</sup> See *supra* Part III.B.3.

<sup>451</sup> Burton, *supra* note 431, at 437. Mao had foreseen this dilemma. *Id.* In moving away from its ideological legitimacy, the Party instead embraced the “principles of nationalism, Chinese industry, and the ability of China to compete in the international economy.” Gallagher, *supra* note 415, at 371.

<sup>452</sup> Burton, *supra* note 431, at 437; accord WANG HUI, CHINA’S NEW ORDER 57–58 (2003).

<sup>453</sup> Burton, *supra* note 431, at 437; accord Lubman, *supra* note 37, at 80–81; MEISNER, *supra* note 351, at 437.

<sup>454</sup> MEISNER, *supra* note 351, at 476.

<sup>455</sup> HUI, *supra* note 452, at 57. The reformers could not repudiate Mao altogether, and indeed, had to characterize Mao’s legacy with caution for the sake of the Party’s legitimacy. See HUANG, *supra* note 23, at 21; MEISNER, *supra* note 351, at 439–46.

<sup>456</sup> SAICH, *supra* note 152, at 3.

<sup>457</sup> JOHN BRYAN STARR, UNDERSTANDING CHINA: A GUIDE TO CHINA’S ECONOMY, HISTORY, AND POLITICAL CULTURE 58 (2001).

<sup>458</sup> See DREYER, *supra* note 36, at 112–20.

the reformers' efforts as they struggled to reconcile formal law with authoritarian rule.<sup>459</sup>

The second major challenge that a formal legal system posed was the law's restrictive nature—not for society, but for the CCP itself.<sup>460</sup> Irrespective of the particular policies it embodies, the law constrains government action.<sup>461</sup> This seems counterintuitive for an authoritarian government; the CCP can change its policies at will.<sup>462</sup>

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<sup>459</sup> Balance has been institutionalized as part of China's broader reforms. See David Shambaugh, *The Chinese State in the Post-Mao Era*, in THE MODERN CHINESE STATE 181 (David Shambaugh ed., 2000); see also BRUCE GILLEY, THE RIGHT TO RULE: HOW STATES WIN AND LOSE LEGITIMACY 25 (2009) (citing the CCP's 2004 acknowledgment that its ruling status is not ensured and must be diligently managed). The Party also values flexibility because the goals of economic development and social order are not always consistent with one another. Xin Frank He, *Sporadic Law Enforcement Campaigns as a Means of Social Control: A Case Study from a Rural-Urban Migrant Enclave in Beijing*, 17 COLUM. J. ASIAN L. 121, 138–39 (2003).

<sup>460</sup> Indeed, any institutionalization is constraining. FEWSMITH, *supra* note 17, at 5. Even the “[i]nstitutionalization of state-society relations . . . binds the party-state . . .” *Id.* at 12.

<sup>461</sup> The law and economics movement “perceives law as restraining the state and empowering private actors.” RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 452–53 (2002). Ancient Chinese rulers recognized that public laws constrained their freedom to act. Qiang Fang & Roger Des Forges, *Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949 CE*, 44 STAN. J. INT'L L. 101 (2008). The ancient Chinese correlated their leaders' faithful observance of the laws with the leaders' legitimacy; thus, a ruler's downfall was often attributed to their disregard of the laws. *Id.*; see also FUKUYAMA, *supra* note 400, at 361 (noting that Chinese emperors were restrained by the bureaucracy and court rules); Huang Zongxi, *Critique of the Chinese Dynastic System*, in 2 SOURCES OF CHINESE TRADITION 4, 10–12 (Jane Kate Leonard & John R. Watt eds., 1992) (asserting that, in ancient China, “as [the laws] become tighter they become the very source of disorder”). Mao, too, was constrained—even by informal institutions—and this explains his attacks on traditional Chinese culture. See COASE & WANG, *supra* note 425, at 11. Local officials today also resent the constraints of law. STEPHEN K. MA, ADMINISTRATIVE REFORM IN POST-MAO CHINA: EFFICIENCY OR ETHICS 123 (1996).

<sup>462</sup> The institutionalization of policy-making processes curtails the elites' ‘freedom of action’ in a second way, in addition to the legitimacy constraint. See HUANG, *supra* note 23, at 14–15. This helps to explain the Party's use of campaigns today—to mitigate bureaucratic entrenchment. See Elizabeth J. Perry, *From Mass Campaigns to Managed Campaigns: ‘Constructing a New Socialist*

But even in an authoritarian system, publicly available laws function as a *commitment by the state*—a commitment that the government will act in a certain way under certain circumstances, and a commitment to use the state's coercive power to compel compliance by others.<sup>463</sup> The CCP's legitimacy is invariably placed at issue when laws are disseminated openly.<sup>464</sup> Public laws create public expectations, which are then measured against the state's actual behavior.<sup>465</sup> The CCP is thus conflicted, in some instances desiring innovation and in others, resisting it.<sup>466</sup>

This Paper has argued that China's flexible formal legality is one of the CCP's key institutional mechanisms to balance these conflicting concerns.<sup>467</sup> Like other authoritarians, the CCP must oppose the Western perspective of the rule of law,<sup>468</sup> as it is incompatible with absolute state power. More generally, authoritarians must oppose any institutions that might constrain their power, or else learn how to mitigate or manipulate such forces. Institutionalization endows the law with a life of its own,<sup>469</sup> and the

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*Countryside*, in MAO'S INVISIBLE HAND 30, 51 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011).

<sup>463</sup> See Corne, *supra* note 7, at 375 (discussing the tradeoff between predictability for regulated actors and the Party's flexibility to respond to social developments); accord Mary E. Gallagher, "Use the Law as Your Weapon!", in ENGAGING THE LAW IN CHINA 54, 76 (Neil J. Diamant et al. eds., 2005); Glenn Morgan & Sigrid Quack, *Law as a Governing Institution*, in THE OXFORD HANDBOOK OF COMP. INSTITUTIONAL ANALYSIS 275, 276 (2010).

<sup>464</sup> Politicians' "freedom of action has usually been constrained by concerns to preserve 'legitimacy' . . ." Lawrence, *supra* note 123, at 224.

<sup>465</sup> Gallagher, *supra* note 463, at 76; Liebman, *supra* note 145, at 20–21; Curtis J. Milhaupt & Katharina Pistor, *The China Aviation Oil Episode: Law and Development in China and Singapore*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS 329, 347–48 (David Kennedy & Joseph E. Stiglitz eds., 2013).

<sup>466</sup> FEWSMITH, *supra* note 17, at 15–16.

<sup>467</sup> For instance, the Party's use of enforcement campaigns contains elements of both flexibility and legal rationality and ultimately promotes the goal of social control. See, e.g., Sarah Biddulph et al., *Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking*, 34 LAW & POL'Y 373 (2012); He, *supra* note 459.

<sup>468</sup> See FEWSMITH, *supra* note 17, at 11–12.

<sup>469</sup> Milhaupt & Pistor, *supra* note 465, at 346 ("Once enacted . . . law often takes on a life of its own as different agents begin to explore how it might advance their own interests.").

reformers realized that in order to obtain some of the benefits of formal law while also preventing it from becoming entrenched and independent of the CCP, the law's flexibility could act as the mitigating factor.

The law's constraining nature is also linked to the CCP's legitimacy challenge. Even the CCP requires sufficient legitimacy—and the cooperation of the governed—to maintain its position.<sup>470</sup> The Party voluntarily undercuts its own vitality when it ignores or contravenes the commitments embodied in its laws.<sup>471</sup> This is precisely why the Maoists,<sup>472</sup> and China's imperial rulers,<sup>473</sup>

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<sup>470</sup> See JENNIFER GANDHI, *POLITICAL INSTITUTIONS UNDER DICTATORSHIP* xvii–xviii (2008) (noting that authoritarians require legitimacy and the cooperation of the governed); accord Jean Blondel, *About Institutions, Mainly, But Not Exclusively, Political*, in *THE OXFORD HANDBOOK OF POL. INSTITUTIONS* 716, 727 (R.A.W. Rhodes et al. eds., 2006); Hand, *supra* note 438, at 102; Philip C.C. Huang, *The Basis for the Legitimacy of the Chinese Political System: Whence and Whither? Dialogues Among Western and Chinese Scholars, VII – Editor's Introduction*, 40 *MOD. CHINA* 107, 107 (2014); WANG, *supra* note 130, at 5–7; see also *THE DICTATOR'S DILEMMA*, *supra* note 145, at 214–215 (noting that “the Party's survival strategy has major impacts on [its] popular support”).

<sup>471</sup> Carlos Wing-Hung Lo, *Socialist Legal Theory in Deng Xiaoping's China*, 11 *COLUM. J. ASIAN L.* 469, 481 (1997) (noting that while “[c]larity was sorely needed” in the 1982 Constitution from the societal perspective, “clarity was too dangerous [to the Party's interests] and might impair [the Party's] legitimacy”).

<sup>472</sup> “Some [in Mao's era] believed that while laws were clearer and more precise after being written down, they also became more difficult to change.” Li, *supra* note 331, at 89. Mao's generation viewed rules as roadblocks to continuous revolution. *Id.*; accord Donald C. Clarke, *The Law, the State and Economic Reform*, in *THE CHINESE STATE IN THE ERA OF ECONOMIC REFORM* 190 (Gordon White ed., 1991); Heilmann & Perry, *supra* note 335, at 14. Even Mao was constrained by the Party's inertia until the Cultural Revolution. See DAVID BACHMAN, *BUREAUCRACY, ECONOMY, AND LEADERSHIP IN CHINA* 47, 237 (1991).

<sup>473</sup> Ernest Caldwell, *Social Change and Written Law in Early Chinese Legal Thought*, 32 *LAW & HIST. REV.* 1 (2014) (noting concerns that written law would constrain elites); Wolfram Eberhard, *The Political Function of Astronomy and Astronomers in Han China*, in *CHINESE THOUGHT AND INSTITUTIONS* 15 (John K. Fairbank ed., 1957) (showing how informal institutions limited the emperor's power); Fang & Des Forges, *supra* note 461, at 106, 122 (noting that ancient authorities debated the tradeoffs of making laws public); S.E. FINER, *THE HISTORY OF GOVERNMENT FROM THE EARLIEST TIMES: ANCIENT MONARCHIES AND EMPIRES* 1303 (1997) (noting informal institutional constraints placed on the

despised publicly-available rules. Mao foresaw what would occur with a formal and transparent set of laws: confronted by changing or unanticipated circumstances, the CCP would be forced to either (a) act contrary to its own commitments, thereby destroying its credibility in plain view of the public, or (b) act in accordance with the law, voluntarily restraining its range of motion and degrading its ability to control society.<sup>474</sup>

The constraining nature of formal law conflicted with the reformers' desire for change. Although the reformers fostered *some* idea of the rule of law, a market economy, and individual economic incentives, they nevertheless *remained communists*.<sup>475</sup> The reformers were as fervently committed as the Maoists had been to the maintenance of the CCP's monopoly.<sup>476</sup> Absolute power and the provision of market-based incentives have become binary in the PRC context. Its power has enabled the CCP to create by fiat a market economy without the constraints of Western institutions. Instead of a Western rule of law, the CCP instituted a regime imbued with legal flexibility. This allows the CCP's evolving policies to be more easily integrated into laws and regulations, facilitated by their

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emperor); LUBMAN, *supra* note 238, at 16–17 (noting imperial constraints placed on the emperor's powers); Wang, *supra* note 327, at 3 (noting that legalist demands periodically resulted in the law's dissemination).

<sup>474</sup> A third option is to use a legitimized, transparent lawmaking process to update the rules. But at least two complications make this possibility unappealing to the CCP. First, procedural formalities are time-consuming and stability in authoritarian states is often tenuous. Reactive laws seldom quell present uprisings. And second, an open, regular process could subject rule-making to a high degree of influence from actors outside of the Party, who might come to view their participation in rule-making as a right.

<sup>475</sup> “Deng Xiaoping . . . saw no incongruity between capitalist economic methods and the Stalinist political system over which he presided.” MEISNER, *supra* note 351, at 514–15. *See also* FUKUYAMA, *supra* note 400, at 363 (noting that the Party is not subordinated to law); MacFarquhar, *supra* note 339, at 383–84 (noting that Deng Xiaoping shut down the 1978 Democracy Wall soon after appearing to endorse it); Brantly Womack, *In Search of Democracy: Public Authority and Popular Power in China*, in CONTEMPORARY CHINESE POLITICS IN HISTORICAL PERSPECTIVE 53, 84 (Brantly Womack ed., 1991) (noting that Deng Xiaoping retreated on reforms when social forces began to challenge the Party).

<sup>476</sup> *See* Lubman, *supra* note 37, at 4; *see also* EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA 251–65 (2011) (discussing the reformers' desire to limit some freedoms even while expanding others).

very ambiguity.<sup>477</sup> Still, this has put the Party in an uncomfortable position: the CCP has no intention of democratizing,<sup>478</sup> yet it has had to promote citizens' legal consciousness through a lengthy law dissemination campaign.<sup>479</sup>

The third critical challenge posed by formal law was enmeshed with the preceding two. Once a society legitimizes private enterprise and allows some degree of *affluence* outside of the state's immediate purview, it necessarily accepts some degree of *influence* outside of the state as well. Though influence is not exclusively a function of money, history's most indelible axiom endures, unmoved even by the most intensive Communist propaganda: power tends inextricably to follow wealth.<sup>480</sup> It is simply not possible for the CCP to allow private wealth without a corresponding rise of *potential competitors for power*.<sup>481</sup> To be sure, not all private interests will become *actual* competitors for power: some will discover a sufficient interest in the status quo, and the CCP thus proactively co-opts private interests through Party membership.<sup>482</sup> Still, this strategy has its limits.<sup>483</sup> It is extraordinary that the CCP voluntarily created the conditions for potential challengers to exist, since "[t]he first impulse of any

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<sup>477</sup> Xiao Li, *Legal and Economic Development with Sui Generis Chinese Characteristics: A Systems Theorist's Perspective*, 39 BROOK. J. INT'L L. 159, 200 (2014).

<sup>478</sup> WILLY WO-LAP LAM, CHINESE POLITICS IN THE ERA OF XI JINPING 75–76 (2015).

<sup>479</sup> Young Nam Cho, *Law Dissemination Campaign in China: The Origin of Chinese 'Rule of Law' Policy*, 21 J. INT'L & AREA STUD. 27 (2014).

<sup>480</sup> See, e.g., ACEMOGLU & ROBINSON, *supra* note 20, at 16 (discussing the relationship between wealth and power in politics). Of course, power can beget wealth as well.

<sup>481</sup> Nearly all incumbents have rivals for power. BUENO DE MESQUITA ET AL., *supra* note 445, at 8, 16–18. As exclusionary arrangements, authoritarian states invariably create rivals. See generally Slater, *supra* note 165.

<sup>482</sup> WEALTH INTO POWER, *supra* note 233, at 66–100.

<sup>483</sup> For example, the Party competes with private employers for human capital. STARR, *supra* note 457, at 58. The empowerment of social groups is also witnessed in the rise of mass protests. See generally LI CHEN, SOCIAL PROTEST AND CONTENTIOUS AUTHORITARIANISM IN CHINA (2012). Thus, the CCP blurs the lines between state and society to prevent "the emergence of formal institutions that will constrain party power." FEWSMITH, *supra* note 17, at 16.

organization . . . on the appearance of a serious competitor is to destroy competition.”<sup>484</sup> The CCP's embrace of such an environment is a testament to the dire circumstances prevailing after Mao, and to the reformers' recognition that a private market was absolutely essential to finance China's sovereignty.<sup>485</sup> Most of all, however, this willingness was a testament to the CCP's confidence that it could effectively check the power connoted in a private market. Flexible legality empowers the CCP to tailor its responses to the inevitable institutional exigencies arising under the influence of foreign investment and with the legitimization of private wealth. In this way, the Party can allow private actors their economic pursuits and even some constructive latitude to influence the development of law while maintaining its own preeminence in institutional entrepreneurship.

Democracies need not exhibit a zero-sum game between the nation's strength internationally and the political incumbents' strength domestically. But in an authoritarian state, where one group monopolizes political authority at the exclusion of others, an unavoidable tension arises: the greater the amount of privately-held wealth, the stronger the PRC can be against the world—but also the more likely that affluent domestic actors might one day credibly challenge the CCP's monopoly.<sup>486</sup> The Party is mindful of the fact that private interests, backed by wealth, can compete for influence.<sup>487</sup> Major instability has been avoided in the reform era, as its flexible legal system has helped the CCP to moderate the pressures to democratize inherent in the state's dependence upon

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<sup>484</sup> Edward A. Ross, *Institutional Competition*, 25 J. SOC. 171, 171 (1919). Indeed, “the accumulation of wealth by anyone not in an elite role poses a great temptation and a threat to the elite.” FRED W. RIGGS, *ADMINISTRATION IN DEVELOPING COUNTRIES* 143 (1964) (emphasis omitted).

<sup>485</sup> See *supra* Parts III.B.4, III.C.

<sup>486</sup> See *supra* Part III.C.

<sup>487</sup> See FUKUYAMA, *supra* note 400, at 354–55, 375–76, 384; Kennedy & Stiglitz, *supra* note 160, at 490; see also *supra* notes 232, 287 and accompanying text (discussing guild power in the Qing and Republican eras respectively).

publicly-derived taxes.<sup>488</sup> Legal flexibilities provide legitimate cover for the CCP to intervene and prevent any actor or coalition from becoming capable of challenging its authority, without upsetting the broader economic frameworks in place.

Alternatively stated, the mere existence of formal institutions also ensures the existence of rival institutional entrepreneurs. The flexibility of China's legal system allows regulated parties and lower-level officials to influence the meanings and effectiveness of these institutions.<sup>489</sup> But higher-level officials can thereby allow for the reasonable adaptation of their policy preferences to local circumstances within their preferred boundaries.<sup>490</sup>

In sum, the PRC's flexible formal legality allows the substance and enforcement of legal rules to shift constantly, entailing a high degree of dynamism. But what does not change—what *cannot* change—is the law's underlying flexibility. This reflects the CCP's determination—having heeded the lessons of history<sup>491</sup>—to hold an ongoing competitive advantage in the competency of institutional entrepreneurship. It is a continuous act of institutional entrepreneurship to preserve the legal superstructure's flexibility, reinforced by the path dependent 'momentum' that the flexible legal system now possesses—but opposed by those interests that would benefit economically from greater certainty and predictability. The CCP's effort to resist legal

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<sup>488</sup> See generally Bruce Bueno de Mesquita & Alastair Smith, *Political Survival and Endogenous Institutional Change*, 42 COMP. LEGAL STUD. 167 (2009).

<sup>489</sup> See generally LILY L. TSAI, *supra* note 194; KELLE S. TSAI, *supra* note 194.

<sup>490</sup> See generally CORNE, *supra* note 159. The argument here—that the CCP benefits from high degrees of legal flexibility not only because it facilitates changes to policy but also because it forces the Party to strategically manage the law's institutional framework—is consistent with John Campbell's proposition that “[i]nnovations that best fit the prevailing institutional context will be more likely to result in evolutionary rather than revolutionary change than those that do not fit as well.” JOHN L. CAMPBELL, *INSTITUTIONAL CHANGE AND GLOBALIZATION* 181 (2004). The Party desires evolutionary change because it is easier to control, and because the CCP, more than any other interest, stands to lose from revolutionary change. See *supra* Part III.B.

<sup>491</sup> See *supra* Part III.B.

entrenchment is aided by the law's very flexibility and amplifies its importance as a higher-order institutional feature. The Party is most likely to fall not from an organized rebellion as in prior epochs of Chinese history, but rather from losing the battle for the 'soul' of the PRC's formal institutions, or from irreparably disintegrating its legitimacy in maintaining control.

This Part has proceeded under the rubric of institutional theory, since the law *is* an institution subject to the principles of institutional design.<sup>492</sup> Yet the discussion above makes clear that the PRC's legal institutions represent a resource more so than an institution per se from the CCP's perspective. The PRC's flexible legal system has been a central resource on which the CCP relies to ensure its ongoing dominance in institutional entrepreneurship, and it is thus a key resource in perpetuating the CCP's survival. While it is beyond the scope of this Paper to consider how the resource-based view<sup>493</sup> informs our assessment of why the Party embraced legal flexibility, it seems anecdotally apparent that the CCP has mimicked what firms can do: combining resources and institutions to achieve competitive advantage.<sup>494</sup> The Party began with the question of what resource was needed to best secure its monopoly after Mao, and built institutions in response. This is the opposite sequence of steps for firms' institutional strategies (in the short-term, anyway): firms begin with the question of what institutions exist, and then determine how they can best be utilized as resources.<sup>495</sup> While firms and the state might both find institutions at the center of their

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<sup>492</sup> See *supra* Part II.

<sup>493</sup> The resource-based view is another leading theory in international business and "posits that firms may obtain sustainable competitive advantage by focusing on strategies that leverage their internal resources to take advantage of environmental opportunities." Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61, 65 (2011).

<sup>494</sup> See, e.g., Christine Oliver, *Sustainable Competitive Advantage: Combining Institutional and Resource-Based Views*, 18 STRATEGIC MGMT. J. 697 (1997). The CCP's competitive advantage has been its dominance in institutional entrepreneurship.

<sup>495</sup> See *supra* Part I. This is the subject of the LAS literature, of which legal entrepreneurship is a part. Of course, individual firms might in the longer-term also seek to create, change, or destroy institutions, acting as institutional entrepreneurs as well.

respective strategies, they will often approach institutions and institutional design from opposite directions.

This analysis has served several purposes. First, it explains why the CCP has opted for a flexible and inefficient legal design even as economic growth remains central to the CCP's success. A flexible legal system enables the CCP to balance its myriad competing goals and constraints; most crucially, it enables and encourages private economic activity while still empowering the CCP to check the potential competitors for power that invariably result from private affluence. Its flexibility affords the Party maximum scope to act legitimately—that is, consistently with the commitments embodied in the law. Flexible legality also supplies the Party-state, at all levels, with a framework in which the legitimacy of the state's identity as institutional entrepreneur is continuous rather than ad hoc or intermittent. While this may necessitate the resolution of regulatory events on a case-by-case basis (subject always to the ambits of CCP policy), the same flexibilities ensure that the CCP need *not* re-justify its role as institutional entrepreneur in exercising its power. This enables the CCP to undertake specific acts of policy-making as “institutional work,” or “purposive actions that [create] . . . new institutional frameworks[.]”<sup>496</sup> The legal institutions of the PRC coordinate interests, announce general policies, and enhance the credibility of rules<sup>497</sup>—hallmarks of any legal system. Yet what *really* defines Chinese law is not its formal artifacts but rather the leadership of the CCP,<sup>498</sup> and the strength of its approach to law “is not its coherence but its openness to unexpected and tentative policy solutions that are seized upon when they come up.”<sup>499</sup> Flexible law, then, allows the

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<sup>496</sup> Nasra & Dacin, *supra* note 96, at 584.

<sup>497</sup> Milhaupt & Pistor, *supra* note 465, at 330.

<sup>498</sup> TEEMU RUSKOLA, *LEGAL ORIENTALISM* 223–25 (2013) (noting that the ideological stakes of theorizing the rule of law are high and are thus taken seriously, and that China's conflicting institutions ensure that the Party remains the true source of power); accord Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 *MOD. CHINA* 12, 23 (2010).

<sup>499</sup> Sebastian Heilmann, *Maximum Tinkering Under Uncertainty: Unorthodox Lessons from China*, 35 *MOD. CHINA* 450, 453 (2009).

CCP to cope with the uncertainties of its own environment<sup>500</sup> and is therefore likely to endure.<sup>501</sup> The motivation for this approach, we have seen, was born of the reformers' ability to interpret China's recent history more skillfully than their predecessors: while formal law would be essential to the country's global restoration, legal institutions could be made to serve the CCP's domestic interests only if flexible enough to discourage and defeat the Party's potential rivals for institutional authority.

Second, the analysis illustrates the centrality of institutional entrepreneurship to the CCP's stability and revealed the Party's conscious recognition of the need to establish and maintain a competitive advantage in institutional entrepreneurship. A system of flexible, formal legality retains this advantage for the CCP while minimizing the erosion of its legitimacy.

Third, this analysis implies a limit to the degree of certainty and predictability that PRC law can achieve before it becomes politically destabilizing.<sup>502</sup> Entrenched legal institutions would, by definition, be perilously independent of and immune to the CCP's influence. By promulgating a highly flexible law, the CCP disallows other actors from enacting a particular path dependent direction in the law without the Party's consent. In the end, only one principle and one means remain entrenched in PRC law: the principle of the Party's monopoly, and the flexible means by which it exerts its ongoing supremacy in institutional entrepreneurship. Viewed thusly, the CCP—for whom economic growth is extremely important—could rationally engineer legal institutions that are

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<sup>500</sup> *Id.* at 454; Heilmann & Perry, *supra* note 335, at 12.

<sup>501</sup> Heilmann, *supra* note 499, at 460; Lubman, *supra* note 37, at 4 (discussing “rolling uncertainty” in the PRC legal system).

<sup>502</sup> Some observers predict that the Party will be forced to abandon legal flexibility on account of China's international legal obligations. *See, e.g.,* Richard Wu, *The Changing Regime for Regulating Loans of State Owned Banks in China: Towards a System of Prudential Banking*, 26 UCLA PAC. BASIN L.J. 107, 139–41 (2009). But this study extrapolated one small subset of Chinese law to the PRC legal system generally. This also underestimates the importance of flexibility to the Party's survival, the CCP's entrepreneurial dexterity, the rate at which new flexibilities are created, and the extent of flexibility in international legal institutions. *See infra* Part IV (discussing flexibility in international legal institutions).

economically suboptimal. Razo observes that “[c]hoosing rules about rules (that is, meta-institutional choices) immediately invites the possibility of an infinite regress in which participants cannot readily agree on preferred institutions in a prior stage (and higher choice level).”<sup>503</sup> But the choice of flexibility as the ‘meta-institutional rule’ of PRC law has helped to unify the CCP’s factions in that legal flexibility provides a measure of security against losing the privileged positions that they share with one another.

With respect to LAS, this analysis has applied business constructs to the legal-historical context to show how *states* can approach law strategically. The LAS literature has focused on law’s strategic value solely from the firm’s vantage. However, a link between law and competitive advantage holds for states, too, in the state’s role as *designer of legal institutions*—that is, as *institutional entrepreneur*. Political incumbents can design legal institutions as instruments of self-preservation. The Paper makes a second related contribution to LAS. An MNC’s recognition of the Party’s entrepreneurial capacity is vital to firm-level strategy in China. The PRC’s historical forces have shaped the institutional environment that now confronts MNCs in China. Accordingly, the analysis here should inform the contextualization of MNCs’ non-market strategies in China today.<sup>504</sup>

China’s approach clearly sacrifices the legal entrenchment that is fundamental to Western rule of law.<sup>505</sup> But the first objective of the PRC legal system is not to ensure stability for those whom it regulates; its paramount goal is instead to advance the interests of the CCP.<sup>506</sup> Yet while the flexibility of Chinese law is motivated by

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<sup>503</sup> Armando Razo, *Strategic Embeddedness and the Microfoundations of Collective Action: A Comparative Institutional Analysis of the Rule of Law and Informal Institutions in Cooperation Games*, 28 J. THEOR. POL. 105, 107 (2016).

<sup>504</sup> See *infra* Part V.

<sup>505</sup> See generally Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 VA. L. REV. 631 (2017).

<sup>506</sup> This stands in obvious contrast to American legal thought, in which law is often understood through its “social purpose.” Justin Desautels-Stein, *A Context for Legal History, or, This Is Not Your Father’s Contextualism*, 56 AM. J. LEGAL HIST. 29, 32 (2016). Differing assumptions concerning law and its societal role help to explain the Western view that the flexibilities and

the CCP's self-interest, this does not mean—as is often assumed in the West—that the effects of China's legal uncertainties are entirely negative. The CCP cannot capture the benefits of legal flexibility for itself without *also* creating opportunities for firms to likewise engage those flexibilities to *their* ends.<sup>507</sup> Understanding the implications of this context is essential to the legal strategies of MNCs in China today.<sup>508</sup>

#### IV. IMPLICATIONS FOR INTERNATIONAL LEGAL INSTITUTIONS

We have seen how the CCP strategically engineered a formal legal system rife with flexibilities to promote its myriad interests—especially to preserve its dominance in, and continuous exercise of, institutional entrepreneurship.<sup>509</sup> It is worth noting here that governments similarly create and utilize legal flexibilities in the global context.<sup>510</sup> Cross-jurisdictional legal rules are bound to be uncertain because international institutions must accommodate “the two poles of sovereignty and community”<sup>511</sup> and because “[p]owerful states delegate authority to international institutions, but they do so in ways that allow them to retain substantial degrees of control.”<sup>512</sup>

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uncertainties of PRC law are exclusively negative. *See supra* Part I (noting this view).

<sup>507</sup> *See supra* Part I.

<sup>508</sup> *See infra* Part V (discussing the need for further research on how MNCs can best strategically account for the PRC's legal flexibilities in light of the historical context discussed here).

<sup>509</sup> *See supra* Part III.

<sup>510</sup> For a helpful overview work, *see generally* Oliver Kessler, *The Same as it Never Was? Uncertainty and the Changing Contours of International Law*, 37 REV. INT'L STUD. 2163 (2011) (discussing the implications of uncertainty and risk in a post-national international law regime).

<sup>511</sup> JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 5 (2nd ed. 2009).

<sup>512</sup> Randall W. Stone, *Institutions, Power, and Interdependence*, in POWER, INTERDEPENDENCE, AND NONSTATE ACTORS IN WORLD POLITICS 31, 48 (Helen V. Milner & Andrew Moravcsik eds., 2009). Customary international law, which one might equate to informal (uncodified) norms, is also characterized by high degrees of uncertainty. *See, e.g.*, Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 EUR. J. INT'L L. 523 (2004).

States deliberately build flexibility into their agreements with one another.<sup>513</sup> Ambiguities can help to facilitate the resolution of conflicts, accommodate evolving circumstances without the need to renegotiate treaties, afford states greater latitude to respond to crises, and in some cases can have a greater deterrence than certain predefined sanctioning.<sup>514</sup> Treaties are often reinterpreted over time so as to change their meanings.<sup>515</sup> The rules governing international organizations can of course be formally amended by the constituent member states, but can also change through informal means.<sup>516</sup> International rules that strategically combine certainty and flexibility can balance the incentives of private actors to engage in global commerce with states' needs to sometimes deviate from rules.<sup>517</sup> Regional trade agreements can also be designed flexibly to promote cooperation and other objectives.<sup>518</sup> Sound monetary institutions, for instance, will make credible commitments but will

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<sup>513</sup> TRIPS provides a high profile example. *See generally* Henning Grosse Ruse-Khan, *The International Law Relation Between TRIPS and Subsequent TRIPS-Plus Free Trade Agreements: Towards Safeguarding TRIPS Flexibilities?*, 18 J. INTELL. PROP. L. 325 (2011) (arguing that conflicts rules in TRIPS-plus free trade agreements can themselves be interpreted creatively to achieve a similar policy space to that offered by the TRIPS flexibilities with respect to implementing free trade obligations in intellectual property).

<sup>514</sup> Itay Fischhendler, *When Ambiguity in Treaty Design Becomes Destructive: A Study of Transboundary Water*, 8 GLOBAL ENVTL POL. 111, 111–12 (2008). Of course, there are also negative tradeoffs in the use of ambiguities. *Id.*

<sup>515</sup> *See generally* Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation Over Time and Their Diverse Consequences*, 9 LAW & PRAC. INT'L COURTS & TRIBS. 9 (2010).

<sup>516</sup> Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE INT'L L.J. 289 (2013) (arguing that one key means of informal change is through the international organization's judicial organ reinterpreting its constitutional document).

<sup>517</sup> *See, e.g.,* Stefan M. Miller, *Parallel Imports: Towards a Flexible Uniform International Rule*, 15 J. COM. BIOTECH. 21 (2009) (advocating for a flexible system of international exhaustion concerning parallel imports in the intellectual property context).

<sup>518</sup> The African Regional Trade Agreements do just this. *See* James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. & COM. REG. 571 (2010).

also flexibly accommodate uncertainties.<sup>519</sup> Flexibility is hailed as a key positive feature in transgovernmental networks, which enable government regulators to work with their foreign counterparts on global problems requiring regulation across countries.<sup>520</sup> Flexibilities in international institutions can extend so far as to allow countries to escape their agreed-upon obligations.<sup>521</sup> Much like this Paper has argued that the PRC's legal flexibilities benefit the CCP, "safeguard clauses" allowing countries to exit international institutions likewise reflect the countries' self-interested behavior.<sup>522</sup>

One interesting question is whether the PRC will hold an advantage in influencing or creating international legal institutions, given its experiences with legal flexibility domestically. The PRC has an incentive, like any country, to promote its interests globally. And in China's case, Joseph Fewsmith has suggested that "[t]he apparent tension between globalization and domestic challenges" implies that the PRC will face difficulties in the future as it reconciles its domestic institutions with global ones,<sup>523</sup> affording the CCP an additional incentive to shape global rules. As the CCP's embrace of domestic legal flexibility signaled its confidence that it could allow for potential competitors while preventing them from becoming too powerful, so may China's engagement with international institutions portend its facility to bend them to its interests.

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<sup>519</sup> Susanne Lohmann, *Sollbruchstelle: Deep Uncertainty and the Design of Monetary Institutions*, 3 INT'L FIN. 391 (2000) (applying the German engineering precept of *sollbruchstelle* to argue that institutions must be designed to accommodate evolving conditions and to themselves be adaptable in the face of changing circumstances).

<sup>520</sup> See, e.g., Kenneth S. Blazewski, *The FATF and Its Institutional Partners: Improving the Effectiveness and Accountability of Transgovernmental Networks*, 22 TEMP. INT'L & COMP. L.J. 1 (2008) (discussing as an example the Financial Action Task Force).

<sup>521</sup> See generally B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001).

<sup>522</sup> *Id.*

<sup>523</sup> Joseph Fewsmith, *The Challenges of Stability and Legitimacy, in CHINA IN THE ERA OF XI JINPING* 92, 111 (Robert S. Ross & Jo Inge Bekkevold eds., 2016).

## V. CONCLUSION

This Paper has argued that the PRC's high degree of legal flexibility exists due to the factors suggested in prior works, but also for another fundamental reason. The CCP's reformers gleaned a crucial insight from their historical context when they realized that China's previous rulers had failed in large part because they were unskilled in institutional entrepreneurship—the ability to create, maintain, modify and destroy institutions as needed. Following Mao's reign, the reformers acknowledged that investment-driven development was necessary for China, and with it, formal legal institutions—which meant that for the Party to remain securely in power, it had to institutionalize its role as China's preeminent institutional entrepreneur. But this needed to be accomplished without strongly committing the Party to particular policy paths, and at the same time, the Party would have to avoid being perceived as indifferent to the 'commitments' that can be read in its laws. Above all, the Party would have to allow potential rival institutional entrepreneurs to exist and even to contribute to the development of China's laws—but without losing ultimate authority over the country's legal landscape.

The answer was to design a system of flexible formal legality. The CCP relies upon economic growth in the maintenance of its legitimacy, but growth capable of destabilizing its rule would be as undesirable as no growth at all from the Party's perspective. Accordingly, the economic suboptimalities inherent in China's flexible laws are not the paradox they appear to be. Myriad tensions remain within the PRC legal system, but its overriding goals—growth bounded by the CCP's ongoing control—mean that Western businesspeople and attorneys must modify the lens through which they view China's law and history. The PRC's flexible legal system ensures that private interests can contribute to the country's institutional evolution—but always along paths that the Party deems acceptable. China's flexible legal institutions thus serve the Party's strategic interests, of which economic development, while important, is made to reinforce the CCP's ongoing rule. These conclusions suggest that the LAS scholarship must account for the state's use of law in the formulation of its own competitive advantages.

Finally, MNCs doing business in China should also make strategic use of these flexibilities by approaching the law entrepreneurially. While this idea has been suggested conceptually and in a general way,<sup>524</sup> empirical research is needed to better understand whether (and how) firms strategically engage with China's legal flexibilities. The historical context and institutional nature of China's flexible law discussed here can be harnessed in the strategies of individual companies doing business in China today.<sup>525</sup> The ambiguities of Chinese law in past eras, when law was perhaps not nearly as ambiguous, were known to stimulate creative discussion.<sup>526</sup> The flexibility of modern PRC law supplies a conducive context for firms to embrace the law's full strategic potential. It remains to be seen how this could—or should—work in practice. This is not to say that legal uncertainties are entirely positive. To be sure, the PRC legal environment carries risks for the firm. But these risks must be understood in conjunction with opportunity, and the firm's cognizance of the history of China's legal flexibility will empower it to embrace legal uncertainty not only as a risk, but also as a strategic opportunity. Indeed, it is precisely because China's legal flexibility often complicates predictions concerning the permissibility of one's potential actions that having a thorough understanding of Chinese law in historical context is an asset for the MNC.

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<sup>524</sup> See generally Evans & Gabel, *supra* note 3.

<sup>525</sup> “Legal history is, can, and should be a mode of analysis to help us to understand not just the past on its own terms, but the present and future on our terms as well.” Roman J. Hoyos, *Legal History as Political Thought*, 56 AM. J. LEGAL HIST. 76, 76 (2016). See also Alfred L. Brophy, *Introducing Applied Legal History*, 31 LAW & HIST. REV. 233, 233–34 (2013) (defining *applied legal history* as “deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues”).

<sup>526</sup> See, e.g., Michael Dalby, *Revenge and the Law in Traditional China*, 25 AM. J. LEGAL HIST. 267, 270 n.5 (1981) (discussing the sanction of revenge in ancient Chinese texts and observing that while these texts were ambiguous, they stimulated, rather than stifled, “creative discussion” on the legal permissibility of revenge as a social practice). Of course, as was noted above, ambiguities in law can also cause problems for regulated parties. Hence, the firm's ability to cope effectively with uncertainty and ambiguity in the law is a crucial asset in one's non-market strategy. See generally Evans & Gabel, *supra* note 3.