

# DEMOCRACY OPTIONAL: CHINA AND THE DEVELOPING WORLD'S CHALLENGE TO THE WASHINGTON CONSENSUS

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## INTRODUCTION

For many years now, and particularly since the end of the Cold War, Western policy makers and academics alike have touted market capitalism, democracy, and the rule of law as the three crucial components of a purportedly universal formula for national development. Scholars have examined this “prevailing development orthodoxy” from many different angles and through many different lenses in the last two decades or so.<sup>2</sup> Some have focused on the mutually reinforcing aspects of capitalism and democracy, while others have stressed the inherent tensions between them.<sup>3</sup> Yet despite all the academic caveats and exposed imperfections, the essential elements of the Western developmental triumvirate – capitalism, democracy, and the rule of law – have remained largely intact. Critics of this so-called “Washington consensus” have been hard pressed to identify real-

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2. Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 287 (2000). See also Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 14-19 (1998); LESTER C. THUROW, *THE FUTURE OF CAPITALISM: HOW TODAY'S ECONOMIC FORCES SHAPE TOMORROW'S WORLD* 1-5 (1996); ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED* 3 (1998).

3. See ROBERT A. DAHL, *ON DEMOCRACY* 168 (1998); ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* 62-73 (1985); Larry Diamond, *Democracy and Economic Reform: Tensions, Compatibilities, and Strategies for Reconciliation*, in *ECONOMIC TRANSITION IN EASTERN EUROPE AND RUSSIA: REALITIES OF REFORM* 107, 108 (Edward P. Lazear ed., 1995); PETER L. BERGER, *THE CAPITALIST REVOLUTION* 73 (1986); Owen M. Fiss, *Capitalism and Democracy*, 13 MICH. J. INT'L L. 908, 911 (1992).

istic alternatives,<sup>4</sup> prompting some to declare that political history as we know it is coming to an end.<sup>5</sup>

This paper contends that the People's Republic of China is an exemplar of one alternative developmental model that has managed, at least temporarily, to produce unprecedented economic growth, develop new legal institutions, and maintain the legitimacy (or at least the administrative viability) of its government while effectively thwarting the development of democracy altogether. This alternative model may be termed mercantile authoritarianism, and it is underpinned by its own triumvirate of key ingredients: market capitalism, rule *by* law, and nationalism. Interestingly enough, this formula is not without precedent in international politics, and it may be evocative of an entire family of developmental approaches that can succeed in promoting growth, stability, and legitimacy without democracy, the rule of law, or other Western-style institutional achievements.

The future of this alternative model in present-day China is surely uncertain, as deep political, legal, and economic changes there continue to accelerate on all fronts, but its successful implementation in the PRC still poses a challenge to the Western developmental orthodoxy that deserves study. At a very basic level, the continued legitimacy of an ostensibly Leninist government in the current era of global capitalism and democratization is a puzzle in itself. In the words of two China scholars, such a case presents the "anomaly of an individual organism surviving in an era of mass species extinction."<sup>6</sup> Yet the Chinese mercantile authoritarian model has been effective thus far in maintaining the Chinese government's legitimacy – or at least its administrative viability – amid changing international and domestic political conditions.

This particular politico-economic puzzle presents three central lessons. The first is that the phenomenon of Chinese mercantile authoritarianism suggests state legitimacy need not be founded upon a democratic relationship between the government and the governed, but may rest instead on rising standards of living and a sense of shared enterprise between the state and society. Nationalism may provide this sense of shared enterprise, but it may also prove a volatile, dangerous foundation for regime legitimacy. Positive structural change and societal devotion to

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4. Jeff Faux, *The Global Alternative*, THE AMERICAN PROSPECT, July 1, 2001, at 15.

5. See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

6. Richard Baum & Alexei Shevchenko, *The "State of the State,"* in THE PARADOX OF CHINA'S POST-MAO REFORMS 333, 354 (Merle Goldman & Roderick MacFarquhar eds., 1999).

the goals of the governing regime may be enough to sustain the legitimacy of an undemocratic state, even in the current international environment.

The second lesson is that, while market economics may be nearly impossible to neglect in today's global economy, democracy and legality are more fragile liberal achievements. Legal institutions that foster predictability, limit government authority, and protect the economic rights of citizens may be a necessary adjunct to economic development in today's global market economy. However, fully independent legal institutions – a true rule of law – can lag significantly behind economic progress. Furthermore, the legal institutions that do emerge in the wake of economic growth may lack the liberal values associated with Western legalism and actually prove an effective tool to advance the initiatives of an anti-democratic authoritarian state.

The third and most sobering lesson is that democracy appears to be the most fragile link in the Western developmental formula. Its emergence may depend on the will of political elites whose interests are aligned against democratic reform, and it can be effectively opposed, delayed, and set at odds with the very fruits of market-driven economic development and legal reform that the West encourages. Additionally, even when it does emerge, formal democracy is easily co-opted, corrupted, or stalled by the state so as to be unacceptable to Western liberal political sensibilities.

These conclusions should serve as cautionary reminders for U.S. policy-makers. Encouraging market economics and limited legal reform may be a winning enterprise in the current global political environment, but the West must be realistic about its ability to insist on democracy and legalism in developing nations. Such insistence may be fruitless, or it may result in a political system antithetical to the very liberal values that underpin the West's own development model. If the mercantile authoritarian approach does prove sustainable, it may present a particularly thorny policy dilemma for adherents to the "Washington consensus": a choice between mutually beneficial economic relationships with stable authoritarian regimes on the one hand and commitment to the liberal normative principles that are associated with the West's own development experience on the other.

This paper is comprised of five main sections. The first section will outline the general features of the mercantile authoritarian model as applied in China since the reform and opening movement of the early 1980's, and it will examine how the three central elements of the model have combined to bolster the legitimacy of the Chinese government. The second section will examine China's recent legal reform efforts (as experiments in

authoritarian rule by law), elucidate the role of legal institution-building in facilitating China's economic development, and assess the prospects for a true rule of law in the future. The third section will scrutinize the Chinese government's use of popular nationalism to create a sense of shared enterprise between state and society, even in the absence of democratic institutions; it will also assess some of the dangers of using nationalism as a pillar of state legitimacy. The fourth section will examine the various ways democracy has been subverted by China's development push and evaluate the prospects for future democratic reform. The fifth section will explore the applicability of mercantile authoritarianism outside of China, briefly presenting case studies from countries with highly divergent cultural and political traditions. The paper will conclude with some comments on implications for U.S. foreign policy.

## I. MERCANTILE AUTHORITARIANISM AND STATE LEGITIMACY IN CHINA

The three central pillars of the Chinese mercantile authoritarian model – market capitalism, rule by law, and nationalism – present a striking (and perhaps somewhat troubling) foil to the traditional Western model. The name conveys the essential core of the model's logic: it is an authoritarian approach to governance, fundamentally premised on achieving national growth and state legitimacy through a carefully managed, productive relationship with the global economy, and backed by popular nationalism. It may be distinguished from simple authoritarianism or traditional Leninism in its international orientation and its embrace of capitalist international economic regimes. In this way it is similar to classic Listian mercantilism, but unlike more traditional mercantile models it has an express political dimension, implying an authoritarian political orientation and a specific strategy for consolidating state legitimacy.<sup>7</sup>

In modern-day China, implementation of market-oriented economic reforms, creation of basic legal institutions under the

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7. Classic Listian Mercantilism is an economic strategy associated with "late industrializers." It focuses on the utility of state intervention in shielding strategic infant industries from international competition and subsidizing them until they reach maturity. The government-coordinated growth of high-tech industries in Japan and other East Asian Newly Industrializing Countries (NICs) after World War II presents a good set of commonly-cited examples. See John Brohman, *Postwar Development in the Asian NICs: Does the Neoliberal Model Fit Reality?*, 72 *ECON. GEOGRAPHY* 107, 116-17 (Apr. 1996). Traditional mercantilist approaches to international political economy, being state-centered, may tend to coincide with authoritarian systems of government, but there is no reason why this must be so. Late Eighteenth Century England may provide one contrary example.

control of governing elites, and calculated appeals to the nationalistic sentiments of the populace have combined to effectively bolster the legitimacy of the Chinese party-state. What is perhaps most interesting is how these three mainstays of state legitimacy have proven mutually reinforcing, even though contrary to prevailing neoliberal theory. China's turn to capitalism, nationalism, and rule by law began with the inauguration of Deng Xiaoping's Reform and Opening Policies in the early 1980s. This shift was a direct result of China's persistent economic backwardness and the ideological disillusionment that sprang up in the wake of the Cultural Revolution.

Traditional Maoism had been effectively discredited by the upheavals of the Cultural Revolution, and the Chinese Communist Party (CCP) itself increasingly came to be seen as ideologically bankrupt. CCP policies had not served the interests of most Chinese citizens, whose lives remained poor and insecure, nor had it consistently advanced the interests of the nation in the international arena, as China itself remained politically isolated and economically underdeveloped.

It was under the pressure of this "demise of Maoist ideology" and the resulting public "crisis of faith" that Deng turned to economic development and national aggrandizement as the new linchpins of CCP legitimacy.<sup>8</sup> Economic reform was essentially an exercise in "self-preservation" for party leaders.<sup>9</sup> According to Jonathan Unger: "the Party has needed to find a new basis of legitimacy to sustain its rule, and it is staking this on its performance as the architect of economic growth and, just as importantly, as the guardian of national pride."<sup>10</sup> In essence, the Chinese government's ideological legitimacy came to rest on the drive to increase China's wealth and power,<sup>11</sup> and its performance measured by the rising standards of living of its citizens.<sup>12</sup> The party's self-justifying "moral vision," and indeed popular notions of the "[p]ublic good" more generally, thus came to be defined not by Maoist ideology or doctrines of class struggle, but by "a more instrumental notion of material well-being and national power."<sup>13</sup>

8. JONATHAN UNGER, *Introduction*, in CHINESE NATIONALISM i, xi (1996).

9. Edward J. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19, 36 (Pitman B. Potter ed., 1994).

10. Unger, *supra* note 8, at xi. See also MARIA HSIA CHANG, *RETURN OF THE DRAGON: CHINA'S WOUNDED NATIONALISM* 177 (2001). According to Chang, Deng sought to "salvage his party's tattered legitimacy from the ruination wrought by Mao and rebuild it upon a pragmatic basis of economic performance."

11. CHANG, *supra* note 10, at 178.

12. Kristen Parris, *The Rise of Private Business Interests*, in THE PARADOX OF CHINA'S POST-MAO REFORMS, *supra* note 6, at 262, 265.

13. *Id.* at 282.

Deng's regime set about pursuing its national development goals through a comprehensive program of economic and legal reform designed to open China to the outside world and introduce elements of market capitalism into China's planned economy. The success of these new policies was evidenced by the high annual growth rates of China's GDP, burgeoning trade volumes, and rising international political stature. Such achievements formed the core of the Chinese government's new legitimacy strategy. In time CCP rule was effectively justified by the joint and several influence of capitalist reform, nationalism, and rule by law. These three elements each exerted an independent positive effect on Chinese state legitimacy *and* simultaneously served to reinforce each other, resulting in a dynamic tripartite symbiosis that has proven reasonably durable (if not without contradictions and difficulties).

The most direct legitimizing effect of Deng's economic reform was its contribution to the individual wealth and material security of Chinese citizens. In keeping with their capitalist thrust, Deng's economic reforms not only increased national wealth, but also redistributed it away from the public sector on a massive scale. While state budgetary revenues accounted for 35.2% of China's GDP in 1978, they comprised just 11.2% of total GDP by 1995, marking an enormous decline in the public sector.<sup>14</sup> The balance of China's financial resources similarly shifted away from the state, with business enterprises and private individuals controlling over 85% of the national total by 1990.<sup>15</sup> The CCP used this redistribution of wealth to effectively purchase popular acquiescence to continued party rule – the citizenry benefited from rising individual incomes and higher standards of living, and in return the Chinese government received “political obedience.”<sup>16</sup>

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14. Barry Naughton, *China's Transition in Economic Perspective*, in *THE PARADOX OF CHINA'S POST-MAO REFORMS*, *supra* note 6, at 30, 36.

15. Joseph Fewsmith, *Elite Politics*, in *THE PARADOX OF CHINA'S POST-MAO REFORMS*, *supra* note 6, at 47, 68. Fewsmith reports that in 1978 the state controlled 31.6% of China's total financial resources, with “enterprise” controlling 18.9% and individuals controlling 49.5%. By 1990 the state's share had dropped to 14.5%, while enterprises and individuals controlled 23.8% and 61.7% of the nation's total financial resources respectively.

16. *Id.* at 69. See also Xiaoming Cheng, *Weichi Wending yu Shenhua Gaige: Zhongguo Mianlin de Jueze [Maintaining Stability and Deepening Reform: A Choice Confronting China]*, in *DANGDAI ZHONGGUO YANJIU [MODERN CHINA STUDIES]*, Nos. 1 & 2 (1995), translated in Shaoguang Wang & Angang Hu, *Wang Shaoguang Proposal (II)*, *CHINESE ECON. STUD.*, July/Aug. 1995, at 88. While such a tradeoff may seem pernicious to Western liberal sensibilities, increased standards of living and financial security predictably hold great appeal in a society like China, whose last century has been marked by poverty and political instability. The prospect of a stable, prosperous future has not been known in China for several generations, and

Aside from this independent practical benefit, economic reform has also facilitated the party's use of nationalism as a more general legitimating ideology. Nationalistic sentiments are increasingly potent in China not only because Maoism has been discredited, but also because of "China's growing confidence in its own economic strength and development."<sup>17</sup> In the words of one China watcher, "the very success of the current thrust to make China 'rich and strong' . . . has begun to feed Chinese pride, and potentially invites thoughts of Great Power muscle flexing."<sup>18</sup> Thus economic growth via market reforms stokes nationalism by increasing China's wealth and power, and nationalism provides a reciprocal ideological impetus for market reforms, which are seen as the primary means of achieving such national aggrandizement.

There is an additional, more subtle connection between nationalism and economic growth. Reform-driven growth also allows the government to keep nationalism under control and channel it into constructive, peaceful outlets. Growth does not just engender nationalism, it encourages the *right kind* of nationalism. Simply put, China must "get along internationally to get ahead economically," and this reality serves to mute more virulent, jingoistic strains of Chinese nationalism in public policy.<sup>19</sup> Should economic growth flag and China's future prospects dim, however, Chinese nationalism may prove harder for the state to control or channel effectively.<sup>20</sup> This risk is particularly worrisome since, as will be discussed in a later section, the specific content of Chinese nationalism and its role in domestic politics is still in flux today.<sup>21</sup>

Deng's legal reforms and the establishment of a more comprehensive rule by law were also fundamentally tied to national economic growth and the legitimacy imperative. In the wake of the Cultural Revolution the CCP sought to reconstruct core government institutions, spur economic development, maintain order in the face of emerging social changes, and legitimate the Chinese state both at home and abroad by distinguishing it from

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citizens are understandably willing to forfeit certain political or social prerogatives to realize greater material security. Such sentiments are readily apparent among university students in China and, perhaps even more so, among parents who want better lives for their children. This tendency may be further exacerbated by the One Child Policy, which concentrates the risk of political and economic instability for each family in the fate of one child.

17. Fewsmith, *supra* note 15, at 72.

18. Unger, *supra* note 8, at xi-xii.

19. *Id.* at xi.

20. *Id.* at xvii-xviii.

21. See discussion of the state's attempts to cultivate popular nationalism, *infra* text accompanying notes 105-15.

its more ideologically strident predecessors.<sup>22</sup> All of these goals demanded the establishment of new rules, robust legal institutions, and a culture of legalism in the society more generally. As Randall Peerenboom has noted, Max Weber long ago concluded that "rational rules not only promote predictability and thus enhance economic efficiency and contribute to development; they also enhance the legitimacy and authority of law in that they are more likely to be normatively acceptable to the people."<sup>23</sup>

Chinese policymaking shifted its focus accordingly, aiming at the "creation of general rules that govern the entire economy and permit competition across a broad range of activities . . . on a level playing field."<sup>24</sup> Domestically, new laws were necessary to consolidate and give practical effect to economic reform policies, creating the predictability and incentives for economic efficiency identified by Weber.<sup>25</sup> Internationally, a new Chinese rule by law was vital to China's successful reintegration into the global economic community (especially in terms of its participation in international trade regimes and its solicitation of foreign investment in the Chinese economy). Edward Epstein summarizes this phenomenon nicely:

China's post-Mao reintegration into the international community and new foreign economic policy have brought intense pressures to conform to international (basically Western) legal standards by both the international community and important trading partners. China has responded with legislative developments which aim to impress the international community, reassure foreign investors, and, at the same time, regulate foreign economic activities in China so as to protect China from potential economic abuse . . .<sup>26</sup>

As economic growth and market reforms proceeded, an increasingly comprehensive legal apparatus was required to sustain them. In order to attract international trade and investment, the Chinese business environment needed the transparency and predictability that only modern legal institutions can provide. And once China opened itself up to the international market, subsequent regression away from legalism became prohibitively costly. International investors would simply take their capital elsewhere. China's foreign investors and trading partners thus became both

22. William P. Alford, *A Second Great Wall? China's Post-Cultural Revolution Project of Legal, Construction*, 11 *CULTURAL DYNAMICS* 193, 199-200 (Jul. 1999).

23. Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 *CULTURAL DYNAMICS* 315, 329 (Nov. 1999). See also MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., 1954).

24. Naughton, *supra* note 14, at 39.

25. Epstein, *supra* note 9, at 19.

26. *Id.* at 21.

the barometers and unofficial watchdogs of Chinese legal reform – at least in areas related to economic policy. In the estimation of at least one analyst, law was never more vital to PRC government legitimacy than in the current reform period.<sup>27</sup>

All of this is not to say that China has developed a truly independent legal system. To the contrary, most of China's post-Mao legal reforms have been pursued with an eye toward preserving the power and legitimacy of the party-state. Minxin Pei has discerned a "new social contract" between Chinese state and society in the 1990s, whereby certain restrictions on "personal and economic freedom" were lifted "in exchange for . . . tacit acceptance of the CCP's authority."<sup>28</sup> As will be discussed in a later section, law is still largely a hostage of politics in China, and while effective implementation of economic reforms has necessitated certain limits on government prerogatives, party policy still trumps formal legislation in almost all settings: "[law] is still conceived and operates as an instrument with which to uphold the Socialist political order and perpetuate party domination . . . law is easily manipulated by the party."<sup>29</sup>

The CCP's selective use of legal reform has not only operated to sustain growth and rationalize economic activity. It is also symbiotically linked to the government's promotion of popular nationalism. High levels of nationalism – or "state worship" – in China tend to emphasize the primacy of the state over civil society, such that the people come to "rely on the state for everything legal."<sup>30</sup> The result is that the content of Chinese nationalism has been infused with CCP "partisan interests", and there is a "tendency to see any criticism of current policies as an unpatriotic act."<sup>31</sup> The CCP has been at least partially successful in equating love of country with support of state policies, co-opting nationalism to support both its legal reform initiatives and its authority to override the law when party policy demands.<sup>32</sup> Thus newly-formed legal institutions serve as evidence that the government is competently pursuing national goals of and upholding

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27. *Id.* at 19.

28. Minxin Pei, *Is China Democratizing? Ignorance and Reality*, 77 FOREIGN AFF. 68, 78 (1998).

29. Epstein, *supra* note 9, at 19. For discussion of Chinese legal reform and the prospects for a rule by law, see *infra* Section II.

30. Shaozi Su, *Problems of Democratic Reform in China*, in THE POLITICS OF DEMOCRATIZATION: GENERALIZING EAST ASIAN EXPERIENCES 221, 223 (Edward Friedman ed., 1994).

31. Lucian W. Pye, *How China's Nationalism was Shanghaied*, in CHINESE NATIONALISM 86, 112 (Jonathan Unger ed., 1996).

32. According to Su: "The party manipulates the ideology and its monopoly of the mass media to make the system appear inevitable, a source of ultimate good, and a reality with no alternatives." Su, *supra* note 30, at 223.

its end of the new implicit “social contract” between state and society, thereby supporting the patriotic consensus. The “state-worship” associated with the nationalistic consensus in turn legitimates both the state’s policy-driven laws and the party’s ability to override them. A legitimated rule *by* law, rather than a rule *of* law, results.

This dynamic symbiosis among the three pillars of state legitimacy in China is neither simple nor obvious, yet it has allowed the Chinese state to carefully balance the imperatives of economic reform, state capacity, social stability and popular consensus. The result has been an administratively viable government legitimated by a mercantile authoritarian development model. Market reforms deliver economic growth and rising standards of living, which increase overall citizen satisfaction and dovetail with popular patriotic aspirations of national power. This economic reform effort is undergirded by legal reforms that at once enable economic growth (and thereby serve the goals of nationalism) and reinforce the government’s monopoly in defining and pursuing the national interest through a rule by law. The basic interrelationships between market capitalism, rule by law, and nationalism in China are sketched on the following page. In the next section this paper will examine China’s legal reform efforts more closely and assess the prospects for a true rule of law in China.

## II. INSTRUMENTS AND IDEOLOGY: LEGAL REFORM AND THE PROSPECTS FOR A RULE OF LAW IN CHINA

### ECONOMICS AND INSTRUMENTALISM: CREATING AN ILLIBERAL LEGAL INFRASTRUCTURE

Several analysts of modern China agree that the impetus for the government’s prodigious legal reform effort since 1978 was essentially economic.<sup>33</sup> As discussed above, the CCP had become dependent on the country’s economic performance for its legitimacy, and it needed new laws and legal institutions to “give concrete form to its economic reforms.”<sup>34</sup> Thus it is not surprising that the fruits of recent Chinese legal reform were geared towards achieving the goals of economic policy – building a canon of “substantive law for market-oriented institutions.”<sup>35</sup> In

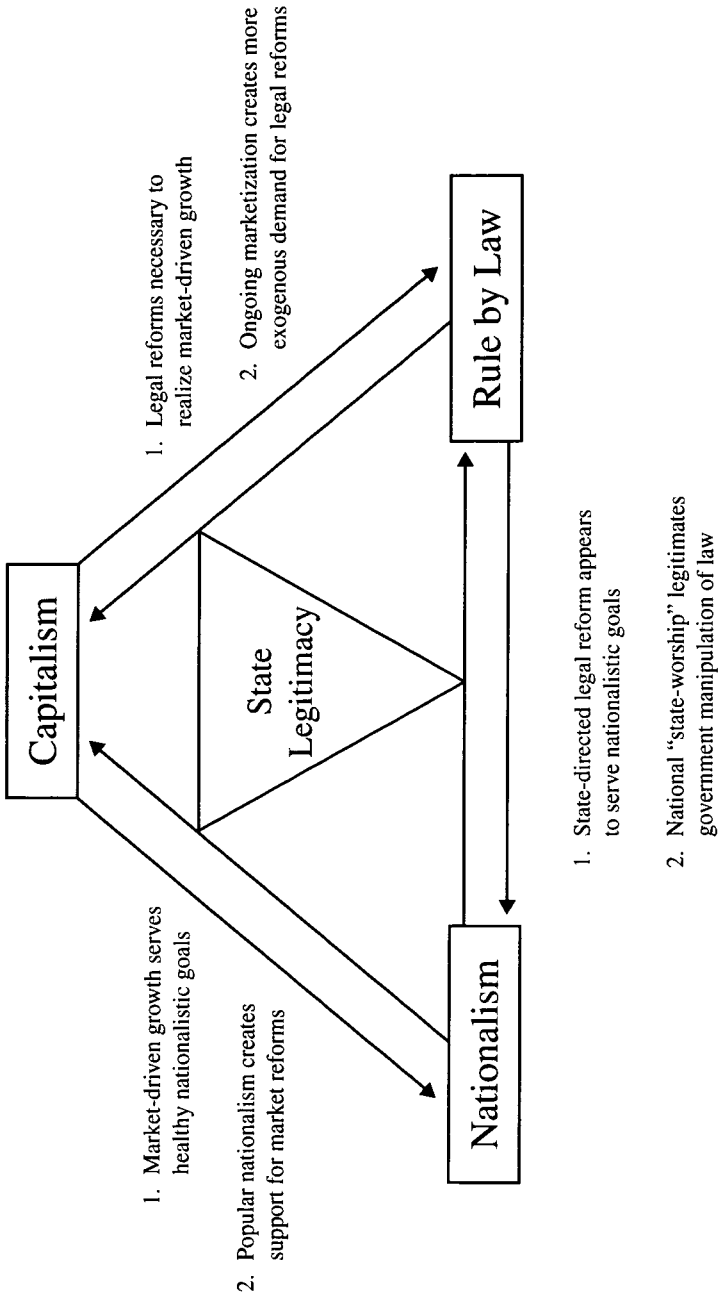
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33. See Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 *Nw. J. INT’L L. & BUS.* 383, 386 (2000); Dingjian Cai, *Development of the Chinese Legal System Since 1979 and its Current Crisis and Transformation*, 11 *CULTURAL DYNAMICS* 135, 138-39, 143-44 (1999); Epstein, *supra* note 9, at 20, 21, 36.

34. Lubman, *supra* note 33, at 386.

35. *Id.*

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the words of China expert Stanley Lubman, new Chinese laws were conceived as a "technical adjunct to economic reform and a faithful creature of CCP policy."<sup>36</sup> Edward Epstein has characterized recent Chinese legal reforms even more simply as a "rationalistic response to the transition to a . . . 'Socialist market economy.'"<sup>37</sup>

This essentially economic focus is reflected in the content of Chinese legal reforms themselves. The reform era has prompted an explosion in Chinese legislation and administrative rule-making. From 1979 to 1997, the National People's Congress enacted 328 laws and decisions, the State Council passed 770 administrative regulations, and local congresses passed more than 5200 local regulations.<sup>38</sup> There also have been more than 24,000 "legal enactments" of various kinds by executive ministries under the national State Council.<sup>39</sup> Most of these new laws were "economic laws," dealing expressly with economic matters.<sup>40</sup> Examples include laws governing foreign investment in the domestic economy and the activities of foreign businesspeople in China,<sup>41</sup> the Company Law (controlling enterprise activity in China), laws governing capital markets, Contract Law, and the General Principles of Civil Law (which guide resolution of tort suits and other civil disputes).<sup>42</sup>

The surge in national rule-making has been accompanied by a commensurate effort to build (or re-define) China's central legal institutions. A renewed focus on law has given the National People's Congress a more important role in Chinese politics as a forum for debate and (on some occasions) criticism of CCP policy proposals.<sup>43</sup> Most conspicuously, Chinese courts have assumed an expanded role in Chinese society. Branching out beyond their traditional limited role of "combating criminal activities," courts are now called upon to resolve economic disputes, adjudicate civil cases, and wrestle with a range of modern social problems.<sup>44</sup>

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36. Stanley Lubman, *Introduction*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA, *supra* note 9, at 1, 3.

37. Epstein, *supra* note 9, at 21.

38. Cai, *supra* note 33, at 136. *See also* Alford, *supra* note 22, at 194 (corroborating these figures).

39. Alford, *supra* note 22, at 194.

40. Cai, *supra* note 33, at 143-44; Epstein, *supra* note 9, at 36.

41. Epstein, *supra* note 9, at 36.

42. Lubman, *supra* note 33, at 386-87.

43. Murray Scott Tanner, *Organizations and Politics in China's Post-Mao Law-Making System*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA, *supra* note 9, at 56, 88.

44. Cai, *supra* note 33, at 137.

Between 1982 and 1991 the number of civil cases annually brought before Chinese courts rose from 767,300 to 1.91 million, while the number of "economic cases (most involving economic contracts) more than quadrupled."<sup>45</sup> Once again, these changes were largely attributable to reform-driven increases in economic activities, and this explosive growth in court activity continued through the 1990s. From 1990 to 1997 the number of economic and civil cases taken to Chinese courts each year rose from 2.4 million to nearly 6 million, with most of this growth resulting from increases in property disputes, contract cases, and tort suits.<sup>46</sup> The greater credibility and institutional capacity of the courts is also reflected in the relative decline of alternative dispute resolution channels. Mediation committees, for example, resolved 5.5 million disputes in 1997, down from 7.4 million in 1990.<sup>47</sup> An increased role for the courts has also swelled the ranks of the legal profession in China from an estimated 3,000 in 1980 to more than 120,000 today.<sup>48</sup>

All of these developments have produced significant changes in the legal culture of Chinese society. Stanley Lubman, for example, credits China's legal reform program with making law "a major instrument of governance," providing an effective "legal framework" for market reforms, and constructing a workable judicial system.<sup>49</sup> Legislation, as opposed to CCP policy directives, has emerged as a central framework for structuring and organizing government operations,<sup>50</sup> and there is a growing consensus in China that "law and legal process do legitimate the exercise of private economic power."<sup>51</sup> On a more practical level, China's new laws also seem to have performed their intended function of facilitating economic growth and development,<sup>52</sup> thereby contributing to both the legitimacy of the Chinese government and the stability of Chinese society.

Yet China's legal reform project should not be misconceived by Western observers. It is not a project in Western legalism and the rule of law (policy successes and societal norm-shifts notwithstanding). There is broad consensus among China scholars that Chinese elites are still committed to an essentially instrumental conception of law. Law is seen as a useful political instrument or

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45. Epstein, *supra* note 9, at 38.

46. Lubman, *supra* note 33, at 387.

47. *Id.* at 388.

48. Alford, *supra* note 22, at 195.

49. Lubman, *supra* note 33, at 384.

50. *Id.*

51. Epstein, *supra* note 9, at 44.

52. Stanley LUBMAN, *Introduction: The Future of Chinese Law*, in CHINA'S LEGAL REFORMS 1, 13 (1996).

administrative tool to implement CCP policies, maintain political stability and exert social control, but it is not a means of limiting government authority.<sup>53</sup> According to Edward Epstein, while law has “never [been] more vigorously invoked to legitimate Communist rule” than it is today, law is still “crudely viewed as pure political machinery determined by the economic infrastructure,” and the government’s attempt to “couch political action in a legally valid form . . . is purely instrumental.”<sup>54</sup> Other accounts see the Chinese government using law as an “administrative tool”<sup>55</sup> or a “technology”<sup>56</sup> that can be deployed in a variety of settings to achieve the objectives of the party-state.

The underlying premises of China’s “reform era” thus appear to be in keeping with earlier periods of overt state planning. Perpetuation of the government’s administrative authority and “adherence to the power-obedience relationship” are evident in the former as well as the latter.<sup>57</sup> Liberal theoretical and normative overlays stressing the role of law as a restraint on state power are still largely absent. William Alford summarizes the Chinese government’s conflicted legal reform approach nicely:

[T]he principle state architects of China’s post-Cultural Revolution law reform project have a genuine ambivalence toward their undertaking. On the one hand, they wish to reap the advantages of liberal legality in terms of its perceived capacity to support economic growth, engage the international community, and legitimate the existing regime. On the other, however, they aspire to do without being unduly subject to its constraints, either in . . . explicit limits . . . of political authority, or . . . adherence to a system of consistently and visibly enforced rules.<sup>58</sup>

The result of this approach has been, predictably, a rule *by* law rather than a rule *of* law – a legal environment where laws do provide some level of order and predictability but remain fundamentally driven by (and enforced according to) the political needs of the party-state.

Examples of the politicized rule-by-law reality abound, most notably in the operation of the court system. Institutionally, Chi-

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53. See 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, 29 (Karen G. Turner et al. eds., 2000); William P. Alford, *Seek Truth from Facts: America’s Understanding of the People’s Republic of China at Law Reform*, 8 *UCLA PAC. BASIN L.J.* 177, 182 (1990); Lubman, *supra* note 33, at 391-92; Lubman, *supra* note 52, at 10; Lubman, *supra* note 36, at 4; Fewsmith, *supra* note 15, at 70; Epstein, *supra* note 9, at 21, 23; Cai, *supra* note 33, at 139-40.

54. Epstein, *supra* note 9, at 19, 24.

55. Cai, *supra* note 33, at 139-40.

56. Alford, *supra* note 22, at 202.

57. Cai, *supra* note 33, at 143-44.

58. Alford, *supra* note 22, at 198.

nese courts are given few special prerogatives relative to other bureaucratic branches of the central government. Judges are viewed as low-status political functionaries,<sup>59</sup> courts lack the essential power of judicial review, and they are often made to enforce rules promulgated by administrative agencies and other government organs.<sup>60</sup> In their day-to-day operation, the courts are effectively controlled by the CCP. Judges are appointed by the party,<sup>61</sup> they are universally party members themselves, and they consult local party branches for guidance on difficult or politically sensitive cases.<sup>62</sup> The party's propensity to interfere in individual cases of all types has been described as "legend,"<sup>63</sup> the CCP can still influence outcomes in cases "at all levels,"<sup>64</sup> and anywhere from 25% to 40% of court rulings are not enforced.<sup>65</sup> According to Stanley Lubman, "courts are expected to apply the laws within whatever boundaries are set by such [CCP] policies and must also respond to changing emphases."<sup>66</sup>

The CCP also has effective control over NPC representatives and other high government officials through its monopoly of the appointment process.<sup>67</sup> The NPC has voted down just one law proposed by its Standing Committee, it has never failed to

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59. Stanley Lubman asserts that "judges are celebrated for being good soldiers of the state, not wise dispensers of justice . . . Chinese judges, in this view, do not make decisions in a significantly different manner than their counterparts in administrative agencies when they are administering policies." Lubman, *supra* note 33, at 398. See also Kaixiang Yang, *A Comparative Study of Judges' Status*, SHANGHAI FAXUE [SHANGHAI JURISPRUDENCE], Apr. 10, 1993, at 137, translated in and microformed on JPRS-CAR-93.041 28 (Joint Publ'ns Res. Serv.) (title is translated as "Judges' Status in Judicial System Discussed"), cited in Lubman, *supra* note 52, at 6.

60. See Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 734 (1994); Anthony Dicks, *Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform*, in CHINA'S LEGAL REFORMS 82, 99-103 (Stanley Lubman ed., 1996).

61. See Donald Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996). While party judges must technically be approved by the National People's Congress, Clarke found that the NPC does not reject CCP appointees in practice.

62. Weifang He, *Tongguo Sifa Shixian Shehui Zhengyi: Dui Zhongguo Faguan Xianzhuang de Yige Toushi* [The Realization of Social Justice Through Judicature: A Look at the Current Situation of Chinese Judges], in ZOU XIANG QUANLI DE SHIDAI: ZHONGGUO GONGMIN QUANLI FAZHAN YANJIU [TOWARD A TIME OF RIGHTS: A PERSPECTIVE ON CIVIL RIGHTS DEVELOPMENT IN CHINA] 209, 249 (Xia Yong ed., 1995), cited in Lubman, *supra* note 33, at 395. See also Susan Finder, *The Structure and Operation of Chinese Courts: China's Litigation System*, in A GUIDE TO THE LEGAL SYSTEM OF THE PRC 17, 17-30 (Chris Hunter et al. eds., 1997).

63. Epstein, *supra* note 9, at 41.

64. Lubman, *supra* note 52, at 6.

65. See Clarke, *supra* note 61.

66. Lubman, *supra* note 33, at 395.

67. Peerenboom, *supra* note 23, at 326. See also KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* (1995).

confirm a party appointee for high office, and its Standing Committee has never voided any enactments of lower-level governments.<sup>68</sup> The individual rights officially enshrined in the 1982 national Constitution are disregarded as a matter of course by the government, and the Constitution itself “remains almost purely an ideal.”<sup>69</sup> Major areas of substantive law are similarly implemented under the influence of politics. Contract disputes are often resolved through politicized mediation mechanisms where bargaining positions are inherently unequal, and the CCP is officially immune from suit under the Administrative Litigation Law.<sup>70</sup> And despite the PRC penchant for expansive government policy authority, China’s administrative law regime is likewise beset by institutional deficiencies, producing “comparatively sub-optimal results.”<sup>71</sup>

Additional barriers to an effective rule of law also exist in the very way PRC laws and regulations are drafted. Chinese legislation tends to be vague, couched in very general terms so as to allow the government maximum flexibility in its enforcement of official rules.<sup>72</sup> Calculated vagueness in drafting legislation likely increases transaction costs for those operating under official laws by decreasing the predictability of rule content and enforcement. Official PRC laws also tend to be inconsistent, with laws in different substantive areas or at different levels of government often contradicting one another. One study found that two thirds of local laws in Beijing, Hebei, and Tianjin were inconsistent with the national Constitution.<sup>73</sup> Another observer has contended that the Chinese legal canon does not even have enough internal consistency to be regarded as a “coherent body of law,” as it lacks “the basic point of reference which all complex systems of law require.”<sup>74</sup> To add to these difficulties, official Chinese laws – or the method of their application – tend to change rapidly with

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68. Michael W. Dowdle, *The Constitutional Development and Operations of the National People’s Congress*, 11 COLUM. J. ASIAN L. 1, 6 (1997); Peerenboom, *supra* note 23, at 338-39.

69. Epstein, *supra* note 9, at 36.

70. Lubman, *supra* note 36, at 6-8.

71. Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKELEY J. INT’L L. 161, 165 (2001).

72. Peerenboom, *supra* note 23, at 336.

73. PETER HOWARD CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* 152 (1997), *cited in* Peerenboom, *supra* note 23, at 337. Donald Clarke also recognizes the inconsistency of laws in China and has discerned a general principle of legal, enforcement whereby higher laws are treated as general guiding principles or legal, ideals, while lower-level laws are actually more legally relevant. *See* Donald Clarke, *State Council Notice Nullifies Statutory Rights of Creditors*, E. ASIAN EXECUTIVE REP., Apr. 15, 1997, at 9-15.

74. Keller, *supra* note 60, at 711.

minimal notice. Such changes often stem from the government's practice of enacting laws on a "provisional or experimental basis" as part of pilot policy programs.<sup>75</sup> These new laws are later repealed or permanently enacted, often suddenly, depending on the success or failure of their associated pilot programs. Still other analysts have noted deep ignorance of the law in China, even among lawyers and government officials.<sup>76</sup>

For many outsiders to the system "it seems that there are no rules at all," since officials at all levels can interpret China's unwieldy mass of vague, inconsistent laws as they wish.<sup>77</sup> This problem is exacerbated by pervasive localism in government administration. Power over low-level judicial appointments and the day-to-day implementation of most laws resides increasingly with local government officials, and these officials have powerful incentives to promote and protect local business activities (of which they are often a part) through illegal means.<sup>78</sup> In fact, laws are often intentionally flouted, misapplied, or disregarded by the CCP, local governments, private companies, and the courts themselves.<sup>79</sup> For example, while national regulations provide for the establishment of 22 retail joint ventures in 11 designated cities across the country, local governments have established roughly 300 such ventures, with more than 40 in Shanghai alone.<sup>80</sup> Similarly, "unauthorized charges on foreign and domestic companies" totaled over \$7 billion in 1996.<sup>81</sup> Personal connections, money, and political power compromise the rule of law in China on a chronic basis, undermining both the practical effectiveness of China's written laws and public faith in the law as a meaningful restraint on state power.<sup>82</sup>

The reality of Chinese legal reform is thus a dualism. New laws and legal institutions have been successful in promoting and

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75. Peerenboom, *supra* note 23, at 337.

76. See Peerenboom, *supra* note 23, at 333 (citing Qi Zhang, *Fazhi de Lixiang he Xianshi* [The Ideal and Reality of Rule of Law], 2 ZHONGWAI FAXUE [Peking U. L.J.] 128, 129 (1998); Buyun Li, *Shixing Yifa Zhiguo Jianshe Shehui Zhuyi Fazhi Guojia* [Establish a Socialist Rule of Law State by Implementing Ruling the Country in Accordance with Law], in ZHONGGONG ZHONGYANG FAZHI JIANGZUO HUIBAN [CCP POLITBURO LEGAL, SYSTEM SYMPOSIA COLLECTION], 133, 154 (PRC Ministry of Justice ed., 1998); ZHONGHUA RENMIN GONGHEGUO LUSHIFA QUANSHU [COMPENDIUM OF THE PRC LAWYERS LAW] 42 (Geng Zhang & Kangsheng Hu eds., 1996).

77. Henny Sender, *Passion for Profit*, FAR E. ECON. REV., June 23, 1994, at 55.

78. Lubman, *supra* note 33, at 395, 402.

79. Peerenboom, *supra* note 23, at 340.

80. Steven Shi & Anne Stevenson-Yang, *Retail Roundabout*, CHINA BUS. REV., Jan.-Feb. 1998, at 43-49.

81. *Foreign Investment: Combating Irregular Fees*, CHINA NOTES (Freshfields Bruckhaus Deringer, Hong Kong), Jan. 1998, at 1-3.

82. Cai, *supra* note 33, at 145-54.

consolidating the market-reform-driven growth so essential to state legitimacy, but they have not achieved independence from the political exigencies of CCP domination. In short, the Chinese government has created a rule *by* law to help ensure the achievement of certain state goals, but it has not allowed the restrictions on its authority implied by a mature rule *of* law. Perpetuation of CCP control over Chinese society has remained the paramount objective, and the government has gone no further than its economic reform goals have demanded in implementing new legal institutions.<sup>83</sup> It is telling that, while recent legal reform efforts have overhauled laws governing contract, capital markets and private enterprise, they have barely touched upon the administration of criminal law, presumably because of its "intimate involvement with basic issues of CCP control over Chinese society."<sup>84</sup> Edward Epstein's basic assessment that "law remains circumscribed by the practical ideology of national stability and unity" thus seems to hold true today.<sup>85</sup>

#### PROSPECTS FOR THE FUTURE

Clearly China has made substantial progress toward legalism over the last two decades, and clearly large obstacles to further legal development persist; but the fundamental question remains: how far will China ultimately move toward a true rule of law? Opinions in the academy are split. Some foresee the imperatives of an increasingly marketized economy driving the CCP to tolerate an independent legal system worthy of Western admiration. According to Cai Dingjian, further overhaul of the Chinese legal system will be necessary to "adapt to the requirements posed by the market economy,"<sup>86</sup> and this process will move China toward "administration according to the rule of law"<sup>87</sup> as economic reforms deepen. Minxin Pei similarly predicts that while the Chinese legal reform program has tended to advance CCP interests thus far, it nonetheless has "the potential to evolve from a system of law into a rule of law."<sup>88</sup> Edward Epstein in turn questions the ability of an instrumentalist rule by law to legitimate the Chinese regime in the future and notes that, while "the ideological function of law has been thus far restricted to the legitimation of economic power," Chinese legal reform efforts have nonetheless

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83. 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, 96 (2000).

84. Lubman, *supra* note 33, at 394.

85. Epstein, *supra* note 9, at 36.

86. Cai, *supra* note 33, at 135-36.

87. *Id.* at 141.

88. Pei, *supra* note 28, at 77.

created a potent legalistic ideology among Chinese legal elites that will continue to “challenge the existing political order.”<sup>89</sup>

Others have expressed doubt about the future of Chinese legal development, citing institutional deficiencies, increased localism, growth-driven opportunities for official corruption, and illiberal traditions as persistent obstacles to a true rule of law.<sup>90</sup> Stanley Lubman, for example, posits that the present weakness of Chinese legal institutions, and the “moral vacuum in which they operate,” encourage political opportunism and make the development of “meaningful legal institutions” unlikely.<sup>91</sup> A rule of law is especially doubtful, according to Lubman, because further reform depends on the support of government elites whose own interests are threatened by increased legalism.<sup>92</sup> Dowdle, taking a more general tack, asserts that, given the “special conditions and needs [that] face developing as opposed to developed societies,” a mature rule of law may not only be unattainable, it may be undesirable in nations like China.<sup>93</sup>

Still other analysts have noted hopefully that, while China still lacks consensus around the liberal theoretical underpinnings of legalism, it is already normatively committed to a “thin” theory of the rule of law – a theory focused on limiting arbitrary rule, “encouraging predictability and economic development,” protecting individuals and resolving disputes.<sup>94</sup> In this view China’s legal development is not destined to be incomplete, but merely different from the West’s, resulting in a “rule of law with Chinese . . . characteristics.”<sup>95</sup> This sort of official legalistic ideal, it is argued, is reflected in the Chinese national Constitution, which proclaims all citizens equal before the law and stipulates that all state organs, political parties, and military personnel must abide by the law.<sup>96</sup> The amount of significance one attaches to these provisions depends in part on how cynically one views the administration of the Chinese party-state. Nonetheless, even Dowdle, who is generally skeptical of the prospects for full legalism in China, observes that the Chinese state does seem to be normatively committed to a rule of law in certain limited ways.<sup>97</sup>

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89. Epstein, *supra* note 9, at 20.

90. Alford, *supra* note 22, at 208.

91. Lubman, *supra* note 33, at 408-09.

92. Lubman, *supra* note 36, at 4-10.

93. Dowdle, *supra* note 68, at 308.

94. Peerenboom, *supra* note 23, at 327-32.

95. Peerenboom, *supra* note 71, at 162.

96. XIANFA [PRC CONSTITUTION], arts. 5, 33 (1982).

97. Dowdle, *supra* note 68, at 300. For more guarded optimism about the future of Chinese legal, reform, see James Hugo Friend, *Foreword: The Rocky Road Toward the Rule of Law in China: 1979-2000*, 20 NW. J. INT’L L. & BUS. 369, 381 (2000).

Some of this ostensibly normative commitment may be due in part to the Chinese leadership's more pragmatic desire for personal political security after the repeated purges and ideological upheavals of the Cultural Revolution. Randall Peerenboom cites a "visceral and personal reaction to the arbitrariness of the Cultural Revolution by many senior Party leaders" as a driving force behind the call for legal reform.<sup>98</sup> One way to ensure a modicum of personal security for Chinese political elites is to insist that any administrative changes be pursued according to the dictates of law. There is some evidence that this approach has paid certain dividends. One study has found that while "counterrevolutionaries" made up well over 30% of the inmate population in the prisons of Shaanxi province during the Cultural Revolution, they accounted for 11.5% of the Shaanxi prison population in 1979 and just 1.9% in 1983.<sup>99</sup>

Optimists about Chinese legalism typically envision a rule of law growing out of deepening economic reform and the associated imperatives of a market economy. Yet such predictions, in relying on an economic motive for reform, do not transcend the essentially instrumentalist, elite-driven legal reform model pursued by China to date. As will be discussed in a later section, Chinese economic reforms have not produced a politically independent middle class, but instead have primarily benefited those who remain dependent on the current political regime. Economic-driven reform *may* indeed lead to a more general culture of legalism, but there is no reason why it must necessarily do so. The optimists have presented an appealing vision, but they have proposed no concrete mechanism for the transition from state-driven economic legalism to a more universal liberal rule of law. Continued economic reform might lift China out of its state-dominated legal model, but thus far economic reform remains the *raison d'être* of the current elite-driven rule-by-law regime.

Popular acceptance of liberal ideals, rather than deepening marketization, would provide a much sounder foundation for a rule of law in China. Even if the CCP remained determined to continue with its program of state-dominated legal reform, public insistence on a Lockean consensual relationship between the state and the people could force the development of a central

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98. Peerenboom, *supra* note 71, at 163.

99. Pei, *supra* note 28, at 79. Of course, deeper complexities underlie apparently simple statistics like these, including the changing nomenclature and official characterization of political crimes in China. Most agree that the Chinese government has continued to imprison individuals for political reasons, even if the Cultural Revolution-era crime of being a "counterrevolutionary" has gone out of style. Similar prosecutorial initiatives may be conducted by the state today using crimes with different, less controversial names.

government limited by law. Yet it appears that the people of China have not yet embraced Western liberal ideology to the extent necessary to foment such fundamental change:

U.S. policy-makers should be sensitive to the ideological nature of the rule of law that many of them urge on China, although most Americans simply take it for granted. . . . Chinese leaders cannot welcome the ideological revolution that the rule of law and the values associated with it threaten to cause . . . notions of political and civil liberties and concepts of inherent legal rights associated with them are extremely underdeveloped in China today and are only beginning to be accepted.<sup>100</sup>

The overall picture of Chinese legal reform is thus extremely complex, prompting some to simply proclaim China's legal future "difficult to judge."<sup>101</sup> In fact the answer is likely to be, like the Chinese legal reform effort itself, dualistic, and the internal dynamics of China's mercantile authoritarian legitimacy model should help provide some clues. The most basic conclusion supported by the Chinese development model is that different types of law can develop differently within the same polity, depending on their role in promoting state legitimacy or furthering certain key government policies. In a rapidly developing state like China, successful integration into the global economy demands that economic laws develop quickly – whether the government likes it or not. Other areas of law may lag behind, particularly those whose development would undermine national goals or threaten state legitimacy. In a polity characterized by government-promoted "state-worship," legal developments that threaten the government's power to direct society will be resisted from above (and maybe also from below).

This situation will likely result in two different but concurrent outcomes in Chinese legal reform: continued progress toward a rule of law in the economic areas where development and legitimacy imperatives brook no other outcome, and a rule by law in more purely social areas where the impulse of nationalistic state-worship and government desire for policy control can take precedence. As the CCP's legitimacy will probably continue to rest, in large part, on its ability to deliver economic growth, and as the Chinese economy itself will continue to diversify and become more complex, areas like contract law and enterprise law will probably develop quickly. Continued national growth will

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100. Lubman, *supra* note 33, at 410-12. See also Robb M. LaKritz, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 240 (1997) (stating that "neither China's leaders nor Chinese society necessarily share the values that underpin imported Western economic laws, despite Western visions of their universality").

101. Naughton, *supra* note 14, at 44.

demand economic efficiency and predictable, apolitical rules. The ability of international market forces to punish China economically for deficiencies in its economic law regimes will promote further development.

Development of robust legal institutions in social areas, like criminal law, face a much more uncertain future. Ongoing reform in those areas, unlike reform in economic law, actually undermines the basis of state legitimacy in China; it threatens the instrumental view of law and the nationalistic consensus around state dominance that underlie China's mercantile authoritarian development model. Such reforms can be portrayed by the government as not just unnecessary, but as dangerous to the nation and its goals. Social law reform can proceed in China only to the extent that (1) the authority of law can be de-linked from government control over policy and (2) popular notions about the need for law can transcend the instrumental demands of national economic development goals. This shift cannot be easily spurred or enforced by the international community. Unlike the realm of economic law, there are no exogenous enforcement mechanisms that will automatically punish China for lagging in its reforms. Indeed China's major trading partners – many of them Western liberal democracies – have actually reinforced an instrumental conception of law by giving economic interests precedence over more ideological or legal concerns in managing their relationships with China.<sup>102</sup>

Again, this is not to say that a rule of law is impossible in China. Doubts about the sustainability of the current rule-by-law system are valid, even if government legitimacy continues to be founded on more non-ideological, objective performance, or competence-related criteria. Recent studies have found, for example, that state-centered “interventionist legal system[s]” typical of socialist countries “predict inferior government performance” overall.<sup>103</sup> Nonetheless, as the West encourages market capitalism in the developing world, it should be realistic about the legal reforms that are likely to come with marketization. The Chinese experience suggests that rapid development of economic law is highly likely, while development of a robust rule of law in areas of general social administration – to the extent

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102. Alford, *supra* note 22, at 203-04. This point does seem to be supported by recent U.S. China policy, which extended Normal Trade Relations to China every year in the late 1990s, when it eventually granted China Permanent Normal Trade Relations and supported Chinese ascension to the WTO despite persistent concerns about human rights abuses, intellectual property violations, illiberal trade practices, and China's expansive territorial claims in the South China Sea.

103. Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222, 222-24 (1999).

that it develops at all – will tend to lag behind. In the long run, the crucial variable may not be marketization or economic development per se, but public devotion to liberal ideals of limited government and individual rights, which, as has been suggested here, authoritarian governments may be able to subvert even as they pursue economic liberalization.<sup>104</sup>

### III. THE “VOLATILE PILLAR”: POPULAR NATIONALISM AND STATE LEGITIMACY

There is a sense among scholars that China has been “drifting ideologically” since the end of the Cultural Revolution.<sup>105</sup> Maoism’s currency as an administrative paradigm became increasingly suspect as the 1970’s progressed, and the CCP began searching for new ideological foundations. Most obvious was the official turn to economic development as a guiding policy objective in the early 1980’s. Associated with this new emphasis on national development was an appeal to popular nationalism, which both gave ideological impetus to China’s economic reform program (the desire to make China wealthy and powerful), and, to the extent that officially-promoted nationalism included support of the Chinese state as guardian of the national interest, ensured CCP control of new reform projects.<sup>106</sup>

The PRC government has long used nationalism to support its rule; Mao himself touted the Communist Revolution of 1949 as the moment when China “stood up” as a nation. Yet the importance of popular nationalism as a legitimizing, cohesive force in Chinese society has increased during the reform era. Much of this nationalistic resurgence was linked to China’s successful economic reforms, which made the Chinese people more confident about their collective future,<sup>107</sup> but it was also spurred by official state propaganda efforts after the Tiananmen Square Incident of 1989. As Maria Hsia Chang has observed, “[i]n the aftermath of the [June 4] massacre, the government sought to regain control

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104. In this area Hong Kong, recently reunited with the mainland in 1997, may provide a glimpse of the future. Ironically enough it was England, traditionally seen as a bastion of liberal legalism, that successfully perpetuated a similar dual legal outcome for nearly a century. Ruled by an authoritarian colonial government primarily dedicated to economic growth and development, Hong Kong developed all the trappings of a mature rule of law in its economic sectors. Indeed, Hong Kong is still regarded as one of the most free, open, and investment-friendly economies in the world. Yet legalism in areas of civil liberties and social policy were slower to develop, and in many areas they did not emerge at all.

105. Lubman, *supra* note 33, at 404.

106. See discussion of nationalism and its role in state legitimacy *supra* Section I.

107. Michel Oksenberg, *China’s Confident Nationalism*, 65 FOREIGN AFF. 501, 501-23 (Am. & the World, 1986).

by instigating a campaign of national unity in which young people were singled out for 'patriotic education.'"<sup>108</sup>

Throughout the 1990's the Chinese leadership made explicit, systematic efforts to both link economic reform with broader nationalistic goals and encourage patriotic nationalism among the Chinese people. The government launched an official Patriotic Education Campaign shortly after the Tiananmen incident, which was initially targeted at school children but later broadened to include the whole population in September, 1994.<sup>109</sup> In 1995 the military flexed its muscles by conducting well-publicized missile tests in the Taiwan Strait, while the government published *Selected Works for Instruction in Patriotic Education*, a compendium of speeches and writings on patriotism officially calculated, according to the *People's Daily*, to "fill an ideological vacuum" among the populace.<sup>110</sup> CCP leaders, including Jiang Zemin himself, repeatedly stressed the party's need to strengthen patriotism and promote the party agenda "under the new banner of nationalism,"<sup>111</sup> and by 1996, international periodicals like *The Economist* were taking note of China's turn to "visceral nationalism" as a legitimating ideology.<sup>112</sup> Perhaps the most "extreme but nonetheless representative index of [Chinese] nationalism in the 1990s"<sup>113</sup> was the tremendous popularity of *China Can Say No*, a now legendary 1996 book espousing Chinese resistance to dominant Western international paradigms and voicing intensely nationalistic (some might say jingoistic) predictions of Chinese power in the twenty-first century.<sup>114</sup> In keeping with all of these

108. CHANG, *supra* note 10, at 177.

109. *Id.*

110. *China Prints Book to Educate Farmers*, S.F. CHRON., Nov. 28, 1995, at A11; Liwen Dong, *Lun Zhonggong Di Aiguozhuyi [On Communist China's Patriotism]*, GONGDANG WENTI YANJIU [STUDIES IN COMMUNISM], Aug. 1995, at 26, cited in CHANG, *supra* note 10, at 177.

111. See, e.g., CHANG, *supra* note 10, at 177 (citing George Wehrfritz, *China: Springtime Perennial*, NEWSWEEK, June 10, 1996, at 17; Jiang Zemin, quoted in DANGDAI SICHAO [CONTEMPORARY THOUGHT], No. 1 1995); See also Unger, *supra* note 8, at xi (citing Jiang Zemin, Address Before the National Publicity Work Conference, in JINGJI RIBAO [ECON. DAILY], Mar. 7, 1994, at 2).

112. See, e.g., *China: Saying No*, THE ECONOMIST, July 20, 1996, at 30; *Stay Back, China*, THE ECONOMIST, Mar. 16, 1996, at 15.

113. Toming Jun Liu, *Restless Chinese Nationalist Currents in the 1980s and the 1990s: A Comparative Reading of River Elegy and China Can Say No*, in CHINESE NATIONALISM IN PERSPECTIVE: HISTORICAL AND RECENT CASES 205, 206 (C. X. George Wei & Xiaoyuan Liu eds., 2001). Liu asserts that "[a]ny serious study of Chinese nationalism in the last two decades of the twentieth century have [sic] to account for two events: the airing of the TV miniseries *Heshang [River Elegy]* in June and August of 1988, and the publication of a book titled *Zhongguo Keyi Shuobu [China Can Say No]* in April 1996." *Id.* at 205.

114. QIANG SONG ET AL., ZHONGGUO KEYI SHUOBU: LENGZHANHO SHIDAI DE ZHENGZHI YU QINGGAN JUEZE [CHINA CAN SAY NO: POLITICS AND CHOICES OF SENTIMENTS IN THE POST-COLD WAR ERA] (1996).

developments, the CCP officially added “Deng Xiaoping Theory” to the preamble of its constitution in 1999, thus formalizing its ideological devotion to economic reform and what Maria Hsia Chang has termed “developmental nationalism.”<sup>115</sup>

Of course the CCP was not just concerned with increasing the prevalence of popular nationalism; it also sought to dictate and exploit its content. As with China’s legal reform program, official efforts to cultivate popular nationalism were fundamentally shaped by the legitimacy imperative. The Chinese government has attempted to craft a popular nationalism that serves the interests and bolsters the legitimacy of the current CCP regime. This required “deliberately blurring the analytic boundaries between nationalism and patriotism so as to . . . make the PRC state synonymous with the nation, and to insist . . . that loving the Chinese nation requires fidelity to the Communist Party-state.”<sup>116</sup> As one nationalistic Chinese writer put it, “the state’s interests are higher than everything else; the interests of the nation must serve those of the state.”<sup>117</sup> Only this conceptual melding of nation and (party) state would allow the CCP to tap into existing popular nationalistic sentiments and redirect them in the service of legitimating the regime. This effort to politicize the substantive content of Chinese nationalism can be readily seen in the most basic symbols of the modern Chinese nation, which “serve[ ] as symbols both for the nation and the Party-state”: the red flag with yellow stars, Tiananmen Square, the celebration of National Day (commemorating the inauguration of the PRC), and the lionization Mao Zedong.<sup>118</sup>

But CCP manipulation of nationalistic sentiment goes beyond mere projects in symbolism. The Communist Party has also claimed full credit for all of China’s material and political advances in the post-war era. According to Maria Hsia Chang: “the Communist Party argues that only its leadership enabled the Chinese people to triumph over countless obstacles and challenges in the past . . . and, it is argued, only with the party’s continuing leadership can China adequately defend itself and achieve terri-

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115. CHANG, *supra* note 10, at 178.

116. *Id.* at 181.

117. Yingming Peng, *Zailun Minzu Wenti di Hanyi* [*A Reconsideration of the Meaning of the National Question*], MINZU YANJIU [NATIONALITY STUDIES], No. 1, at 29 (1993), cited in CHANG, *supra* note 10, at 181-82. Maria Hsia Chang also points out that the CCP’s choice to invoke state-centered patriotism rather than Chinese ethnic nationalism per se was a wise one, as China’s ethnic minorities make up only 8% of the total national population but are significant constituencies in 64% of China’s total land area, particularly in key border areas in southern and western China. CHANG, *supra* note 10, at 180.

118. Unger, *supra* note 8, at xv.

torial reunification.”<sup>119</sup> This naked self-congratulation is perhaps most succinctly expressed in the CCP’s 80th anniversary slogan, repeated constantly by the state-controlled media in promotional campaigns during the spring of 2001: “no Chinese Communist Party, no new China.”<sup>120</sup> For observers who take note of the widespread famines incurred by Mao’s Great Leap Forward, the political upheavals and persecutions of the Cultural Revolution, and the persistent economic backwardness and deprivation wrought by more traditional, ideologically-driven CCP policies, such party credit-taking seems, at best, perverse. In empirical fact China’s recent economic success has stemmed, in large part, from a wholesale rejection of traditional CCP ideological agendas in favor of capitalist market reforms. Many of the largest remaining obstacles to China’s further economic development are themselves CCP creations (official opposition to political reform, corrupt state bureaucracies, and unprofitable state-owned enterprises come to mind).

Nonetheless, CCP efforts to cultivate a state-centered nationalism seem to have met with some success, finding ideological traction in the natural nationalistic sentiments of the Chinese people, popular resentment of China’s humiliation at the hands of imperialist powers in the twentieth century, and public pride over the economic and political achievements of the last two decades.<sup>121</sup> The result is what Chang describes as a “mixture of state-inculcated patriotism and populist reactive nationalism” that has effectively bolstered the legitimacy of the current PRC regime and created united support for state reform programs; “[n]ationalism not only is an ideological replacement for an obsolete Marxism, it also functions . . . as a unifying force that can hold together a society experiencing the disruptive forces associated with rapid economic development.”<sup>122</sup>

State-sponsored nationalism is thus directly linked to the government’s economic reform programs, and the importance of pro-state, pro-party nationalism in supporting China’s economic reform policies becomes clear. National unity, and hence loyalty to the existing regime, is now touted as “a necessary condition

119. CHANG, *supra* note 10, at 181.

120. This single line – “*Mei you Gongchandang, mei you xin Zhongguo*” – was repeated constantly in radio jingles and official publicity pieces for the CCP’s 80th anniversary celebration in Beijing, May 2001.

121. For good discussions of the roots of modern Chinese nationalism and aspects of its recent evolution, see CHINESE NATIONALISM IN PERSPECTIVE: HISTORICAL AND RECENT CASES (C. X. George Wei & Xiaoyuan Liu eds., 2001).

122. CHANG, *supra* note 10, at 178, 179. See also Hongjun Ji & Shan Zheng, *Dali Hongyang Zhonghua Minzu Jingshen* [*Vigorously Promote the Spirit of Chinese Nationalism*], GUOFANG [NATIONAL DEFENSE], No. 9, at 15 (1993).

for the prosperity and development of the state.”<sup>123</sup> Predictably a great many Chinese citizens, who have learned from bitter experience the value of prosperity and stability, seem to have accepted this notion. In emphasizing the dual imperatives of unity and stability, state-guided nationalism has also served to contain the political effects of reform by stigmatizing all critics of the regime as unpatriotic.<sup>124</sup> In this way the Chinese government has used the “mystique of patriotism to neutralize politically the very Chinese who have been the most successful in modernizing,” allowing the CCP to profit politically from economic reform while silencing the vanguards of reform in the general public.<sup>125</sup> It is thus not Chinese nationalism per se that has primarily contributed to the legitimacy of the current Chinese regime, but the unique brand of nationalism inculcated and encouraged by the CCP – complete with explicit, mutually reinforcing links to economic reform programs and CCP dominance of the party-state.

In the final analysis, popular Chinese nationalism has been exploited and manipulated by the CCP to create what popular elections provide in a democratic regime: a sense of ownership and shared enterprise between the people and the government. Popular visions of increased international power, a common mission to develop the domestic economy and improve living standards, and universal recognition of the party’s self-proclaimed importance in advancing the public interest all encourage a sense of public ownership over the regime – a conviction among Chinese people that the current government is *their* government in a very real sense. So long as the government seems to be advancing national interests valued by the general public, and so long as the achievement of those interests is believed to be contingent on public support of the party-state, popular nationalism will remain a vital pillar of state legitimacy in the PRC.

Yet as the title of this section suggests, nationalism is the most volatile pillar of state legitimacy in the PRC. There is nothing especially unique about the Chinese government’s invocation of nationalism in support of state policies. Jonathan Unger maintains that the Chinese government has not played upon nationalistic sentiments to a greater extent than do “many other governments.”<sup>126</sup> Other scholars have noted that nationalism has become a powerful political force all over the world in recent years, and especially in post-Communist states, “for want of any

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123. BINGHAO JIN & ZAIXIAN ZHU, *MINZU LILUN ZHENGCE GAILUN* [A SUMMARY OF NATIONALITY THEORIES AND POLICIES] 183, 184 (1994), cited in CHANG, *supra* note 10, at 181.

124. Pye, *supra* note 31, at 87.

125. *Id.*

126. Unger, *supra* note 8, at xi.

other vehicle for organizing political participation and legitimating government."<sup>127</sup> The American public response to the September 11th terrorist attacks in 2001 demonstrate that even those nations most devoted to liberal democracy can invoke popular nationalism in the service of state goals. The difference in the Chinese neo-mercantile authoritarian model lies in the degree of state dependence on nationalism for legitimation. In the absence of national elections, religious doctrine, monarchic figureheads, or other oft-used sources of shared enterprise and state legitimacy in other countries, nationalism must carry a disproportionate share of the legitimation load in China.

This imbalance is worrisome primarily because Beijing's control over the substantive content and emotive depth of Chinese nationalism is tenuous. Like all popular sentiments, "nationalism is never fully subsumed by the nation-state," but tends to take on a life of its own in the public consciousness.<sup>128</sup> It should be noted that some scholars have conceived of modern nationalism as a construct of political elites, created and manipulated for the benefit of those in power, without any necessary organic roots in the greater population.<sup>129</sup> Yet all indications are that modern Chinese nationalism is not a pure product of elite political will. In fact just as the Chinese party-state was stepping up its efforts to foster state-centered nationalism in the wake of the Tiananmen Square incident, some Chinese intellectuals were advocating adherence to a "Second Kind of Loyalty" – a national patriotism abstracted from the party state itself, which recognizes that one's patriotic duty can demand actually opposing the formal state government.<sup>130</sup> More recently, John Fitzgerald has noted that "the relationship between state and nation is under negotiation in China today to an extent that defies all precedent" such that "[p]atriotic nationalism has taken root outside the state itself."<sup>131</sup> This should not be surprising, as the transition from a planned economy to a market economy necessarily implies fun-

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127. Guyora Binder, *The Kaplan Lecture on Human Rights: The Case for Self-Determination*, 29 STAN. J. INT'L LAW 223, 264 (1993).

128. Prasenjit Duara, *De-Constructing the Chinese Nation*, in CHINESE NATIONALISM 31, 32 (Jonathan Unger ed., 1996).

129. Liah Greenfeld, for example, has asserted that nationalism can take hold as a social reality if a majority of the population adheres to it, or if a powerful minority acts to force it on the majority. See LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 18 (1992).

130. Merle Goldman et al., *China's Intellectuals in the Deng Era: Loss of Identity with the State*, in CHINA'S QUEST FOR NATIONAL IDENTITY, 125, 141-43 (Lowell Dittmer & Samuel S. Kim eds., 1993).

131. John Fitzgerald, *The Nationless State: The Search for a Nation in Modern Chinese Nationalism*, in CHINESE NATIONALISM 56, 83-85 (Jonathan Unger ed., 1996).

damental shifts in the role of the state and its relationship to civil society.

Such shifts have occurred on a massive scale in China since reform began in 1979. The reform-era experiences of southern China and the SEZ's – which tended to prosper and internationalize quickly as China opened – have challenged traditional notions of nationalism and created what Edward Friedman describes as a “distinct national identity” among “the marketeers, the mobile, open-minded, and tolerant.”<sup>132</sup> Other areas, such as the Gansu and Qinghai provinces, have remained more socially isolated and economically backward. As discussed earlier, economic reform has also redistributed wealth away from the central government and into the hands of private individuals or local government officials. Legal reforms have also been characterized by localism and administrative inconsistency. Reform-driven divergence of internal conditions has thus highlighted fundamental tensions in China's national identity – the predicament of “a civilization pretending to be a nation-state.”<sup>133</sup> With so many elements of the national identity in flux, the party-state's ability to “define the content of nationalism”<sup>134</sup> is waning, and a monolithic loyalty to the national leadership “can no longer be taken for granted.”<sup>135</sup>

The uncertain state of Chinese nationalism is even more unsettling given the potential for nationalistic sentiments – in any country – to turn virulent. A certain level of national pride and collective ambition are healthy components of any cohesive society; but nationalism often segues into jingoism or revolution, and these tendencies have been evident in the PRC's political history. Douglas Fewsmith has cautioned that over-use of nationalism in domestic political competition may inhibit “normalize[d]” elite politics in China, particularly given the PRC's historical propensity for “struggle” politics and leadership purges.<sup>136</sup> The potential for jingoism is starkly evident in China's strident territorial claims in the South China Sea and its often aggressive posture toward Taiwan – at once the centerpiece and the short fuse of China's state-sponsored nationalistic ethos. In keeping with the general reform-era ambition to make China wealthy and powerful, “[n]ational power is being touted as a value in and of it-

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132. Ming K. Chan, *Decolonization without Democracy: The Birth of Pluralistic Politics in Hong Kong*, in *THE POLITICS OF DEMOCRATIZATION: GENERALIZING EAST ASIAN EXPERIENCES*, *supra* note 30, at 161, 173-75.

133. Pye, *supra* note 31, at 109.

134. Unger, *supra* note 8, at xvi.

135. Chan, *supra* note 132, at 175.

136. Fewsmith, *supra* note 15, at 72-73.

self"<sup>137</sup> in China, and some analysts have discerned in modern Chinese nationalism "a volatile mix of potentially troublesome attributes" predisposed to irredentism and "aggression."<sup>138</sup>

There is also a distinctly anti-Western aspect to Chinese nationalism that should give American analysts pause. Geremie Barme, Maria Hsia Chang, and others have noted a "growing disenchantment with the West" in the aftermath of the failed 1989 democracy movement.<sup>139</sup> Where the thrust of the reform movement was once to emulate Western institutions and "catch up" with the developed world, many Chinese intellectuals are now convinced that "neither liberal democracy nor communism is suitable for China."<sup>140</sup> A distinct anti-Western bent can be seen in a widespread Chinese "desire for revenge for all the real and perceived slights of the past century," many of which came at the hands of Western colonialism.<sup>141</sup> Conflicted Chinese attitudes about the West, and about the United States in particular, are evident in the views of most average Chinese citizens. In a July 1995 poll by the *China Youth Daily* (in the wake of the Taiwan Strait missile crisis), over 87% of survey respondents said the United States was the country most unfriendly to China, and yet a plurality of 35% also indicated that the U.S. was the country they would most like to visit or move to.<sup>142</sup> A popular Beijing truism holds that, while Sino-Russian relations are like a stale marriage – trying but reasonably predictable – Sino-American relations more closely resemble a youthful love affair, oscillating between extreme infatuation and intense jealousy or resentment.

In the arena of formal policy-making, furthermore, the Chinese government has often invoked popular nationalism to oppose Western policy initiatives. Official Chinese policy statements have consistently stressed China's right to sovereignty, a concept that, by definition, appeals to nationalistic sentiments. This issue is highlighted most starkly in the debates over China's human rights policies, where the core of China's official

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137. *Id.* at 72.

138. CHANG, *supra* note 10, at 182. Chang lists the following problematic "attributes" of Chinese nationalism: "an ethnic-racial conception of nationhood; a reactive nationalism that nurses memories of China's historical humiliation . . . a collective sense of victimhood and insecurity; xenophobic narcissism; a preoccupation with power; cultural-moral relativism; an illiberal worldview; an irredentist resolve to reclaim lost territories; and political authoritarianism." *Id.*

139. Geremie R. Barmé, *To Screw Foreigners is Patriotic: China's Avant-Garde Nationalists*, in CHINESE NATIONALISM 183, 187 (Jonathan Unger ed., 1996); *See also* CHANG, *supra* note 10, at 197.

140. CHANG, *supra* note 10, at 197.

141. Barmé, *supra* note 139, at 184.

142. SHIJI RIBAO [WORLD DAILY], July 9, 1996, at A10, *cited in* CHANG, *supra* note 10, at 197.

pro-sovereignty position is framed as an invocation of the right to autonomy and self-determination:

China has firmly opposed to [sic] any country making use of the issue of human rights to sell its own values, ideology, political standards and mode of development, and to any country interfering in the internal affairs of other countries on the pretext of human rights, the internal affairs of developing countries in particular, and so hurting the sovereignty and dignity of many developing countries.<sup>143</sup>

The Chinese government has appealed to similar nationalistic sentiments in officially opposing the alleged Western strategy of “peaceful evolution” – a process whereby Western countries purportedly seek to manipulate China by encouraging political reforms and the inculcation of liberal Western ideology.<sup>144</sup> The currency of China’s official Taiwan policy likewise clearly rests on popular nationalism, tapping into a strong irredentist desire to reclaim lost territories and restore national dignity. Here too, public passions are often incited or exploited to effectively oppose American policy.

The anti-Western element of Chinese nationalism, while a valid cause for concern, should not be over-emphasized. Chinese nationalism is, first and foremost, pro-Chinese. Similarly, modern Chinese nationalism should not be seen as purely a product of state propaganda. The CCP uses popular nationalism to its benefit to be sure, but its efforts would not be so effective if they did not resonate with some preexisting core of public sentiment. As noted earlier, Chinese nationalism has its roots outside the PRC state, and loyalty to the CCP leadership per se cannot be assumed unless that leadership appears to be serving the national interest. The success of recent reform policies in making China richer and more powerful have certainly bolstered the CCP’s credibility as guardian of the national interest, but suppose the economy flags (as it eventually must) and growth halts. Suppose that accession to the WTO is more economically painful than an-

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143. Information Office of the State Council of the P.R.C., *White Paper on Human Rights in China: Active Participation in International Human Rights Activities*, § X (Nov., 1991).

144. Matthew C. Stephenson colorfully labels this the U.S.’s “Trojan Horse” strategy. Stephenson, *supra* note 83, at 96. In the absence of overt sanctions or other demonstrably hostile Western policies, the Chinese government has increasingly focused on this “peaceful evolution” concept. As with other CCP manipulations of nationalistic sentiment, the irony of this move should not be lost on the Western observer. The alleged strategy of “peaceful evolution” can only work if the Chinese people themselves *want* Western-style political institutions and protection of human rights. Thus the CCP is, in effect, calling upon the Chinese people to oppose Western encouragement of political reforms that the people themselves presumably want. For an articulation of the official government view, see JIN & ZHU, *supra* note 123, at 185.

ticipated. Suppose international politics present a situation in which the Chinese government appears unacceptably constrained in defending Chinese interests or saving national face.

Extreme dependence on nationalism for state legitimacy thus poses some difficult questions. Once the link between furtherance of nationalistic goals and government legitimacy is expressly made, can the two be de-linked? More frightening still: can a regime that has staked its legitimacy on the service of nationalistic goals ever safely choose moderate policy options on issues – like Taiwan – characterized by passionate popular nationalism?

In fact there are some subtle indications that the Chinese government has recognized the volatility of popular nationalism and its own increasing inability to control or define it. After the United States bombed the Chinese embassy in Belgrade in 1999, the Chinese government provided buses to Beijing-area universities so students could be transported to the U.S. Embassy for protests. The government also allowed or arranged for (accounts differ) truckloads of bricks to be delivered to the area so that the crowd could hurl them at the U.S. compound. State encouragement of nationalistic demonstrations was notable, but the state, acting by itself, could never have orchestrated the spontaneous outpouring of nationalism and anti-Americanism that followed the embassy bombings. The countless incidents of protest at universities and public squares throughout Beijing,<sup>145</sup> as well as the informal “siege” on the U.S. embassy,<sup>146</sup> clearly came from a deep and genuinely popular source, outside the realm of state policy.

It is interesting to note that, by contrast, no such buses or bricks were made available in the wake of the Spring 2001 spy plane incident, and administrators at some colleges met with student CCP leaders to ensure that campus protests were contained.<sup>147</sup> Similarly, while the issuance of an American visa to Taiwanese President Lee Teng-hui sparked missile testing in the Taiwan Strait in the Spring of 1995, actual sale of weapons to Taiwan in 2001 – ostensibly a more dangerous act of American support for Taiwan – drew only rhetorical condemnation from Beijing. Recently national pride has been invoked in less political, more civilian areas, such as the 2001 Beijing Olympic bid.

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145. See Elisabeth Rosenthal, *Crisis in the Balkans: Beijing; China Students Are Caught up by Nationalism*, N.Y. TIMES, May 12, 1999, at A1.

146. See *U.S. Embassy in China Under Siege By Protestors After NATO Bombing of Chinese Embassy in Belgrade* (CBS This Morning television broadcast, May 10, 1999), available at LEXIS.

147. These accounts came from interviews with Beijing university students who were enrolled in college during both incidents.

Surely there were many other policy considerations driving these choices, but CCP desire to reign in an increasingly independent popular nationalism may have played a part as well.

Nationalism thus emerges as the most volatile pillar of Chinese state legitimacy under the mercantile authoritarian model. Popular nationalism has, at least to some degree, created a workable sense of shared enterprise and mutual ownership between state and society in China since 1979. A replacement for a fading Maoist ideology, it has been invoked and manipulated to serve CCP interests and garner support for state policy dominance, but it is only effective insofar as the party-state appears to be advancing popular nationalistic interests. Chinese nationalism supports capitalist economic reforms as long as they produce growth and increased living standards. Nationalism bolsters a party-state-centered rule by law so long as the CCP can credibly claim sole stewardship of nationalist aspirations. Yet the depth and content of popular nationalism are ultimately beyond state control in any society, and the potential for instability exists wherever nationalism must carry a disproportionate share of the state's legitimation burden.

The ultimate sustainability of the nationalism "pillar" remains an open question. Yet politicized popular nationalism in one form or another has created enough state-society cohesion to carry China through two decades of profound change, and this phenomenon deserves study. At the very least, it suggests that Western policy-makers must recognize the ability of nationalism – or its equivalents in other societies<sup>148</sup> – to stand in for popular elections and other sources of Lockean social contract between governments and the governed, at least for a while. It also calls for Western governments to be mindful of nationalism's volatility, and the resultant potential for instability in societies like China, when making policy choices.

#### IV. LIBERALISM'S WEAKEST LINK: THE FRAGILITY OF INSTITUTIONAL DEMOCRACY<sup>149</sup>

The one element of the liberal developmental "orthodoxy" completely absent from the Chinese legitimation model is de-

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148. As will be discussed in Section IV of this paper, other cultural or institutional elements can serve this same unifying function. Government rule in the name of commonly accepted religious doctrine, official embodiment of the nation in a national monarch or other single authority figure (often also with religious overlays), celebration of a particular ethno-cultural identity, or popular devotion to a single political ideology can also create the requisite sense of shared enterprise and mutual ownership for regime legitimation.

149. Here I define democracy in a broad but traditional sense: a set of political institutions that effectively allow citizens to choose their political leaders through

mocracy. While certain forms of Western-style legalism and market capitalism are included in official government reform programs, large-scale efforts in electoral politics have been kept off the agenda.<sup>150</sup> In many ways the Chinese development experience illustrates the incredible fragility of democracy as a political institution, and this paper contends that democracy is the weakest link in the Western developmental triumvirate. Market capitalism and some minimal level of legalism are necessary for sustained development in the modern global economy. To at least some degree, international investors and merchants will punish (via ordinary market mechanisms) nations whose economic policies and associated legal institutions are inadequate. The developmental experience of China and a host of other developing countries, particularly in Asia, bears this out. Yet there are no such exogenous mechanisms to enforce the institutionalization of democracy. China's development drive demonstrates that democracy is fundamentally fragile along at least three dimensions in developing countries: it can be subverted by the very fruits of market-driven economic development, its development depends on the political calculations of authoritarian political elites, and, to the extent that it emerges at all, it can be co-opted or corrupted by authoritarian political incumbents.

#### CAPITALISM VERSUS DEMOCRACY I: THWARTING POPULAR DEMAND

Political scientists and economists of various stripes have questioned the link between capitalism (or economic wealth more generally) and the development of democracy in various contexts. While the proposed symbiosis between capitalism and democracy has a strong theoretical pedigree,<sup>151</sup> China's experience illustrates the reality that capitalism, as one prominent scholar has noted, "can very well coexist with societies which are anything but democratic."<sup>152</sup> Some skeptics have focused on the tension between the material inequities created by capitalism and the egalitarianism implied by democratic politics.<sup>153</sup> In fact

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open, public direct elections. Associated liberal commitments to human rights and the rule of law are generally implied but not strictly necessary for the purposes of this paper.

150. China's small-scale experiments with democracy at the village level will be discussed later in this section of the paper.

151. See generally SAMUEL HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942).

152. GREENFELD, *supra* note 129, at 489.

153. See, e.g., Edward Friedman, *Democratization: Generalizing the East Asian Experience*, in *THE POLITICS OF DEMOCRATIZATION: GENERALIZING EAST ASIAN EXPERIENCES*, *supra* note 30, at 19, 32, 48-49.

China's own market-driven development program has created one of the world's largest income gaps in a mere twenty years, and the Chinese government itself has recently acknowledged that extreme material inequity may threaten social stability.<sup>154</sup> In addition, China's underdeveloped legal system and nascent regulatory institutions will make such inequity difficult to reverse.<sup>155</sup> Yet just as China's farmers and workers – traditionally the CCP's strongest support base – have become more disenchanted with the economic inequities of the current reform program,<sup>156</sup> a new Chinese middle class of urban elites and intellectuals has prospered by comparison, re-bolstering the regime with a new constituency. And while China's wealth gap remains a very real problem, capitalist reforms have served to subvert democracy in ways that transcend issues of equity, further debunking the notion that “socioeconomic development deliver[s] an easy transition from wealth to democracy.”<sup>157</sup>

Paradoxically, the very success of market reforms in China has limited public demand for democratic change. While the aforementioned “wealth gap” clearly remains a major obstacle to social stability and healthy democratic politics, almost all Chinese citizens are materially more comfortable and secure than they were twenty years ago.<sup>158</sup> The significance of such progress in a society that has endured harsh deprivations over the last century should not be underestimated. For the first time in perhaps four generations, Chinese parents can be reasonably confident in

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154. Associated Press, *China Sounds Alarm on Wealth Gap*, May 11, 2002, available at LEXIS. The article reports that Zhiqiang Lu, deputy director of the Development Research Center of the Chinese government, asserted that “[t]he problem of income distribution has become the most noticeable issue among current social problems in China.” Reportedly 70 percent of all Chinese feel that the “wealth gap has harmed social stability.”

155. *Id.*

156. Reports of unrest among Chinese peasants and villagers have proliferated in the last 10 years. Most of these protests focus on corruption among local officials or the inevitable economic hardships imposed on rural communities by marketization. For a recent example, see Matthew Forney, *Bodies of Evidence: Justice can be elusive in China, but villagers in Hunan province are bringing out the dead in an effort to get it*, TIME INT'L, Mar. 18, 2002, at 24 (reporting on peasant protests against corruption among local police forces).

157. Friedman, *supra* note 153, at 48-49. See also David S. G. Goodman, *The New Middle Class, in THE PARADOX OF CHINA'S POST-MAO REFORMS*, *supra* note 6, at 241, 242. Goodman asserts flatly that “there is no necessary connection between increasing wealth and democratic values.”

158. The Associated Press, *China Sounds Alarm*, *supra* note 154 (acknowledging this even as it warns of China's growing material inequities and noting that, despite a widening income gap, “[m]ost Chinese have seen tremendous improvements in their quality of life over the past two decades”. While none seriously maintain that the fruits of China's economic development have fully “trickled down” to the general public, it is also undeniable that the overall standard of living in most Chinese cities has risen dramatically since 1979.

a prosperous future for their children. The public optimism and satisfaction created by such improvements has allowed the government to stand on its economic performance and effectively limit demand for democratic reform. Edward Friedman and other scholars noted this phenomenon in the mid-1990s, suggesting that “[p]erhaps it was the unique economic dynamism of post-Mao China that permitted Deng Xiaoping not to compromise and that made the task of coalition building peculiarly difficult for Chinese democrats.”<sup>159</sup>

Economic prosperity has also given the Chinese government a powerful card to play in its efforts to marginalize democracy supporters: the specter of political instability. The CCP has consistently maintained that democracy will destabilize China. Given China’s current state of underdevelopment, it is argued, democratic reform would be a “recipe for chaos”<sup>160</sup> and political instability, which would threaten the nation’s hard-won (and highly prized) economic progress.<sup>161</sup> A one-party system is considered necessary “to constrain dissent” while “difficult and painful reforms” are implemented in China’s more backward sectors.<sup>162</sup> The CCP instead has advocated cautious, incremental political reform programs, such that future “political reform should not be expected to result in a rapid expansion of democratic participation.”<sup>163</sup>

This ironic twist on the traditional Western notion that there are socio-economic prerequisites to democracy seems to have gained some currency with the Chinese public. William Overholt, for example, has observed that:

there is a broad consensus in China about which policies were crucial to the rise of the people from hunger and the nation from humiliation. At the core is the overwhelming priority given to economic development . . . most Chinese have ac-

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159. Friedman, *supra* note 153, at 44. See also Su, *supra* note 30, at 229 (stating that the “economic direction of China in contrast to Eastern Europe also mattered. Chinese living standards registered certain major improvements in the 1980s.”).

160. Pei, *supra* note 28, at 79. It is interesting to note that Alexander Hamilton anticipated this kind of assertion over 200 years ago, predicting that opponents of democracy would portray civil liberty as a threat to public order. THE FEDERALIST No. 9 (Alexander Hamilton).

161. Interview with Jiaquan Li, Senior Researcher, Institute of Taiwan Studies, Chinese Academy of Social Sciences, Beijing, China (Dec. 2000). Professor Li shares the government’s belief in the destabilizing potential of democracy, but he insists that democracy may yet come to China after public education and economic development have prepared the masses to participate constructively in politics.

162. William H. Overholt, *China after Deng: Coping Well with Succession*, 75 FOREIGN AFF. 63, 67 (1996).

163. Pei, *supra* note 28, at 82.

cepted . . . the view that economic priorities are the right ones and political liberalization should be slow.<sup>164</sup>

Wu Guoguang and Zheng Yongnian have similarly noted that even strong advocates of democracy admit that the process has gone too far, threatening the stability of the state.<sup>165</sup> The government thus has been able to characterize democracy advocates as political “boat-rockers” who threaten the common good. Those who demonstrated for democracy on Tiananmen Square in 1989 have been labeled “anarchists” or “terrorists” in both the state-run news media and Chinese primary school textbooks since the event, and present-day Chinese students generally regard the Tiananmen incident with ambivalence.<sup>166</sup> Economic growth is touted as the most important goal, while democracy is, at best, a political luxury or, at worst, a threat to national economic progress.

#### CAPITALISM VERSUS DEMOCRACY II: POLITICAL CO-OPTION OF THE EMERGENT MIDDLE CLASS

Economic progress in China has also presented another, more subtle obstacle to democratization: close alignment of interests between the party-state and China’s rapidly emerging middle class. It is almost an article of faith among many in the West that democratization generally follows the emergence of a prosperous, politically independent middle class, which is itself the product of industrialization and general economic development. Indeed this may have been the general sequence of political and economic evolution in Western states, and it may even be applicable to nations from other cultural traditions. Yet by virtue of the party-state’s unique role in orchestrating and implementing the country’s economic development policies, China’s middle class is not politically independent of the state, however prosperous it may be. David Goodman made precisely this observation

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164. Overholt, *supra* note 162, at 66, 68.

165. See generally GUOGUANG WU & YONGNIAN ZHENG, LUN ZHONGYANG-DIFANG GUANXI [DISCUSSION OF CENTER-PERIPHERY RELATIONS] (Hong Kong: Oxford University Press, 1995). Randall Peerenboom also corroborates this diagnosis, asserting that “the view that democracy will not work in China and that strong (neo-authoritarian) leaders are needed because the masses are incapable of governing themselves – a view with deep historical roots in China – remains widespread, even among reform-minded intellectuals. While the number of people who support democracy in China remains limited, the number who endorse a liberal understanding of human rights and relation of individual to society is even more limited. Most reject the basic premises of liberalism . . . the anti-majoritarian function of rights that lies at the core of liberal democracies remains all but ignored in China.” Peerenboom, *supra* note 23, at 330.

166. Interviews with Chinese college students, 2000-2001.

in his recent work on economic reform and China's new middle class:

there has been little evidence of the political space and subsequent potential for conflict between the state and the middle classes that was a major source of the drive to democratization the European experience . . . [t]he party-state has remained the central social as well as political influence in the formation of China's middle classes.<sup>167</sup>

Since the Chinese party-state has dictated the depth and pace of economic reform, and since the allocation of economic opportunities in a planned economy is a fundamentally political process, China's nouveau riche have prospered primarily by cultivating and leveraging close political ties with the current ruling regime: "entrepreneurial managers and bureaucrats not only maintain their links with the party-state, but much of their successful, entrepreneurial activity is based precisely on exploiting those links."<sup>168</sup> The result has been a phenomenon that Kevin O'Brien dubs "entwinement" – a process whereby emerging social or economic forces try to gain relevance and influence by allowing themselves to be co-opted by existing power centers.<sup>169</sup> This process is especially important in a developing system, like the one surrounding China's marketization experiments, where power is highly concentrated and levels of formal institutionalization are low. Under such circumstances "the agents of change seek proximity to existing centers of power (i.e., entwinement) rather than distance . . . they realize that independence at this point means irrelevance and that future development demands sensitivity to existing power relations."<sup>170</sup> Predictably, this is exactly what happened in China's emerging free enterprise sectors. In light of the CCP's complete monopolization of political power and policy control, it was "not merely expedient but strategically optimal" for China's new entrepreneurs to "tie their fortunes to the local state, allowing themselves to be coopted."<sup>171</sup>

This fact was not lost on the leaders of the party-state, who immediately set about absorbing the emerging capitalist class by concentrating "distributional decisions" in local CCP organs and creating a system of "organized dependency" where new business opportunities were exchanged for political compliance.<sup>172</sup>

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167. Goodman, *supra* note 157, at 241-42.

168. *Id.* at 245.

169. Kevin J. O'Brien, *Chinese People's Congresses and Legislative Embeddedness: Understanding Early Organizational Development*, 27 *COMP. POL. STUD.* 80, 99-101 (Apr. 1994).

170. *Id.* at 101. See also Baum & Shevchenko, *supra* note 6, at 358.

171. Baum & Shevchenko, *supra* note 6, at 358-59.

172. *Id.* at 355-56. This process began as early as the mid-1980s, when China's economic reforms were still largely nascent. In 1986, Andrew Walder characterized

The result was a middle class highly dependent on the party-state for its economic success and well positioned, by virtue of its embeddedness in the existing political system, to take advantage of future economic opportunities. By 1993 over 5,400 business owners were elected to People's Congresses at the county level or above, with eight elected to the National People's Congress.<sup>173</sup> Similarly, 8,600 business owners held positions on the influential Chinese People's Political Consultative Committees at or above the county level.<sup>174</sup> Perhaps more significantly, a reported 17.1% of business owners were CCP members by 1995.<sup>175</sup> These numbers are striking for a Leninist state that had officially outlawed all private enterprise just a few years earlier.

Prominent Chinese dissident Li Shaomin has dubbed the Chinese economic system "relation-based capitalism," in which "relations with government officials, not property rights or the rule of law, underpin the Chinese market."<sup>176</sup> In such a system, emerging entrepreneurs are always beholden to the state for capital, licenses and contracts, and political independence from the CCP is virtually impossible: "at the end of the day, the state controls nearly the entire edifice on which China's 'free' market rests. It also means that China's brand of capitalism blurs, rather than clarifies, the distinction between the public and the private realms on which political liberty depends."<sup>177</sup>

Some, like David Goodman, have even asserted that due to this kind of "entwinement," there will be no occasion for structural conflict between Chinese business leaders and the CCP as long as the government remains highly committed to economic growth.<sup>178</sup> This is likely overstating things, but certainly given the central role of economic growth and development in legitimizing the Chinese government, there does seem to be a fundamental alignment of incentives between government leaders and business elites. While such alignments are perhaps not unique to China, China's particular mercantile authoritarian development

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the CCP's system of co-option as a "complex web of personal loyalty, mutual support, and material interest creates a stable pattern of tacit acceptance and active cooperation for the regime that no amount of political terror, coercion, or indoctrination can even begin to provide." See ANDREW G. WALDER, *COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY* 249 (1986).

173. Parris, *supra* note 12, at 274.

174. *Id.*

175. *Id.* at 275.

176. Lawrence F. Kaplan, *Trade Barrier: Why Trade Won't Bring Democracy to China*, THE NEW REPUBLIC ONLINE, July 9, 2001, available at <http://www.tnr.com/070901/kaplan070901.html>.

177. *Id.*

178. Goodman, *supra* note 157, at 260-61. For additional analysis of this phenomenon, see MAURICE MEISNER, *THE DENG XIAOPING ERA: AN INQUIRY INTO THE FATE OF CHINESE SOCIALISM* (1996).

model does make them especially important. The party-state regime receives important political support, and emerging business leaders profit handsomely through what Vivienne Shue has termed a “mutually-empowering” relationship.<sup>179</sup>

This process of co-option is not simply regime legitimacy-maintenance. Party-state elites get more than political support from China’s young business community – they get money. In many areas government officials themselves comprise the new entrepreneurial class, and they use political position to create their own business opportunities or seize the reins of newly-liberalized economic institutions. Local officials effectively control the implementation of economic reform through functional activities traditionally more familiar to CEOs than CCP functionaries: direct management of factories, discretionary allocation of government resources, administration of bureaucratic services like licensing and certifications, and “control of investment and credit decisions.”<sup>180</sup> According to Jean Oi, who labels this phenomenon “local state corporatism,” “it is the local party bosses . . . who are at the helm of the drive for economic development.”<sup>181</sup> David Goodman similarly notes that local governments often hold shares of the equity in local enterprises and help direct operations,<sup>182</sup> while Baum and Shevchenko report that local government performance is now largely measured by its ability to make new revenue sources available to citizens.<sup>183</sup> Even those CCP officials who are not inclined to manage local enterprises or direct local development efforts can profit from simple petty corruption. As growth proceeds and the Chinese economy diversifies, opportunities for official graft and malfeasance abound.<sup>184</sup> China’s burgeoning trade sector provides a good example: while China’s nominal tariff rate was 32% in 1995, only 6% was officially collected during that year.<sup>185</sup>

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179. Vivienne Shue, *State Power and Social Organization in China*, in *STATE POWER AND SOCIAL FORCES: DOMINATION AND TRANSFORMATION IN THE THIRD WORLD* 65, 83 (Joel S. Migdal et al. eds., 1994), cited in Baum & Shevchenko, *supra* note 6, at 359.

180. Jean C. Oi, *Fiscal Reform and the Economic Foundations of Local State Corporatism in China*, 45 *WORLD POL.* 99, 123 (1992).

181. *Id.* at 124.

182. Goodman, *supra* note 157, at 243.

183. Baum & Shevchenko, *supra* note 6, at 342.

184. Of course corruption itself was not brought about by economic reform but it was merely redirected and re-shaped. As economic development proceeded, corruption came to be characterized by simple economic rent-seeking on the part of government officials. The incentive structure of the system punishes local officials who do not capitalize on opportunities for graft and petty extortion. For an excellent discussion of these trends, see XIAOBO LU, *CADRES AND CORRUPTION: THE ORGANIZATIONAL INVOLUTION OF THE CHINESE COMMUNIST PARTY 1-29* (2000).

185. Kaplan, *supra* note 176, at 24.

Thus economic development in China does not only reduce demand for democracy by increasing standards of living and weakening the impetus for bottom-up political reform, it also facilitates the political co-option of an emerging middle class by the party-state, which perpetuates the current non-democratic regime and thwarts the middle-class-driven democratization envisioned by the West. Local government officials profit directly from their close relationships with China's new entrepreneurs, and they often manage new enterprises themselves, largely removing any incentive for top-down democratic reform. Indeed it would seem that "[economic] [g]rowth will result as long as there are secure property rights for *some* organized unit and sufficient incentives for that unit to pursue growth."<sup>186</sup> Since the government itself can comprise such an "organized unit," individual property rights per se are not required. One recent study observed exactly this phenomenon in Chinese village governments, which were found to be the key "locus of corporatist governance" in rural China.<sup>187</sup> Aptly dubbed "Village Inc.," the modern-day rural village is the place where the regime's administrative reach and the economic incentives of market reform co-terminate to drive state corporatist activities and local government entrepreneurship.<sup>188</sup> This kind of arrangement fits perfectly with the state-centric, growth-driven thrust of the mercantile authoritarian model.

Contrary to the hopes of Western liberals, marketization has not weakened the coercive power of the Chinese state, it has not produced a politically independent liberal middle class, and the effects of Western liberal ideals transmitted through commerce have been equivocal at best.<sup>189</sup> Instead it has enriched precisely those incumbent groups who have large political and economic stakes in the non-democratic status quo, and they in turn have been able to effectively co-opt or otherwise neutralize other potentially competing power centers. All this supports the conclusion of Barrington Moore's influential study *Social Origins of Dictatorship and Democracy* – that in elite-driven revolutions like China's, capitalist reform actually tends to weaken the forces of liberalism in society.<sup>190</sup>

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186. Oi, *supra* note 180, at 100.

187. FLEMMING CHRISTIANSEN & JUNZUO ZHANG, *The Village Revisited, in VILLAGE INC.: CHINESE RURAL SOCIETY IN THE 1990s* 1, 2 (1998).

188. *See id.*

189. Kaplan, *supra* note 176, at 23.

190. *Cited in id.* at 24.

DEMOCRACY DEPENDENT: THE PRIMACY OF ELITE  
POLITICAL INTERESTS

In the absence of a politically independent middle class, democratic reform must rest on the ideologies and political calculations of incumbent ruling elites. Guillermo O'Donnell and Philippe Schmitter concluded as much in their seminal work on democratic transitions in Latin America,<sup>191</sup> and the democratic transitions of other Asian nations illustrate the same principle. It was Gorbachev, not Soviet farmers, who initiated political reform policies in the 1980's, Chiang Ching-kuo took similar executive initiative to democratize the Taiwanese political system in 1986, and South Korea, Japan and India followed a similar elite-driven pattern. In most cases, authoritarian political elites are crucial in initiating liberalization and defining its limits;<sup>192</sup> they survey the political landscape around them and "choose democratization when the costs to them of not doing so become too high."<sup>193</sup>

This dependence on elite political calculations may be seen as an additional weakness of institutional democracy – especially as compared to legalism or market capitalism, which, as has been discussed, may be enforced or encouraged by exogenous forces. Such dependence on elites also does not bode well for the cause of Chinese democracy, as the Chinese ruling class remains staunchly opposed to extensive democratic reform. Despite landmark changes in economic policy and the development of legal institutions since 1979, electoral politics and rights of political expression have remained absolutely prohibited by the Chinese state. Quite simply, in the words of China expert Edward Friedman, the "arms of [state] coercion" in China are "still props of elite intransigents whose values and interests preclude[ ] risk- ing . . . a popular vote."<sup>194</sup> The CCP has, in many respects, staked its very administrative viability on the notion that political and economic reform can be separated, and the last two decades of Chinese history seem to prove that, to some extent, such a separation is possible.

While Chinese democracy was dealt a brutal blow in the Tiananmen Square incident in 1989, China's spectacular eco-

191. GUILLERMO O'DONNELL & PHILIPPE C. SCMITTER, *TRANSITION FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* 15-37 (1986).

192. See Stephen Manning, *Social and Cultural Prerequisites of Democratization: Generalizing From China*, in *THE POLITICS OF DEMOCRATIZATION: GENERALIZING EAST ASIAN EXPERIENCES*, *supra* note 30, at 232, 244.

193. Thomas P. Bernstein, *Farmer Discontent and Regime Responses*, in *THE PARADOX OF CHINA'S POST-MAO REFORMS*, *supra* note 6, at 197, 219.

194. Friedman, *supra* note 153, at 21.

conomic growth drive continued, and even the most outraged Western nations flocked back to trade in China's seaports just a few years later. Legal institutions also continued to develop in the wake of Tiananmen, with significant developments in the Chinese legal landscape, discussed earlier in this paper,<sup>195</sup> occurring throughout the 1990s. While democracy and Western liberalism suffered a huge setback, legal and economic development proceeded on their prior spectacular trajectories. More recent events demonstrate that the party-state's opposition to broad democratic reform and political expression remains as staunch as ever. Arrests of Falun Gong practitioners over the past years have made international headlines,<sup>196</sup> and those associated with the Chinese Democratic Party (or other peaceful opposition groups) continue to face lengthy prison sentences for their activities.<sup>197</sup>

There is one seeming exception to the prevailing reality which has sparked curiosity and enthusiasm in the U.S. academy: the inauguration of limited local elections at the village level in rural China. Beginning in the 1980s as a socio-political experiment in rural administration, institutionalization of villager self-governance accelerated in the 1990s. The first major national law in this area, the Village Committee Law, was passed in 1998,<sup>198</sup> and by 2001 some Chinese villagers had participated in multiple elections of local village governments.<sup>199</sup> American analysts tended to herald these rural electoral experiments as the harbingers of a brave new democratic era in China – at the very least there was a hope that village elections could generate more pop-

195. For discussion of Chinese legal, reform, see *supra* Section II.

196. For a recent incident, see Christopher Bodeen, *Arrests Reported over Falun Gong TV Transmission in Northern China*, Associated Press, Apr. 2, 2002, available at [http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020402/ap\\_wo\\_en\\_ge/china\\_banned\\_sect\\_4](http://story.news.yahoo.com/news?tmpl=story&u=/ap/20020402/ap_wo_en_ge/china_banned_sect_4).

197. See, e.g., Erik Eckholm, *China Hands out Long Jail Terms to 2 Leaders of Democracy Party*, N.Y. TIMES, May 31, 2002, at <http://www.nytimes.com/2002/05/31/international/31CND-CHIN.html?ex=1108962000&en=cd36586de42eb726&ei=5070> (reporting that Mingjun Hu and Sen Wang, leaders of the Chinese Democracy Party from Chengdu, were sentenced to 11 and 10 years in prison respectively after they had issued a statement of support for protesting workers at a state-owned steel mill).

198. The 1998 Organic Law is available at: <http://www.mca.gov.cn/laws/law7.html> and in ZHONGHUA RENMIN GONGHEGUO FALU QUANSHU (1998) (9) [COMPLETE COLLECTION OF THE LAWS OF THE PEOPLE'S REPUBLIC OF CHINA], 9 (9) (Wang Huian et al. eds., 1999). An English translation of the law is available at: <http://www.cartercenter.com/CHINA/dox/laws/organic.html>.

199. Lianjiang Li & Kevin J. O'Brien, *The Struggle over Village Elections*, in THE PARADOX OF CHINA'S POST-MAO REFORMS, *supra* note 6, at 129, 130. For an excellent comprehensive discussion of China's village elections and their prospects, see also Jamie Horsley, *Villager Self-Governance and Rule of Law in China* (Nov. 9, 2001) (unpublished manuscript, on file with author).

ular demand for democratic reform.<sup>200</sup> Some, like Minxin Pei, also wondered hopefully if institutionalized village elections signaled an increasing government tolerance of political discourse and democratic principles.<sup>201</sup>

Yet a close examination of China's village elections reveals more about the vulnerabilities of institutional democracy than any alleged ideological shift within the Chinese party-state. As with other Chinese reform efforts, the impetus for village election experiments was not devotion to liberal principles but administrative pragmatism. The Chinese government implemented local village self-rule as a way to encourage political compliance among villagers and aid the enforcement of "unpopular central policies" like the one-child policy.<sup>202</sup> According to a study by Lianjiang Li and Kevin O'Brien, village elections "can actually smooth policy implementation" for the party-state, as elected local officials "are generally scrupulous about carrying out township-assigned tasks" and "often take the lead in complying with state policies" handed down by non-elected higher officials.<sup>203</sup> Empirical work has demonstrated that Chinese villagers are typically concerned with eliminating local corruption and incompetence, but they tend not to vote for candidates that run "against the state" itself.<sup>204</sup>

In this way village elections, while giving villagers more direct control over local officials, have actually facilitated compliance with the illiberal policies of the greater non-democratic regime. Just as rising standards of living were traded for acceptance of CCP rule in the economic sphere, here limited democratic rights at the village level were exchanged for compliance with the authoritarian super-structure of the party-state.<sup>205</sup> Such compliance among rural villagers has become especially important since, as economic reform progresses and the aforementioned "wealth gap" widens, much of China's social unrest now occurs in poor rural areas or among state-run workers.<sup>206</sup> Limited local democracy has certainly improved the daily lives of some Chinese peasants (who no longer must tolerate overtly cor-

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200. See Horsley, *supra* note 199.

201. See Pei, *supra* note 28.

202. Horsley, *supra* note 199, at § 1.

203. Li & O'Brien, *supra* note 199, at 140-41.

204. *Id.* at 143 (internal citations omitted).

205. See Kevin J. O'Brien, *Implementing Political Reform in China's Villages*, 32 AUSTLIAN J. CHINESE AFF. 33, 33-59 (1994). See also Li & O'Brien, *supra* note 199, at 143 (asserting that "[g]rass-roots political reform makes it possible for villagers to hold officials accountable in exchange for their compliance with state policies.").

206. For discussion of China's growing income gap, see *supra* notes 154-57 and accompanying text.

rupt local officials), but it has also had the perverse effect of reinforcing the party-state's larger illiberal administration.

Furthermore, there is evidence that local electoral processes themselves are regularly subverted or corrupted whenever political exigencies permit. Party leaders have often maintained control of villages, even in the face of popular elections, through force, bribery, or political patronage, opposing elected leaders and preventing official examination of village accounts.<sup>207</sup> Party-elected township leaders (one level above the elected village officials in the political hierarchy) generally have incentives to "prevent or to sabotage" village elections unless incumbents are likely to win – or local administration has become impossible – and village party leaders often bribe their township-level counterparts to cancel or manipulate the elections themselves.<sup>208</sup> All this is just to reinforce the greater point that China's fledgling democratic experiments, much like the other economic and legal reform programs discussed elsewhere in this paper, have not achieved independence from the Chinese party-state, and as such they remain fundamentally instruments of the greater CCP regime and its policies. The CCP is still by far the most powerful and extensive organization in China, and its leaders continue to control the speed and depth of the reform efforts themselves. Even if more open elections were to occur on a large scale in China, the CCP and its business-world allies would enjoy enormous organizational and financial advantages by virtue of the party's pre-established position within the system. As things now stand, the Chinese party-state has implemented limited democracy, at the lowest level of the Chinese political hierarchy, in order to serve the administrative needs of the authoritarian system more generally.

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Democracy thus appears triply fragile. To the extent that market reforms increase overall standards of living, popular demand for democracy may be limited by the very fruits of the economic reform that the West encourages. State-driven economic reform policies also allow emerging middle-class groups to be co-opted by the incumbent regime as reform proceeds, precluding the development of a liberal-minded, independent middle class – a development absolutely crucial to democratic institution-building in the West. Absent a bottom-up, middle-class-driven politics, democratic reform is dependent on the political calculations

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207. See Erik Eckholm, *China's Party Bosses Thwart Local Leaders*, N.Y. TIMES, Apr. 25, 2002, available at <http://www.nytimes.com/2002/04/25/international/asia25CHIN.html>.

208. Li & O'Brien, *supra* note 199, at 137-40.

of autocratic elites who will control the speed, depth and applications of democratic institution-building according to their own interests. Thus even when formal electoral politics emerge in a developing country like China, observers must be realistic about what is likely to result. Formal elections can often be the servants of a larger authoritarian administration, and such institutional democracy as is achieved will be vulnerable to rollback or subversion by established power centers.

## V. STRANGE BEDFELLOWS?: MERCANTILE AUTHORITARIANISM IN OTHER STATES

As alluded to at the beginning of this paper, the PRC is not the only state to adopt mercantile authoritarianism as an economic development and regime legitimation strategy. In fact the common elements of the mercantile authoritarian approach can be discerned in a number of polities, most notably in the Middle East and East Asia.<sup>209</sup> While a comprehensive examination of each case is beyond the scope of this study, a brief survey of some exemplars will suffice to confirm the existence of fundamentally similar developmental strategies – all bearing the essential earmarks of the mercantile authoritarian model – in nations with disparate cultural and political backgrounds.

### THE MIDDLE EAST:

Scholars recently have discerned the key features of mercantile authoritarianism in several Middle Eastern states (though they were not identified explicitly as such). Governments in states like Syria, Iran, and Egypt all recently have sought to bolster their legitimacy through policy initiatives featuring top-down liberal economic reforms, associated nationalistic development goals, and the establishment of a basic legal superstructure designed to promote growth and establish an “enforced limited pluralism.”<sup>210</sup> Rather than democratization, such limited liberal reforms created increased inequality in the distribution of wealth and political influence while at the same time preserving the state’s “nationalist legitimacy” under a “tacit ‘social contract’” very similar to the one prevailing in China: economic development and “nationalistic accomplishments” were traded for mass

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209. Specific examples, some of which will be discussed below, include Syria, Iran, Egypt and perhaps Saudi Arabia in the Middle East, along with Vietnam and the recently pre-democratic regimes of South Korea and Taiwan in East Asia.

210. AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA 4 (James M. Malloy ed., 1977), *quoted in* Steven Heydemann, *Taxation without Representation: Authoritarianism and Economic Liberalization in Syria*, in *RULES AND RIGHTS IN THE MIDDLE EAST: DEMOCRACY, LAW AND SOCIETY* 69, 78 (Ellis Goldberg, et al. eds., 1993) (internal citations omitted).

political support.<sup>211</sup> Just as in the Chinese case, these reform programs had at their center an alliance between the state and emergent business elites who benefited from essentially instrumental economic and legal reforms, and this effectively precluded the development of a politically independent liberal middle class.<sup>212</sup> To the chagrin of Western observers, this legitimation scheme was generally supported by an emergent middle class both agnostic about institutional democracy and anxious to preserve the gains achieved through liberal economic reforms.<sup>213</sup> Certainly the availability of oil rents and other state-specific factors complicate analysis of these trends, but the basic dynamics of the mercantile authoritarian approach are unmistakable in several Middle Eastern states.

The recent reform program of Syria serves as a case-in-point. In response to severe economic difficulties in the 1980's, which threatened the nation's populist/Marxist ideological consensus, the Ba'th government of Syria initiated a program of "selective and corporatist liberalization" designed to bolster its legitimacy.<sup>214</sup> Certain sectors of the economy were opened to private investment and detached from the state-controlled central planning system, and new business laws were drafted to reassure potential investors, enabling greater access to both global markets and new domestic sources of capital.<sup>215</sup> Syria has also attempted to begin integrating itself into the global economy, applying for WTO membership in 2001.<sup>216</sup>

This economic liberalization did indeed deliver impressive economic growth. During the first four years of the reform program (1985-1989), overall production and capital accumulation in the economy's private and joint sectors (the "liberalized" sectors of the economy) more than doubled, increasing at an average annual rate of over 20%.<sup>217</sup> Commodity exports from the private sector similarly exploded during this period, increasing almost

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211. Raymond A. Hinnebusch, *Liberalization without Democratization in "Post-Populist" Authoritarian States: Evidence from Syria and Egypt*, in *CITIZENSHIP AND THE STATE IN THE MIDDLE EAST: APPROACHES AND APPLICATIONS* 123, 129-31 (Nils A. Butenschon, et al. eds., 2000).

212. *Id.* at 125-30.

213. *Id.*

214. Heydemann, *supra* note 210, at 73, 81-82.

215. *Id.* at 81-82.

216. See BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: SYRIA (Feb. 2002), at <http://www.state.gov/r/pa/ei/bgn/3580.htm>. [hereinafter SYRIA].

217. Between 1985 and 1989, overall private and joint sector production increased from \$42.6 billion to \$111 billion, for an average annual growth rate of 27.1%. Capital accumulation in these same sectors grew from \$6.5 billion to \$15.2 billion during the same period, for an average annual growth rate of 23.6%. Heydemann, *supra* note 210, at 87.

five-fold between 1986 and 1989, and in 1989 Syria reported its first trade surplus in three decades.<sup>218</sup> By 1992, private investment accounted for 66% of total national investment, up from just 29% in 1975.<sup>219</sup>

At the same time, the Syrian government maintained its control over many major state-owned enterprises and forged close ties with the country's newly-energized business community, whose financial success remained dependent on the state and its reform program. The result was a new "détente" between a largely Sunni Islamic merchant class (previously seen as a political danger to the state's Marxist regime) and the political elites of the ruling Ba'th regime, centered around a partially liberalized "military-mercantile complex."<sup>220</sup> Syrian business leaders were given a small policy role, while the Ba'th government politically co-opted national business associations and continued to reassure existing state clients (most notably the state-owned enterprises) that they remained key to overall national development goals.<sup>221</sup> The Syrian bourgeoisie has indeed proved willing to mute demands for liberal political reform in exchange for increased financial security and commercial freedom.<sup>222</sup> The Syrian regime thus created striking economic growth and attracted fresh foreign investment while simultaneously co-opting the country's emergent capitalists and maintaining control over other important political constituencies.

The Syrian government's public statements about this reform program were often distinctly nationalistic in tone. In remarks that bear striking resemblance to the Chinese government's insistence on a system of "socialism with Chinese characteristics," the Syrian regime urged its citizens to reject the political formulations of other states – particularly the democratic systems of the West – and adhere to Syria's own unique

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218. From 1986 to 1989, private sector commodity exports increased from S£3.4 billion to S£16.2 billion, for an average annual growth rate of 68.7%. *Id.*

219. SYRIAN CENTRAL BUREAU OF STATISTICS, ANNUAL STATISTICAL BULLETIN OF THE MINISTRY OF SOCIAL AFFAIRS AND LABOR 503 (1993), cited in Raymond A. Hinnebusch, *Change Held in Abeyance: Durability and Vulnerability in Asad's Syria*, 2 UCLA J. INT'L L. & FOREIGN AFF. 171, 182-83 (1997-98).

220. Hinnebusch, *supra* note 211, at 133.

221. Heydemann, *supra* note 210, at 88, 94-97.

222. Hinnebusch, *supra* note 219, at 175-76. According to Hinnebusch, the Syrian merchant class "has not yet consolidated itself into a coherent entity and cannot exert its normal capacity to dominate the state. The weakness of the bourgeoisie allows the state, which is dominated by a personalistic leader, to achieve relative autonomy in its decision-making, relying on nationalist/populist legitimization, the military and bureaucracy, and the mobilization of plebian forces . . ." Hinnebusch also notes that the Syrian state is predictably biased toward "clientalism" and "statism." *Id.* at 172-73.

reform agenda.<sup>223</sup> Syria, it was asserted, could achieve national wealth and power on its own terms. This more generalized nationalist stance was buttressed by the Syrian government's continued hard-line opposition to rapprochement with Israel, a policy that serves to unite the population behind a common enemy and enable what has been termed a "nationalist/populist legitimization" of the state.<sup>224</sup>

The political dimensions of the reform program were also carefully controlled to "keep the process from ending in democratization."<sup>225</sup> Indeed Syria's current leader, President Bashar Al-Asad, was elected in a single-candidate national referendum in 2000.<sup>226</sup> Sporadic "bursts" of political liberalization through "corporatist structures" and "controlled elections" were designed to mollify the new middle class and secure the support of broader mass constituencies, thereby reinvigorating the Ba'th regime's legitimacy.<sup>227</sup> The government thus harnessed shallow, intermittent liberalization "to strengthen, not change, the regime."<sup>228</sup> And just as in China, the public generally appeared willing to trade certain political reform demands for new business opportunities and higher standards of living. The forces of liberalization have thus been effectively contained in Syria, despite economic reforms, and the authoritarian regime endures in defiance of Western liberal expectations.<sup>229</sup>

While Syria is certainly the Middle East's clearest case of mercantile authoritarian policymaking, varying shades of this approach can be seen in other states as well. Egypt pursued an aggressive national development strategy under Nasser that used economic liberalization and the pursuit of national wealth and power to achieve what has been described as "considerable nationalist legitimacy."<sup>230</sup> While democratic elections have subsequently emerged in Egypt, vestiges of an authoritarian past still linger in the current regime, as the government continues to limit civil liberties and manipulate the political process.<sup>231</sup> Yet whatever one's evaluation of Egypt's current situation, the Nasser era remains a salient example of mercantile authoritarianism as an effective early-stage development model.

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223. Heydemann, *supra* note 210, at 99-100.

224. Hinnebusch, *supra* note 219, at 171-73.

225. Hinnebusch, *supra* note 211, at 137.

226. See SYRIA, *supra* note 216.

227. Hinnebusch, *supra* note 211, at 137-39.

228. *Id.*

229. Hinnebusch, *supra* note 219, at 171-76. For a brief sketch of the current Syrian political system, see SYRIA, *supra* note 216.

230. Hinnebusch, *supra* note 211, at 137-39.

231. See BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: EGYPT (June 2002), at <http://www.state.gov/r/pa/ei/bgn/5309.htm>.

Iran is another state that pursued aggressive economic reform in the face of an increasingly global marketplace and a looming legitimacy deficit at home. Economic liberalization began in earnest in the 1990's, driven, as in China, by reform-minded elites from within the incumbent political regime.<sup>232</sup> Responding to declines in national GDP driven by falling oil prices, the Khatami regime has embarked on a program of economic reform designed to cut back government funding and shift more economic responsibility to the private sector.<sup>233</sup> Limited legal reform followed, though this has lagged significantly behind economic liberalization for religious reasons – the clergy's ongoing influence severely constrained efforts to secularize and modernize the legal system.<sup>234</sup> Tentative forays into democratization then followed with the nation's first national and local elections held in 1997 and 1999 respectively. As in China, such political developments were largely instrumental and tightly controlled by the state's incumbent political elites. All candidates for national elections are selected by Iran's Guardian Council and members of the ruling clergy, for example.<sup>235</sup> Non-elected clerical elites still often play a decisive role in national politics, critics of the state can be charged with treason, and all political candidates – including Khatami himself – are made to swear allegiance to the regime before being allowed to run for office.<sup>236</sup> Iran has continued to develop on all fronts over recent years, engaging in tentative forays into liberal political reform, especially after the February, 2000 election of moderate Mohammed Khatami as

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232. CATHARIN E. DALPINO, DEFERRING DEMOCRACY: PROMOTING OPENNESS IN AUTHORITARIAN REGIMES 31 (2000) (citing Eric Hooglund, *Khatami's Iran*, 98 CURRENT HIST. 59, 61-62 (1999)).

233. *Id.* at 18-19. See also Mark Gasiorowski & Suzanne Maloney, Elections in Iran: What Happened? Why? And Will It Matter?, Remarks at a Brookings Institution Press Briefing, (Feb. 23, 2000) (discussing the potential for further reform under the new Khatami-led parliament), available at [http://www.brookings.edu/comm/events/20002023\\_elections\\_iran\\_page.htm](http://www.brookings.edu/comm/events/20002023_elections_iran_page.htm).

234. DALPINO, *supra* note 232, at 36. The author would like to note that, while many Western liberals would not classify adherence to traditional Islamic law as a "rule of law" in the conventional (i.e., secular) sense of the term, it should be remembered that "rule of law" refers to the functional independence of law from the exigencies of government policy-making, not necessarily the substantive content of the law itself. That is, a true rule of law requires that the government and its officers are themselves subject to and constrained by the law. While this does not appear to have developed in Iran, it is entirely possible under a system of traditional religious law.

235. *Id.* at 48.

236. Neil Shevlin, Student Comment, *Velayat-E Faqih in the Constitution of Iran: The Implementation of Theocracy*, 1 U. PA. J. CONST. L. 358, 381-82 (1998). For a general outline of Iran's political system, see BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: IRAN (Feb., 2002), at <http://www.state.gov/tpa/ei/bgn/5314.htm>.

President.<sup>237</sup> Nonetheless, Iran's political and legal institutions certainly are not fully liberalized by Western standards. Economic reforms remain salient, but their efficacy in generating national wealth – and hence their utility to the regime as legitimating forces – probably remain limited by international economic sanctions.

Special note should also be taken of the unique role of religion in many Middle Eastern political regimes, including that of Iran. Of course religious influences are present in most modern societies, including ex-communist polities where religion was officially forbidden before the 1990's. Yet most modern states have made a formal effort to separate church and state (as the American colloquialism goes), eschewing the use of religion as an overt pillar of regime legitimacy.<sup>238</sup> Many Middle Eastern governments, on the other hand, have based their legitimacy, at least in part, on religious identities or affiliations. In such situations, religion may play much the same role that nationalism plays in less overtly religious societies (like China), or that democracy plays in democratic societies: it may give the population a sense of common enterprise with the government, a way to recognize the regime as its own. Indeed in states where the national identity is expressly tied to a certain religious creed, one might say that common religious belief *is*, functionally at least, a kind of nationalism. This description certainly seems to apply to modern Iran, where the revolutionary foundations of the current regime – and thus the identity of the state itself – are rooted in Shia Islam.

Similarly, devotion to the person or family of a monarch or other ruler – usually with some associated religious implications – may also provide a sense of common purpose between state and society. As traditional monarchic loyalties are almost universally tied to specific states or territories, this too can be seen as a certain kind of nationalism. In all cases it is important that the term “nationalism” be understood as a broad concept encompassing religious and monarchical loyalties, but *only* to the extent that they are expressly tied to the identity of the regime and its leaders.

This recognition does not change the fundamental dynamics of the mercantile authoritarian legitimization model, but it may assist one's analysis of states like Saudi Arabia, where the contin-

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237. Layla Nourae, Note, *Reassessing U.S. Policy Toward Iran: Stimulating Reform Through Economic Means*, 25 SUFFOLK TRANSNAT'L L. REV. 535, 535-36 (2002).

238. There are, of course, implicit or informal religious requirements for regime legitimacy in most states. Most societies are unlikely to recognize as legitimate any regime whose religious orientation differs dramatically from that of the population at large.

uing legitimacy of the regime may be hard to understand if “nationalism,” as used in the model proposed here, is defined too narrowly. Indeed Saudi Arabia is ruled by a hereditary monarch whose powers are constrained by the dictates of traditional Islamic law,<sup>239</sup> constituting at the center a regime undergirded by monarchical nationalist loyalties and common commitment to a rule by religious law.<sup>240</sup> These illiberal elements have remained even as Saudi Arabia has pursued its own limited economic liberalization program over the last decade. Like Syria, Saudi Arabia recently has sought to join the WTO, and it has established governmental institutions designed to strengthen the role of the private sector in the national economy, increase foreign investment in the country, and open up previously government-dominated sectors (like telecommunications and energy).<sup>241</sup> Such modest reforms may pale in comparison to the economic and legal sea change occurring in China, but they nonetheless suggest that Saudi Arabia and other more traditional regimes may be in the early-stages of a fundamentally similar development and legitimization strategy.

Several states in the Middle East thus seem to fit the model proposed here, especially when the “nationalism” element is understood broadly. Of course, the future course of economic, legal and political developments in these states remains an open question. In particular, the continued development of institutional democracy in states like Egypt and Iran should be watched closely. Nonetheless, the experiences of these states confirm the efficacy of mercantile authoritarianism as an early-stage development model, whether it applies to current regimes or those of the past.

#### EAST ASIA

Other key exemplars of the mercantile authoritarian model – both current and from the recent past – are found in the Far East. Aside from China, Vietnam is perhaps the clearest modern-day case. In response to severe economic stagnation and skyrocketing inflation in the 1980s,<sup>242</sup> the Vietnamese govern-

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239. For a brief sketch of the Saudi Arabian political system, see BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: SAUDI ARABIA (Feb., 2002), at <http://www.state.gov/r/pa/ei/bgn/3584.htm>. [hereinafter SAUDI ARABIA].

240. See *supra* note 234 (acknowledging the difficulty inherent in applying the Western liberal “rule of law” concept to sectarian legal systems).

241. For a brief sketch of the Saudi Arabian political system, see SAUDI ARABIA, *supra* note 239.

242. See Lan Cao, *Reflections on Market Reform in Post-War, Post-Embargo Vietnam*, 22 WHITTIER L. REV. 1029, 1037 (2001) (noting that “[e]conomic production in Vietnam stagnated in the late 1970s and the 1980s. The post-war economy suf-

ment adopted its now-famous *doi moi* (“renovation”<sup>243</sup> or “new day”<sup>244</sup>) program of economic, legal and (limited) political reforms in 1986. True to the roots of the Vietnamese party-state government, this new initiative drew on the regime’s essentially nationalist foundations<sup>245</sup> and was animated less by ideology than a pragmatic dedication to national development.<sup>246</sup>

The main thrust of the *doi moi* initiatives focus on reinvigorating and modernizing the economy by opening up to the international marketplace and attracting foreign investment. The Vietnamese government, like its Chinese and Syrian counterparts, has retained its control over the bulk of the nation’s large state sector while allowing economic liberalization and privatization in certain industries, fostering the growth of a “parallel” private sector comprised of foreign-funded enterprises and joint ventures.<sup>247</sup> These reforms allowed the Vietnamese government – which never relinquished its political control of the reform process or the distribution of resultant economic benefits – to co-opt the nation’s new sources of private capital and channel them into financially strapped state-owned enterprises.<sup>248</sup> The mercantile nature of these initiatives, particularly the central role of foreign capital investment in promoting national growth, cannot be overstated. In order to achieve its ambitious goal of doubling the na-

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ferred from hyperinflation, as annual rates exceeded 100 percent and reached 400 percent in 1985 and 1986. Vietnam’s standard of living declined precipitously, dropping to among the lowest in the world, with a gross national product per capita of \$200” (internal citations omitted).

243. Spencer Weber Waller & Lan Cao, *Law Reform in Vietnam: The Uneven Legacy of Doi Moi*, 29 N.Y.U. J. INT’L L. & POL. 555, 555 (1997).

244. Hiep D. Truong, *Encouraging Foreign Direct Investment in Vietnam: Economic Reform, Protection Against Expropriation, and International Arbitration*, 8 J. TRANSNAT’L L. & POL’Y 347, 349 (1999).

245. The Vietnamese Communist Party (VCP) effectively took over the Vietnamese nationalist movement in the early 1930s after the French colonial government destroyed the Vietnamese Nationalist Party (VNQDD). The popularity and legitimacy of Ho Chi Minh and the Communist Party movement thus came to rest largely on appeals to popular nationalism, and the VCP often downplayed the role of Communist doctrine as circumstances demanded (e.g., during World War II). D. R. SARDESAI, *VIETNAM: TRIALS AND TRIBULATIONS OF A NATION* 68-77 (1988). In fact Ho Chi Minh himself stated: “At first patriotism, not yet Communism, led me to have confidence in Lenin.” *VIETNAM: HISTORY, DOCUMENTS AND OPINIONS ON A MAJOR WORLD CRISIS* 37-39 (Marvin E. Gettleman ed., 1965). In keeping with these nationalist roots, Ho Chi Minh “remained nationalist first and Communist second” throughout his political life. SARDESAI, *supra* note 245, at 71. Forged out of Ho’s patriotism, the Vietnamese regime has rooted its legitimacy largely in nationalism ever since – as its *doi moi* national development programs in the mid-1980’s suggest.

246. Pragmatism has generally tended to trump ideology in Vietnamese policy, especially since the end of the war with the United States in the mid-1970s. See SARDESAI, *supra* note 245, at 140, 148.

247. Cao, *supra* note 242, at 1039-40.

248. *Id.* at 1046.

tional GDP between 1990 and 2000, it was estimated that the Vietnamese government would have to bring in \$40 billion of capital investment, of which \$12-13 billion was to come from foreign direct investment (FDI).<sup>249</sup> As Vietnamese Communist Party General Secretary Do Muoi baldly proclaimed in 1996: "our present slogan must be capital, capital and more capital."<sup>250</sup>

In order to attract this needed capital, the Vietnamese state announced its commitment to "running the nation by law"<sup>251</sup> and set about augmenting its economic reforms with new legislation and institutional legal reforms designed to support a rudimentary market economy. The centerpieces of this market-making legal construction effort were a new Law on Companies, a Law on Private Enterprises, the Temporary Regulation on the Issuance of Bonds and Stocks of State Owned Enterprises,<sup>252</sup> and a Foreign Investment Law characterized as one of the most "liberal" in the developing world.<sup>253</sup> "[H]undreds of new laws and ordinances – running up to 20,000 pages" – soon clustered around these major enactments,<sup>254</sup> law schools were re-opened around the country, and Vietnam became, in the words of one scholar, a virtual "legislation factory."<sup>255</sup>

Vietnam's economic performance under the *doi moi* reforms has been impressive indeed. National GDP growth and industrial output growth stayed well above the government's ambitious target rates throughout the mid-1990's,<sup>256</sup> exports grew at roughly 20% per year, and FDI expanded at an amazing 40-50% per year.<sup>257</sup> By 1996, incoming FDI amounted to \$8.3 billion, more than one third of Vietnam's national GDP,<sup>258</sup> and an estimated \$11 billion was raised between 1996 and 2001.<sup>259</sup> Spurred by such success, the Vietnamese government initiated another

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249. Truong, *supra* note 244, at 348.

250. Jeremy Grant, *Vietnam Party Chief Urges Debt Repayment*, FIN. TIMES, Jan. 15, 1996, at 3.

251. Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC'Y. REV. 93, 99 (1998) (quoting Prime Minister Vo Van Kiet), *cited in* Cao, *supra* note 242, at 1040-41.

252. Truong, *supra* note 244, at 353.

253. Thomas R. Stauch, *The United States and Vietnam: Overcoming the Past and Investing in the Future*, 28 INT'L LAW. 995, 1011 (1994).

254. Rose, *supra* note 251, at 100.

255. Cao, *supra* note 242, at 1048-49.

256. Ngo Quang Xuan, *Vietnam: Potential Market and New Opportunities*, 19 FORDHAM INT'L L.J. 32, 34-35 (1995) (noting that Vietnam's GDP growth exceeded the government's official 5.5-6.5% target rate during the mid-1990s, and industrial output similarly grew faster than its 7.5-8.5% target rate).

257. *Id.*

258. Cao, *supra* note 242, at 1048.

259. John Zarocostas, *Vietnam Pushing to Advance Its WTO Entry Bid*, UPI, Oct. 13, 2000, LEXIS, News Library, UPI File, *cited in* Cao, *supra* note 242, at 1043.

burst of institutional economic reforms since 1999, including an amended Law on Foreign Investment, a new Enterprise Law, and plans to establish a national stock exchange.<sup>260</sup>

Yet while successful in economic terms, Vietnam's reform program did not produce political liberalization or a rule of law. In fact, the *doi moi* reforms were specifically designed to bolster the legitimacy of the Communist party-state by furthering the simultaneous goals of "economic development and political entrenchment."<sup>261</sup> Partial marketization was not initiated to decrease the government's coercive grip on society, but was pursued solely for the "ideological purpose of furthering 'market socialism.'"<sup>262</sup> The VCP remains in express control of the society and the economy, allowing private enterprise only so long as it remains subject to state management, and refusing to approve business enterprises that threaten its political control.<sup>263</sup> Similarly, the goals of Vietnam's legal reform efforts were purely economic and instrumental. The state views law as "a purely political tool to shape the people and to build a new society,"<sup>264</sup> and legal institutions were created, not to effect deep political change, but to provide the "infrastructure"<sup>265</sup> necessary to support markets and attract foreign capital.<sup>266</sup> And despite the party-state's avowed ambition to govern the nation according to law, the Vietnamese legal system still lacks the "transparency, impartiality and predictability" commonly associated with a rule of law.<sup>267</sup> The Vietnamese government likewise remains opposed to democratization or "peaceful evolution" toward Western modes of governance.<sup>268</sup> Citizens have proven willing to offer political compliance in exchange for material improvements in their daily lives, as electoral politics are nonexistent and public demand for democracy remains low, even at the village level.<sup>269</sup>

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260. Norman Brown IV, *The Long Road to Reform: An Analysis of Foreign Investment Reform in Vietnam*, 25 B.C. INT'L & COMP. L. REV. 97, 100 (2002).

261. Luke Aloysius McGrath, *Vietnam's Struggle to Balance Sovereignty, Centralization, and Foreign Investment Under Doi Moi*, 18 FORDHAM INT'L L.J. 2095, 2110-22 (1995).

262. Cao, *supra* note 242, at 1046.

263. Truong, *supra* note 244, at 350. According to Truong, the Vietnamese government's stringent – and highly political – mandatory approval process for FDI projects remains a significant barrier to further economic growth. *See also* Cao, *supra* note 242, at 1041.

264. Rose, *supra* note 251, at 101.

265. Waller & Cao, *supra* note 243, at 556 (using this term in their discussion of Vietnamese legal, reform).

266. McGrath, *supra* note 261, at 2095-97, 2104-07.

267. Cao, *supra* note 242, at 1032-33. *See also* Rose, *supra* note 251, at 102.

268. DALPINO, *supra* note 232, at 40.

269. *Id.* at 50.

The Vietnamese party-state has thus pursued a development and legitimization strategy strikingly similar to that of China, Syria and the other states discussed here. In the face of economic hardship and a delegitimized Marxist ideology, the VCP party-state initiated an ambitious program of selective economic liberalization and instrumental legal institution-building, which it justified and promoted through appeals to popular nationalism. Indeed the problems faced by Vietnam in its pursuit of this strategy are largely identical to those facing China, including a widening societal wealth gap<sup>270</sup> and policy conflicts between the central government and self-interested regional authorities.<sup>271</sup> Yet through the *doi moi* reform efforts, economic growth was achieved, democratic reform was averted, important emerging constituencies were co-opted by the state, and the regime's legitimacy was preserved.

While Vietnam is the clearest and most current East Asian example of mercantile authoritarianism, other states in the region have engaged similar strategies in the recent past. In Taiwan, for example, the Kuomintang (KMT) established a true authoritarian party-state that, while stridently anti-Communist, was "organized along Leninist lines."<sup>272</sup> Government security forces completely repressed political dissent and KMT party branches penetrated virtually every sector of Taiwanese society for decades after World War II.<sup>273</sup> Far from being a democracy, the Taiwanese regime did not permit opposition parties until 1986. The legitimacy of the KMT government also rested on expressly nationalistic foundations. The regime's official "Three Principles of the People" ideology – devised as a foil to the Communist ideology promulgated in mainland China – proclaimed a national "mission to fight communism, resist the Russians, recover lost territories, and save the life and freedom of [Taiwan's] compatriots."<sup>274</sup>

Yet like the other states discussed here, the KMT government combined this nationalistic illiberal political superstructure with heavy doses of free-market capitalism to create what one analyst has termed a "planned free economy."<sup>275</sup> With tight political controls providing "stability, order and encouragement to investments," Taiwan successfully constructed an economic system based on "private capital, the market mechanism," and for-

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270. Waller & Cao, *supra* note 243, at 555-56.

271. McGrath, *supra* note 261, at 2096-99.

272. Steve Tsang, *Transforming a Party State into a Democracy*, in *DEMOCRATIZATION IN TAIWAN 1-2* (Steve Tsang & Hung-mao Tien eds., 1999).

273. See Brohman, *supra* note 7, at 124.

274. Tsang, *supra* note 272, at 4.

275. KANG LU-TAO, LI KUO-TING K'OU-SHU LI-SHIH 194 (1993).

eign trade.<sup>276</sup> The results were impressive indeed: Taiwan's per capita GNP grew from just US\$167 in 1953<sup>277</sup> to US\$10,566 in 1993,<sup>278</sup> an average increase of almost 11% per year. Such growth prompted many to declare Taiwan's development drive nothing less than an economic miracle.

As is now well known, democratic political reform eventually followed from this striking economic development, but – consistent with the pattern observed in China and elsewhere – only at the behest of incumbent political elites. Taiwan's political reform process was fundamentally driven by the personal goals and political calculations of Chiang Ching-kuo, leader of the KMT, who personally approved the establishment of Taiwan's first opposition party in 1986.<sup>279</sup> This top-down reform process was also facilitated by the emergence of a socially active middle class made up of native Taiwanese (as opposed to the original KMT leadership from the mainland). These reform beneficiaries were less easily co-opted by the traditional party-state power structure for social and cultural reasons, but they made up 70% of the KMT membership by the early 1980s.<sup>280</sup> Taiwan thus benefited from a middle class that was more independent of the state than its "entwined" mainland counterpart.

South Korea presents a similar case. Beginning in the 1960s, nationalist development goals were successfully pursued through policies devoted to both free market economics and military control of the government. Under this hybrid approach, "some elements of democracy were overlaid by the exigencies of authoritarian control," but meaningful political liberalization was avoided.<sup>281</sup> The Korean Central Intelligence Agency and paramilitary police forces preserved order and stability (often by imposing martial law),<sup>282</sup> effectively stalling democratic reform while national economic growth rocketed forward at upwards of 9% per annum.<sup>283</sup> True democratic reform was finally initiated in top-down fashion when national military leader Roe Tae Woo,

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276. Tsang, *supra* note 272, at 6.

277. KUO-TING LI, *THE EVOLUTION OF POLICY BEHIND TAIWAN'S DEVELOPMENT SUCCESS* 159 (1988).

278. Government Information Office Taipei, 1995 TAIWAN Y.B. 205.

279. See Tsang, *supra* note 272, at 13-15.

280. Ping-lung Jiang & Wen-cheng Wu, *The Changing Role of the KMT in Taiwan's Political System*, in *POLITICAL CHANGE IN TAIWAN* 81 (Tun-jen Cheng & Stephan Haggard eds., 1992). See also Tsang, *supra* note 272, at 13-15.

281. ROBERT E. BEDESKI, *THE TRANSFORMATION OF SOUTH KOREA: REFORM AND RECONSTRUCTION IN THE SIXTH REPUBLIC UNDER ROE TAE WOO, 1987-1992* 28 (1994). For an excellent discussion of South Korea's development drive and subsequent political reformation since the 1970s, see *id.* at 23-28.

282. Brohman, *supra* note 7, at 124-25.

283. South Korea's GDP grew at an average annual rate of 9.6% from 1970 to 1980 and 9.7% from 1980 to 1990. *Id.* at 109.

like Chiang Ching-kuo in Taiwan the year before, made a unilateral decision to begin democratizing the country in 1987.<sup>284</sup> From that time forward measured political reforms have been initiated, always at the behest of the ruling government, and never at the expense of greater economic development goals.

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It must be acknowledged that, in presenting these non-Chinese exemplars of mercantile authoritarianism in such a cursory fashion, detail and nuance were inevitably sacrificed to clarity and simplicity. All of the states just discussed are unquestionably products of their own unique cultural and political histories, and clearly the complexity that inheres in such polities defies capture within a single model. Nevertheless, the fundamental elements of the mercantile authoritarian legitimation model are clearly evident in these examples, and the level of detail presented here was calibrated merely to demonstrate this basic fact.

Through this brief survey of other cases one can glimpse the applicability of the mercantile authoritarian model to developing polities across culture, space, and time. Not all the states using this model are East Asian (geographically or culturally); not all of them are current cases. Additionally, it should be noted that the model proposed here is not a rigid monolith, but rather a broad ideal type encompassing several variations along a continuum of development models. In any event, for present purposes it is enough simply to observe that the mercantile authoritarian approach has been employed – and is currently being employed – with substantial success to promote early-stage economic development and manage regime legitimacy in states with dramatically disparate cultural and political traditions.

## VI. CONCLUSION AND POLICY IMPLICATIONS

Faced with the increasing ideological bankruptcy of Marxism and deepening economic difficulties, the PRC regime has employed a tripartite strategy of liberal economic reform, establishment of a highly politicized rule *by law*, and official cultivation of popular nationalism to simultaneously manage elite-driven development efforts and bolster the administrative mandate of the party-state government. Through this strategy the Chinese party-state has managed to preserve its administrative legitimacy, construct robust new legal institutions, and achieve spectacular economic growth and development, all while effectively avoiding democratic political reforms or the establishment of a true rule of law.

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284. BEDESKI, *supra* note 281, at 27.

What's more, it is evident that this Chinese development and legitimization program, while certainly unique in many of its particulars, is evocative of a more generalized early-stage development strategy employed by many other states, both past and present. The fundamental elements of mercantile authoritarianism are unmistakable in the current development programs of several polities in the Middle East and East Asia, including states as culturally disparate as Vietnam and Syria. If the temporal scope of the inquiry is widened, additional examples will no doubt abound, perhaps even including historical ancestors of the very regimes who now champion the neo-liberal orthodoxy. At the very least, the success of the mercantile authoritarian model across culturally and politically dissimilar states poses a major challenge to neo-liberal conceptions of national development and its pre-requisites.

Of course, the long-term sustainability of the model remains an open question. Indeed one could imagine the mercantile authoritarian approach as merely a modern-era way-station on the road to full economic and political liberalization. The economic liberalization and limited legal institution building inherent in this approach might in fact bear fruits that inevitably lead, sooner or later, to a more expressly neo-liberal political model. Certainly this is the hope of Western liberal policymakers, but the future course of events remains indeterminate. To borrow Samuel Huntington's terminology, it is not clear whether nations like China are effectively resisting the "Third Wave" or merely delaying its onset.<sup>285</sup> In addition, the mercantile authoritarian approach is also rife with its own unique contradictions and vulnerabilities. These include the prevalence of wide wealth gaps between elites and ordinary citizens and the dangers of relying on popular nationalism (a volatile element largely exogenous to the government itself) as a foundation of regime legitimacy.

Yet while it certainly cannot be proven that the mercantile authoritarian approach is ultimately sustainable, it has shown itself to be, at the very least, a highly viable early-stage development strategy. Additionally, even assuming that the mercantile authoritarian strategy is doomed to be a temporary precursor to more complete liberalization, the cases presented here suggest that this "intermediate" stage may be quite lengthy – and thus extremely significant in policy terms. Several U.S. administrations have come and gone since China adopted its first opening and reform policies in 1978; China's wealth and power have increased exponentially, and still liberal democracy is nowhere on

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285. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

the immediate horizon. While 25 years may be negligible in the sweep of a nation's lifespan, it is certainly not negligible in the world of foreign policy-making; indeed the United States' entire foreign policy paradigm has changed completely since 1979, largely due to the end of the Cold War. Given that developing countries make up a majority of the world's nations today, and especially considering that many of the poorest and least stable states are governed by distinctly illiberal regimes, the significance of the mercantile authoritarian strategy as a viable early-stage development model may be substantial – in pragmatic policy-making terms if nothing else. The resurgence of nationalism in many countries, especially in post-communist states, “for want of any other vehicle for organizing political participation and legitimating government”<sup>286</sup> similarly points in this direction.

In any event, nothing in the research presented here suggests that transition to neo-liberal modes of development is inevitable for nations like China. Certainly ongoing reform – including political reform – appears unavoidable in states like China, Syria, and Vietnam, but there is no reason to believe that such reforms must inevitably take on neo-liberal contours. One basic lesson of the cases discussed here is that authoritarian regimes have proven extremely creative and resilient in resisting political liberalization, and even the most ardent liberal should expect them to continue to do so. Additionally, to the extent that mercantile authoritarian states are successful in achieving their development goals – as the states discussed in this article certainly have been – they may provide a tempting example for other developing regimes to follow, particularly regimes who have been disappointed with their own forays into more liberal development strategies (economically pinched states in South America and Eastern Europe come to mind). All of this is not to suggest that the West may soon face a world populated with development policy disciples of the PRC; surely it will not. Yet the analysis here does suggest that Western liberals cannot take for granted their ability to encourage political liberalism in developing states, even if certain modes of capitalism and legalism appear inevitable in today's global economy.

Furthermore, to the extent that the legitimacy of mercantile authoritarian regimes rests on popular nationalism, overt Western demands for political reform in these states may backfire, triggering popular defiance and strengthening the hand of political hardliners, as it often has in China. More generally, regimes that are primarily dependent on nationalism for their popular mandates will inevitably have less policy flexibility on issues that

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286. Binder, *supra* note 127, at 264.

implicate nationalistic sentiments (witness China on the Taiwan issue). Western policymakers must also be mindful of this when dealing with such states.

Yet even in the absence of an illiberal, nationalistic backlash against Western pressure, democracy appears to be a very fragile institution, easily thwarted or co-opted even as liberal economic reform and legal development proceed. As such, the West should be realistic about the likely pace and depth of democratic reform in developing nations. In many cases democracy is likely to be resisted altogether, and, to the extent that it does develop, it is not likely to be normatively satisfying to liberalism's strongest adherents. Nascent democratic institutions will always be ripe for co-option or domination by incumbent political elites, just as they are in China, and so development of a healthy democratic regime is likely to be slow even after nominally democratic institutions emerge. In the meantime, the likelihood of an illiberal yet formally democratic politics will be extremely high.

Likewise, legal institution-building in many developing nations will almost certainly accompany any economic liberalization effort (driven by the exogenous demands of the international marketplace), but such legal developments are likely to be narrow, instrumental ones aimed at fostering economic growth and creating an attractive environment for international investors. Robust social legalism as envisioned by Western liberals (and human rights advocates in particular), is likely to lag behind or be neglected entirely. New laws will be aimed at bolstering the incumbent illiberal regime and its policies, not at protecting the rights of the regime's political opponents. Again, this is not to say that the West should not encourage legal reform in developing states, but merely that analysts should be realistic about what kind of legal developments are likely to emerge from such efforts.

All of this is not to counsel neo-liberal despair. As mentioned in the foregoing discussions of legal reform and democracy in China, even tentative or shallow legal reforms may contribute to liberal shifts in popular opinion. The ultimate developmental course of mercantile authoritarian states will be dictated by the development (or not) of a liberal consensus among the citizenry, and increased legalism and economic freedom can have an impact here, even if the initial impetus for reform is purely instrumental. Far from being a call for pessimism, this study is an appeal to caution in policy and realism in expectations – an invitation to recognize the exigencies of a significant alternative to the neo-liberal developmental model and consider the policy implications that flow from them.