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Paul A. Barresi
Southern New Hampshire University, p.barresi@snhu.edu

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ARTICLE

The Chinese Legal Tradition as a Cultural Constraint on the Westernization of Chinese Environmental Law and Policy: Toward a Chinese Environmental Law and Policy Regime with More Chinese Characteristics

PAUL A. BARRESI*

More than half a century of rapid industrialization has left the People's Republic of China (PRC) reeling from a precipitous decline in environmental quality.¹ According to the World Bank, environmental pollution causes about 750,000 premature deaths in the PRC every year.² About half of them are due to outdoor urban air pollution, with indoor air pollution causing most of the rest.³ Water pollution causes about 60,000 premature deaths

* Professor of Political Science and Environmental Law, Southern New Hampshire University, Manchester, New Hampshire, U.S.A. (p.barresi@snhu.edu); Ph.D. (Boston University); M.A.L.D. (The Fletcher School of Law and Diplomacy, Tufts University); J.D. with Highest Honors (The George Washington University National Law Center); B.S. (Cornell University).

1. *See generally* ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* 50-53, 59-94 (2d ed. 2010); JUDITH SHAPIRO, *MAO'S WAR AGAINST NATURE* 195 (2001).

2. Richard McGregor, *750,000 a Year Killed by Chinese Pollution*, *FIN. TIMES*, July 2, 2007, <http://www.ft.com/cms/s/0/8f40e248-28c7-11dc-af78-000b5df10621.html#axzz1inmnqOP4>.

3. *See id.* The PRC's air pollution woes appeared to reach a new high in January 2013 when air quality monitoring equipment on the roof of the U.S. Embassy in Beijing recorded an air quality index of 755 on a U.S. Environmental Protection Agency (USEPA) scale of 0 (for the best air quality) to 500 (for the worst air quality), with any level above 100 meaning that the air is "unhealthy" and any level above 300 meaning that the air is "hazardous." Edward Wong, *On Scale of 0 to 500, Beijing's Air Quality Tops 'Crazy Bad' at 755*, *N.Y. TIMES*, Jan. 12, 2013, <http://www.nytimes.com/2013/01/13/science/earth/beijing-air-pollution-off-the-charts.html>. *Cf.* AIRNOW, *Air Quality Index (AQI) – A Guide to Air Quality and Your Health*, <http://airnow.gov/index.cfm?action=aqibasics.aqi> (last visited Feb. 1, 2013) (explaining USEPA's air quality

annually, mostly in the countryside.⁴ According to the PRC's State Council, which under the PRC's Constitution⁵ functions as both the executive body of the national legislature—the National People's Congress (NPC)—and the highest organ of state administration,⁶ environmental degradation from pollution and other sources costs the PRC more than \$200 billion annually, which is ten percent of its annual gross domestic product (GDP),⁷ and roughly the same as its GDP growth rate in recent years.⁸ The social costs of the PRC's environmental crisis have been just as dramatic.⁹ Grass roots environmental protests—many of them violent—have become increasingly common, sometimes averaging as much as one every other day.¹⁰ In perhaps the biggest and

index). Within two days, the municipal government had enacted a week-long emergency response plan that ordered nearly 100 major businesses to rein in their emissions by stopping or reducing production and removed nearly a third of government vehicles from the roads, and within a week had released a proposal to strengthen its air pollution regulations. *Air Pollution: Beijing Proposes New Regulations, Penalties to Deal with Record Levels of Air Pollution*, 36 INT'L ENV'T REP. 144 (2013).

4. See McGregor, *supra* note 2.

5. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (1982, as amended 1988, 1993, 1999 & 2004), translated at <http://english.people.com.cn/constitution/constitution.html> [hereinafter PRC CONST., with the date of enactment of provisions currently in force noted parenthetically].

6. *Id.* art. 85 (1982).

7. Kathleen E. McLaughlin, *General Policy: China Environmental Assessment Estimates \$200 Billion Annual Damage from Pollution*, 29 INT'L ENV'T REP. 438 (2006).

8. See THE WORLD BANK, *GDP Growth (annual %)*, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (last visited Sept. 8, 2012).

9. See, e.g., Howard W. French, *Anger in China Rises Over Threat to Environment*, N.Y. TIMES, July 19, 2005, <http://www.nytimes.com/2005/07/19/international/asia/19china.html>; Andrew Jacobs, *In China, Pollution Worsens Despite New Efforts*, N.Y. TIMES, July 28, 2010, <http://www.nytimes.com/2010/07/29/world/asia/29china.html>; Ian Johnson, *China Faces 'Very Grave' Environmental Situation, Officials Say*, N.Y. TIMES, June 3, 2011, <http://www.nytimes.com/2011/06/04/world/asia/04china.html?ref=world>; Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES, Aug. 26, 2007, <http://www.nytimes.com/2007/08/26/world/asia/26china.html>; Michael Standaert, *Toxic Substances: China to Launch Checks on Chemical Plants, Restrict New Companies to Industrial Parks*, 34 INT'L ENV'T REP. 917 (2011); Qian Yanfeng, *Protests Help Clear the Air*, CHINA DAILY, Aug. 4, 2009, http://www.chinadaily.com.cn/cndy/2009-08/04/content_8514306.htm.

10. See ECONOMY, *supra* note 1, at 4, 89-91; Reuters, *Pollution Fuels Protests and Riots, Says Environmental Boss*, STANDARD, Apr. 21, 2006, <http://www>.

most violent such protest to date, 30,000 to 40,000 villagers attacked thirteen chemical plants in Zhejiang (Che-chiang) Province that they blamed for a rash of crop failures, air pollution, and spontaneous miscarriages in the region, breaking windows, assaulting government officials, overturning buses, and setting police cars on fire.¹¹

This environmental crisis is similar in kind to—if not greater in scale than—the creeping barrage of environmental horrors that by the late 1960s had pummeled the West into realizing that something had to be done to stop and, if possible, to reverse the negative environmental impacts of industrialization.¹² From killer smog events to urban rivers so burdened with industrial pollution that stray sparks were enough to cause them to burst into flame,¹³ this firestorm of environmental degradation finally galvanized Western countries into action.¹⁴ They responded with a flood of environmental statutes and regulations.¹⁵ Although new environmental challenges have emerged since most of this enacted law debuted in the West, especially at the global level,¹⁶

thestandard.com.hk/news_print.asp?art_id=17058&sid=7588930. According to one official estimate, the number of pollution "disputes" in the PRC—in whatever form—exceeded 50,000 in 2005 alone. *Id.*

11. See *ECONOMY*, *supra* note 1, at 90.

12. See *id.* at 28 ("[W]hat sets China today apart from the United States of a century ago . . . is the scale of the environmental degradation it confronts . . .").

13. See generally DEVRA LEE DAVIS, WHEN SMOKE RAN LIKE WATER 28-29 (2002); WILLIAM WISE, KILLER SMOG: THE WORLD'S WORST AIR POLLUTION DISASTER 60 (1968); Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 *FORDHAM ENVTL. L.J.* 89 (2002).

14. *Cf.*, e.g., Edmund S. Muskie, A Whole Society, Address at Harvard University and the University of Pennsylvania (Apr. 21-22, 1970), in *EARTH DAY – THE BEGINNING* 90, 91-92 (Nat'l Staff of Env'tl. Action eds., 1970) (decrying certain negative environmental impacts of economic growth and prosperity, and urging listeners to vote with an "environmental conscience").

15. See, e.g., Michael E. Kraft, *U.S. Environmental Policy and Politics: From the 1960s to the 1990s*, in *ENVIRONMENTAL POLITICS AND POLICY, 1960S-1990S* 17, 22-25, 30 (Otis L. Graham ed., 2000). *Cf.* ALEXANDRE KISS & DINAH SHELTON, *MANUAL OF EUROPEAN ENVIRONMENTAL LAW* vii-xiv (2d ed. 1997) (observing that a few, mostly industrialized states adopted national environmental legislation in the 1960s, but that almost all states had adopted environmental legislation by the 1990s, mostly based on European or American models).

16. *Cf.*, e.g., SPENCER R. WEART, *THE DISCOVERY OF GLOBAL WARMING* 150-53 (rev. ed. 2008).

it has been remarkably successful in mitigating the relatively localized problems that most of it was intended to address.¹⁷

Since 1979, the PRC has sought to emulate the West in that regard.¹⁸ The Standing Committee of the NPC¹⁹ adopted in trial form the PRC's first environmental statute²⁰—the Environmental Protection Law²¹—in 1979, then revised it substantially and adopted it in permanent form in 1989.²² This statute, which established the framework for the elaboration of the PRC's

17. See generally Jesse H. Ausubel, David G. Victor & Iddo K. Wernik, *The Environment Since 1970*, 1 CONSEQUENCES NO. 3 (Autumn 1995) available at <http://www.gcrl.org/CONSEQUENCES/fall95/envir.html> (assessing environmental change worldwide since 1970).

18. Cf., e.g., A COURSE IN CHINA'S ENVIRONMENTAL PROTECTION LAW 6-8 (Zhang Kunmin & Jin Ruilin eds., 1992) [hereinafter ZHANG KUNMIN & JIN RUILIN] (arguing that the progress of environmental protection in China depends on environmental protection laws, and summarizing the development of those laws from 1979 through the early 1990s).

19. The NPC shares the State's legislative power with its own Standing Committee. E.g., PRC CONST., *supra* note 5, art. 58 (1982). For the complex relationship between the two, see *id.* art. 67, §§ 1-2, 4, 6-7, 8, 11-17; *id.* amend. IV, § 10 (2004) (revising subparagraph [section] 20 of article 67), and compare *id.* art. 62, §§ 3, 5-6, 9-10, 11, 14, art. 63, §§ 2-3 (1982) (enumerating the functions and powers of the NPC), with *id.* art. 67, §§ 3, 5, 9-10, 18-19 (enumerating the functions and powers of the NPC's Standing Committee).

20. By "statute," I mean legislation adopted by the National People's Congress or its Standing Committee and promulgated by the President. Cf. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 726-27 (1994), reprinted in CHINESE LAW AND LEGAL THEORY 239 (Perry Keller ed., 2001) (explaining the challenge of translating the Chinese terms for various categories of legislation into English).

21. Environmental Protection Law of the People's Republic of China (adopted by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, promulgated by Order No. 22 of the President P.R.C., Dec. 26, 1989, effective Dec. 26, 1989), translated in ECOLEX, <http://www.ecolex.org> (Legislation ID number: LEX-FAOC003551) (P.R.C.) [hereinafter PRC Env'tl. Prot. Law].

22. Compare *id.*, with Environmental Protection Law of the People's Republic of China (for Trial Implementation) (adopted in principle by the Standing Comm. Nat'l People's Cong., Sept. 13, 1979, effective Sept. 13, 1979), translated in ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, available at <http://www.asianlii.org/cn/legis/cen/laws/eplotproc564/> (P.R.C.) [hereinafter PRC Env'tl. Prot. Law Trial Version]; see also PRC Env'tl. Prot. Law, *supra* note 21, art. 47 (abrogating the trial statute). The PRC expects to update its Environmental Protection Law again by 2015, partly on the basis of a pilot reform project slated to be undertaken in one province in central China in the interim. See Michael Standaert, *China: Country to Try Out Updated Version of Environmental Law in Shanxi Province*, 34 INT'L ENV'T REP. 708 (2011) [hereinafter Standaert 07/20/11].

environmental law regime,²³ marked the leading edge of a deluge of other environmental statutes, regulations, decisions, circulars, and other legally normative measures that resemble their Western counterparts in many ways.²⁴ Like its Western analog, environmental law in the PRC is highly technical and scientific,²⁵ and almost labyrinthine in its complexity.²⁶ The statutes at their core generally conform to the substantive legal taxonomy established in the West. In accordance with this taxonomy, the PRC has enacted an environmental impact assessment statute,²⁷ an air pollution control statute,²⁸ a water pollution control statute,²⁹ a solid waste management statute,³⁰ a noise pollution

23. Cf. ZHANG KUNMIN & JIN RUILIN, *supra* note 18, at 13 (describing the statute as providing the basis for "drafting specialized environmental protection regulations and rules").

24. See, e.g., Li Kuntao & Li Wenzeng, *Introduction to China's Environmental Protection Laws*, CHINESE EDUC. & SOC'Y, May/June 2004, at 21, 22; Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 161, 184-87, 190-93 (2007). Cf. ZHANG KUNMIN & JIN RUILIN, *supra* note 18, at 7-8 (describing enacted environmental law in the PRC as "an environmental statute system characterized with Chinese features").

25. See ZHANG KUNMIN & JIN RUILIN, *supra* note 18, at 8-9.

26. See *id.* at 9. Environmental law is hardly unique in this respect in the PRC. Cf. Keller, *supra* note 20, at 711 ("The disparate mass of laws and regulations which makes up the formal written sources of Chinese law does not possess sufficient unity to be regarded as a coherent body of law.").

27. Law of the People's Republic of China on Evaluation of Environmental Effects (adopted by the Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2003), *translated in* ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *available at* <http://www.asianlii.org/cn/legis/cen/laws/eoee1368/> (P.R.C.) [hereinafter PRC Env'tl. Effects Evaluation Law].

28. Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution (adopted by the Standing Comm. Nat'l People's Cong., April 29, 2000, promulgated by the President P.R.C., April 29, 2000, effective Sept. 1, 2000), *translated in* ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *available at* <http://www.asianlii.org/cn/legis/cen/laws/lotprocotpacoap841/> (P.R.C.) [hereinafter PRC Atmospheric Pollution Law].

29. Law of the People's Republic of China on the Prevention and Control of Water Pollution (adopted as revised by the Standing Comm. Nat'l People's Cong., Feb. 28, 2000, promulgated by Order No. 87 of the President P.R.C., Feb. 28, 2008, effective June 1, 2008), *translated in* ECOLEX, <http://www.ecolex.org> (Legislation ID number: LEX-FAOC003551) (P.R.C.) [hereinafter PRC Water Pollution Law].

30. Law of the People's Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes (adopted as amended by the Standing Comm. Nat'l People's Cong., Dec. 29, 2004, promulgated by Order No. 77 of the

control statute,³¹ and a marine environmental protection statute,³² as well as an array of forestry, fisheries, wildlife, and other natural resource statutes with environmental implications.³³

Many of the policy design principles and implementation strategies around which these statutes revolve are Western in origin. For example, some PRC environmental statutes have embraced versions of the polluter pays or pollution prevention principles, which since emerging in the West in the 1970s have become prominent if not necessarily pervasive features of Western environmental law.³⁴ The polluter pays principle

President P.R.C., Oct. 29, 1996, effective April 1, 2005), *translated in* ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *available at* <http://www.asianlii.org/cn/legis/cen/laws/lotprocotpacoepbsw1034/> (P.R.C.) [hereinafter PRC Solid Waste Law].

31. Law of the People's Republic of China on the Prevention and Control of Environmental Noise Pollution (adopted by the Standing Comm. Nat'l People's Cong., Oct. 29, 1996, promulgated by Order No. 77 of the President P.R.C., Oct. 29, 1996, effective March 1, 1997), *translated in* ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *available at* <http://www.asianlii.org/cn/legis/cen/laws/lotprocotpacoenp931/> (P.R.C.) [hereinafter PRC Noise Pollution Law].

32. Marine Environmental Protection Law of the People's Republic of China (adopted as revised by the Standing Comm. Nat'l People's Cong., Dec. 25, 1999, promulgated by Order No. 26 of the President P.R.C., Dec. 25, 1999, effective April 1, 2000), *translated in* ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *available at* <http://www.asianlii.org/cn/legis/cen/laws/meplotproc607/> (P.R.C.) [hereinafter PRC Marine Env'tl. Prot. Law].

33. *See* Canfa, *supra* note 24, at 187-90.

34. *Compare, e.g.,* PRC Water Pollution Law, *supra* note 29, art. 3, *and* PRC Solid Waste Law, *supra* note 30, art. 3, para. 1, art. 5, *and* PRC Env'tl. Prot. Law, *supra* note 21, art. 24, art. 28, para. 1, *with, e.g.,* Consolidated Version of the Treaty on the Functioning of the European Union, art. 191, § 2, 2010 O.J. (C 83) 47, 132, *and* Clean Air Act Amendments of 1989, Pub. L. No. 101-549, § 108(k), 104 Stat. 2399 (1990) (codified at 42 U.S.C. §§ 7401(a)(3), (b)(4), (c)), *and* Pollution Prevention Act of 1990, Pub. L. No. 101-508, tit. VI, subtit. F, 104 Stat. 1388-321 (codified at 42 U.S.C. §§ 13101-13109), *and* Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 224(a)(2), 98 Stat. 3221, 3253 (codified at 42 U.S.C. § 6922(b)(1)), *and* Council Directive 2008/1, Integrated Pollution Prevention and Control (Codified Version), pmb. ¶ 2, art. 1, art. 2(12), art. 3(1)(a)-(d), art. 6(1)(f)-(g), art. 9(3)-(4), art. 11, art. 13(1), (2)(b), art. 17(2), annex IV, 2008 O.J. (L 24) 8, 8, 10, 11-12, 13-14, 15, 16, 25 (EC), *and* Org. Econ. Co-operation & Dev. [OECD] Council, *Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies*, at ¶ I, annex ¶ a(4), OECD Doc. C(72) 128 (May 26, 1972), *available at* <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?>

imposes the costs of pollution prevention and control on the polluters themselves.³⁵ The pollution prevention principle—also known as “P2,” “source reduction,” or “cleaner production”—gives priority to reducing or to eliminating pollution at its source, with end-of-pipe pollution control measures serving merely as a fallback strategy.³⁶ Indeed, the PRC has adopted a stand-alone statute to promote pollution prevention.³⁷

The PRC’s environmental laws also seek to implement these and other policy design principles by means of a host of Western implementation strategies. For example, the PRC’s air and water pollution control statutes revolve around both ambient environmental quality standards and performance standards, which have been hallmarks of Western air and water pollution control laws since the 1970s.³⁸ In general, the ambient air and

InstrumentID=4&Lang=en&Book=False [hereinafter *OECD Environmental Recommendation*], and National Pollution Prevention Roundtable, *Blueprint for Pollution Prevention & Sustainable Development: A Work in Progress*, at apps. A-B (Aug. 2002) (unpublished manuscript), available at <http://www-rohan.sdsu.edu/faculty/dunnweb/rprnts.blueprint.htm> (summarizing the history of the pollution prevention principle as both a private sector cost control strategy and a public policy design principle in the United States and around the world) [hereinafter *National P2 Roundtable Blueprint*], and Nicolas de Sadeleer, *The Polluter-Pays Principle in EU Law – Bold Case Law and Poor Harmonisation*, in *PRO NATURA. FESTSKRIFT TIL H.C. BUGGE 405, 406-08* (2012), available at <http://www.desadeleer.eu/uploads/papers/de%20Sadeleer.pdf> (summarizing the recognition of the polluter pays principle in European Union law since the 1970s).

35. See, e.g., *OECD Environmental Recommendation*, *supra* note 34, at annex ¶ a(4). Cf. ZHANG KUNMIN & JIN RUILIN, *supra* note 18, at 80-84 (defining and explaining the derivation and significance of the “principle of ‘who pollutes, who treats’” in the context of the PRC’s Environmental Protection Law).

36. See *National P2 Roundtable Blueprint*, *supra* note 34, at 6, apps. A-B. Cf. ZHANG KUNMIN & JIN RUILIN, *supra* note 18, at 51-55 (defining and explaining the rationale for the “principle of laying stress on prevention” in the context of the PRC’s Environmental Protection Law).

37. See *Law of the People’s Republic of China on Promotion of Cleaner Production* (adopted by the Standing Comm. Nat’l People’s Cong., June 29, 2002, promulgated by Order No. 72 of the President P.R.C., June 29, 2002, effective Jan. 1, 2003), translated in *ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE’S REPUBLIC OF CHINA*, available at <http://www.asianlii.org/cn/legis/cen/laws/pocpl354/> (P.R.C.).

38. Compare PRC Water Pollution Law, *supra* note 29, arts. 11-12, art. 13, paras. 1-2, and PRC Atmospheric Pollution Law, *supra* note 28, art. 6, art. 7, paras. 1-2, and PRC Marine Env’tl. Prot. Law, *supra* note 32, art. 9, paras. 1-2, art. 10, with, e.g., Federal Water Pollution Control Act, Pub. L. No. 92-500, §§

water quality standards are limits on specific pollutants—usually applied as numerical concentrations averaged over a given period of time—that apply to the ambient outdoor air or to the water circulating in lakes, rivers, and other water bodies.³⁹ The corresponding performance standards are generally limits on the same pollutants—usually applied numerically, but not necessarily as concentrations—that apply to airstreams emitted into the ambient air or to effluents discharged into the ambient water.⁴⁰

301(a), (b)(2)(A)(i), 303(a)-(c), (g)-(h), 86 Stat. 816, 844-45, 846-48, 850 (1972) (codified as amended at 33 U.S.C. §§ 1311(a), (b)(2)(A)(i), 1313 (a)-(c), (g)-(h)), and Clean Air Act, Pub. L. No. 91-604, §§ 109, 111, 84 Stat. 1676, 1679-80, 1683-84 (1970) (codified as amended at 42 U.S.C. §§ 7409, 7411), and Council Directive 2008/50, Ambient Air Quality and Cleaner Air for Europe, annexes VII, XI, XIV, 2008 O.J. (L 152) 1, 24-25, 30-31, 34-35 (EC), and Council Directive 2001/80, Limitation of Emissions of Certain Pollutants into the Air from Large Combustion Plants, annexes III-VII, 2001 O.J. (L 309) 1, 12-17 (EC), and Council Directive 2000/60, Framework for Community Action in the Field of Water Policy, arts. 10(2)(b), 16(1), (7)-(8), 2000 O.J. (L 327) 1, 18, 25 (EC) (as amended); see generally ZHANG KUNMIN & JIN RUILIN, *supra* note 18, at 14 (listing the different types of "environmental protection standards" in the PRC). The PRC's Environmental Protection Law established the legal framework for the promulgation of both ambient environmental quality and performance standards. See PRC Env'tl. Prot. Law, *supra* note 21, art. 9-10.

39. See, e.g., Council Directive 2008/50, Ambient Air Quality and Cleaner Air for Europe, art. 2(1)-(3), (5), (9), (14), (21), 2008 O.J. (L 152) 1, 4-5 (EC); Council Directive 2000/60, Framework for Community Action in the Field of Water Policy, art. 2(31), (35), 2000 O.J. (L 327) 1, 10-11 (EC) (as amended). For example, pursuant to the administrative rule-making authority granted to it by the U.S. Clean Air Act, the U.S. Environmental Protection Agency (USEPA) has set the "national primary 1-hour annual ambient air quality standard" for oxides of sulfur, measured in the ambient air as sulfur dioxide, at 75 parts per billion. See 40 C.F.R. § 50.17(a) (2012). Similarly, pursuant to the authority granted to it by the U.S. Federal Water Pollution Control Act, USEPA has set the "ambient water quality criteria" for bacteria in coastal recreation waters in certain States at levels expressed as numbers of visible bacteria per 100 milliliters of water. See *id.* §§ 131.41(a), (c)-(e). Ambient air and water quality standards in the PRC follow the same general pattern. See, e.g., Environmental Quality Standard for Surface Water (approved by the State Env'tl. Prot. Admin., Apr. 26, 2002, effective June 1, 2002), tpls./lists 1-3, translated at JIANGSU TIANYI SCI. & TECH. DEV. CO., JIANGSU WATER TREATMENT NET, available at <http://www.jstykj.com/en/release/review.asp?id=66> (P.R.C.); CLEAN AIR INITIATIVE FOR ASIAN CITIES, *China Releases New Ambient Air Quality Standards: PM2.5 Standards Set*, <http://cleanairinitiative.org/portal/node/8163> (last visited Sept. 23, 2012).

40. See, e.g., Council Directive 2001/80, Limitation of Emissions of Certain Pollutants into the Air from Large Combustion Plants, art. 2(1)-(3), 2001 O.J. (L 309) 1, 2-3 (EC); Council Directive 2000/60, Framework for Community Action

The law generally requires these performance standards to be set at levels sufficient to achieve the ambient standards within the constraints imposed by available or affordable pollution control technologies.⁴¹ In the water pollution realm, caps on the total loads of pollutants discharged into receiving waters, which are disaggregated and parceled out among the sources of those pollutants, can help to achieve ambient water quality standards when technology-based performance standards are a limiting

in the Field of Water Policy, art. 2(40), 2000 O.J. (L 327) 1, 11 (EC) (as amended). For example, pursuant to the administrative rule-making authority granted to it by the U.S. Clean Air Act, the U.S. Environmental Protection Agency (USEPA) has prohibited the emission into the atmosphere from certain fossil-fuel-fired steam generators of any gases containing sulfur dioxide in excess of certain amounts measured in nanograms per Joule or pounds per million British thermal units of heat input as a "standard of performance." 40 C.F.R. § 60.43 (2011). Similarly, pursuant to the administrative rule-making authority granted to it by the U.S. Federal Water Pollution Control Act, USEPA has set "effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable" for certain pollutants discharged from certain steam electric power generating point sources at levels expressed as concentrations measured in micrograms per liter, as amounts equal to the flows of the discharges multiplied by those concentrations, or as a prohibition on any discharge or detectable amount, depending on the pollutant and the discretion of the permitting authority. 40 C.F.R. §§ 423.13(a)-(b)(1), (c)(1), (d)(1), (e), (g) (2012). Performance standards for sources of air and water pollution in the PRC follow the same general pattern. *See, e.g., Air Pollution: New Limits on Steel Industry Pollution Set in China*, 35 INT'L ENV'T REP. 869 (2012); Michael Standaert, *Mining: China Prepares to Issue New Standards to Clean Up Rare Earths Mining Sector*, 34 INT'L ENV'T REP. 94 (2011).

41. Compare PRC Water Pollution Law, *supra* note 29, art. 13, paras. 1-2, and PRC Atmospheric Pollution Law, *supra* note 28, art. 7, paras. 1-2, and PRC Marine Env'tl. Prot. Law, *supra* note 32, art. 9, para. 1, art. 10, with, *e.g.*, Federal Water Pollution Control Act §§ 302(a), 304(b), 33 U.S.C. §§ 1312(a), 1314(b) (2006), and Clean Air Act §§ 107(a), 110(a)(1)-(2)(A), 172(b)-(c)(1), 42 U.S.C. §§ 7407(a), 7410(a)(1)-(2)(A), 7502(b)-(c)(1) (2006). *See generally* Council Directive 2000/60, Framework for Community Action in the Field of Water Policy, art. 16(8), 2000 O.J. (L 327) 1, 25 (EC) (as amended) (requiring to establish "environmental quality standards" for and "controls" on the principal sources of discharges of priority water pollutants to surface waters in certain circumstances based on "consideration of all technical reduction options," among other things); PRC Env'tl. Prot. Law, *supra* note 21, art. 10, paras. 1-2 (requiring "national standards for the discharge of pollutants" to be established "in accordance with the national standards for environmental quality and the country's economic and technological conditions," and permitting certain local governments to establish supplementary or stricter local standards in certain circumstances).

factor, although the law makes the instrumental value of these caps more explicit in the West than in the PRC.⁴²

The list of Western-style features of the PRC's environmental laws hardly ends there. A few more examples should be sufficient to illustrate the point. The PRC's noise pollution control statute, for example, revolves around analogs of the ambient environmental quality and performance standards embedded in its air and water pollution control statutes, thus following the lead established by Western noise pollution control laws decades ago.⁴³ Similarly, the PRC's solid waste management statute adopts an essentially Western conception of solid waste, which is expansive enough to encompass solid, semi-solid, and containerized gaseous wastes, and which dates from the 1970s.⁴⁴ The same statute also uses an almost equally long-standing Western approach to identify certain solid wastes as hazardous wastes. In accordance with this approach, some hazardous wastes qualify as such because they exhibit certain physical characteristics when subjected to certain scientific testing protocols, whereas others qualify because they appear on a list of solid wastes deemed to be hazardous by administrative authorities.⁴⁵ The same statute's complex definition of waste

42. Compare PRC Water Pollution Law, *supra* note 29, art. 18, paras. 1-3, with Federal Water Pollution Control Act § 303(d)(1)-(2), 33 U.S.C. § 1313(d)(1)-(2) (2006). See generally Council Directive 2000/60, Framework for Community Action in the Field of Water Policy, art. 10(3), 2000 O.J. (L 327) 1, 19 (EC) (as amended) (requiring "more stringent emission controls" to be imposed when "emission limit values," among other pollution control measures, would be insufficient to achieve a given "quality standard"). Cf. PRC Marine Env'tl. Prot. Law, *supra* note 32, art. 10 (requiring "the determination of water pollutant discharge standards . . . [to] take the control standards of the standards to control [sic] the total load of key pollutants for sea disposal as an important basis" in marine areas where total pollutant loads are being controlled).

43. Compare PRC Noise Pollution Law, *supra* note 31, art. 10, para. 1, art. 11, with, e.g., Noise Control Act of 1972, §§ 5(a)(2), 6(a)-(c), 42 U.S.C. §§ 4904(a)(2), 4905(a)-(c) (2006), and Council Directive 2002/49, Assessment and Management of Environmental Noise, art. 5(4), art. 8, annex V, § 1, 2002 O.J. (L 189) 12, 15-16, 23 (EC), and Council Directive 83/206, Limitation of Noise Emissions from Subsonic Aircraft, art. I(1), (3), (5), (7), 83 O.J. (L 117) 15, 15-16 (EEC).

44. Compare PRC Solid Waste Law, *supra* note 30, art. 88, § 1, with Resource Conservation and Recovery Act of 1976 § 1004(27), 42 U.S.C. § 6903(27) (2006).

45. Compare PRC Solid Waste Law, *supra* note 30, art. 88, § 4, with 40 C.F.R. §§ 261.3(a)(2)(i)-(ii), 261.20(a), 261.21-.24, 261.31-.33 (2012), and Council

“treatment” also shows clear signs of having been influenced by Western law.⁴⁶ Observers expect the climate change legislation currently being drafted in the PRC to include both a carbon tax and a cap-and-trade program,⁴⁷ the two implementation strategies that continue to dominate efforts to reduce anthropogenic carbon dioxide emissions in the West.⁴⁸

Meanwhile, the many Western-style policy design principles and implementation strategies around which the PRC’s environmental laws largely revolve, which in the West are expressed with great legal precision, have been filtered through a purportedly modern variant of a traditional Chinese approach to statutory drafting that prizes both the “general” (*yuanzhexing*) and the “flexible” (*linghuoxing*).⁴⁹ The aim of this approach is to ensure that national laws can be implemented throughout the PRC but also adapted to local conditions.⁵⁰ The result is a curious amalgam of obviously Western and characteristically Chinese elements that on its face ensnares both regulated parties and administrative officials in a labyrinth of universally applicable but vaguely articulated Western-style substantive and procedural requirements.

Directive 2008/98, Waste, art. 3(2), annex III, 2008 O.J. (L 312) 3, 9, 25-26 (EC), and Council Directive 91/689, Hazardous Waste, art. 1(4), annexes I-III, 1991 O.J. (L 377) 20, 20-21, 23-27 (EEC), *repealed by* Council Directive 2008/98, Waste, 2008 O.J. (L 312) 3 (EC).

46. Compare PRC Solid Waste Law, *supra* note 30, art. 88, § 6 (defining “treatment”), with Resource Conservation and Recovery Act of 1976 § 1004(34), 42 U.S.C. § 6903(34) (2006) (defining “treatment”).

47. See Michael Standaert, *China: Draft Climate Law Expected in China; Change in Leadership Could Slow Other Initiatives*, 35 INT’L ENV’T REP. S-37 (2012). The Central Government already has approved pilot cap-and-trade programs to be launched in several provinces and municipalities. Michael Standaert, *Emissions Trading: Carbon Trading in Seven Chinese Localities to Inform Choice for Nationwide System*, 35 INT’L ENV’T REP. 74 (2012) [hereinafter Standaert 01/18/12].

48. See, e.g., Stephen Gardner, *Emissions Trading: European Commission Proposes to Link EU, Swiss Emissions Trading Schemes*, 33 INT’L ENV’T REP. 1126 (2010); Eduard Goldberg, *Emissions Trading: New Zealand Announces Trading Scheme for Carbon Emissions; Abandons Carbon Tax*, 30 INT’L ENV’T REP. 769 (2007); Jeremy Hainsworth, *Taxes: British Columbia Carbon Tax Wins Positive Reviews for Reducing Greenhouse Emissions*, 35 INT’L ENV’T REP. 646 (2012).

49. See Keller, *supra* note 20, at 749, 749 n.191.

50. *Id.* at 749.

Unfortunately, this nominally Chinese but heavily law-based, essentially Western approach to mitigating the negative environmental impacts of industrialization has fallen short of its promise in the PRC.⁵¹ Regulated parties—usually industrial enterprises—routinely flout the law, often with the collusion of local officials.⁵² Institutional factors are partly to blame, at least with respect to enforcement. By statute, the PRC's environmental laws are enforced by local Environmental Protection Bureaus (EPBs), each of which is an arm of the local government that exists at the corresponding administrative level of the State.⁵³ These local EPBs are also legally subordinate to

51. Cf. Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 203 (2007) (arguing that the generally accepted view that "China's environmental laws are relatively complete and that enforcement is now the real problem" is only partly true because those laws are inherently weak in certain respects).

52. See, e.g., ECONOMY, *supra* note 1, at 5-6, 7, 75, 115; Michael Standaert, *Enforcement: Enforcement of Environmental Laws in China Hindered by Local Officials' Focus on Growth*, 34 INT'L ENV'T REP. 255 (2011) [hereinafter Standaert 03/02/11].

53. Song Ying, *The Chinese Environmental Lawmaking Framework*, 1 CHINESE J. INT'L L. 225, 231 (2002). Cf., e.g., PRC CONST., *supra* note 5, arts. 105, 115 (1982) ("Local people's governments at different levels are the executive bodies of local organs of state power as well as the local organs of state administration at the corresponding level."). The PRC is a unitary state in which neither the separation of powers nor federalism plays a role. See *id.* pmb., cl. 3, arts. 30, 57 (1982); but see RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 81 (2002) (arguing that as a result of economic reforms that have devolved both authority and responsibility to local governments in the PRC, "authority has become fragmented to such an extent that China arguably now has a de facto federalist form of government."). In a pattern that even the Chinese Emperors would have recognized, however, the central authorities have dispersed the power of the State as a strategy for coping with the challenges of governing such a big country, both as a matter of policy and as a matter of law. See *id.* at 189, 241. Cf. STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 16-17 (1999) (describing in general the administrative subdivision of the Chinese empire down to the county level, and the tendency of the Chinese Emperors to rule indirectly through local elites, thus stretching the state resources available to govern such a large country). The PRC Constitution divides the State into a complex network of eleven different types of nested administrative units. See PRC CONST., *supra* note 5, art. 30 (1982). Cf. CENTRAL INTELLIGENCE AGENCY, *The World Factbook, East and Southeast Asia: China*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html> (last updated Mar. 29, 2013) (listing the numbers, Chinese-language designations, and proper names of certain administrative subdivisions of the PRC). All of these administrative subdivisions qualify as

the Central Government's Ministry of Environmental Protection, but depend on the local governments of which they are a part for most of their funding, among other resources, and therefore tend to be more responsive to them than to their nominal superiors in Beijing.⁵⁴ At the same time, powerful political incentives have encouraged local governments to pursue economic development at almost any cost,⁵⁵ regardless of what environmental laws require.⁵⁶

Beyond this institutional problem, however, lies a more basic cultural one, with profound implications for both enforcement and compliance. It is here that the Chinese legal tradition plays a pivotal role. In this context, the term *legal tradition* refers to "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught."⁵⁷ A society's legal tradition doubles as the core of its legal culture.⁵⁸ A society's legal system is the set of

"local" under PRC law. *Cf.*, e.g., Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China (adopted by the Nat'l People's Cong., July 1, 1979, promulgated by Order No. 1 of the Chairman Standing Comm. Nat'l People's Cong., July 4, 1979, effective Jan. 1, 1980, as amended for the fourth time by the Standing Comm. Nat'l People's Cong., Oct. 27, 2004), art. 18, paras. 1-2, *translated in* ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *available at* <http://www.asianlii.org/cn/legis/cen/laws/olotlpcalgotproc908/> (P.R.C.) (referring to various levels of "local" government in prescribing procedures for submitting bills and proposals to local people's congresses).

54. *See* ECONOMY, *supra* note 1, at 113.

55. *Cf.* Canfa, *supra* note 24, at 171 (noting that GDP has been "the primary standard against which the achievements of local governments are measured" since 1992).

56. *See, e.g.*, Lixin Gu & William R. Sheate, *Institutional Challenges for EIA Implementation in China: A Case Study of Development Versus Environmental Protection*, 36 ENVTL. ASSESSMENT 125 (2005); Standaert 03/02/11, *supra* note 52.

57. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 2 (3d ed. 2007).

58. *See id.* ("The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective."). By *culture*, I mean the set of descriptive and prescriptive beliefs and associated behaviors that together define a distinct way of life for the members of a given social group in a given domain of experience, and are transmitted socially between generations. This definition falls squarely within

institutions through which the society's legal tradition and the broader legal culture of which it is a part are expressed.⁵⁹

The most widespread and influential legal traditions worldwide are the civil law tradition and the common law tradition.⁶⁰ The former is rooted historically in the law of the ancient Roman republic, and dominates in Europe, Latin America, and much of Asia and Africa.⁶¹ The latter dates from the Norman conquest of England, and is found in Great Britain and its former colonies.⁶² The Chinese legal tradition predates the Roman civil law by as many as several centuries, and has been as influential throughout East Asia as the civil law and common law traditions have been in other parts of the world.⁶³ Although this legal tradition is uniquely Chinese, it resembles its civil law counterpart in crucial respects.⁶⁴ As is almost always the case in civil law jurisdictions, enacted law is and always has been the only formal source of law in China.⁶⁵ Moreover, much like the courts in civil law jurisdictions, Chinese courts almost never have had the authority to interpret this enacted law, and never have had the authority to render decisions with precedential effect, although judicial decisions have served as informal guidance for courts in other cases since China's imperial

the scope of the ordinary usage of the term. See John Gerring & Paul A. Barresi, *Culture: Joining Minimal Definitions and Ideal-Types*, in CONCEPTS AND METHOD IN SOCIAL SCIENCE: THE TRADITION OF GIOVANNI SARTORI 241 (David Collier & John Gerring eds., 2009).

59. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 57, at 2 ("A legal tradition . . . is a set of deeply rooted, historically conditioned attitudes about . . . the proper organization and operation of a legal system, [among other things] The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.").

60. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 98-118, 218-37 (Tony Weir trans., 3d rev. ed. 1998).

61. MERRYMAN & PÉREZ-PERDOMO, *supra* note 57, at 2-3.

62. *Id.* at 3-4.

63. See JOHN W. HEAD & YANPING WANG, LAW CODES IN DYNASTIC CHINA 3-4 (2005).

64. Cf. MERRYMAN & PÉREZ-PERDOMO, *supra* note 57, at 4 (noting that many Chinese jurists think of China as a civil law jurisdiction, but emphasizing that comparative lawyers recognize a distinct East Asian legal tradition).

65. Compare *id.* at 24-25 (listing the sources of law in the civil law tradition), with HEAD & WANG, *supra* note 63 (surveying the legal codes of the Chinese empire), and LUBMAN, *supra* note 53, at 145 ("According to Chinese law and doctrine, the sole source of legal rules is legislation . . .").

era.⁶⁶ Yet despite these superficial similarities, the Chinese and civil law traditions have been shaped by fundamentally different historical and cultural factors. Whereas the modern civil law tradition is primarily an expression of the ideology of the French Revolution and nineteenth-century German legal science,⁶⁷ the Chinese legal tradition has been shaped primarily by indigenous historical and cultural phenomena.⁶⁸

This Article argues that the Chinese legal tradition is essentially a Confucian legal tradition, and that its Confucian attributes significantly constrain the effectiveness of the Western-style environmental laws enacted by the PRC in recent decades. Part I explores the emergence of a Confucian legal tradition in China and its impact on Chinese legal culture before the founding of the PRC. Part II highlights some of the impacts of this tradition on the Chinese legal system during the same period. Part III makes a case for the endurance of the Confucian essence of this legal tradition in the PRC itself, and highlights its implications for the effectiveness of the PRC's Western-style environmental laws. This Article concludes with a few preliminary strategic suggestions for making the PRC's environmental law and policy regime more effective by aligning it more closely with the Confucian essence of the Chinese legal tradition.

66. Compare MERRYMAN & PÉREZ-PERDOMO, *supra* note 57, at 23-25, 46-47 (describing the implications of the civil law tradition's conception of the sources of law for the limited scope of the judicial function), with LUBMAN, *supra* note 53, at 23, 281-85 (describing the historic and contemporary role of cases in Chinese law); *but cf.* MERRYMAN & PÉREZ-PERDOMO, *supra* note 57, at 42-46, 47 (describing the tension between theory and practice with respect to the judicial function in civil law jurisdictions).

67. *See, e.g.*, MERRYMAN & PÉREZ-PERDOMO, *supra* note 57, at 15-19, 61-67.

68. *Cf. id.* at 4 (noting that some observers have suggested the existence of a Confucian legal tradition in East Asia).

I. THE EMERGENCE OF A CONFUCIAN LEGAL TRADITION IN CHINA AND ITS IMPACT ON CHINESE LEGAL CULTURE BEFORE THE FOUNDING OF THE PRC

The emergence of a Confucian legal tradition in China is integrally bound up with the origin and early history of China itself. Law per se—or *fa*⁶⁹—almost never has played more than a subordinate role in maintaining social and political order in China.⁷⁰ It played a dominant role only during the Qin (Ch'in) Dynasty (221-206 B.C.E.),⁷¹ after Ying Zheng (Ying Cheng)—the ruler of the Chinese kingdom of Qin—finally unified the country after nearly 200 years of warfare among several Chinese states.⁷² The Qin's *fa*-based approach to governance—known as the Legalist or School of Law (*fa jia*) tradition—was not a new invention, having emerged almost 200 years earlier in the Chinese Kingdom of Zhou (Chou).⁷³ The Qin's embrace of this strategy was deeply unpopular, however, and did not last for long.⁷⁴ After only fifteen years, the Qin were overthrown by the founder of what became the Han Dynasty (206 B.C.E.-220 C.E.).⁷⁵

69. *Fa* means the positive or written law in the abstract, although it also can be used to refer to individual laws. DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 11 (1967). The term connotes a standard of behavior to which ordinary people must conform because it has been imposed on them by superior authority. *See id.*

70. *Cf.* PEERENBOOM, *supra* note 53, at 48 (noting the low esteem in which the Chinese always have held law as a means of achieving social order).

71. With rare exceptions, which are described *infra*, this article romanizes Chinese names and other Chinese nouns according to the *pinyin* system, followed parenthetically in the first instance by the Wade-Giles equivalent, if different. Some Chinese names have become so familiar to Western audiences either in their Wade-Giles form (i.e., Chiang Kai-shek), as Latinized equivalents of the Chinese (i.e., Confucius, Mencius), or in some other romanized form (i.e., Sun Yat-sen) that this article uses the more familiar forms, followed parenthetically in the first instance either by the *pinyin* or by both the *pinyin* and the Wade-Giles romanizations, in that order, as appropriate. The diacritical marks indicating the tones that would distinguish among what otherwise would be homonyms in spoken Chinese have been omitted from all romanizations.

72. *See* HEAD & WANG, *supra* note 63, at 63-75.

73. *See id.* at 45-48.

74. *See id.* at 73, 75.

75. *See id.* at 76-77. Strictly speaking, the Han Dynasty (206 B.C.E.-220 C.E.) was comprised of two distinct dynasties -- the Former Han (206 B.C.E.-8

For most of the 2,200 years since then, Confucian behavioral norms—or *li*⁷⁶—have been much more important than *fa* as a means of maintaining social and political order in China.⁷⁷ These *li* encompass the full range of institutions and relationships that Confucianists believe are necessary to maintain social and political harmony.⁷⁸

A pre-Confucian form of the *li* performed this function among the members of the Zhou aristocracy in the middle of the second millennium B.C.E.⁷⁹ Confucius (Kung Fuzi or K'ung-fu-tzu) (551-479 B.C.E.) built upon the *Zhou li* by expanding the *li* concept to encompass relations among all members of society, by emphasizing that government should be based almost solely on the *li* instead of on *fa*, and by arguing that the authority to govern therefore ought to be vested in scholars who had demonstrated their mastery of the *li*.⁸⁰ The most influential of Confucius's early disciples—Mencius (Mengzi or Meng-tzu) (372-289 B.C.E. or 390-305 B.C.E.) and Xunzi (Hsun-tzu) (313-238 B.C.E.)⁸¹—modified Confucius's own philosophy in the centuries between his death and China's unification by positing that the function of the *li* was to maintain the inherent stratification of society, and that punishment should play a greater role in

C.E.) and the Later Han (25-220 C.E.) -- separated by a brief interregnum that scholars generally discount as historically insignificant. *See id.* at 77-82.

76. Strictly speaking, *li* means "rites" or "ritual." D. C. Lau, *Introduction to CONFUCIUS, THE ANALECTS* ix, xxxviii (D. C. Lau trans., Chinese Univ. Press 2d ed. 1992).

77. *See, e.g.*, EDWIN O. REISCHAUER & JOHN K. FAIRBANK, *EAST ASIA: THE GREAT TRADITION* 30 (1960).

78. BODDE & MORRIS, *supra* note 69, at 19.

79. HEAD & WANG, *supra* note 63, at 23-24, 28-30.

80. *Id.* at 32. For the classic statement of Confucius's own teachings, see *CONFUCIUS, THE ANALECTS* (D. C. Lau trans., Chinese Univ. Press 2d ed. 1992).

81. For more than 1,000 years, Mencius's contribution to the Confucian tradition has been recognized officially in China as second in importance only to that of Confucius himself. D. C. Lau, *Introduction to MENCIOUS, MENCIOUS* ix, ix (D.C. Lau trans., Chinese Univ. Press rev. ed. 2003) [hereinafter Lau on Mencius]. Strictly speaking, Mencius's name was Mengke (Meng K'o), and *Mencius* merely the title of his book, *see MENCIOUS, MENCIOUS* (D.C. Lau trans., Chinese Univ. Press rev. ed. 2003), but the one has come to be known by the title of the other. HEAD & WANG, *supra* note 63, at 41 n.46. Xunzi, who is the only other great figure in early Confucianism, had much less influence on later scholars. Lau on Mencius, *supra* note 81, at ix-x.

governance than Confucius himself preferred as a supplement to leadership by moral example based on the *li*.⁸²

The most enduring form of Confucianism emerged about a century later during the reign of Emperor Wudi (Wuti) (141-87 B.C.E.), who presided over the golden age of the Former Han Dynasty (206 B.C.E.-8 C.E.).⁸³ Emperor Wudi had been educated in the Confucian classics, the oldest of which were already many centuries old,⁸⁴ so it was natural that he should turn to a Confucian scholar—Dong Zhongshu (Tung Chung-shu) (ca. 179-104 B.C.E.)—to articulate a clear rationale for the Emperor's claim to be the legitimate, sole ruler over all of China.⁸⁵ Dong rose to the challenge by reinventing Confucianism as an imperialist amalgam that blended the preexisting form with elements of the Legalist tradition, Daoism, and other cosmologies.⁸⁶ This "imperial Confucianism"⁸⁷ would play an indispensable role in reinforcing the imperial system for the next 2,000 years.⁸⁸

The *li* of imperial Confucianism were derived from the basic Confucian conception of a naturally harmonious cosmic order inhabited by human beings who are naturally rational, whether or not they are naturally good,⁸⁹ and who therefore are capable of

82. HEAD & WANG, *supra* note 63, at 41-45; *see also* MENCIOUS, *supra* note 81, at bk. IV, pt. A, ¶ 1 (quoting Mencius as affirming, "Goodness alone is not sufficient for government; The law unaided cannot make itself effective."). *Cf. id.* (quoting Mencius as saying, "When those above have no principles and those below have no laws, . . . then it is good fortune indeed if a state survives.").

83. *See* HEAD & WANG, *supra* note 63, at 32, 78-79, 86-87. For the relationship between the Former and Later Han dynasties, *see supra* note 75.

84. *See* HEAD & WANG, *supra* note 63, at 87. For brief histories and summaries of the Confucian classics and their relationship to Confucianism *per se*, *see* REISCHAUER & FAIRBANK, *supra* note 77, at 64-67, 68.

85. *See* HEAD & WANG, *supra* note 63, at 86-87. *Cf.* BRADLEY SMITH & WAN-GO WENG, CHINA: A HISTORY IN ART 79 (1973) (describing the mutually beneficial "meeting of the minds" of Emperor Wudi and Dong Zhongshu).

86. HEAD & WANG, *supra* note 63, at 86-91; *see also* REISCHAUER & FAIRBANK, *supra* note 77, at 105-07 (explaining the "philosophical syncretism" of Han-era Confucianism, and noting Dong Zhongshu's rise to prominence in Wudi's court).

87. *See, e.g.*, HEAD & WANG, *supra* note 63, at 86-91.

88. *Cf., e.g.*, REISCHAUER & FAIRBANK, *supra* note 77, at 107-08 (attributing the superior longevity of the Chinese empire partly to the incorporation of imperial Confucianism into the Chinese State).

89. *See, e.g.*, HEAD & WANG, *supra* note 63, at 49 box II-1, 88-89. Mencius and Xunzi disagreed about whether human beings are naturally good, although

learning the virtuous behaviors needed to maintain social stability and, thus, to preserve cosmic harmony.⁹⁰ These *li* vary in accordance with a person's age and social rank, primarily in the context of the five principal Confucian social relationships—ruler and subject, father and son, husband and wife, elder brother and younger brother, and friend and friend⁹¹—of which the first three are the most important.⁹² In general, rulers should be benevolent whereas subjects should be loyal; fathers should be compassionate whereas sons should be filial; elder brothers should be kind whereas younger brothers should be respectful; husbands should be righteous whereas wives should be submissive; and friends should be faithful.⁹³ The *li* derive their legitimacy from their role in reinforcing the harmonious cosmic order of which the stratification of society is an expression.⁹⁴ Society both ensures its own stability and preserves cosmic harmony by socializing its members to behave in accordance with the *li*.⁹⁵ The Emperor's own behavior plays an indispensable role in this dynamic.⁹⁶ As the ultimate behavioral exemplar, the

later Confucian scholars sided with Mencius in believing that they are. *See, e.g.,* REISCHAUER & FAIRBANK, *supra* note 77, at 80-81.

90. *See* HEAD & WANG, *supra* note 63, at 35-36, 41-44, 49 box II-1, 88-89. *Cf.* MENCIUS, *supra* note 81, at bk. VI, pt. A, ¶ 6 (quoting Mencius as affirming the inherent capacity of human beings to become good).

91. *See* BODDE & MORRIS, *supra* note 69, at 20, 21.

92. *Cf.* SMITH & WENG, *supra* note 85, at 79 (noting Dong Zhongshu's view that social stability depends on the relationships between ruler and subject, father and son, and husband and wife).

93. HEAD & WANG, *supra* note 63, at 49 box II-1; *see also* MENCIUS, *supra* note 81, at bk. I, pt. A, ¶ 5, bk. III, pt. A, ¶ 4, bk. III, pt. B, ¶ 2, bk. VI, pt. B, ¶ 7 (quoting Mencius on proper behavior, duties, and the nature of certain social relationships).

94. *See* BODDE & MORRIS, *supra* note 69, at 20-21. *Cf.* CONFUCIUS, *supra* note 80, at bk. I, ¶ 12 (quoting one of Confucius's disciples with approval as saying, "Of the things brought about by the rites [*li*], harmony is the most valuable."). Only the Confucian relationship of friend to friend implies a measure of social equality. *See* DANIEL C. K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL* 43 (2003). *Cf.* MENCIUS, *supra* note 81, at bk. III, pt. A, ¶ 4 (quoting Mencius as characterizing the relationship between friends as based on "faith").

95. *See* BODDE & MORRIS, *supra* note 69, at 20, 21. *Cf.* MENCIUS, *supra* note 81, at bk. IV, pt. A, ¶ 1, bk. VII, pt. B, ¶ 32 (quoting Mencius on the relevance of the *li* to the preservation of the State and the order of the Empire).

96. *Cf.* JEROME CH'EN, YUAN SHIH-K'AI 200 (1961) ("[O]nly the Emperor, the son of Heaven, might intercede with Heaven for his people.").

Emperor is the linchpin of social stability,⁹⁷ and thus of cosmic harmony. An Emperor who fails to fulfill this role by failing to observe the *li* forfeits the Mandate of Heaven (*tianming*) from which his authority is derived, and thus forfeits the right to rule.⁹⁸

Imperial Confucianism—either with or without its explicitly imperial trappings, which are not especially relevant here—implies a distinctly Confucian legal tradition with distinctly Confucian conceptions of the nature of law and its role in society and the polity. With respect to the nature of law, this Confucian legal tradition makes a basic moral distinction between the *li* and *fa*. The *li* are of universal moral validity because they were derived from human nature and the cosmic order by the ancient savants.⁹⁹ *Fa* has no moral validity because it is merely a modern human construct intended to serve as an ad hoc source of political power.¹⁰⁰ This basic moral distinction has important implications for the role of law in society and the polity. A government based on the persuasive power of the *li* is virtuous, whereas a government based on the compulsive power of *fa* is merely tyrannical.¹⁰¹ A government based on the *li* is also harmonious because the *li* are unwritten and therefore can be adapted to fit any circumstance,¹⁰² and because a ruler who governs through the *li* is capable of winning the loyalty of his subjects by force of moral example.¹⁰³ A government based on *fa*

97. See PEERENBOOM, *supra* note 53, at 31-32; see also MENCIOUS, *supra* note 81, at bk. IV, pt. A, ¶ 20 (quoting Mencius as saying, "When the prince is benevolent, everyone else is benevolent; when the prince is dutiful, everyone else is dutiful; when the prince is correct, everyone else is correct. Simply by rectifying the prince one can put the state on a firm basis."). Cf. CONFUCIUS, *supra* note 80, at bk. XVI, ¶ 2 (quoting Confucius as saying, "When the Way prevails in the Empire, the rites . . . are initiated by the Emperor.").

98. See HEAD & WANG, *supra* note 63, at 18 box I-3, 28-29. Cf. MENCIOUS, *supra* note 81, at bk. V, pt. A, ¶ 5 (quoting Mencius as explaining how only Heaven can give the Empire to the Emperor).

99. BODDE & MORRIS, *supra* note 69, at 20-21.

100. *Id.* at 21.

101. *See id.* at 20.

102. *See id.* at 21.

103. *See id.* at 20. Cf. CONFUCIUS, *supra* note 80, at bk. XII, ¶ 17 (quoting Confucius as saying, "Government (*cheng*) is being correct (*cheng*). If you give a lead in being correct, who would dare to be incorrect?") (footnote omitted);

lacks harmony, however, and merely sows contention in society.¹⁰⁴ Although *fa* is sufficiently coercive to ensure that the people comply with its formal requirements, it is incapable of ensuring that they abide by its spirit because it fosters no inner loyalty to the State.¹⁰⁵

This Confucian legal tradition leaves little room for law as a means of maintaining social or political order, except as a fallback strategy to be used in isolated instances to restore social—and therefore, cosmic—harmony by punishing the few social deviants who fail to conform to the *li*.¹⁰⁶ Hence the traditional Chinese proverb that law is meant for the base person, but not for the gentleman.¹⁰⁷ Moreover, the resort to law by either individuals or the State is by definition a departure from the social and cosmic harmony that the law's enforcement seeks to restore.¹⁰⁸ The resort to law is also an admission of moral failure—on the part of individuals, society, and the State, unlike in Western legal traditions.¹⁰⁹ In accordance with these features of the Confucian

MENCIUS, *supra* note 81, at bk. II, pt. A, ¶ 3, bk. III, pt. A, ¶ 3 (quoting Mencius on how a true king teaches the people to be affectionate).

104. See BODDE & MORRIS, *supra* note 69, at 21.

105. See *id.* at 20, 21. Cf. CONFUCIUS, *supra* note 80, at bk. II, ¶ 3 (quoting Confucius as saying, "Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but will have no sense of shame."); MENCIUS, *supra* note 81, at bk. II, pt. A, ¶ 3 (quoting Mencius as saying, "When people submit to force they do so not willingly but because they are not strong enough. When people submit to the transforming influence of morality they do so sincerely, with admiration in their hearts.").

106. BODDE & MORRIS, *supra* note 69, at 3, 4; Franz Michael, *The Role of Law in Traditional, Nationalist and Communist China*, CHINA Q., Jan.-Mar. 1962, at 124, 128. See generally BODDE & MORRIS, *supra* note 69, at 43-48, 50 (exploring and summarizing the traditional Chinese view of law as a means of repairing violations of the social order and, thus, of cosmic harmony, and offering illustrations from various imperial legal codes).

107. Cf. Yu Xingzhong, Comment, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 32 (1989) (attributing the proverb to the traditional Chinese belief that the only purpose of law is "to deter the potentially evil").

108. Cf. BODDE & MORRIS, *supra* note 69, at 43 (arguing that the traditional Chinese view of law "primarily as an instrument for redressing violations of the social order . . . could hardly have started with the Confucians, at least the early Confucians, since law to them was itself a violation of the social order.").

109. See Michael, *supra* note 106, at 124-26, 128. Cf. REISCHAUER & FAIRBANK, *supra* note 77, at 84 ("Whereas Western law has been conceived of as a human embodiment of some higher order of God or nature, the law of the Legalists [in imperial China] represented only the ruler's fiat.").

legal tradition, most of the Emperor's subjects viewed the imperial *fa* as both morally vacuous and inherently unpleasant, and of little relevance to their daily lives.¹¹⁰ Their antipathy toward the law was matched only by their aversion to the local magistrate's office (*yamen*), which functioned as the local imperial court.¹¹¹ The dead should stay out of hell, went an imperial Chinese saying, and the living should stay out of *yamens*.¹¹²

The Empire endured for more than 2,100 years, from the unification of China by the Qin in 221 B.C.E. until the abdication of the last Emperor of the Qing (Ch'ing) Dynasty (1644-1912) in February 1912.¹¹³ It was succeeded for a few decades by a nominal republic,¹¹⁴ in which similarly Confucian attitudes toward law prevailed.¹¹⁵ The Chinese of the early Republican era

110. See REISCHAUER & FAIRBANK, *supra* note 77, at 84. Cf. BODDE & MORRIS, *supra* note 69, at 3-4, 5-6 (explaining how "Chinese traditional society . . . was by no means a legally oriented society" in that the behavior of ordinary Chinese people was constrained much more by Confucian ethical principles than by law); JOHN K. FAIRBANK, EDWIN O. REISCHAUER & ALBERT M. CRAIG, EAST ASIA: THE MODERN TRANSFORMATION 624 (1965) ("[L]aw had been neither primary nor pervasive in [imperial] Chinese society."); PEERENBOOM, *supra* note 53, at 39 (explaining why many people in imperial China considered participating in a lawsuit to be disgraceful, and preferred to use informal means of dispute resolution instead).

111. See LUBMAN, *supra* note 53, at 23. Cf. ARTHUR H. SMITH, CHINESE CHARACTERISTICS 238 (13th ed. 1894) (noting the tendency of the literati to be terrified in the presence of a district magistrate, even in cases that do not concern them personally). Local magistrates, who performed the imperial analog of what Westerners would consider to be a judicial function, among many other functions, were the all-purpose administrative representatives of the Emperor at the local level. William C. Jones, *Introduction to THE GREAT QING CODE 1, 9-10* (William C. Jones trans., 1994).

112. SMITH, *supra* note 111, at 214.

113. See, e.g., FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 640-41; REISCHAUER & FAIRBANK, *supra* note 77, at 85-92. Cf. PERCY HORACE KENT, THE PASSING OF THE MANCHUS 310-16 (photo. reprint 1977) (1912) (recounting the abdication of the last Qing Emperor).

114. See, e.g., FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 642-717, 848-60.

115. Cf. PAUL S. REINSCH, AN AMERICAN DIPLOMAT IN CHINA 117, 177, 291-92 (1922) (remarking on the limited role of written laws and "set tribunals" in Chinese life, and quoting a prominent Chinese official as explaining that abstract legal thinking and "hard-and-fast" Western ideas of legality in relations between the central government and regional governments are foreign to the Chinese way of thinking).

were “[n]ot much given to legal refinements,”¹¹⁶ as one knowledgeable Westerner observed, and resented the careful draftsmanship of the American contract lawyers employed by the American engineers and financiers who flocked to China to profit from its government’s efforts to modernize the country’s infrastructure.¹¹⁷ Steeped for millennia in a Confucian legal tradition, the Americans’ Chinese partners had become accustomed to doing business without the benefit of written contracts.¹¹⁸ By the twilight of the Republic, this antipathy toward the law remained unchanged.¹¹⁹ As late as the 1940s, Chiang Kai-shek (Jiang Jieshi), the last supreme leader of the Republic on the mainland,¹²⁰ felt compelled to exhort his compatriots that they must “habituate [them]selves to rule by law” so that they could “accomplish the task of establishing [their] state on the basis of law.”¹²¹ Meanwhile, Chiang himself was invoking the wisdom of the ancient Confucian sages for the proposition that morality ought to be ontologically prior to law in the maintenance of the Chinese polity.¹²²

116. *Id.* at 208.

117. *See id.* at 208-09.

118. *Cf.* SUN YAT-SEN, *SAN MIN CHU I: THE THREE PRINCIPLES OF THE PEOPLE WITH TWO SUPPLEMENTARY CHAPTERS BY CHIANG KAI-SHEK* 40 (Frank W. Price trans., Comm’n for the Compilation of the History of the Kuomintang ed., n.d.) (explaining that no contract is needed when a foreigner places an order for goods in China because the Chinese use “verbal [sic] promises” rather than written contracts in their business relations).

119. *Cf.* PAN WEI-TUNG, *THE CHINESE CONSTITUTION: A STUDY OF FORTY YEARS OF CONSTITUTION-MAKING IN CHINA* 133 (1945) (observing during the late Chinese Republic that China has been governed for 2,300 years more by Confucian morality than by “formal law”).

120. *See generally* JONATHON FENBY, *CHIANG KAI-SHEK: CHINA’S GENERALISSIMO AND THE NATION HE LOST* (2004). Chiang and his government were driven from the mainland by the Communists in 1949 after a protracted civil war. *See, e.g.*, FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 859-60.

121. CHIANG KAI-SHEK, *CHINA’S DESTINY* 211 (Wang Chung-hui trans., 1947).

122. *See id.* at 203. *Cf.* FENBY, *supra* note 120, at 184 (describing Chiang as caught between his desire to modernize China and his insistence on the primacy of Confucian principles and behavioral norms).

II. IMPACTS OF THE CONFUCIAN LEGAL TRADITION ON THE CHINESE LEGAL SYSTEM BEFORE THE FOUNDING OF THE PRC

The attitudes about the nature of law and its role in society and the polity at the center of the Confucian legal tradition imply certain attitudes about the proper organization and operation of a legal system. China's legal system reflected these attitudes for millennia before the founding of the PRC.¹²³ For example, there was much less law in imperial China than there was in the West during the same period.¹²⁴ Moreover, what law there was in China was overwhelmingly punitive.¹²⁵ For example, it was typical for the complainant, the accused, and all witnesses to be imprisoned under horrific conditions for the duration of any legal proceeding in which they were involved.¹²⁶ The interrogation of witnesses or other law-abiding persons in connection with legal proceedings often involved torture.¹²⁷ Even the least severe legal

123. Cf. HEAD & WANG, *supra* note 63, at 228-29 (characterizing the history of legal codification in imperial China through the collapse of the Qing Dynasty in 1912 as "a form of legal conservatism – a conserving of . . . the Legalist-Confucianist alloy[] that had emerged from the Qin-Han period.").

124. Cf. LUBMAN, *supra* note 53, at 19-20 (noting the dearth of commercial law in the Chinese imperial law codes, and the extent to which the terms of commercial transactions were governed by custom); PAN WEI-TUNG, *supra* note 119, at 133 (arguing that China has been governed for ages less by "formal law" than by "a sense of morality and reason").

125. See HEAD & WANG, *supra* note 63, at 219-20. Cf. KENT, *supra* note 113, at 69 (describing how the authorities in imperial China have a great advantage over troublemakers in "a country where there are no niceties of judicial process and vengeance is swift and sure."). For insights into the ancient Chinese association of law (*fa*) with punishment (*xing*), especially corporal punishment, both conceptually and as a matter of legal usage, see BODDE & MORRIS, *supra* note 69, at 11-12.

126. Jones, *supra* note 111, at 11. Cf. THE GREAT QING CODE art. 396, § 1, art. 407 (William C. Jones trans., 1994) (addressing the imprisonment of law-abiding persons interrogated about public matters under investigation with which they are involved indirectly, and the unduly prolonged imprisonment of complainants).

127. See Jones, *supra* note 111, at 11. Cf. THE GREAT QING CODE, *supra* note 126, art. 396, § 2 (referring to "putting [witnesses] to the question" and in certain circumstances "interrogation under torture . . . carried out according to the law" with respect to law-abiding persons indirectly involved with public matters under investigation). See generally SMITH, *supra* note 111, at 214 (describing some of the "dreadful tortures which are inflicted upon Chinese prisoners in the name of justice.").

punishment meted out by the magistrate—a beating with a light bamboo rod—could be crippling, if not deadly.¹²⁸ In a society that considered Confucian behavioral norms to be the morally preferable means of maintaining social and political order, and in which law functioned merely as a fallback strategy for restoring social and cosmic harmony by punishing the few social deviants who failed to conform to the *li*, the punitive character of the imperial *fa* ought not to be surprising.¹²⁹ Its principal purpose was to enable the magistrate to identify the proper punishment for any legally significant transgression against the Emperor or the social order for which he was responsible, which was the only type of behavior to which the *fa* applied.¹³⁰ The punitive character of the imperial *fa* was primarily what led the Western powers to insist on the principle of extraterritoriality for their own nationals in the unequal treaties that they forced upon the Chinese beginning in the middle of the nineteenth century.¹³¹ As late as the 1940s, Westerners in China still were subject to Western law rather than Chinese law, as was their real and personal property.¹³²

The laws with which the Western powers were concerned comprised only a small part of the imperial *fa*, however. In accordance with the Confucian conception of law as merely a

128. See Jones, *supra* note 111, at 11. Cf. THE GREAT QING CODE, *supra* note 126, art. 1 (defining the five basic punishments applicable in various degrees to the universe of legal transgressions).

129. Cf. *supra* notes 99-109 and accompanying text (explaining the moral distinction between the *li* and *fa* and the implications of that distinction for the roles of the *li* and *fa* in society and the polity in the Confucian legal tradition).

130. See Jones, *supra* note 111, at 12-13, 24.

131. See FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 144-46, *but cf.* BODDE & MORRIS, *supra* note 69, at 41-43 (noting various respects in which the imperial *fa* was more humane than its Western analog, both on its face and as applied).

132. See FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 714. The legal modernization efforts undertaken by the central government of the nominal republic that followed the Empire's collapse were in part a response to the refusal of the Western Powers to abandon the principle of extraterritoriality unless China reformed its criminal laws. See VICTOR H. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES 20 (1978).

source of political power,¹³³ most of the imperial *fa* focused on ensuring that the Emperor's bureaucrats performed their duties properly, and on punishing them when they did not.¹³⁴ Very little *fa* applied to relations among private individuals, and then only insofar as those relations impinged upon the interests of the Emperor.¹³⁵ Even this *fa* applied to private matters only through the agency of the State, such that a private party with what in the West would be viewed as a civil claim against another private party would complain to the Emperor's bureaucrats, who would decide whether or not to take legal action against the alleged wrongdoer.¹³⁶ No *fa* at all applied to the Emperor himself, whose authority to rule was a function of his position at the apex of the Confucian social hierarchy believed to be an expression of the natural cosmic order, and who therefore was beyond the reach of purely human institutions such as law.¹³⁷

133. *Cf. supra* notes 99-109 and accompanying text (contrasting the moral validity and related implications of the *li* and *fa* in the Confucian legal tradition).

134. *See Jones, supra* note 111, at 6-7, 9, 11. *Cf. HEAD & WANG, supra* note 63, at 222 (emphasizing that the "audience" of the dynastic legal codes was the imperial bureaucracy).

135. *Jones, supra* note 111, at 6; *see BODDE & MORRIS, supra* note 69, at 4 (explaining how imperial Chinese law was concerned primarily with acts that seemed disruptive of the social order, and only secondarily with defending the rights of citizens against each other). *But cf. HEAD & WANG, supra* note 63, at 222-25 (arguing that if the Qing Code is viewed as being aimed primarily at regulating the behavior of state bureaucrats, then it nevertheless addresses in that context many of the same issues that in the West are private civil law matters).

136. *See BODDE & MORRIS, supra* note 69, at 4.

137. *PEERENBOOM, supra* note 53, at 41; *see also LUBMAN, supra* note 53, at 15-17 (referring to the seemingly absolute power of the Emperor within the authoritarian hierarchy of Chinese society in theory, but noting that the Emperor's power also was limited in theory by his duty to implement the cosmic order in accordance with the classic Confucian texts). *But cf. WEN CHING, THE CHINESE CRISIS FROM WITHIN* 110-11 (G. M. Reith ed., 1901) (explaining how the Emperor's power was absolute in theory but strictly circumscribed in practice because the heir apparent was trained to respect the existing governmental machinery and not to innovate). The Emperor would have remained almost wholly above the law even under a plan for a constitutional monarchy endorsed by imperial edict in the final years of the Empire. *See KENT, supra* note 113, at 39-40.

Moreover, the imperial *fa* was pervaded by Confucian ethical principles.¹³⁸ The process of incorporating the latter into the former began during the Han Dynasty (206 B.C.E.-220 C.E.), and was complete by the time that the Tang (T'ang) Dynasty (618-907 C.E.) enacted its legal code in 653 C.E.¹³⁹ The law remained substantively Confucian through the collapse of the last imperial dynasty in 1912,¹⁴⁰ most notably in its treatment of different persons differently—whether they were defendants, would-be defendants, or convicted persons—depending on their status within the Confucian social hierarchy, both in the abstract and relative to any injured parties.¹⁴¹ It also codified certain especially important Confucian social obligations, such as filial piety.¹⁴² Moreover, the Confucian context in which the imperial *fa* was enacted and applied lent its content a coherence that its structure often lacked.¹⁴³ Even Mao Zedong's (Mao Tse-tung's) father once lost a lawsuit in the twilight of the imperial era because his opponent offered the court a fitting quotation from the Confucian classics.¹⁴⁴

The efforts of Chiang Kai-shek's Guomintang (Kuomintang)—or National People's Party¹⁴⁵—to Westernize the legal system of the nominal Republic that briefly succeeded the Empire marked

138. HEAD & WANG, *supra* note 63, at 235; PEERENBOOM, *supra* note 53, at 38. *But cf.* Jones, *supra* note 111, at 16-18 (acknowledging that "[t]here seems to be no question that Confucianism did influence a large number of the . . . provisions" of the Qing dynasty's codification of the imperial *fa*, but cautioning that "[a]t present it seems that all one can say with certainty is that there is a great deal of congruence between the rules of the [Qing] Code and the standards of behavior advocated by Confucianists.").

139. BODDE & MORRIS, *supra* note 69, at 29. For illustrations drawn from the last imperial legal code, the Qing Dynasty (1644-1912 C.E.) Code of 1740, see *id.* at 29-43.

140. See HEAD & WANG, *supra* note 63, at 228-29.

141. See BODDE & MORRIS, *supra* note 69, at 29, 30, 33-38, 43; Jones, *supra* note 111, at 16-17.

142. See BODDE & MORRIS, *supra* note 69, at 39-41.

143. See Keller, *supra* note 20, at 717.

144. EDGAR SNOW, RED STAR OVER CHINA 133 (rev. ed., Grove Press 1968) (quoting Mao Zedong).

145. See, e.g., FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 651. *But see* KENT, *supra* note 113, at 36 n*. (offering an alternative origin and original meaning of what became the party's name).

only a superficial departure from this Confucian pattern.¹⁴⁶ After consolidating its rule over central China in the late 1920s, the Guomindang enacted several legal codes of German-inspired design.¹⁴⁷ These and related legal reforms had little impact on Chinese society, however, both because the writ of the Guomindang never extended much beyond the big cities that it controlled, and even there often failed to ensure compliance with the new laws, and because the domestic chaos and foreign wars that plagued the brief life of the Republic otherwise prevented effective implementation.¹⁴⁸ Even at the apex of the social order, the Westernized law adopted by the Republican authorities—even before the Guomindang's comprehensive reform efforts—had about as much impact as had the imperial *fa*, which is to say very little. Within two years of his inauguration, the Republic's first permanent President—Yuan Shikai (Yüan Shih-k'ai)¹⁴⁹—secured

146. The Guomindang's efforts echoed a similar attempt made during the final years of the Qing Dynasty, when would-be reformers convinced the powers behind the throne to accept plans for establishing a putatively constitutional monarchy and enacting several European-style legal codes and other laws. See KENT, *supra* note 113, at 14, 164, 171, 191-92; PAN WEI-TUNG, *supra* note 119, at 4-7; Keller, *supra* note 20, at 717-18. These and other legal reform efforts largely came to naught, however, both because traditionalists in the imperial court tried to block their implementation, see KENT, *supra* note 113, at 161; PAN WEI-TUNG, *supra* note 119, at 8-10; Keller, *supra* note 20, at 717, and because of the chaos that followed the Empire's collapse. PEERENBOOM, *supra* note 53, at 43. Similar reform efforts endorsed a decade earlier by the Emperor himself had failed because of similar internal opposition. See CHING, *supra* note 137, at 56-57, 64-65, 165-66. Ironically, at least one scholar has argued that the earlier reform movement was inspired by Confucianism. CH'ËN, *supra* note 96, at 63-64.

147. Keller, *supra* note 20, at 718.

148. See *id.* at 718-19; Michael, *supra* note 106, at 133-34. Cf. FENBY, *supra* note 120, at 230, 291 (noting "the absence of a proper legal system" as one of the features of the Republic under Chiang, and the impact of the war with Japan on the Republican government's centralization and modernization efforts); LI, *supra* note 132, at 20 (doubting that the Republic's "instant modern Chinese law" had much influence beyond the major centers of government and commerce, and noting that publicizing and implementing it took a back seat to the national government's efforts to deal with domestic turbulence and foreign wars). Even in the early years of the Republic, the central government's influence had not penetrated very deeply into Chinese society. See REINSCH, *supra* note 115, at 321.

149. Yuan, who took the oath of office as the second Provisional President of the Republic in March 1912, was elected and sworn in as the first permanent President in October 1913. CH'ËN, *supra* note 96, at 39, 171-72.

the constitutional authority to wield absolute power.¹⁵⁰ Subsequent changes to the presidential election law made it possible for him to wield this power for life, and to pass it on to one of his sons.¹⁵¹ As one Western chronicler observed, these legal changes made Yuan "a minor Mussolini in a period when no Mussolini had yet emerged for precedent."¹⁵²

The power of both Chiang Kai-shek, Yuan's last successor on the mainland,¹⁵³ and the political party that he led, were only slightly more constrained.¹⁵⁴ As head of both the executive and the military, Chiang effectively controlled the Republic's central government from an early date, although he did not assume the presidency until May 1948, when he was inaugurated as the first President under the Republic's first Constitution.¹⁵⁵ That constitution,¹⁵⁶ adopted nearly twenty years after Chiang's

150. FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 641, 646; see CONSTITUTIONAL COMPACT OF 1914, art. 14 (Republic of China), *translated in* U.S. DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1914 56 (1922), *reprinted as revised in* PAN WEI-TUNG, THE CHINESE CONSTITUTION: A STUDY OF FORTY YEARS OF CONSTITUTION-MAKING IN CHINA 171 (1945) ("The President is the head of the Nation and combines in himself all powers of government.").

151. CH'EN, *supra* note 96, at 201-02; PAN WEI-TUNG, *supra* note 119, at 28-29; see also FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 646 ("By the end of 1915 [Yuan] was president for life, emperor in all but name.").

152. LYON SHARMAN, SUN YAT-SEN: HIS LIFE AND ITS MEANING 203 (1934).

153. As a string of Communist victories in the protracted Chinese civil war made the Guomindang's hold on the mainland increasingly untenable, President Chiang purported to turn over power to his vice president without clearly relinquishing the presidency, but continued to control events from behind the scenes before fleeing the mainland to reestablish his government on the island of Taiwan. See FENBY, *supra* note 120, at 488-98.

154. Cf. FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 849 (arguing that in Chiang Kai-shek, the "[Nationalist] party dictatorship [of the late Chinese Republic] has its indispensable leader, the one man at the top to give final answers."); FENBY, *supra* note 120, at 185-86 (observing that soon after the Guomindang consolidated its power it became clear that China's legal system would be subject to its interests); REISCHAUER & FAIRBANK, *supra* note 77, at 298 (describing Chiang as the "indispensable foc[us] of final power, somewhat like emperors of old.").

155. See Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan* (with Documents) 9, 14 (OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. No. 115, 1993); FENBY, *supra* note 120, at 231, 390, 479.

156. CONSTITUTION OF THE REPUBLIC OF CHINA (1947, as modified by temporary provisions 1948-91, and amended 1991 & 1992), *translated in* Hungdah Chiu,

consolidation of power over the parts of China controlled by the Guomindang,¹⁵⁷ formally confirmed the President's expansive powers.¹⁵⁸ It also resurrected in nominally republican form an ancient Chinese institution—the Censorate (*yushitai*, but later *duchayuan*)—the principal function of which had been to uncover and to report directly to the Emperor any failure of his bureaucrats to fulfill their duties, although the censors also could exercise the Confucian scholar's prerogative of gently pointing out to the Emperor any shortcomings in his own behavior.¹⁵⁹ Although the revival of this institution—known in Republican China as the Control Yuan (*jiancha yuan*)¹⁶⁰—signified the endurance of the Confucian preoccupation with using the law as a means of policing the behavior of state bureaucrats,¹⁶¹ it signified little if any retreat from the equally Confucian principle that the supreme ruler is and should be above the law.¹⁶² The Constitution purportedly subjected even the President to the Control Yuan's jurisdiction, but the “temporary” constitutional provisions promulgated by Chiang's government just ten days before his inauguration, which were to be effective for the duration of what the Guomindang considered to be a Communist

Constitutional Development and Reform in the Republic of China on Taiwan (with Documents) 42 (OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. No. 115, 1993) [hereinafter ROC CONST., with the date of enactment of provisions currently in force noted parenthetically].

157. Cf. FENBY, *supra* note 120, at 171 (noting Chiang's return with full powers to the Republic's capital at Nanking (Nanjing or Nan-ching) in 1928 after an internal Guomindang power struggle).

158. See, e.g., ROC CONST., *supra* note 156, arts. 35-44 (1947, as amended and supplemented 1991).

159. Compare *id.* arts. 90, 95-100 (1947, as amended 1992) (describing the control powers of the Control Yuan), with REISCHAUER & FAIRBANK, *supra* note 77, at 168, 200-01, 274, 297-98, 368-69 (describing the role of the Censorate in imperial China under the most important dynasties from the Tang through the Qing).

160. See ROC CONST., *supra* note 156, art. 100 (1947, as amended 1992).

161. Cf. *supra* notes 133-34 and accompanying text (noting the imperial *fa*'s Confucian preoccupation with ensuring that the Emperor's bureaucrats performed their duties properly).

162. Cf. *supra* note 134 and accompanying text (explaining how and why the Chinese emperors were above the law in the context of the Confucian legal tradition).

rebellion, placed him all but beyond the censors' reach.¹⁶³ These "temporary" provisions were not abrogated until 1991, more than fifteen years after Chiang's death in office and more than forty years after he and his government fled the Chinese mainland for the island of Taiwan.¹⁶⁴ Both the first and last presidents of the Chinese Republic on the mainland behaved almost instinctively like their imperial predecessors,¹⁶⁵ who were unfettered by law,¹⁶⁶ as one would expect in a society steeped for millennia in an essentially Confucian legal tradition. More importantly,

163. See TEMPORARY [CONSTITUTIONAL] PROVISIONS EFFECTIVE DURING THE PERIOD OF COMMUNIST REBELLION arts. 1-6, 8, 10 (1948, as amended 1960, 1966 & 1972) (abrogated 1991), translated in Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan* (with Documents) 50 (OCCASIONAL PAPERS/REPRINTS SERIES IN CONTEMP. ASIAN STUD. No. 115, 1993). Cf. Chiu, *supra* note 155, at 14 (describing the circumstances under which the Temporary Provisions were adopted).

164. Chiu, *supra* note 155, at 31. See generally FENBY, *supra* note 120, at 497-500 (briefly recounting Chiang's life from his flight to Taiwan in 1949 through his death in office in 1975).

165. See FENBY, *supra* note 120, at 98; REINSCH, *supra* note 115, at 47; SHARMAN, *supra* note 152, at 351. Cf. CH'EN, *supra* note 96, at 199-200 (describing certain imperial customs and rituals officially revived by Yuan); RHODES FARMER, SHANGHAI HARVEST 168-69 (1945) (recounting an interview in which Chiang declared, "I am the State."). See generally REINSCH, *supra* note 115, at 186 (paraphrasing a Chinese official of the early Republican era as describing the government as essentially functioning like a monarchy domestically). But cf. CH'EN, *supra* note 96, at 133, 201, 228 (quoting Yuan in a message to Sun Yat-sen on the day of the Emperor's abdication as pledging never to allow "monarchical Government" in China; citing him on another occasion as pledging to Heaven and Earth that the monarchy would not be restored in China as long as he lived; and describing the decree abolishing Yuan's Empire, in which he claimed to have been manipulated by others into assuming the throne); REINSCH, *supra* note 115, at 192-93 (recounting Yuan Shikai's deathbed declaration that he had not wanted to become Emperor, but had been tricked into believing that the public wanted it and that it was necessary for the country). Mao carried on this tradition while candidly acknowledging its ancient cultural roots, if disingenuously claiming to deplore its effects. See Edgar Snow, *A Conversation with Mao Tse-tung*, LIFE, Apr. 30, 1971, at 46, 46. Cf. JUNG CHANG & JON HALLIDAY, MAO: THE UNKNOWN STORY 391 (2005) ("[Mao] was averse to law, and wanted there to be nothing that could bind him."); HENRY KISSINGER, ON CHINA 334 (2011) (characterizing Mao's style of governance as that of "a traditional emperor of a majestic and awe-inspiring kind"); REISCHAUER & FAIRBANK, *supra* note 77, at 298 (describing Mao as the "indispensable foc[us] of final power, somewhat like emperors of old.").

166. *Supra* note 137 and accompanying text (explaining the inapplicability of the imperial *fa* to the emperors themselves).

whatever superficially Western attributes the Chinese legal system might have acquired as a result of Republican efforts clearly were at odds with the Confucian attitudes toward law that persisted among the general population throughout the Republican era.¹⁶⁷

The persistence of these attitudes was a natural consequence of the endurance of essential elements of the imperial Confucianism from which they were derived. Emperor Wudi adopted this form of Confucianism as the official ideology of the early Chinese State, and in 124 B.C.E. established an academy for training candidates for government posts who would demonstrate their fitness for office by passing a civil service examination based on the classic Confucian texts.¹⁶⁸ Confucianism retained this official status into the final years of the last imperial dynasty—the Qing—which collapsed in 1912, when the official examinations were stripped of their signature Confucian requirement and then abolished altogether.¹⁶⁹ Sun Yat-sen (Sun Yixian or Sun I-hsien), the ostensibly Westernized revolutionary who took the oath of office as Provisional President of the Republic even before the Emperor's abdication,¹⁷⁰ offered a harbinger of things to come, however, he reprised an ancient ritual almost simultaneously with his successor's election by recounting the events of the revolution in a "prayer" to the spirit of the founder of the Ming Dynasty (1368-1644) at the latter's tomb.¹⁷¹

167. *Cf. supra* notes 114-22 and accompanying text (arguing that Confucian attitudes toward law endured throughout the Republican era).

168. *See* HEAD & WANG, *supra* note 63, at 86-87, 89, 90; REISCHAUER & FAIRBANK, *supra* note 77, at 106-07; *but cf. id.* at 101-08 (arguing that in practice Wudi was almost as much of a Legalist as the Qin Dynasty Emperor Ying Zheng had been, and that Confucianism emerged as the dominant ideology of imperial China only slowly over the course of the Han Dynasty as a whole).

169. *See* KENT, *supra* note 113, at 15, 32-33; SHARMAN, *supra* note 152, at 70-71; CHING, *supra* note 137, at 57-59. For a brief account of the collapse of the Qing Dynasty, see FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 639-41.

170. *See* SHARMAN, *supra* note 152, at 133. Sun's propaganda and fund-raising skills had played a pivotal role in the revolution that brought down the Qing. *Id.* at 270-71. For an account of a pivotal phase in his ostensible Westernization, see *id.* at 10-16.

171. *See, e.g., id.* at 140-43. Sources differ on the timing of this event. *Compare id.* at 140 (placing it the day after the election of Sun's successor), *with*

Less than two years after the Emperor's abdication, Sun's successor—Yuan Shikai—briefly if ineffectually restored Confucianism to official status, despite having failed the official examinations repeatedly and not being much of a Confucianist himself.¹⁷² Yuan performed the ancient imperial rites at the Temple of Heaven, albeit with a few small changes meant to symbolize China's reinvention as a republic,¹⁷³ but then went too far by trying to have himself enthroned as Emperor.¹⁷⁴ Military leaders and provincial governors rebelled, leading Yuan to renounce the throne a few months later.¹⁷⁵ Less than a decade after that, Sun Yat-sen called for a similar Confucian revival, arguing that the key to governing China and to freeing it from foreign control would be to revive its ancient political philosophy in accordance with the Confucian classics.¹⁷⁶ Sun's erstwhile protégé Chiang Kai-shek¹⁷⁷ twice tried to restore Confucianism to official status in the late Republican era, but with similarly lackluster results.¹⁷⁸

KENT, *supra* note 113, at 322 (placing it on the morning of the day of the election of Sun's successor).

172. See CH'ËN, *supra* note 96, at 14, 15, 200; FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 640-41, 646, 649-50; REINSCH, *supra* note 115, at 23. Cf. TEMPLE OF HEAVEN DRAFT [CONSTITUTION] of 1913 art. 19 (Republic of China), translated in THE CHINA YEARBOOK 490 (H.G.W. Woodward ed., 1914), reprinted as revised in PAN WEI-TUNG, *supra* note 119, at 157-58 ("The people of the Chinese Republic shall have the obligation to undergo primary education according to law. In the education of citizens, the doctrine of Confucius shall be adopted as the great principle for the regulation of persons.").

173. FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 646; see also REINSCH, *supra* note 115, at 24-26 (describing the imperial rites as performed by Yuan).

174. See FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 650; REINSCH, *supra* note 115, at 171-75, 179.

175. CH'ËN, *supra* note 96, at 228; FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 651; PAN WEI-TUNG, *supra* note 119, at 30; REINSCH, *supra* note 115, at 180, 182. Ironically, the name that had been chosen for Yuan's imperial reign was *Hong Xian* (*Hung Hsien*) – or "Great Constitutional Era." *Id.* at 186.

176. See SUN YAT-SEN, *supra* note 118, at 41-44.

177. Cf. FENBY, *supra* note 120, at 56 (describing events that established Chiang as a "loyal right-hand man for Sun," and as giving rise to their deep personal rapport).

178. See FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 706, 713; FENBY, *supra* note 120, at 246-47, 248. Cf. CHIANG KAI-SHEK, *supra* note 121, at 156, 186-87, 190-93 (expounding on the cultivation of traditional Confucian values as essential to national salvation, and on the value of Confucianism as a means of restoring order in the Chinese state); FAIRBANK, REISCHAUER & CRAIG, *supra*

The failure of these prominent efforts to restore Confucianism to official status was a natural—perhaps inevitable—consequence of the organic link between its former standing as the official ideology of the Chinese State and the imperial system per se, which had broken down irretrievably during the long, slow collapse of the Qing.¹⁷⁹ The success or failure of these efforts is much less important, however, than the fact that throughout the Republic's brief life the Chinese people continued to live their own lives more or less as they had done for millennia—that is, in accordance with the Confucian behavioral norms that had served as the touchstone of Chinese culture since the reign of Emperor Wudi, albeit increasingly shorn of their specifically imperial connotations.¹⁸⁰ Mao Zedong considered Chinese culture to be so

note 110, at 717 (arguing that Chiang Kai-shek's losing quest to save China from Communist domination "was damaged less by inadequacies of virtue than by an excess of virtues that were out of date His inflexible rectitude mirrored the inertia of a whole political tradition, still in the shadow of the Confucian monarchy."); FENBY, *supra* note 120, at 253 ("[T]he nearest Chiang came to expounding a creed was in a meld of Confucian classicism and Methodism that had little relevance to the real problems facing the nation.").

179. *Cf.* FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 649, 692, 713 (arguing that "the ancient Confucian ethical sanctions and the ceremonial forms of imperial rule had lost their potency" by the early Republican era, characterizing the "old domestic traditions" of China as "bankrupt" by the late Republican era, and criticizing the Confucian "traditionalism" of Chiang Kai-shek's political manifesto as "invok[ing] ideas even more out-of-date" than Mao Zedong's rival ideology); REINSCH, *supra* note 115, at 272-85 (detailing the ill-fated attempt by an imperial general to restore the last Qing Emperor to the throne, and asserting that both it and Yuan Shikai's earlier attempted assumption of the throne "actually served to entrench more deeply the republican form of government."); Keller, *supra* note 20, at 717 (arguing that "[t]he upheavals of the nineteenth century brought an end to the dominance of Confucian orthodoxy within China," which led many Chinese intellectuals to call for a constitutional form of government); Michael, *supra* note 106, at 132-33 (noting that faith in the "Confucian system" largely had been lost even before the collapse of the Qing); *but cf.* REINSCH, *supra* note 115, at 275 (describing Beijing's population as showing "an almost joyous excitement" following the brief restoration of the last Qing Emperor to the throne after the death of the Republic's first permanent President).

180. *Cf., e.g.,* REINSCH, *supra* note 115, at 24 (quoting the Minister of the Interior of the early Republic on how it would be "dangerous" for the Republican government "to neglect the worship of Heaven" because of the likely reaction of the rural population in the event of a bad harvest). For Emperor Wudi's contributions to the rise of Confucianism as the touchstone of traditional Chinese culture, see *supra* notes 83-88, 168 and accompanying text.

saturated with Confucianism that even before proclaiming the founding of the PRC in 1949 he launched a decades-long crusade to eradicate it.¹⁸¹

**III. THE ENDURANCE OF THE CONFUCIAN
ESSENCE OF THE CHINESE LEGAL TRADITION
IN THE PRC, AND ITS IMPACTS ON THE
EFFECTIVENESS OF THE PRC'S WESTERN-
STYLE ENVIRONMENTAL LAWS**

Like all cultural phenomena, legal traditions change over time. "Culture moves rather like an octopus," the anthropologist Clifford Geertz once observed, "not all at once . . . but by disjointed movements of this part, then that, and now the other which somehow cumulate to directional change."¹⁸² As a result, no one should expect the Chinese legal tradition today to be the same as it was during the Qing Dynasty, much less during the Han. The Confucian essence of that tradition clearly has endured, however, and has been reinforced by socialist legal theory in at least one crucial respect. The endurance of this Confucian essence is a function of the endurance of the broader Confucian culture of which it is an expression,¹⁸³ despite Mao's best efforts to purge the PRC of every Confucian influence.¹⁸⁴

Mao's professed hostility toward Confucianism had early roots. Although the younger Mao studied the Confucian classics in primary school, and also later under the tutelage of an elderly scholar, he disliked them, and preferred to read just about anything else.¹⁸⁵ The elder Mao—who had attended only two years of school but had become relatively prosperous by buying

181. See MAO TSE-TUNG, ON NEW DEMOCRACY 1 n.1, 59-60 (1954) [hereinafter MAO TSE-TUNG ON NEW DEMOCRACY].

182. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 408 (1973).

183. Cf. R. P. Peerenboom, *What's Wrong with Chinese Rights? Toward a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29, 32 (1993) [hereinafter Peerenboom 1993] ("Confucianism continues even today to be the basis of the Chinese world view, despite the attempts of the socialist government [in the early 1990s] to eradicate such 'feudal' thinking.").

184. Cf. *supra* note 181 and *infra* notes 187-201 and accompanying text (noting the early start and describing the development and peak of Mao's decades-long, anti-Confucian crusade).

185. See SNOW, *supra* note 144, at 131, 133-34, 135 (quoting Mao Zedong).

grain from poor peasants and transporting it to the city for sale to merchants at a profit—disapproved of his son’s reading habits, arguing that by mastering the classics the younger Mao could have helped his father to win lawsuits.¹⁸⁶ By the time Mao Zedong had risen to lead the Communist Party of China (CPC) in its uneasy alliance with the Guomindang during the Anti-Japanese War (1937-45), Mao was denouncing “the worship of Confucius, the study of the Confucian canon, the old ethical code and the old ideologies” as symptoms of a “semi-feudal culture” that together had “formed a reactionary cultural alliance [with imperialist culture that] . . . serves the imperialists and the feudal class and must be swept away.”¹⁸⁷

Mao’s anti-Confucian crusade reached its peak during the Cultural Revolution (1966-76).¹⁸⁸ Confucius and Mencius were pilloried in pamphlets and the press,¹⁸⁹ which linked the Master and his most illustrious disciple with the “bourgeois careerist, conspirator, double-dealer, renegade and traitor” Lin Biao (Lin Piao),¹⁹⁰ whom Mao had purged in the early 1970s as a threat to his own power.¹⁹¹ Some of these polemics focused on the opposition of Confucius and his followers to the Legalists,¹⁹² albeit as proxies for opponents and supporters of Mao’s radical

186. *Id.* at 131, 133-34 (quoting Mao Zedong).

187. MAO TSE-TUNG ON NEW DEMOCRACY, *supra* note 181, at 1 n.1, 59-60.

188. *See generally* THE CHINESE CULTURAL REVOLUTION AS HISTORY 224 (Joseph W. Esherick et al. eds., 2006).

189. *See, e.g.*, 1 YANG JUNG-KUO ET AL., SELECTED ARTICLES CRITICIZING LIN PIAO AND CONFUCIUS (1974) [hereinafter ARTICLES CRITICIZING CONFUCIUS 1]; 2 YANG JUNG-KUO ET AL., SELECTED ARTICLES CRITICIZING LIN PIAO AND CONFUCIUS (1975) [hereinafter ARTICLES CRITICIZING CONFUCIUS 2].

190. ARTICLES CRITICIZING CONFUCIUS 1, *supra* note 189, at Publisher's Note; ARTICLES CRITICIZING CONFUCIUS 2, *supra* note 189, at Publisher's Note. Ironically, Lin Biao had compiled Mao's "Little Red Book" of quotations. *E.g.*, KISSINGER, *supra* note 165, at 268.

191. *See, e.g.*, CHANG & HALLIDAY, *supra* note 165, at 552-64.

192. *See* Lo Szu-ting, *Evolution of the Debate Between the Confucians and Legalists as Seen from Wang An-shih's Reform – On Reading A Brief Study of the Biography of Wang Ching Kung*, in ARTICLES CRITICIZING CONFUCIUS 1, *supra* note 189, at 185; Lo Szu-ting, *Struggle Between Restoration and Counter-Restoration in the Course of Founding the Chin Dynasty – In Relation to the Social Basis of the Polemics Between the Confucianist and Legalist Schools*, in ARTICLES CRITICIZING CONFUCIUS 1, *supra* note 189, at 107.

political program, respectively.¹⁹³ Amid the relentless anti-Confucian propaganda of the era,¹⁹⁴ even school children were required to write poems “exposing” Confucius and Lin Biao.¹⁹⁵

Yet the appeal of Confucianism as a cultural touchstone for the masses was fated to survive this onslaught largely intact, as even Mao seemed to realize near the end of his life.¹⁹⁶ One incident stands out as especially prophetic. In August 1966, a band of Mao Zedong Thought Red Guards, inspired by Mao’s call to destroy the Four Olds (*si jiu*)—Old Thought, Old Culture, Old Customs, and Old Habits¹⁹⁷—massed outside the Confucian Temple complex in Qufu (*Ch’ü-fu*), the hometown of both Confucius and Mencius, intending to smash it to bits.¹⁹⁸ Local peasants, students, militia members, and government officials joined forces to fight off the young zealots, leaving them battered and humiliated but no less eager to achieve their goal.¹⁹⁹ After a three-month siege of the complex, with their ranks swelled by hundreds of reinforcements from Beijing, the red guards attacked again, forcing the defenders to surrender, and sacking the

193. See Shao-chuan Leng, *The Role of Law in the People's Republic of China as Reflecting Mao Tse-tung's Influence*, 68 J. CRIM. L. & CRIMINOLOGY 356, 369-73 (1977).

194. See GEORGE H. W. BUSH, CHINA DIARY OF GEORGE H. W. BUSH 30-31 (Jeffrey A. Engel ed., 2008). Cf. JAMES LILLEY WITH JEFFREY LILLEY, CHINA HANDS 176 (2004) (noting that the “popular slogan” at the time of the official opening of the U.S. Liaison Office in Beijing in 1973 was “Criticize Lin, Criticize Confucius”).

195. BUSH, *supra* note 194, at 336.

196. See Dahpon David Ho, *To Protect and Preserve: Resisting the Destroy the Four Olds Campaign, 1966-1967*, in THE CHINESE CULTURAL REVOLUTION AS HISTORY 64, 92 (Joseph W. Esherick, Paul G. Pickowicz & Andrew G. Walder eds., 2006). Cf. KISSINGER, *supra* note 165, at 110 (noting that when during their historic summit meeting in 1972 President Richard Nixon complimented Mao on the success of his efforts to transform China's ancient civilization, Mao replied, “I haven't been able to change it. I've only been able to change a few places in the vicinity of Beijing.”). *But cf.* Ho, *supra*, at 85-89 (quoting the county official who led local residents in an effort to protect the most important Confucian historical sites from destruction by Red Guards during the Cultural Revolution as recalling, “The Three Confucian Sites were treasures of China—we weren't defending Confucius, we were defending our country's cultural relics.”).

197. Ho, *supra* note 196, at 65-66.

198. *Id.* at 86.

199. *Id.* at 64, 84, 85-86, 86-87.

Confucius family tombs.²⁰⁰ The local residents and officials succeeded in protecting other parts of the complex from destruction, however, with the help of at least two highly placed CPC officials in Beijing.²⁰¹

Mao's death in 1976 finally brought the Cultural Revolution to an end.²⁰² By 1980, Deng Xiaoping (Teng Hsao-p'ing) (1904-97), who had sought to moderate the effects of Mao's culture war after Mao summoned him back from internal exile in 1973,²⁰³ had consolidated his power as China's new supreme leader.²⁰⁴ Under Deng's leadership, the PRC soon adopted a new constitution.²⁰⁵ This Constitution affirms that the Chinese State seeks to build a "socialist spiritual civilization" (*shehuizhuyi jingshen wenming*),²⁰⁶ a goal officially endorsed by Deng at the Twelfth National Party Congress three months before the adoption of the Constitution itself.²⁰⁷ The Constitution sheds little light on the meaning of this term,²⁰⁸ except perhaps indirectly in its preamble, which declares that the Chinese people "will continue to . . . follow the socialist road" under "the guidance of Marxism-

200. *Id.* at 64, 84-85, 86, 88, 89-90, 90-91, 92.

201. *See id.* at 90, 91-92. *Cf. id.* at 88-89 (describing the local defenders' efforts during the siege to forestall the destruction of the sites).

202. *Cf.* Joseph W. Esherick, Paul G. Pickowicz & Andrew G. Walder, *The Chinese Cultural Revolution as History: An Introduction*, in *THE CHINESE CULTURAL REVOLUTION AS HISTORY* 1, 1 (Joseph W. Esherick, Paul G. Pickowicz & Andrew G. Walder eds., 2006) (noting that the military repression and campaigns of political persecution associated with the Cultural Revolution began to fade in the early 1970s, but that China remained politically unstable until Mao's death, with effects that stretched into the early 1980s).

203. CHANG & HALLIDAY, *supra* note 165, at 612-14.

204. *See* KISSINGER, *supra* note 165, at 329-39.

205. PRC CONST., *supra* note 5.

206. *Id.* art. 24 (1982).

207. *See 12th National Party Congress Opens*, BEIJING REV., Sept. 6, 1982, http://www.bjreview.com.cn/90th/2011-07/01/content_373426.htm#. *Cf.* DENG XIAOPING, Opening Speech at the Twelfth National Congress of the CPC (Sept. 1, 1982), in *SELECTED WORKS OF DENG XIAOPING (1975-1982)* 394, 396 (Bureau for the Compilation & Translation of Works of Marx, Engels, Lenin & Stalin under the Cent. Comm. of the Communist Party of China, 1984) (translating the phrase as "socialist civilization"). *See generally* RICHARD BAUM, *BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING* 143-44 (1996) (recounting the origin of the term).

208. *See* PRC CONST., *supra* note 5, art. 24 (1982) ("The state strengthens the building of socialist spiritual civilization . . .").

Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of "Three Represents."²⁰⁹ Thirty years later, however, it has become clear that the PRC's "socialist spiritual civilization" is imbued with precious little socialism, which for the bulk of the Chinese population has little normative appeal,²¹⁰ but also is suffused with a heavy dose of Confucianism.²¹¹ Since 2004, the Central Government has underscored the salience of Confucian values in contemporary China by helping to establish more than three hundred Confucius Institutes at colleges and universities in more than ninety countries and regions around the world, with more than sixty in the United States alone.²¹² These institutes promote the Chinese language and traditional Chinese culture, including key Confucian values such as benevolence, righteousness, and harmony,²¹³ if not Confucianism per se.²¹⁴ Hu

209. Compare *id.* art. 24 (1982), with *id.* at pmb., para. 3 (1982), and *id.* amend. IV, ¶ 1 (2004) (amending the preamble in relevant part). Until 1999, when the reference to Deng Xiaoping Theory was added, the Constitution cited only Marxism-Leninism and Mao Zedong Thought. Compare *id.* amend. III, paras. 1-2 (1999) (amending "paragraph seven" [sic] of the preamble), with *id.* amend. II, ¶ 3 (1993) (amending the preamble), and *id.* pmb., para. 3 (1982). The reference to PRC President Jiang Zemin's (1993-2003) "Three Represents" was added in 2004. See *id.* amend. IV, ¶ 1 (2004). See generally PEERENBOOM, *supra* note 53, at 237 n.166 (explaining the meaning and limited impact of the "Three Represents," also translated as the "Three Representatives"). Of these four ideologies, Deng Xiaoping Theory has become the most important by far as a practical matter. Cf. Maria Hsia Chang, *The Thought of Deng Xiaoping*, 29 COMMUNIST & POST-COMMUNIST STUD. 376, 377-78, 384-86 (1996) (arguing that Deng Xiaoping Theory, which as "theory" has been elevated by the Chinese Communist Party to a status equal to that of Marxism and Leninism, has guided China's economic modernization and the revival of Chinese nationalism by transforming Marxism into an ideology of developmental nationalism).

210. See PEERENBOOM, *supra* note 53, at 170-71, 407.

211. See CHOW, *supra* note 94, at 44-45; Peerenboom 1993, *supra* note 183, at 32; but see PEERENBOOM, *supra* note 53, at 171, 407 (asserting that the Communist Party's efforts to create a "socialist spiritual civilization," which includes "praise for the indigenous and illustrious tradition of Confucianism," and to "revitalize Confucianism," have been "largely ineffectual").

212. See, e.g., Liu Chang, *No Need to Fuss over Confucius Institutes*, CHINA DAILY, Aug. 14, 2010, http://www.chinadaily.com.cn/cndy/2010-08/14/content_11152936.htm; *China's Confucius Institutes: Rectification of Statues*, ECONOMIST, Jan. 22, 2011, at 52.

213. Liu Chang, *supra* note 212. Cf., e.g., CONFUCIUS, *supra* note 80, at bk. I, ¶ 12, bk. IV, ¶ 16 (quoting a discipline of Confucius as identifying harmony as the most valuable thing brought about by following the *li*, and quoting Confucius himself as asserting that "[t]he gentleman is versed in what is moral," whereas

Jintao (Hu Chin-t'ao), who as both General Secretary of the CPC's Central Committee (2002-12) and PRC President (2003-13) embraced the ancient Confucian concept of a *xiaokang* (*hsiaok'ang*)—or moderately well-off—lifestyle to define his near-term vision for Chinese society, has been a prime mover behind these and other official efforts to revive Confucianism in the PRC, as have his Premier Wen Jiabao (Wen Chia-pao) (2003-13) and the CPC generally.²¹⁵ The irony of these developments in a country that still purports to be guided by Mao Zedong Thought is almost palpable.²¹⁶ As if to highlight this irony, the authorities erected a huge bronze statue of Confucius in Tiananmen (T'ien-an Men) Square in January 2011, within a stone's throw of Mao's mausoleum.²¹⁷

Notwithstanding these developments, the PRC is not the Empire, in which the State threw its full weight behind imperial Confucianism as the ideological focal point of civic life.²¹⁸ As if to

"[t]he small man is versed in what is profitable," respectively); MENCIOUS, *supra* note 81, at bk. I, pt. A, ¶ 1 (quoting Mencius as arguing that benevolence and rightness are all that matter, and are more important than profit).

214. See *China's Confucius Institutes: Rectification of Statues*, *supra* note 212, at 52.

215. See *Confucius and the Party Line*, *ECONOMIST*, May 24, 2003, at 38; *Confucius Makes a Comeback*, *ECONOMIST*, May 19, 2007, at 48. Cf. HU JINTAO, HOLD HIGH THE GREAT BANNER OF SOCIALISM WITH CHINESE CHARACTERISTICS AND STRIVE FOR NEW VICTORIES IN BUILDING A MODERATELY PROSPEROUS SOCIETY IN ALL RESPECTS: REPORT TO THE SEVENTEENTH NATIONAL CONGRESS OF THE COMMUNIST PARTY OF CHINA ON OCT. 15, 2007 § IV (2007), available at www.china.org.cn/english/congress/229611.htm (acknowledging the steady progress that had been made toward achieving "the goal of building a moderately prosperous society in all respects" set at the previous National Party Congress in 2002, and setting forth "new requirements" for attaining that goal). See generally KISSINGER, *supra* note 165, at 490-91, 563 n.3 (summarizing the Confucian revival under Hu and Wen). President Jiang Zemin's (Chiang Tse-min's) (1993-2003) earlier efforts to promote the rule of virtue (*dezhi*) in the PRC also had Confucian overtones. PEERENBOOM, *supra* note 53, at 237 n.166.

216. Cf. PRC CONST., *supra* note 5, amend. IV, § 1 (2004) (revising paragraph 2 of the preamble to read in relevant part, "Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents', the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship, [and] follow the socialist road . . .").

217. See *China's Confucius Institutes: Rectification of Statues*, *supra* note 212.

218. Cf. PEERENBOOM, *supra* note 53, at 170, 407 (arguing in 2002 that "traditional normative systems such as Confucianism . . . have withered" in

underscore the difference, the authorities removed the statue of Confucius from Tiananmen Square four months after its installation after more than sixty percent of respondents to an online poll conducted by the *People's Daily*—the CPC newspaper—opposed its presence there.²¹⁹ Yet Confucianism clearly remains a powerful force in Chinese society, even at the highest levels, as its promotion by those at the pinnacles of both CPC and state power attests.²²⁰

The Confucian essence of the Chinese legal tradition seems to have been just as durable.²²¹ The PRC's legal system continues to exhibit many of the Confucian hallmarks of its imperial and Republican predecessors.²²² For example, China's legal institutions remain relatively primitive by Western standards.²²³ Although there is much more law per se in China today than there was during the Empire, and especially since the death of

China after being "[u]nder attack for the last fifty years," and that "the Party's efforts over the years to destroy traditional normative systems such as Confucianism . . . have taken their toll" such that its efforts to "revitalize Confucianism" as a means of arresting China's moral decay "have been largely ineffectual"; Peerenboom 1993, *supra* note 183, at 32 (acknowledging that "Confucianism is not the only intellectual influence" on "the Chinese world view").

219. See Andrew Jacobs, *Confucius Statue Vanishes Near Tiananmen Square*, N.Y. TIMES, Apr. 22, 2011, <http://www.nytimes.com/2011/04/23/world/asia/23confucius.html> (reporting on the removal of the statue four months later); *China's Confucius Institutes: Rectification of Statues*, *supra* note 212.

220. See *supra* notes 212-15 and accompanying text.

221. See CHOW, *supra* note 94, at 45; Keller, *supra* note 20, at 712, 714-15; Yu Xingzhong, *supra* note 107, at 32. Cf. CHOW, *supra* note 94, at 62 ("China's current legal system represents in many ways a break with Confucianism However, while it is one matter to formally break with traditions, it is another matter to completely overcome the influence of traditions so deeply embedded in centuries of Chinese culture."); REISCHAUER & FAIRBANK, *supra* note 77, at 31 ("Communism represents only the latest of a series of assaults on old concepts and social institutions [in China]. Some aspects of traditional society may survive better than others – for example, the . . . emphasis on ethics rather than law.").

222. *But cf.* Keller, *supra* note 20, at 714 (asserting that "[t]here is little overt evidence of a direct link between China's imperial legal order and the one more recently established under the People's Republic of China," except for a few conceptual and organizational terms embedded in PRC legislation).

223. See generally PEERENBOOM, *supra* note 53, at 12-17, 239-449 (surveying the PRC's legislative system, judiciary, legal profession, and administrative law regime).

Mao, most of the impetus for law-making has come from the Central Government's desire to modernize China's economy, to attract foreign investment, and to be accepted for membership in the World Trade Organization.²²⁴ Scholars estimate that at least seventy percent of all laws proposed in the NPC, the Standing Committee of the NPC, and the State Council during the first wave of post-Mao legal reforms in the 1980s were economic laws.²²⁵ In fact, China's Legislation Law, which was enacted in 2000 and governs the enactment, revision, and nullification of all other statutes, regulations, and rules in the PRC, declares that "[l]aws shall be made in compliance with the . . . principle[] of taking economic development as the central task"²²⁶ Significantly, the structural incoherence of this increasingly voluminous body of law rivals that of the imperial *fa*, with CPC and State policy—and perhaps traditional Chinese values—giving its content the consistency that imperial Confucianism once gave to the law of the Empire.²²⁷

224. See CHOW, *supra* note 94, at 59-61. Cf. PEERENBOOM, *supra* note 53, at 49 ("The disastrous Cultural Revolution [of the Mao era] made it clear to all that China needed to rebuild its legal system to limit government arbitrariness and provide the predictability and certainty required to attract foreign investors and grow the economy."); Keller, *supra* note 20, at 713 (partly attributing the CPC's pursuit of legal modernization beginning in 1978 to the recognition by Chinese leaders that trade and investment legislation would be needed to attract foreign investors to the PRC).

225. CHOW, *supra* note 94, at 326-27. For a summary of the major PRC laws of relevance to commercial activity, see *id.* at 327-58. For the relationship between the NPC and its Standing Committee, see *supra* note 19. The State Council functions as both the executive body of the NPC and the highest organ of state administration. PRC CONST., *supra* note 5, art. 85 (1982). Cf. *id.* art. 57 (identifying the NPC as the "highest organ of state power"). It may exercise any function or power that the NPC or its Standing Committee authorizes it to exercise, but also may "adopt administrative measures, enact administrative rules and regulations, and issue decisions and orders" on its own authority. *Id.* art. 89, §§ 1, 18 (1982).

226. Legislation Law of the People's Republic of China (adopted by the Nat'l People's Cong., Mar. 15, 2000, promulgated by Order No. 31 of the President P.R.C., Mar. 15, 2000, effective July 1, 2000), art. 3, *translated in* ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, *available at* <http://www.asianlii.org/cn/legis/cen/laws/ll145/> (P.R.C.).

227. See Keller, *supra* note 20, at 717, 729. Cf. *id.* at 732-38 (describing the complexity of the PRC's legislative hierarchy and its negative implications for the coherence of Chinese law).

Law in the PRC also remains unusually punitive by Western standards. For example, PRC law permits the death penalty to be imposed for dozens of offenses, almost two-thirds of them nonviolent.²²⁸ Capital punishment remains popular with the public, and even opponents acknowledge that its ongoing popularity among many Chinese citizens is a function of deeply-rooted cultural beliefs about retributive justice and the death penalty's deterrent value.²²⁹ The PRC's environmental statutes include special provisions that prescribe administrative punishments for state bureaucrats for abuse of authority or dereliction of duty in carrying out their environmental supervisory or administrative responsibilities, even if their unlawful behavior is neither criminal nor fraudulent, nor for personal gain.²³⁰ The remedy for these purely administrative transgressions is not merely the setting aside of an action unlawfully taken or the compulsion of an action unreasonably delayed or unlawfully withheld, as one would expect in the West.²³¹ A separate statute—the Administrative Punishments Law,²³² which the National People's Congress adopted in part to ensure effective state administration²³³—provides in relevant part for the administrative punishment of governmental officials for a

228. *Reducing Death Penalty Crimes in China More Symbol than Substance*, DIALOGUE, Fall 2010, at 1, available at http://duihua.org/work/publications/nl/nl_pdf/nl_41.pdf. In 2010, the Standing Committee of the National People's Congress started to consider a proposed amendment to the law that would remove from the list thirteen economic crimes for which the death penalty has been imposed rarely, if ever. *Id.* at 1-2.

229. *Id.* at 1, 3.

230. See PRC Solid Waste Law, *supra* note 30, art. 67; PRC Env'tl. Effects Evaluation Law, *supra* note 27, arts. 28, 30, 32, 35; PRC Atmospheric Pollution Law, *supra* note 28, art. 65; PRC Marine Env'tl. Prot. Law, *supra* note 32, art. 94; PRC Noise Pollution Law, *supra* note 31, art. 62; PRC Env'tl. Prot. Law, *supra* note 21, art. 45. One other environmental statute includes a similar provision that refers merely to punishments prescribed by law. See PRC Water Pollution Law, *supra* note 29, art. 69.

231. See Administrative Procedure Act, 5 U.S.C. § 706 (2006) (defining the scope of judicial review of the actions of administrative agencies).

232. Administrative Punishments Law (adopted by the Nat'l People's Cong., Mar. 17, 1996, promulgated by Order No. 63 of the President P.R.C., Mar. 17, 1996, effective Oct. 1, 1996), translated in ASIAN LEGAL INFO. INST., LAWS OF THE PEOPLE'S REPUBLIC OF CHINA, available at <http://www.asianlii.org/cn/legis/cen/laws/apl330/> (P.R.C.).

233. See *id.* art. 1.

broad array of purely administrative transgressions, including the failure to check or to punish the unlawful acts of others.²³⁴

As these punitive provisions suggest, PRC law also remains disproportionately aimed at policing the behavior of state bureaucrats, at least by Western standards. Many laws are internal or otherwise not accessible to the general public for that reason.²³⁵ At least one Western scholar of Chinese law has discerned in this lack of transparency a cultural legacy of the imperial Confucianism in which the Emperor's bureaucrats were steeped, which was based in part on the Mencian belief that human beings are naturally good, and which therefore meant that those bureaucrats could be trusted to behave appropriately without public supervision.²³⁶ The provisions of the PRC's laws that are concerned with punishing government officials are aimed primarily at subordinate officials, however. The PRC's senior leaders, and the CPC generally, remain wholly or partly above the law,²³⁷ as was Mao,²³⁸ the President of the Chinese Republic and the Guomindang, and the Emperors and mandarins of old.²³⁹

Most importantly, the current attitudes of the Chinese people toward law differ hardly at all from the attitudes of their imperial and Republican ancestors. For the bulk of the PRC's population, law in the Western sense remains almost as alien an institution as ever, neither highly regarded nor often sought out as a means

234. *See generally id.* arts. 55-58, 61-62. *Cf. id.* arts. 59-60 (providing for the administrative punishment of administrative officials for certain tort-like acts).

235. *See* HEAD & WANG, *supra* note 63, at 237 (quoting an e-mail message from R. Randal Edwards to J. W. Head, Apr. 10, 2003).

236. *See id.* at 237, 237 n.35 (quoting an e-mail message from R. Randal Edwards to J. W. Head, Apr. 10, 2003).

237. *See* PEERENBOOM, *supra* note 53, at 132, 214-15, 217, 419. This weakness endures despite a 1999 constitutional amendment asserting that the PRC is ruled in accordance with law. *Cf.* PRC CONST., *supra* note 5, amend. III, para. 3 (1999) (adding as a new "first section" of article 5, entitled "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.").

238. *Cf.* REISCHAUER & FAIRBANK, *supra* note 77, at 298 (describing Mao as the "indispensable foc[us] of final power, somewhat like emperors of old."). In fact, Mao's style of governance amounted to "a version of Confucian tradition through the looking glass" in that it claimed to represent a radical departure from the past, but relied on many traditional Chinese institutions. KISSINGER, *supra* note 165, at 94-95.

239. *See supra* notes 134, 149-66 and accompanying text.

of resolving disputes or solving social problems.²⁴⁰ An extreme if peculiarly cyber-age manifestation of the extent to which the Chinese rely on non-legal mechanisms to enforce social norms is the recent rise of the “human-flesh search engine” (*renrou sousuo yinqing*), in which groups of ordinary Chinese citizens punish perceived social deviants by identifying and shaming them online, with the intention of mobilizing others to isolate them socially and otherwise to punish them offline.²⁴¹ Even to the extent that Chinese citizens do turn to the law, they seem as eager as their imperial forebears to temper its application with extralegal factors such as the relationship and circumstances of the parties and prevailing notions of justice.²⁴² The contrast with the West in that regard is stark.²⁴³ To the extent that law has come to play a more important role in maintaining social and political order in China since 1978 than it did historically, that achievement is a function of the partial Westernization of Chinese legal institutions in the face of a much older and more robust Chinese legal tradition.²⁴⁴

The PRC insists that its legal system is socialist, despite its many Confucian attributes.²⁴⁵ Whatever the merits of this

240. See, e.g., Keller, *supra* note 20, at 712; Yu Xingzhong, *supra* note 107, at 50.

241. See Tom Downey, *China's Cyberposse*, N.Y. TIMES, Mar. 3, 2010, <http://www.nytimes.com/2010/03/07/magazine/07Human-t.html>.

242. See Keller, *supra* note 20, at 714-15.

243. Cf. RACHEL KLEINFELD BELTON, COMPETING DEFINITIONS OF THE RULE OF LAW 9-10 (Carnegie Endowment for Int'l Peace, Rule of Law Series No. 55, 2005), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=16405> (exploring the role of equality before the law in the Western rule of law concept).

244. See CHOW, *supra* note 94, at 64-66. Cf. PEERENBOOM, *supra* note 53, at 161 (“By and large, . . . PRC scholars agree that China's traditional ‘rule of man’ culture not only has precious few features that support rule of law but that it constitutes one of the biggest obstacles to the realization of rule of law.”); *but cf.* Carlos Wing-Hung Lo, *Socialist Legal Theory in Deng Xiaoping's China*, 11 COLUM. J. ASIAN L. 469, 472 (1997) (arguing that “foreign legal concepts and traditions have been adapted within a broader framework of Marxian rule and have been accommodated to the basic principles of socialism” in the PRC).

245. See, e.g., PRC CONST., *supra* note 5, art. 5 (1982) (“The state upholds the uniformity and dignity of the socialist legal system.”). Cf. *id.* amend. III, paras. 2-3 (1999); *id.* at amend. IV, ¶ 1 (2004) (revising “paragraph seven” [sic] of the preamble to read in relevant part, “The basic task of the nation is to concentrate its efforts on socialist modernization by following along the road of Chinese-style

official claim, it would be a misnomer to characterize socialist legal theory in China as synonymous with the Chinese legal tradition in the way that one might have characterized socialist legal theory in the Soviet Union, for example, as synonymous with the Soviet legal tradition.²⁴⁶ Socialist legal theory never had the chance to put down the cultural roots in the PRC that it did in the Soviet Union because of the fundamentally different roles that law played in the founding and subsequent evolution of the Soviet and PRC States.²⁴⁷ The responsibility for its failure to put down cultural roots in China lies primarily with Mao. Although Mao studied in the home of an unemployed law student for six months while in his mid-teens, and a few years later registered for but never attended a law school,²⁴⁸ he lacked Lenin's formal legal training and experience as a practicing lawyer.²⁴⁹ Law played a central role in Lenin's critiques of the tsarist regime and

socialism. Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents,' the Chinese people of all nationalities will continue to . . . improve the socialist legal system . . . , and adding as a new "first section" to article 5 "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.").

246. *But cf.* Lo, *supra* note 244, at 472 (asserting in the late 1990s that the "tradition of 'socialist law'" remained important in the PRC).

247. *See supra* note 58 and accompanying text (noting the relationship between a society's legal tradition and its legal culture).

248. SNOW, *supra* note 144, at 134-35, 143 (quoting Mao Zedong).

249. None of Mao's contemporaries in the senior Party leadership were lawyers either. PEERENBOOM, *supra* note 53, at 44. Lenin, however, studied jurisprudence at the Imperial Kazan University until his participation in a demonstration against state control of the university and the strict regulation of student life led to his expulsion part way through his first year. ROBERT SERVICE, *LENIN: A BIOGRAPHY* 63, 67-69 (2000). He later passed the jurisprudence exams as an external student at the Imperial St. Petersburg University, where he was the only student in his class to earn the highest possible grade in every subject. *Id.* at 82-84, 85-86. After graduation, he practiced law as an assistant barrister for a year and a half in Samara before moving back to St. Petersburg to take up the cause of revolution full time. *Id.* at 86, 89; *see also id.* at 91-93 (recounting Lenin's registration as an assistant to a barrister after moving back to St. Petersburg, but noting that "[h]is legal work went no further than occasional informal advice to friends and associates."). His arguments before the court in Samara were reputed to be first-rate. *See* Jane Burbank, *Lenin and the Law in Revolutionary Russia*, 54 *SLAVIC REV.* 23, 25 (1995).

of the Provisional Government that briefly succeeded it,²⁵⁰ and also loomed large in the Bolsheviks' efforts to consolidate and legitimize their rule after their seizure of power in October 1917.²⁵¹ The Chinese Communists took a very different tack. In the rural areas that they controlled before 1949, Mao and his followers essentially replaced the pre-existing legal system with an administrative one, in which the decrees of CPC leaders established simple norms of political and social behavior.²⁵² Although the CPC's Central Committee purported to abolish all Guomintang legislation even before the official founding of the PRC, it also decreed that CPC policy would control in the absence of new laws to replace the old.²⁵³ For the most part, these policy directives served as a substitute for a formal legal system for the PRC's first few years.²⁵⁴ When the Chinese Communists finally turned to building a formal legal system in the early 1950s, they imported Soviet legal theory for the purpose.²⁵⁵ Yet even their efforts to lay the foundation for a socialist Chinese legal culture based on this foreign legal theory soon came to naught. By the mid-1950s, Mao openly disdained even Stalin's legal system as an inherent constraint on class struggle.²⁵⁶ Mao preferred to regulate social behavior through the internalization of social norms inculcated through education and mass participation in a politicized legal process and enforced by social pressures rather than through the enforcement by bureaucratic institutions of

250. See Burbank, *supra* note 249, at 25-29, 30-34.

251. See *id.* at 36-42. Lenin himself drafted most of the first legal decrees to be issued by the new Soviet government. See SERVICE, *supra* note 249, at 313-15, 316-18, 321.

252. See Keller, *supra* note 20, at 719.

253. *Id.*; see also Yu Xingzhong, *supra* note 107, at 33 (reproducing in translation an excerpt from the Party's February 1949 "Instructions" on the abrogation and criticism of the Guomintang laws).

254. See Keller, *supra* note 20, at 719. The Chinese Communists acted with Bolshevik-like dispatch in establishing a constitutional basis for their state, however. Compare *id.* at 719-20 (summarizing the Chinese Communists' efforts), with Burbank, *supra* note 249, at 37-39, 38-39 n.68 (describing the context and consequences of the Bolsheviks' early efforts).

255. See Keller, *supra* note 20, at 720. Cf. Yu Xingzhong, *supra* note 107, at 36-37 (describing the PRC's "large-scale adoption . . . of Soviet legal institutions and Soviet legal thought" in the 1950s with the help of Soviet legal advisers, but noting that the adoption of the former was "qualified" from the outset).

256. Lo, *supra* note 244, at 473.

codified legal rules.²⁵⁷ Beginning with the “anti-rightist campaign” (*fan youpai yundong*) of 1957, which nipped the liberal “hundred flowers movement” (*baihua yundong*) of the previous year in the bud,²⁵⁸ Mao systematically gutted the PRC’s nascent socialist legal system, dismantling the Ministry of Justice, transferring much of the procuracy’s²⁵⁹ functions to the state security organs, and persecuting judges, lawyers, and legal scholars who argued for greater legal control over the CPC, many of whom were banished to the countryside to “learn from the peasants.”²⁶⁰ Politics eclipsed law as the staple of Chinese legal education and in the content of those legal journals that continued to publish anything at all.²⁶¹ The NPC’s legislative activities ground to a halt, and would not resume for another twenty years.²⁶² After a brief revival in the early 1960s, the fortunes of the legal system sunk even lower during the official

257. See Leng, *supra* note 193, at 356-57.

258. In 1956, Mao tried to revive China's flagging socialist revolution by calling on Chinese intellectuals to "let a hundred flowers bloom, a hundred schools of thought contend." *E.g.*, PEERENBOOM, *supra* note 53, at 44-45. When they responded with a blistering critique of the Communist Party, including its management of legal affairs, *see, e.g.*, CHANG & HALLIDAY, *supra* note 165, at 418, Mao abruptly cracked down on dissent. *E.g.*, PEERENBOOM, *supra* note 53, at 45. For a more elaborate account of the "hundred flowers movement" and Mao's "anti-rightist" response, see MU FU-SHENG, *THE WILTING OF THE HUNDRED FLOWERS: THE CHINESE INTELLIGENTSIA UNDER MAO* 166-73 (1962).

259. Notwithstanding their shifting fortunes under Mao, procuratorates in the PRC are similar to procurators' offices in civil law jurisdictions, which in turn are roughly comparable to attorneys' general or district attorneys' offices in common law jurisdictions. *Compare, e.g.*, PRC CONST., *supra* note 5, arts. 129-35 (1982) (describing the structure and functions of the procuracy), and Organic Law of the People's Procuratorates of the People's Republic of China (adopted by the Nat'l People's Cong., July 1, 1979, promulgated by Order No. 4 of the Chairman Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980, as amended by the Standing Comm. Nat'l People's Cong., Sept. 2, 1983), art. 8, *translated in* ASIAN LEGAL INFO. INST., *LAWS OF THE PEOPLE'S REPUBLIC OF CHINA*, available at <http://www.asianlii.org/cn/legis/cen/laws/olotppotproc656/> (P.R.C.), and Yu-Nan Chang, *The Chinese Communist State System Under the Constitution of 1954*, 18 J. POL. 520, 544-45 (1956) (explaining the functions of procuratorates under the 1954 PRC Constitution and the Organic Law of the People's Procuratorates in effect at the time), with MERRYMAN & PÉREZ-PERDOMO, *supra* note 57, at 104-05 (summarizing the functions and career paths of public prosecutors in civil law jurisdictions).

260. See PEERENBOOM, *supra* note 53, at 44-45; Keller, *supra* note 20, at 723.

261. See *id.* at 45.

262. See Keller, *supra* note 20, at 723.

lawlessness of the Cultural Revolution,²⁶³ when even the CPC newspaper *People's Daily* editorialized in favor of lawlessness.²⁶⁴ Throughout this turbulent period, the normative policy documents issued by the State's administrative authorities functioned as a substitute for law per se.²⁶⁵ The intensity and duration of Mao's onslaught made it impossible for socialist legal theory to put down the cultural roots in China that otherwise might have transformed it into an emergent Chinese legal tradition.²⁶⁶

The modern era of Chinese legal history began in 1978, when at the behest of Deng Xiaoping the Third Plenum of the Eleventh Central Committee of the CPC formally called for the strengthening of the PRC's "socialist legal system."²⁶⁷ This effort, spurred primarily by the Central Government's interest in jump-starting the PRC's development by integrating its economy with the global economy,²⁶⁸ has produced a partially Westernized legal system.²⁶⁹ Proponents of this legal modernization effort at first resurrected Soviet legal theory and even draft Chinese legislation from the 1950s; however, since the early 1980s these proponents have developed a more sophisticated conception of China's own legal history and the function of law in China today.²⁷⁰ Deng Xiaoping Theory, which as "theory" has been elevated by the CPC to a status equal to that of Marxism and Leninism, has eclipsed both Marxism-Leninism and Mao Zedong Thought as the pole star of China's modernization efforts, and has been the ideological

263. See PEERENBOOM, *supra* note 53, at 45; Leng, *supra* note 193, at 358-59.

264. See *In Praise of Lawlessness*, PEOPLE'S DAILY, Jan. 31, 1967, translated in U.S. CONSULATE GEN. H.K., SURVEY OF CHINA MAINLAND PRESS 13 (Feb. 14, 1967).

265. Keller, *supra* note 20, at 724.

266. Cf. *supra* notes 57-59 and accompanying text (defining "legal tradition," and explaining the relationship between a society's legal tradition, its legal culture, and its legal system).

267. CHOW, *supra* note 94, at 56-57. Cf. Deng Xiaoping, *Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future (December 13, 1978)*, in SELECTED WORKS OF DENG XIAOPING (1975-1982) 151, 157-58 (1984) (arguing in a speech at the close of preparations for the Third Plenum that the PRC must strengthen its legal system in order "[t]o ensure people's democracy").

268. See *supra* notes 224-26 and accompanying text.

269. See CHOW, *supra* note 94, at 64-66.

270. Keller, *supra* note 20, at 727.

driving force behind its legal revival.²⁷¹ As a practical matter, Deng Xiaoping Theory pays only lip service to socialism per se, and then only for its instrumental value as a means of enabling China to remain independent of foreign domination, especially given the PRC's current economic circumstances.²⁷² Deng's often cited adaptation of the old Sichuan (Szechuan) saying about the unimportance of a cat's color as long as the cat catches mice endures as one of the most revealing symbols of his pragmatism in that regard.²⁷³ Given the PRC's insistence that its legal system is a socialist one, it might be tempting to characterize the evolution of that legal system since 1978 as evidence of the emergence of a distinctly Chinese socialist legal theory.²⁷⁴ The purely instrumental link between Deng Xiaoping Theory and socialism per se, however, strongly suggests that these developments merely signify a resurgence of the pragmatic instrumentalism that has been a hallmark of Chinese legal culture since the unification of China under the Qin, but which found its most persistent expression in the Confucian legal tradition that began to emerge a hundred years later during the reign of the Han emperor Wudi.²⁷⁵

271. Lo, *supra* note 244, at 474, 476; *see also* Chang, *supra* note 209, at 377-78, 384-86.

272. *See* Chang, *supra* note 209, at 385-86.

273. *Cf., e.g.,* PEERENBOOM, *supra* note 53, at 217 (citing Deng's remark in pointing out that it would be easy to overstate the importance of socialist ideology per se in China today). *See generally* Qin Hanxiong, *Deng Xiaoping's Famous "Cat Theory" from Where?*, XINHUA (Apr. 24, 2011), http://news.xinhuanet.com/2011-04/24/c_121341795.htm (explaining the origin of Deng's "cat theory").

274. Yu Xingzhong, *supra* note 107, at 30 n.4, 36-37 (explaining the version of Marxist legal theory used by Chinese legal scholars in their efforts to adapt Marxism to Chinese conditions, and arguing in the late 1980s that the Soviet model of legal theory continues to exert a strong influence in the PRC). *Cf. Lo, supra* note 244, at 474-86 (explaining Deng Xiaoping's approach to law, and arguing that it set the stage for the development of a Chinese socialist theory of law).

275. *See* Yu Xingzhong, *supra* note 107, at 40 n.44, 49. *Cf. id.* at 30, 37-50 (arguing that legal reforms in the PRC have paid lip service to Marxist legal theory, but otherwise have been purely pragmatic, with legal instrumentalism as a means of promoting economic development playing a prominent role); *but see* Keller, *supra* note 20, at 754-55 (identifying an instrumentalism rooted in Soviet socialist legal theory as an emphasis of the dominant theme in the development of the formal sources of PRC law in the 1980s and 1990s). Yu

Even to the extent that socialist legal theory per se provides part of the ideational foundation for the PRC's current legal system, it merely reinforces one of the most central tenets of the Confucian essence of the Chinese legal tradition. Socialist legal theory flowered beginning in the late 1930s when Josef Stalin (1879-1953) rejected the orthodox Marxist view that law was merely a tool of capitalist exploitation made obsolete by the destruction of the bourgeois State.²⁷⁶ The principal architect of the new view was Stalin's chief prosecutor, Andrei Ianuar'evich Vyshinskii (1883-1954).²⁷⁷ Marx had conceptualized law as a product of the dissolution of natural human communities and the formation of the State for the purpose of protecting the property and interests of the ruling class,²⁷⁸ first under feudalism and then under capitalism. Accordingly, orthodox Soviet Marxists expected both law and the State to wither away with the success of the proletarian revolution and the abolition of private property

Xingzhong, *supra* note 107, at 37 (noting that the adoption by Chinese scholars in the 1950s of a Soviet model of legal theory "illustrates the beginnings of the Chinese-style pragmatic approach in law."). For the significance of the Qin Dynasty and Emperor Wudi in the development of Chinese legal culture, see *supra* notes 69-78, 83-88, 99-109 and accompanying text.

276. Compare J. V. Stalin, *Report to the XVIII Party Congress*, in SOVIET LEGAL PHILOSOPHY 343, 347-48 (Hugh W. Babb trans., Harvard Univ. Press 1951) (arguing that Marxism permits the socialist State to perform certain functions performed by the bourgeois State, albeit in the service of the proletarian dictatorship), with E. B. Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 111 (Hugh W. Babb trans., Harvard Univ. Press 1951) (expounding on the view of law that Stalin rejected, from the perspective of a leading proponent). See generally Lo, *supra* note 244, at 470-71 (summarizing the impact of Stalin's view on the development of socialist legal theory).

277. See, e.g., W. E. Butler, *Towards an Introduction to Russian Legal Theory*, in RUSSIAN LEGAL THEORY xi, xliii-xliv (Int'l Library of Essays in Law & Legal Theory Series, Legal Cultures No. 11, Tom D. Campbell ser. ed., W. E. Butler vol. ed., 1996). Cf. A. Y. Vyshinsky, *The Fundamental Tasks of the Science of Soviet Socialist Law*, in SOVIET LEGAL PHILOSOPHY 303 (Hugh W. Babb trans., Harvard Univ. Press 1951) (laying down the Stalinist line regarding the nature and functions of law in Soviet society).

278. See Karl Marx, *The German Ideology: Part I* (S. Rayazanskaya trans. & ed.), in THE MARX-ENGELS READER 146, 186-87 (Robert C. Tucker ed., W. W. Norton 2d ed. 1978) (1964).

under socialism.²⁷⁹ Vyshinskii argued, however, following Stalin, that both the law and the state would wither away only after they had achieved their maximum strength, which they would do under socialism, when socialism finally gave way to communism.²⁸⁰ He went on to define law in purely instrumental terms. According to Vyshinskii,

[l]aw is the aggregate of the rules of conduct expressing the will of the dominant class and established in legal order, as well as of customs and rules of community life confirmed by state authority, the application whereof is guaranteed by the coercive force of the state to the end of safeguarding, making secure and developing social relationships and arrangements advantageous and agreeable to the dominant class.²⁸¹

Accordingly, law's essential purpose under socialism is merely to strengthen the socialist State.²⁸² It was not until the 1970s that Soviet legal scholars began to depart publicly from the conflation of law in general (*jus*) with the positive law (*lex*) on which Vyshinskii's instrumental conception of law rests.²⁸³

In their efforts to build a socialist legal system, Chinese legal theorists wholeheartedly embraced Vyshinskii's conception of law as the instrument through which the State pursues the interests of the ruling class.²⁸⁴ In their view, the function of the law is merely to express the norms of current CPC policy.²⁸⁵ To the

279. See, e.g., Pashukanis, *supra* note 276, at 121-24. Cf. *id.* at 119-20 ("Only bourgeois-capitalist society creates all the conditions essential to the attainment of complete definiteness by the juridic element in social relationships.")

280. See Vyshinsky, *supra* note 277, at 336. Cf. *id.* at 328 (arguing that that law reaches its highest stage of development under socialism). For Vyshinskii, proponents of the orthodox Marxist view were "provocateur[s]," "wrecker[s]," "Trotsky-Bukharin fascist agents," and "traitors." *Id.* at 303-04, 307, 313-16.

281. *Id.* at 336 (footnote omitted). For alternative versions of Vyshinskii's definition, both as delivered orally and as subsequently published, see Butler, *supra* note 277, at xliii.

282. Cf. *id.* at 331-32 (arguing that "the tasks of the science of soviet socialist law . . . require . . . the development and strengthening of soviet law and the soviet state to the maximum degree."). Vyshinskii insisted, however, that law was not merely synonymous with state policy. See *id.* at 328, 330.

283. Butler, *supra* note 277, at xliv.

284. Keller, *supra* note 20, at 720; Yu Xingzhong, *supra* note 107, at 36-37.

285. Keller, *supra* note 20, at 721.

extent that there is any truth in the PRC's insistence that its legal system is, or ever has been, a meaningfully socialist one, despite the ravages that it suffered under Mao and its partial Westernization since 1978, the purportedly socialist theoretical foundation of that system merely reinforces one of the most central tenets of the Confucian essence of the Chinese legal tradition, according to which law is merely a source of political power with no inherent moral significance.²⁸⁶ The idea that the positive law (*lex*), if not law in general (*jus*), is inherently instrumentalist, is such a core component of socialist legal theory that the same reinforcing relationship would hold true whether the socialist legal theory underpinning the PRC's current legal system were the Stalinist version imported by the Chinese Communists in the 1950s but ultimately orphaned by Mao, or some post-1978, specifically Chinese variant developed to support the PRC's more recent economic modernization efforts.

Against this cultural and theoretical backdrop, the relative ineffectiveness of Western-style environmental laws in the PRC—from both compliance and enforcement perspectives—should come as no surprise. For more than 2,000 years, the Confucian essence of the Chinese legal tradition has marginalized law as a means of maintaining social and political order, and thus as a means of implementing public policies, which is one of its principal functions in the West.²⁸⁷ Socialist legal theory—to the extent that it plays any meaningful role as part of the ideational foundation of the PRC's current legal system—reinforces this Confucian cultural phenomenon by positing law as a mere instrument of political power, rather than as an inherently moral force.

The results of recent social science survey research on the perceived effectiveness of environmental law enforcement in the PRC implicitly underscore this point. In 2000, researchers concerned about an environmental law “enforcement gap” in the

286. *Cf. supra* note 100 and accompanying text (explaining *fa*'s lack of moral validity in the Confucian legal tradition).

287. *Cf. BELTON, supra* note 243, at 9 (“A government bound by law [in accordance with the Western rule of law concept] must act through pre-written laws in executing its decisions and change laws through established legislative means. . . . Binding the government to rule *by* law is the sine qua non of the rule of law.”).

PRC surveyed local environmental enforcement officials in three cities, deemed to be broadly representative of urban China, in order to assess the relative influence of certain factors on the officials' perceptions of the effectiveness of environmental law enforcement in their jurisdictions, and to identify any geographical variation in these patterns of influence.²⁸⁸ The researchers used the perceptions of these officials as reasonably reliable proxies for the effectiveness of environmental law enforcement per se,²⁸⁹ which they conceptualized in terms that seemed to presume noncompliance in the absence of enforcement.²⁹⁰ Of the five factors analyzed, the officials' beliefs in the legitimacy of the policies expressed through environmental laws was the only one that had a significant positive relationship to the officials' perceptions of the effectiveness of environmental law enforcement in all three cities, with relatively little variation across jurisdictions.²⁹¹ This result led the researchers to conclude that environmental officials in the PRC should be hired and

288. See Carlos Wing-hung Lo, Gerald E. Fryxell & Wilson Wai-ho Wong, *Effective Regulations with Little Effect? The Antecedents of the Perceptions of Environmental Officials on Enforcement Effectiveness in China*, 38 ENVTL. MGMT. 388, 389-90, 394 (2006) [hereinafter Lo et al.]. The officials questioned were officials of the local EPBs. *Id.* at 394. For a summary of the role of local EPBs in the PRC's environmental law and policy regime, see *supra* notes 53-54 and accompanying text.

289. See Lo et al., *supra* note 288, at 390, 395.

290. *Cf. id.* at 390, 391 (defining "enforcement effectiveness" in terms of "closing the enforcement gap" by "securing compliance," and defining "enforcement gap" as a gap in compliance, not in enforcement). This apparent presumption is significant in the Chinese context given the Confucian conception of law as inherently lacking in moral force. *Cf. supra* note 100 and accompanying text (explaining *fa's* lack of moral validity in the Confucian legal tradition).

291. See Lo et al., *supra* note 288, at 399, 402-03. The researchers had hypothesized that the relationship between these variables would be positive, and that there would be a positive relationship between the enforcement officials' perceptions of the effectiveness of environmental law enforcement in their jurisdictions and the officials' environmental values, perceptions of sufficient organizational capacity, perceptions of support from other societal organizations, and perceptions of support from local and regional governmental departments, and that the relationships between these factors and the officials' perceptions of the legitimacy of the policies expressed through environmental laws, on the one hand, and the officials' perceptions of the effectiveness of environmental law enforcement in their jurisdictions, on the other hand, would vary by location. *See id.* at 391-94.

trained so as to ensure that they believe in the legitimacy of their work.²⁹² It also implies, however, that the extent to which enforcement officials consider the policies expressed through the PRC's environmental laws to be legitimate is more important than the fact that those policies are expressed through law per se in determining the extent to which they are likely to be enforced. This effect is precisely what one would expect in a society steeped for millennia in an essentially Confucian legal tradition, in which law per se has no inherent moral significance.²⁹³

IV. TOWARD A CHINESE ENVIRONMENTAL LAW AND POLICY REGIME WITH MORE CHINESE CHARACTERISTICS

The Chinese people have every reason to be proud of their ancient civilization.²⁹⁴ Even Mao Zedong, whose goal in founding the PRC was not merely to create a free and prosperous China, but "to change a China which has been ignorant and backward under the rule of the old culture into a China that will be enlightened and progressive under the rule of a new culture," acknowledged China's ancient cultural splendor, and argued that the success of his transformational project depended on the absorption into the new culture of certain features of the old.²⁹⁵ Yet for more than a century, in a radical departure from millennia of past practice,²⁹⁶ China has looked to the West for

292. *See id.* at 402-04.

293. *Cf. supra* note 100 and accompanying text (explaining *fa*'s lack of moral validity in the Confucian legal tradition).

294. *Cf. PRC CONST.*, *supra* note 5, pmb., para. 1 (1982) ("China is one of the countries with the longest histories in the world. The people of all nationalities in China have jointly created a splendid culture . . .").

295. MAO TSE-TUNG ON NEW DEMOCRACY, *supra* note 181, at 3, 81-82.

296. *Cf. CONFUCIUS*, *supra* note 80, at bk. VII, ¶ 1 (quoting Confucius as saying, "I transmit but do not innovate; I am . . . devoted to antiquity."); Chiang Kai-shek, *Conclusion* to SUN YAT-SEN, *SAN MIN CHU I: THE THREE PRINCIPLES OF THE PEOPLE WITH TWO SUPPLEMENTARY CHAPTERS* BY CHIANG KAI-SHEK, 318, 324-29 (Frank W. Price trans., Comm'n for the Compilation of the History of the Kuomintang ed., n.d.) (describing in detail how the goal of Sun Yat-sen's plans for a *Min Sheng* ("People's Livelihood") type of social reconstruction resembles the ancient Confucian vision of a "Great Commonwealth"); SUN YAT-SEN, *supra* note 118, at 37-41, 151, 184 (arguing that the Chinese people must recover their ancient morality if they are to restore their international standing, and equating

models of its own future, with mixed results.²⁹⁷ In recent decades, the Chinese have made no secret of their eagerness to borrow from Western environmental laws.²⁹⁸ The result illustrates the pitfalls of a derivative approach.²⁹⁹

One strategy for improving the effectiveness of the PRC's environmental law and policy regime would be to transform the PRC's legal culture along Western lines so as to make it more supportive of the PRC's nominally Chinese but heavily law-based, essentially Western approach to mitigating the negative environmental impacts of China's rapid industrialization. The barriers to the success of this strategy would be formidable, however. As cultural phenomena, legal traditions are enduring by definition.³⁰⁰ Cultures "resist manipulation," as one social scientist has observed, because "people defend their assumptions,"³⁰¹ and pass them on to the next generation of their social group as constitutive elements of the group's identity.³⁰² Transforming the Confucian essence of the Chinese legal tradition, which continues to roll through the millennia like a juggernaut despite more than a century of fitful efforts to

the goal of his *Min Sheng* ("People's Livelihood") Principle with Confucius's hope of a "great commonwealth.").

297. See FAIRBANK, REISCHAUER & CRAIG, *supra* note 110, at 315-20; KENT, *supra* note 113, at 26-29, 34, 64-65, 168-69, 360, 374-75; PEERENBOOM, *supra* note 53, at 43; REINSCH, *supra* note 115, at 42, 231; SHARMAN, *supra* note 152, at 218-19; SUN YAT-SEN, *supra* note 118, at 46, 108-09, 136; Keller, *supra* note 20, at 712.

298. See Standaert 07/20/11, *supra* note 22. Cf. Standaert 01/18/12, *supra* note 47 (describing the PRC's use of foreign models in its efforts to design pilot carbon trading systems for several provinces and municipalities).

299. Cf. SHARMAN, *supra* note 152, at 343, 355-57 (arguing that China's efforts to adapt to the outside world by imitating the West leaves "China's individual genius . . . thwarted of its own expression," as illustrated by Sun Yat-sen's disregard for the fundamentally family-based structure of Chinese society in his plan for a Chinese republic.).

300. Cf. Gerring & Barresi, *supra* note 58, at 252 (identifying endurance as an ideal-type attribute of the culture concept as revealed by the ordinary social science usage of the term).

301. SAMUEL H. BARNES, POLITICS AND CULTURE 16 (1988).

302. Cf. Gerring & Barresi, *supra* note 58, at 249, 255 (identifying culture's "learned" and constitutive qualities as ideal-type and minimal attributes of the culture concept, respectively, as revealed by the ordinary social science usage of the term).

Westernize China's legal institutions,³⁰³ would be especially fraught with challenges. It would be the work of generations, perhaps dozens of generations,³⁰⁴ if it could be done at all, as Mao's ghost might attest.³⁰⁵ Given the severity and pervasiveness of the PRC's environmental crisis,³⁰⁶ as well as the PRC's newfound status as the world's largest emitter of carbon dioxide,³⁰⁷ the most important anthropogenic greenhouse gas,³⁰⁸ neither China nor the world has the time to wait.

A more viable strategy would seek to make the PRC's environmental law and policy regime more effective by aligning it more closely with the Confucian essence of the Chinese legal tradition.³⁰⁹ At least three strategic corrections to the current trajectory of that regime would seem to be in order. First, the PRC's environmental law and policy regime probably would be more effective if it relied on law as little as possible as a means of expressing environmental policies, which probably means relying on it much less than is the case now. Law is merely one way of expressing public policies.³¹⁰ Political practice is another.³¹¹ It

303. See Keller, *supra* note 20, at 714 ("There is little overt evidence of a direct link between China's imperial legal order and the one more recently established under the People's Republic of China," except for a few conceptual and organizational terms embedded in PRC legislation, but arguing that "the influence of China's once dominant Confucian ethos is readily apparent in the variant strains of modern Chinese legal culture.").

304. Cf. SHARMAN, *supra* note 152, at 370-71 (arguing that the creation of an ethic of democracy in China would be a multi-generational task).

305. Cf. *supra* notes 181, 187-201, 211-17 and accompanying text (describing Mao's ultimately unsuccessful efforts to rid Chinese culture of Confucianism, and its resurgence even at an official level in recent years).

306. Cf. *supra* notes 1-11 and accompanying text (describing the PRC's environmental crisis).

307. See Press Release, PBL Neth. Evtl. Assessment Agency, Chinese CO₂ Emissions in Perspective (June 22, 2007), available at <http://www.pbl.nl/en/news/pressreleases/2007/20070622ChineseCO2emissionsinperspective.html>.

308. Cf. WEART, *supra* note 16, at 2, 26-30, 114, 126-29 (comparing the current and potential future contributions to global warming of anthropogenic carbon dioxide and other anthropogenic greenhouse gases).

309. Cf. Yu Xingzhong, *supra* note 107, at 34 (noting that as a legal adviser to the Guomindang Ministry of Justice in the twilight of the Republic Roscoe Pound argued that the Chinese should seek Chinese solutions to Chinese problems instead of adopting Western legal principles).

310. See DAVID EASTON, *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* 130-31 (1953).

has become clear that the PRC's national five-year plans—as well as the larger complex of related shorter- and longer-term national and local planning and related policy documents of which those five-year plans are a part—can be much more effective than law in achieving ambitious environmental policy goals.³¹² Although the national five-year plans are ratified by the NPC,³¹³ they are essentially political documents drafted by Central Government bureaucrats under the supervision of the CPC to provide a “vision and guideline” (*guihua*) for economic and social development practice at all administrative levels of the State, and increasingly include a host of environmental policy goals.³¹⁴ Law undoubtedly has an important role to play in the PRC's future efforts to mitigate the negative environmental impacts of its rapid industrialization, but the Confucian attitudes toward the role of law in society and the polity around which the Chinese legal tradition has revolved for more than 2,000 years strongly suggest that environmental law would be more effective in the PRC if

311. *See id.* at 131.

312. Cf. Michael Standaert, *Energy: Chinese Provinces Restrict Electricity Use, Raise Rates to Meet Energy Intensity Goals*, 33 INT'L ENV'T REP. 941 (2010) (describing the extraordinary efforts of many provinces to meet the energy intensity goals in the PRC's Eleventh Five-Year Plan (2006-10) in the final months of the planning period). *See generally* JOSEPH CASEY & KATHERINE KOLESKI, U.S.-CHINA ECONOMIC & SECURITY REVIEW COMMISSION, BACKGROUNDER: CHINA'S 12TH FIVE-YEAR PLAN 2, 5-7 (2011), available at http://origin.www.uscc.gov/sites/default/files/Research/12th-FiveYearPlan_062811.pdf (describing the powerful political incentives for local government officials to achieve the goals of the national five-year plans, noting the use of additional incentives for local officials to achieve the environmental and energy policy goals in those plans, and noting elements of the complex of government planning and related policy documents of which the plans are a part).

313. *See* PRC CONST., *supra* note 5, art. 62(9) (1982).

314. *See, e.g.*, CASEY & KOLESKI, *supra* note 312, at 1-3, 11, app. I, app. II at 16-17, apps. III-IV. Since the Eleventh Five-Year Plan (2006-10), the Chinese authorities have used the term *guihua* (*kuiehua*) -- literally "plan" or "planning," but connoting "vision and guideline," "program," or "layout" -- instead of the term *jihua* (*chihua*) -- merely "plan" or "planning" -- to refer to these documents, which signifies a shift in focus from detailed central planning and quantitative economic indicators to a more market-oriented approach, broad principles and development goals, and a range of quality of life factors, including environmental ones. *See* C. Cindy Fan, *China's Eleventh Five-Year Plan (2006-2010): From "Getting Rich First" to "Common Prosperity,"* 47 EURASIAN GEOGRAPHY & ECON. 708, 717-18 (2006).

there were much less of it than is the norm in the West, which probably means much less of it than there is now.

Second, the PRC's environmental law and policy regime probably would be more effective if its laws focused more than they do now on policing the behavior of state bureaucrats, and less on regulating the activities of private parties and their quasi-private analogs, such as state-owned enterprises. In their heightened concern for punishing state bureaucrats for purely administrative transgressions, the PRC's environmental laws already focus disproportionately on policing official behavior by Western standards.³¹⁵ Moreover, except for the provisions that create or elaborate on private judicial or administrative causes of action for injunctive relief or to recover compensatory damages for environmental injuries,³¹⁶ the PRC's environmental statutes at least superficially appear to follow the traditional Chinese pattern in that the private or quasi-private activities with which they are concerned are limited to those that impinge on state interests—in this case, the State's interests in achieving or maintaining a desired level of environmental quality and in preserving the social stability that presumably flows from doing so.³¹⁷ Just beneath the surface of these statutes, however, lies a welter of Western-style policy design principles and implementation strategies.³¹⁸ The effect is to enmesh private parties and their quasi-private analogs in an intricate, Western-style web of substantive and procedural requirements that in the context of Western legal traditions—in which law is an inherently moral force that plays a principal role in maintaining social and

315. See *supra* notes 230-34 and accompanying text (explaining the provisions of the PRC's environmental statutes and Administrative Punishments Law aimed at punishing state bureaucrats for purely administrative transgressions).

316. See, e.g., PRC Water Pollution Law, *supra* note 29, arts. 85-86; PRC Solid Waste Law, *supra* note 30, art. 84; PRC Atmospheric Pollution Law, *supra* note 28, art. 62; PRC Noise Pollution Law, *supra* note 31, art. 61. Cf. PRC Marine Env'tl. Prot. Law, *supra* note 32, art. 90, para. 1 (requiring anyone causing pollution damage to the marine environment to remove the pollution and provide compensation for the losses).

317. Cf. *supra* notes 1-11 and accompanying text (describing the PRC's environmental crisis, including its socially destabilizing effects).

318. See *supra* notes 34-46 and accompanying text (highlighting some of the Western-style policy design principles and implementation strategies around which the PRC's environmental laws revolve).

political order³¹⁹—would be merely one of the many legal costs of doing business in a modern society, but in the context of the Confucian essence of the Chinese legal tradition is a prescription for noncompliance.³²⁰ The PRC's environmental law and policy regime probably would be more effective if its laws applied to private parties and their quasi-private analogs only indirectly through the agency of state bureaucrats to the maximum extent possible given the laws' policy goals, which probably means to a much greater extent than is the case now. In accordance with millennia of Chinese practice inspired by the Confucian essence of the Chinese legal tradition, the PRC's environmental laws would look primarily to the bureaucracy as the human instrumentality for achieving their goals.³²¹

Third, the PRC's environmental law and policy regime probably would be more effective if its laws could be applied more flexibly in ways designed to accommodate—or even to reinforce—certain types of locally valued social relationships in which the private and quasi-private enterprises to which those laws apply are embedded. One of the hallmarks of Western environmental laws is the nearly universal equality with which their requirements are applied. Western environmental statutes and regulations can be unequal in their formulation, especially where structurally fragmented law- and policy-making systems—like that of the United States—offer numerous points of access for organized interests seeking to influence law and policy outcomes.³²² The result is often a host of statutory or regulatory

319. Cf. BELTON, *supra* note 243, at 5-6, 8-9, 10-11 (emphasizing that "[p]rotection from one's fellow citizens – or law and order, as we would say today – . . . is central to the popular understanding of the rule of law," an historically Western cultural and institutional phenomenon, and explaining the history and implications of the concept of a State bound by law as a rule of law goal); REISCHAUER & FAIRBANK, *supra* note 77, at 84 ("Western law has been conceived of as a human embodiment of some higher order of God or nature . . .").

320. See *supra* notes 69-70 and accompanying text (emphasizing that law per se almost never has played more than a subordinate role in maintaining social and political order in China).

321. See *supra* notes 133-34 and accompanying text (explaining the imperial *fa*'s preoccupation with policing the behavior of state bureaucrats).

322. See generally KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 289-357 (1986) (exploring the many ways

exclusions or other special legal considerations for politically skillful economic interests,³²³ and on rare occasions for individual facilities.³²⁴ Moreover, in Western federations and confederations, national environmental laws also may give regional governments substantial discretion either in setting environmental quality standards or in choosing the best means to achieve them, which may include treating different subregions differently, including on economic grounds, but typically within legal limits set at the national level.³²⁵ Yet despite these structurally conditioned anomalies, Western environmental laws generally impose the same substantive and procedural requirements on all regulated parties that fall within broadly

in which organized interests try to influence policy-making in the legislative and executive branches of the U.S. Federal Government).

323. *See, e.g.*, Comprehensive Environmental Response, Compensation and Liability Act § 101(14), 42 U.S.C. § 9601(14) (2006) (excluding from the statutory definition of "hazardous substance" petroleum and certain petroleum products, natural gas in gaseous or liquid form, and synthetic gas that can be used for fuel); 40 C.F.R. §§ 261.4(b)(2)-(5), (b)(7) (2012) (excluding from the statutory definition of "hazardous waste" in regulations implementing the Resource Conservation and Recovery Act certain agricultural; mining; coal and other fossil fuel combustion; crude oil, natural gas, and geothermal energy exploration, development, or production; and ore and mineral extraction, beneficiation, and processing wastes).

324. *Cf.* 40 C.F.R. §§ 60.43(a)(2), (e) (2011) (permitting a particular fossil-fuel-fired steam generating facility in the State of Illinois to comply with an alternative to the performance standard for sulfur dioxide applicable to other fossil-fuel-fired steam generating facilities under the Clean Air Act).

325. *See, e.g.*, Federal Water Pollution Control Act § 303(c), 33 U.S.C. § 1313(c) (2006) (requiring States to review periodically and to revise as appropriate—or at the States' discretion to adopt as new—state ambient water quality standards in accordance with the uses for which the States have designated the relevant waters, and within certain federally imposed constraints); Clean Air Act §§ 107(d)-(e), 161-63, 164(a)-(b), 166, 42 U.S.C. §§ 7407(d)-(e), 7471-73, 7474(a)-(b), 7476 (2006) (authorizing States to designate or to redesignate certain air quality control regions so as to permit new emissions of certain pollutants to different degrees within different regions under the statutory provisions requiring the prevention of significant deterioration of air quality within such regions, within certainly federally imposed constraints); Council Directive 2000/60, Framework for Community Action in the Field of Water Policy, arts. 4(5), 5(1), 2000 O.J. (L 327) 1, 14-16 (EC) (as amended) (authorizing Member States to pursue environmental objectives less stringent than otherwise would be required for specific bodies of water when they are so heavily affected by human activity, as determined by the Member States, or their natural condition is such that achieving the objectives that otherwise would be required would be infeasible or disproportionately expensive, under certain Community-imposed conditions).

defined categories distinguished by the inherent attributes of their members. The U.S. Federal Water Pollution Control Act, for example, requires nearly all point source discharges of certain pollutants to certain waters to comply with performance standards based on the "best available technology economically achievable" for the relevant point source category.³²⁶ The regulations implementing the statute generally express these performance standards in terms of numerical concentrations that apply uniformly to discharges from all point sources in discrete industrial sectors, such as steam electric power generators, with some variation depending on the size of the facility.³²⁷ Similarly, the European Community's Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH) Regulation generally requires any manufacturer or importer of a chemical substance in quantities of one ton or more per year to register that substance with the European Chemicals Agency.³²⁸ The nearly universal equality with which substantive and procedural requirements such as these are applied in the West is an institutional expression of the principle of equality before the law, which is an integral part of all Western legal traditions.³²⁹

Notwithstanding the PRC's embrace of a host of Western-style policy design principles and implementation strategies as mainstays of its environmental laws,³³⁰ the principle of equality before the law of which the nearly universal applicability of these strategies in the West is an expression, and on which their effectiveness depends, is foreign to the Chinese legal tradition.³³¹

326. See Federal Water Pollution Control Act § 301(b)(2)(A)(i), 33 U.S.C. § 1311(b)(2)(A)(i) (2006). Cf. *id.* §§ 502(12), (14), 33 U.S.C. §§ 1362(12), (14) (defining "discharge of a pollutant" and "point source").

327. See, e.g., 40 C.F.R. §§ 423.13(a)-(b)(1), (c)(1), (d)(1), (e), (g) (2012).

328. See Council Regulation 1907/2006, Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH), arts. 3(1)-(2), (9), (11), (18), 6(1), 2006 O.J. (L 396) 1, 53-54, 55, 57, 62 (EC).

329. Cf. BELTON, *supra* note 243, at 9-10 (explaining the principle of equality before the law as an essential element of the Western rule of law concept).

330. Cf. *supra* notes 34-46 and accompanying text (highlighting some of the Western-style policy design principles and implementation strategies around which the PRC's environmental laws revolve).

331. Cf., e.g., BODDE & MORRIS, *supra* note 69, at 21, 29 (attributing the Confucian antipathy to law in part to its obliteration of Confucian social relationships through the imposition of uniform behavioral norms, and

In accordance with the Confucian essence of that tradition, which rests in part on the Mencian conception of society as naturally and harmoniously stratified,³³² Chinese law always has been applied unequally in ways that reflect prevailing social norms.³³³ The imperial *fa*, for example, treated different persons differently—whether they were defendants, would-be defendants, or convicted persons—depending on their status within the Confucian social hierarchy, both in the abstract and relative to any injured parties.³³⁴ Mao and his cadres substituted class status for Confucian social rank as the relevant legal touchstone, but retained the Confucian principle of inequality before the law as a central feature of the PRC's rudimentary socialist legal system.³³⁵ Deng Xiaoping professed to make equality before the law one of the central goals of the legal reforms that he championed after Mao's death.³³⁶ His emphasis was on eliminating the extralegal political and economic privileges enjoyed by certain CPC cadres by virtue of their party status, however, which he blamed for causing great suffering among the masses during the Cultural Revolution and for wounding the CPC's prestige, not on embracing the Western cultural conception of equality before the law *per se*.³³⁷ More importantly, the belief that the application of the positive law should be tempered by

emphasizing that the most basic distinction between the Legalist *fa* and the Confucian *li* is the universalism of the former and the social and circumstantial particularism of the latter).

332. Cf. *supra* note 81-82 and accompanying text (introducing Mencius and summarizing his most important contributions to Confucianism).

333. These norms seem to have been as enduring as Confucianism itself, despite the professed desires of would-be Westernizers to nibble around their edges. Cf., e.g., SUN YAT-SEN, *supra* note 118, at 78-82 (arguing that there is no such thing as natural human equality, but that an artificial equality in political status could be and should be created).

334. *Supra* note 141 and accompanying text.

335. See Leng, *supra* note 193, at 363-65; Carlos Wing-Hung Lo, *supra* note 244, at 473, 473-74 n.14.

336. See, e.g., Carlos W. H. Lo, *Deng Xiaoping's Ideas on Law: China on the Threshold of a Legal Order*, 32 ASIAN SURV. 649, 653-54, 656 (1992).

337. See Deng Xiaoping, *On the Reform of the System of Party and State Leadership (August 18, 1980)*, in SELECTED WORKS OF DENG XIAOPING (1975-1982) 302, 309, 315-16 (Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Cent. Comm. of the Communist Party of China, 1984).

extralegal factors such as the relationship and circumstances of the parties and widely shared conceptions of justice remains nearly as widespread in the PRC as it was in the Empire.³³⁸

This enduring Chinese cultural preference for flexible legal norms that vary in accordance with the social relationships and circumstances of the parties and reflect widely shared social norms could be used to strengthen the PRC's environmental law and policy regime.³³⁹ The most basic conflict of relevance to the relative ineffectiveness of environmental law in the PRC is the conflict perceived to exist between short-term economic development imperatives and longer term environmental quality goals.³⁴⁰ Although the political pressures fueling this conflict come from both the highest and lowest reaches of governance in the PRC, its geographical locus is primarily local.³⁴¹ One way of using law to reconcile this conflict in a manner consistent with the Confucian essence of the Chinese legal tradition would be to make the PRC's environmental laws more pervasively but precisely flexible in ways designed to accommodate—or even to reinforce—economically relevant social relationships that are valued throughout the local community. For example, the PRC's air and water pollution control statutes currently authorize certain local governments to establish their own local performance standards for sources of air and water pollution, but only when those standards would be supplementary to or more stringent than the national standards established by the Central Government.³⁴² These statutes probably would be viewed as

338. See Keller, *supra* note 20, at 715.

339. *But cf. id.* at 751 (arguing that the social context in which the laws are applied is not likely to be as useful in stabilizing legal practice in China as it once was because economic development and exposure to foreign influences have undermined the homogeneity of Chinese society).

340. See *supra* notes 52-56 and accompanying text. The sustainable development concept is essentially an effort to demonstrate that this conflict is more perceived than real. *Cf.* WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 43-46 (1987) (defining and elaborating on the sustainable development concept).

341. See *supra* notes 52-56 and accompanying text.

342. See PRC Water Pollution Law, *supra* note 29, art. 13, paras. 1-2; PRC Atmospheric Pollution Law, *supra* note 28, art. 7, paras. 1-2. *Cf.* PRC Marine Evtl. Prot. Law, *supra* note 32, art. 10 (referring to "national and local water pollutant discharge standards"). See generally PRC Evtl. Prot. Law, *supra* note

more legitimate locally—and thus probably would be more effective nationwide—if they authorized local governments to relax the national performance standards with respect to industrial enterprises that play an especially important role in the local economy, especially by providing large numbers of local people with a decent living under decent working conditions, while imposing more stringent standards on other enterprises, such as those that employ mostly migrant workers from elsewhere in China,³⁴³ albeit within the aggregate constraints implied by the applicable ambient environmental quality standards. This arrangement would sacrifice the equality before the law that Western legal traditions prize so highly, but which is foreign to the Confucian essence of the Chinese legal tradition, in order to accommodate, if not to reinforce, certain widely valued local social relationships that, if ignored, can undermine the local effectiveness of environmental laws through both widespread noncompliance and spotty enforcement.³⁴⁴

These preliminary suggestions for strategic corrections to the current trajectory of the PRC's environmental law and policy regime hardly exhaust the possibilities. Yet each of them, if implemented, would be an important step toward aligning that regime more closely with the Confucian essence of the Chinese legal tradition. Much like the negative *yin* and the positive *yang*, China's legal institutions and its legal culture must be complementary if they are to function harmoniously as the two halves of a coherent whole.³⁴⁵ The nominally Chinese but heavily

21, art. 10, (authorizing certain local governments to establish "local standards for the discharge of pollutants" that supplement or are more stringent than the national standards established by the Central Government).

343. See generally Andrew Jacobs, *Chinese Factories Now Compete to Woo Laborers*, N.Y. TIMES, July 12, 2010, <http://www.nytimes.com/2010/07/13/world/asia/13factory.html> (exploring the complexities of the migrant factory labor market in the PRC).

344. Cf. *supra* notes 52-56 and accompanying text (explaining how local economic development imperatives impair the effectiveness of the PRC's environmental laws).

345. According to one of the ancient Chinese cosmologies on which imperial Confucianism is based, the negative *yin* and the positive *yang* are the two complementary forces that control the universe. See, e.g., SMITH & WENG, *supra* note 85, at 79-80. For a summary of the origin and content of imperial Confucianism, see *supra* notes 83-98 and accompanying text.

law-based, essentially Western approach to mitigating the negative environmental impacts of industrialization that the PRC has pursued in recent decades, on the one hand, and the ancient Confucian essence of the Chinese legal tradition, on the other, hardly could be less complementary. By transforming the former so as to align it with the latter, the PRC could harmonize its efforts to solve its environmental crisis, which would make those efforts much more effective. Given the depth and breadth of that crisis, as well as the PRC's growing contribution to the exacerbation of global environmental challenges such as anthropogenic climate change, neither China nor the world has any time to lose.