

PROPERTY RIGHTS, LABOR RIGHTS AND
DEMOCRATIZATION: LESSONS FROM CHINA
AND EXPERIMENTAL AUTHORITARIANS

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This Article argues that a fundamental paradox exists in efforts to promote democratization abroad that emphasize property rights to the exclusion of labor rights. Such a paradox emerges from the still-tenuous connection between property rights and foreign legal development alongside the renewed emphasis on independent unionization in democratization theory. The Article explores the paradox in action through the willingness of modern authoritarian regimes to experiment with rule of law reforms, and creatively so in the realm of property rights, while being uniformly repressive of associative labor rights. In this vein, the Article further details this paradox through the example of today's most successful experimental authoritarian, China's Chinese Communist Party. The CCP's approach to property rights reform is but one area where it has used formal legal regulation to improve its governance capacity and legitimacy. At the same time, the CCP has developed an expansive state-dominated corporatist labor regime while engaging in the unyielding repression of private labor organizing. The Article then outlines the implications of this promotion paradox and the authoritarian experience for U.S. influence on labor rights abroad, emphasizing the troubling parallels between the emphasis on employment law and employer self-regulation favored in authoritarian regimes and current trends in U.S. labor law. Beyond questioning dominant assumptions about the role of law in democracy promotion abroad, these parallels provocatively provide a new vantage point from which to consider the classic tension between property rights and labor rights in U.S. labor law doctrine.

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I. INTRODUCTION

On June 7, 2012, Chinese labor activist Li Wangyang was found dead, more than twenty years after his imprisonment following the Tiananmen protests in 1989, and shortly after giving a controversial interview on his subsequent treatment.¹ Li had incurred the wrath of the Chinese Communist Party (CCP) during the Tiananmen protests for his leadership role in the Shaoyang Autonomous Workers Federation, an illegal independent labor union organization. He was one of many labor activists who were singled out by the CCP for the harshest punishments during its violent crackdown in the wake of the Tiananmen Movement, which included imprisonment, torture, and in some cases execution. For labor activists such as Li, it is all too clear that independent labor organizing was and continues to be the most aggressively repressed form of collective action in modern China. That the putatively communist CCP has long embraced its own state-led union, the All-China Federation of Trade Unions (ACFTU), has masked the fact that independent trade unions have been given no quarter under CCP rule, even as China has privatized much of its economy.

1. See Bo Gu, *Tiananmen Activist Found Dead Under Suspicious Circumstances*, NBC NEWS (June 7, 2012, 1:16 PM), http://behindthewall.nbcnews.com/_news/2012/06/07/12106858-tiananmen-activist-found-dead-under-suspicious-circumstances. See generally Jiang Kelin, *Gonghui Yu Dang-Guojia de Chongtu* [Conflicts between the Trade Unions and the Party-State], 8 XIANG-GANG SHEHUI KEXUE [Hong Kong Journal of Social Sciences] 135 (1989).

Consider now that China has been the object of a range of U.S.-led democracy and rule of law promotion efforts since Deng Xiaoping inaugurated China's project of managed liberalization in 1978. One of the most consistent themes of these efforts has been formalizing and strengthening property rights in China, especially in land. Touted as a central component of economic development and a motor force of democratization, property rights reform has been seen as engendering China's future liberalization and, thus, an insistent aspect of such U.S. efforts. Though private property has traditionally been anathema to the CCP's socialist ideology, one key to the CCP's continued monopoly on political power while managing China's massive social and economic transformation has been its experimental approach to property rights reforms. This experimentation has tested liberal assumptions about the social role and political externalities of property rights, as well as their nature as proxies for security and predictability.

The openness of the CCP to property rights experimentation and its ruthless repression of independent union organization thus present a challenge to the traditional focus on property rights in U.S. legal reform efforts in China—a focus now also shared by the World Bank and many development theories. Furthermore, though China is perhaps the most successful example of authoritarian resilience in the modern era, its approach to property and labor rights is neither unique historically nor in the contemporary era. Almost all modern authoritarian regimes show an interest in property rights reform while, simultaneously, unequivocally and often violently repressing independent trade unions. Herein, the promotion paradox emerges in full bloom. Traditionally a great deal of emphasis has been placed on property rights as a medium for undermining authoritarian regimes even though this has proven largely ineffective, if not counterproductive, for inducing democratization. In contrast, a great deal of international activity by the United States actually undermines private unionization and exhibits an indifferent, if not discouraging, attitude towards workplace rights in general—the same rights that strike directly at the core of authoritarian regimes' domination of civil society.

As authoritarian regimes like China increasingly recognize the many uses of formal legal regulation, this paradox is rearticulated in the consistent inability to find a place for

property rights in democratization theory, or even to establish strong links between property rights and economic growth as an indirect vector of democratic transition. Certainly there has been no shortage of efforts to establish such links, and the Chinese authoritarian experience has been a prime empirical example that many property rights proponents have recurrently tried to explain away.² In contrast, much recent work in democratization theory has focused on independent unionization as a key factor in democratic transitions, not because of unions' economic role as collective bargainers per se, but because of unions' historically deep connection to civil society development and their ability to help organize social movement activity.³ This research reflects what modern authoritarians like the CCP have demonstrated in practice through their prioritized repression of labor activists. And to be clear from the outset, such a democratizing dynamic is independent of the tangled and contested issues of profitability and productivity that have dominated contemporary U.S. pro- and anti-union scholarship.⁴

Explaining this paradox is in part an instructive example of the useful and variable ways in which foreign legal experience can promote examination of our own current presumptions about legal development and the relationship of particular legal forms to substantive democracy. Analyzing the authoritarian experience with property and labor rights reveals not only that our attempts to influence foreign legal development are damaged by rigid preconceptions, but that this rigidity is a product of the degraded recognition of labor law's democratic

2. See *infra* Part II.B.

3. See *infra* Part II.C.

4. Compare, e.g., Barry T. Hirsch, *Unionization and Economic Performance: Evidence on Productivity, Profits, Investment, and Growth*, in *UNIONS AND RIGHT-TO-WORK LAWS: THE GLOBAL EVIDENCE OF THEIR IMPACT ON EMPLOYMENT* 35 (Fazil Mihlar ed., 1997) (providing a less optimistic summary of U.S. union performance), with Rosemary Batt & Theresa M. Welbourne, *Performance and Growth in Entrepreneurial Firms: Revisiting the Union-Performance Relationship*, in *MANAGING PEOPLE IN ENTREPRENEURIAL ORGANIZATIONS: LEARNING FROM THE MERGER OF ENTREPRENEURSHIP AND HUMAN RESOURCE MANAGEMENT* 147, 147 (Jerome A. Katz & Theresa M. Welbourne eds., 2002) (arguing for a large, positive union effect on the most dynamic of modern technology firms). These performance concerns, while not unimportant, simply re-emphasize the dominant de-democratization of debates on unionization explored later in the paper.

potential in the United States. The contemporary decline of labor law in the United States has been repeatedly linked to the doctrinal and political elevation of property rights over associative labor rights. Herein the most striking implication of the promotion paradox is one of domestic import: that many of the recent trends in labor regulation in the United States not only employ impoverished conceptions of labor law's democratic externalities, but they in many ways parallel the forms of regulation increasingly embraced by modern authoritarian regimes.

To wit, the CCP, in an attempt to manage and quell widespread labor unrest, has expanded its state-dominated corporatist union, which exists as a formal organ of the state and is tasked with administering state policy rather than representing workers' interests. At the same time, the CCP has emphasized the use of employment law protections and systems of monitored employer self-regulation in the workplace. In response to all but the most dramatic labor protests, the CCP has embraced an individualistic, contractarian view of the employment relationship in labor regulation and exhibited an affinity for procedural reforms in dispute resolution over the substantive empowerment of workers. Furthermore, the CCP has not been adverse to implementing unilateral changes in minimum wage laws or putting pressure on private employers to make wage increases. Summarily, the CCP's fear of independent unionization is not primarily economic and derived from concerns about competitiveness, but instead is primarily political and derived from concerns about losing its monopoly on political power and influence over civil society development.

It is thus striking that much recent U.S. labor law scholarship has felt reluctantly compelled by the decline of domestic unionization to turn to employment law and self-regulatory "new governance" approaches resonant with the CCP's anti-solidaristic vision of labor law.⁵ This is not meant to understate the comparative oppression of workers in China with those in

5. Note that this paper routinely employs the U.S. doctrinal distinctions between labor law and employment law. Here, in brief, labor law refers to the formation of unions and the regulation of collective bargaining, and employment law refers to the regulation of the relationship between individual employees and employers (of which employment discrimination is one common statutory adjunct).

the United States, but to highlight parallel structural changes that underscore trends of convergence rather than divergence in the regulation of labor in the United States and in authoritarian regimes like China.

Certainly such shifts reflect in part the growing political hostility towards unionization in the United States and popular cynicism about unionization's genuine relationship to democratic civil society. Indeed, the hostile environment in which U.S. unions operate has led to internal rigidification and a deep preoccupation with short-cycle electoral politics that has narrowed unions' temporal and social scope. Furthermore, globalization and its challenge to nation-state sovereignty have weakened the power of unions by increasing the transnational mobility of capital and concomitant downward pressures on labor's bargaining power.

Nevertheless, this linkage between our international and domestic labor law discourses transforms the promotion paradox from one of ineffectiveness in advocacy to one of deeply troubling self-reflection. This begs the question of whether we truly know the legal forms that lead to "good democracy" clearly enough to induce it abroad—and what in fact is specifically "democratic" about our contemporary forms of workplace regulation.

The lessons learned from the promotion paradox are thus two-fold. Internationally, we need to seriously reconsider the content and nature of our efforts to impact democratization abroad through legal reform, emphasizing associative labor rights⁶ over property rights. Domestically, the promotion paradox reveals a need for a renewed appreciation for the inherently democratic nature of associative labor rights. This renewal would challenge the current doctrinal elevation of property rights over labor rights, but more importantly would require reinvigorating in the United States exactly what the CCP fears most: a labor movement broadly conceived and engaged in civil society development beyond workplace bargaining. Such revitalization also promises to serve as the best basis to inspire those who are committed to the legacy of dedicated

6. Here again, associative labor rights that facilitate collective action, such as union bargaining, are distinguished from individual employment rights.

activists like Li Wangyang in China and other authoritarian regimes.

To substantiate and elucidate the observations and claims made above, this Article will proceed as follows. Part II will describe new studies on authoritarian resilience and their relationship to the renewed focus on unionization in democratization theory, alongside limited but intransigent efforts to link property rights to legal development. It will highlight how the disconnect between these disparate track records is shown clearly in the experimental attitude that many authoritarian regimes have taken towards the rule of law and formal legal regulation, and their starkly differential approach to property rights experimentation and labor rights repression. Part III will use the example of China's CCP to show how the authoritarian experience tests the limits of utilitarian understandings of property rights and their relationship to civil society. It will outline the CCP's strategic use of property rights to selectively co-opt key social classes in China while engaging in a legalized regime of land expropriation. It will also establish how the CCP's twin strategy of state corporatism and associative labor rights repression is based on its deep fear of independent trade unionism as a vector of democratization. It will end by outlining nascent signs that the gravity of labor unrest in China might now force the CCP to experiment with internal reforms approximating the function of independent unions. Part IV will demonstrate how the promotion paradox leads the United States to negatively affect the development of labor rights abroad by projecting a historical revisionism that mischaracterizes the legal history of the United States and the role of unions therein. It will then turn to examine the troubling consonances between current trends in workplace law in the United States and China that focus on forms of employment law and private self-regulation. The Article will ultimately argue that such consonance calls for a rejection of the elevation of property rights over associative rights in U.S. labor law doctrine and a broad reinvigoration of the social role of unions in U.S. civil society. The Article concludes in Part V by explicating how the promotion paradox and experimental authoritarians can serve as one example of the potential that foreign legal experience holds for self-examination and reform in U.S. law.

II. AUTHORITARIANS, DEMOCRATIZATION, AND THE RULE OF LAW

In the twentieth century, defining political regimes became an increasingly complex task. The easy distinction between monarchy and democracy in the nineteenth century gave way to a number of ideologies that drew on notions of democratic legitimacy but diverged significantly in the economic and political structures they promoted.⁷ The fascist movements of World War II and the rise of international communism rejected liberal norms of democracy while claiming their own truer commitment to democratic ideals.⁸ At this time, the salience of “totalitarian” and “authoritarian” came into play for describing regimes that were not feudal in nature but were governed through the absolute political authority of a limited group of individuals—from dictators to single political parties. These regimes even used formal elections to bolster their claims to political legitimacy.⁹ As such, concurrent with this diversification of democratic theories were attempts to distinguish different forms of modern democratic citizenship.¹⁰

As decolonization swept the mid-twentieth century globe, the notion of “democratization” became a central puzzle for development theorists.¹¹ In the 1970s, many Latin American countries began to formally democratize, and after the collapse of the Soviet Union in 1989, democratic regimes began to proliferate in Eastern Europe. This proliferation of democratic nations, often organized by scholars into “waves” of democratization, made it increasingly difficult to make broad claims as to the core character of democratic regimes.¹² Further, the bi-polar global order of the Cold War often made geo-political allegiance more important than formal institu-

7. *See generally* MICHAEL WALLER, *DEMOCRATIC CENTRALISM: AN HISTORICAL COMMENTARY* (1981).

8. *See generally* ROGER GRIFFIN, *THE NATURE OF FASCISM* (1991).

9. *See* Jennifer Gandhi & Ellen Lust-Okar, *Elections Under Authoritarianism*, 12 ANN. REV. POL. SCI. 403, 406 (2009).

10. *See generally* DAVID HELD, *MODELS OF DEMOCRACY* (3d ed. 2006); T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950); BRYAN S. TURNER, *CITIZENSHIP AND SOCIAL THEORY* (1993).

11. *See, e.g.*, PARTHA CHATTERJEE, *LINEAGES OF POLITICAL SOCIETY* 2–4 (2011).

12. *See generally* SAMUEL P. HUNTINGTON, *THE THIRD WAVE* 6–13 (1991).

tions for U.S. characterizations of whether a government was committed to democracy.¹³

In the contemporary era, this murkiness has continued to darken, as the popularization of terms such as “semi-authoritarian” or “illiberal democracy” has challenged the clear demarcation between democratic and authoritarian regimes.¹⁴ The decline of totalitarian regimes that enforce an all-encompassing ideological vision upon society has been significant. Instead, the bureaucratization and greater sophistication of authoritarian regimes has led to their granting of varying levels of civil and economic freedom to their citizens.¹⁵ Even after formally free elections, many democratic transitions have ended up in intentionally stalled states of development, held hostage to the consolidation of political power by a narrow stratum of social elites—what Joel Hellman calls “partial reform equilibrium.”¹⁶ After the relative euphoria of the post-Soviet wave of democratization, the increasing resilience of authoritarian regimes and the rise of authoritarian qualities in existing democracies have inspired a new cohort of scholars focused on understanding the internal dynamics of modern authoritarianism.¹⁷

However, these difficulties of typology have done little to dampen the enthusiasm of private and public actors in the United States engaged in what is commonly called “democracy

13. Often forgotten today, U.S. support of Chiang Kai-shek was the first modern example of this phenomenon. See generally Jedidiah Kroncke, *Roscoe Pound in China: A Lost Precedent for the Liabilities of American Legal Exceptionalism*, 38 *BROOK. J. INT’L L.* 77 (2012) (chronicling Roscoe Pound’s appointment of China’s main legal advisor before the Guomindang Party’s defeat by the Chinese Communist Party).

14. See MARINA OTTAWAY, *DEMOCRACY CHALLENGED* 3–10 (2003); FAREED ZAKARIA, *THE FUTURE OF FREEDOM* 17 (2003).

15. GUILLERMO A. O’DONNELL, *MODERNIZATION AND BUREAUCRATIC AUTHORITARIANISM* 51–53 (1979).

16. Andreas Schedler, *The Logic of Electoral Authoritarianism*, in *ELECTORAL AUTHORITARIANISM* 1, 3–6 (Andreas Schedler ed., 2006); Joel Hellman, *Winners Take All: The Politics of Partial Reform in Postcommunist Transitions*, 50 *WORLD POL.* 203, 204–05 (1998).

17. JASON BROWNLEE, *AUTHORITARIANISM IN AN AGE OF DEMOCRATIZATION* 14–15 (2007); JENNIFER GANDHI, *POLITICAL INSTITUTIONS UNDER DICTATORSHIP*, at xix (2008); STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM* 4–5 (2010).

promotion.”¹⁸ As democratic transitions have increased in number, the struggle to define the causal factors behind democratization has continued to both entrance and frustrate scholars and activists.¹⁹

Traditionally, mainstream democratization theorists emphasized the role of new capitalist middle classes in the rise of democratic regimes,²⁰ though others emphasized, often cynically, the strategic accommodation of working class movements.²¹ Material and cultural factors find differential favor among a wide-range of analysts, whose often conflicting research is routinely summarized as provocative but indeterminate.²² While regionalized models of democratic change have shown greater promise in recent years,²³ the inability to isolate specific causes of democratization has given rise to the general conclusion that outside intervention, the very presumption of democracy promotion, is inconclusive at best as a vector of democratization.²⁴ It is thus not surprising that overviews of democracy promotion within the academic field have been his-

18. CAN DEMOCRACY BE DESIGNED? 21, 304–05 (Sunil Bastian & Robin Luckham eds., 2003); DEMOCRACY ASSISTANCE 217–25 (Peter Burnell ed., 2000).

19. Adam Przeworski & Fernando Limongi, *Modernization: Theories and Facts*, 49 *WORLD POL.* 155, 158 (1997).

20. E.J. HOBBSAWM, *INDUSTRY AND EMPIRE: THE MAKING OF MODERN ENGLISH SOCIETY, VOL. II: 1750 TO THE PRESENT DAY* 102 (1968); CHARLES MORAZÉ, *THE TRIUMPH OF THE MIDDLE CLASSES* 204–08 (1966).

21. REINHARD BENDIX, *NATION BUILDING AND CITIZENSHIP* 74–79 (1977); E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 13–14 (1980).

22. Dirk Berg-Schlosser, *Introduction*, in *DEMOCRATIZATION: THE STATE OF THE ART* 1, 17–23 (Dirk Berg-Schlosser ed., 2004); JOHN T. ISHIYAMA, *COMPARATIVE POLITICS: PRINCIPLES OF DEMOCRACY AND DEMOCRATIZATION* 221–27 (2011).

23. See generally JON C. PEVEHOUSE, *DEMOCRACY FROM ABOVE* (2005); Sharun W. Mukand & Dani Rodrik, *In Search of the Holy Grail: Policy Convergence, Experimentation, and Economic Performance*, 95 *AM. ECON. REV.* 374 (2005).

24. Berg-Schlosser, *supra* note 22, at 23. This parallels the track record of rule of law and development reforms as well. See generally Jedidiah Kroncke, *Law and Development as Anti-Comparative Law*, 45 *VAND. J. TRANSNAT'L L.* 477, 544–45 (2012); Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 *CORNELL INT'L L.J.* 209, 209–10 (2011).

torically pessimistic,²⁵ and those produced by practitioners at best agnostic, if ever optimistic.²⁶

Instead, faith in democratization as an applied enterprise has been shown more often than not to replicate the ideological pre-commitments of its adherents and to be more amenable to the charisma of policy entrepreneurs than to the rigor of social science.²⁷ Some have pointed to the role of democracy promotion in weakening authoritarian regimes if not leading to democratization itself,²⁸ though others have emphasized that efforts should instead be placed solely on strengthening fledgling democracies during their post-transition phase.²⁹ Nonetheless, the murkiness of democracy promotion has done little to deaden the enthusiasm of its proponents,³⁰ even as it is matched by the cynicism of its critics.³¹

The repeated demonstration of contemporary democracy promotion as well-intentioned but ineffective exertion is in part due to the increasing sophistication of authoritarian regimes—a sophistication that has challenged our presumptions about what constitutes democracy, and specifically what role legal reform plays in sustaining or undermining these regimes. The embrace of specific legal institutions and practices by authoritarian regimes raises questions about their role in our

25. See, e.g., PETER BURNELL, PROMOTING DEMOCRACY ABROAD 306–07 (2011); EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA vii–ix (Abraham F. Lowenthal ed., 1991).

26. See, e.g., THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD 15–17 (1999).

27. See generally Gregg A. Brazinsky, *Policy Makers, Intellectuals, and Democracy Promotion in Twentieth-Century American Foreign Policy*, in THE DYNAMICS OF DEMOCRATIZATION 245, 263–64 (Nathan J. Brown ed., 2011) (detailing the relationship between policy makers and academics in the twentieth century).

28. INTERNATIONAL ACTORS, DEMOCRATIZATION AND THE RULE OF LAW 256–57 (Amichai Magen & Leonardo Morlino eds., 2009); James M. Scott & Carrie A. Steele, *Assisting Democrats or Resisting Dictators? The Nature and Impact of Democracy Support by the United States National Endowment for Democracy, 1990–99*, 12 DEMOCRATIZATION 439, 453–54 (2005).

29. José Antonio Cheibub & James Raymond Vreeland, *Economic Development and Democratization*, in THE DYNAMICS OF DEMOCRATIZATION 145, 169 (Nathan J. Brown ed., 2011).

30. See, e.g., EXPORTING DEMOCRACY: RHETORIC VS. REALITY 234–35 (Peter J. Schraeder ed., 2002).

31. See, e.g., WILLIAM I. ROBINSON, PROMOTING POLYARCHY 6 (1996) (arguing that the U.S. policy of promoting “democratic” regimes actually upholds the undemocratic status quo of Third World countries).

own democracy, and about the ever-present challenge of what constitutes “good democracy.”³²

A. *Modern Authoritarians and Negotiating the Rule of Law*

One of the popular ways to distinguish authoritarian from democratic regimes has been the invocation of the rule of law.³³ The specter of massive land expropriation under communism or the unchecked caprice of executions under various dictatorial regimes gives such a distinction instinctive weight. This instinct has been the basis of attempts to link democracy promotion with the promotion of the rule of law in authoritarian regimes. This instinct also forms the basis of U.S. support for supposedly virtuous authoritarians that promise rule of law reforms as future stewards of democratization.³⁴

Yet, the bureaucratization and resilience of modern authoritarian regimes have challenged this instinctive notion. On a rhetorical level, many authoritarian regimes have embraced the rule of law as it has become a relatively unchallenged global norm.³⁵ Many scholars have long noted that purely formal notions of the rule of law and notions of political obedience are compatible.³⁶ Others have noted the pre-democratic origins of rule of law ideals and their earlier deployment in

32. See JORGE NEF & BERND REITER, *THE DEMOCRATIC CHALLENGE* 66–67 (2009).

33. See C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 1, 1–2 (C. Neal Tate & Torbjörn Vallinder eds., 1995); see also, e.g., *STATE AND LAW IN EASTERN ASIA* 143 (Leslie Palmiera ed., 1996) (“[I]t is probably safe to assume that all governments would prefer the convenience of arbitrary rule, and abjure it only when compelled.”).

34. See ROBERT A. PACKENHAM, *LIBERAL AMERICA AND THE THIRD WORLD* 167–68 (1973).

35. See generally Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in *RULE OF LAW IN LATIN AMERICA* 17 (Pilar Domingo & Rachel Sieder eds., 2001); BRIAN TAMANAHA, *ON THE RULE OF LAW* (2004); Tamir Moustafa, *The Political Origins of “Rule-by-Law” Regimes* (Paper prepared for the Workshop on the Rule of Law, Yale University, Mar. 28–29, 2008), <http://www.yale.edu/macmillan/ruleoflaw/papers/yalepaper3.pdf> (detailing the ways in which authoritarian rulers utilize judicial institutions).

36. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 *IND. L.J.* 379 (1991); see, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 *U. CHI. L. REV.* 1175, 1177 (1989).

fascist regimes.³⁷ Brian Tamanaha has noted that such examples should give us pause in too confidently defining the rule of law, and that such efforts often devolve into recursive debates over “thick” and “thin” notions of the rule of law.³⁸ In the most direct terms, legal and personal liberty may not necessarily coincide.³⁹ As a result, attempts to establish the rule of law as an explanatory factor in democratization have succumbed to the generally unyielding morass of democratization theorization,⁴⁰ and failed to even explain the survival of new democracies.⁴¹

This openness of authoritarian regimes to some form of the rule of law helps explain why such regimes have been willing to allow the operation of foreign legal reform projects within their borders, commonly called “law and development” work,⁴² even as these projects carry the implicit assumption

37. DAVID DYZENHAUS, LEGALITY AND LEGITIMACY 49 (1997); JOSEPH RAZ, THE AUTHORITY OF LAW 211 (1979); Ugo Mattei, Comment, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 209–10 (1994). Others have even cited the complicated relationship between the rule of law and anti-majoritarian debates in U.S. history. See Amy L. Chua, *Markets, Democracy and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 27 (1998).

38. See David Clark, *The Many Meanings of the Rule of Law*, in LAW, CAPITALISM AND POWER IN ASIA 28, 36 (Kanishka Jayasuriya ed., 1999) (distinguishing between the role of the rule of law in East Asia and in Europe); Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD 31, 33–34 (Thomas Carothers ed., 2006); Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in ASIAN DISCOURSES ON RULE OF LAW 1, 5 (Randall Peerenboom ed., 2004).

39. TAMANAHA, *supra* note 35, at 37 (“Legal liberty may easily exist without personal liberty. Non-liberal regimes with the rule of law demonstrate this. To say that a citizen is free within open spaces allowed by the law says nothing about how wide (or narrow) those open spaces must be.”). This resembles what Richard Gunther called the “zone of indifference” in Franco’s Spain. RICHARD GUNTHER, PUBLIC POLICY IN A NO-PARTY STATE 261 (1980); see also DYZENHAUS, *supra* note 37; RAZ, *supra* note 37, at 221.

40. See generally Matteo Cervellati et al., *Consensual and Conflictual Democratization, Rule of Law, and Development* 39 (Ctr. for Econ. Policy Research, Discussion Paper No. 6328, 2007).

41. Joe Foweraker & Roman Krznaric, *The Uneven Performance of Third Wave Democracies: Electoral Politics and the Imperfect Rule of Law in Latin America*, 44 LATIN AMERICAN POL. & SOC’Y 29, 47 (2002).

42. RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 234 (Thomas Ginsburg & Tamir Moustafa eds., 2008). See generally Mariana Mota Prado, *What Is Law & Development?*, 11 REVISITA ARGENTINA DE TEORÍA

that they will undermine such regimes.⁴³ In fact, new authoritarianism studies concerned with law have come to emphasize that instrumental legal reform can entrench power inequalities in authoritarian regimes and help them accommodate the very tensions that might precipitate political change.⁴⁴ In their summary evaluation of rule of law reform in authoritarian regimes, Ginsburg and Moustafa emphasize that authoritarians have recognized the utility of regular and efficient legal institutions in five key areas: social control, legitimation, controlling administrative agents and maintaining elite cohesion, credible commitments in the economic sphere, and delegation of controversial reforms to judicial institutions.⁴⁵

Moreover, authoritarians have used participation in international legal reform projects to improve their public image, legitimize their legal institutions, and siphon development resources for their own ends.⁴⁶ The internationalization of legal

JURÍDICA I (2010) (describing the conceptual and methodological diversity within the field of law and development).

43. See David M. Trubek & Alvaros Santos, *Introduction*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 1, 7–13 (David M. Trubek & Alvaros Santos eds., 2006). See, e.g., Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 *DUKE L.J.* 891, 1021 (2008).

44. ANTHONY W. PEREIRA, *POLITICAL (IN)JUSTICE* 192 (2005) (assessing the role of the judiciary in the support of authoritarian regimes in Argentina, Brazil, and Chile); Sophie Richardson, *Self-Reform Within Authoritarian Regimes: Reallocations of Power in Contemporary China*, in *POLITICAL CIVILIZATION AND MODERNIZATION IN CHINA* 149 (Yang Zhong & Shiping Hua eds., 2006); Thomas W. Wälde & James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants: A Short-cut to Social Economy Status?*, in *MAKING DEVELOPMENT WORK* 67, 87 (Ann Seidman, Roert B. Seidman & Thomas W. Wälde eds., 1999). See generally JAMES A. GARDNER, *LEGAL IMPERIALISM* (1980).

45. *RULE BY LAW*, *supra* note 42, at 4, 238; see also LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP* 27–28 (2007); TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER* 4–6 (2007). A favorite case example of the entrenchment of elite power through law is Vietnam. See Bui Thi Bich Lien, *Legal Education in Transitional Vietnam*, in *ASIAN SOCIALISM AND LEGAL CHANGE* 135, 135 (John Gillespie & Pip Nicholson eds., 2005) (describing the influence of social legal doctrines on Vietnamese legal education); John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry Vietnam*, 51 *ICLQ* 641, 672 (2002); Brian J.M. Quinn, *Vietnam's Continuing Legal Reform: Gaining Control Over the Courts*, 4 *ASIAN-PAC. L. & POL'Y J.* 431, 435–36 (2003).

46. See Karen Bravo, *Smoke, Mirrors, and the Joker in the Pack: On Transitioning to Democracy and the Rule of Law in Post-Soviet Armenia*, 29 *HOUS. J. INT'L L.* 489, 575 (2007); Mark F. Massoud, *Myth Making and the Collusion of*

discourse has also led authoritarian regimes to selectively adapt the terms of legal debates, such as those concerning corruption and terrorism, to justify their own repressive political policies.⁴⁷ This use of legal reform within modern authoritarian regimes has led to a range of experimental adaptations to find the right balance between productive self-restraint and the maintenance of political domination—what this Article will call “experimental authoritarianism.”

B. *Authoritarians and the False Romance of Property Rights*

Within debates about democratization and development, property rights have always held a special place among liberal theorists. Prototypically drawing on Lockean political sentiments, the salience of private property has been central to classic statements about the relationship of economic and political freedom.⁴⁸ Strong private property rights are also commonly cast as a central component of the rule of law⁴⁹ and even as the foundational right of modern democracy.⁵⁰

Today, liberal adherents to the idea that property rights are essential to liberty and insulate citizens from abusive state power are not only legion,⁵¹ but their differences with even radical economic theorists on the general desirability of prop-

Rights: Law and Development in Sudan 17 (2008) (unpublished Ph.D. dissertation, University of California Berkeley) (on file with author).

47. See Sarah Bracking, *Political Development and Corruption: Why 'Right Here, Right Now!?',* in CORRUPTION AND DEVELOPMENT 3, 11–12 (Sarah Bracking ed., 2007); Sundhya Pahuja, *Global Formations: IMF Conditionality and the South as Legal Subject,* in CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT 161, 171–75 (Peter Fitzpatrick & Patricia Tuit eds., 2004); David Kennedy, *The International Anti-Corruption Campaign,* 14 CONN. J. INT'L L. 455, 462 (1999).

48. See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM 4 (2002); F.A. HAYEK, THE ROAD TO SERFDOM 80–81 (1944).

49. Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights,* 39 RUTGERS L.J. 59, 62 (2007).

50. See, e.g., JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT (3d ed. 2008); RICHARD A. EPSTEIN, TAKINGS 331–34 (1985). For a review of the underdeveloped place of property in U.S. constitutional law, see Thomas W. Merrill, *The Landscape of Constitutional Property,* 86 VA. L. REV. 885, 890 (2000).

51. RICHARD PIPES, PROPERTY AND FREEDOM, at xii (1999); PROPERTY RIGHTS 1–2 (Terry L. Anderson & Fred S. McChesney eds., 2003); PROPERTY RIGHTS AND THE LIMITS OF DEMOCRACY 1–2 (Charles K. Rowley ed., 1993); D. Benjamin Barros, *Property and Freedom,* 4 N.Y.U. J.L. & LIBERTY 36, 38 (2009).

erty rights are often issues of implementation rather than of conception. These strong assertions are confronted domestically with more criticism and nuance, yet this domestic diversity is rarely projected abroad.⁵² All of this generates the appearance of a broad normative consensus about the desirability of property rights in legal reform work abroad, though concealing on-going domestic contention.⁵³ One need spend little time observing recent debates on real property in the context of U.S. takings jurisprudence⁵⁴ or the nature of intellectual property in promoting economic and technological innovation,⁵⁵ much less the extant variation in state-based property rights under the U.S.'s federalist regime,⁵⁶ to see that property rights are an on-going site of debate and reform at both the constitutional and policy levels.

Though the connection between property rights and democratization is sometimes argued to be sourced directly in their asserted liberty-promoting qualities, it is most often argued that property rights are connected to one of the classic causal factors studied by democratization theorists—economic

52. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 362 (1996).

53. Dimitris Milonakis & Giorgos Meramveliotakis, *Homo Economicus and the Economics of Property Rights: History in Reverse Order*, 45 REV. RADICAL POL. ECON. 5, 20 (2012). There is of course still great difference consequentially between mainstream and critical economic approaches to property rights. See, e.g., G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 259–64 (1995) (undermining the idea that freedom can be found through capitalism and the inequalities it creates); UGO MATTEI & LAURA NADER, PLUNDER 4–6 (2008) (examining the practice of stronger political actors victimizing weaker ones through violent extraction). But see Daniel H. Cole, 'An Unqualified Human Good': E.P. Thompson and the Rule of Law, 28 J.L. & SOC'Y 177, 182 (2001).

54. Janice Nadler, Shari Seidman Diamond & Matthew M. Patton, *Government Takings of Private Property*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 286, 286 (Nathaniel Persily et al. eds., 2008); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings*, 29 HARV. J. LAW & PUB. POL'Y 491, 493 (2006).

55. David S. Abrams & R. Polk Wager, *Poisoning the Next Apple? The America Invents Act and Individual Inventors*, 65 STAN. L. REV. 517, 520 (2013); Andrew W. Torrance & Bill Tomlinson, *Patents and the Regress of Useful Arts*, 10 COLUM. SCI. & TECH. L. REV. 130, 132 (2009).

56. Compare J. Mark Jacobson, *Federalism and Property Rights*, 15 N.Y.U. L.Q. REV. 319, 368 (1937), with Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL. F. 53, 87.

growth.⁵⁷ Generally, economic growth is supposed to give rise to demands for the improved governance guarantees of democracy and the representation of the interests of new middle-class entrepreneurs.⁵⁸

The nature of this proposed causal chain from property rights to pressures for democratization leads to a duality in how property rights are defined by proponents. A juriscentric view emphasizes property rights as a set of exclusionary privileges that can be effectively enforced by a judiciary against private and public actors alike.⁵⁹ In contrast, a utilitarian view emphasizes property rights as a state of legal regulation that provides investment security and predictability. Many proponents of property rights reform abroad often cast the juriscentric and utilitarian views as inherently linked, but there is much slippage as arguments move in between the specifically political and economic implications of property rights reform.

This definitional slippage plays out clearly in how the promise of property rights to promote both political and economic freedom has been central to the current popularity of institutional economic approaches to development theory generally associated with Douglass North.⁶⁰ These approaches emphasize that institutional development is key to economic growth by providing for both the efficient resolution of economic disputes and also creating incentives for long-term and collaborative investment patterns. Central to much new institutional economic scholarship is a fixation on property rights regimes as the central legal institution in generating such incentives. North's historical arguments have resonated with traditional views of property rights within American legal thinking, a view epitomized by the work of Harold Demsetz.⁶¹ The syn-

57. DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* 32 (1998); David A. Leblang, *Property Rights, Democracy and Economic Growth*, 49 *POL. RES. Q.* 5, 6 (1996); Richard Roll & John Talbott, *Political Freedom, Economic Liberty, and Prosperity*, 14 *J. DEMOCRACY* 75, 76 (2003).

58. Bruce Bueno de Mesquita & George W. Downs, *Development and Democracy*, 84 *FOREIGN AFF.* 77, 77 (2005).

59. Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 *N.Y.U. J. INT'L L. & POL.* 551, 557 (2009).

60. DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 121 (1990).

61. Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV.* 347, 347 (1967).

ergy of such approaches has led to sustained arguments that property rights are key to economic growth,⁶² and thus democratization more broadly.⁶³ Perhaps no better example of the global popularity of this pro-property rights discourse is the work of Hernando de Soto.⁶⁴ De Soto is best known for advancing the institutional argument that economic growth can be unleashed in the non-Western world through the formal titling of informal land claims, which then allows landowners to collateralize their land in order to access credit markets.⁶⁵

This line of thinking is evident in both private and public U.S. actors working on development and democratization projects abroad. The juriscentric and utilitarian view of property rights are both well-represented by private organizations such as the Center for International Private Enterprise and the Heritage Foundation.⁶⁶ In the public sector, the National Endowment for Democracy (NED)⁶⁷ and the U.S. Agency for International Development (USAID)⁶⁸ both advance property rights as key parts of their foreign agendas. While both private and public U.S. actors rely on the property rights-growth-democratization arguments, they often also directly play upon more fluid associations between property rights and political liberty. Characteristically, Gregory Myers, USAID's division chief for land tenure and property rights, recently asserted that: "We all firmly believe that a fundamental building block of any democracy or market-based economy is the right to property . . . If you don't have the right to property, you can-

62. See, e.g., KENNETH W. DAM, *THE LAW-GROWTH NEXUS* 123 (2006).

63. Terry Anderson & Laura E. Huggins, *PROPERTY RIGHTS: A PRACTICAL GUIDE TO FREEDOM AND PROSPERITY* 92 (2009).

64. See HERNANDO DE SOTO, *THE OTHER PATH* 158–63 (1989); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* 221 (2000).

65. Contra Errol Meidinger, *Property Law for Development Policy and Institutional Theory: Problems of Structure, Choice, and Change* 13 (Buffalo Legal Studies, Research Paper No. 2006-01, 2006).

66. See CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE, <http://www.cipe.org/blog/> (last visited Oct. 10, 2013); HERITAGE FOUNDATION, <http://blog.heritage.org/tag/property-rights/> (last visited Oct. 10, 2013).

67. For a country-by-country overview of the work of the NED that uniformly includes property rights reform, see WHERE WE WORK, NATIONAL ENDOWMENT FOR DEMOCRACY, <http://www.ned.org/where-we-work/> (last visited Oct. 10, 2013).

68. For an overview of the USAID approach to property rights, see USAID LAND TENURE AND PROPERTY RIGHTS PORTAL, <http://usaidlandtenure.net/> (last visited Oct. 10, 2013).

not be a member of the economy . . . And you don't have a say in the political process."⁶⁹

The popularity of property rights approaches to development and democratization is, in large part, what drew many in the past to support authoritarian regimes that carried out property rights reforms.⁷⁰ The promise of both economic and political liberty seen in such efforts seduced many liberal legal scholars who once argued confidently that civil liberties should be delayed if property rights were not yet established in such regimes.⁷¹

Organizationally, the development work of the World Bank is emblematic of the spread of the U.S. embrace of this view of property rights.⁷² While many organizations promote property rights abroad,⁷³ the World Bank has undertaken a global rule of law reform effort that consistently asserts property rights as its keystone component.⁷⁴ Even after recognizing criticisms of its past approaches, the Bank has only modified this focus by adding ever-more institutional factors to the mix of its property rights-based market reforms,⁷⁵ while

69. See Angela Rucker, *A Right to Land*, USAID.gov (July 17, 2012), http://transition.usaid.gov/press/frontlines/fl_jul12/FL_jul12_LANDTENURE.html.

70. Thomas Carothers, *The 'Sequencing' Fallacy*, 18 J. DEMOCRACY 12, 26 (2007); see also Michael McFaul & Kathryn Stoner-Weiss, *The Myth of the Authoritarian Model: How Putin's Crackdown Holds Russia Back*, 87 FOREIGN AFF. 68, 83 (2008).

71. Richard Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 9 (1998).

72. See Tor Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model*, 52 HARV. INT'L L.J. 287, 297–98 (2011).

73. See, e.g., WOLFGANG KASPER, ECONOMIC FREEDOM AND DEVELOPMENT 65 (2005) (published by a foreign-sponsored think tank in Nigeria).

74. Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 253, 268 (David M. Trubek & Alvaro Santos eds., 2006).

75. ERIK REINERT, HOW RICH COUNTRIES GOT RICH . . . AND WHY POOR COUNTRIES STAY POOR 204–05 (2007); Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion?*, 44 J. ECON. LITERATURE 973, 978 (2006); see also Kevin E. Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141, 145–48 (2004).

still generally giving only tepid support to social development.⁷⁶

However, the ability to conclusively link property rights to economic growth has been stubbornly limited,⁷⁷ and thus its ties to democratization even more strained.⁷⁸ While not damning of property rights in general, the inability to link property rights to development underscores the challenge of reforming complex systems where social relations and a plethora of supportive institutions drive the functionality of legal institutions.⁷⁹ Even de Soto's prescription of formalizing property title regimes to promote growth and civil society empowerment has succumbed to many of the same issues of over-determination,⁸⁰ and in some cases even generated adverse outcomes.⁸¹ Yet while critiques of the role of property rights in theories of legal development are recurrent and trenchant,⁸² the popularity of property rights promotion remains largely undis-

76. See GALIT A. SAFARTY, *VALUES IN TRANSLATION* 134 (2012); Kerry Ritlich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199, 200 (2004).

77. See generally WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH* (2001) (detailing the failure of poor countries to grow despite Western aid).

78. JAN TEORELL, *DETERMINANTS OF DEMOCRATIZATION* 27–28 (2010); see also Mark Roe & Jordan I. Siegel, *Finance and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in the Law-Growth Nexus*, 47 J. ECON. LITERATURE 781, 792–94 (2009).

79. Stephen Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205, 221 (2008); Annie Trimberger, *Are Individual Property Rights Crucial for Economic Development?: An Analysis of Honduran and Nicaraguan Land Reform, with Policy Implications for Developing Countries*, 29 WIS. INT'L L.J. 140, 143 (2011); Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 32 (Carnegie Endowment for Int'l Peace, Working Paper No. 30, 2002); see, e.g., Frank Place, *Land Tenure and Agricultural Productivity in Africa: A Comparative Analysis of the Economics Literature and Recent Policy Strategies and Reforms*, 37 WORLD DEV. 1326, 1333 (2009).

80. RICARDO FORT, *PROPERTY RIGHTS AFTER MARKET LIBERALIZATION REFORMS* 111–13 (2007).

81. Dyal-Chand, *supra* note 49, at 63, 102; Timothy Besley & Maitreesh Ghatak, *The de Soto Effect* 20 (Ctr. for Econ. Policy Research, Discussion Paper No. 7259, 2009) (the conversion of debt into long-term improvement of welfare is an uncertain and difficult process, and formalization can allow greater extraction by elites).

82. See generally Chantal Thomas, *Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutional Critique of Institutionalism*, 96 CORNELL L. REV. 967 (2011) (discussing critiques of the neoclassical economic development theory's approach to property rights).

turbed.⁸³ Frank Upham's recent work most aptly summarizes directly both this enthusiasm and the shaky track record of property rights.⁸⁴

In summary terms, even though property rights are plausibly related to economic growth, and economic growth plausibly related to democratization, the unpredictable ecological impact of property rights reforms means that instrumentalizing property rights reform as a vehicle for either economic or political change is continually plagued by high levels of conceptual and implementation plasticity that serves as a poor platform for the enthusiasm property rights engenders in development discourse.

This challenge to property rights promotion as a vehicle for social change is highlighted and intensified by the experience of authoritarian regimes in pursuing property rights reforms. Much like the rule of law, authoritarian regimes have historically been considered hostile to property rights.⁸⁵ At the same time, modern authoritarian regimes have almost uniformly begun to recognize the utility of property rights as one of the panoply of legal institutions that can provide governance benefits without directly challenging their rule. This is a sub-set of "capitalist authoritarianism" that has increasingly characterized today's non-democratic regimes.⁸⁶ The resistance to questioning the utility of property rights as a means of inducing change in authoritarian regimes reflects the general resistance of orthodox development positions to integrating the challenges of recent history.⁸⁷

This authoritarian experimentation in property rights reform has revealed that the motor forces of property rights' presumed contributions to economic development, predictability and security, are inherently psychological phenomena

83. See also Tom Ginsburg, *Does Law Matter for Economic Development?*, 34 L. & SOC'Y REV. 829, 835 (2000) (discussing how most developed countries have mechanisms that establish and protect property rights).

84. Upham, *From Demsetz to Deng*, *supra* note 59, at 591–92.

85. Carl Henrik Knutsen, *Democracy, Dictatorship and Protection of Property Rights*, 47 J. DEV. STUD. 164, 167 (2011).

86. PAUL W. DRAKE, *LABOR MOVEMENT AND DICTATORSHIPS* 192 (1996).

87. See John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219, 224–25 (2007) (critiquing the orthodox development theory's application to the experience of Northeast Asia).

that are far from binary affairs.⁸⁸ Especially in the context of prescriptions that emphasize the judicial enforcement of property rights, it is key to remember that all legal regimes are ultimately enforced by people, not rules themselves.⁸⁹ Even the simplest game theoretic model can reveal the overwhelming interest of authoritarians in promoting economic predictability for the health of their regimes.⁹⁰ While the traditional model of a capitalist middle class clamoring for democratization is largely derived from the idea that democratization will better protect their economic interests vis-à-vis the state, authoritarian regimes have doled out property rights and investment security to such interests to co-opt them into the state.⁹¹ In a system where the regime controls the initial delegation of such property rights, internal party elections can distribute property rights as a form of rent-sharing to ensure political loyalty.⁹² Here property rights can privatize state power while creating huge endowment effects that cannot be undone from within the legal system.⁹³ In contrast, land reform projects, though themselves highly imperfect, have been shown to be most effective when they correct historical injustices rather than simply reorganize land administration practices.⁹⁴

Further, experimental authoritarians have also recognized that foreign investors are an important modern economic constituency concerned with property rights. As a result, they have similarly provided security for such investors, even promoting themselves as better protectors of property

88. See Donald Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 108 (2003) (discussing the role of property rights in China's economic development).

89. Gerard Alexander, *Institutionalized Uncertainty, the Rule of Law, and the Sources of Democratic Stability*, 35 COMP. POL. STUD. 1145, 1146 (2002).

90. Mancur Olson, *Dictatorship, Democracy and Development*, in DEMOCRACY, GOVERNANCE AND GROWTH 115, 124–25 (Stephen Knack ed., 2003).

91. Stephen Haber, *Introduction: The Political Economy of Crony Capitalism*, in CRONY CAPITALISM AND ECONOMIC GROWTH IN LATIN AMERICA, at x, xii–xiv (Stephen Haber ed., 2002); Markus Goldstein & Christopher Udry, *The Profits of Power*, 116 J. POL. ECON. 981, 1017–19 (2008).

92. Lisa Blaydes, *Authoritarian Elections and Elite Management: Theory and Evidence from Egypt 2* (2008) (prepared for delivery at the Princeton University Conference on Dictatorships).

93. Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691, 693–94 (2006).

94. MICHAEL LIPTON, *LAND REFORM IN DEVELOPING COUNTRIES* (2009).

rights than democracies because of their exclusion of potentially troublesome domestic constituencies.⁹⁵ Simultaneously, experimental authoritarian regimes have often empowered their judiciaries to enforce these selectively granted property rights and use private property norms to deconstruct social welfare provisions.⁹⁶ Thus, many authoritarians have been able to successfully use strategically constructed property rights regimes to encourage economic growth and strengthen their rule.⁹⁷ This success helps explain why openness to foreign direct investment has been linked not to the promotion of democratization but in some cases to its inhibition.⁹⁸

All of this is not to say that property rights are not normatively desirable, or that the existence of property rights may not in itself indicate certain conditions of liberty. Again, even alternative development theorists embrace property rights conceptually, though they focus on the limits of their utilitarian analysis.⁹⁹ Furthermore, democracies do seem, on the whole, to protect property rights better than authoritarian regimes, but such a claim is neither absolute nor necessarily illuminating of the necessary consequences of such protection.¹⁰⁰ Property rights may in fact insulate citizens in authoritarian regimes from state power, but they may also solidify cleavages between citizens rather than unite their common interests

95. Quan Li & Adam Resnick, *Reversal of Fortunes: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries*, 57 INT'L ORG. 175, 185–86 (2003) (describing how more-autocratic countries have fewer “veto players”); Ida Bastiaens, *Variations in Foreign Direct Investment in Authoritarian Regimes* 25 (2011) (paper for the annual meeting of the American Political Science Association).

96. Moustafa, *supra* note 35, at 36–37.

97. See Quan Li & Rafael Reuveny, *Economic Globalization and Democracy: An Empirical Analysis*, 33 BRIT. J. POL. SCI. 29, 53 (2003) (exploring the effects of globalization on governments through such measurements as foreign direct investment); Nathan Jensen et al., *Unbundling the Relationship Between Authoritarian Legislatures and Political Risk*, BRIT. J. POL. SCI., Apr. 10, 2013, at 25, available at <http://dx.doi.org/10.1017/S0007123412000774> (arguing that authoritarian governments are better at creating protections for investors). *Contra* Kanwal Zahra et al., *A Panel Data Analysis of Globalization and Institutional Quality: An Asian Perspective*, 1 J. ASIAN DEV. STUD. 42, 49 (2012) (arguing that globalization improves democracy but does not affect institutional quality).

98. TEORELL, *supra* note 78, at 14.

99. AMARTYA SEN, DEVELOPMENT AS FREEDOM 60 (1999).

100. KNUTSEN, *supra* note 85, at 179.

against the regime. Here we are reminded of David Ricardo's argument against universal suffrage as one grounded in the threat it posed to existing property rights and the protection of elite economic interests—a classic anti-majoritarian position.¹⁰¹ Summarily, the relative force and extensivity of property rights is necessarily reflective of legal liberty, but, following Tamanaha, not inherently reflective of political liberty.¹⁰²

In truth, such complexity should not be surprising given our own often conflicted historical experience with the relationship between democracy and property rights.¹⁰³ Reflecting the United States' highly diverse experience with developing a modern property regime,¹⁰⁴ U.S. history is rife with the use of property rights to selectively enfranchise and disenfranchise members of society.¹⁰⁵ Furthermore, U.S. legal history is rife with the use of expropriation to promote national economic development,¹⁰⁶ and expropriation is often the most invoked area of concern for property rights in developing contexts.¹⁰⁷ The focus on exporting an idealized regime of property rights abroad reflects but one of the curious areas where we pre-

101. See Chua, *supra* note 37, at 106 (arguing that democracies can help dominant ethnic groups remain that way); Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 J. ECON. PERSP. 51, 52 (1993) (reviewing historical views on economic consequences and universal suffrage).

102. Tamanaha, *supra* note 35, at 141.

103. See generally Joseph Singer, *Property Law as the Infrastructure of Democracy* 7–10 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 11-16, 2011); STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* 3 (2011).

104. Charles Donahue, Jr., *The Future of the Concept of Property Predicted from its Past*, in PROPERTY 28, 30–31 (J. Roland Pennock & John W. Chapman eds., 1980).

105. GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDER'S UNION* 3 (2010); Daniel A. Farber, *A Fatal Loss of Balance: Dred Scott Revisited*, 39 PEPP. L. REV. 13, 36 (2011); see also Mark Douglas McGarvie, *Transforming Society Through Law: St. George Tucker, Women's Property Rights and an Active Republican Judiciary*, 47 WM. & MARY L. REV. 1393, 1394 (2006) (focusing on disenfranchisement of women); Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 484–85 (2006) (focusing on disenfranchisement of Native Americans).

106. Harry Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: the United States*, 33 J. ECON. HIST. 232, 250 (1973).

107. Upham, *From Demsetz to Deng*, *supra* note 59, at 598–99.

scribe legal reforms at odds with our own developmental history.¹⁰⁸

Such tension is far from abated. Not only are the nature of property rights still contested within contemporary American law,¹⁰⁹ but most democratic nations fall short of the liberal ideal.¹¹⁰ Globally, property law is in fact more contentious than it is in the United States, as there it is given greater recognition as being an inherently distributional issue,¹¹¹ whereas the United States continues to struggle with simply recognizing the relationship between formal legal equality and economic inequality.¹¹²

C. *Labor Rights as the Bane of Authoritarians*

In contrast to the recurrent popularity of property rights as a tool for democracy promotion, labor rights, specifically the right to unionize, have traditionally been under-theorized in development scholarship.¹¹³ Like property rights, labor rights are generally better protected under democratic regimes than their authoritarian counterparts.¹¹⁴ Yet, specifically in the realm of legal reform, labor law has rarely been the fo-

108. HA-JOON CHANG, *KICKING AWAY THE LADDER 2* (2003) (“[D]eveloped countries did not get where they are now through the policies and the institutions that they recommend to developing countries today. Most of them actively used ‘bad’ trade and industrial policies . . . practices that these days are frowned upon, if not actively banned, by the WTO . . .”).

109. Charles E. Cohen, *supra* note 54, at 499–500; Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 185 (2007).

110. Sang-young Rhyu, *Institutionalizing Property Rights in Korean Capitalism: A Case Study on the Listing of Samsung Life*, in *THE RULE OF LAW IN SOUTH KOREA* 159, 159–61 (Jongryn Mo & David W. Brady eds., 2010).

111. GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY* 9 (2006).

112. David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 328 (2003); Philip Selznick, *American Society and the Rule of Law*, 33 SYRACUSE J. INT’L L. & COM. 29, 38–39 (2006).

113. Tonia Novitz & David Mangan, *Introduction to THE ROLE OF LABOUR STANDARDS IN DEVELOPMENT* 1, 1–2 (Tonia Novitz & David Mangan eds., 2011).

114. Michael A. Paarlberg, *Labor Policy in New Democracies* 38 (Apr. 8, 2009) (unpublished M.A. thesis, Georgetown University) (on file with the Georgetown University Library).

cus of law and development work or development theories,¹¹⁵ even by those who propose alternative frames more amenable to social rights.¹¹⁶ This under-theorization persists even though labor rights are one area in non-democratic regimes and democratic regimes alike where a substantial gap exists between formal law and effective enforcement.¹¹⁷

Yet, for all the turmoil over recurrent attempts to link property rights to political freedom and democratization, associative labor rights, again here in the form of independent unions, have a much stronger presence in democratization theory. Much of the emphasis on rising capitalist classes in early democratization theory gave way in the mid to late twentieth century to a similarly top-down focus on intra-elite bargaining.¹¹⁸ However, recent democratization scholarship has begun to increasingly emphasize civil society factors not only in democratic transitions but also in democratic consolidation post-transition.¹¹⁹

Part of this shift has been recognition of the often key role that unions have played in democratic transitions,¹²⁰ in particular their ability to coordinate mass movements and disrupt the operation of authoritarian regimes.¹²¹ Here labor rights exhibit a stark difference from property rights in their political externalities, as the formal economic role of unions to collectively bargain for higher wages and other working

115. See Kerry Rittich, *Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?*, in *LABOR LAW BEYOND BORDERS* 157, 157 (The International Bureau of the Permanent Court of Arbitration ed., 2003).

116. Kevin Kolben, *A Development Approach to Trade and Labor Regimes*, 45 *WAKE FOREST L. REV.* 355, 362–63 (2010).

117. *LABOUR LAW AND WORKER PROTECTION IN DEVELOPING COUNTRIES* 3 (Tzehainesh Teklè ed., 2010).

118. GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE* 50 (1986); see also *AUTHORITARIANS AND DEMOCRATS* 253–54 (James M. Malloy & Mitchell A. Seligson eds., 1987); Michael Burton, Richard Gunther & John Higley, *Introduction: Elite Transformations and Democratic Regimes*, in *ELITES AND DEMOCRATIC CONSOLIDATION IN LATIN AMERICA AND SOUTHERN EUROPE* 1, 30 (John Higley & Richard Gunther eds., 1992).

119. GEORG SORENSON, *DEMOCRACY AND DEMOCRATIZATION* 74–77 (3d ed. 2008); see also ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK* 181 (1993).

120. See generally RUTH BERINS COLLIER, *PATHS TOWARD DEMOCRACY* 4–5 (1999).

121. J. Samuel Valenzuela, *Labor Movements in Transitions to Democracy: A Framework for Analysis*, 21 *COMP. POL.* 445, 447 (1989).

condition concessions is secondary to the broader political role they have played in social movements.¹²² As such, studies have shown that independent unions' ability to serve as a mechanism for coordinating and transcending ethnic divisions has been a key determinant in overcoming this consistent barrier to regime change.¹²³ Similarly, the political externalities of independent unionization were sometimes overtly promoted as part of pro-enfranchisement arguments earlier in the twentieth century.¹²⁴

A wide-range of studies have now analyzed the variety of roles that unions have played in past democratic transitions, including individual case studies (Korea,¹²⁵ Zambia,¹²⁶ Chile,¹²⁷ and Bulgaria¹²⁸), more regional analyses (Latin America,¹²⁹ Africa,¹³⁰ and Southern Europe¹³¹), and broad

122. Barbara J. Fick, *Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society*, 12 J. LAB. & SOC'Y 249, 249 (2009). Some scholars have attempted to link unionization to middle-class formation, and thus democratization, through an indirect economic development logic similar to that deployed by property rights proponents, but such arguments are similarly dependent on now-contested models of democratic development.

123. ADRIENNE LEBAS, FROM PROTEST TO PARTIES 115–16 (2011) (focusing on Africa); Leo B. Simmons, *Challenging Hegemony: Labor, Capital, and Democracy in Ukraine and Kazakhstan* 22 (1999) (unpublished Ph.D. dissertation, American University) (on file with author) (showing success in the Ukraine but failure to do so in Kazakhstan).

124. Adriana V. Coronel, *A Revolution in Stages: Subaltern Politics, Nation-State Formation, and the Origins of Social Rights in Ecuador, 1834–1943, at 970–71* (Jan. 2011) (unpublished Ph.D. dissertation, New York University) (citing the example of Peru).

125. Hagen Koo, *The State, Minjung, and the Working Class in South Korea*, in STATE AND SOCIETY IN CONTEMPORARY KOREA 131, 133 (Hagen Koo ed., 1993); YIN CHU, *THE STRUGGLE FOR DEMOCRACY* 344 (1995).

126. LISE RAKNER, *TRADE UNIONS IN PROCESSES OF DEMOCRATISATION* 1 (1992).

127. JAIME RUIZ-TAGLE, *EL SINDICALISMO CHILENO DESPUÉS DEL PLAN LABORAL* (1985).

128. Graeme B. Robertson, *Leading Labor: Unions, Politics, and Protest in New Democracies*, 36 COMP. POL. 253, 254 (2004).

129. Ruth Berins Collier & James Mahoney, *Adding Collective Actors to Collective Outcomes: Labor and Recent Democratization in South America and Southern Europe*, in TRANSITIONS TO DEMOCRACY 97, 97 (Lisa Anderson ed., 1999); RUTH COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA* 3 (2d ed. 2002); PETER H. SMITH, *DEMOCRACY IN LATIN AMERICA* 238 (2d ed. 2011).

130. *TRADE UNIONS AND THE COMING OF DEMOCRACY IN AFRICA* 2 (Jon Kraus ed., 2007).

comparative studies.¹³² Most recently in 2011 and 2012, the role of labor rights in democratization movements was acutely highlighted by the role of unions in the events of the Arab Spring. Traditional studies of Arab societies have emphasized the fragmentation of civil society as an impediment to regime change.¹³³ However, the collective organizing efforts of unions played a key coordinating role in Tunisia,¹³⁴ continue to agitate for democracy in Morocco,¹³⁵ and were historically important during Algerian independence.¹³⁶

Further, the centerpiece of the Arab Spring, Egypt, has provided a clear example of the relationship of unionization to democratization. The contemporary origins of the current regime turmoil have been linked to a series of illegal wildcat strikes in 2004,¹³⁷ which led to growth in organized resistance to the Mubarak regime.¹³⁸ Even U.S. government officials privately noted prior to the regime's collapse that independent "labor union structures could serve as a gateway to enhancing

131. Collier & Mahoney, *supra* note 129, at 97.

132. KURT SCHOCK, UNARMED INSURRECTIONS 145–46 (2005) (comparing situations in Philippines, South Africa, and Nepal); TEORELL, *supra* note 78, at 13 (“[I]n more authoritarian regimes . . . efforts to mobilize non-violent popular insurgencies against the incumbent regime should be promoted . . . where there are intra-regime splits . . .”).

133. MARINA OTTAWAY & AMR HAMZAWY, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, PROTEST MOVEMENTS AND POLITICAL CHANGE IN THE ARAB WORLD 1 (2011).

134. Paul Schemm, *Tunisian Democracy Threatened by Weak Opposition*, ASSOCIATED PRESS (July 4, 2012), <http://bigstory.ap.org/article/tunisian-democracy-threatened-weak-opposition> (indicating that dominant political powers are repeating behaviors of former ruling parties by antagonizing unions).

135. *Moroccans Take to Streets in Protest*, TAIPEI TIMES (May 29, 2012), <http://www.taipetimes.com/News/world/archives/2012/05/29/2003534022>.

136. OTTAWAY & HAMZAWY, *supra* note 133, at 5.

137. MARSHA PRIPSTEIN POSUSNEY, LABOR AND THE STATE IN EGYPT 2 (1997) (describing how strikes have been illegal in Egypt since Gamal Nasir's regime).

138. Joel Beinin, *Afterword*, in SOCIAL MOVEMENTS, MOBILIZATION, AND CONTESTATION IN THE MIDDLE EAST AND NORTH AFRICA 237, 247 (Joel Beinin & Frédéric Vairel eds., 2011); Tamir Moustafa, *Law in the Egyptian Revolt*, 185 MIDDLE EAST L. & GOVERNANCE 181, 185 (2011). A key moment in anti-regime defiance came with the establishment of the Independent General Union of Real Estate Tax Authority Workers in 2009. Eric Lee & Benjamin Weinthal, *Trade Unions: The Revolutionary Social Network at Play in Egypt and Tunisia*, THE GUARDIAN (Feb. 10, 2011), <http://www.theguardian.com/commentisfree/2011/feb/10/trade-unions-egypt-tunisia>.

broader political reform [in Egypt].”¹³⁹ Notably, a strong independent union movement has not been part of the protest against the still-defiant Syrian regime.¹⁴⁰

The place of labor rights in authoritarian regimes highlights that such regimes recognize unionization as a key threat to their monopoly on political power.¹⁴¹ Almost universally, authoritarian regimes have aggressively repressed independent trade unions in an attempt to fragment broad social mobilization.¹⁴² This holds true for right-wing and left-wing authoritarians alike, with conservative regimes historically playing upon anti-communist rhetoric¹⁴³ and communist regimes adopting Neo-Stalinist theories of labor corporatism.¹⁴⁴ Again, examples abound of the violent repression of unions under regimes as culturally and geographically diverse as Chile,¹⁴⁵ South Korea,¹⁴⁶ Iraq,¹⁴⁷ and Spain.¹⁴⁸

139. *Labor Anxiety May Open Door to Union Democratization Efforts*, WIKILEAKS (US Embassy Cairo, Mar. 14, 2007), <http://wikileaks.org/cable/2007/03/07CAIRO721.html> (last visited Sept. 26, 2013).

140. See JAMES L. GELVIN, *THE ARAB UPRISINGS* 55–57 (2012) (describing the importance of organized labor in the Tunisia and Egypt uprisings).

141. Frederic C. Deyo, *Industrial Flexibility, Economic Restructuring, and East Asian Labor*, in *THE FOUR ASIAN TIGERS* 184, 187 (Eun Mee Kim ed., 1998).

142. Steven Levitsky & Scott Mainwaring, *Organized Labor and Democracy in Latin America*, 39 *COMP. POL.* 21, 37–38 (2006) (noting that labor movements in Latin America affiliated themselves with democratic, Marxist, and populist regimes); Joel Phillip Stillerman, *From Solidarity to Survival: Transformations in the Culture and Styles of Mobilization of Chilean Metalworkers under Democratic and Authoritarian Regimes, 1945-1995*, at 11–12 (1998) (unpublished Ph.D. dissertation, The New School) (on file with author).

143. Daniel Goh, *The Rise of Neo-Authoritarianism: Political Economy and Culture in the Trajectory of Singaporean Capitalism 2* (Ctr. for Research on Social Org., Working Paper No. 591, 2002); see also Frederic C. Deyo, *State and Labor: Modes of Political Exclusion in East Asian Development*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 182, 193 (Frederic C. Deyo ed., 1987).

144. STEPHEN F. DIAMOND, *FROM “CHE” TO CHINA: LABOR AND AUTHORITARIANISM IN THE NEW GLOBAL ECONOMY* Ch. 1, at viii (2009).

145. Manuel Antonio Garretón, *Popular Mobilization and the Military Regime in Chile: The Complexities of the Invisible Transition*, in *POWER AND POPULAR PROTEST* 259, 270 (Susan Eckstein ed., 2001) (Pinochet reduced unionized labor force from 54% to 9% from 1972 to 1981).

146. BRUCE CUMINGS, *KOREA’S PLACE IN THE SUN* 371 (1997).

147. Adnan A. Zulfiqar, *Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions*, 9 *U. PA. J. LAB. & EMP. L.* 421, 432 (2007).

148. Omar G. Encarnación, *Labor and Pacted Democracy: Post-Franco Spain in Comparative Perspective*, 33 *COMP. POL.* 337, 350 (2001).

Traditionally, authoritarian regimes eventually evolved into what Paul Drake calls “atomizers” or “corporatists.”¹⁴⁹ While older atomizers simply emphasized marginalizing labor organization through repression, many others came to couple violent repression of independent unions with a corporatist approach to labor issues. Corporatism involves the creation of a state-sponsored union that is integrated into the state’s political structure and generally renounces the ability to strike. While many modern democracies have labor parties that grew out of union activities, or governmental bodies concerned with labor rights protections, corporatist regimes preclude any form of independent union organization outside of the state.

Even early fascist states like pre-World War II Japan pursued corporatist policies to proactively circumscribe labor resistance and help achieve labor discipline in order to promote state industrial goals.¹⁵⁰ Early in the twentieth century Latin American authoritarians were innovators in corporatist regimes, looking to involve but not empower citizens in state economic campaigns.¹⁵¹ And most corporatist regimes were initially rejected by independent labor activists.¹⁵²

The dual-deployment of state sponsored unions and the violent repression of independent union organization eventually became a hallmark of authoritarian regimes across the globe by the mid-twentieth century,¹⁵³ prototypically by Mexico’s putatively socialist Partido Revolucionario Institucional

149. DRAKE, *supra* note 86, at 192.

150. ANDREW GORDON, *A MODERN HISTORY OF JAPAN* 213 (2003).

151. Henry A. Dietz & David Scott Palmer, *Citizen Participation under Innovative Military Corporatism in Peru*, in *POLITICAL PARTICIPATION IN LATIN AMERICA VOLUME I: CITIZEN AND STATE* 172, 182 (John A. Booth & Mitchell A. Seligson eds., 1978).

152. Michal Kohout, *The New Labor Culture and Labor Law Reform in Mexico*, 35 *LATIN AM. PERSP.* 135, 136 (2008).

153. CHRISTOPHER CANDLAND, *LABOR, DEMOCRATIZATION AND DEVELOPMENT IN INDIA AND PAKISTAN* 2–5 (2007) (comparing corporatist Pakistan with independent Indian unions); Sean Cooney, *The New Taiwan and Its Old Labor Law: Authoritarian Legislation in a Democratized Society*, 18 *COMP. LAB. L.J.* 1, 8 (1997) (Taiwan pre-1987); Libby Cooper, *The Salvadoran Labor Movement and Development*, 54 *GUILD PRAC.* 224, 226 (1997) (El Salvador); Giuseppe Solfrini, *The Peruvian Labor Movement Under Authoritarian Neoliberalism: From Decline to Demise*, 31 *INT’L J. POL. ECON.* 44, 52 (2001) (Peru).

(PRI).¹⁵⁴ These corporatist unions also linked authoritarian regimes through international organizations, such the International Conference of Arab Trade Unions (ICATU).¹⁵⁵ Such corporatist forms were very attractive for regimes that claimed socialist inspiration, and in some places may have been seen as giving labor a legitimate role in state affairs. Equally commonly, however, authoritarian regimes such as the PRI actually claimed that their repression of labor dissent improved economic performance,¹⁵⁶ an argument coincident with their ability to provide better investment security because of their explicitly non-democratic labor policies.¹⁵⁷

The success of such corporatist programs is evidenced in the often ambivalent stance that corporatist union leaders have taken towards democratization and the potential loss of their place within an existing political status quo.¹⁵⁸ This parallels a great deal of the post-colonial experience, where independent labor unions involved in overturning colonial regimes became deradicalized and incorporated into authoritarian corporatist states.¹⁵⁹ Thus the political strategies of corporatist unions have been a far cry from the democratic activism of independent unions, and corporatist union leaders generally follow bureaucratic career priorities.¹⁶⁰ Moreover, they are often a central culprit in stalled transitions and the entrenched politics of semi-authoritarian regimes who for-

154. EMILY EDMONDS-POLI & DAVID SHIRK, *CONTEMPORARY MEXICAN POLITICS* 72–73 (2d ed. 2012).

155. The ICATU's creation also reflected the role of union activism in the Egyptian revolution of 1952. See POSUSNEY, *supra* note 137, at 61–62; Raouf Abbas, *Labor Movement in Egypt: 1899-1952*, 11 *DEV. ECON.* 62, 73 (1973).

156. KEVIN J. MIDDLEBROOK, *THE PARADOX OF REVOLUTION: LABOR, THE STATE, AND AUTHORITARIANISM IN MEXICO* 303 (1995); Jenna Acuff, *The Race to the Bottom: The United States' Influence on Mexican Labor Law Enforcement*, 5 *SAN DIEGO INT'L L.J.* 387, 428 (2004).

157. ATUL KOHLI, *STATE-DIRECTED DEVELOPMENT* 373 (2004).

158. Eva Bellin, *Contingent Democrats: Industrialists, Labor, and Democratization in Late-Developing Countries*, 52 *WORLD POL.* 175, 180–81 (2000).

159. RAKNER, *supra* note 126, at 48–52 (1992).

160. Martin Comack, *Comrades and Citizens: The Effect of Militant Labor Organizations upon the Processes of Democratization in Communist Poland and Corporate Mexico* 60–61 (Aug. 1, 2010) (unpublished Ph.D. dissertation, Northeastern University) (on file with author) (comparing the Polish and Mexican experiences).

mally embrace democracy.¹⁶¹ Many “semi-authoritarian” democratic regimes have continued to aggressively undermine independent unionization decades after taking power.¹⁶² As will be explored later, many of these regimes actually invoke liberal conceptions of property rights to undermine the ability to strike and other associative labor organizing strategies.¹⁶³

One curious corollary of the role of independent unions in democratization movements is in fact how little their contribution is rewarded under new regimes.¹⁶⁴ While this might be a positive for those generally unfavorable to strong unionization in modern economies, it does highlight that a great deal of the appeal for promoting unions under authoritarian regimes is their coalition-building power, even if they lose long-term economic power after post-transition demobilization.¹⁶⁵ Successful attempts to convert corporatist union structures to private labor organizations independent of the state leave such organizations in a weaker bargaining position under regimes that pursue privatization and other forms of market deregulation.¹⁶⁶ Tied to this reality is the link between weak labor or-

161. Ana Virginia Gomes & Mariana Mota Prado, *Flawed Freedom of Association in Brazil: How Unions Can Become an Obstacle to Meaningful Reforms in the Labor Law System*, 32 COMP. LAB. L. & POL'Y J. 843, 869 (2011); Graeme B. Robertson, *Strikes and Labor Organization in Hybrid Regimes*, 101 AM. POL. SCI. REV. 781, 782 (2007).

162. See JEFFREY BROADBENT ET AL., CULTURE AND AUTHORITARIAN LOGIC 60 (2009) (Korea); MARIA VICTORIA MURILLO, LABOR UNIONS, PARTISAN COALITIONS, AND MARKET REFORMS IN LATIN AMERICA 110 (2001) (Mexico); Sean Cooney, *The New Taiwan and Its Old Labour Law: Authoritarian Legislation in a Democratised Society*, 18 COMP. LAB. L.J. 1, 20 (1997) (Taiwan); Encarnación, *supra* note 148, at 350–51 (2001) (Spain); James G. Samstad, *Corporatism and Democratic Transition: State and Labor During the Salinas and Zedillo Administrations*, 44 LATIN AMER. POL. & SOC'Y 1, 20 (2002).

163. *Infra* Part III.C.

164. Paarlberg, *supra* note 114, at 5–6; Volker Karl Frank, *Plant Level Leaders, the Union Movement, and the Return to Democracy in Chile* 439–40 (1995) (unpublished Ph.D. dissertation, Notre Dame University).

165. Mark Beissinger, *Event Analysis in Transitional Societies*, in ACTS OF DISSENT (Dieter Rucht et al. eds., 1998); Patricia L. Hipsher, *Democratization and the Decline of Urban Social Movements in Chile and Spain*, 28 COMP. POL. 273, 273 (1996).

166. GÉRARD KESTER, TRADE UNIONS AND WORKPLACE DEMOCRACY IN AFRICA 128 (2007); María Lorena Cook, *Labor Reform and Dual Transitions in Brazil and the Southern Cone*, 44 LATIN AMER. POL. & SOC'Y 1, 2 (2002).

ganization and poor democratic consolidation after formal democratization.¹⁶⁷

Today, the successful management of labor unrest through corporatist state agencies has been one factor that studies have tied to the comparative survival of authoritarian regimes¹⁶⁸ such as Singapore¹⁶⁹ and Iran.¹⁷⁰ However, labor protest continues to be a key weakness of authoritarian regimes,¹⁷¹ and union organizing a recurrent aspect of new social movement mobilizations world-wide—even where unions' economic bargaining position is relatively weak.¹⁷² This recurrent tension is still an unresolved issue of the Arab Spring, where recent political retrenchments in Tunisia and Egypt are coincident with regime push-backs on labor activism.¹⁷³

III. PROPERTY RIGHTS AND LABOR RIGHTS UNDER THE CCP'S ADAPTIVE AUTHORITARIANISM

Perhaps the most remarkable modern experimental authoritarian regime exists in the People's Republic of China. Not only has the Chinese Communist Party (CCP) retained its

167. Rosario Espinal, *Torn Between Authoritarianism and Crisis-Prone Democracy: The Dominican Labor Movement* 30 (Kellogg Institute, Working Paper No. 116, 1988).

168. Jorge I. Domínguez, *The Perfect Dictatorship?: Comparing Authoritarian Rule in South Korea and in Argentina, Brazil, Chile, and Mexico* 14 (Paper Prepared for delivery at the 2002 Annual Meeting of the American Political Science Association, Aug. 29–Sept. 1, 2002). For a failed example, see Rob Lambert, *Authoritarian State Unionism in New Order Indonesia* 33 (Asia Research Ctr. on Soc., Political and Econ. Change, Murdoch Univ., Working Paper No. 25, 1993) (failure of Indonesian corporatism).

169. GANY RODAN, *THE POLITICAL ECONOMY OF SINGAPORE'S INDUSTRIALIZATION* 91–93 (1989).

170. FARHAD NOMANI & SOHRAB BEHDAD, *CLASS AND LABOR IN IRAN* 17–19 (2006); Farhad Nomani & Sohrab Behdad, *Labor Rights and the Democracy Movement in Iran: Building a Social Democracy*, 10 NW. J. INT'L HUM. RTS. 212, 220–21 (2012).

171. Graeme Robertson & Emmanuel Teitelbaum, *Foreign Direct Investment, Regime Type, and Labor Protest in Developing Countries*, 55 AMER. J. POL. SCI. 665, 666 (2011).

172. Benny Hari Juliawan, *Street-Level Politics: Labour Protests in Post-authoritarian Indonesia*, 41 J. CONTEMP. ASIA 349, 367 (2011).

173. Jano Charbel, *Labor Law Stalled as Independent Unions Struggle for Representation*, EGYPT INDEPENDENT, July 12, 2012, available at <http://www.egyptindependent.com/news/labor-law-stalled-independent-unions-struggle-representation>; Paul Schemm, *supra* note 134.

monopoly on political power for the last sixty years, it has done so while governing a fifth of the world's population and managing enormous social and economic restructuring.¹⁷⁴ Furthermore, it has fared comparatively better than most developing countries, democratic or otherwise, with respect to a number of governance indicators.¹⁷⁵ At the same time, China has also long been the focus of democracy promotion efforts, especially by the United States.¹⁷⁶ These efforts have long anticipated some form of as-yet unrealized political liberalization since China's reopening to international society in the late 1970's.

In many ways, China exemplifies the evolution of modern bureaucratic authoritarianism into experimental authoritarianism as the CCP has stepped back from the communist ideology of its more totalitarian origins. The systematic economic reform inaugurated by the late Deng Xiaoping coincided with a variable but significant withdrawal of the Party from direct control of daily life in China. This followed a simultaneous version of Polyani's now-classic double movement of commodification and social protection development, as the CCP has worked to reap the benefits of market forces while providing the populace some limited insulation from new social and economic risks.¹⁷⁷

In contrast to the rapid privatizations and regime turnovers after the collapse of the Soviet Union, the CCP has adhered to a gradualist approach to reform, yielding a political and economic system that continues to challenge easy definition.¹⁷⁸ The Party has devolved a great deal of governance re-

174. See generally Andrew J. Nathan, *Authoritarian Resilience*, in U.S.–CHINA RELATIONS IN THE TWENTY-FIRST CENTURY 13 (Christopher Marsh & June Teufel Dreyer eds., 2003).

175. Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 CULTURAL DYNAMICS 315, 343–44 (1999). Peerenboom's scholarship has consistently argued that the CCP's track record is exemplary, even a model for other countries, when its level of economic development is taken into consideration.

176. See Jedidiah Kroncke, *Law & Development as Anti-Comparative Law*, *supra* note 24, at 505–06 (2012); THOMAS LUM, CONG. RESEARCH SERV., 7–5700, U.S. ASSISTANCE PROGRAMS IN CHINA 4 (2011).

177. KARL POLYANI, THE GREAT TRANSFORMATION, at xxviii (1944).

178. Martin L. Weitzman & Chenggang Xu, *Chinese Township-Village Enterprises as Vaguely Defined Cooperatives*, 18 J. COMP. ECON. 121, 122 (1994).

sponsibilities to local political units,¹⁷⁹ while maintaining both informal and formal control over large swaths of the economy¹⁸⁰ and finessing the widespread growth of new information technologies.¹⁸¹

Many analysts have attributed the CCP's management of China's great internal diversity and social dynamism to its experimental attitude towards governance, and its willingness to selectively explore forms of accountability and public input without, as of yet, undermining its political authority.¹⁸² This approach has given rise to terms, such as "consultative Leninism"¹⁸³ or "authoritarian deliberation,"¹⁸⁴ that attempt to capture this experimental approach to handling issues of governance and public dissent, even including local elections.¹⁸⁵ While such experiments are still limited in scope,¹⁸⁶ the relative success of the Party in providing effective governance for China's economy has led many Chinese intellectuals to openly question whether eventual democratization is even desirable.¹⁸⁷

179. PIERRE F. LANDRY, *DECENTRALIZED AUTHORITARIANISM IN CHINA* 258 (2008).

180. BRUCE J. DICKSON, *WEALTH INTO POWER* 19–20 (2008); KELLE S. TSAI, *CAPITALISM WITHOUT DEMOCRACY* 202–03 (2007).

181. Rebecca MacKinnon & Bernard L. Schwartz, *New Am. Found., Networked Authoritarianism in China and Beyond: Implications for Global Internet Freedom* 9 (Paper Prepared for delivery at the 2010 Liberation Technology in Authoritarian Regimes Conference, Stanford University, Oct. 11–12, 2010).

182. *See, e.g.*, KEVIN J. O'BRIEN, *REFORM WITHOUT LIBERALIZATION* 178 (1990).

183. Steve Tsang, *Consultative Leninism: China's New Political Framework*, 18 *J. CONTEMP. CHINA* 865, 866 (2009).

184. Min Jiang, *Authoritarian Deliberation on Chinese Internet*, 20 *Electronic J. Comm.* 2 (2010), available at <http://www.cios.org/ejcpublish/020/2/020344.html>; *see also* The Search for Deliberative Democracy in China 134–35 (Ethan J. Leib & Baogang He eds., 2006).

185. Pierre F. Landry, Deborah Davis & Shiru Wang, *Elections in Rural China: Competition Without Parties*, 43 *COMP. POL. STUD.* 763, 766 (2010); *see also* Monica Martinez-Bravo et al., *Do Local Elections in Non-Democracies Increase Accountability?: Evidence from Rural China* 29, 30 (Nat'l Bureau of Econ. Research, Working Paper No. 16948, 2011).

186. ZAIJUN YUAN, *THE FAILURE OF CHINA'S "DEMOCRATIC" REFORMS* 1 (2012).

187. *See, e.g.*, Pan Wei, *Toward a Consultative Rule of Law Regime in China*, in *DEBATING POLITICAL REFORM IN CHINA* 3, 26–32 (Suisheng Zhao ed., 2006) (arguing that the purported benefits of democracy, in fact, stem from the

Nowhere has this experimental and selective pattern of reform been more pronounced than in the wholesale transformation of the Chinese legal system over the last four decades. In purely infrastructural terms, the growth of legal institutions and practices during this time has been expansive and continuous.¹⁸⁸ Ideologically, the notion of the rule of law has gained currency in official political discourse, with the phrase *yifa zhiguo*, or roughly “using the rule of law to govern the country,” having been elevated to constitutional status.¹⁸⁹ The CCP has realized the utility of legal forms of regulation, and its experimental approach has attempted to balance the self-restraint and accountability inherent in the rule of law with its general monopoly on political power.¹⁹⁰ This technocratic and experimental approach is often referred to in China as the “scientific development viewpoint” (*kexue fazhan guan*), and it received constitutional recognition after public promotion by former CCP President Hu Jintao.¹⁹¹

Some commentators have described this process as “legalization.”¹⁹² Legalization is seen as a process that has not lim-

rule of law, not from democracy itself). For a more optimistic view, see Merle Goldman, *Authoritarian Populists: China's New Generation of Leaders*, 2 YALE J. INT'L AFF. 20, 25 (2007).

188. See generally STANLEY B. LUBMAN, BIRD IN A CAGE 2 (1999); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD THE RULE OF LAW 560–61 (2002).

189. For an overview of the varying interpretations of the term see DEBORAH CAO, CHINESE LAW: A LANGUAGE PERSPECTIVE 42–3 (2004). The Chinese Constitution (*Xianfa*) has been revised many times since 1949, and while not justiciable by even the Supreme People's Court (*Zuigao Renmin Fyuan*), is often reflective of shifts in CCP political strategies. See generally ANDREW J. NATHAN, CHINESE DEMOCRACY 110–11 (1985); Stephanie Balme, *The Judicialisation of Politics and the Politicisation of the Judiciary in China (1978–2005)*, 5 GLOBAL JURIST 1, 36–37 (2005).

190. For two quite different but revealing examples, compare Carl F. Minzner, *Xin角度: Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 104–05 (2006) (focusing on a form of official petitioning to settle civil disputes), with SARAH BIDDULPH, LEGAL REFORM AND ADMINISTRATIVE DETENTION POWERS IN CHINA 3 (2007) (focusing on the use of unchecked administrative powers to handle criminal cases) and Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFO. 7, 24–25 (2008).

191. Joseph Fewsmith, *Promoting the Scientific Development Concept*, 11 CHINA LEADERSHIP MONITOR, No. 11 (2004) available at <http://www.hoover.org/publications/china-leadership-monitor/article/6226>.

192. See LUBMAN, *supra* note 188, at 139; KEVIN O'BRIEN, REFORM WITHOUT LIBERALIZATION 178 (1990).

ited, but provided a more coherent institutionalization of CCP power,¹⁹³ that has strengthened the regime's domestic and international legitimacy.¹⁹⁴ The ability of the Party to devolve governance responsibilities to local bodies has in large part hinged on its embrace of legal regulation and its use of legal mechanisms to focus public dissent on local, rather than national, government.¹⁹⁵ This localization has developed in tandem with the massive proliferation of administrative law to regularize and control this devolution.¹⁹⁶ Broadly, the legalization process has followed bifurcated trajectories in civil and criminal law reform, with most forms of economic rights far more liberalized than political rights.¹⁹⁷ Prototypically, in the direct exercise of state power, the CCP has been careful to shield itself by strategically deploying frames such as "emergency powers" and "national secrets" that parallel Western legal debates.¹⁹⁸

This selective adaptation of the rule of law has led to continued domestic and international criticism of China's legal system, but China's experience still challenges many notions of how legal reform and political development, especially de-

193. See Mark Sidel, *Dissident and Liberal Legal Scholars and Organizations in Beijing and the Chinese State in the 1980s*, in *URBAN SPACES IN CONTEMPORARY CHINA* 326, 345 (Deborah S. Davis et al. eds., 1995).

194. See Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 163, 172 (Karen G. Turner et al. eds., 2000); Robert Berring, *Chinese Law, Trade, and the New Century*, 20 *NW. J. INT'L L. & BUS.* 425, 431–36 (2000); Pitman B. Potter, *Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China*, 138 *CHINA Q.* 325, 358 (1994). Internationally, see Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 *CHINA Q.* 699, 710–13 (2007); Nicole Schulte-Kulmann, *U.S.–China Legal Cooperation—Part I: The Role of Actors and Actors' Interests*, 42 *CHINA ANALYSIS* 1, 7–8 (2005).

195. ZHENG YONGNIAN, *DE FACTO FEDERALISM IN CHINA* 353–54 (2007). Contra Thomas B. Foley, *A Devolution Revolution?: Disputing De Facto Federalism in China*, 37 *HONG KONG L.J.* 951, 952 (2007).

196. Xin He, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in *BUILDING CONSTITUTIONALISM IN CHINA* 143, 143–45 (Stéphanie Balme & Michael Dowdle eds., 2010).

197. See Fu Hualing, *Commentary: Transforming Family Law in Post-Deng China*, 191 *CHINA Q.* 696, 697 (2007) ("The paradox in the Chinese political and legal reform is the contrast between severe repression in core policy areas and the lack of restrictions in peripheral areas.").

198. Christopher Chaney, *The Despotic State Department in Refugee Law: Creating Legal Fictions to Support Falun Gong Asylum Claims*, 6 *ASIAN-PAC. L. & POL'Y J.* 130, 132 (2005).

mocratization, are intertwined.¹⁹⁹ The professionalization of China's judiciary²⁰⁰ and private legal profession²⁰¹ are two examples of legal actors often given great prominence in theories of legal liberalization. Yet the CCP has integrated these classes into the regime through an intentional process of institutional co-optation that often relies as much on self-regulation as overt political control.²⁰² Along with the aggressive co-optation of China's rising entrepreneurial classes through Party membership, the CCP has selectively empowered and constrained many of the agents long presumed to be the agitators for democratic transitions.²⁰³

The development of China's adaptive authoritarianism has done little to depress U.S. interest in shaping China's social development.²⁰⁴ After China's global re-opening, U.S. private and public efforts to influence China's legal restructuring have only grown.²⁰⁵ China has been a popular setting for "Trojan Horse" theories of legal reform that view legal modernization as a variety of democracy promotion capable of progressively undermining CCP rule.²⁰⁶ The indirect logic of property rights linkage to democratization through economic growth

199. Upham, *From Demsetz to Deng*, *supra* note 59, at 564.

200. See Nicholas Calcina Howson, *Corporate Law in the Shanghai People's Courts, 1992–2008: Judicial Autonomy in a Contemporary Authoritarian State*, 5 E. ASIA L. REV. 303, 315 (2010); Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 32 (2007).

201. See Sida Liu, *Client Influence and the Contingency of Professionalism: The Work of Elite Corporate Lawyers in China*, 40 LAW & SOC'Y REV. 751, 751 (2006); Ethan Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, 113 AM. J. SOC. 352, 353–54 (2007).

202. Rachel E. Stern & Jonathan Hassid, *Amplifying Silence: Uncertainty and Control Parables in Contemporary China*, 45 COMP. POL. STUD. 1230, 1238–39 (2012).

203. See generally Bruce J. Dickson, *Cooptation and Corporatism in China: The Logic of Party Adaptation*, 115 POL. SCI. Q. 517, 525 (2001).

204. See Kroncke, *Law & Development as Anti-Comparative Law*, *supra* note 24, at 495–96.

205. See generally Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 411–12 (1999).

206. Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls?: Problems and Prospects of US-Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 78–79 (2000). *Contra* Paul Gewirtz, *The U.S.–China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 621 (2003).

has thus been popular for U.S. reform efforts seen as “build[ing] foundations for political change” in China.²⁰⁷

Yet, as China has adapted legal reform to the needs of the Party, such foreign efforts have been limited in their ability to intentionally shape Chinese developments,²⁰⁸ and even the CCP’s entrance into the WTO has led to reforms clearly still dictated by CCP priorities rather than externally imagined timetables.²⁰⁹ Following its experimental approach, the Party has selectively allowed rule of law projects to operate in China, even those aimed at encouraging public interest litigation, to the extent that it views such projects to be useful as information gathering or governance improvement mechanisms.²¹⁰

A. *The Fuzzy Hybridity of Chinese Property Rights*

Within the CCP’s regime of experimental legal reform, property rights have taken center stage as the CCP has moved away from its early practice of total state ownership and cradle-to-grave employment and social welfare provision.²¹¹ While the Party has allowed for the private ownership of enterprise and other forms of personal property,²¹² the ideological position of the CCP has never wavered on the issue of state ownership of land.²¹³ In 1999, private property was given symbolic

207. THOMAS LUM, CONG. RESEARCH SERV., RS 22663, U.S. ASSISTANCE PROGRAMS IN CHINA 3 (2013).

208. See Jacqué DeLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 255–56 (1999); Sophia Woodman, *Bilateral Aid to Improve Human Rights: Donors Need to Adopt a More Coherent and Thoughtful Strategy*, 51 CHINA PERSP. ¶ 28 (2004), <http://chinaperspectives.revues.org/788>.

209. See Icksoo Kim, *Accession into the WTO: External Pressure for Internal Reforms in China*, 11 J. CONTEMP. CHINA 433, 445 (2002).

210. See Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 FORDHAM INT’L L.J. 1209, 1209-12 (2006); Wang Yi, *Human Rights Lawyers and the Rule-of-Law Camp*, 3 CHINA RTS. F. 21, 23–24 (2006).

211. For earlier historical trends including pre-1949 attempts at land reform see PATRICK A. RANDOLPH & LOU JIANBO, CHINESE REAL ESTATE LAW 1–8 (1999).

212. CHIH-JOU JAY CHEN, TRANSFORMING RURAL CHINA 74 (2004); PROPERTY RIGHTS AND ECONOMIC REFORM IN CHINA 10 (Jean C. Oi & Andrew G. Walder eds., 1999); Yingyi Qian, *How Reform Worked in China*, in IN SEARCH OF PROSPERITY 297, 310 (Dani Rodrik ed., 2003).

213. Peter Ho, *Who Owns China’s Land?: Policies, Property Rights and Deliberate Institutional Ambiguity*, 166 CHINA Q. 394, 419 (2001).

parity with public property in the Chinese Constitution (*Xianfa*),²¹⁴ but the formal status of much of China's increasingly complex property regime was not given a complete legal overhaul until the promulgation of the new Property Law (*Wuquan Fa*) in 2007.²¹⁵

The fact that the CCP has been able to achieve consistent and remarkable growth while approaching private property rights with reluctant hesitation has led to intense and ongoing attempts to reconcile this track record with the traditional argument that property rights are needed for sustained economic growth.²¹⁶ In contrast, the sometimes unclear and often under-defined nature of Chinese property rights that has emerged from this circumscribed turn to private ownership has led to defenses of the system's "fuzziness"²¹⁷ as intentionally flexible in practice, and ultimately allowing for better management of China's boisterous economic development.²¹⁸

The 2007 Property Law formalized many of the existing practices of contingent land use rights that had evolved out of the localized public delegation of land for private use after 1978.²¹⁹ That the law was first drafted in 1993 speaks to uncer-

214. Chen Jianfu, *The Revision of the Constitution in the PRC: A Great Leap Forward or a Symbolic Gesture?*, 53 CHINA PERSP. at ¶ 16 (2004).

215. Note that this article does not directly address the issue of intellectual property rights. However, much the same overpromise and ahistoricism applies to this discourse, especially in Sino-American relations. See generally Robert Ostergard, *Economic Growth and Intellectual Property Rights Protection: A Reassessment of the Conventional Wisdom*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT 115, 154–55 (Daniel J. Gervais ed., 2007). For China, the debate is well-bookmarked by WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE* (1995) and Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 26 OR. REV. INT'L L. 101 (2011).

216. See Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 89–91 (2003); Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 UCLA J. INT'L L. & FOREIGN AFF. 227, 233 (2004).

217. Katherine Verdery, *Fuzzy Property: Rights, Power, and Identity in Transylvania's Decollectivization*, in UNCERTAIN TRANSITION 53, 54–55 (Michael Burawoy & Katherine Verdery eds., 1999).

218. BARRY NAUGHTON, *THE CHINESE ECONOMY* 122 (2007); Ho, *supra* note 213, at 420–21. It should be noted that though this Article does not specifically address the issue of intellectual property rights in China, much the same experimental approach has been taken and with a similar co-evolution with the needs of local and national governments.

219. FANG SHAOKUN (房绍坤), *WUQUAN FA YONGYI WUQUAN BIAN* (物权法用益物权编) [Use Rights Under the Property Law] (2007).

tainty even within the Party concerning how to regulate a system whose day-to-day implications were at odds with its formal political ideology, while also effectively managing the productive and social welfare concerns of a billion-plus population.²²⁰ More specific legislative compromises were made along the way, specifically the Land Management Law (*Tudi Guanli Fa*) in 1998 and the Rural Land Contracting Law (*Nongcun Tudi Chengbao Fa*) in 2002.²²¹ Debates during the drafting of the Property Law were intense, and worked along clear intellectual divisions among Chinese scholars and activists.²²² Perhaps counter-intuitively to some, the law, which still contains a large number of socialist elements, was attacked by China's left as an embrace of the Washington Consensus,²²³ and Marxist legal scholar Gong Xiantian popularized the position that land reform would simply lead to greater exploitation of China's working class.²²⁴

While placing many fewer restrictions on personal property, the Law restricts all land rights to use rights (*shiyongquan*) rather than ownership rights (*suoyouquan*). The primary bifurcation in China's property rights regime is between rural and urban land, reflecting the persistence of the household registration system (*hukou*) that assigns citizens to specific rural and

220. National People's Congress Standing Committee Civil Law Legal Working Committee, *Wuquanfa Lifa Beijing Yu Guandian Quanji* (物权法立法背景与观点全集) [A Complete Legislative History of the Property Law] (2007).

221. *Tu Di Guan Li Fa* (中华人民共和国土地管理法) [Provisions on Land Management Reform] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1988, effective Dec. 29, 1988) (China), http://www.law-lib.com/law/law_view.asp?id=95544; Xinhua News Agency, *PRC Land Reform Regulations*, XINHUANET (Aug. 29, 2002), http://news.xinhuanet.com/zhengfu/2002-08/30/content_543847.htm.

222. Wei-chin Lee, *Yours, Mine, or Everyone's Property?: China's Property Law in 2007*, 15 J. CHINESE POL. SCI. 25, 25 (2009).

223. Matthew S. Erie, *China's (Post-)Socialist Property Rights Regime: Assessing the Impact of the Property Law on Illegal Land Takings*, 37 HONG KONG L.J. 919, 937 (2007). Broadly, approaches to economic reform are divided into right wing (*youpai*) and left wing (*zuopai*) labels that translate poorly to U.S. politics.

224. Gong Xiantian, *Yibu Weibei Xiaqnfafa de Wuquan Fa* [A Property Law (Draft) that Violates the Constitution and Basic Principles of Socialism] (Eva Cheng trans., 2005), available at <http://www.chinaelections.org/newsinfo.asp?newsid=45986>.

urban locales.²²⁵ While commonly transgressed by China's massive migrant population,²²⁶ the registration system is key to the allocation of rural land rights. For rural residents, various short and long-term land use contracts are granted by local government officials on a number of bases, from production quotas to household number. Such rights include limited assignment rights for non-agricultural usage.²²⁷ The fact that most rural land use contracts are for thirty year terms, some of which are now decades old, has made the issue of their renewal one of the most hotly debated in China, and fundamental to whether renewable long-term contracts can provide tenure security approximating full private property rights.²²⁸

Urban land contracts have fewer restrictions on transfer and securitization than their rural counterparts but similarly have fixed terms that, though much longer than rural contracts, are currently automatically renewable only for residential land, the exact terms of which are still unclear.²²⁹ Urban rights are also likewise initially distributed through local party discretion, including a variety of allocative and auctioning processes.²³⁰

This mixed regime of land use contracts sanctioned by the 2007 law has naturally led to debate regarding the desirability of these deviations from a fully liberal property rights regime. Reflecting the diversity of China's internal intellectual culture,²³¹ there is especially strong disagreement as to

225. Kam Wing Chan & Will Buckingham, *Is China Abolishing the HuKuo System?*, 195 CHINA Q. 582, 583 (2008) (emphasizing that though relaxed in practice, the system is still central to CCP governance).

226. DOROTHY J. SOLINGER, *CONTESTING CITIZENSHIP IN URBAN CHINA* 1–3 (1999).

227. Kai Wang, *Whatever-ism with Chinese Characteristics: China's Nascent Recognition of Private Property Rights and Its Political Ramifications*, 6 U. PA. E. ASIA L. REV. 43, 58–59 (2011).

228. Robin Dean & Tobias Damm-Luhr, *A Current Review of Chinese Land-Use Law and Policy: A "Breakthrough" in Rural Reform?*, 19 PAC. RIM L. & POL'Y J. 121, 128 (2010). Ironically, it is less often noted that though formally a post-aristocratic society, such lease "purchases" still exist in many British land transactions.

229. See Gregory M. Stein, *Mortgage Law in China: Comparing Theory and Practice*, 72 MO. L. REV. 1315, 1324–25 (2007).

230. Donald Clarke, *China's Stealth Urban Land Revolution* 7–8 (Feb. 22, 2012) (unpublished manuscript) (on file with author).

231. Erie, *supra* note 223, at 935.

whether limits on rural land alienation create a practical social security regime that can stabilize China's continued economic transition,²³² or are an unjust and inefficient limitation on rural citizen's economic opportunities.²³³

However, China's approach to property rights and its continued economic growth only re-emphasizes that many of the purported utilitarian benefits that link property rights and economic growth, and thus property rights and democratization, are based on perceptions of investment security and other use incentives that play out on the level of individual psychology and within a larger social ecology of regulation. Does a seventy year lease "feel" different from an absolute right? Does it induce different behavior and, more importantly, to what degree? For example, while there is undeniable corruption in China's system of urban land contract auctioneering,²³⁴ China's recently overheated real estate market certainly indicates that the current property regime has not dulled urban investment or demand for those rights.²³⁵

Further, just as the CCP has taken an experimental attitude towards property rights, so too have the Chinese people. The concept of "minor property rights" (*xiao chanquan*) has emerged in rural China, where sales of housing built on rural land to urban residents have led to whole new community developments.²³⁶ While clearly illegal under the 2007 Property Law, local governments have formulated a variety of responses to this development—sometimes by stopping ongoing construction, other times by destroying residences, but more often

232. See Wang, *supra* note 227, at 96–98.

233. Benjamin W. James, *Expanding the Gap: How the Rural Property System Exacerbates China's Urban Rural Gap*, 20 COLUM. J. ASIAN L. 451, 453 (2007).

234. Gregory M. Stein, *The Chinese Land Use Right: Is It Property?*, 21 PROB. & PROP. 22, 27 (2007).

235. Shruti Rana, *The Emergence of the New Chinese Banking System: Implications for Global Politics and the Future of Financial Reform*, 27 MD. J. INT'L L. 215, 229–30 (2012).

236. Eva M. Pils, *Waste No Land: Property, Dignity and Growth in Urbanizing China*, 1 ASIAN-PAC. L. & POL'Y J. 1, 41 (2010); Dai Zhongliang (戴中亮) & Yang Jingqiu (房静秋), *Nongcun Jiti Tudi Fazhanquan de Eryuan Zhuti Ji Qi Maodun* (农村集体土地发展权的二元主体及其矛盾) [The Twin Owners of Rural Collective Land Development Rights and Their Contradictions], 5 NANJING CAIJING DAXUE XUEBAO (南京财经大学学报) [Nanjing University Journal of Finance and Economics] 24 (2004).

than not by simply turning a blind eye.²³⁷ For all its ideological allegiance to public ownership of land, the CCP has allowed this local experimentation to the extent that it solves a real problem of limited urban land and facilitates growth, and does so on a scale that some estimate involves close to thirty million acres of rural land.²³⁸

Such openness underscores the fact that while under-specification and the persistence of formal state ownership are intentional choices made by the CCP, property rights remain an ongoing governance issue.²³⁹ Even prior to 1978 the CCP faced recurrent land ownership disputes,²⁴⁰ and it should be remembered that every developing country faces land use issues even when “full” private ownership is embraced.

For example, the universal challenges of eminent domain bring into view the common problematic of land use in all modern property rights regimes. The concept of eminent domain in the Chinese context is itself notable as a very clear and intentional borrowing from liberal property theory. The CCP has used this borrowing to recharacterize its development policies under a formal legal rubric while tying its practices to the history of Western developmental land expropriation.²⁴¹ In parallel terms to U.S. doctrine, local governments in China can expropriate (*zhengshou*) land from rural and urban residents in the name of “public interest” (*gonggongliyi*) as long as “appropriate compensation” (*xiangying buchang*) is given.²⁴²

A range of scholars has highlighted the massive abuses inherent in the CCP’s deployment of eminent domain, describing not only the extensivity of the practice²⁴³ but also the companion issue of how to define public interest and adequate

237. Pils, *supra* note 236, at 53–54.

238. *Id.* at 53 n.165.

239. Donald C. Clarke, *Legislating for a Market Economy in China*, 191 CHINA Q. 567, 570 (2007).

240. Peter Ho, *Contesting Rural Spaces: Land Disputes, Customary Tenure and the State*, in CHINESE SOCIETY, CHANGE, CONFLICT AND RESISTANCE 101, 105 (Elizabeth J. Perry & Mark Selden eds., 2d ed. 1999).

241. Pamela N. Phan, *Enriching the Land or the Political Elite? Lessons from China on Democratization of the Urban Renewal Process*, 14 PAC. RIM L. & POL’Y J. 607, 639–45 (2005).

242. Erie, *supra* note 223, at 921–22.

243. You-Tien Hsing, *Socialist Land Masters: The Territorial Politics of Accumulation*, in PRIVATIZING CHINA: SOCIALISM FROM AFAR 57, 62–63 (Li Zhang & Aihwa Ong eds., 2008).

compensation.²⁴⁴ The resulting social unrest has been significant, and protests against expropriation have been met with varying forms of harassment, including the prosecution of public interest lawyers working on expropriation cases.²⁴⁵ Yet on the national level, the response of the CCP has not been one of total aversion, as again it has seen expropriation as another arena where an adaptive balance must be met. Notably, its response has been legal, rather than political, addressing not the underlying issues of land development but attempting to shift responsibility onto local governments.²⁴⁶ As such, in 2011 the State Council issued new administrative guidelines for defining public interest and outlining proper compensation calculations.²⁴⁷ What remains of great concern is that a cycle of legally streamlined expropriation and the subsequent granting of strong property rights to new owners will longitudinally disempower many Chinese citizens.²⁴⁸

Contrast this experience of expropriation with the trajectory of one of China's property rights experiments—homeowner associations.²⁴⁹ With the growth of private developments in the 1980s, developers often set up self-governing bodies for residents to handle collective issues similar to those in Western co-op and condominium properties.²⁵⁰ Such groups have taken their residential property rights quite seriously, and these associations have been studied as an example of new

244. Upham, *From Demsetz to Deng*, *supra* note 59, at 586–87.

245. Eva Pils, *Land Disputes, Rights Assertion and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235, 265 (2005). *See generally* Eva Pils, *Asking the Tiger for His Skin*, *supra* note 210, at 1209–12; Yi, *supra* note 210, at 22.

246. Annie Deng, Note, *Dousing the Flames: The Tang Fu Zhen Self-Immolation Incident and Urban Land Takings Reform in the People's Republic of China*, 20 S. CAL. INTERDISC. L.J. 585, 589 (2011).

247. Guoyou Tudi shang Fangwu Zhengshou yu Buchang Tiaoli (国有土地上房屋征收与补偿条例) [Rules for Expropriation and Compensation for Properties on State-owned Land] (2011).

248. This is in essence also Pils' conclusion. Pils, *Waste No Land*, *supra* note 236, at 48–49.

249. For an analysis of the emergence of homeowner associations, see Feng Deng, *From Property Rights to Urban Institutions: An Economic Analysis of China's Emerging Urban Institutions*, 20 POST-COMMUNIST ECONOMIES 347, 347 (2008).

250. *See generally* ROBERT G. NATELSON, LAW OF PROPERTY OWNER ASSOCIATIONS (1989).

prospects for civil society activism,²⁵¹ following what Carol Rose has noted as a potential affinity between shared property rights and self-government.²⁵² In contrast to rural residents fighting expropriation, homeowner associations have been somewhat successful in addressing the narrow range of shared interests that their common property ownership entails, though this success has not spilled over into any form of broader social activism.²⁵³ Like many of the CCP's deliberative experiments, homeowner associations serve regime interests as a check on local governments while providing a private legal mechanism for protecting the interests of China's middle and upper economic classes.

Like the privatization debate more broadly, the tension over property rights makes clear that the CCP recognizes the utilitarian implications of its property regime and is balancing a number of long-term, if self-interested, concerns about property rights. For most of China's relatively enfranchised economic elite, the CCP's attempt to closely parallel in substance the ideals of liberal private property rights has been successful and serves to pacify the classes traditionally seen as the vanguard of liberalization in authoritarian regimes.²⁵⁴ Similarly, great efforts have been made to protect the property interests of foreign investors, another constituency whose influence has

251. Benjamin L. Read, *Inadvertent Political Reform via Private Associations: Assessing Homeowners' Groups in New Neighborhoods*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 149, 170–71 (Elizabeth J. Perry & Merle Goldman eds., 2007).

252. ROSE, *supra* note 52, at 345.

253. Benjamin L. Read, *Property Rights and Homeowner Activism in New Neighborhoods*, in PRIVATIZING CHINA 41, 53–56 (Li Zhang & Aihwa Ong eds., 2008); Luigi Tomba, *Residential Space and Collective Interest Formation in Beijing's Housing Disputes*, 184 CHINA Q. 934, 950–51 (2005).

254. See Bruce Dickson, *Do Good Businessmen Make Good Citizens? An Emerging Collective Identity Among China's Private Entrepreneurs*, in CHANGING MEANINGS OF CITIZENSHIP IN MODERN CHINA 255, 286 (Merle Goldman & Elizabeth Perry eds., 2002); David S.G. Goodman, *The New Middle Class*, in THE PARADOX OF CHINA'S POST-MAO REFORMS 241, 260–61 (Merle Goldman & Roderick MacFarquhar eds., 1999) (“Politically, the new middle classes, far from being alienated from the party-state or seeking their own political voice, appear to be operating in close proximity and through close cooperation [with the party-state].”).

now been linked to dulled pressures for China's liberalization.²⁵⁵

Thus the gradual approximation of a private property rights regime in China demonstrates that improvements in formalization and security can often have countervailing effects on social enfranchisement, especially when they represent selective redistributions of power within co-opted social classes.²⁵⁶ The expropriation issue shows the limitations of utilitarian analysis of formal property rights and their liabilities for disenfranchised groups.²⁵⁷ Rather, favored property interest groups like homeowner associations can be effective tools for managing regime interests in social stability without evolving into aggressive political activism.²⁵⁸

The CCP has demonstrated that the right to exclude the state—the very right that lies at the heart of the liberal fixation on linking property rights to political freedom—can be modulated to fit logics of exclusion vis-à-vis other citizens, where other citizens are only an allocatively efficient expropriation away from providing the substance for another citizen's secure property right.²⁵⁹ Not only are there few, selectively chosen, constituencies empowered by property rights, but these constituencies are inclined not to agitate the regime for more systemic change. This successful co-optation strategy has provided little necessary incentive for the CCP to change its self-interested experimental course in property rights in the near term.²⁶⁰

255. See Weisteng Chen, *Foreign Direct Investment Without Property Rights?* 9, 11–13 (2010). See generally MARY ELIZABETH GALLAGHER, *CONTAGIOUS CAPITALISM* 35–36 (2005); Robert C. Berring, *Chinese Law, Trade and the New Century*, 20 *Nw. J. INT'L L. & BUS.* 425, 437 (2000).

256. See Liu Xiaobo, *China's Robber Barons*, 2 *CHINA RTS. F.* 73, 73 (2003).

257. Pils, *Waste No Land*, *supra* note 236, at 32.

258. See Yongshun Cai, *Local Governments and the Suppression of Popular Resistance in China*, 93 *CHINA Q.* 24, 26 (2008) (“Because local officials are assigned the responsibility of maintaining social stability, they have a strong incentive to prevent popular resistance.”).

259. Valerie Jaffee Washburn, *Regular Takings or Regulatory Takings?: Land Expropriation in Rural China*, 20 *PAC. RIM. LAW & POL'Y J.* 71, 79–82 (2011).

260. Frank Xianfeng Huang, *The Path to Clarity: Development of Property Rights in China*, 17 *COLUM. J. ASIAN L.* 191, 213 (2004).

B. *Chinese Labor Corporatism and the Repression of Independence*

There is only one union in China today, the official All-China Federation of Trade Unions (ACFTU) (*Zhonghua Quanguo Zonggong Hui*). Historically, the ACFTU actually predates the CCP, originating in the 1920s and one of the organizations repressed by U.S.-supported Chiang Kaishek's own authoritarian rule during the Chinese Civil War. Even though it had collaborated with various independent unions prior to its rise to power in 1949, the CCP folded the ACFTU into the state as it adopted a corporatist approach to labor management, as did most communist regimes—the assumption being that state and workers' interests were now inherently aligned. The turn to a corporatist solution was initially met with resistance by union leaders, many of whom were purged from the ACFTU after 1949.²⁶¹ The ACFTU reorganized in 1978 after its dissolution during the Cultural Revolution,²⁶² and fully came under CCP's legalization project with the 1992 Trade Union Law (*Gonghui Fa*).²⁶³

Today, the ACFTU is the world's largest formal union, with over 250 million members organized into ten national industrial unions, thirty-one regional federations (existing at the provincial, prefectural, county and township levels of the CCP's administrative structure) and over a million grassroots local unions.²⁶⁴ All unions are regulated through a vertical administrative relationship with the Ministry of Labor and Social Security (*Laodong he Shehui Baozhang Bu*) and a horizontal ad-

261. Ching Kwan Lee, *Pathways of Labor Insurgency*, in CHINESE SOCIETY 48, 72–73 (Elizabeth J. Perry & Mark Selden eds., 3d ed. 2000). Notable is the Nazi-parallel, where the embrace of “national socialism” formally embraced unionism, but only after a purge of union leaders and a re-organization of labor under a state-dominated regime. This reflected a long-standing hesitation that independent unions would make national economic centralization difficult and undermine Nazi domination of social politics. See DIETRICH ORLOW, *THE HISTORY OF THE NAZI PARTY 1919-1933*, at 103 (1969).

262. David Metcalf & Jianwei Li, *Chinese Unions: Nugatory or Transforming? An Alice Analysis 5* (Center for Economic Performance, Discussion Paper No. 708, 2005), available at <http://cep.lse.ac.uk/pubs/download/dp0708.pdf>.

263. CHANG KAI (常凯) & DERONG ZHANG (张德荣), *GONGHUI FA TONGLUN (工会法通论) [A GENERAL THEORY OF TRADE UNION LAW]* (1993).

264. ALL-CHINA FEDERATION OF TRADE UNIONS, *A Brief Introduction of the All-China Federation of Trade Unions (ACFTU)*, <http://english.acftu.org/template/10002/file.jsp?cid=63&aid=156> (last visited Oct. 26, 2013).

ministrative relationship with either their provincial or local party organs. Grassroots unions are enterprise specific and can be established in either state work units or private enterprises.

The embedding of the ACFTU in the CCP's administrative state also follows the typical corporatist pattern of personnel overlap. The national and regional leadership of the ACFTU are almost uniformly Party members, and the Chairman of the ACFTU is a member of the Party's Political Bureau.²⁶⁵ Furthermore, many grassroots union leaders are themselves enterprise managers with strong ties to the interests of the local business community²⁶⁶ and are appointed or run unopposed in the vast majority of union elections.²⁶⁷

As a result of this embedded relationship within the CCP, the corporatist role of the ACFTU has been to transmit labor policy rather than represent workers' interests.²⁶⁸ The broad devolution of governance responsibility to local leaders by the CCP after 1978 has shifted a great deal of discretion and responsibility over union administration to local party committees.²⁶⁹ This reality has severely limited the power of unions both administratively and practically,²⁷⁰ especially in regards to China's migrant population, who, though recently allowed

265. Miao Qingqing, *An Urge to Protect is Not Enough: China's Labor Contract Law*, 2 TSINGHUA CHINA L. REV. 159, 179 (2010).

266. Mary Gallagher, *"Time Is Money, Efficiency Is Life": The Transformation of Labor Relations in China*, 39 STUD. COMP. INT'L DEV. 11, 28 (2004).

267. See generally Anita Chan, *Challenges and Possibilities for Democratic Grassroots Union Elections in China: A Case Study of Two Factory-Level Elections and Their Aftermath*, 34 LAB. STUD. J. 293 (2009) (documenting a failed attempt to empower workers by setting up elected trade union branches).

268. See Ronald C. Brown, *China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. COMP. & INT'L L. 35, 52 (2006); Mingwei Liu, *Union Organizing in China: Still a Monolithic Labor Movement?*, 64 INDUS. & LAB. REL. REV. 30, 35 (2011).

269. John Bruce Lewis & Bruce L. Ottley, *China's Developing Labor Law*, 59 WASH. U. L. REV. 1165, 1175 (1982).

270. Feng Chen, *Between the State and Labor: The Conflict of Chinese Trade Unions' Double Identity in Market Reform*, 176 CHINA Q. 1006, 1026–27 (2003); Feng Chen, *Union Power in China: Source, Operation, and Constraints*, 35 MOD. CHINA 662, 663–64 (2009); Tong Xin, *Labor Unions in Enterprises: Proactive Actors, Taking the Operation of the Labor Union at B Corporation, a Sino-Foreign Joint Venture in Beijing, as an Example*, 37 CHINESE SOC. & ANTHROPOLOGY 52, 55–57 (2005).

to join local unions,²⁷¹ have interests which local governments possess little incentive to respect.²⁷² It was not until 2002 that the Constitution of Trade Unions (*Laodong Xianfa*) even formally elevated workers' interests as part of the ACFTU's mission.²⁷³ As a result, the focus of ACFTU has been on labor discipline rather than advancing worker interests, one clear consequence of which is the lack of any wage premium stemming from union presence in Chinese enterprises.²⁷⁴

The place of the ACFTU within the Chinese workplace has shifted since 1978. This shift followed the CCP's gradual privatization project which has been characterized by a progressive move away from guaranteed lifetime employment in state-run industries to a mix of public and private employment using, in theory, private forms of labor contracting.²⁷⁵ The Trade Union Law of 1992 and its amendment in 2001 were in large part responses to the decline in ACFTU membership following privatization.²⁷⁶ In the past two decades, the CCP has run several campaigns to expand the ACFTU into the private sector, and especially into foreign owned enterprises.²⁷⁷

271. In 2003 the ACFTU could, for the first time, organize migrant laborers as part of the CCP's attempt to increase union density. Fang Lee Cooke, *Labour Market Regulations and Informal Employment in China: To What Extent Are Workers Protected?* 21 (Paper prepared for the Third China Task Force Annual Meeting, June 25th–26th 2008), http://policydialogue.org/files/events/Cooke_labour_market_regulations_informal_employment_2.pdf.

272. See generally Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 *BERKELEY J. INT'L L.* 254 (2008); Qiu Yang, *ILO Fundamental Conventions and Chinese Labor Law: From a Comparative Perspective*, 2 *CHINESE L. & POL'Y REV.* 18 (2007).

273. Zana Z. Bugaighis, *What Impact Will The Revised Trade Union Law of China Have on Foreign Business?*, 16 *PAC. RIM L. & POL'Y J.* 405, 418 (2007).

274. See Chang Hee Lee & Mingwei Liu, *Collective Bargaining in Transition: Measuring the Effect of Collective Voice in China*, in *THE ROLE OF COLLECTIVE BARGAINING IN THE GLOBAL ECONOMY* 205, 206 (Susan Hayter ed., 2011).

275. Daniel Z. Ding et al., *The Impact of Economic Reform on the Role of Trade Unions in Chinese Enterprises*, 13 *INT. J. HUM. RESOURCE MGMT.* 431, 432–33 (2002); Mary E. Gallagher, "Time Is Money, Efficiency Is Life", *supra* note 266, at 15.

276. Ding et al., *supra* note 275, at 432–33.

277. Tomoaki Ishii, *Trade Unions and Corporatism Under the Socialist Market Economy in China*, in *CHINA'S TRADE UNIONS—HOW AUTONOMOUS ARE THEY* 1, 12 (Masaharu Hishida et al. eds., 2010).

As the ACFTU has had no traditional collective bargaining role, and all other forms of labor organizing are outlawed, there has been no independent unionization to negotiate the terms of these individual labor contracts. Instead, the CCP has used the ACFTU to negotiate broad contractual minimums in certain geographic areas and industries to attempt to further its vision of industrial relations.²⁷⁸ Revisions to the Trade Union Law have made this possible by reducing barriers to unionization, most critically by calling for mandatory unionization in 2001. Colloquially called the “Rainbow Plan,” in 2010 the ACFTU was involved in formulating the government’s new directive to unionize all private companies and then conclude collective contract agreements by 2012.²⁷⁹

Such changes reflect the CCP’s recognition that no other issue in China today is as contentious and broadly felt as labor unrest.²⁸⁰ The corporatist solution to labor organization had never served the CCP perfectly even prior to the 1980s, rarely completely easing the long history of Chinese worker activism.²⁸¹ In fact, though commonly underappreciated, the CCP had been wary of worker activism from the 1950s on, as it observed the experience of other communist countries with labor revolts and moved to quickly stifle any widespread labor organization.²⁸²

Today, the place of labor in China’s legalization process has been problematic, and the role of unions in China’s political and economic future hotly debated.²⁸³ Though the

278. Ronald C. Brown, *China’s Collective Contract Provisions*, *supra* note 268, at 58; Jing Wang (王晶), *Jiti Xieshang Tanpan Zhidu Xu Yi Laogong Sanquan Wei Jichu* (集体协商谈判制度须以劳工三权为基础) [The Collective Negotiation System Should be Based on the Workers’ Three Rights], *ZHONGGUO RENLI ZIYUAN KAIFA* (中国人力资源开发) [Strategy & Management] (2012).

279. RUDOLF TRAUB-MERZ & FRIEDRICH EBERT STIFTUNG, *WAGE STRIKES AND TRADE UNIONS IN CHINA—END OF THE LOW-WAGE POLICY?* 7 (2011).

280. See Feng Chen, *Privatization and Its Discontents in Chinese Factories*, 185 *CHINA Q.* 42, 42–43 (2006); see also REN HONGJIE (任红杰), *Shehui Wending Wenti Qianyan Tansuo* (社会稳定问题前沿探索) [A PRELIMINARY EXPLORATION OF PROBLEMS OF SOCIAL STABILITY], (2005) (LAND AND SEA POLLUTION).

281. See JACKIE SHEEHAN, *CHINESE WORKERS: A NEW HISTORY* 11–12 (1998).

282. See *id.* at 7.

283. See the debate represented between CHANG KAI (常凯), *Laoquan Baozhang yu Laozi Shuangying* (劳权保障与劳资双赢) [Protecting Labor Rights and Workplace Cooperation], (2009) (pro-unionization scholar) and

breadth of labor unrest in modern China has largely been unreported, since the mid-1990s it has generally increased at a rate of 25% a year.²⁸⁴

The traditional underreporting of labor unrest in China has been recently upended by several high profile protests at some of China's largest urban manufacturing plants. In January and February of 2012, hundreds of workers dramatically threatened collective suicide at Foxconn. Foxconn, China's largest private sector employer, produces a staggering 40% of the world's electronics goods but is best known for its close relationship with Apple and as a key supplier for Microsoft.²⁸⁵ These protests had antecedents in 2010, after several suicides at Foxconn plants brought attention to the numerous labor violations that even China's most high profile employers could carry out with relative impunity.²⁸⁶ The Fair Labor Association, created after the bilateral trade agreement that granted China "Most Favored Nation" status under the Clinton Administration, issued a report that substantiated many of the workers' initial grievances.²⁸⁷

Given the high profile status of Apple within the United States, an outcry emerged after the revelation of working conditions at Foxconn plants. Even Apple's own investigations admitted numerous problems, such as underpayment, illegal

DONG BAOHUA (董保华), *Laodong Hetong Fa de Zhengming yu Sikao* (劳动合同立法的争鸣与思考) [Debate and Deliberation on the Labor Contract Law], (2011) (pro-corporatist scholar).

284. See the most recent years of the China Labour Statistical Yearbook [*Zhongguo Laodong Tongji Nianjian*].

285. Michael Kan, *Foxconn Workers Stage Protest in Chinese City*, PC WORLD (Jan. 10, 2012, 8:20 PM), www.pcworld.com/article/247812/workers_stage_protest_in_chinese_city.html; Clare Jim & Jonathan Standing, *Workers Protest at Foxconn Plant in China*, REUTERS (Apr. 27, 2012, 10:13 AM), <http://www.reuters.com/article/2012/04/27/us-china-foxconn-idUSBRE83Q0JV20120427>.

286. Ben McGrath, *China: Two hundred Foxconn Workers Threaten Suicide*, WORLD SOCIALIST WEB SITE (May 12, 2012), <https://www.wsws.org/en/articles/2012/05/foxn-m12.html>.

287. The objectivity of the FLA is still debated, as it is funded by member corporation dues and has been very quick to subsequently absolve Foxconn of its initial criticism. Hong Kong-based NGO China Labour Bulletin (<http://www.clb.org.hk>) is the best clearinghouse for updates on reports of actual working conditions and violations in China.

overtime, and environmental contamination.²⁸⁸ Foxconn responded to this outcry and pressure from the CCP by unilaterally increasing wages throughout its workforce. It, along with Apple, made public commitments to improved monitoring of working conditions, and the CCP claimed that ACFTU expansion in such contexts would assist firms in improving their new efforts at self-monitoring.²⁸⁹

The resort of Chinese workers to these dramatic public strikes reflects a now well-established trend targeting major manufacturers.²⁹⁰ And, again, even these urban protests only capture a fraction of the labor unrest in China,²⁹¹ much of which is successfully repressed outside of international scrutiny, and which is spurred not only by specific workplace issues, but also by the pervasive exploitation of migrant laborers²⁹² and structural issues such as unpaid pension and health benefits for retired workers.²⁹³

Since there is no legally protected right to strike in China, managers are unrestrained in firing strikers and most often able to rely on local government assistance in repressing

288. Charles Duhigg & Steven Greenhouse, *Electronic Giant Vowing Reforms in China Plants*, N.Y. TIMES, Mar. 30, 2012, at A1, available at http://www.nytimes.com/2012/03/30/business/apple-supplier-in-china-pledges-changes-in-working-conditions.html?_r=0; Sam Biddle, *Overworked and In Danger: The Full Foxconn Labor Report*, GIZMODO (Mar. 29, 2012, 4:38 PM), <http://gizmodo.com/5897593/the-full-foxconn-report-heres-everything-you-need-to-know>.

289. Ying Zhu et al., *Employment Relations "With Chinese Characteristics": The Role of Trade Unions in China*, 150 INT'L LAB. REV. 127, 138–39 (2011).

290. See, e.g., Tania Branigan, *Wave of Strikes Bring Chinese Workers a Step Nearer New Rights*, THE GUARDIAN (Aug. 1, 2010, 10:07 AM), <http://www.theguardian.com/world/2010/aug/01/china-strikes-honda-workers-rights> (detailing a spate of strikes and protests across a number of Chinese factories, including Honda and Foxconn).

291. See TRAUB-MERZ, *supra* note 279, at 2–4 (describing the increase in wage strikes in recent years).

292. See Na Lan, *Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?*, 10 ASIAN-PAC. L. & POL'Y J. 482, 489–93 (2009) (describing the ways in which migrant workers are exploited); Margaret Y.K. Woo, Christopher Day & Joel Hugenberger, *Migrant Access to Civil Justice in Beijing*, 4 LOY. U. CHI. INT'L L. REV. 167, 175–77 (2007) (detailing systematic abuse and deprivation of Chinese migrant workers as a newly created social underclass).

293. CHING KWAN LEE, *AGAINST THE LAW*, at x (2007).

smaller scale protests.²⁹⁴ These protests are usually met with a muted response from the ACFTU, which more often than not simply acquiesces to the suppression of smaller strikes and coordinates with other government bodies to quell larger strikes.²⁹⁵ As a result, even with the spread of collective contracts, a great deal of the scholarly criticism that arises in response to these labor protests has called for the re-organization of the ACFTU or the legalization of independent union organizing.²⁹⁶

However, even with these high levels of labor protest, the one area in which the CCP has shown complete unwillingness to experiment is in fact independent unionization. In parallel, for all of its newfound participation in public international law, the CCP has never signed treaties, such as the ILO Conventions, that include the right to collectively bargain or strike.²⁹⁷ Labor sociologist Ching Kwan Lee has argued that independent unionization is an experimental nonstarter because labor organization has the potential to draw on broad social solidarities that would strike at the core logic of the CCP's authoritarian strategy, what she calls "decentralized legal authoritarianism."²⁹⁸ Like other scholars, Lee emphasizes that the CCP has sought to accommodate labor unrest, even forcing wage concessions on employers, in large part to inhibit protest from inspiring any form of independent labor organi-

294. Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China*, 44 L. & SOC'Y REV. 157, 162 (2010).

295. Chen Feng, *Trade Unions and the Quadripartite Interactions in Strike Settlement in China*, 201 CHINA Q. 104, 108 (2010).

296. Toby D. Merchant, *Recognizing ILO Rights to Organize and Bargain Collectively: Grease in China's Transition to a Socialist Market Economy*, 36 CASE W. RES. J. INT'L L. 223, 236–53 (2004); Mayoung Nham, Note, *The Right to Strike or the Freedom to Strike: Can Either Interpretation Improve Working Conditions in China?*, 39 GEO. WASH. INT'L L. REV. 919, 942 (2007).

297. Pitman B. Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 699, 710–13 (2007). This has been true from the outset of the PRC, starting with its refusal to sign the Convention on the Application of the Principles of the Right to Organize and to Bargain Collectively, July 1, 1949, ILO No. 98, 96 U.N.T.S. 257 (entered into force July 18, 1951).

298. LEE, *supra* note 293, at xi; see also MINXIN PEI, CHINA'S TRAPPED TRANSITION 36 (2006) (describing "decentralized predation").

zation outside of the CCP.²⁹⁹ The repression of independent labor organizations has forced even international labor NGOs to focus exclusively on narrow workplace issues and refrain completely from any form of broader political organization.³⁰⁰

Here we very clearly see the traditional authoritarian wariness of associative labor rights. If independent trade unions were simply a legal form with solely economic functions that could to some variable degree mediate worker's employment conditions, then we would see some sort of approximation strategy of the kind that the CCP pursues in the property rights arena. Instead, the CCP has since 1978 closely monitored local union developments to make sure any local changes within the ACTFU were not moving towards genuine worker advocacy.³⁰¹ It should also be clear that this wariness is not motivated by the fear that unions would raise Chinese manufacturing wages to uncompetitive levels, as the CCP has been willing to effect large increases in minimum wages in response to labor unrest—but only through its own appeasement calculations.³⁰²

The consistent repression of any form of independent labor organization is a clear indication of the CCP's historical awareness that such organization has been central to the overthrow of other authoritarian regimes. Recent scholarship has shown that Deng Xiaoping and other CCP leaders were in fact most wary of the Tiananmen Movement not because of student protests but because of the involvement of labor activists, which reminded them of the Polish Solidarity movement that at the time was a major force in overturning Poland's communist regime.³⁰³ The comparatively harsh sentences, including execution, given to labor activists after Tiananmen were seen

299. Bruce J. Dickson, *Sustaining Party Rule in China: Coercion, Co-optation, and Their Consequences*, in *THE DYNAMICS OF DEMOCRATIZATION* 93, 101 (Nathan J. Brown ed., 2011).

300. Cynthia Estlund & Seth Gurgel, *A New Deal for China's Workers?: Labor Law Reform in the Wake of Rising Labor Unrest* 34 (N.Y.U. Pub. L. & Legal Theory Workshop Res. Paper Series, Working Paper No. 11-58, 2012).

301. CHANG KAI (常凯), LAOQUAN LUN (劳权论：当代中国劳动关系的法律调整) [THEORY OF WORKER'S RIGHTS] 26 (2004).

302. TRAUB-MERZ, *supra* note 279, at 3.

303. Masaharu Hishida, *Introduction to CHINA'S TRADE UNIONS—HOW AUTONOMOUS ARE THEY*, at xvi (Masaharu Hishida et al. eds., 2010).

as necessary to undermine the Workers Autonomous Federation (WAF), which had begun to organize in 1989 in opposition to the ACFTU.³⁰⁴ Again, the core of the CCP's authoritarian experimentation is to find forms of legal regulation that can devolve responsibility and improve governance, but that do not create any truly independent basis for collective allegiance or the expression of interests at odds with its developmental project.³⁰⁵

For example, even with the greater latitude sometimes extended to political organization in Hong Kong, the 1997 turnover coincided with the subrogation of the previously activist Hong Kong Federation of Trade Unions into the corporatist fold.³⁰⁶ The CCP took this action in part to compete with the then nascent Confederation of Trade Unions, which operates as the only independent union under CCP rule and which is a focal point of Hong Kong's democratic opposition.³⁰⁷

In contrast to independent labor organizing, beyond broadening the organizational scope of the ACFTU, the area in which the CCP has experimented in order to mediate labor unrest has been what would be called employment law in the United States.³⁰⁸ As part of the shift towards private labor contracting after 1978, the legalization of workplace relationships in China has almost exclusively embraced individualized contractual norms. The promulgation of China's first Labor Law (*Laodong Fa*) did not occur until 1994, after a long and protracted drafting process, and ultimately prioritized personal la-

304. Kai Chang (常凯), *Gongchawenti de Diaocha yu Fenxi* (工潮问题的调查与分析) [A Survey and Analysis of the Strikes], 1 DANGDAI GONGHUI (当代工会文丛) [Contemporary Trade Unions] 1 (1988); Andrew G. Walder & Gong Xiaoxia, *Workers in the Tiananmen Protests: The Politics of the Beijing Workers' Autonomous Federation*, 29 AUSTRALIAN J. CHINESE AFF. 1, 24 (1993).

305. MICHAEL KORZEC, *LABOUR AND THE FAILURE OF REFORM IN CHINA* 6–7 (1992).

306. See Robert C. Berring, *Farewell to All That*, 19 LOY. L.A. INT'L & COMP. L. REV. 431, 446 (1997).

307. Andy W. Chan, *Trade Unions in Hong Kong: Worker Representation or Political Agent?*, in *TRADE UNIONS IN ASIA* 81, 86 (John Benson & Ying Zhu eds., 2008).

308. HILARY K. JOSEPHS, *LABOR LAW IN CHINA* 11–12 (2d ed. 2003).

bor contracts as the medium for regulating workplace relations.³⁰⁹

The terms of the Labor Law were revised again in 2007 with the promulgation of a trio of new laws: the Labor Contract Law (*Laodong Hetong Fa*), Labor Dispute Mediation and Arbitration Law (*Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa*), and Employment Promotion Law (*Jiuye Cujin Fa*).³¹⁰ While these revisions strengthened some of China's formal workplace protections and enshrined its rejection of the common law's at-will employment doctrines,³¹¹ they were ultimately met with little retaliation from foreign corporations operating in China.³¹² These new laws' focus on private employment rights and the streamlining of administrative mediation of labor disputes reflect the CCP's legalization strategy of simultaneous individuation and state-dependence. The new laws allow the state to maintain control over labor law enforcement in much the traditional authoritarian manner, limiting the translation of new rights into any purportedly uncompetitive costs for employers, a concern always expressed about new labor protections in China's generally low-wage export industries.³¹³

The emphasis on employment contracts without independent unionization thus leaves the Party as the sole external source of pressure on the terms of such contracts, the role it

309. Hilary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559, 560 (1995).

310. The LCL was predated by an earlier attempt to create guidelines for collective contract negotiation in 2004 under the Provisions on Collective Contracts (*Jiti Hetong Guiding*).

311. SHANGYUAN ZHENG (郑尚元), *Laodong Zhengyi Chuli Chengxufa de Xiandaihua* (劳动争议处理程序法的现代化) [Modernization of the Labor Dispute Procedure Law] (2003).

312. William J. Hurst et al., *Implementing China's Labor Law Reforms: Interests and Obligations at the Firm Level*, in LAW AND POLICY FOR CHINA'S MARKET SOCIALISM 118, 129–30 (John Garrick ed., 2012) (emphasizing that high wage employers were more open to implementing the new law); Aaron Halegua, *The Debate over Raising Chinese Labor Standards Goes International*, 1 HARV. L. & POL'Y REV. (2007), <http://www.law.harvard.edu/programs/lwp/HaleguaChinaLaborStandardsHLPR2007.pdf>.

313. Liu Xiangguo (刘湘国) et al., *Laodong Hetong Fa Dui Zhejiang Minyingqiye Zhi Yingxiang* (《劳动合同法》对浙江民营企业的影响) [The Impact of the Labor Contract Law on Private enterprise in Zhejiang], 21 JIAXING XUEYUAN XUEBAO 137 (嘉兴学院学报) [Journal of Jiaxing University] (2009).

played in the aftermath of the Foxconn strikes. The granting of national employment rights is still primarily dependent on local enforcement and enables the national government to continue to portray itself as the vindicator of worker rights against local corruption, and as chief facilitator of the harmonious society (*hexie shehui*) now trumpeted by China's leadership.³¹⁴

The fact that the contractarian nature of employment law is compatible with the CCP's legal strategy is not to claim that such rights are trivial or even that they do not have the potential to resolve some workplace issues. As part of their long history of civil activism, Chinese citizens have been quite eager to attempt to litigate their employment law rights³¹⁵ and have already begun to put a great deal of pressure on Chinese courts and other forms of administrative dispute resolution to accommodate their grievances.³¹⁶ In fact, the great pressure being put on Chinese courts to resolve labor disputes is partly the impetus for the CCP's recent retreat from aggressive legal formalization and the overpromise of broad court-based dispute resolution.³¹⁷

The back and forth of the CCP's continued experimentation with judicial administration itself only exacerbates the reality that enforcement of formal employment rights is still at the relative discretion of the state, which has to date been lack-

314. LI HUAN (李环主编), *HEXIE SHEHUI YU ZHONGGUO LAODONG GUANXI* (和谐社会与中国劳动关系) [The Harmonious Society and China's Labor Relations] (2007) (critically examining the lack of independent unionization). This new rhetoric is a classic example of what Laura Nader has called "harmony ideology." See LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* 1-3 (1990) (illustrating harmony ideology through observations of the Talean Zapotec of Mexico).

315. Timothy Webster, *Ambivalence and Activism: Employment Discrimination in China*, 44 VAND. J. TRANSNAT'L L. 643, 692 (2011).

316. YU JIANRONG, *XINFANG DE ZHIDUXIN QUESHI JIQI ZHENGZHI HUOGUO* [The Institutional Failure of the Xinfang System and its Political Consequences] (2004); Jill E. Monnin, *Extending the Reach of the Chinese Labor Law: How Does the Supreme People's Court's 2006 Interpretation Transform Labor Dispute Resolution?*, 16 PAC. RIM L. & POL'Y J. 753, 772-73 (2007).

317. Carl F. Minzer, *China's Turn Against Law*, 19 AM. J. COMP. L. 935, 938 (2011); see also Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in *RULE BY LAW* 207, 234 (Tom Ginsburg & Tamir Moustafa eds., 2008) (noting that support for courts would be eroded if party members selectively benefit from such institutions).

luster.³¹⁸ Again it is quite telling that even with this exponential increase in judicial caseloads, the CCP has been unwilling to experiment with class action lawsuits to handle this surge in labor disputes,³¹⁹ again exactly because it would violate its fundamental anti-solidaristic priority.³²⁰

As a result, any granting of employment rights replicates the general difficulties of individual litigation under the current regime,³²¹ especially in areas where workplace discrimination is a product of cultural norms rather than explicit state interests.³²² Further, administrative and judicial arbitration of labor disputes have been also shown to be systemically biased against workers.³²³ Moreover, private litigation cannot raise the numerous issues that the CCP has not yet felt pressed to address under employment law, such as the provision of employee bonds to secure employment contracts³²⁴ or the total avoidance of labor regulations in the wide-spread employment of underage student labor “interns.”³²⁵

Moreover, many critics of the CCP’s tactics have long worried that activists are being drawn into the individualistic framework of employment rights that undermines other forms

318. Ronald C. Brown, *China’s Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 420–21 (2006); Virginia E. Harper Ho, *From Contracts to Compliance?: An Early Look at Implementation Under China’s New Labor Legislation*, 23 COLUM. J. ASIAN L. 35, 46–47 (2009).

319. Yin Lily Zheng, Note, *It’s Not What Is on Paper, but What Is in Practice: China’s New Labor Contract Law and the Enforcement Problem*, 8 WASH. U. GLOBAL STUD. L. REV. 595, 615–16 (2009).

320. LEE, *supra* note 293, at 31–32.

321. Yunqiu Zhang, *Law and Labor in Post-Mao China*, in DEBATING POLITICAL REFORM IN CHINA 180, 181 (Suisheng Zhao ed., 2006).

322. Rangita de Silva de Alwis, *Opportunities & Challenges for Gender-Based Legal Reform in China*, 5 E. ASIA L. REV. 197, 234 (2010); Charles J. Ogletree & Rangita de Silva-de Alwis, *When Gender Differences Become a Trap: The Impact of China’s Labor Law on Women*, 14 YALE J.L. & FEMINISM 69, 92–93 (2002).

323. Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People’s Republic of China*, 30 FORDHAM INT’L L.J. 1050, 1069–70 (2007); Yun Zhao, *China’s New Labor Dispute Resolution Law: A Catalyst for the Establishment of Harmonious Labor Relationship?*, 30 COMP. LAB. L. & POL’Y J. 409, 427 (2009).

324. Anita Chan, *Globalization, China’s Free (Read Bonded) Labour Market, and the Chinese Trade Unions*, 6 ASIA PAC. BUS. REV. 260, 271–73 (2000).

325. Yojana Sharma, *Vocational Students Face Exploitation in Sweatshops*, 209 CHINA LABOUR BULL. (Feb. 19, 2012), <http://www.clb.org.hk/en/node/101248>.

of collective action.³²⁶ Some labor scholars now chastise labor NGOs that embrace employment rights as “anti-solidarity machines,” to the extent that they accept this atomized legal framework.³²⁷

C. *The Possibilities of Forced Experimentation*

The differential accommodation of property and labor rights under the CCP’s experimental authoritarian regime forcefully replicates the modern authoritarian experience with using legal reform to manage and cabin the stresses inherent in non-democratic regimes. Yet, the CCP’s successes to date do not necessarily predict a future ability to accommodate social unrest and dislocation caused by the boisterous growth of Chinese economic and social life. While many still question the viability or desirability of the CCP’s negotiated implementation of private property rights, its success to date in utilitarian terms is difficult to question. Yet, as labor unrest continues to spread, the continued viability of the CCP strategy of meek labor corporatism and individuated employment rights raises doubts about whether it will have a choice to experiment or not.³²⁸ And none of this touches on the possibilities for the evolution of other forms of labor reorganization along the lines of collective and employee ownership that have persisted throughout China’s privatization program.³²⁹

Some research has already revealed that local chapters of the ACFTU have been empowered by the rise in labor contention and energized in their efforts to expand meaningful workplace unionization.³³⁰ Regional unions have also begun to broaden their constituencies into laid off and unemployed

326. Anita Chan, *Revolution or Corporatism? Workers and Trade Unions in Post-Mao China*, 29 AUSTRALIAN J. CHINESE AFF. 31, 52–55 (1993); Feng Chen, *Individual Rights and Collective Rights: Labor’s Predicament in China*, 40 COMMUNIST & POST-COMMUNIST STUD. 59, 60 (2007).

327. Estlund & Gurgel, *supra* note 300, at 33–34.

328. *Contra* Frank K. Upham, *Reflections on the Rule of Law in China*, 6 NAT’L TAIWAN U. L. REV. 251, 261–62 (2011) (arguing that a fundamental compromise on labor is more likely than on property).

329. Xiao-yuan Dong et al., *Share Ownership and Employee Attitudes: Some Evidence from China’s Postprivatization Rural Industry*, 30 J. COMP. ECON. 812, 833–34 (2002).

330. Mingwei Liu, *Union Organizing in China: Still a Monolithic Labor Movement?*, 64 INDUS. & LAB. REL. REV. 30, 51 (2010); Christina Chen, *The Politics of Labor Protection in Authoritarian Systems: Evidence from Labor Law and*

workers, as well as to diversify the organizational structure of grassroots unions beyond single enterprises, such as multi-employer union associations (*gonghui lianhehui*), community unions (*shequ gonghui*), office building unions (*bangonglou gonghui*), and special union associations of foreign-owned enterprises (*waiqi gonghui lianhehui*).³³¹

In 2011 and 2012, some of the most contentious attempts yet by provincial unions emerged in Shenzhen and Guangdong, including the first attempts to legalize a limited right to strike.³³² While such provincial proposals are still controversial and inchoate, they reflect how the diversification of ACFTU organizing strategies has grown alongside regulatory experimentation by different levels of local governance.³³³

It should be remembered that for all their respective deficiencies, China has minimum wage laws, workers compensation systems, state-run pension funds, and a range of other workplace protections that may only have modest national baselines but are supplemented by local variations down to the municipal level.³³⁴ And there is growing borrowing occurring between local governments, making such changes part of a

Enforcement in Post-Reform China 112 (2011) (unpublished Ph.D. dissertation, University of California, San Diego).

331. Mingwei Liu, *supra* note 330, at 41, 49.

332. *Guangdong Regulations on the Democratic Management of Enterprises* [Guandong Sheng Qye Minzhu Guanli Tiaoli Cao'an Xiugai] at <http://law.51labour.com/lawshow-90971.html>; Shenzhen Jingji Tequ Hexie Laodong Guanxi Cujin Tiaoli [Regulations to Shenzhen Special Economic Zone on the Promotion of Harmonious Labor Relations] (promulgated by the Standing Comm. People's Cong. Shenzhen Municipality, Oct. 6, 2008, effective Nov. 1, 2008) (China), available at <http://hk.lexiscn.com/law/law-chinese-1-468229.html>.

333. Austin Ramzy, *A Labor Strike in Southern China Offers Hope for a More Democratic Future*, WORLD.TIME.COM (July 8, 2012), <http://world.time.com/2012/07/08/a-labor-strike-in-southern-china-offers-hope-for-a-more-democratic-future/>.

334. China Briefing, *A Complete Guide to China's Minimum Wage Levels by Province, City, and District*, CHINA BRIEFING (Jan. 28, 2013), <http://www.china-briefing.com/news/2013/01/28/a-complete-guide-to-chinas-minimum-wage-levels-by-province-city-and-district.html>; Mark W. Frazier, *After Pension Reform: Navigating the "Third Rail" in China*, 39 STUD. COMP. INT'L DEV. 45, 64 (2004); Robert Guthrie & Mariyam Zulfa, *Occupational Accident Insurance for All Workers: The New Challenges for China*, 3 E. ASIA L. REV. 1, 8–10 (2008); China Labour Bulletin, *Beijing to Increase Municipal Minimum Wage, Pensions and Welfare Benefits* (Dec. 28, 2010), available at <http://www.clb.org.hk/en/node/100955>.

general intra-national diffusion of experimentation beyond the national level.³³⁵

Such changes offer the possibility that local unions could take advantage of developments in employment law and actually help realize their genuine enforcement in the workplace, creating an institutional basis to better channel now-nascent activism on a range of employment and social welfare issues.³³⁶

Still, many continue to question whether even such diversification can ever transcend the administrative and bureaucratic limitations of the ACFTU.³³⁷ It is clear that recent changes in the ACFTU are but one aspect of the CCP's increased expenditures aimed at "stabilizing" Chinese society.³³⁸ In addition, the greater empowerment of the ACFTU may actually make it, like its other corporatist brethren, a stronger bulwark against genuine political change that would undermine its privileged position.³³⁹

For example, the great fanfare of the ACFTU's unionization of Walmart was met by eventual acquiescence in large part because the ACFTU's mission is still intentionally non-adversarial.³⁴⁰ Thus, if increased union density is tangential to functional reform, the ACFTU may simply come to parallel the example of more "successful" corporatist unions, such as those in Singapore,³⁴¹ and continue to control rather than spur the

335. Though this also leads to what Peerenboom called "legislative chaos." PEERENBOOM, *supra* note 188, at 240.

336. WEBSTER, *supra* note 315, at 682–83 (discussing to what extent current employment discrimination activism around Hepatitis B resembles a social movement).

337. Chelsea Chia-chen Chou, *The Expansion of Social Rights in Authoritarian Regimes: The Politics of Labor Policy Reform in China, 1978–2009* (2009) (unpublished Ph.D. dissertation, Cornell University) (on file with author). *Contra* Bill Taylor & Qi Li, *Is the ACFTU a Union and Does It Matter?*, 49 J. OF INDUS. REL. 701, 711 (2007).

338. Willy Lam, *Beijing's Blueprint for Tackling Mass Incidents and Social Management*, 11 CHINA BRIEF 3, 3–5 (2011).

339. PAARLBERG, *supra* note 114, at 3.

340. Zana Z. Bugaighis, *What Impact Will the Revised Trade Union Law of China Have on Foreign Business?*, 16 PAC. RIM L. & POL'Y J. 405, 426–27 (2007).

341. Chew Soon Beng & Rosalind Chew, *A New Form of Union Representation to Meet the Challenges of a Globalized World* 13–14 (Paper prepared for the 16th ILERA World Congress, Philadelphia, July 2–5, 2012), <http://ilera2012.wharton.upenn.edu/RefereedPapers/ChewSoonBeng%20RosalindChew.pdf>.

civil society development central to independent unions' democratizing potential.³⁴²

Even so, the current scope of the CCP's deliberative experiments would have been unthinkable just a few decades ago, much like its selective but effective embrace of property rights. Although the CCP has been forced to continue experiments that test the faultlines between formal and substantive legal empowerment, the results of these experiments have not been predictable. Perhaps the insistent activism of China's workers will allow less room for the CCP to use legal formalism to escape responsibility for genuine improvements in working conditions. As the CCP's property rights experiment has shown, such a drive for broad social enfranchisement is unlikely to come from China's middle and entrepreneurial classes. If the CCP is forced to experiment in a manner that finally compels it to genuinely devolve power in unprecedented ways, such transformation will need to be brought into existence by collective movements formed from much broader solidarities.

IV. EXPORTING EASY ILLUSIONS OR IMPORTING HARD LESSONS

One of the oft-noted but ever alluring notions inherent in many efforts to influence foreign legal and political development is that there are universal "best practices" that can be implemented in any country.³⁴³ This allure dovetails neatly with technocratic visions of legal reform that can imagine such work bypassing local politics.³⁴⁴ These ideas are often embraced by officials in developing countries who import wholesale copies of legal codes and legislation from abroad, especially those regarding economic regulation.³⁴⁵ In fact, the very turn of the World Bank towards legal development work was

342. GORDON WHITE, JUDE A. HOWELL & SHANG XIAOYUAN, *IN SEARCH OF CIVIL SOCIETY* 40 (1996).

343. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 29 (2004). *Contra* Ohnesorge, *supra* note 87, at 225; DAVIS, *supra* note 75, at 161–62.

344. See *supra* Part II.B.

345. JOHN GILLESPIE, *TRANSPLANTING COMMERCIAL LAW REFORM* 1 (2006) (Vietnam), ALAN WATSON, *LEGAL TRANSPLANTS* 27 (2d ed. 1993); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 *AM. J. COMP. L.* 163, 172 (2003).

tied to its sudden presumption that such work was apolitical and therefore not in violation of its charter.³⁴⁶

One part of the great appeal of property rights reform is the possibility that efficiency and justice can be promoted in known and predictable ways that are universal to all legal systems.³⁴⁷ This possibility was at the heart of earlier, and in some cases continuing, views that authoritarians could implement economic reforms that were compatible with, if not directly conducive to, subsequent democratization.³⁴⁸

Labor rights, again especially regarding unionization, are in many ways the opposite. Few pretend that they are apolitical.³⁴⁹ They are inherently associative, and in many ways inherently disruptive. Again, depending on one's view of political economy, they may also be inefficient.³⁵⁰ In contrast to the strong association of property rights with classic liberal political theory and the rule of law, labor rights are not only historically younger, but born of modern political controversy³⁵¹—and, in some cases construed as oppositional to liberty.³⁵² But this opposition must contend with the fact that unions have been critical to democratization moments, even if they commonly find themselves weak economic actors in their aftermath.

The experience of authoritarian regimes like China shows that it is exactly because of the “messy,” associative democratic nature of labor rights that authoritarians aggressively repress them. Authoritarians rarely fear the economic consequences of unionization, as their own corporatist union strategies highlight their very active concern with appeasing, if also controlling, labor unrest. That the CCP sees property rights as far less

346. Lawrence Tshuma, *The Political Economy of the World Bank's Legal Framework for Economic Development*, 8 SOC. & LEGAL STUD. 75, 75–76 (1999); see also David Kennedy, *Laws and Developments*, in LAW AND DEVELOPMENT 17, 18 (John Hatchard & Amanda Perry-Kessaris eds., 2003); Scott Newton, *Post-Communist Legal Reform: The Elision of the Political*, in LAW AND DEVELOPMENT 161, 162 (John Hatchard & Amanda Perry-Kessaris eds., 2003); Marina Ottaway & Thomas Carothers, *Toward Civil Society Realism*, in FUNDING VIRTUE 293, 296 (Marina Ottaway & Thomas Carothers eds., 2000).

347. See *supra* Part II.B.

348. POSNER, *supra* note 71, at 2–3.

349. See *supra* Part II.C.

350. See *supra* Part II.B.

351. See *id.*

352. See *id.*

disruptive of its objectives than labor rights reminds us not only of the pre-democratic origins of many liberal political theories and their atomistic assumptions about the nature of liberty, but also that the relationship between economic development and economic liberty is far less automatic than is often presumed.

A. *Development Revisionism and Undermining
Labor Rights Abroad*

From the outset of the twentieth century, the United States has often sought to export legal institutions and practices that some broad constituency believes to exemplify the best of our legal system, whether this be our Constitution, corporate law, or public interest litigation.³⁵³ Labor law is perhaps one of the most controversial aspects of American law, and the solidaristic social and political presumptions under which our regime of collective bargaining was created during the New Deal are and have always been in conflict with more individualistic U.S. political imaginations.³⁵⁴ Yet, this and other classic conflicts of U.S. legal history are often elided in foreign democracy promotion and rule of law work.³⁵⁵ This work often draws upon quite stylized notions of legal history, employing narratives drawn from the industrial revolution to as far back as the Roman Empire.³⁵⁶ Herein, U.S. legal history and all of its rich veins of conflict and international diversity are packaged into policy prescriptions that do violence to the often ambiguous lessons of our own legal heritage. As has been shown elsewhere in development, it is much harder to export controversies and contentions than idealizations.³⁵⁷

353. See Kroncke, *Law and Development as Anti-Comparative Law*, *supra* note 24, at 497–80.

354. Thomas C. Kohler, *The Notion of Solidarity and the Secret History of American Labor Law*, 53 *BUFF. L. REV.* 883, 887 (2005); James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 *BUFF. LAW. REV.* 653, 654–55 (2009).

355. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* (1950).

356. See Ulrike Malmendier, *Law and Finance “at the Origin”*, 47 *J. ECON. LITERATURE* 1076, 1077 (2009).

357. See generally Kroncke, *Law and Development as Anti-Comparative Law*, *supra* note 24, at 358–59.

Perhaps more importantly, such stylized narratives are rife with a deep revisionism that often leads us to offer development solutions which are at odds with our own historical trajectory—one full of massive government intervention, systemic political conflict, and trade protectionism.³⁵⁸ Part of this revisionism also denies the centrality of unions for the substantive enfranchisement of large swaths of our populace and their related role in non-economic political organizing.³⁵⁹ The popularity of narratives of American development driven by individualism and classic liberalism thus innately clash with collective visions of development carried out by foreign populist movements to which labor unionization is a key social movement tool.³⁶⁰ This reality reflects the promotion paradox back upon us, as again labor rights have been shown as key to many democratization processes, and it is democratization that is still most often heralded as the United States' highest calling abroad.³⁶¹

In contrast, during the immediate post-New Deal formation of the modern U.S. labor law regime, promoting unionization was a core feature of U.S. democracy promotion. The connection between associative labor rights and democratic development was part of America's newly energetic aspiration to impact global development in the post-World War II era.

358. REINERT, *supra* note 75, at 16–19; see John Ohnesorge, *Legal Origins and the Tasks of Corporate Law in Economic Development: A Preliminary Exploration*, 2009 BYU L. Rev. 1619, 1628; see also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 146–47 (1997) (discussing these trends in intellectual property law).

359. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1121–22 (1989). Forbath invokes traditions of U.S. Republican economic ideology classically explored by ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970) and most recently by AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010). See also GERALD FRIEDMAN, *STATE-MAKING AND LABOR MOVEMENTS: FRANCE AND THE UNITED STATES, 1876–1914*, at 62–63 (1998); DANIEL JACOBY, *LABORING FOR FREEDOM* 166–67 (1998).

360. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 377 (2002); James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971, 971–74 (2000); see also Mustapha Kamel Al-Sayid, *A Clash of Values: U.S. Civil Society Aid and Islam in Egypt*, in *FUNDING VIRTUE: CIVIL SOCIETY AID AND DEMOCRACY PROMOTION* 49, 64–65 (2000).

361. See, e.g., TONY SMITH, *AMERICA'S MISSION* 146 (1994).

The landmarks of U.S. state-building in Japan³⁶² and West Germany³⁶³ both emphasized independent unions as part of the democratic transition in those countries, and labor union promotion was part of the Marshall Plan aid to Europe more broadly.³⁶⁴ And for a time, unions were seen as a central democratic bulwark against Communism during the early Cold War.³⁶⁵

Yet, in the contemporary era, the bulk of U.S. public and private international efforts not only marginalize the promotion of labor rights abroad, but much of their influence has a countervailing effect. Much of this countervailing effect derives from the mainstream technocratic consensus in development work that labor “best practices” involve relaxing existing forms of labor and employment protection, heralding so-called “labor flexibility” as an adjunct to economic development.³⁶⁶

Following this approach, the World Bank and IMF have sought to strengthen property rights while almost universally promoting the reduction of what it calls EPL, or “employment protection legislation.”³⁶⁷ This anti-promotion continues despite the fact that the long-term track record of “flexibilization” programs on even utilitarian terms has been questionable³⁶⁸ and the evidence that labor rights

362. Harry Arthur, *Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad*, 21 STAN. L. & POL'Y REV. 527, 532 (2010) (discussing post-World War II Japan and the Cold War).

363. Michael Fichter, *HICOG and the Unions in West Germany: A Study of HICOG's Labor Policy Toward the Deutscher Gewerkschaftsbund*, in AMERICAN POLICY AND THE RECONSTRUCTION OF WEST GERMANY, 1945–1955, at 257, 257 (Jeffrey M. Diefendorf et al. eds., 1993).

364. ANTHONY CAREW, LABOUR UNDER THE MARSHALL PLAN 1–2 (1987).

365. See generally AMERICAN LABOR AND THE COLD WAR (Robert W. Cherny et al. eds., 2004).

366. Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 52 (2009).

367. Juan Botero et al., *The Regulation of Labor* 23 (National Bureau of Economic Research, Working Paper No. 9756, 2003) (studying the effects of regulation constraints); see also Taline Koranchelian & Domenico Fanizza, *How Does Employment Protection Legislation Affect Unemployment in Tunisia? A Search Equilibrium Approach* 3 (International Monetary Fund Working Paper No. WQ/05/92, 2005).

368. Daniel H. Autor et al., *Does Employment Protection Reduce Productivity? Evidence From US States*, 117 ECON. J. at F189, F194 (2007) (pointing to multi-

reduce even gross economic growth remains highly contested.³⁶⁹

Nonetheless, USAID and other U.S. reform projects on labor have adopted this “flexibility” paradigm that discourages labor strikes while urging labor leaders towards “harmonization.”³⁷⁰ There are certainly levels of rhetorical support for labor rights within the U.S. foreign assistance community,³⁷¹ but when it comes to concrete project implementation or enforcing treaty content regarding union activities, such high rhetoric falls victim to more generalist invocations of the need to promote economic growth through EPL reductions. Most of these recommendations are based on assumptions regarding individual labor mobility and general economic liberty that rarely capture the complex nature of labor conditions in developing contexts—what Garance Genicot calls the “the paradox of voluntary choice.”³⁷² Such reform projects commonly contract with U.S. employment and labor law consultants who in their private practices aggressively advise international clients on anti-union tactics.³⁷³

ple ambiguous studies in the U.S.); Ton van Schaik & Theo van de Klundert, *Employment Protection Legislation and Catching-Up*, 45 *APPLIED ECON.* 973, 980–81 (2011) (arguing for historical disjunctures in the effects of EPL on growth).

369. Eric Neumayer & Indra de Soysa, *Globalization and the Right to Free Association and Collective Bargaining: An Empirical Analysis*, 34 *WORLD DEV.* 31, 35 (2006).

370. See, e.g., DANN JOHNSON, WEIDEMANN ASSOCIATES, INC., USAID, LABOR LAW MEASURE PLUS: INDONESIA 21–22 (2011); USAID ARMENIA, SOCIAL PROTECTION STRENGTHENING SYSTEMS PROJECT, THE STATE OF LABOR LEGISLATION AND INSTITUTIONS IN ARMENIA 3 (2008). For one very different example, see EQUITY EXPANSION INTERNATIONAL, USAID SAN JOSE MISSION, A (PROPOSED) LAW TO ENCOURAGE THE DEMOCRATIZATION OF FUTURE CAPITAL OWNERSHIP FOR CITIZENS OF COSTA RICA, 1–vi (1989).

371. LYNN SALINGER & JEFFREY WHEELER, USAID, THE ROLE OF THE LABOR SECTOR IN PROMOTING U.S. FOREIGN ASSISTANCE GOALS, at viii (2010).

372. Garance Genicot, *Bonded Labor and Serfdom: A Paradox of Voluntary Choice*, 67 *J. DEV. ECON.* 101, 103 (2002); see also KAUSHIK BASU, *PRELUDE TO POLITICAL ECONOMY* 157 (2000) (discussing how allowing contractual sexual harassment may result in a form of coercion).

373. Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksites*, 25 *COMP. LAB. L. & POL'Y J.* 257, 270 (2004).

Take, for example, a USAID evaluation of the new Armenian Labor Code enacted in 2004.³⁷⁴ The report takes aim at new employment protections in the Code enacted in part in response to the highly unequal distribution of Armenian economic growth. Yet, it ultimately claims that, as such protections decrease employment turnover, they should be eliminated even if weakly enforced. There is no consideration of the socio-political effects of greater “turnover” for the economic security of Armenians or for the slow-to-grow bonds of civil society in post-authoritarian regimes. Almost in parallel, a World Bank report on Croatian EPL passes through an almost identical analytic process, criticizing the Croatian Labor Code and calling for greater ease in firing employees, limiting fixed-term contracts, reducing severance payments (including for wrongfully dismissed workers), and in every respect reducing the collective bargaining power of unions.³⁷⁵

Similarly, while many foreign agencies tasked with promoting labor rights abroad, such as Department of Labor’s Bureau of International Labor Affairs or the Department of State’s Bureau of Democracy, Human Rights and Labor, give rhetorical recognition to unionization, they all de-emphasize political action and in the end emphasize less contentious employment issues such as child trafficking or general human rights abuses.³⁷⁶ And it is further worth noting that in the U.S. occupation of Iraq, the Coalition Provisional Authority kept in place the labor law of the previous authoritarian regime of Saddam Hussein.³⁷⁷

Perhaps most telling is the track-record of the NED’s funding of the American Center for International Labor Solidarity. The Solidarity Center, as it is popularly called, is an outgrowth of U.S. Cold War anti-communist promotion of labor unions. Deriving the vast majority of its funding from the NED

374. USAID ARMENIA, SOCIAL PROTECTION SYSTEMS STRENGTHENING PROJECT, THE ASSESSMENT OF LABOR CODE IMPACT ON VULNERABLE GROUPS IN THE ARMENIAN LABOR MARKET (2008).

375. THE WORLD BANK, EMPLOYMENT PROTECTION LEGISLATION AND LABOR MARKET OUTCOMES: THEORY, EVIDENCE AND LESSONS FOR CROATIA 25–27 (2011).

376. SALINGER & WHEELER, *supra* note 371, at 53.

377. Matthew Harwood, *Pinkertons at the CPA*, 37 WASHINGTON MONTHLY 24, 25 (2005), available at <http://www.washingtonmonthly.com/features/2005/0504.harwood.html>.

and other government agencies, the Solidarity Center is administered by the AFL-CIO and does provide monitoring of labor conditions in many countries.³⁷⁸ However, the Center's work has, again, always emphasized non-political action by unions and been repeatedly accused of having sacrificed its independence.³⁷⁹

In recent decades, this criticism has become increasingly heated, as local unions have no say in the Solidarity Center's administration and there is no mandated transparency on the Center's foreign operations.³⁸⁰ Recent documents released as part of the Wiki-leaks phenomenon has led many to question whether the view of labor unions promoted by the AFL-CIO abroad in fact inhibits democratization,³⁸¹ and thus mimics the worse qualities of a corporatist, rather than an independent, union.

On the level of bilateral diplomacy and trade policy, many have long argued that promoting labor rights should be part of our general free trade strategy,³⁸² and some U.S. treaties do involve small labor monitoring programs.³⁸³ Yet none include the specific promotion of unionization rights³⁸⁴ and most are

378. See SOLIDARITY CENTER, <http://www.solidaritycenter.org/content.asp?pl=407&contentid=407> (last visited Oct. 31, 2013).

379. Paul Garver, *Beyond the Cold War: New Directions for Labor Internationalism*, 1 LABOR RES. REV. 61, 63 (1989).

380. Kim Scipes, *Globalization from Below: Labor Activists Challenging the AFL-CIO Foreign Policy Program*, 38 CRITICAL SOC. 303, 308–09 (2011).

381. Peter Waterman, *Wikileaks on AFL-CIO in Latin America Sparks Debate on US Labour Education Site (Kim Scipes, USA)*, UNIONBOOK (Jan. 7, 2012, 15:00 PM), <http://www.unionbook.org/profiles/blogs/wikileaks-on-afl-cio-in-latin-america-sparks-debate-on-us-labour>.

382. See Kevin Kolben, *The WTO Distraction*, 21 STAN. L. & POL'Y REV. 461, 462 (2010); Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL. TRADE 261, 271–73 (2005); see also Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 527–30 (2004). Some have argued this for more cynical reasons. See Monique Garcia, *China's Labor Law Evolution: Towards a New Frontier*, 16 ILSA J. INT'L & COMP. L. 235, 236 (2010) (promoting labor rights to balance out China's unfair trade practices).

383. Kevin Kolben, *A Development Approach to Trade and Labor Regimes*, 45 WAKE FOREST L. REV. 355, 384–85 (2010).

384. See Christopher David Ruiz Cameron, *What's Prologue is Past: How the Present of International Labor Law Predicts the Past of U.S. Labor Law*, 18 SW. J. INT'L L. 145, 154 (2011).

formal gestures in practice.³⁸⁵ It is thus not surprising that even the Obama administration, which is generally seen as pro-union by contemporary standards, has generally supported the World Bank's use of EPL measurements to downgrade nations' credit worthiness.³⁸⁶

In the context of Sino-American relations, we again see a general indifference or elision of labor rights in U.S. democratization discourse. During the 1990s, labor conditions were temporarily part of the debate on whether to grant China Most Favored Nation Status.³⁸⁷ However, such concern was displaced in favor of the familiar argument that trade liberalization is linked to social development, akin to how labor rights were marginalized during the evolution of GATT and now the WTO.³⁸⁸ Not surprisingly, China has itself acted to further weaken labor rights as a concern for international economic institutions.³⁸⁹ U.S. unions, for reasons of their perceived self-interest, have generally focused on China's unfair trade practices rather than unionization abroad.³⁹⁰ Even in China, where U.S. unions have sent delegations to the ACFTU, these unions have generally, following the usual critique of the Solidarity Center's anti-political stance, stayed clear of labor dissidents.³⁹¹

385. Jonathan P. Hiatt & Deborah Greenfield, *The Importance of Core Labor Rights in World Development*, 26 MICH. J. INT'L L. 39, 46–47 (2004); César F. Rosado Marzán, *Of Labor Inspectors and Judges: Chilean Labor Law Enforcement After Pinochet (and What the United States Can Do to Help)*, 54 ST. LOUIS U. L.J. 497, 500 (2010) (Chile).

386. Arthurs, *supra* note 362, at 533 n.26.

387. Hilary K. Josephs, *Labor Law in a "Socialist Market Economy"*, *supra* note 309, at 560.

388. Hilary K. Josephs, *Upstairs, Trade Law; Downstairs, Labor Law*, 33 GEO. WASH. INT'L L. REV. 849, 849 (2001).

389. See Stephen F. Diamond, *The "Race to the Bottom" Returns: China's Challenge to the International Labor Movement*, 10 U.C. DAVIS J. INT'L L. & POL'Y 39, 41–42 (2003).

390. A review of the records of the Congressional Executive Commission on China reveals this position quite clearly. CONGRESSIONAL EXECUTIVE COMMISSION ON CHINA, <http://www.cecc.gov/> (last visited Oct. 31, 2013).

391. DIAMOND, *supra* note 144, 117–18. But see Dean Frutiger, *AFL-CIO China Policy: Labor's New Step Forward or The Cold War Revisted?*, 27 LAB. STUD. J. 67, 73–74 (2002) ("The AFL-CIO says that the United States should engage in trade with China, but only when China raises wages, improves working conditions, allows strong unions, and respects human rights.").

To the extent that our national interest in democratization abroad is legitimate and of high priority, the pro-flexibilization and anti-political views of labor rights abroad are untenable. The seductive illusions that legal liberty and political liberty are synonymous, or that technocratic forms of regulatory reform can lead to political change while bypassing actual domestic political conflict have been shown to be unreliable at best, and counterproductive at worst. It may in fact be quite difficult for public and private actors in the United States to promote politically active labor unionization abroad. Certainly the CCP has been quick to quell any notion that such promotion would be possible to operate in China. Such assessments are inherently country specific.

It may ultimately be unsatisfying to know that independent unionization can promote democratization, and yet be unable to proactively apply this knowledge. However, it is much easier to *not promote* ademocratic views of labor flexibilization that undermine the potential for labor-based activism in authoritarian and semi-democratic regimes. But herein lies the rub of the historical shift away from U.S. post-World War II pro-union democracy promotion: Our current impact on labor rights abroad reflects the de-democratization of U.S. labor law at home. And if we are concerned about any particular legal component of democratization abroad, we must necessarily reflect on such legal component of democratization at home.

B. *The De-Democratization of U.S. Labor Law*

It has been a recurrent mantra in recent decades that U.S. labor law is in a state of serious decline.³⁹² Decreased union density in the United States has been a clear trend since the 1970s, and labor law scholars have lamented what Cynthia Estlund has now classically called the “ossification” of U.S. labor law.³⁹³ Most labor law scholars forward evidence that U.S. workers desire greater union representation and that continued structural and doctrinal roadblocks in the U.S. labor law regime are a perpetual, and worsening, cause of this mis-

392. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 9–11 (1990).

393. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

match.³⁹⁴ Though some labor law scholars once predicted that a major economic crisis might lead to a thorough reform of U.S. labor law, such reform has proven almost impossible even under drastic economic disruptions.³⁹⁵

As labor law debates in the United States continue, what is perhaps equally striking beyond this ossification itself is the troubling ways in which trends in U.S. labor law have resonated with the modern authoritarian approach to labor regulation described earlier. Not only do we refrain from promoting abroad the one aspect of our legal system with the tightest relationship to democratization theory—private unionization—but we also are witnessing a convergence between our labor discourse and that of the non-democratic societies which we often presume to influence. The original conception of U.S. collective bargaining was to extend the model of democracy to employment relations.³⁹⁶ Yet, we do not export labor law in large part because at home we have lost faith in its democratic character.

The promotion paradox is thus rendered more comprehensible when we consider that labor rights and property rights have been in deep conflict within U.S. labor law doctrine since the very outset of our modern system of collective bargaining, beginning with the enactment of the National Labor Relations Act (NLRA) in 1935. In fact, the decline of U.S. labor law has been classically argued by Karl Klare to be tied to the invocation of common law property rights by the U.S. judiciary since the NLRA first enshrined the right to unionization.³⁹⁷ The triumvirate cases of *Babcock*, *Jean Country*, and *Lechmere* are now commonly used to benchmark the doctrinal progression whereby employer property rights have increasingly

394. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 154–55 (1999).

395. Samuel Estreicher, “Come the Revolution”: *Employee Involvement in the Workers’ State*, 1 U. PA. J. LAB. & EMP. L. 87, 87 (1998).

396. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1515 (1981).

397. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 318 (1978). For an earlier argument see William B. Gould, *Union Organizational Rights and the Concept of “Quasi-Public” Property*, 49 MINN. L. REV. 505, 506 (1965). The seeds of this deconstruction have been traced to the beginning of the twentieth century by DANIEL R. ERNST, *LAWYERS AGAINST LABOR* 3–4 (1995).

justified the limitation of union collective action,³⁹⁸ leading to a consistent prioritization of state common-law rights of employers over the federal statutory rights of workers.³⁹⁹ In essence, if an employer's liberty in the workplace is defined in terms of exclusion, and a worker's liberty defined solely as limitations to exclude, then such interests are inherently at odds. Thus, the basic logic of these decisions is that labor activism on or incident to employer property creates an easily cognizable harm, regardless of whether such activities are central to the associative nature of the labor rights. Thus, in contrast to the United States' post-World War II leadership in promoting independent unionization, U.S. workers now have fallen far behind other developed nations in their ability to form unions and the range of associative actions they can take once unionized.⁴⁰⁰

This particular doctrinal progression and its embrace of common-law property rights are devoid of any recognition of the particularly democratic character of labor rights. However one feels about their utilitarian efficiency or normative appeal, the common-law presumptions that undergird the doctrinal backlash against the NLRA are pre-democratic in origins and thus give no particular weight to the democratic life of workers.⁴⁰¹ The very presumption that the workplace is defined as an extension of the liberty and rights of employers rather than the liberty and rights of workers is a basic status distinction with roots in non-democratic economic regimes.⁴⁰² In the actual process of judicial and administrative decision-making, this dismissal of labor law's democratic function manifests in a textually strict reading of the NLRA along with broad historical invocations of the common law from which property gains

398. *National Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *Jean Country*, 291 N.L.R.B. 11, 19 (1988); *Lechmere, Inc. v. National Labor Relations Bd.*, 502 U.S. 527, 539–40 (1991). See generally Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 315–16 (1994).

399. Jeffery M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891, 893 (2006); James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 519 (2004).

400. See generally LANCE COMPA, UNFAIR ADVANTAGE (2000).

401. Ken Matheny & Marion Crain, *Disloyal Workers and "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1752–54 (2004).

402. Patrick Macklem, *Property, Status, and Workplace Organizing*, 40 U. TORONTO L.J. 74, 94 (1990).

the instinctive prioritization for legal and personal liberty described earlier.

As a result, the collective nature of U.S. union activity is heavily circumscribed by the presumption that unions exist solely to remediate bargaining inequalities in discrete moments of collective contract formation, rather than to facilitate the integration of democratic values into economic life. Thus collective actions outside the workplace that inherently promote broad solidarities, such as secondary boycotts, can be prohibited purely based on economic grounds, going unbalanced in any way with democratic concerns.⁴⁰³ The end result is a modern labor law doctrine that is intensely anti-collective and one that would ban outright the tactics employed by independent unions fighting against modern authoritarian regimes.⁴⁰⁴

The reaction of many contemporary U.S. labor law scholars to this state of affairs has been a reluctant turn to what have been dubbed “new governance” approaches to workplace regulation.⁴⁰⁵ These more technocratic approaches to workplace governance emphasize non-state based interventions that primarily rely on logics of employer self-regulation rather than independent employee representation.⁴⁰⁶ Such approaches emphasize the possibility of “win-win” employee-employer coordination and the aspiration that private enterprises will internalize public norms through properly structured, but non-union based, forms of employee voice.⁴⁰⁷ Part of the turn to promoting innovation through self-regulation is also a response to the perception that transnational forms of labor pro-

403. Notably, secondary boycotts were originally allowed under the NRLA but eliminated under the 1947 Taft-Hartley Act. See Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1365 (1962).

404. Ahmed A. White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1, 79–80 (2010).

405. See, e.g., CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 14, 15 (2010); Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071, 1075–76 (2005). For more U.S. and parallel international invocation of new governance, see *REGULATING LABOUR IN THE WAKE OF GLOBALISATION* (Brian Bercusson & Cynthia Estlund eds., 2007).

406. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 453–55 (2004).

407. This is well-captured by Estlund’s argument for “co-regulation.” ESTLUND, *supra* note 405, at 20–21.

tection and organization are more promising given the globalization of the economy⁴⁰⁸ (though with less than promising results to date).⁴⁰⁹

Another response to the ossification conclusion has been a turn to the individual rights of employment law as an alternative avenue for advancing workers' interests. Predicted nearly thirty-five years ago by Paul Weiler,⁴¹⁰ the move to refocusing on employment law to assert workers' interests in the workplace has been pointed to by a variety of labor scholars as a possible substitute for organizing under the traditional National Labor Relations Board (NLRB) regime.⁴¹¹ Such a move turns labor activism based on employment law toward the courts and other administrative agencies to by-pass NLRB unresponsiveness or ineffectiveness. Some have even argued that such a turn represents a positive recognition of the false dichotomy between labor, employment, and employment discrimination law in the United States.⁴¹²

This is not to say that pro-union labor law scholars have abandoned labor law reform. Many have called for procedural changes in the regulation of union formation, as evidenced in the recent push to enact the Employee Free Choice Act under the Obama administration.⁴¹³ These proposals emphasize the

408. Jeffrey Hirsch, *Employee Collective Action in a Global Economy*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 606, 625–26 (Kenneth G. Dau-Schmidt et al. eds., 2008); Jeffrey M. Hirsch, *Making Globalism Work for Employees*, 54 ST. LOUIS U. L.J. 427, 427–28 (2010).

409. James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85, 124 (2004); Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQ. L. 403, 405–07 (2011).

410. WEILER, *supra* note 392, at 226 (though Weiler was dubious of their potential efficacy).

411. Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687 (2008); KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS 237 (2004).

412. Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 215–16 (2007).

413. Catherine L. Fisk & Adam R. Pulver, *First Contract Arbitration and the Employee Free Choice Act*, 70 LA. L. REV. 47, 47–48 (2009); Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 713–18 (2010). *Contra* RICHARD A. EPSTEIN, THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT 6–10 (2009).

prevalence of bargaining delays,⁴¹⁴ and try to earn incremental procedural changes given the lack of judicial or political receptivity to labor law reform.⁴¹⁵ Many such approaches strategically try to avoid tying democratic norms to the workplace and instead base their arguments on less controversial frames such as procedural equality and fairness.⁴¹⁶

Emblematic of these new turns is the current debate on employee speech recently invigorated by *Garcetti* and the Supreme Court's weakening of the traditional protection of speech by public employees.⁴¹⁷ *Garcetti* represents the delinking of even public employment from democratic norms,⁴¹⁸ and this new doctrinal hostility to employee speech has been accompanied by rapidly proliferating limitations on employee communications and privacy in the workplace that emphasize workplace loyalty and efficiency while again excluding democratic norms.⁴¹⁹ Such norms of loyalty presume a specific prioritization and ordering of personal liberty along a strict employee/employer binary.

Beyond those who simply emphasize the centrality of employer free speech rights,⁴²⁰ the new governance solution to the issue of workplace speech has been to offer due process solutions with the hope that workplaces will internalize public

414. Benjamin Sachs, *Revitalizing Labor Law*, 31 BERKELEY J. EMP. & LAB. L. 333, 335–36 (2010).

415. William B. Gould IV, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States*, 43 U.S.F. L. REV. 291, 300–01 (2009).

416. See Brishen Rogers, "Acting Like a Union": *Protecting Workers' Free Choice by Promoting Workers' Collective Action*, 123 HARV. L. REV. FOR. 38, 52–53 (2010).

417. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that public employees possess no special free speech rights to facilitate government whistle blowing). See generally Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 3–4 (2009).

418. Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment 5* (2013) (unpublished manuscript) (on file with author).

419. Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 830 (2011); Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. 1091, 1093–94 (2011).

420. Harry G. Hutchinson, *Liberty, Liberalism, and Neutrality: Labor Preemption and First Amendment Values*, 39 SETON HALL L. REV. 779, 841 (2009).

values.⁴²¹ Yet, even though the debate explicitly invokes constitutional norms of free speech supposedly at the heart of U.S. democracy, such procedural responses accept another key pre-democratic common law demarcation, that between citizenship in the economic and political realm—exactly what our traditional system of independent unionization initially rejected.⁴²²

While there are many reasons for the decline of unionization in the United States today, this doctrinal state of affairs *in nuce* explains why U.S. promotion of unionization abroad has shifted so drastically in the last fifty years. The elevation of property rights to the exclusion of labor rights in development discourse does not reflect an open assessment of history and development experience, but rather a projection of domestic developments. The allure of property rights reform as a depoliticized form of democracy promotion abroad and the resistance to integrating the experience of the CCP and other experimental authoritarians into development orthodoxy are instead driven by the need to rationalize the domestic divorce of democratic values from U.S. labor law.

Providing this explanation of the promotion paradox does not, however, exhaust its utility. As seen earlier, under the CCP, “labor law” as collective bargaining does not exist, but employment law and monitoring regimes are on the rise. The very nature of the 2007 Labor Contract Law enacted by the CCP reflects the view that refocusing labor relations around individual contracts, even those influenced by informal state intervention, was meant to stifle democratic development and the threat of class-based civil society development. Further, the CCP’s reform of the ACFTU’s organizational structure was meant to facilitate coordination with employers rather than democratize the workplace, as evidenced by

421. See, e.g., Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1264–65 (2007); Orly Lobel, *The Lawyer’s Role in a Contemporary Democracy, Promoting the Rule of Law, Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1249–50 (2009).

422. For a summary of criticism of *Garcetti*, and a defense, see Kermit Roosevelt III, *Not As Bad As You Think: Why Garcetti v. Ceballos Makes Sense*, 14 U. PA. J. CONST. L. 631, 632 (2012).

Walmart's embrace of the ACFTU's new organizing campaign.⁴²³

In broad terms, the move towards a "market economy" in China has followed a basic reconceptualization of economic enterprise as a joint social enterprise to one based on employer property rights and managerial discretion.⁴²⁴ Should it not give us pause that the CCP creates a legal framework for an individuated workplace law in which Chinese workers' experimentation with wildcat strikes, slowdowns, and secondary boycotts are illegal? Consider also that while we celebrate Chinese whistleblowers almost reflexively,⁴²⁵ the CCP, a constitutional provision protecting whistleblowers notwithstanding, permits the aggressive regulation of public and private employee speech as a legitimate basis for termination.⁴²⁶ It should also give us pause that both labor activists in China and the United States have found themselves forced to work with the same second-best alternatives though possessing a clear preference for unionization.⁴²⁷

This anti-democratic parallelism in U.S. and Chinese labor regulation begs the question of the extent to which such second-best alternatives become self-perpetuating as they align with the larger logic of labor law's long-term degradation and the erosion of the economic bases of its civil society dynamism.⁴²⁸ Such a claim invariably invites debate over short-term versus long-term legal change,⁴²⁹ but the authoritarian experi-

423. Esther Wang, *As Wal-Mart Swallows China's Economy, Workers Fight Back*, THE AMERICAN PROSPECT (Apr. 23, 2013), <http://prospect.org/article/wal-mart-swallows-chinas-economy-workers-fight-back>.

424. Chang Kai & William Brown, *From Individual to Collective Labor Relations: Transformation of Collective Labor Relations and Evolution of Labor Policy in China*, 44 INDUS. REL. J. 102, 103 (2013).

425. Jeremy Page, *China Whistleblower on Graft Gets Unusual Media Help*, WALL STREET JOURNAL, Sep. 3, 2011, at A11, available at <http://online.wsj.com/article/SB10001424053111904716604576546231510978902.html>.

426. See Isabelle Bennett, *Media Censorship in China*, COUNCIL ON FOREIGN RELATIONS (Jan. 24, 2013), <http://www.cfr.org/china/media-censorship-china/p11515>.

427. This is what Benjamin Sachs has referred to as the "hydraulic" force of the NLRB's inability to be effectively reformed. Sachs, *supra* note 415, at 334.

428. ROBERT D. PUTNAM, *BOWLING ALONE* 192–94 (2001).

429. William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 264–65 (2002) (employment rights are rising, unionization still needed).

ence, in China in particular, makes clear that there is no long-term substitute for the promotion of solidarity. Labor law will always be about the basic distribution of power in society.⁴³⁰ And, so, it will always be about the state.⁴³¹ While in the comparative context this helps us understand the actual functioning of specific labor law reforms in China, it also reminds us that we should understand changes in workplace law within the context of our own cyclic political struggles and not as part of an inevitable evolutionary advancement.

Furthermore, this reality only underscores a long-standing position within U.S. labor law scholarship that emphasizing the narrow utilitarian aspect of collective bargaining is detrimental exactly because unionization has never functioned in U.S. history without broader collective social action.⁴³² As discouraging as recent doctrinal and political developments in U.S. labor law appear, pragmatic solutions in the short-term should not be seen as precluding the aggressive pursuit of paradigmatic re-evaluations.⁴³³

Thus, even if in the end we cannot influence Chinese legal development, the Chinese experience can lead us to take more seriously U.S. labor law scholars that have continued to advance new possibilities for long-range re-imaginings of modern U.S. labor law. For example, James Pope has argued for a new articulation of labor organization under the Thirteenth Amendment to explicitly recognize the innate power dynamics

430. Peter Zumbansen, *The Law of Society: Governance Through Contract*, 14 *IND. J. GLOBAL LEGAL STUD.* 191, 193 (2007) (formalism of contractual analysis deludes as to broader socio-political context); see also Aditi Bagchi, *The Myth of Equality in the Employment Relation*, *MICH. ST. L. REV.* 579, 581 (2009). *Contra* Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 *YALE L.J.* 1357, 1360 (1983).

431. PAUL G. BUCHANAN, *STATE, LABOR, CAPITAL* 8 (1987).

432. George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 *BERKELEY J. EMP. & LAB. L.* 187, 203–04 (1994); Joel Rogers, *Divide and Conquer: The Legal Foundations of Postwar U.S. Labor Policy*, 12 *GERMAN L.J.* 210, 214 (2011); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law, Liberalism, and the Waning of Union Strength*, 20 *BERKELEY J. EMP. & LAB. L.* 1, 11–13 (1999).

433. Kerry Rittich, *Between Workers' Rights and Flexibility: Labor Law in an Uncertain World*, 54 *ST. LOUIS U. L.J.* 565, 582–83 (2010) (calling for a fundamental reorientation in labor values). Notably excluded are other individualistic frames that, while not incompatible with collective action, are still grounded in individual analysis. See, e.g., David C. Yamada, *Human Dignity and American Employment Law*, 43 *U. RICH. L. REV.* 523, 524 (2009).

in labor relations.⁴³⁴ Pope's view is reminiscent of those advanced by the AFL prior to the New Deal about the constitutional dimensions of labor relations, and would be as radical in the United States today as it would in China.⁴³⁵ Paul Mishler has also emphasized a revival of union organization to reassert the primacy of labor action outside of the workplace and to lessen the emphasis on short-term electoral politics.⁴³⁶ William Forbath has advanced a new labor movement model, based on historical U.S. visions of republican self-rule, that defends constitutional democracy in the workplace, and exposes the economic/political citizenship distinction as a recent doctrinal construction that should be considered as much out of place in U.S. law, as it is unsurprisingly embraced by the CCP.⁴³⁷

Such visions are compatible with individual employment rights or even forms of employer co-regulation to the extent that they can help articulate broad common interests in the workplace,⁴³⁸ transcend employment law's dependence on the legal definition of what constitutes "work,"⁴³⁹ and move beyond the general limits of solely litigation-based reform strate-

434. James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"*, 119 YALE L.J. 1474, 1481 (2010); see also Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1462 (2012); Jim Pope, *Next Wave Organizing and the Shift to a New Paradigm of Labor Law*, 50 N.Y.L. SCH. L. REV. 515, 549 (2005–2006).

435. Mark Dudzic, *Saving the Right to Organize: Substituting the Thirteenth Amendment for the Wagner Act*, 14 NEW LAB. F. 59, 64 (2005).

436. See Paul C. Mishler, *Trade Unions in the United States and the Crisis in Values: Towards a New Labor Movement*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 861, 871 (2006).

437. William E. Forbath, *The Distributive Constitution and Workers' Rights*, 72 OHIO ST. L.J. 1115, 1126 (2011) ("With a more democratically governed constitutional political economy would come an end to the use of inherited, anti-labor common law rules and entitlements to define the substantive content of constitutional guarantees."); see also Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503, 509 (2007) (emphasizing democratic process for protecting labor rights).

438. Benjamin I. Sachs, *Employment Law as Labor Law*, *supra* note 411, at 2690 ("[G]alvanizing a group of workers capable of acting collectively involves two interrelated tasks: workers must develop both a common understanding of a set of shared workplace problems, and a group identity strong enough to sustain a collective response to these problems.").

439. See Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in *THE GLOVES-OFF ECONOMY* 31 (Annette Bernhardt et al. eds., 2008) (discussing the complexity of defining "employment").

gies.⁴⁴⁰ Even some proponents of the new regulation have argued for unions' need to diversify their roles into forms of craft and citizen unionism.⁴⁴¹

Focusing on broader concepts of union activity may seem difficult for unions now fighting aggressively in the short-term time horizons of U.S. electoral politics.⁴⁴² But here again the authoritarian experience is telling, as unions involved in democratization movements often spend years, if not decades, working outside electoral politics after major defeats, intentionally avoiding inclusion in the state, some long before they had any power as collective bargainers.⁴⁴³ Parallel to rising recognition of popular constitutionalism, or constitutional law outside of the courts,⁴⁴⁴ almost every labor movement had to initially embrace labor law outside the courts.

Moreover, the U.S. labor movement has been far more adaptive and vibrant than current caricatures often portray,⁴⁴⁵ and contemporary examples of forms of social movement

440. See generally ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 9 (1982) (critically analyzing the appropriateness of litigation as a forum for advancing policy goals); GERALD N. ROSENBERG, *THE HOLLOW HOPE* 336–37 (1991).

441. Katherine K.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 *UCLA L. REV.* 519, 525–26 (2001) (arguing for a reexamination of U.S. employment law in the context of a “boundaryless” workplace); see also Richard R. Carlson, *Citizen Employees*, 70 *LA. L. REV.* 237, 245–46 (2009) (arguing that “citizen employees,” or citizens who participate in civic duties, need more definition and protection in employment law).

442. HERBERT B. ASHER ET AL., *AMERICAN LABOR UNIONS IN THE ELECTORAL ARENA* 173–74 (2001).

443. Dan Clawson & Mary Ann Clawson, *What Happened to the US Labor Movement?: Union Decline and Renewal*, 25 *ANN. REV. SOC.* 95, 100 (1999) (providing a history of the decline in U.S. labor unions and suggestions for ways the AFL-CIO can reverse this trend); Jack Fiorito et al., *National Union Effectiveness in Organizing: Measures and Influences*, 48 *INDUS. & LAB. REL. REV.* 613, 619 (1995) (arguing that union effectiveness is correlated with internal union democracy).

444. See Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 *WIS. L. REV.* 159, 159 (2012) (providing a history of and reform proposals for popular constitutionalism).

445. HOYT N. WHEELER, *THE FUTURE OF THE AMERICAN LABOR MOVEMENT* 7–10 (2002) (providing a history of U.S. labor unions and possible paths forward).

unionism in the United States already exist.⁴⁴⁶ In addition, many have pointed to the diversification and experimentation that could be unleashed by removing federal labor pre-emption,⁴⁴⁷ the exclusivity built into the current U.S. bargaining paradigm,⁴⁴⁸ or broadening the scope of union representation, including employment rights.⁴⁴⁹

Such an experimentalist attitude might also call for greater contemplation of the unexplored ground resulting from the current disengagement of labor law from corporate law,⁴⁵⁰ and in particularly forms of employee ownership.⁴⁵¹ Some have advanced more conciliatory views of worker empowerment and corporate self-interest,⁴⁵² asserting that the historical antipathy of labor activists towards internal forms of corporate representation unduly limits the potential of such as complements to external representation.⁴⁵³ But such experimentalism should not be unqualified, for, as the CCP teaches

446. Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1930–31 (2007).

447. Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law: Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 101 (2009); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1160 (2011).

448. Orly Lobel, *Orchestrated Experimentalism in the Regulation of Work*, 101 MICH. L. REV. 2146, 2154 (2003).

449. Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 BERKELEY J. EMP. & LAB. L. 57, 59 (2002).

450. Timothy P. Glynn, *Communities and Their Corporations: Towards a Stakeholder Conception of the Production of Corporate Law*, 58 CASE W. RES. L. REV. 1067, 1100 (2008).

451. Aditi Bagchi, *Varieties of Employee Ownership: Some Unintended Consequences of Corporate Law and Labor Law*, 10 U. PA. J. BUS. & EMP. L. 305, 305–06 (2008).

452. Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 963 (1993); Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 J. CORP. L. 1, 20 (2007). *Contra* Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 DEL. J. CORP. L. 979, 1002–04 (1998) (arguing that participatory management can solve informational inefficiencies, informational asymmetries, and excessive hierarchy; but are pro-corporate, not pro-worker).

453. Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. L. REV. 827, 829 (1996).

well, experimentation is only a tool, and can be deployed for authoritarianism as much as it can for democracy.⁴⁵⁴

Such an experimental turn towards expanding rather than retracting the role of labor law in civil society necessarily includes a trenchant critique of the status of democratic norms within U.S. unions themselves.⁴⁵⁵ Idealizing the history of the U.S. labor movement does as little for domestic debate as it would for exporting U.S. labor law—itsself part of reason for the limited success of U.S. post-New Deal union promotion abroad.⁴⁵⁶ The U.S. labor movement's mid-century inability to help transcend racial divides has a legacy that still survives today.⁴⁵⁷ Problems of centralization and internal rigidification simulate the worse qualities of corporatist labor regimes abroad, and only provide fuel to those who argue that unionization is a threat to individual liberty.⁴⁵⁸ Centralization and too-close ties to the state contribute to intra-union dissent, as seen earlier in the foreign policy work of the AFL-CIO's Solidarity Center. Certainly, if Chinese labor activists can be experimental in the face of explicit state repression, the U.S. labor movement can find experimental spaces with a longer term view of change.

454. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation*, 94 COLUM. L. REV. 753, 761–62 (1994); Orly Lobel, *Agency and Coercion in Labor and Employment Relations: Four Dimensions of Power in Shifting Patterns of Work*, 4 U. PA. J. LAB. & EMP. L. 121, 186 (2001).

455. Teresa Sharpe, *Union Democracy and Successful Campaigns: The Dynamics of Staff Authority and Worker Participation in an Organizing Union*, in REBUILDING LABOR 62, 63 (Ruth Milkman & Kim Voss eds., 2004); Samuel Estreicher, *Deregulating Union Democracy*, 21 J. LAB. RES. 247, 247 (2000); Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, U. ILL. L. REV. 367, 367–68 (1992); Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93, 96–99 (1984); Kim Voss, *Democratic Dilemmas: Union Democracy and Union Renewal*, 15 TRANSFER: EUR. REV. LAB. & RES. 369, 371–75 (2010); see also Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 13–14 (2005).

456. Arthurs, *supra* note 362, at 527–28.

457. Marion Crain, *Whitewashed Labor Law, Skinwalking Unions*, 23 BERKELEY J. EMP. & LAB. L. 211, 213 (2002).

458. Harry G. Hutchison, *What Workers Want or What Labor Experts Want Them to Want?*, 26 QUINNIPIAC L. REV. 799, 799–802 (2008).

V. CONCLUSION

The real challenge of the promotion paradox is not in the clear limitation of our ability to influence foreign legal reform, which is already well-documented.⁴⁵⁹ Instead it is taking this limitation as fuel for self-evaluation and reform. Debates about the utility of foreign legal experience commonly hinge on whether one is open to the possibility that U.S. law or current U.S. legal trends are not always global exemplars.⁴⁶⁰ There are many promising indicators that U.S. legal culture is beginning to recognize that our engagement with foreign legal systems is not a unidirectional affair.⁴⁶¹ The experimental attitude of authoritarian regimes provides an array of legal adaptations to study empirically, from which we can also draw cautionary tales. Crucially, such learning runs the risk of self-aggrandizing stereotyping if we simply read foreign experiments through the lens of our ideological and theoretical pre-commitments.⁴⁶²

Certainly, the use of Chinese legal reform as a mirror for self-reform agitates some very deep seeded U.S. assumptions and ideas about Chinese law.⁴⁶³ The reflexive assertion that the legal contexts of the United States and China are too alien to draw comparisons should only cause deeper reflection when points of convergence are drawn. Just as with many of the traditional categorizations of comparative legal traditions, the formal structures of U.S. and Chinese law may be quite different, but their explanatory power becomes blurred when

459. See Kroncke, *supra* note 24, at 553–54.

460. See John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 548–49 (1995); SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM 40 (1996); Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 464–65 (2010).

461. See Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, 4 INT'L JUD. OBSERVER 2, 2–3 (1997); David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1, 17–19 (2011); Kroncke, *Law and Development as Anti-Comparative Law*, *supra* note 24, at 540–45.

462. See OTTAWAY, *supra* note 14, at 11–12. This is a form of what Kahan and Braman would identify as a rigid interpretive schema of “cultural cognition.” See Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 147, 148–49 (2006).

463. See generally TEEMU RUSKOLA, LEGAL ORIENTALISM 3 (2013).

examining empirical responses to functionally similar social problems.⁴⁶⁴

What the Chinese authoritarian experience shows is that today, the value of assessing our attempts to shape foreign legal development is less in providing a means of fine-tuning such enterprises, but rather in setting aside reflexive dismissal of their domestic import, and laying open the possibility of revisiting our own assumptions about domestic legal development.⁴⁶⁵ Many labor law scholars have long lamented that the study of foreign labor law has traditionally been formalistically sterile, both in the United States and elsewhere.⁴⁶⁶ There is a growing recognition of the inherently international and comparative nature of modern labor and employment law practice,⁴⁶⁷ and an awareness that many of the issues placing stress on U.S. labor law reflect common global concerns.⁴⁶⁸ In this way, the decline of U.S. unionization is part of a global phenomenon, with globalization weakening unions for many of the same reasons it has weakened democratic consolidation in young democracies.⁴⁶⁹

464. See Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, 2009 BYU L. REV. 1879, 1879–81; Seán Patrick Donlan, *Comparative Law and Hybrid Legal Traditions: An Introduction*, in *COMPARATIVE LAW AND HYBRID LEGAL TRADITIONS* 9, 10–11 (Eleanor Cashin Ritaine et al., eds, 2010).

465. See Eric Stein, *Uses, Misuses—And Nonuses of Comparative Law*, 72 NW. U. L. REV. 198, 216 (1977). As one author explains:

In short, the claim here is not that universalistic theories of law and development should be rejected out of hand. Rather, they should be regarded sceptically, and each one ought to be tested against a powerful set of objections to which even the most sophisticated theories of this kind have proven vulnerable.

Kevin E. Davis, *Legal Universalism: Persistent Objections*, 60 U. TORONTO L.J. 537, 553 (2010).

466. Clyde Summers, *Comparative Labor Law in America: Its Foibles, Functions, and Future*, 25 COMP. LAB. L. & POL'Y. J. 115, 115 (2003) (“Comparative Labor Law is not a scholarly subject but a trip to the zoo or academic tourism.”).

467. Susan Bisom-Rapp, *Exceeding Our Boundaries: Transnational Employment Law Practice and the Export of American Lawyering Styles to the Global Worksite*, 25 COMP. LAB. L. & POL'Y. J. 257, 258 (2004); Charles J. Ogletree & Rangita de Silva-de Alwis, *supra note* 322, at 71–72.

468. GUY DAVIDOV & BRIAN LANGILLE, *BOUNDARIES AND FRONTIERS OF LABOUR LAW* 8 (2006).

469. Marcus J. Kurtz, *The Dilemmas of Democracy in the Open Economy: Lessons from Latin America*, 56 WORLD POL. 262, 265 (2004).

If one is sufficiently troubled by the merging parallels between the labor rights discourse in China and the United States, there is much to be learned from international experience once dismissive assumptions and idealizations are set aside.⁴⁷⁰ It is important to remember that earlier in the twentieth century national cross-fertilization was quite common in U.S. labor law's development, and central to the initial formation of the NLRA.⁴⁷¹ Although the common contemporary pressures of globalization on most labor rights regimes have grown, strong convergence predictions have, as in many areas of legal regulation, not materialized.⁴⁷² Other civil and common-law countries have continued to experiment with forms of social unionism in the face of these pressures,⁴⁷³ and through internationalization we are already indirectly influenced by foreign labor law regimes.⁴⁷⁴ Lest we forget the parallel dynamic in property rights, this Article's discussion of eminent domain flows naturally into the now growing field of comparative takings analysis and other institutional innovations in property rights abroad.⁴⁷⁵

470. See, e.g., Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21, 26–27 (1995) (discussing deviations from ideal type in the Brazilian and U.S. union regimes).

471. See generally DANIEL T. RODGERS, ATLANTIC CROSSINGS 418 (1998); Harry Arthurs, *Extraterritoriality By Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad*, 21 STAN. L. & POL'Y REV. 527, 534 (2010) (focusing on the influence of U.S. labor law on Canadian labor law); Mozart Victor Russomano, *The Influence of American Industrial Development on Brazilian Labor Law*, 22 U. FLA. L. REV. 210, 212 (1969) (noting the origins of U.S. labor dynamics in Great Britain and considering the influence of such dynamics on Brazilian labor law).

472. See Gordon Anderson et al., *The Evolution of Labor Law in New Zealand: A Comparative Study of New Zealand, Australia, and Five Other Countries*, 33 COMP. LAB. L. & POL'Y J. 137, 164 (2011) (showing a lack of convergence between New Zealand, Australia, the United Kingdom, the United States, India, Germany, and France).

473. AMANDA TATTERSALL, POWER IN COALITION 179–82 (2010).

474. See, e.g., Kati L. Griffith, *Globalizing U.S. Employment Statutes Through Foreign Law Influence: Mexico's Foreign Employer Provision and Recruited Mexican Workers*, 29 COMP. LAB. L. & POL'Y J. 383, 384 (2008).

475. See, e.g., Jianlin Chen, *China's Ding Zi Hu, the United States's Kelo, and Singapore's En-Bloc Process: A New Model for Economic Development Eminent Domain from a Givings Perspective*, 24 J. LAND USE & ENVTL. L. 107, 107–11 (2009) (comparing such policies in the United States, China, and Singapore).

Doctrinally, not only can we see different approaches to balancing property and labor rights, but the European Court of Human Rights has recently, with still unknown consequence, embraced collective bargaining as an essential right.⁴⁷⁶ Certainly, one does not need to completely negate employer property rights in economic enterprise if one sets such rights and employee labor rights within the same proportionality debates that have preoccupied global judicial discourse on reconciling tensions between fundamental rights.

Furthermore, in not only reviving but also reforming U.S. unions, there are international successes in both non-hierarchical union structures and expanded non-economic civil society action that could inspire their internal democratization.⁴⁷⁷ Even critics of U.S. labor law have allies abroad, who should not be overlooked as they are again helpful to seeing foreign legal experiences with their own internal complexities and contests.⁴⁷⁸

Yet old prejudices are slow to change, and former NLRB Chairman William Gould recently noted that he would likely have been impeached for citing foreign law during his tenure.⁴⁷⁹ The very notion of democracy promotion and rule of law reform as taken-for-granted aspects of U.S. private and public foreign policy exists in tandem with not only their poor historical track records,⁴⁸⁰ but also our own intensifying struggle with the meaning of democratic consolidation and the rule of law at home.⁴⁸¹ While international contexts often seduc-

476. K.D. Ewing & John Hendy, *The Dramatic Implications of Demir and Baykara*, 39 *INDUS. L.J.* 2, 4 (2010).

477. Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 *N.C. L. REV.* 319, 323–24 (2012) (comparing United States' approach to union unemployment representation to that of socialist countries); Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 *DENV. U. L. REV.* 1, 5 (2010) (focusing on the British experience with non-hierarchical unions).

478. See, e.g., Atsushi Tsuneki & Manabu Matsunaka, *Labor Relations and Labor Law in Japan*, 20 *PAC. RIM L. & POL'Y J.* 529, 531 (2011).

479. William B. Gould IV, *Labor Law Beyond U.S. Borders: Does What Happens Outside of America Stay Outside of America*, 21 *STAN. L. & POL'Y REV.* 401, 409 (2010).

480. Tamanaha, *supra* note 24; Kroncke, *Law and Development as Anti-Comparative Law*, *supra* note 24, at 480.

481. Thomas C. Heller, *An Immodest Postscript*, in *BEYOND COMMON KNOWLEDGE* 382, 399 (Erik G. Jensen & Thomas C. Heller eds., 2003); Thomas

tively appear to be more ripe for legal intervention than the well-known frustrations of domestic politics,⁴⁸² if we seek to promote democratic processes abroad through legal activism then we must not take for granted that we know what types of legal reform inspire democratization.⁴⁸³

Here the experience of authoritarian China offers us a pointed example of whether what we have been attempting to export is simply our assumptions.⁴⁸⁴ The possibility that our non-corporatist form of labor unionization may in some cases be our best legal export for democratization runs counter to contemporary trends in U.S. labor law and the historical revisionism these trends have inspired.⁴⁸⁵

The turn to new governance approaches to labor law in the United States often invokes transnational learning, but the same pressures to capture apolitical “best practices” often hamper such invocation.⁴⁸⁶ Similarly, unionization has been avoided by some human rights work that sees labor rights as problematically political⁴⁸⁷ and inherently organizational rather than legalistic.⁴⁸⁸

Carothers, *Promoting Democracy in a Postmodern World*, 43 *DISSENT* 35, 40 (1996).

482. Yves Dezalay & Bryant G. Garth, *Constructing Law Out of Power*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 354, 354 (Austin Sarat & Stuart Scheingold eds., 2001).

483. Thomas F. McInerney, *Law and Development as Democratic Practice*, 1 *VOICES OF DEV. JURISTS* 1, 5 (2004); Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 *YALE HUM. RTS. & DEV. L.J.* 185, 189 (2010).

484. Upham, *supra* note 79, at 7.

485. Alvaro Santos, *Three Transnational Discourses of Labor Law in Domestic Reforms*, 32 *U. PA. J. INT’L L.* 123, 199–200 (2011). For activism and idealistic projections, see *LAW AND GLOBALIZATION FROM BELOW* (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005); Michael William Dowdle, *Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China*, 24 *FORDHAM INT’L L.J.* S56, S69–S72 (2000); Julie Mertus, *The Liberal State vs the National Soul: Mapping Civil Society Transplants*, 8 *SOC. & LEGAL STUD.* 121, 127 (1999).

486. Cook, *supra* note 166, at 1–2; see also Ohnesorge, *supra* note 87, at 304.

487. Dave Spooner, *Labor Unions and NGOs: The Need for Cooperation*, in *DEVELOPMENT NGOs AND LABOR UNIONS* 11, 18–19 (Deborah Eade & Alan Leather eds., 2005).

488. Kevin Kolben, *Labor Rights as Human Rights?*, 50 *VA. J. INT’L L.* 449, 484 (2010).

That such approaches seek to avoid the political conflicts that have generated contemporary domestic resistance to reforming U.S. labor law is understandable. But it is also a danger to the extent that it plays to the aversion in U.S. law to addressing the persistently difficult questions that democratization studies recurrently revisit; that is, distributive and structural issues of economic and political power. If democratization studies emphasize broadly shared notions of equity,⁴⁸⁹ associative rights,⁴⁹⁰ substantive legal empowerment,⁴⁹¹ and the destabilizing force of high inequality,⁴⁹² then we elide such debates at our peril.

Such potentially difficult lessons serve to remind us how the existence of formal democracy and formal legal equality should never overwhelm the pursuit of substantive social empowerment.⁴⁹³ That authoritarian regimes such as China have learned this well should inspire greater introspection, not greater demonization nor equivocation.

Perhaps in the end we will choose alternative forms of labor organization than the NLRA model. At the least, we should not begrudge other nations taking different paths—or the actual path we have already taken. Even if one were to believe with certainty that independent unions are unnecessary in contemporary U.S. democratic development, such a belief must be accompanied by the concession that they may nevertheless be crucial to other countries' current democratic needs and that their historical civil society function has been demonstrably replaced by other arenas of our society.

In the end, the brute lesson of the authoritarian experience is that as long as we conceive of legal development in solely utilitarian or apolitical terms we will not only be of very little use to foreign democratic activists seeking to learn from

489. Edgardo Buscaglia, *Introduction*, in *THE LAW AND ECONOMICS OF DEVELOPMENT* 1, 2 (Edgardo Buscaglia, William Ratliff & Robert Cooter eds., 1997).

490. PRANAB BARDHAN, *SCARCITY, CONFLICTS, AND COOPERATION* 1 (2005).

491. Stephen Golub, *Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development*, in *HUMAN RIGHTS AND DEVELOPMENT* 297, 297 (Philip Alston & Mary Robinson eds., 2005).

492. Stanley L. Engerman & Kenneth L. Sokoloff, *Factor Endowments, Inequality, and Paths of Development Among New World Economies* 1 (Nat'l Bureau of Econ. Research Working Paper No. 9529, 2002), available at http://www.nber.org/papers/w9259.pdf?new_window=1.

493. ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* (1985).

our experience, but we also risk sapping the vibrancy of our very own democratic accomplishment. The growing convergence in union-hostility and general labor regulation between the United States and authoritarian regimes like China begs the question of whether we can sustain the idea that political and economic liberty are interconnected when we simultaneously propose that democratic values have no place in the U.S. workplace.