

What Is Democracy For in China? The Case of Trade Union Elections

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I. Introduction

“Democracy” has been a prominent theme and a recurring rallying cry throughout the history of the People’s Republic of China (PRC) in 1949. But the meaning of democracy in Chinese discourse, and its perceived value, has often been quite opaque to Western observers. “Democratic centralism,” as the Chinese Communist Party (CCP) describes its unelected rule on behalf of the people, seems to many Americans to be not just a contradiction in terms but a monstrous charade. And yet if one conceives of “democracy” as less of a binary either-or question and more of a question of degree or a spectrum, it is clear that one can see aspects of democratization in modern China.

Consider the process leading to the enactment of the Labor Contract Law that took effect in 2008.¹ The State Council passed a draft law and sent it on to the National People’s Congress (NPC). The NPC sought public comments on the draft -- and got over 190,000 of them -- and conducted surveys across the country. In response to the conflicting views expressed in the comments and surveys, the draft law was subsequently revised four times before final adoption in June of 2007. What was unusual about this process was not the role of the National People’s Congress in considering and voting on the law; that is conventional in the Chinese legislative process. What was unusual was the publication of the draft law and solicitation of public comments, the outpouring of comments, and the revisions that followed. This is not “Democracy” – neither the State Council nor the National People’s Congress is elected through open, contested democratic procedures. And yet the “notice and comment” process represents a democratizing move, one that has been repeated (with varying levels of transparency) for subsequent legislation.

Or consider the highly-publicized 2012 elections in the village of Wukan in Guangdong Province. “Direct” secret ballot elections for village leaders have been taking place in some fashion since 1987.² It was important (though not unprecedented) that the Wukan villagers got to nominate their own candidates for the first-level elections. In China these so-called “*haixuan*” or “sea elections” have been often used, though often manipulated or denied in fact, in village elections. The real news in Wukan was the confrontational means by which villagers gained these concessions -- the dramatic and well-publicized standoff between protesting villagers and resistant local CCP officials -- and the subsequent election of two protest leaders to the governing body of the village. The Wukan villagers had wrested control of the election process from local CCP officials, apparently with the blessing of

higher level officials. The episode might suggest that more democratic election procedures are gaining traction in China.

Recognizably democratizing tendencies, experiments, and reforms are evident in many parts of the very complex Chinese political landscape. But one may wonder when and why these democratizing moves occur in an essentially authoritarian society. This paper examines these large questions through one of several possible windows: the evolving procedures for selection of "grassroots" trade union officials – that is, for enterprise-level union officials. This window on electoral democracy is decidedly partial; the frame conceals many important aspects of the question. But it is a large enough and important enough window to reveal some larger trends and currents of thought regarding electoral democracy in China today – both among the citizens and within the government. The recent rise of more democratic elections at the lowest level of the trade union hierarchy may be instructive not only as to the evolution of labor relations in China, but also as to the future of democratizing reforms more generally.

Our focus is on the All-China Federation of Trade Unions (ACFTU), an arm of the party-state which has a closely guarded monopoly on the collective representation of workers. In recent years of labor unrest, the ACFTU has been seen as largely "useless" to China's workers, especially its migrant workers in the private sector. The point was underscored by a township-level ACFTU official who told reporters, in the midst of the 2010 Honda strike, that workers' efforts to secure higher wages was "a matter between labor and employers. It is inappropriate for the trade union to intervene."³

One problem (out of many) with the ACFTU's ability to represent workers is that workers do not choose ACFTU leaders. That has long held true even at the lowest level of the organization, that is, within the enterprise. Elections are nominally required, and have often occurred, at that level; but they have been dominated by managers, who typically control the nomination process and choose one of their own to lead the union chapter. But as labor unrest has risen, the ACFTU has come under growing pressure from above, below, and within to reform itself and to become a more effective and genuine representative (or overseer) of China's unruly workers. That is the context in which electoral democracy in grassroots unions has become a focal point of reform.

Recent experience in the trade union context suggests that, in China today, electoral democracy -- specifically in the form of "*haixuan*" elections for grassroots leadership positions -- can sometimes appear to be the only way, or at least the best way, to quell localized social unrest that otherwise threatens to grow into political unrest. People with shared grievances, once they are sufficiently mobilized to conduct sustained collective protest actions, not

only can wrest substantive concessions from the regime, but can sometimes secure the ability to choose some of their own leaders and thereby achieve a measure of collective self-determination. To the powers-that-be in China, electoral democracy appears to be a highly risky departure from prevailing conceptions of Party-led "democratic centralism"; yet it is sometimes the lesser of two evils, as compared to continued agitation from below. To the people, electoral democracy may initially appear to be at best a means to an end; yet once secured, the ability to select one's own leaders may acquire intrinsic value, and may be hard for the government to take back even when tensions abate. At the same time, the growing practice of electoral democracy at the lowest tiers of the polity may help to build up civic habits and experiences that enhance the viability and appeal of democracy at higher levels.

All these dynamics can now be seen in the current labor relations scene in China, especially in the comparatively tolerant environment of Guangdong Province, where relatively well-organized labor protest has been concentrated. Beginning in early 2012, some groups of workers who have organized themselves sufficiently to carry out a strike have been able to demand genuine direct *haixuan* election of their union leaders within the enterprise. Guangdong may be a special case, but China's leaders are paying close attention to that case, and may see it as a test of the value of electoral democracy in securing labor peace.

Election of union officers may seem to many readers to be only remotely related to political democracy. And so it might be in the more familiar (to us) setting of relatively autonomous unions. But the ACFTU is a branch of the party-state and an integral institution of governance in China. Experience with electoral democracy in the trade union setting is thus highly relevant to other settings in which localized popular unrest threatens to disrupt social harmony and stability. The converse is also true, for the current debates and developments in regard to trade union elections in China echo in many ways those relating to village elections since the late 1980s. That experience – the good, the bad, and the ugly – offers crucial lessons regarding the prospects for electoral democracy taking hold in the trade union setting.

Part II of the paper gives some crucial background on the rise of labor unrest in the years since China opened its doors to foreign investment and domestic entrepreneurship. The threat that labor unrest poses for social and political stability is the problem to which leaders are seeking solutions -- solutions beyond the obvious but often counterproductive response of brute force. Part II also sketches the structure and role of the ACFTU, with particular attention to impediments to the union's accountability to workers and to its ability to help solve the problem of labor unrest. The aim of this Part is to give a concise account of the particular context of labor relations within which electoral democracy has become a pressing issue.

Part III begins by taking a step back and considering (in very broad comparative and historic strokes) the relationship between unions' accountability to workers and the promotion of industrial peace. We then turn to current proposals for more democratic elections for union officers at the enterprise level. While elections have long existed on paper, real elections in which workers control the nomination process – *haixuan* elections – are rare. All of the powerful actors in China's labor relations scene – national and local ACFTU and CCP officials, as well as employers – worry that open elections will lead to the escalation of conflict and the loss of control. But sometimes the alternative – the continuation of the current conflict – seems worse, and real elections are permitted to go forward. So *haixuan* elections are on the rise. Part IV briefly examines what is driving both the supply of and the demand for *haixuan* elections.

We conclude by posing some questions and venturing some hypotheses about the future of democratic elections in Chinese unions (and perhaps more generally). Many leading labor relations scholars and some policymakers seem to regard the labor relations arena as a major testing ground for democratizing reforms. They see democratization as a process that proceeds step by step – “*yí bù, yí bù*” (though the steps do not necessarily lead to what Westerners would regard as full-fledged electoral democracy). Some of those steps are taking place today as a result of growing collective consciousness and collective action among China's beleaguered workers.

II. China's Labor Question and the Urgency of Reform in the ACFTU

Any discussion of electoral democracy in China's trade union requires some understanding of the contemporary problem of labor unrest in China, its origins, and the nature and structure of China's leading labor relations actor, the ACFTU. We offer a brief account of those matters here.

A. Rising Labor Unrest and the Turn to Labor Relations Reform

China's contemporary labor question began to emerge with the liberalization of China's economy in the late 1970s, when Deng Xiaoping and other pragmatists within the Party elite took charge after Mao's disastrous Cultural Revolution. Foreign companies began to beat a path to China's factories and its low-wage labor market. And China's rural peasants, spurred on by poverty and family necessity, dreams of prosperity, and duty to county, began to beat their own tortured paths to those factories. For many, the long hours, low wages, and dangerous and degrading conditions that they found there were apparently preferable to a rural life devoid of prospects.⁴ At the same time, the rapid growth of private and foreign-owned enterprises helped drive the rationalization and partial privatization of the SOEs; and that in turn led to the shattering of the "iron rice bowl" -- the encompassing if modest set of

workplace-based entitlements to housing, food, education, and health care that urban workers enjoyed under Mao.⁵

The two groups of workers -- those of the declining "rustbelt" of state-owned factories in the north and those of the booming but brutally exploitative factories of the "sunbelt" -- each developed their own characteristic set of grievances.⁶ From the "rustbelt" came the grievances of urban workers whose relatively high wages, benefits, and lifetime security in the SOEs, and their proclaimed standing as "masters of the factory," were all upended in the more competitive environment that followed liberalization. Workers protested both the crumbling of their own former entitlements and the enrichment of the elite few.⁷ But the world's attention (and our own) has been drawn largely to China's "sunbelt" and its rapidly expanding "private sector." In these foreign-owned, jointly-owned, and domestic private enterprises, poor migrant workers bore the brunt of very low wages, very long hours, and abysmal working conditions. Collective representation was non-existent, as the ACFTU ignored the private and foreign-invested sector, while the state harshly suppressed any sign of workers' independent organizing.⁸

The Chinese state both orchestrated the rise of capitalist development and retained considerable leverage over private enterprises.⁹ Yet effective state *regulation* of factories lagged behind.¹⁰ An important clue to the seeming paradox of continuing state leverage and lagging regulation lies in the fact that the "capitalists" and the local officials who regulated them were often one and the same. High ranking local party members acquired businesses on egregiously favorable terms; and, beginning in 1992, local business owners were welcomed into the CCP.¹¹ For the first few decades of "reform and opening," the lure of profits at the local level thus reinforced national policies that prioritized economic growth over decent wages and working conditions. The result was a bare-knuckled version of *laissez faire* capitalism reminiscent of the era of "liberty of contract" in the U.S.¹² Indeed, some Chinese leaders' "scientific" understanding of the stages of socialist development may have foretold, even prescribed, a period of labor exploitation.¹³

In such conditions, the rise of collective labor unrest could surely come as no surprise. Chronically long hours, low wages, and hazardous conditions created tinderbox conditions in which a spark – an accident, a worker's collapse from exhaustion, the discharge of a pregnant worker, or the failure to pay promised wages – may produce an explosion.¹⁴ There have been many sparks and many explosions in the past two decades. The resulting "mass incidents" – which involve anywhere from ten individuals to thousands – have become a major preoccupation of the regime. The government has stopped reporting these statistics, but a senior Party source put the number of "mass incidents" in 2008 at 127,467, perhaps one-third of them labor-related. Foreign sources estimated 180-190,000 mass incidents in 2011.¹⁵

One factor in rising worker unrest is sociological: Many early migrant workers, raised in the dire poverty of the 1960s and 1970s and the paroxysms of the Cultural Revolution, were encouraged, and were willing, to “let a few get rich first.”¹⁶ Today’s migrant workers, most born after 1979 in the “one-child” era, are said to be unwilling to “eat bitterness” as their parents did. The new generation is more disposed to pursue their own interests, and to see their interests as diverging from those of the rich. For now, these aspirations may be fueling the rise of collective labor protest (though strains of individualism and materialism may also curb those collective impulses, at least if economic growth continues).

Until recently, most labor protests arose from “rights disputes” – the alleged violation of legal or “contractual” entitlements. Most disputes stemmed from simple non-payment of wages owed; and most arose from collective grievances. In principle, the law afforded remedies for these claims, but the reality fell far short. In addition to the vagaries of proof, lack of legal representation, and fly-by-night employers that stymie many low-wage workers, even in the U.S., Chinese workers were often unable to prove the existence of an employment relationship, or were rebuffed because of the sensitivity of the dispute.¹⁷ Collective claims in particular were mostly turned away. Even when workers prevailed, they were rarely awarded full compensation; they were expected to compromise regardless of the merits.

Local officials’ and judges’ receptivity to workers’ complaints was undermined by their own interest in promoting local economic growth. Even apart from their lucrative ties with local business owners, local officials were evaluated and rewarded by the central government mainly on that basis. (Crucially, there is no “separation of powers,” and not even the pretense of judicial independence, in China.) It was often after one or more fruitless visits to the local labor bureau or labor arbitration body, typically over wage arrears, that workers took to the streets.¹⁸ When they did so, their claims were usually self-consciously expressed in terms of “rights.”¹⁹

Rising labor unrest, mainly over “rights disputes,” had become a major social issue by 2007, when China enacted three major labor laws, including the sweeping Labor Contract Law (LCL). This suite of reforms, which sought to beef up both the substance and enforcement of individual labor rights, was a logical response to the rise of collective rights disputes.²⁰ The intent was obviously to afford workers an official avenue for peaceful redress of “rights disputes.” The result has been a dramatic rise in labor-related complaints through official arbitral and judicial channels.²¹ But these reforms proved inadequate to stem the tide of labor unrest. That is partly because many of the problems that workers faced before the reforms persisted thereafter: Workers still lacked legal representation, and tribunals still insisted on individual treatment of collective disputes. Moreover, the flood of post-LCL

claims swamped tribunals, leading to delays and pressure to “mediate” or settle claims for very partial relief. For some white collar workers, the LCL proved quite helpful; many employers complain that the law tipped the balance too far in workers’ favor. But for most factory workers, it simply failed to afford reasonable redress of widely-shared grievances.

In the meantime, a larger labor relations challenge has emerged. While policymakers sought to expand official channels of redress for workers’ rights disputes, China’s workers have decided they want more – not only vindication of their legal rights and enforcement of minimum standards, but higher wages. The rise of “interest disputes” started with a bang in May, 2010, with the highly publicized strike by over 1800 workers at the Nanhai Honda component factory. The Honda strike, the biggest and longest-running strike ever in a foreign-invested Chinese factory, virtually shut down three downstream Honda assembly plants for nearly two weeks, and cost Honda up to \$350 million a day. It triggered strikes at another Honda component factory and other foreign and domestic automakers, and ushered in a new wave of economic interest strikes: Workers were seeking higher wages and better working conditions.²²

The post-Honda strike wave has dramatically underscored the inadequacy of the government’s favored reform strategy of improving and enforcing minimum standards, and highlighted the need for institutional reforms that enable workers to press their own demands. China’s leaders well know the history of industrialization, in which the resolution of workers’ collective interest disputes (as opposed to their sheer repression) has been found in some form of collective bargaining. That is what workers have demanded and that is what governments have instituted, grudgingly or otherwise. China is no exception. Although official sources continue (tellingly, as we will see) to insist on the term “collective consultation,” collective bargaining has been on the front burner for policymakers for the last several years, and the Honda strike brought new urgency to these discussions.

Many questions about collective bargaining are on the table. For example, will bargaining take place on at the enterprise level or at the sectoral level? The practice so far includes some of each, and varies by province and industry; that sort of heterogeneity is likely to persist. Another crucial question is what leverage will workers have to induce management to grant concessions? Historically workers’ main leverage in collective bargaining has been the strike; and lately Chinese workers have been getting quite a lot of leverage out of strikes. But strikes are not legally protected in China -- they are deemed overly confrontational in the “harmonious society” to which the regime aspires -- and historically the ACFTU has had nothing to do with strikes (except for trying to stop them).²³ So it is nearly certain that strikes will not be the officially prescribed recourse for workers unsatisfied with

employers' offers. What then is supposed to induce employers to bargain? Interest arbitration? Government persuasion? These two possibilities are not entirely distinct from each other, and are likely to be more viable in China than our own history and experience might suggest.

But the most vexed question of all, and the focus of this paper, is about whether and how workers are to be represented at the negotiating table. The ACFTU is not really a trade union as we understand the term in the West (and under international labor law). But as the official representative of all of China's workers, it will be central to any official strategy for dealing with the problem of labor unrest. In fact, as we will see, the national ACFTU was quick to respond to the Honda strikes with its own reform proposals. In order to understand those proposals, however, one must understand what it is that is being reformed.

B. The ACFTU: Arm of the CCP? Pawn of Management? Both?

The ACFTU is a nation-wide "mass organization" with federations at the provincial, municipal, county, rural township, and municipal district levels, and with 1.7 million "grassroots" branches within enterprises.²⁴ So why is the union commonly said to be "useless" to workers seeking to improve their wages and working conditions?²⁵ One answer is quite simple: The ACFTU is not a genuine representative of the workers but a creature of the ruling CCP and a vehicle for promoting party rule and regime stability. There is much that is true and important in that simple answer, but there are also important complications, contradictions, and changes within the ACFTU.

The ACFTU, first established in 1921, went through ups and downs during Mao's rule before its reestablishment in 1978 on the cusp of economic liberalization.²⁶ There were brief flashes of independent activism within the ACFTU in the 1980s; but after 1989 (and Tiananmen, and the union-led toppling of the communist regime in Poland), it was brought under tighter party control.²⁷ It serves as one of the major Leninist "transmission belts" by which dictates of party leaders are conveyed down to the "masses," and the masses' concerns up to the leaders.²⁸ The ACFTU's particular mission is especially contradictory: It is supposed to both protect worker interests and advance the interests of "the working class as a whole" -- which include maintaining production and promoting economic growth -- while "upholding the Party's cause" and "consolidating the Party's basis of rule."²⁹ In terms often heard today, the ACFTU is supposed to both protect worker rights (*weiquan*) and protect stability (*weiwen*); but when those aims conflict, *weiwen* generally wins.

At its modern re-inception in 1978, the ACFTU was adapted to function in a planned economy dominated by SOEs that were managed on behalf of "the worker state," not shareholders.³⁰ The union's constituents were the

urban workers -- including managerial and administrative personnel -- whose entire life and welfare centered around their "work unit" (*danwei*). The ACFTU retained that basic character and that limited constituency for many years -- even as private and foreign-owned capital and rural migrant workers began to flow into China's "sunbelt," even as the SOEs began to contract and, through restructuring, to mimic their market-driven private counterparts, and even as wealth and salary disparities mushroomed. In short, the dramatic transition from a state-controlled economy to a market economy had brought no fundamental alteration of either the ACFTU's structure or its official mission.

The ACFTU's ability to represent workers' interests is compromised by party control; yet the regime tolerates no alternative institutions of worker representation. The ACFTU's official monopoly is aggressively enforced on the ground. Independent union-like groups that purport to organize workers, especially across factories, are flatly illegal and virtually non-existent.³¹ Even labor NGOs that advocate workers' interests or represent them in legal disputes find only a tenuous and shifting toehold.³²

China's rejection of the principle of "freedom of association," a core international labor right and central organizing principle of the International Labor Organization, long made the ACFTU a pariah within the Western labor movement. But China's economic growth, integration into the world economy, and impact on global labor standards has made some form of engagement over Chinese labor issues look increasingly vital,³³ while the regime's unflinching resistance to political change on this front has discouraged hopes in the near term for the development of an independent labor movement. The ACFTU, however flawed a vehicle of worker representation, has come to be seen as "the only game in town" in a town that could not be ignored.³⁴

The formally monolithic character of the ACFTU obscures both crucial distinctions and interesting developments within the ACFTU. To begin with, there is an important distinction between the enterprise chapters of the ACFTU and the rest of the ACFTU hierarchy. While the former is straightforwardly an arm of the party, the latter typically function (if they function at all) more as an arm of enterprise management.³⁵ But these generalizations, too, risk obscuring important variations and developments.

1. The ACFTU Outside the Enterprise and the Complexity of Party Control

The ACFTU hierarchy mirrors the organization of the party, from national to provincial and local levels of administration; and ACFTU positions are staffed by party cadres -- indeed, career civil servants -- whose ACFTU tenure was often a stepping stone in a career within the party apparatus.³⁶ As a branch of the party-state, the ACFTU is obviously subject to party-state control. At the same time, control is not complete, and is not simply hierarchical,

or even vertical. In general, the Leninist principles of “democratic centralism” dictate strict hierarchical organization, with lower levels of the organization subject to the authority of higher levels.³⁷ But Party control of the ACFTU operates mostly “horizontally,” from the national party to national ACFTU, from provincial party to provincial ACFTU chapters, and so on down to the local level. Horizontal control by the relevant party branch dominates vertical control either by the national ACFTU or by its industrial branches, and it is often through these horizontal relationships that the ACFTU is enlisted to participate in *weiwen* (protecting stability) activities.³⁸

As many scholars have observed, the sheer size and complexity of China confers a measure of *de facto* local autonomy from the central government, the ancient roots of which are captured in the Chinese aphorism, “the sky is high, and the emperor is far away.”³⁹ Local ACFTU and CCP officials have thus often been able to resist direction from the center. That resistance has often been exerted in the interest of the local businesses that are both engines of economic growth and often a source of personal enrichment for local officials. But it has also created space for innovation on behalf of workers. For example, officials in Guangdong province (in the Pearl River Delta near Hong Kong) and their counterparts in Zhejiang province (south of Shanghai) have experimented off and on with direct election of union officials.⁴⁰

The horizontal nature of party control of the ACFTU, and the responsiveness to local concerns that this entails, is a double-edged sword for workers. On the one hand, greater central control of the ACFTU hardly seems likely to enhance accountability and responsiveness to workers at the grassroots. On the other hand, a centrally-directed ACFTU that is committed to representing workers, raising wages, and reversing trends toward growing inequality could be a powerful ally for workers in their disputes with private and foreign businesses.

Especially since the Honda strikes, powerful voices within the ACFTU have questioned its two-way “transmission belt” function, as well as its role in reconciling the interests of workers and employers.⁴¹ They believe that employers are represented through other channels, and see the ACFTU’s function as the more coherent and traditional one (internationally speaking) of representing workers’ interests vis-a-vis employers. That does not mean that they see the union’s role in adversarial terms, nor that they seek to arm themselves with the “economic weapons” by which this adversarial contest is traditionally carried out in the U.S. But it is a major change that may both explain and trigger other changes in the ACFTU’s structure and conduct.

2. ACFTU at the Grassroots and the Problem of Management Domination

The enterprise chapters of the ACFTU, or “grassroots unions,” have a different character. The enterprise unions are officially assigned the task of

representing workers within the enterprise.⁴² But even apart from the conflict posed by their assigned role in promoting discipline and maintaining production, the conventional wisdom is that "firm level union branches are weak, non-democratic and subordinate to management."⁴³ That is partly because unions' charge to represent workers is rarely backed up by democratic mechanisms of selection (as we will see in more detail below).⁴⁴

It is more than ironic that the ACFTU encompasses *both* a massive nationwide wing of the Chinese Communist Party *and* over a million enterprise-level unions that are mostly pawns of profit-seeking capitalist corporations.⁴⁵ The contradictory nature of the ACFTU reflects some of the central contradictions within contemporary China's political economy. Like many features of China's labor market institutions, the subordination of enterprise unions to management is partly a holdover from the SOE era in which managers' responsibilities ran not to shareholders but to the workers of the enterprise and the "worker state."⁴⁶ But that begs the question of why the union structure has not been overhauled to suit the needs of workers within privately-owned profit-making enterprises. One answer is that, until the last decade, the ACFTU had almost no presence in the private and foreign-owned sector (where rural migrant workers predominated), and found itself mostly struggling to quell the anger and cushion the fall of urban SOE workers whose security, benefits, and status were crumbling in the wake of "restructuring."

More recently, and especially in the era of the "harmonious society," it has become clear to the regime that social harmony and political stability required addressing the concerns and quelling unrest among the millions of mostly migrant workers in the enormous and growing non-state sector. In 2003, the ACFTU opened unions to previously excluded rural migrant workers; and in 2006, it set out with much fanfare to "organize" the operations of large, Fortune-500 firms in China. By the end of 2008, the ACFTU claimed to have organized more than 82 percent of the Fortune 500 companies that do business within China.⁴⁷ The ACFTU now has as its stated goal "to establish union organizations in all foreign-invested enterprises in China."⁴⁸ But what does this "organizing" mean for workers on the ground?

Most of the ACFTU's organizing of foreign-owned enterprises followed this pattern:⁴⁹ Local ACFTU officials, faced with quotas for enterprise union formation, would call managers to announce that the enterprise had been targeted for formation of a union chapter. When management in turn called its lawyers in a panic, the lawyers delivered "bad news" and "good news": The "bad news" was that management had little choice but to accede to the ACFTU's demand, and to channel two percent of the firm's payroll to the union. The "good news" was that the union's presence would otherwise make little difference to the firm's operations. That is because, first, management could select (or arrange for the election of) a union chair who was not only

friendly to management but part of management (albeit perhaps wearing his or her other hat as a CCP cadre).⁵⁰ Second, if a union sought to secure a "collective agreement," it would agree to one that merely incorporated the law's minimum standards (along with some modest worker welfare provisions, like better food and breaks for women workers). Moreover, management was assured that ACFTU unions never organize strikes, and indeed take seriously their responsibility to avoid work stoppages. The ACFTU's ability to prevent strikes was part of its pitch to foreign-owned corporations.⁵¹

In some ways these enterprise union chapters resemble the "company unions" that were popular with some U.S. companies in the 1920s and early 1930s, but were outlawed by the NLRA in 1935.⁵² But management domination of grassroots unions in China has its own distinct genealogy in the Maoist state-owned economy. Apart from the unions' official mission of maintaining labor discipline and minimizing work stoppages, and their complete dependence on management for funding (in the form of the 2 percent payroll tax),⁵³ there is the fact that the union represents all workers in the enterprise, including managers.⁵⁴ Of course, managers seem likely to side with "the employer" on many issues of concern to rank-and-file workers, and in any case simply do not share the same conditions of employment.

One might have thought that the conflict of interest between capital (and its managers) and labor would be especially obvious in China with its nominally Marxist ideological commitments. But even as the ACFTU is refocusing its mission on representing workers, there is resistance to the notion of institutionalizing conflict within enterprises. The prevailing view remains that, among and within legitimate social actors (which now include private corporations), "contradictions" should be mediated within comprehensive institutions, not fought out between contesting ones.⁵⁵ The wall-to-wall, top-to-bottom definition of the union's constituency thus seems unlikely to change. But neither does it seem inevitably to preclude union representation of front-line workers' interests, as the latter clearly outnumber managers. But that brings us to the final source of management domination, and the one that will occupy us here: Workers have not been able to choose their own union officers. Grassroots union leaders (that is, officers of enterprise ACFTU chapters) have typically been chosen, with or without "election," by managers in consultation with CCP cadres. Indeed, at least until very recently, the union chairs typically *were* top managers. It is the absence of meaningful union elections that has become a chief target of reform.

Before turning directly to the election issue, let us briefly step back and take stock: With the subjection of the SOEs to market forces and the expansion of the private economy, China's party-state shifted from a conception of productive enterprises as integral components of the state to a more familiar (to us) conception of enterprises as largely autonomous entities whose activ-

ities needed to be regulated in the interest of society. The shift from an administrative to a regulatory posture toward corporations is not complete; the requirement that each enterprise maintain a CCP chapter shows the continued vigor of the older view. Moreover, the regulatory state is still very much a work in progress. But by and large, as in other modern market economies, collective economic activity in the corporate form enjoys a large measure of autonomy, and is regulated rather than directly managed by the state.

But the regime has not made the parallel shift with respect to collective labor activity, which the regime still seeks to administer or manage rather than to regulate. Officially, collective labor activity is the exclusive province of the party-state's own ACFTU rather than that of autonomous, self-organized groups subject to regulatory oversight. For now, the regime's own reform efforts remain wholly within that framework. But much of the international community will judge those efforts by whether they tend toward greater autonomy for workers and their own organizations.

The judgment of the international community is far from the top concern of China's leaders in the field of labor relations. Their main concern, and a major impetus for reform, is that unions that are useless to workers in resolving their disputes with employers are also useless to the regime in promoting labor peace. Management domination of grassroots union chapters has thus come to look like more of a problem than a solution to labor unrest. As labor unrest has risen, the ACFTU has thus come under growing pressure from above, below, and within to reform itself and become a more effective and genuine representative (or overseer) of China's unruly workers. That is the context in which electoral democracy has become a leading reform goal.

III. The Urgency and the Challenges of Reforming Union Elections

Making the ACFTU more responsive and accountable to workers has become a major focus of reform efforts; and yet those efforts face daunting hurdles – deeply entrenched structural barriers to democratization and powerful interests in maintaining official control of workers. In this part I explore both the logic behind the recent push for more democratic union elections and some of the challenges that lie ahead.

A. Why Elections Matter: The Relationship between Unions' Regulatory Role, their Representativeness, and Industrial Peace

[*This section is newly written and citation-free for now.*] The Honda strike underscored both the inadequacy of the regime's favored reform strategy of improving and enforcing minimum standards, and the uselessness of the ACFTU in promoting industrial peace. The well-organized strike and negotiations, and the ACFTU's unhelpful role in them, highlighted both the possibility and the necessity of real collective bargaining and real elected leadership,

and made it clear that, absent serious reforms within the ACFTU, both might take place outside the officially-designated trade union structure.

China's leaders thus face a serious dilemma: On the one hand, leaders are anxious to maintain party control of the official labor movement. On the other hand, leaders are also anxious to get a handle on the problem of worker unrest, and their prescribed mechanism for doing that is proving deficient. The ACFTU's ability to lead or control the workers is deeply compromised by the workers' perception that the union is merely a tool of the party-state and, within the enterprise, of management. So the regime's effort to maintain party control of the ACFTU is in tension with its desire to bring worker unrest under control.

It may be helpful to step back and view China's current labor pains in a historic and comparative perspective – painted here with a *very* broad brush: In the major industrial economies of the world, workers have generally won basic rights of freedom of association and collective bargaining *not* (or not only) by electing sympathetic legislators or persuading elites of the justice of their cause, but by making those rights the price of industrial peace. In other words, workers won their basic rights by creating a problem of labor unrest to which unions and collective bargaining became the solution.

The U.S. provides a familiar case in point. To telescope the history to an embarrassing degree: During the early decades of the twentieth century, labor organizing, agitation, and economic pressure, often aimed at inducing private employers to bargain and grant concessions, were frequently met with state repression – police action, criminal sanctions, injunctions, civil penalties. The labor movement and its leadership were bruised, battered, and often weakened by these confrontations; but they were also hardened and politicized. Labor conflict became more violent and more political, and at times seemed to pose an existential threat to the existing political and economic order. Some combination of workers' votes and a growing belief among elites in the justice of their demands surely provided the political energies for the New Deal labor reforms that legitimized unions and collective bargaining. But indispensable to their success, both in Congress and in the Supreme Court, was the conviction that industrial peace and basic social order could not be secured without the creation of a legal framework for union recognition, collective worker action, and collective bargaining.

Extrapolating from this drastically compressed account, we offer a hypothesis: Once workers gain the capacity to pursue shared economic aims through strikes and other forms of collective protest, direct public regulation of workers' collective action becomes costly and counterproductive.⁵⁶ Governments in modern industrial societies regulate workers' collective dissent

mainly through the intermediate institution of trade unions. Unions regulate workers; governments regulate unions. Let me explain.

Governments have limited tools for the direct regulation of workers' strike and protest activity; they typically turn to the use of force, perhaps backed by executive or judicial directive. But that sort of intervention by public authorities tends both to escalate the level of conflict and to politicize it – to shift the focus of workers' collective discontent from private employers to public officials and institutions. The solution to the "labor question" in one industrial society after another in the early to mid-20th century was found in the very institutions that were leading workers' protests: the trade unions. The labor law frameworks established in the mid-20th century through much of the industrialized world offering unions a *quid pro quo*: Unions gained public legitimacy, a bundle of privileges and protections, and the ability to secure gains for workers through peaceful channels; but all these gains were conditioned, more or less explicitly, on the unions' acceptance of a regulatory role in securing industrial peace.

Unions were thus enabled by the labor laws to tap workers' collective power to disrupt production and social order, to direct it into peaceful forms of economic conflict, and to strategically deploy it to achieve instrumental ends. But they could only use workers' collective power by regulating it. That allowed the government, in turn, to step back from the front lines in the regulation of workers' labor activity. The larger society (including employers and the public) could thus secure industrial peace, and the depoliticization and de-escalation of labor conflict, by regulating the unions. Unions were induced to keep collective action within lawful bounds through a combination of rewards (including better contracts, dues payments, and a seat at the table in economic policymaking) and punishments (fines and injunctions against certain potent labor tactics and violent or trespassory activity). The mid-20th century settlement of the "labor question" made unions central to the regulation of labor conflict.

Of course, it is ironic to draw this lesson from U.S. history, given the steady decline of union density and strike levels to historically low levels.⁵⁷ Somehow the U.S. in the 21st century has managed to secure "industrial peace" without a large labor movement or a large role for collective bargaining. That is another story, ripe for recounting, but not here.⁵⁸ Suffice it to say that the lessons of the 1930s and 1940s may be more relevant for China than those of the 2000s (though that is also debatable and debated in China).

If it is true that, in a time of heightened labor unrest, trade unions can play a crucial regulatory role, what does it take for them to play that role? Stated differently, what does it take to get workers, when they have gained the capacity to organize themselves and carry out disruptive strikes, to sub-

mit to the regulatory control of unions? First, the workers have to be able to secure gains by submitting to union regulation and the discipline of collective bargaining. That is, unions have to have a fair opportunity to secure gains for workers by controlling and channeling workers' collective power. (Otherwise the workers have nothing to gain from giving up the leverage they enjoy by virtue of their power to disrupt production.) Second, workers have to trust the unions and regard them as their true representatives. If unions are to be able not only to call a strike but to end a strike, the workers have to believe union leaders when they tell the workers, "This is the best deal we can get right now." Otherwise, why should the workers go back to work?

In the U.S. in the 1930s, it was the first element that was missing, and that the NLRA sought to supply: The law had to compel employers to recognize unions and sit down at the bargaining table with them. As for the second element, the accountability of the major U.S. unions to their worker constituents was not much in doubt in the 1930s.⁵⁹ Whatever quibbles one might have about that in the U.S., it is immediately apparent that this is where China's official unions fall short: The workers simply have no reason to trust the union, and to return to work, if it cuts a deal and tells the workers it is the best deal possible. They did not elect the ACFTU or its officers at any level, and the ACFTU's long history of control by local CCP officials or managers inspires no loyalty, confidence, or trust on the part of workers.

At least some of China's leaders may recognize that, for the ACFTU to be an effective regulator of restive workers, it must be more representative of and responsive to those workers. There are two obvious ways to pursue that end: One is to give up the ACFTU's monopoly on worker representation and allow workers to form their own independent unions; the other is to give up CCP control of the ACFTU and allow it to reconstitute itself as an independent trade union federation. Neither of those possibilities is currently on the table. That is, there is no near-term prospect in China for genuinely independent union representation for workers.

The union reform agenda instead consists of more modest reforms that would make the existing ACFTU more accountable to workers.⁶⁰ Much of the focus has been on ways to combat management domination of grassroots chapters, leaving party domination of the rest of the ACFTU essentially untouched. For example, various regulations and directives now bar top managers and their relatives from serving as union chairs. More ambitiously, reformers have sought to promote more democratic elections for "grassroots" (enterprise level) union officials. There has been much talk, and some official edicts, calling for "direct elections" of grassroots union officials. But direct elections come in many forms, more and less democratic, and more and less likely to promote unions' accountability to rank-and-file workers who most need representation and who most threaten industrial and social peace.

B. How Will Elections Work? Existing Models for Grassroots Union Elections

Generally, some constellation of management and union and party officials chooses the election method. While there is law on the books at the national level calling for “direct elections,” Chinese labor law does not prescribe any particular procedures for the elections. In particular, it does not prescribe the nomination process. At least until 2012, our sources reported that nearly all grassroots union elections began with nominations by management, perhaps in consultation with the chair of the enterprise's CCP committee (usually a manager) and local ACFTU officials (let us call this “management-plus”). Management-plus would nominate one or two more candidates than positions available (e.g., nine candidates to fill seven or eight positions). Then workers would vote, indirectly or directly, on these hand-picked nominees. Elections thus served largely as a rubber stamp for the choices of managers (and CCP cadres with whom they overlap and enjoy close ties).

In some “elections” most workers cast no vote at all. For example, in one large U.S. multinational firm as of 2011, management chose both the nominees and the “electors.” Managers would go to each working group or department and say, “We think workers X, Y, and Z would be good representatives of this group; anyone who disagrees please raise your hand.” No one disagreed. The management-chosen electors would then vote on the management-nominated candidates, and would eliminate the one or two lowest vote getters. Management then assigned union board positions to those who remained.⁶¹ This would appear to violate even the law's vague prescription of “direct elections.”

But even “direct” elections typically left control of nominations in the hands of managers. For example, in Zhejiang province in 2011, it was typical for management-plus to nominate candidates -- one or two more than positions available -- and for the workers to vote. The lowest vote-getter lost, and management assigned officer positions, including the union chair, from among the “winners.” In a slightly more democratic variant of this model, union board positions were assigned on the basis of vote totals, with the highest vote-getter becoming union chairperson.

There is a difference between these two “direct” but not quite democratic election methods: In the second, the workers not only eliminate the least favored of management's approved candidates; they determine which of those candidates will run the union chapter. On a spectrum of “democraticness,” the latter is closer to what we might call electoral democracy. Moreover, both of these “direct” election procedures permit workers to eject an unpopular incumbent union chair. And they do. A 2008 posting on the ACFTU's official website promoting “direct elections” reported on the recent

experiment in the Dalian Economic Development Zone: "[S]ince direct election was introduced in 2003, 13 trade union chairpersons have come up for re-election but not a single one of them got elected."⁶²

So even a little democracy can send a loud message to unresponsive incumbents. Still, none of the prevalent election procedures allows ordinary rank-and-file workers to choose their own leaders, or to elect a candidate that is not approved by management.

C. The Rise of Open Haixuan Elections

Our sources in Zhejiang identified a third type of election, the so-called *haixuan* or "sea-election," in which the workers themselves choose the nominees, and can even nominate themselves. *Haixuan* elections are familiar from their use (more than occasional, though not routine) in village committee elections since the 1980s. ... *Haixuan* elections – not merely "direct" but also open to workers' own nominees – would seem to be just what is needed to make grassroots unions more accountable to the workers. Yet *haixuan* elections for union officials have heretofore been exceedingly rare; in Zhejiang in May, 2011, just one or two teachers' unions were experimenting with *haixuan* elections. Even in December 2011, with union reform on the front burner, we were told that no central government directives would be likely to require *haixuan* elections. Why?

For one thing, a nationwide mandate of *haixuan* elections would run against a strong historical pattern, even a norm, of vagueness from above and discretion below. Dictates from Beijing – for example, "direct elections of enterprise union officials" – often leave wide room for local interpretation and discretion in implementation. So in December 2011, we were told that any new central directive on union elections would surely not *require* local ACFTU or party officials (or managers) to use *haixuan* elections, but would *allow* them to do so. We were also told that this would rarely happen.

The reason given for both the lack of a mandate for *haixuan* elections, and for the likely rarity of their use, was simple: Opening up elections to workers' own nominees would threaten the control by current powers-that-be – managers and union and party officials, both local and central – of the union apparatus. As factory managers in Zhejiang explained to the union official with whom we spoke: "We're most afraid that either we're not going to like their guys, or that they're not going to pick our guys." The "right guys" may be defined in part by their intelligence and appreciation of the realities of running a successful business (qualities that managers are likely to see in their peers). But the "right guys" are surely also those who are not too aggressive, strident, or unyielding in their demands. Union and CCP officials may not know the individuals as management does, but they share the goal of avoiding confrontation, and are inclined to defer to managers' judgment

on who the "right guys" are. Election procedures thus allow managers and officials to oversee the process to ensure that the "right guys" -- or at least not the "wrong guys" -- are selected.

At the same time, events on the ground seem to be running ahead of the planned scope of reforms. By May 2012, striking workers had begun to demand, and authorities to allow, *haixuan* elections for enterprise union offices (especially in Guangdong). There are scattered reports of workers simply conducting their own elections in the course of a strike, and of both management and party officials acceding to their choice of leadership given the fraught circumstances.⁶³ But let us look briefly at what lies behind this apparent trend.

IV. What is Electoral Democracy For? Supply and Demand for Haixuan Elections [NB: This section is the least developed.]

Haixuan elections would seem to be just what is needed to promote greater union responsiveness at the grassroots level. But even now it remains unlikely that *haixuan* elections will become mandatory across the country. Rather, *haixuan* elections are mostly being dealt out on an ad hoc basis, often as a concession in the midst of labor conflict. Even in the village election context, with decades of law and policy favoring village self-governance, villagers have often had to agitate in favor of this more democratic form of election, and higher level officials have had to decide to grant it, as occurred in Wukan recently. Let us begin with the supply side.

B. Official Willingness to Supply Haixuan Elections

Why and when do local and national party-state officials and enterprise managers agree to *haixuan* elections? This we probably know. This democratizing reform is not being instituted for its intrinsic virtues, nor merely because workers want it, but because it sometimes looks like the "lesser of two evils." Some savvy, mobilized workers have been able to make electoral democracy part of price of industrial peace. Grassroots democratization then becomes a strategy for fostering stability in localized arenas that have threatened to become unmanageable. That would strongly echo a pattern seen in the history of village elections....

Some government officials may see beyond the short-term goal of ending a disruptive strike. They might recognize that democratically-elected union officials could help to reduce unrest and promote stability, and even to shore up political legitimacy. Some managers, too, may take a longer view; they may hope that fairer institutional arrangements will lead to a more engaged, loyal, and productive workforce. (A few employers, with encouragement from progressive local union officials, have begun to introduce *haixuan* elections before unrest breaks out, as a good industrial relations practice.⁶⁴ To

the extent that open elections become paired with higher wages as the price of labor peace, and especially to the extent that employers and party-state officials begin to recognize the link between labor peace and democratic trade union elections, we may expect the trend to continue.

The perceived price of greater democratization -- and the major hurdle to demands for *haixuan* elections now as before -- is of course a loss of control by the higher level officials and managers. But the loss of control may be tolerable at lowest levels. "Grassroots" union chapters, though part of ACFTU "transmission belt," are peripheral to party-state governance structures. It is essential to keep in mind that the trend toward more open and democratic union elections is strictly confined to the lowest level of the union hierarchy.

Official receptivity to *haixuan* elections may also reflect the changing character of workers' leaders -- and of workers' ideas about who they want to lead them. According to Professor Shi Xiuyin of the Chinese Academy of Social Sciences, workers are discovering that the firebrands who first led them onto the streets or into a sit-down strike are not necessarily the most effective in gaining concessions from management once bargaining occurs. Once workers gain the right to elect their own leaders, they have sometimes passed over the strike leaders with more educated, skilled, and "responsible" leaders who seem better suited to dealing effectively with management.⁶⁵ Perhaps this pattern (hardly limited to China) reflects not workers' genuine preferences but their "adaptive preferences" -- adaptive, that is, to managers' recalcitrance in dealing with more militant leaders. One way or another, however, workers may be taking a more pragmatic -- some would say "mature" -- view of who is best suited to lead and most able to secure tangible gains for workers. These recent changes in demands, tactics, and leadership choices have helped make *haixuan* elections both more tolerable and more necessary from the standpoint of social stability and productivity -- that is, from the standpoint of union and party officials and enterprise managers.

A. Bottom-up Demand for Haixuan Elections

So officials have become more receptive to demands for *haixuan* elections. But why and when do workers seek open *haixuan* elections? That may seem obvious to Westerners schooled in the virtues of democratic self-governance. But it is worth asking when and why China's poor migrant workers began to demand not just wage increases but institutional reforms. Again, it may be useful to look to the history of village elections for some possible answers.

Village residents initially regarded open *haixuan* elections instrumentally -- as perhaps a useful tool in securing tangible improvements in their lives. Yet the experience of open and direct elections often led to a growing sense of entitlement to self-governance. ... Over the years villagers began to feel

entitled to elections, to value them intrinsically, and to demand cleaner and more open election procedures. They did not always succeed; incumbent manipulations of village elections, especially by discouraging or disqualifying disfavored candidates, are still common.⁶⁶ (And one may anticipate the same problems in trade union elections.) Opinions differ on the efficacy of village elections, but there have not been wholesale rollbacks of either the entitlement to elections or formally democratizing reforms once won.

The labor setting is arguably seeing an accelerated reprise of this pattern. Demand for *haixuan* elections is hardly universal among strikers, but it has been growing among workers with experience in self-organization and collective action -- that is, in the coastal south where the strike wave is concentrated. Workers initially see instrumental value in democracy, hoping that more responsive unions will help to secure and sustain economic gains through collective bargaining. But they, like the village residents described above, are also beginning to see democracy as intrinsically valuable, and even as a civic entitlement. Moreover, the experience of village elections in China suggests that these democratic reforms will be difficult for the government to take back once granted, even once tensions abate. The wider experience of democratic elections, actual and vicarious, may spur more demands for democracy -- at least "horizontally" to more enterprises, if not "vertically" to higher levels of the union.

So in spite of ambivalence at all levels of the party-state, and in spite of calculated vagueness in the terms of all relevant legal directives, the current policy push for "democratic elections" is easing the way for spontaneous grassroots demands for democracy to succeed, at least at the grassroots.

V. Conclusion: The Future of *Haixuan* Elections and Democracy in Union Elections (and Beyond) [very preliminary]

Many questions remain about the viability and spread of *haixuan* elections in trade unions and the consequences for China's future, both in labor relations and beyond. Will genuine collective bargaining through democratically accountable union officials continue to serve as a limited tactic for restoring social stability in the face of occasional popular outbursts? Or will it become institutionalized? Will limited introduction of electoral democracy at the grassroots satisfy popular demands for political voice and self-governance, or will it stoke those demands? Will elected grassroots union officials and their worker-constituents create pressure for democratic accountability at higher levels of ACFTU and CCP? Or will officials' fear of that very result strengthen official resistance to democratic reforms? Or will the growing experience of voting and self-governance at the grassroots (in villages as well as unions) encourage those within the regime who favor wider

political reforms, and reassure those who doubt that China's citizens are "ready" for democracy?

For now, the ACFTU, managers, and party officials are trying to create institutions that are just democratic enough that workers will accept their leadership within the factory and stay off the streets. Still, what is "democratic enough" for workers appears to have shifted in a democratic direction just in the last year. Many of China's leaders fear precisely what many Western observers hope – that real elections for grassroots union leaders will lay the foundation and increase the pressure for further democratization both at higher levels of the ACFTU and in other spheres of society.

Democratization at the lowest levels of society may have ripple effects on the citizens' attitudes and capacities with regard to democratization at higher levels of the polity. Democratic processes foster "civic skills" and, in a society with relatively few participatory opportunities, perhaps civic demands for greater voice. On the one hand, several decades of experience with village elections has produced neither strong vocal demands for nor official receptivity to open, democratic elections at higher levels of the polity, at which party control remains (for now) unquestionable. But direct open *haixuan* elections in the trade unions would introduce the experience of democracy into urban areas for the first time. Such an experience may have political repercussions beyond what village elections have had in the rural areas.

If workers do continue to push for a genuine voice in their working lives, and gain a sense of entitlement to democratic mechanisms of voice, then the current round of reforms may indeed push popular demands for democratization up one level, and into the political system. Moreover, if elections produce grassroots union leaders who are responsive to workers' demands, such leaders themselves might put added pressure on the unelected local union officials and party-state officials that sit above them on the "transmission belt." With those prospects in mind, both powerful local union and government officials and employers can be expected to continue to use what levers they have to bring about the "election" of friendly or moderate worker representatives. Again, it is not yet possible to predict whether the end result will be the frustration of democratic reforms (perhaps accompanied by mollifying economic concessions) or their extension to higher levels of governance. Proponents of both can be found within the governing elite.

The labor arena may be serving as a gigantic laboratory in which to test competing views within China's leadership over the best strategy for maintaining political stability, and over the right mix of control and flexibility, repression and responsiveness, cooptation and democratization. Behind these competing views lie different theories about what Chinese workers, and indeed Chinese citizens, want. Will workers be content with material im-

provements -- better pay and conditions – or will they hold out for a meaningful voice in their working lives? The former might be achievable through top-down governance structures. The latter will require real change in those structures.

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¹ Kuang Tan, *The Evolution of Labor Contract Law and Comments on Two Papers*, 7 CHINA CURRENTS, No. 3 (2008).

² See GUNTER SCHUBERT & ANNA L. AHLERS, PARTICIPATION AND EMPOWERMENT AT THE GRASS-ROOTS: CHINESE VILLAGE ELECTIONS IN PERSPECTIVE 15-22 (2012); Tianjian Shi, Village Committee Elections in China: Institutionalist Tactics for Democracy, 51 WORLD POLITICS 385-412 (1999).

³ “Avid Young Reader of Mao Zedong’s Poetry from the post-1980s generation leads the Honda strike,” China News Weekly, June 2, 2010, p. 6, translated by China Labor Translations, available at <http://www.clntranslations.org/article/56/honda>.

⁴ In the words of the great 20th century writer Lu Xun, the peasants’ fate was “to suffer until they become stupefied” or “to devote all their energies to dissipation.” Lu Xun, *My Old Home* (1921), available at <http://21stcenturysocialism.com/article/worth-looking-at-my-old-home-by-lu-hsun-01212.html>

⁵ The staging and mechanisms by which capitalism took hold in China, and the key role played by foreign direct investment, is brilliantly dissected in GALLAGHER, id.

⁶ CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA’S RUSTBELT AND SUNBELT* (2007).

⁷ China Labor Bulletin, *Going it Alone: The Workers’ Movement in China 2007-2008*, [Hereafter “Going it Alone”], available at http://www.clb.org.hk/en/files/share/File/research_reports/workers_movement_07-08.pdf. According to one leading Chinese scholar, worker protest during the deconstruction of the planned economy did not yet reflect a collective action mentality; rather, workers were responding as jilted “masters of the factory.” Chang Kai, *From Individual Labor Relations to Collective Labor Relations*, Renmin Conference Materials, 65 (2011).

⁸ Id. at --.

⁹ There are many mechanisms of control, both internal to firms’ ownership and governance structure, and externally through political controls. See HUANG, supra note --, at --; RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS* (2010). One source of leverage lies in the state’s ultimate ownership of all land in the country. There is still no private “fee simple” ownership of land; some private leases and use rights are fairly secure while others – especially those of peasant residents – are notoriously insecure. See Eva Pils, *Land Disputes, Rights Assertion, and Social Unrest in China: A Case from Sichuan*, 19 COLUM. J. ASIAN L. 235, -- (2005); Frank Upham, *From Demsetz to Deng: Speculations on the*

Implications of Chinese Growth for Law and Development Theory, 41 J. INT'L L. & POL. 551, 585-91 (2009).

¹⁰ "Regulation" as we know it did not exist in the state-administered economy under Mao. The need for regulation grew along with the development of the private sector and the submission to market forces. The development of a modern regulatory state thus lagged behind economic liberalization, but has proceeded with rather impressive vigor. See DALI YANG, *REMAKING THE CHINESE LEVIATHAN* (2004). The "double movement" toward markets and regulation is one of the great master trends of 150 years. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1957).

¹¹ On this process (and on the tendency of Chinese business owners of both stripes to support the existing regime), see BRUCE J. DICKSON, *WEALTH INTO POWER: THE COMMUNIST PARTY'S EMBRACE OF CHINA'S PRIVATE SECTOR* (2008), pp. ----

¹² On the latter, see Forbath, *The Ambiguity of Free Labor*; see also Friedman, Lee *supra* n. 9 at 507-08.

¹³ See Chen Naixin, Lou Jianbing, Chen Mei, *The New Thinking of Stipulating the Right to Strike into the Constitution*, Renmin Conference Materials 98 (2011) (discussing the necessity of exploiting China's natural and human resources for the accumulation of capital, but noting that "scientific development" calls for an end to this type of capital exploitation).

¹⁴ On poor factory conditions and workers' responses to them, see ANITA CHAN, *CHINA'S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY* (2001).

¹⁵ [EU document] That would represent a 50 percent increase over the last officially released figure of 87,000 in 2005. China Labor Bulletin, *Protecting Workers' Rights or Serving the Party: The way forward for China's trade unions*, March 2009, p.6 [Hereafter "Protecting Workers' Rights"], available at http://www.chinalabour.org.hk/en/files/share/File/research_reports/acftu_report.pdf.

¹⁶ A paraphrase of Deng Xiao Ping. See "China Celebrates Deng Centenary," BBC News, August 22, 2004, available at <http://news.bbc.co.uk/2/hi/asia-pacific/3587838.stm>.

¹⁷ See Halegua, *supra* note --, at --. Labor arbitrators in and around Shanghai noted, in conversations with the authors, that workers often lose cases because they cannot produce "reliable" enough evidence to fulfill the new Labor Contract Law's low burden of production; that is, evidence that they had even worked at a particular enterprise.

¹⁸ See 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 (2006); Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 *BERK. J. INT'L L.* 254 (2008); Virginia Ho, *From Contracts to Compliance? An Early Look at Implementation under China's New Labor Legislation*, 23 *COLUM. J. ASIAN L.* 35 (2009).

¹⁹ The centrality of law in these labor disputes is emphasized in two excellent books, CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT* (2007); and MARY GALLAGHER, *CONTAGIOUS CAPITALISM*, *supra* note --. The role of law in shaping popular protest in China is not confined to the labor arena. Rural protests over land appropriation, pollution, excessive taxation, and corruption also typically take the form of "rightful resistance." KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006). Protesters appeal to higher authority, sometimes in provincial capitals or beyond, for redress against local wrongdoing; rather than challenging the established order, they seek to uphold it. See Minzner, *supra* note --. "Rightful resistance" seeks to use law as both a sword against wrongdoers and a shield against repression.

²⁰ For one excellent overview of the Labor Contract Law and related reforms, see Biddulph, et al., *supra* note --.

²¹ This is aside from the labor related complaints that were the subject of *xinfang*, or “letters and visits.” *Xinfang* is a distinctive form of petitioning that is rooted in imperial China, continued to serve as a mainstay of the CCP’s system of governance, and still operates alongside, and arguably as a rival to, the post-Cultural Revolution legal system. For an excellent overview of the *xinfang* system, see Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103 (2006). We do not focus on it here as it is primarily concerned with disputes between citizens and government; although labor disputes do make their way into the *xinfang* system when courts and arbitrators fail to afford relief, it is not a distinctive institution for the resolution of labor disputes.

²² Ironically, the strike may have been partly caused by the fact that “Nanhai Honda follow[ed] the laws so strictly”; in limiting overtime to the statutory 36 hours a month, it “affected the workers’ incomes.”

²³ See The Trade Union Law of the People’s Republic of China, Art. 27. “The trade union shall assist the enterprise or institution in properly dealing with the matter so as to help restore the normal order of production and other work as soon as possible.” This duty was underscored by Guo Jun, director of the ACFTU’s trade union democratic management department, shortly after the passage of the Labor Contract Law:

The Labor Law and the Union Law contain a rule we call ‘outstanding incidents.’ This rule mandates that the union must intervene [in strikes], representing a negotiator between the workers and the enterprise. Under the precondition of satisfying reasonable requests of workers, we help the enterprise and state-run institutions restart their production sequence. As far as I know, there are over one hundred of these incidents each year.

“After the Passage of the Labor Contract Law, Can the Unions Extend Their Power?” Southern Weekend, July 4, 2007; Complete article available in Chinese at <http://www.infzm.com/content/7939>.

²⁴ Stanley Lubman, *The New Challenge of the Strikes Won’t Go Away*, Wall St. Journal, China Real Time Report, July 14, 2010, available at <http://blogs.wsj.com/chinarealtime/2010/07/11/the-new-challenge-of-the-strikes-wont-go-away/> (citations omitted).

²⁵ See, e.g., Anita Chan, *Labor Unrest and Role of Unions*, China Daily, 6/18/2010, available at http://www.chinadaily.com.cn/opinion/2010-06/18/content_9987347.htm)

²⁶ For a concise recent account of the history and structure of the ACFTU, see China Labour Bulletin, *Protecting Workers’ Rights or Serving the Party: The Way Forward for China’s Trade Unions*, March 2009 (available at http://www.clb.org.hk/en/files/share/File/research_reports/acftu_report.pdf).

²⁷ See Anita Chan, ---. The shift is seen in how trade unions were officially defined before and after Tiananmen. During the 1980s they were described as “independent social entities, which should not, in terms of organizational affiliation, be equivalent to working departments of the Party.” By contrast, the recent 15th National Trade Union Congress directed the unions to “dedicate themselves to helping consolidate the Party’s basis of rule, to realise its ruling mission and uphold the cause of the Party.” China Labour Bulletin, *Going it Alone: The Workers’ Movement in China (2007-2008)*, 70-71. For a concise account of the changing relationship between ACFTU and the CCP, see Bill Taylor & Qi Li, *Is the ACFTU a Union and Does It Matter?*, 49 J. of Indus. Rel. 701-715 (2007).

²⁸ On the "transmission belt" function of the ACFTU, see Jude A Howell, *All-China Federation of Trade Unions beyond Reform? The Slow March of Direct Elections*, 196 CHINA QUARTERLY 845 (2008); RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS* (2010), --

²⁹ See Simon Clarke, Chang-Hee Lee & Qi Li, *Collective Consultation and Industrial Relations in China*, 42 Brit. J. Indus. Rel. 235 (2004).

³⁰ Id.

³¹ Some see glimmers of independent worker organization in recent strike activity. See China Labor Bulletin, ACTFU, 34. But they remain glimmers, under a heavy shadow of state repression.

³² The very interesting topic of labor NGOs deserves fuller treatment than is possible within the confines of this paper.

³³ See, e.g., "Change to Win Delegates Visit China," available at <http://www.clntranslations.org/article/18/change-to-win-delegates-visit-china>.

³⁴ See, e.g., Taylor & Li, *supra* note --, at 712.

³⁵ See Chang Kai, *From Individual Labor Relations to Collective Labor Relations*, Renmin Conference Materials, 65 (discussing "local unions' bureaucratization" -- *difang gonghui xingzhenghua* -- and "enterprise union boss-ification" -- *qiye gonghui laobanhua*).

³⁶ See Taylor & Li; Rudolf Traub-Merz, *All China Federation of Trade Unions: Structure, Functions and the Challenge of Collective Bargaining*, in *INDUSTRIAL DEMOCRACY IN CHINA* 23 (Rudolf Traub-Merz & Kinglun Ngok, eds.) (China Social Sciences Press, 2011).

³⁷ Id. at 19.

³⁸ Id. at 20.

³⁹ For example, see YONGNIAN ZHENG, *DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS* (World Scientific, 2008).

⁴⁰ See Jude A Howell, *All-China Federation of Trade Unions beyond Reform? The Slow March of Direct Elections*, 196 CHINA QUARTERLY 845 (2008). For reports on collective bargaining in Zhejiang, see "Collective Wage Consultation a Breakthrough for Resolving Labor Disputes in Wenling, Zhejiang," China Business Report, October 10, 2008. Translated into English by China Labor News Translations, Original article is available at: <http://www.cbh.com/news/gc/2008/109/08109142531HDBEIAJIC62E2JC8H712.html>. For reports on elections in Guangdong, see "Plans for election of union chair at Nanhai Honda" June 14, 2010. Translated into English by China Labor News Translations, available in Chinese at <http://new.takungpao.com/china/zgyw/79939.html>

⁴¹ Information garnered in recent discussions with multiple Chinese labor academics.

⁴² The unions are not the only institutions for workers' democratic participation in the enterprise. That function is to be carried out chiefly through the Staff and Worker Representative Congress (SWRC). See Constitution of the People's Republic of China, Art. 16 ("State-owned enterprises practice democratic management through congresses of workers and staff and in other ways in accordance with the law."). Vested with an array of deliberative, supervisory, and consultative rights, SWRCs were meant to engage the workers more directly than the ACFTU, and to augment the "democratic" prong of democratic centralism. See generally Feng Tongqing, *An Overview of the Workers' Congress System in China*, in Traub-Merz & Ngog, *supra* note --, at 195. But in the post-Deng era, SWRCs have not lived up to this

potential; in particular, they have rarely played an active role in the private sector. That appears to be changing. As a workplace-based worker organization with a bundle of legal participatory rights, the SWRCs have proven to have their uses to various actors, sometime as a way of circumventing without defying the ACFTU. And policymakers have recently sought to fortify the role of the SWRCs in the private sector. (Interview w/ Feng Tongqing, May 23, 2012). The SWRCs are deserving of fuller treatment than we can give them here. But for now, the ACFTU remains the primary locus of activity and reform efforts with regard to worker representation..

⁴³ Stanley Lubman, *The New Challenge of the Strikes Won't Go Away*, Wall St. Journal, China Real Time Report, July 14, 2010, available at <http://blogs.wsj.com/chinarealtime/2010/07/11/the-new-challenge-of-the-strikes-wont-go-away/> (citations omitted).

⁴⁴ Simon Clarke, Chang-Hee Lee and Qi Li, *Collective Consultation and Industrial Relations in China*, 42 BRIT. J. INDUS. REL. 237, 242 (2004).

⁴⁵ One clue to the seeming paradox lies in the fact that the enterprise unions come under the jurisdiction and supervision of *local* party officials, who are widely seen as beholden to local businesses, not only by virtue of the commitment to “growth” above all (local cadres’ assessment and future careers in the Party being dependent largely on their success in promoting growth), but also through dense and sometimes corrupt connections to local business owners. So one interesting aspect of Anita Chan’s recent proposal for reform of ACFTU is to place the enterprise unions under the jurisdiction of higher levels of the party hierarchy, where pursuit of workers’ interests as part of the “harmonious society” are less compromised by local corruption.

⁴⁶ See Clarke, *supra*, 237.

⁴⁷ See Traub-Merz, *supra* note --, at 29.

⁴⁸ Andreas Lauffs, *Responding to the Unionization Drive*, available at <http://www.bakermckenzie.com/RRChinaRespondingToTheUnionizationApr10/>.

⁴⁹ The following “unionization timeline” was recounted in interviews with international law firms in Shanghai and Hong Kong.

⁵⁰ See Traub-Merz, *supra* n. --, at 32-33; Qiao Jian, *Between the Party-State, Employers and Workers: Multiple Roles of the Chinese Trade Unions during Market Transition*, Paper presented at 7th Asian Congress of the International Industrial Relations Association, Bali, Indonesia, Sept. 2010. It was typical for a firm’s head of human resources, or the wife of the top manager, to serve as chair of the union. According to a 2006 ACFTU report, “the proportion of union chairmen serving concurrently as corporate officers at private domestic and foreign invested companies in [Guangzhou] was as high as 98.7 percent.” China Labour Bulletin, “Protecting Workers’ Rights,” 26, fn. 39 (Citing “Unions: The gap between ideal and reality). Sino-Foreign Management), 2006, No. 10, 28-29).

⁵¹ Our discussions with various district and municipal labor union leaders corroborated this fact. There are exceptions to this pattern. For example, there was a flurry of excitement among labor advocates and China watchers when actual grassroots union activists organized the first Wal-Mart store, and struck an unprecedented blow against Wal-Mart’s global anti-unionism by winning recognition over management opposition. Elaine Sio-ieng Hui & Chris King-chi Chan, *The Prospect of Trade Union Reform in China: The Cases of Wal-Mart and Hon-da*, in Traub-Merz & Ngok, *supra* note --, 103. But subsequent chapters in Wal-Mart stores, and even in that first store, soon fell back into old habits of compliance and coziness with management. China Labour Bulletin, “Union chair resigns over the imposition of collective contracts at Wal-Mart,” September 23, 2008, available at

“<http://www.clb.org.hk/en/node/100310>. Wal-Mart now touts its excellent labor relations in China as evidence of its new commitment to social responsibility, while workers still have no organization of their own to fight for their interests.

⁵² While old-style “company unions” are largely extinct in the U.S. since the 1930s, less formal (but still illegal) employee representation schemes appear to be quite common. See John Godard & Carola Frege, *Union Decline, Alternative Forms of Representation, and Workplace Authority Relations in the United States*, Unpublished paper, available at --- (2011) (34% of non-union employees reported employer-established systems in which employee representatives met with management about workplace issues, often including wages and benefits). U.S. labor law scholars and reformers debate whether the NLRA's ban on “company unions” should be amended to allow more forms of employee representation in non-union workplaces. But it is virtually uncontested that employees have a right to choose independent union representation, and that trade union officials should be elected by employees and independent of management.

⁵³ Some Chinese labor law scholars recognize that this “undermines the independence of labor unions, whose leaders find themselves in an awkward position. While they are supposed to defend workers' rights, they do not dare offend company management that pays their salaries.” Qian Yanfeng, *supra* fn. 101. Recently the ACFTU has begun to plan for funding of enterprise unions through the union rather than the employer. See Traub-Merz, *supra* n. --, at 44.

⁵⁴ The ACFTU's comprehensive constituency originated within the SOEs of the relatively egalitarian pre-1978 Chinese economy, in which it was possible to believe that all participants of an enterprise were in it together and required no separate representation. The question is how that notion has managed to survive since the commodification of labor, the growth of private for-profit enterprises, and the spectacular economic inequalities that have followed.

⁵⁵ For a powerful minority view, see Yu Jian Rong's idea of “flexible stability,” that the protection of workers' rights and organizations will secure flexible, and more robust, stability. Yu Jian Rong, *supra* note ---.

⁵⁶ The “capacity to act collectively” may require both organizational capacity on the part of workers and a labor market context in which workers can hold up production – that is, in which they can't be easily replaced, e.g., by moving production elsewhere.

⁵⁷ Collective labor unrest – in terms of both work stoppages and socially disruptive protest activity – has dropped precipitously since the 1950s, and has continued to drop with union density. Both the number of major work stoppages (i.e., those affecting more than 1000 workers) (470) and the number of workers affected (2.75 million) peaked in 1952, around the peak of union density in the U.S.; in 2009, both hit the lowest level since 1947, with five major work stoppages affecting 13,000 workers. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, USDL-13-0193, Work Stoppages Summary (Feb. 8, 2013), *available at* <http://www.bls.gov/news.release/wkstp.nr0.htm>. There has been a slight uptick since then: 2012 saw 19 major work stoppages involving 148,000 workers. *Id.*

⁵⁸ Clearly there is no simple correlation between legitimizing unions and collective bargaining and lower strike levels; indeed, in the U.S., strike levels have fallen along with union density. [] Yet the New Deal reforms did tend to abate the violence and politicization of strikes; that was the most acute threat in the 1930s, and that is what China's leaders most fear today.

⁵⁹ The major unions had either a long history of independent worker representation and internal self-governance or, in the case of the newly-formed Congress of Industrial Organizations (CIO) unions, strong bona fides on this score. ...

⁶⁰ For example, there is some discussion of funding the ACFTU with public revenues so as to decrease its economic reliance on employer funding. ...

⁶¹ This procedure was described to us in a confidential interview in June, 2011.

⁶² ACFTU website (English language version), available at <http://english.acftu.org/template/10002/file.jsp?cid=57&aid=405> (emphasis added).

⁶³ Conversations with Chinese labor law scholars, December 2011 and May 2012.

⁶⁴ We were told this is more common in Western (especially German) companies.

⁶⁵ Conversation at Chinese Academy of Social Sciences, Beijing, May 26, 2012. On the other hand, sometimes that is because the strike leaders have been fired!

⁶⁶ See Shi, *supra* note --, at --.