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Will Workers Have a Voice in China's "Socialist Market Economy"? The Curious Revival of the Workers Congress System

Cynthia Estlund*

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I. Introduction

The United States stands virtually alone in the world in the extent to which the concept of "industrial democracy" has been tied to the institutions of collective bargaining. The exclusion of other institutions of worker participation in workplace governance has proven fateful for U.S. workers as unions have lost power and coverage. The idea of workplace democracy is simply not a living concept for the vast majority of workers in the U.S. In the rest of the developed world, there is greater space, and often a legal mandate, for other institutions of worker participation beyond trade unions. European and especially German "works councils" (WCs) are the leading examples of such institutions.

China stands with much of the world, then, in maintaining officially sanctioned institutions beyond the trade unions through which workers are to be represented within the workplace. The Staff and Worker Representative Congresses (SWRCs)¹ are linked with the enterprise trade unions, "grassroots chapters" of China's only lawful union federation, the All-China Federation of Trade Unions (ACFTU), and are the primary vehicles of "democratic management" of the enterprise. In the planned economy the SWRCs were supposed to enable workers to exercise their authority as "masters" of the state-owned enterprises (SOEs). With the "reform and opening" of China's economy, the SWRCs' role was curtailed within the newly "corporatized" SOEs, and largely absent within the growing non-state sector. More recently, however, the SWRCs appear to be experiencing a modest revival. In the wake of the ACFTU's campaign to organize union chapters in major private and especially foreign enterprises, policymakers have begun to press for the establishment of SWRCs in those enterprises as well. The move might prove to be little more than symbolic; for now, China's SWRCs are generally seen as feeble and ineffectual. But symbols can be portentous, and change may be in the air.

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¹ The Chinese term (职工代表大会, or *zhigong daibiao dahui*) has several translations. "Staff and Workers' Representative Congress," though unwieldy, captures the inclusion of all employees of an enterprise, including workers, technicians, management, and party cadres.

An effort by China to promote employee participation in workplace governance – if that is what is afoot – might be welcomed by workers advocates across the world, much as it would be met with apprehension from corporations operating in China, especially those hailing from the U.S. European-based corporations would likely view this development with more equanimity, given the obvious parallels with European works councils. Still, the very different role and shape of both the state and the trade union in China command attention, for they are bound to affect our appraisal of both the intentions behind the SWRCs and their effects on the ground.

This Article briefly traces the evolution of the SWRCs, and asks what their tentative revival means: What does it mean for China’s workers and for companies operating in China? And what does it tell us about the emerging shape of the “socialist market economy”? It is implausible to believe that China's leaders expect or intend by these reforms to restore workers’ role as the “masters” of the enterprise, even in the still-large SOE sector, much less in the private firms operating in China. But the SWRCs might exemplify an effort by some Chinese leaders to give workers a larger role in enterprise governance. Having first “corporatized” the enterprises of the planned economy to resemble the capitalist enterprises of the world’s developed market economies, some in China might now aim to “socialize” those capitalist enterprises to a modest degree. It is worth exploring the reasons behind such an aim.

A closer look at the SWRCs and their changing legal status may thus offer a partial glimpse of what China’s leaders envision in the next stage of the socialist market economy: What is the proper role of workers within the enterprises of the socialist market economy? That might be neither their prior role as “masters of the enterprise,” nor as the mere sellers of “commodified” labor to profit-driven corporations. And it might be neither the somewhat empowered role of U.S. workers in the small and shrinking unionized sector nor of European workers who are represented by both trade unions and works councils. It might be something new, and it calls for a closer look.

II. The Fall and Rise of “Democratic Management” and the SWRCs

In the 1960s, on the cusp of the Cultural Revolution, Deng Xiaoping described the SWRC as “a good means of broadening democracy in the enterprises, of recruiting workers and staff to take part in the management and of overcoming bureaucracy,” as well as “an effective method of correctly handling contradictions among the people.”² The last point suggests one reason for the recent revival of the SWRCs. But first let us review what it is that is being revived.

A. Democratic Management in the Twilight of the Planned Economy

China's SWRCs, and the underlying principle of workers' participation in enterprise management, have their roots in the pre-revolutionary practices of the Communist Party

² Ma Wen Kuei, *Industrial Management in China – How China’s Socialist State-Owned Industrial Enterprises are Managed*, PEKING REVIEW, no. 9, Feb. 26, 1965, available at <http://www.massline.org/PekingReview/PR1965/PR1965-09k.htm>.

of China (CPC), and in transnational currents of thought about "industrial democracy" in the early 20th century.³ With the establishment of the People's Republic, China adopted a constitutional principle of "democratic management," and settled on worker congresses as the primary vehicles for engaging workers in the management of the SOEs of which they were the official "masters."⁴ Yet "democratic management" was never fully institutionalized under Mao. For reasons both pragmatic and ideological, enterprise management was dominated by factory managers and party secretaries, with workers having little input and less power; workers and their institutions were given tasks to perform, but were rarely consulted on enterprise management.⁵ Then came the Cultural Revolution, which decimated China's institutions.⁶ So paradoxically, the democratic management system gained its firmest foothold within the SOEs in the twilight of the planned economy under Deng Xiaoping.⁷ The reform of the planned economy lagged behind the growth of the unplanned, non-state economy, and the institutions of the planned economy were restored before they were restructured along market principles. And so democratic management was institutionalized in the SOEs in the 1980s before it was largely eviscerated.⁸

The centerpiece of the democratic management system was the SWRC, which was supposed to be broadly representative of the workforce as a whole. According to Deng's 1980 statement, the SWRCs "have the right to discuss and take decisions on major questions of concern to their respective units, to propose to the higher organizations the recall of incompetent administrators, and to introduce – gradually and within appropriate

³ See Feng Tongqing, *An Overview of the Workers' Congress System in China*, in Rudolf Traub-Merz and Kinglun Ngok (eds.), *INDUSTRIAL DEMOCRACY IN CHINA 197-99* (Beijing: China Social Sciences Press, 2012) (PDF version available online at <http://www.sociology2010.cass.cn/upload/2013/01/d20130122160207969.pdf>).

⁴ "State-owned enterprises practice democratic management through congresses of workers and staff and in other ways in accordance with the law." XIANFA(宪法) [Constitution of the People's Republic of China], art. 16.

⁵ For an excellent overview of the history of SWRCs before the Cultural Revolution, see Paul Harper, *Workers' Participation in Management in Communist China*, 4 *Studies in Compar. Communism* 111, --- (1971). Marxist Communists have generally rejected, and labeled as "syndicalist" or "economist," the notion that the interests of workers in a socialist country are distinct from managers of (state-owned) enterprises, and from the people as a whole, and should be separately represented. *Id.* at 112.

⁶ Feng, *supra* note --, at 198-99.

⁷ Deng's explanation for the restoration of the SWRCs in 1980 is intriguing for its attempt to smooth over the rupture of the Cultural Revolution: SWRCs, he said, "will be introduced in all enterprises and institutions. That was decided long ago. The question now is how to popularize and perfect the system." Speech on Aug. 18, 1980 to an enlarged meeting of the Political Bureau of the Central Committee of the CPC, as discussed and endorsed by the Political Bureau on Aug. 31, 1980 (hereinafter "*Deng Speech 1980*"), available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1460.html>.

⁸ The SWRCs were legally established, first on an interim basis in 1981 (*Interim Regulations on State-owned Industrial Enterprise Worker Representatives Congresses* (No. [1981] 24), re-transmitted by the Central Committee of the CPC and the State Council on 13 July 1981), then on a permanent basis in 1986, by the *Regulations on State-owned Industrial Enterprise Worker Representatives Congress* (effective as of 1 October 1986).

limits – the practice of electing their leaders.”⁹ The revival of this workplace democratization project on the cusp of economic liberalization might have been a sign of the intended limits of liberalization, at least in the state-owned sector. And perhaps it was meant to help legitimize the disruptive changes that were soon to come with reform and restructuring.¹⁰

As a formal matter, the SWRC stood above factory management.¹¹ But the formally powerful role of the SWRC was undercut by institutional design from the outset. Most SWRCs met only infrequently – once or twice a year; their day-to-day functions were to be carried out by the enterprise trade union, a “grassroots” affiliate of the ACFTU that was usually dominated by factory management.¹² So the factory director ordinarily held sway over both the SWRC and the trade union, while all three were subordinate to the CPC, in the person of the Party secretary of the enterprise. Still, as we will see, SWRCs sometimes exercised real power on behalf of workers.

Let us briefly consider two aspects of the SWRCs: their selection and composition, and their functions. Deng’s suggestion in 1980 that the SWRCs were supposed to “democratize” enterprises without necessarily being elected may present a puzzle for many Westerners, but not for those familiar with Chinese (and Leninist) conceptions of “democratic centralism”: In the official view, democracy is enhanced, not undermined, by Party guidance in the selection of grassroots representatives; the Party, after all, is held to embody the people’s will.¹³ This view of democracy obviously has vast implications that cannot be explored here.¹⁴ But what it meant for the SWRCs in the era of Deng is that their democratic character lay chiefly in their composition rather than their selection: The SWRCs were large bodies – typically around ten percent of the workforce – “with a tiered representation structure, from small groups on the production line up to the factory level.”¹⁵ Any member of an enterprise could become a representative; leading cadres, or

⁹ *Deng Speech 1980, supra note --.*

¹⁰ I thank Mingwei Liu for suggesting this point.

¹¹ *Regulations on State-owned Industrial Enterprise Worker Representatives Congress* (effective as of 1 October 1986), Art. 7.

¹² *Id.*, Art. 23.

¹³ Yu Keping, *Toward an Incremental Democracy and Governance: Chinese Theories and Assessment Criteria*, 24 *NEW POL. SCI.* 181, 184-85 (2002), available at <http://www.tandfonline.com/doi/pdf/10.1080/07393140220145207>. The official view – attributed to Deng and now said to be part of China’s constitution – is that “China would be in great chaos...if democracy is not put under the leadership of the CPC and there would be no democracy if there is political instability.” *Id.*

¹⁴ For reflections on the meaning of democracy from a leading CCP intellectual, see YU KEPING, *DEMOCRACY IS A GOOD THING: ESSAYS ON POLITICS, SOCIETY, AND CULTURE IN CONTEMPORARY CHINA* (Brookings Institution Press, 2011).

¹⁵ Chen & Chan, OHS (2010), *supra note --*, at 47.

managers, were supposed to make up no more than 20 percent of the members; and women and younger workers were to constitute a “suitable” proportion.¹⁶

Notwithstanding Deng’s hesitancy, by 1986 the law did call for elections: Depending on the size of the enterprise, SWRCs were to be directly elected from either individual work units or entire factories and workshops.¹⁷ But that did not foreclose “guidance” from above. As Professor Joel Andreas elaborates in his recent ethnographic study of SWRCs in the SOEs before (and after) their “restructuring,” there was a good deal of variation on the ground in how SWRC members were chosen:

In some factories . . . , the process of selecting representatives was relatively democratic—small teams nominated candidates and workshops then convened meetings to elect representatives from among the small teams’ nominees. More often, elections were “guided from above” (*yindao* (引导)), with workshop party leaders asking workers to select from a list of nominees with one or two more names than the number of representatives required from their workshop, and in some factories, the party secretary simply named the representatives.¹⁸

However they were selected, “representatives were generally people on whom the party organization felt it could rely – . . . employees who cooperated with the factory leadership and conscientiously took responsibility for factory affairs.”¹⁹ Managers were heavily represented, and shift supervisors and small team leaders were counted among the “workers” who were to make up at least half the representatives. As one former SWRC representative put it: “Even though there are elections, people vote for the candidates the leaders support. Most representatives are common people, but they agree with what the leaders want.”²⁰

The SWRCs enjoyed broad powers on paper, though it was still clearly subordinate to the Party. The 1988 law governing SOEs contained a long list of “functions and powers” possessed by SWRCs regarding factory operations.²¹ In particular, the SWRCs had the formal power to “evaluate and supervise,” and even to remove, factory directors

¹⁶ Quanmin Suoyouzhǐ Gongyè Qīyè Zhīgōng Dàibào Dàhuì Tiáoli (全民所有制工业企业职工代表大会条例) [Regulation on State-Owned Enterprise SWRCs] arts. 10, 12 (1986) [Hereinafter Regulation on SWRCs], available at http://www.34law.com/lawfg/law/6/1189/law_250917172417.shtml. “Regulations” such as these have the force of law in China, but are not termed “laws.”

¹⁷ Regulation on SWRCs, *supra* note ___, art. 11.

¹⁸ Joel Andreas, “Losing Membership Rights: The Impact of Eliminating Permanent Job Tenure on Power Relations in Chinese Factories” 8 (unpublished manuscript) (on file with author).

¹⁹ *Id.* See also Andrew G. Walder, *Factory and Manager in an Era of Reform*, 118 THE CHINA QUARTERLY 242, 247 (1989): “Party members and youth league activists dominate these congresses, in large part because nominations lists for leading positions are screened by Party branches, and also because workers who are not politically active are in most enterprises uninterested in, if not disdainful of, these proceedings.”

²⁰ Andreas, *supra* note --, at 8.

²¹ Law of the People’s Republic of China on Industrial Enterprises Owned by the Whole People (promulgated by the National People’s Congress, Apr. 13, 1988, effective Aug. 1, 1988) art. 52 (Lawinfochina).

(subject to the approval of party-state authorities).²² That power seemed to give real bite to the official role of Chinese SOE workers as “masters of the enterprise,” and it backed up the SWRCs’ other powers, such as “the right to know virtually everything about the enterprise ... and participation in decisions on anything related to workers' wages, benefits, and welfare, distribution of housing.”²³ The SWRC had more formal power than the trade union, yet it was heavily dependent on the union to exercise its powers. The SWRC met only infrequently, when convened by the trade union, and between meetings its functions were delegated to the union.²⁴

Did the SWRCs actually empower workers within the SOEs of the planned economy? The picture is mixed.²⁵ Most SWRCs appear to have served as little more than a “rubber stamp” for management.²⁶ But workers were sometimes able to make use of their formal participation rights to influence a range of managerial decisions.²⁷ Andreas finds that “[i]n some factories, congresses were held irregularly and were simple events with perfunctory reports and votes. In others, congresses were convened at least twice a year and were protracted and elaborate events.”²⁸ When it came to evaluating factory directors, the SWRCs’ role was typically “perfunctory” but sometimes decisive; on a few occasions, “employee representatives—or the entire workforce—voted to remove a leader.”²⁹ Sometimes “candidates for leadership positions competed for votes,” and made speeches “outlining their qualifications and plans before large meetings of employees”; and “the winner was not always the candidate preferred by higher level leaders.”³⁰

These outbursts of workplace democracy took place within limits determined from above – “above” being the Party. Voting over the factory director position, for example, “could only be organized by higher level authorities, who decided when they were appropriate and what form they would take. Often, it seems, such elections simply provided democratic cover for decisions already made at higher levels. ... Sometimes,

²² *Id.*, art. 44, 52. Factory directors could also be directly chosen and removed by a “competent department of the government” after seeking the opinion of the SWRC. *Id.*

²³ Meei-shia Chen & Anita Chan, *Occupational health and safety in China: the case of state-managed enterprises*, 40 *Int’l J. of Health Services* 43, 47 (2010) (hereinafter, “*OHS*”).

²⁴ Regulation on SWRCs, *supra* note --, art. 4. See Meei-Shia Chen & Anita Chan, *Employee and union inputs into occupational health and safety measures in Chinese factories*, 58 *Social Science & Medicine* 1231, 1242-43 (2004) (hereinafter “*Employee & union inputs*”).

²⁵ See SEAN COONEY, SARAH BIDDULPH, YING ZHU, *LAW AND FAIR WORK IN CHINA* 39 (2012).

²⁶ MALCOLM WARNER, *CHANGING WORKPLACE RELATIONS IN THE CHINESE ECONOMY* 27-28 (2000). See also JACKIE SHEEHAN, *CHINESE WORKERS: A NEW HISTORY* 201 (1998) (arguing that SWRCs were not effective in the 1980s due to powerful factory directors and a lack of support from Party committees).

²⁷ See WARNER, *supra* note ___, at 107-08, 111. One 1990s study by the ACFTU (perhaps a dubious source) found that, of the nearly 300,000 enterprises with SWRCs, significantly more than half were able to undertake “democratic appraisal” of managerial cadres. NG SEK HONG & MALCOLM WARNER, *CHINA’S TRADE UNIONS AND MANAGEMENT* 88 (1998).

²⁸ Andreas, *supra* note --, at 6.

²⁹ *Id.* at 9.

³⁰ *Id.* at 9.

however, authorities arranged such votes in response to dissatisfaction from below."³¹ While it was unusual for SWRCs to play a major role in the selection of factory directors, they were more often active in selecting and supervising shop floor leaders.³²

Andreas concludes that the SWRCs, and the system of democratic management as a whole, afforded a measure of power to ordinary workers only because of the workers' permanent "membership" or citizenship in the enterprises of the planned economy: Because workers were permanently assigned to their work unit, and could rarely either quit or be fired, managers and the party cadres who oversaw them had to attend to workers' views, cultivate their loyalty, and select leaders for whom they were willing to work diligently.³³ It was their permanent membership, says Andreas, more than the formal institutions of "democratic management," that empowered workers within the enterprise (and even so, only within limits determined by Party leaders).³⁴

B. The Decline of Democratic Management in the Era of "Corporatization"

As the SOEs were reorganized into the corporate form and subjected to some market pressures, the SWRCs lost clout relative to more profit-driven managers.³⁵ The 1994 Company Law – China's first corporate governance statute – was a watershed: The Company Law provided the framework for both "corporatization" of SOEs and the formation of private corporations; it was a major step in China's opening to foreign and domestic capitalist investment and its creation of a "socialist market economy."³⁶ But the "socialist" and the "market" components of that aspiration pulled in opposite directions when it came to the question of "democratic management."³⁷ On the one hand, the Company Law extended the formal reach of the principle of "democratic management" to non-state enterprises, as discussed below; but it also reassigned the most conspicuous legal powers of the SWRCs – the powers to "appraise and supervise the cadres and elect the director of the enterprise" – to a corporate board of directors and supervisory

³¹ *Id.* at 9-10

³² *Id.* at 10-11.

³³ Walder similarly emphasizes the importance of workforce stability and job security in motivating managers to attend to their workers' concerns. See Walder, *Factory and Manager*, *supra* note --, at 252-53. But Walder also notes that managers had many sources of leverage over workers given the wide range of discretionary rewards and punishments available to managers and the many social needs met through the work unit (housing, education). Walder, *Organized Dependency*, *supra* note --, at 56-64.

³⁴ Andreas, *supra* note --, at 11-12.

³⁵ See Andreas, *supra* note --, at 8; Feng, *supra* note --, at 200, 203; COONEY, BIDDULPH & ZHU, *supra* note ___, at 68-69.

³⁶ For an early critical view of the Company Law, see Nicholas C. Howson, *China's Company Law: One Step Forward, Two Steps Back--A Modest Complaint*, 11 COLUM. J. ASIAN L. 127 (1997), available at: <http://scholarship.law.berkeley.edu/facpubs/1868>. On the modern state of corporate governance in China, see Donald C. Clarke, *Law Without Order in Chinese Corporate Governance Institutions*, 30 Nw. J. INT'L L. & BUS. 131 (2010).

³⁷ Indeed, that can be said about how the Company Law organized corporate governance itself: The simultaneous objectives of maintaining state control and of attracting investment and promoting growth led to some unusual features in the Company Law. See Howson, *supra* note --.

committee.³⁸ The Company Law has since become a touchstone for proponents of shareholder and managerial primacy in debates over the proper role of "democratic management" and SWRCs.

At the same time as the SWRCs' formal powers were diluted, their informal power in the state sector was undercut as workers gradually lost "membership" in the enterprise, and became mere employees by contract. Andreas finds that workers and managers alike linked workers' loss of voice to their loss of job security (especially in enterprises that were effectively privatized). Said one retired factory director: "If a worker complains you can just let him go."³⁹ A worker in a privatized factory agreed: "Now they can fire you on the spot ... [T]he workers are more docile."⁴⁰ Another worker contrasted the late 1980s: "Back then, when workers attended meetings, if they had something to say, they just said it. Now, 'What I say goes; you just do what I say.' It's more dictatorial... They can fire you, take your wages, you won't have anything to eat."⁴¹ With the workers' loss of job security and the growing power of shareholders and managers, the powers of the SWRC steeply declined.

When SOEs were wholly or partially privatized, SWRC structures were often "undermined, if not completely forgotten" along the way.⁴² Attitudes toward democratic management changed dramatically. Andreas reports that, in privatized former SOEs, "in which the top leaders own controlling shares, they have acquired a sense of proprietorship that brooks no questioning of their position, and any suggestion that employees might have a say in their selection or removal would be seen as ridiculous ..."⁴³ Even in the many remaining SOEs, "the SWRC has been formally relegated to a marginal position, and the ideas, institutions, and practices of 'democratic management' are widely regarded as anachronistic relics of a bygone era, not suited for a modern corporate environment."⁴⁴ The form of the SWRC thus remains in the SOEs and their successor enterprises, but in most it has become an empty shell.

³⁸ See Company Law of the People's Republic of China (promulgated by the National People's Congress, Dec. 29, 1993, effective date July 1, 1994) [hereinafter Company Law], art. 38. See also RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 46 (2009) (citing Company Law, art. 16). Professor Feng downplays this aspect of the Company Law in describing a "continuous improvement of statutes and policies on workers' congresses" since the "reform and opening," see Feng, *supra* note --, at 202. But he recognizes that the SWRCs have been weakened in practice. *Id.* at 203.

³⁹ Andreas, *supra* note ____, at 20.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See BILL TAYLOR, KAI CHANG & QI LI, INDUSTRIAL RELATIONS IN CHINA 142-43 (2003). See also Wang, *supra* note ____, at 532 (reporting that the SWRC of a privatized SOE was ineffective because it was packed with management representatives; frontline workers were unable to put themselves up for election).

⁴³ Andreas, *supra* note ____, at 19. See also Wang Shaobo, *A Case Study on the Workers' Rights Protection Mechanism during the Reform of a State-Owned Company*, in CONFLICT AND COOPERATION: THE INTERNATIONAL SYMPOSIUM OF COLLECTIVE LABOR DISPUTE RESOLUTION AND REGULATION 532 (2011).

⁴⁴ Andreas, *supra* note ____, at 19.

There were exceptions. Anita Chan and her colleagues report that SWRCs continued to influence the fate of factory directors and managers, at least into the late 1990s. For example, in one province, “more than 2300 managers of [SOEs] were dismissed or demoted after failing to obtain the necessary 60 percent of the votes” of their SWRCs.⁴⁵ In some SOEs that retained a more paternalistic culture, it was possible for trade unions to use the SWRCs and their powers to significantly improve health and safety conditions,⁴⁶ or to fairly distribute new housing benefits.⁴⁷ So while the SWRCs were often powerless, active trade unions could sometimes put their considerable formal powers to use on workers’ behalf, at least when management was not antagonistic.

In the burgeoning non-state sector, by contrast, most companies lacked even the formalities of democratic management.⁴⁸ For the law, including the Labor Law of 1994, conferred powers on the SWRCs if they existed, but did not clearly require them to exist.⁴⁹ The task of setting up the SWRC was largely left to Party and union cadres within the firm, and the SWRCs thus lagged behind the ACFTU push to organize trade union chapters in large private and foreign-invested enterprises.⁵⁰ It was news in 2006 when Wal-Mart agreed, after lengthy negotiations with the newly-organized ACFTU chapter, to create an SWRC, and when the Nanjing Wal-Mart’s SWRC, at its inaugural

⁴⁵ Jonathan Unger & Anita Chan, *The internal politics of an urban Chinese work community: A case study of employee influence on decision-making at a state-owned factory*, 52 THE CHINA JOURNAL 1, 10 (2004) (citing China News Digest). And in Tianjin, 660 SOE managers were fired and 1550 were demoted or transferred after losing an SWRC vote of confidence. *Id.* at 10 & n. 22 (citing WORKERS DAILY, 10 Apr 1998).

⁴⁶ Chen & Chan, *OHS*, *supra* note --; Chen & Chan, *Employee and Union Inputs*, *supra* note --.

⁴⁷ Unger & Chan, *supra* note --.

⁴⁸ Feng, *supra* note --, at 202 (noting as of 2011 that “only a few newly-created private enterprises, foreign-invested enterprises, or joint enterprises “have established workers’ congresses”). Official government statistics show a large number of SWRCs in the non-state sector. Xie Zengyi, *Zhidaihui de Dingwei yu Gongneng Chongsu* (职代会的定位于功能重塑) [*Reshaping the Position and Function of Staff and Worker Representative Congresses*], 3 FAXUE YANJIU (法学研究) [CHINESE J. L.] 110, 112 (citing a People’s Daily article reporting 700,900 SWRCs in non-public enterprises in 2007). However, SWRCs were to be set up by the ACFTU, which had little presence in the private and foreign-invested sector until recently; so it seems likely that most of those SWRCs were in former SOEs, joint enterprises, or collectively-owned (township and village) enterprises rather than in wholly private or foreign-owned companies.

⁴⁹ The Labor Law of 1994, which governs both non-state and state enterprises, provides that new workplace rules and other matters relating to employment “shall be submitted to the [SWRCs] or all the employees for discussion and passage.” *Labor Law of People’s Republic of China*, effective on January 1, 1994, Art. 33.

⁵⁰ A 1997 ACFTU survey found that 46% of private manufacturing companies that had workplace unions also had SWRCs. Zhu Xiaoyang & Anita Chan, *Staff and Workers’ Representative Congress: An Institutionalized Channel for Expression of Employees’ Interests?*, 37 CHINESE SOC. & ANTHROPOLOGY 6, 13-14. But only a small fraction of such companies had unions.

meeting, approved a collective contract that provided for annual raises for all workers.⁵¹ But this appears to have been a rare event.

The Labor Contract Law (LCL) of 2008 – a major advance in the *regulation* of employment relations – did little to clarify the shape of "democratic management" in the non-state sector. Much like the 1994 Labor Law, the LCL provided that changes to certain corporate by-laws, company rules, and collective contracts in all enterprises must "be submitted to the workers representative assembly *or all workers*."⁵² Initially most private and foreign companies either ignored the law's worker consultation provisions or sought to circumvent them. For example, relying on the LCL's provision for submission to "all workers," some lawyers advised managers that it was enough to post notice of changes to by-law or collective contract provisions on a company bulletin board or in an employee handbook, and to construe employee inaction in the face of such notice as assent.⁵³

The upshot of all this is that the SWRCs have not been much of a factor in Chinese labor relations in recent decades, especially in the non-state sector. The SWRCs have been widely viewed as "useless," and a "rubber stamp."⁵⁴ At a conference in 2010, a Chinese labor relations scholar's prediction that the SWRCs might become important for the protection of worker rights was met with laughter.⁵⁵

C. SWRCs Stage a Comeback?

That may be changing. Some signs come from politically connected corners of the Chinese academy. In a 2012 paper, Professor Feng Tongqing of the China Institute of Industrial Relations, the academic institute of the ACFTU, endorses SWRCs as still-important vehicles of "democratic management," and finds new interest on the part of workers.⁵⁶ While "workers' congresses established top-down are prone to becoming mere rubber stamp organizations," those that are established "bottom-up are often highly energetic,"⁵⁷ and "a powerful weapon in [workers'] participation in reform."⁵⁸ Feng maintains that that "workers' congresses in China can have a bright future" if the trade unions become more democratic and responsive, and if they do more to support SWRCs

⁵¹ Sun Yinguo, *Meinian Jia Xin 8% Woerma Zhidaihui Shuohua Guanyong* (每年加薪 8%沃尔玛职代会说话管用) [*Wal-Mart SWRC's Advocacy Proves Useful in Obtaining Annual 8% Salary Increase*], SUN YINGUO LINGSHOU CEHUA (孙印国零售策划) [SUN YINGUO'S RETAIL STRATEGY] (2008-9-11 17:22:57 Sept. 9, 2011, 5:22 PM), available at http://blog.sina.com.cn/s/blog_4d15de0f0100anah.html.

⁵² See Labor Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), LAWINFOCHINA.COM, arts. 4, 51 art. 33 [hereinafter Labor Contract Law].

⁵³ According to conversations with management lawyers for firms doing business in China.

⁵⁴ Au Loong Yu, *From "master" to "menial": State-owned enterprise workers in contemporary China*, 14 Working USA 453 (2011).

⁵⁵ Reported by Seth Gurgel.

⁵⁶ Feng, *supra* note --.

⁵⁷ Feng, *supra* note --, at 203.

⁵⁸ *Id.* at 205.

on the ground.⁵⁹ (That “if” is crucial. For China’s “grassroots,” or enterprise-level trade unions are almost invariably dominated by and deferential to management, much as they were in the SOEs of the planned economy. We will return to this point.)

In a recent article in the influential Chinese Journal of Law, Professor Xie Zengyi of the Chinese Academy of Social Sciences (CASS) argues that “[n]ot only is the use of SWRCs justified, it is also feasible and essential. China should not abandon SWRCs, but rather should support and perfect them.”⁶⁰ Xie aims to recast democratic management for the contemporary era. He argues that “the basis for establishing SWRCs is not that workers are ‘masters of the enterprise,’” but rather that workers’ participation will have economic and political benefits.⁶¹ In terms familiar to Western proponents of worker participation, Xie argues that SWRCs will “increase the flow of information between managers and employees,” raise employee morale and productivity, and “strengthen oversight of corporate operations,” as well as “mitigate worker subjugation.”⁶² Pointing to positive experience with SWRCs at the provincial level and with works councils in capitalist Europe (on which more below), Xie contends that the SWRCs’ consultative role on decisions that affect employee interests is entirely compatible with the Company Law and with managerial power over day-to-day affairs and matters that do not relate directly to employee welfare.⁶³ Far from supplanting the authority of corporate managers, he argues, SWRCs can supplement it.

In the meantime, various official bodies in recent years have acted to bolster the SWRCs’ powers, including in the non-state sector.⁶⁴ Courts have given sharper teeth to the LCL’s requirement that certain changes, to be valid, must be submitted to the SWRC (if one exists). For example, a court in 2009 overturned the discharge of an employee because the rule the employee had violated had not been approved by the company’s

⁵⁹ Feng, *supra* note --, at 205. Feng advocates reform of the enterprise unions, which currently play a critical role in the SWRCs, but insofar as they “find it hard to truly represent the workers because of the constraints imposed by enterprise managers,” he also contends that more representative industry-wide or sectoral unions “could improve the situation,” *Id.*

⁶⁰ Xie, *supra*, note __ at 118. CASS is a kind of “think tank” for China’s State Council, its top policymaking body. That does not mean that writings by CASS professors carry an official stamp of approval, but it does suggest official interest in and toleration of the views expressed.

⁶¹ Xie, *supra* note --, at 115-18.

⁶² *Id.* Evidence of the productivity benefits of “participatory management” through SWRCs is found in Minqi Li, *Workers’ Participation in Management and Firm Performance: Evidence from Large and Medium-Sized Chinese Industrial Enterprises*, 36 REV. OF RADICAL POLITICAL ECON. 358 (Summer 2004).

⁶³ *Id.* at 118-19.

⁶⁴ As of Oct. 31, 2013, 29 of 34 provincial level jurisdictions had regulations on “democratic management” or SWRCs. For example, new collective consultation legislation in Shenyang province requires that collective contracts must receive the approval of the SWRC. Qiao Jian, *Exploring the New Policy of Harmonious Labor Relations*, CONFLICT AND COOPERATION: THE INTERNATIONAL SYMPOSIUM OF COLLECTIVE LABOR DISPUTE RESOLUTION AND REGULATION 438 (2011). In Henan, in response to large-scale protests over the privatization of SOEs, the provincial standing committee stated that any SOE conversion that takes place without consulting the enterprise SWRC will be rendered invalid. *See* Wang, *supra* note __, at 53.

SWRC.⁶⁵ In the wake of decisions like that, managers and lawyers of large and especially foreign non-state enterprises are beginning to reckon more seriously with SWRCs – at least where they exist.

Of course, the net effect of laws and rulings that strengthen the powers of SWRCs once they exist, but that do not require them to exist, might have been to stiffen management resistance to their formation. But in recent years SWRCs have made significant headway in the non-state sector. Shanghai and Zhejiang Province, among other jurisdictions, have issued regulations requiring all public and private enterprises to establish SWRCs.⁶⁶ In the meantime, Party and union officials in private and foreign enterprises have been setting up SWRCs (at least on paper). As of March 2013, roughly 81 percent of the organizations, public and private, that had a trade union chapter -- that is, over 4 million enterprises -- had established a workers congress.⁶⁷

At a national level, the ACFTU in its 2012 “Provisions on the Democratic Management of Enterprises” calls for the establishment of SWRCs in private enterprises

⁶⁵ *Bu Jing Zhigong Taolun Gongsi Guizhang jiu shi Kongwen (不经职工讨论公司规章就是空文)* [Company Regulations Not Discussed by Employees Found Meaningless], *CHUTIAN DUSHI BAO (楚天都市报)* [CHUTIAN CITY NEWS] (Nov. 28, 2009), <http://ctdsb.cnhubei.com/html/ctdsb/20091128/ctdsb915310.html>. For other post-LCL examples, see *Gongsi Guizhang Zhidu Wei Jing Minzhu Chengxu Zhiding bing Gongshi dui Yuangong bu Fasheng Falv Xiaoli (公司规章制度未经民主程序制定并公示对员工不发生法律效力)* [Company Policy Does Not Undergo Democratic Process, Held Legally Ineffective], *TJB148.COM*, <http://www.tjb148.com/ShowArticle.shtml?ID=201281017241695514.htm> (last visited Aug. 9, 2013); *Xiao Yu, Shengbing Qingjia Zao Kuangong Fayuan Panjue Danwei Luan Kouqian (生病请假遭旷工法院判决单位乱扣钱)* [Court Rules Employer Wrongly Fined Employee for Absence], *CHONGQING CHENBAO (重庆晨报)* [CHONGQING MORNING NEWS] (Apr. 10, 2008), available at http://cqcbepaper.cqnews.net/cqcb/html/2008-04/10/content_162794.htm.

⁶⁶ See *Shanghai Zhigong Daibiao Dahui Tiaoli (上海职工代表大会条例)* [Shanghai Regulations on SWRCs] (promulgated by the Standing Comm. Shanghai People’s Congress, Dec. 23, 2010) arts. 2-3 (March 15, 2012, 1:21 PM), available at http://gh.sjiz.songjiang.gov.cn/GhWeb/GhDetail.aspx?contentid=_IYKY2LIT2&catalogId=004009002; *Zhejiangsheng Qiye Minzhu Guanli Tiaoli (浙江省企业民主管理条例)* [Zhejiang Regulations on the Democratic Management of Enterprises] (promulgated by the Standing Comm. of the Zhejiang Nat’l People’s Congress, March 30, 2010), available at http://www.zjhrss.gov.cn/art/2010/3/30/art_156_1261.html (March 30, 2010); *Jiangxisheng Zhigong Daibiao Dahui Tiaoli (江西省职工代表大会条例)* [Jiangxi SWRC Regulations] (promulgated by Standing Comm., Jiangxi People’s Congress, July 28, 2006) (Sept. 13, 2006), available at http://www.china.com.cn/law/flfg/txt/2006-09/13/content_7157124.htm; *Xizang Zizhiqu Zhigong Daibiao Dahui Tiaoli (西藏自治区职工代表大会条例)* [Tibet Autonomous Region SWRC Regulations] (promulgated by Standing Comm., Tibet Autonomous Region, Aug. 13, 2009, effective Oct. 1, 2009), available at http://china.findlaw.cn/fagui/p_4/342002.html (last visited June 24, 2013).

⁶⁷ ACFTU RESEARCH DEPARTMENT, 2012 NIAN GONGHUI ZUZHONG GONGHUI GONGZUO FAZHAN ZHUANGKUANG TONGJI GONGBAO 9 (2012年工会组织和工会工作发展状况统计公报) [2012 Union Organization and Work Development Statistics] (2013), available at <http://stats.acftu.org/upload/files/1370483520528.pdf>. That is a 36 percent annual increase from 2003 to 2012. Personal communication from Dr. Isabelle Wan, Nov. 10, 2013 (on file with author).

nationwide.⁶⁸ The Provisions are not legally binding on companies,⁶⁹ but they govern the trade union chapters that are charged with convening the SWRCs, and are likely to spur the further proliferation of SWRCs in the private sector – again, at least on paper. Once an SWRC exists, binding national laws define its formal powers. For the most part the Provisions track those laws in their account of the SWRCs’ powers: they are to put forward opinions and suggestions on an enterprise’s development plans and operation, “deliberate the bylaws ... on important matters,” “deliberate and adopt collective contract drafts,” and “examine and supervise the enterprise’s implementation of labor laws and regulations.”⁷⁰ The Provisions empower SWRCs to elect employee representatives to the board of supervisors and the board of directors.⁷¹ Interestingly, the SWRC is also given power to supervise and elect the enterprise’s business managers, albeit only “upon authorization.”⁷² That final cryptic qualification might determine whether this provision is seen as a gloss on the law or an overreach that conflicts with the Company Law’s reallocation of these supervisory powers to the corporate board.⁷³

The Provisions also underscore the SWRCs’ potential to represent the workforce as a whole. No more than one-fifth of the members can be upper- or mid-level managers,⁷⁴ and members are to be directly elected or removed by their work unit at a meeting at which two-thirds of the members are present.⁷⁵ Crucially, however, there are no explicit rules on nominations; representatives may be nominated by the trade union, by managers, or by employees, and actual practices vary.⁷⁶ In short, nothing in the law nor in the ACFTU Provisions ensures that the SWRCs’ make-up will reflect the genuine choices of rank-and-file workers, nor that they will act vigorously, nor that management will take

⁶⁸ See Provisions on the Democratic Management of Enterprises (promulgated by the ACFTU, effective Feb. 13, 2012) art. 3 (Lawinfochina) [hereinafter ACFTU Provisions] (“Enterprises shall... establish a democratic management system with the employees’ congress as the basic form.”).

⁶⁹ “Laws” in China are enacted by the National People’s Congress; binding national regulations emanate from the State Council and top-level ministries. Legislative Law of PRC, effective on July 1, 2000, Arts. 7, 56. Neither the ACFTU nor the “co-sponsors” of the Provisions (CPC Central Commission for Discipline Inspection, Organization Department of CPC Central Committee, State-owned Assets Supervision and Administration Commission of State Council, Ministry of Supervision, and All-China Federation of Industry and Commerce) is among those bodies.

⁷⁰ Provisions on Democratic Management, art. 13.

⁷¹ *Id.*, art. 36. The trade union is to nominate employee directors and supervisors. *Id.*, art. 38.

⁷² *Id.*, Art. 13.

⁷³ See Company Law, *supra* note ___, art. 38. For example, Jiang Junlu, president of the Labor Law and Social Security Law branch of the Beijing Law Society, commented that the “Provisions on Democratic Management have extended the Company Law and Labor Contract Law to a great extent. It is a conceptual progress.” Jiang Junlu, *Provisions on Democratic Management: On Publishing and Implementing*, online talk available at <http://politics.people.com.cn/GB/8198/85825/242289/>. Yet the Provisions do not emanate from sources with authority to “extend” national laws.

⁷⁴ Provisions on Democratic Management, art. 9. The number of representatives must generally equal at least 5 percent of the enterprise’s employees and no less than 30 individuals, and must include an “appropriate” number of female representatives. *Id.*, art. 8.

⁷⁵ *Id.*, art. 24. Procedures may differ for large enterprises.

⁷⁶ Email from management attorney to author (June 9, 2012).

them seriously.⁷⁷ But the SWRCs do supply a legally sanctioned vehicle for enterprise-level worker participation that is larger and less management-heavy than grassroots trade union officers.

The ACFTU Provisions represent a major official intervention in a heated ongoing debate over whether a robust role for the SWRCs, and for democratic management, is consistent with the Company Law and its more management- and shareholder-centered vision of corporate governance.⁷⁸ On the other side of that debate are most major foreign and domestic corporations operating in China, along with some powerful allies in government. This is a critical debate about the future of China's "socialist market economy," and the role of workers in that economy, to which I will return below.

D. An Aside on SWRCs and Worker Committees in Multinational Companies

The SWRCs offer to some multinational corporations a mechanism for worker participation in their own and their suppliers' operations. Firms that purport to follow "socially responsible" supply chain practices face stakeholder pressure to engage workers in the enforcement of their rights under local laws and codes of conduct; but in China they also face skepticism from both stakeholders and workers about the official trade union as a genuine worker representative, as well as a prohibition on workers' forming their own trade unions outside the ACFTU. Given those cross-cutting pressures, some firms have turned to SWRCs as a vehicle for engaging workers in enforcement of their rights. Multinational companies with SWRCs in some of their China-based locations include McDonalds,⁷⁹ KFC,⁸⁰ and, as noted above, Wal-Mart.⁸¹ Reports are mixed on whether SWRCs have actually helped to to enforce companies' legal and social responsibility commitments.⁸²

⁷⁷ *A Brief History of a Workers' Rights Group in China*, CHINA LABOUR BULLETIN (SEPT. 11, 2009), available at <http://www.china-labour.org.hk/en/node/100560>.

⁷⁸ Li Peng, 广东企业民主条例难产背后 [Guǎngdōng qīyè mǐnzhǔ tiáoli nánchǎn bèihòu] [Go Beyond the Difficulty of Passing Guangdong Provisions on Democratic Management], *ENNWEEKLY*, October 11th 2010, available at <http://finance.sina.com.cn/g/20101011/12188757381.shtml>.

⁷⁹ *Shanghai Maidanglao Shipin Youxian Gongsì Qianding zai Zhongguo Diyifen Jiti Hetong* (上海麦当劳食品有限公司签订在中国第一份集体合同)[*McDonald's Shanghai Branches Sign Company's First Collective Contract in China*] (5/23/2013), <http://www.shzgh.org/renda/node5902/node5906/node6563/u1a1574966.html>.

⁸⁰ Gu Wei, *Kendeji zai Zhongguo Shou Qian Jiti Hetong Zhigong Pingjun Gongzi Nian Zeng 5%* (肯德基在中国首签计提合同职工平均工资年增 5%) [*Kentucky Fried Chicken Signs First Collective Contract in China, Workers' Average Annual Income to Rise 5%*], XIN HUA NET (June 6, 2010, 10:18 AM), http://news.xinhuanet.com/legal/2010-06/18/c_12233334.htm.

⁸¹ Anita Chan, *Wal-Mart Workers in China*, Discussion with the International Labor Rights Forum and National Labor College: *Wal-Mart Workers in China 12* (Oct. 8, 2008), available at <http://www.laborrights.org/sites/default/files/publications-and-resources/Wal-Mart%20Workers%20in%20China.pdf>.

⁸² While the articles on McDonald's and KFC above suggest that they do help workers, the more persuasive account by Chan (on Wal-Mart) is much less sanguine. Chan, *Wal-Mart Workers*, supra note --. But a recent study by CASS Professor Shi Xiuyin found that SWRCs in foreign-invested enterprises were more successful at raising workers' wages and working conditions than SWRCs at domestic workplaces.

Other multinational companies and their major suppliers have instead established unofficial Employee Committees to facilitate employee participation in workplace governance.⁸³ These committees have no legal status or legal powers, and no formal connection to the Party-state or the ACFTU; they are more likely than SWRCs to be openly and democratically elected by the workers.⁸⁴ That makes them potential vehicles of grassroots worker empowerment. So when the Foshan Honda strikers in 2010 elected representatives to negotiate with management, they appear to have done so under the auspices of an Employee Committee, not the SWRC (and certainly not the trade union).⁸⁵

These unofficial Employee Committees are most often found in companies (or in the major suppliers of companies) whose managers have favorable experience with democratic unions and works councils at home – in Germany and Sweden, for example. These companies tend to pay relatively well and to take a proactive approach to labor relations; they may see little risk of workers going into opposition against management, and believe that risk is reduced by participatory mechanisms.⁸⁶ Even so, the impetus for the creation of Employee Committees often comes from outside – from stakeholder pressure, and sometimes union pressure at home, to adopt “best practices” in corporate social responsibility and compliance with domestic and international labor standards. Worker advocates have long pressed for worker representation in private labor standards regimes,⁸⁷ and have recognized the inadequacy of official union representation in China.⁸⁸ Some companies have sought to fill that gap through unofficial Employee Committees.

For now, Chinese officialdom appears to be leaving Employee Committees alone. They are seen as creatures of management, neither part of the official structure for worker

Shi Xiuyin, *The Transformation of the Enterprise Power Structure*, CONFLICT AND COOPERATION: THE INTERNATIONAL SYMPOSIUM OF COLLECTIVE LABOR DISPUTE RESOLUTION AND REGULATION 473 (2011).

⁸³ See Niklas Egels-Zanden & Jeroen Merk, *Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights*, J. BUS. ETHICS 1, 7-8 (2013) (available at <http://link.springer.com/article/10.1007%2Fs10551-013-1840-x>).

⁸⁴ Interview with Chinese industrial relations scholar, Aug. 14, 2013.

⁸⁵ Foshan Honda Worker Representative Committee Letter, *available at* <https://sites.google.com/a/socialistbulletin.com/socialist-bulletin/international/foshanhondaworkersrepresentativecommitteeletter> (last updated June 4, 2010). It is ambiguous whether it was an SWRC or an unofficial Employee Assembly to which these workers refer, but knowledgeable observers say that it was the latter.

⁸⁶ Interview with Chinese labor relations scholar, ---.

⁸⁷ See, e.g., Mark Barenberg, *Toward a Democratic Model of Transnational Labour Monitoring?*, in BRIAN BERCUSSON & CYNTHIA ESTLUND (EDS.), *REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS*, p. 63 (2008); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401, 436 (2001); KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, *CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION?*, pp. 69–72 (2003); Linda Shaw & Angela Hale, *The Emperor's New Clothes: What Codes Mean for Workers in the Garment Industry*, in RHYS JENKINS, ET AL., *CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY* 104–05 (2002).

⁸⁸ See, e.g., David Metcalf & Jianwei Li, *Chinese Unions: An Alice in Wonderland*, in DAVID LEWIN, BRUCE E. KAUFMAN (EDS.), 15 *ADVANCES IN INDUSTRIAL & LABOR RELATIONS* 213-268 (2006).

representation nor a threat to it; and they seem to pose little threat of spreading worker activism across enterprises. If policymakers continue to embrace and expand the role of SWRCs in these foreign companies, the Employee Committees might begin to look like competitors for workers' attention, and might attract greater official scrutiny. And if the SWRCs do end up functioning as vehicles of worker participation, the Employee Committees might appear redundant to managers and stakeholders. So let us return to our focus on the SWRCs' potential for engaging workers in enterprise governance.

III. Two Comparative Perspectives on "Democratic Management": A Legal Void in the U.S., Works Councils in Europe

For Western observers seeking to make sense of the SWRCs and their possible revival, it may be helpful to compare them to more familiar institutions of worker participation. But U.S. observers may need a comparative layover in Europe, where the concept of "democratic management" has a resonance that it lacks in the U.S., and where works councils (WCs) have long served as a channel of employee participation in enterprise governance.

A. American Labor Law's Hostility to Non-Union Employee Representation

U.S. labor law may be unique in the world in virtually barring meaningful employee participation in workplace governance other than through independent union representation. In the U.S., there is no analogue to the legally constituted SWRC; and the equivalent of a voluntarily constituted, management-sponsored Employee Committee would be an illegal "company union." This is just one dimension of the "American exceptionalism" that so often shows its face in the law of the workplace.

Under U.S. labor law, an employer and a union can, through collective bargaining, create an employee representation structure analogous to a "works council" or an SWRC (provided that the union itself is independent, not employer-dominated). The analogy to either SWRCs or WCs would still be strained, for no public law would define the powers or govern the composition of such an entity. But in any event, the analogy is largely hypothetical, for American unionists have traditionally regarded such structures as a circumvention of the union. The United Auto Workers thus broke new ground in agreeing with Volkswagen (VW) to establish a works council in a Tennessee plant in the event workers chose to be represented by the union.⁸⁹ But the workers' February 2014 vote against union representation at least postpones the VW experiment and the sea-change in American industrial relations that it might have presaged.⁹⁰

In the non-union workplaces where over 93 percent of U.S. private sector employees work, employee representation committees that discuss wages or working conditions

⁸⁹ See Steven Greenhouse, *VW and Its Workers Explore a Union at a Tennessee Plant*, N.Y. TIMES, Sept. 6, 2013, available at http://www.nytimes.com/2013/09/07/business/vw-and-auto-workers-explore-union-at-tennessee-plant.html?_r=0.

⁹⁰ See Steven Greenhouse, *Volkswagen Vote is Defeat for Labor in South*, N.Y. TIMES, Feb. 14, 2014, available at http://www.nytimes.com/2014/02/15/business/volkswagen-workers-reject-forming-a-union.html?_r=0.

almost inevitably run afoul of the labor law's proscription of "company unions." Employee committees that discuss managerial concerns such as productivity or quality are lawful and common. But under the National Labor Relations Act (NLRA), any organization in which employees participate, and that "deals with" the employer on terms and conditions of employment, is defined by as a "labor organization"; and it is unlawful for an employer to "dominate or interfere with ... or contribute financial or other support" to a labor organization.⁹¹ The prohibition holds even if employees enthusiastically embrace the representation structure, and even absent any anti-union motive on the employer's part.⁹² That is why VW will probably be unable to establish a "Works Council" at its Tennessee plant in the wake of the workers' vote against union representation.⁹³

The peculiar union-or-nothing system of worker representation in the U.S. has generated two sharply different regimes, each of which affords a single channel for both the resolution of "distributional conflict" over wages and the cooperative pursuit of mutual gains: either collective bargaining through independent trade unions, or unfettered managerial rule. In the union sector, the cooperative pursuit of mutual gains is at least periodically disrupted by distributional conflict; and in the non-union sector, workers have no collective voice in distributional conflict, nor in ensuring that gains will be mutual.

Still, U.S. firms are not immune from the the challenges of human resource management and industrial relations that have led to the rise of structures of employee participation beyond collective bargaining in many other industrialized nations. So the actual picture in the U.S. is more complex. While formal "company unions" have been largely extinct in the U.S. since the 1930s, less formal representation schemes are surprisingly common. In one recent study, 34 percent of non-union employees reported that their employers maintained a system in which worker representatives met with management about workplace issues, often including wages and benefits; and most employees declared themselves satisfied with this domesticated form of collective

⁹¹ The definition of "labor organization," National Labor Relations Act (NLRA), 29 U.S.C. § 152(5), is very broad, and was meant to include all manner of employee representation committees that engage in "bilateral exchange" with the employer. See *Electromation, Inc.*, 309 NLRB 990, --- & n. 21 (1992), enf'd, 35 F.3d 1148 (7th Cir. 1994), citing *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

⁹² The meaning of "interfere," "dominate," and "support," prohibited by Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2) (2006), is also very broad; it is not limited to employer conduct that aims to squelch independent unionism. *Electromation*, 309 U.S. at ---, n. 24 (citing *NLRB v. Newport New Shipbuilding Co.*, 308 U.S. 241 (1939)).

⁹³ Two qualifications are in order: First, in principle, VW's workers could form a "labor organization" that is limited to the Chattanooga plant, and unaffiliated with the UAW, which could then agree with VW to establish a works council system. <http://www.reuters.com/article/2014/02/16/us-autos-vw-council-analysis-idUSBREA1F0VV20140216>. Such unions, without external labor movement support, are rare and generally thought to be very vulnerable to management interference and domination. Second, VW could establish a system through which workers exercise delegated managerial power rather than "dealing with" the employer. See *Crown, Cork, & Seal Co.*, 334 NLRB 699 (2001), discussed in Benjamin Sachs, *A New Way Forward for VW-Tennessee* (posted in *On Labor: Workers, Unions, and Politics*, May 20, 2014; available at <http://onlabor.org/author/bsachsonlabor/>).

voice.⁹⁴ That is not surprising given what U.S. workers say they want by way of representation at work. In the most in-depth survey of worker attitudes, while 30 to 40 percent of non-union, non-managerial private sector employees said they would vote for independent union representation, fully 85 percent said they wanted an organization that is “run jointly” by employees and management.⁹⁵

So U.S. labor law proscribes what most workers say they want, and what many say they have. To be sure, that proscription is backed by no onerous sanctions, and no sanctions at all unless someone files a charge with the National Labor Relations Board. Still, illegality has consequences. Major corporations with a high public profile and a commitment to legal compliance (like VW) cannot simply disregard the law. The informal employee representation schemes that do exist in the U.S. workplace operate quietly, and without public scrutiny, regulation, or support. We know little about them. And they neither reflect nor reinforce public norms of “workplace democracy.” Instead, the idea of collective voice at work in the U.S. is almost exclusively identified with unions; and unions carry a lot of baggage in the eyes of many workers and much of the public, and in any event are shrinking and beleaguered.

The resulting “representation gap” is a serious problem for U.S. workers. It also complicates the U.S. perspective on the rising profile of SWRCs in China. On the one hand, the view of employee representation that is embodied in U.S. labor law would usefully counsel us to look beyond the SWRCs and to assess the independence of the trade union chapters that carry out their day-to-day functions. Given the near-ubiquity of employer domination of the trade unions,⁹⁶ we would be constrained to condemn the SWRCs, too, as “company unions” – not merely less effective than independent union representation but illegitimate. (Indeed, the role that managers and supervisors play in German works councils, discussed below, would constitute unlawful assistance or interference unless sanctioned through collective bargaining with a labor organization – a union – that is wholly independent of management.) On the other hand, one suspects that most U.S. workers would take a different view of an SWRC-like body – as better than nothing, and perhaps even better than an independent union that has to fight management every step along the way.

⁹⁴ See John Godard & Carola Frege, *Labor Unions, Alternative Forms of Representation, and the Exercise of Authority Relations in U.S. Workplaces*, 66 INDUS. & LAB. REL. REV. 142, 152 (2013).

⁹⁵ RICHARD FREEMAN AND JOEL ROGERS, *WHAT WORKERS WANT* 81–92 (Ithaca: Cornell University Press, 2006). Indeed, when asked to choose between an organization with which management cooperated but that had no power, and an organization that had more power but that management opposed, employees said they preferred the former by a margin of 63 percent to 22 percent. *Id.* at --. Undoubtedly, “adaptive preferences” are at work here: Given employers’ vehement opposition to unions, and the risks and costs that therefore attend unionization, it may be entirely rational for employees to shift their own preferences toward a more cooperative alternative. See *id.* at --.

⁹⁶ That is partly because the enterprise trade unions are almost invariably management-dominated, by the lights of U.S. labor law. See Cynthia Estlund & Seth Gurgel, *Will Labor Unrest Lead to More Democratic Trade Unions in China?*, forthcoming in *CHINA AND ILO FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* (Roger Blanpain, Ulla Liukkonen, & Yifeng Chen, eds., 2014).

B. How do SWRCs Compare to German Works Councils?

In sharp contrast to the U.S., the rest of the developed world allows or even requires non-union forms of employee participation in workplace governance. In particular, China's SWRCs have an obvious kinship with European works councils, which have their roots in early 20th century efforts to promote industrial democracy (alongside of and often in competition with the trade unions).⁹⁷ SWRCs fall within a prominent scholarly definition of WCs as "institutionalized bodies for representative communication between a single employer and the employees of a single plant or enterprise."⁹⁸ And in many respects, SWRCs would fit comfortably within a typology of European WCs, which vary widely from country to country.⁹⁹ In particular, the SWRC system and China's concept of "democratic management" are superficially analogous to the German WC system and the concept of "co-determination" that it embodies. German WCs are unusual even within Europe in their legal and political entrenchment; although the current system was established after World War II, WCs are the product of over a century of institutional development.¹⁰⁰ In part for that reason, the German WC system is recognized as a "prototype" within Europe and is relatively familiar outside Europe.¹⁰¹ It will serve as a useful point of comparison here.

The reader may well wonder just how useful this comparison is likely to be, given the raft of differences between the two nations' legal, political, and industrial relations systems. Germany's WCs rest on a foundation of independent unions, an independent judiciary, and multi-party electoral democracy, while China is adamantly opposed to all three institutions. Those differences are indeed crucial to understanding the WCs efficacy in advancing workers' interests, and we will keep them in view. Still, a closer look at the WCs will highlight crucial features of the SWRCs and their institutional context, some of which may be changing.

The German WCs are unusual within Europe not only in their institutional entrenchment, but also in the formal elaboration and extent of their prerogatives. The WCs have not only rights to *information* and *consultation* over many management decisions, but also *co-determination* rights – the right to demand third party resolution in case the WC does not agree with management – and even *veto* rights over some topics.

⁹⁷ Joel Rogers & Wolfgang Streek, *The Study of Works Councils: Concepts and Problems*, in WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 11-16 (Joel Rogers & Wolfgang Streek eds., 1995) [hereinafter WORKS COUNCILS].

⁹⁸ *Id.* at 6.

⁹⁹ *Id.* at 17; Wolfgang Streek, *Works Councils in Western Europe: From Consultation to Participation*, in WORKS COUNCILS, *supra* note --, at 313-14.

¹⁰⁰ See Martin Behrens, *Germany*, in COMPARATIVE EMPLOYMENT RELATIONS IN THE GLOBAL POLITICAL ECONOMY 206-08, 212-15, 217-18 (Carola Frege & John Kelley, eds., 2013); Walther Müller-Jentsch, *Reassessing Co-Determination*, in THE CHANGING CONTOURS OF GERMAN INDUSTRIAL RELATIONS (Hansjörg Weitbrecht & Walther Müller-Jentsch, eds., 2003) (hereinafter "*Reassessing*"), 39, 44-46.

¹⁰¹ See Carola M. Frege, *A Critical Assessment of the Theoretical and Empirical Research on German Works Councils*, 40 BRITISH J. OF INDUS. REL. 221, 222 (2002).

Imagine two intersecting sets of concentric circles – one radiating outward from a core of essential employee concerns, and one radiating outward from a core of essential management concerns. Roughly speaking, the prerogatives of the WC increase with the proximity to the former and with the distance from the latter.¹⁰² Specifically, German WCs have veto rights over some individual staff movements, and co-determination rights over a wide range of personnel and work-related matters that do not affect the basic scope or strategy of the enterprise. The WCs have a weaker but still meaningful right to consult over other aspects of the work environment and job-related decisions (including new technology), and they have the right to receive information on financial matters and structural decisions that might affect workers.¹⁰³

The German WCs are designed, and their powers are tailored, to enable workers to participate in enterprise decisions that affect workers directly and that may affect productivity. The logic of the German system is to hive off sharp distributional conflict from the potentially cooperative pursuit of mutual gains; and that logic is reflected in the enumerated powers of the WCs and in their formal separation from the trade unions.¹⁰⁴ Crucially, the German WCs have no role in wage-setting and no right to strike.¹⁰⁵ In Germany as in much of Europe, collective wage bargaining takes place mainly at the sectoral level; that is the domain of the trade unions.¹⁰⁶

But the formal separation of the German unions and WCs does not prevent a great deal of interaction on the ground. The trade unions have found the WCs to provide a helpful workplace-level structure for engaging and protecting their members, and have been able to use the WCs' consultation and co-determination rights to influence a wide range of managerial decisions on working conditions and job security. Unions have exercised informal power in and through the WCs, for example, by running candidates for positions on the WCs.¹⁰⁷ On the whole, the German WCs became stronger and more effective in the post-war era, in part because of the trade unions' shift from skepticism to pragmatic support to what one leading German scholar describes as a "symbiotic relationship" with the WCs.¹⁰⁸ The trade unions' embrace of the WCs in recent decades may reflect in part their own declining power outside the WC system.¹⁰⁹ If unions continue to decline, however, the efficacy of the WC system is sure to suffer.

¹⁰² See Müller-Jentsch, *Germany: From Collective Voice to Co-management*, in *WORKS COUNCILS* (hereinafter "*Germany*") at 58-59, 60.

¹⁰³ *Id.*

¹⁰⁴ See Müller-Jentsch, *Germany*, *supra* note --, at 61; Behrens, *supra* note --, at 454-55. .

¹⁰⁵ See Müller-Jentsch, *Germany*, *supra* note --, at 61-62; Streek, *supra* note --, at 314.

¹⁰⁶ *Id.* at ---.

¹⁰⁷ See Müller-Jentsch, *Germany*, *supra* note --, at 63.

¹⁰⁸ See Müller-Jentsch, *Reassessing*, *supra* note --, at 49-51.

¹⁰⁹ *Id.* at 44. On the continuing decline of union power in Germany, see Martin Behrens, *Germany*, in *COMPARATIVE EMPLOYMENT RELATIONS IN THE GLOBAL POLITICAL ECONOMY* 456-59 (Carola Frege & John Kelley, eds., 2013).

The role of the union in a WC is only one of several variables that can influence the actual functioning of a WC. For it turns out that even an elaborate and well-entrenched legal framework does not produce uniform or uniformly effective institutions on the ground. WCs can be marginalized or engaged, cooperative or combative, conventional or creative; and that depends partly on unions' involvement and partly on managerial "culture" and posture toward workers and WCs.¹¹⁰ That is yet another large caveat to this brief comparison between German WCs and China's SWRCs.

Let us now return to the latter. Before the early 1990s, the SWRCs had formal decisionmaking power in some areas in which the WCs have rights of codetermination or less; in particular, they had the formal power to approve some major business decisions and even to replace management. As noted above, however, those powers were rarely realized in fact, and they have been much diluted since 1994. Now the powers of the SWRCs appear both vaguer and weaker, even on paper, than those of the WCs.

In one crucial respect, however, the SWRCs' powers are broader than those of the German WCs: The SWRCs have a formal role in approving "collective contracts," including wage levels. That difference between the SWRCs and the WCs goes hand-in-hand with another: the SWRCs are formally intertwined with the enterprise trade union, which is charged with carrying out the day-to-day functions of the SWRC in between its infrequent meetings. As we have already noted, Chinese trade unions are typically dominated by management at the enterprise level (and by the CPC above that level). And China's collective contracts bear little resemblance to U.S.-style collective bargaining agreements; for neither the SWRCs nor the unions engage in collective bargaining as we know it in the West. But where workers themselves are actively agitating for higher wages, the requirement that SWRCs approve collective contracts may provide a vehicle for workers' direct participation in wage setting.¹¹¹

Whatever the formal powers of the SWRCs, it is clear that, at least since their heyday in the waning years of the planned economy, they have in fact exercised much less power on workers' behalf than have most German WCs.¹¹² While there are wide variations in

¹¹⁰ One German scholar of WCs in 1981 identified seven distinct "ideal types" of WCs, ranging from those that are ignored, those that operate as part of management, those that operate as "cooperative counterpower" on behalf of workers, and those that are combative on behalf of workers. See Frege, *supra* note --, discussing Kotthoff, H., *Betriebsräte und betriebliche Herrschaft: eine Typologie von Partizipationsmustern im Industriebetrieb* (Frankfurt: Campus 1981); and Kotthoff, H., *Betriebsräte und Bürgerstatus: Wandel und Kontinuität betrieblicher Codetermination* (Munich and Mering: Rainer Hampp Verlag 1994).

¹¹¹ In the 1980s, the SWRCs often engaged in some give-and-take over pay levels (though pay differentials were extremely modest in the planned economy). See Andreas, *supra* note --, at 10.

¹¹² See Xie, *supra* note --; Jin Duoduo, *Deguo Gongchang Weiyuanhui Zhidu yu Zhongguo Zhigong Daibiao Dahui Zhidu zhi Bijiao* (德国工厂委员会制度与中国职工代表大会制度之比较) [A Comparison of German Works Councils and Chinese SWRCs] 34-36 (May 8, 2006) (unpublished MA dissertation, Xiangtan University).

the actual functioning of both German WCs and Chinese SWRCs, in general the former have had a much greater impact on both management and workers than the latter.¹¹³

IV. Some Constraints on the Efficacy of SWRCs and the Outlook for Change

This brief comparison highlights several dimensions of the SWRCs and their institutional context that seem crucial to their efficacy. One dimension, diffuse but important, is the relative vagueness of Chinese law on the SWRCs' powers, structure, and composition, which gives workers far less traction against managerial power than the more specific and detailed legal provisions of German law. The difference is partly a reflection of the Chinese legal system in general, and raises issues of legal and political development that are beyond the scope of this inquiry. But this much should be said: Considering that China began constructing a modern legal and regulatory system virtually from scratch just over 30 years ago, continued progress on this front seems likely. The evolution of China's employment protection laws, described briefly below, provides a case in point.

Employment protection, or job security, is in fact another point of comparison, one that lies outside the SWRCs and WCs as such, but has been highlighted by Andreas. In addition, the role and nature of both the trade union and the state – in the SWRCs and in China – command our attention. On each of these dimensions, the current state of affairs tilts against Chinese workers and their prospects for a real voice at work through SWRCs, at least as compared to the situation of German workers and their WCs. But on each dimension, one can discern signs of a shift in workers' favor in China.

A. Job security

One reason for the weakness of the SWRCs in recent years, according to Andreas, is that ordinary Chinese workers in most companies have enjoyed little job security, either in China's SOEs since the demise of the *danwei* system or in private companies. That view may strike a chord with American legal scholars, including myself, who have argued that freedom from unjustified discharge is a necessary predicate for workers to be able to exercise voice rights that they may enjoy on paper.¹¹⁴ If that is so, then the fate of the SWRCs may turn partly on whether the Labor Contract Law of 2008 (LCL) can accomplish one of its more ambitious objectives of improving job security for Chinese workers.

¹¹³ That is clear if one compares Andreas' account of the SWRCs' declining role in the SOEs and former SOEs in the "corporate era," *id.*, with a leading scholarly account of the German WCs, Müller-Jentsch, *Collective Voice to Co-Management*, *supra* note --, at 55 (arguing that because of works councils, "[e]mployers had to accept that broad areas of managerial decision making had become an area of joint regulation"). A review of the literature on German WCs underscores the consensus that, notwithstanding their variations, most WCs have a significant presence and role of some kind in workplace governance. See Frege, *supra* note --.

¹¹⁴ See Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655-92 (1996).

The 1994 Labor Law had sought to regulate unjustified dismissals during the term of a labor contract, whether fixed or indefinite. But apart from chronic enforcement difficulties, that form of job security was easily defeated by employers' use of short fixed-term contracts.¹¹⁵ One goal of the 2008 LCL was to shore up workers' job security, partly by limiting employers' use of fixed-term contracts. On paper, it has succeeded: According to a recent OECD survey of employment protection legislation, China's legislation ranks as the most protective in the world!¹¹⁶

To be sure, the LCL makes no effort to restore what Andreas calls "membership" in the enterprise, which entailed a virtual ban on quitting as well as on discharge. The former was part of the price workers paid for the security of the "iron rice bowl," and might have helped to motivate workers to speak up against management.¹¹⁷ That kind of "security" is not coming back. But the LCL does attempt to enable workers to speak up by requiring employers to justify termination of most employees (or else to compensate them). That is roughly the kind of job security that is enjoyed by most formally employed workers throughout the developed world, including Germany, and by the small fraction of U.S. workers who are covered by a collective bargaining agreement. If that is the kind of security that China's workers need to exercise the democratic participation rights that they enjoy on paper, then the LCL would seem to be just the ticket.

But of course job security rights that exist only on paper will do nothing to bring to life democratic participation rights that exist on paper. It remains to be seen whether Chinese law will manage to make its job security protections real for most employees. On the one hand, workers have won a high percentage of the cases that have poured into formal adjudication channels since the LCL, and managers complain about the strict legal standards for dismissal.¹¹⁸ On the other hand, most ordinary workers lack access to legal representation and effective legal recourse. Moreover, employers seeking "flexibility" have continued to look for ways to get around the LCL's constraints on discharge of indefinite term employees. (China is hardly the only place where employers respond to tough legal restrictions on discharge, if they can, by shifting to labor arrangements that fall outside the law's restrictions.¹¹⁹) A popular tactic has been to hire workers through a

¹¹⁵ See Mary E. Gallagher & Baohua Dong, *Legislating Harmony: Labor Law Reform in Contemporary China*, in FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA 40 (Sarosh Kuruvilla, Ching Kwan Lee & Mary E. Gallagher eds., 2011).

¹¹⁶ See OECD Indicators of Employment Protection, 2013, available at <http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection.htm>.

¹¹⁷ In Andrew Walder's words, "[w]ork units [had] a form of property rights over their employees." See Walder, *Organized Dependency*, *supra* note --, at 56.

¹¹⁸ In 2008, the number of labor-related cases doubled to over 600,000, and that number has stayed relatively steady since then. In 2011, workers won almost 200,000 of the cases they brought, whereas employers won less than 75,000. LAODONG TONGJI NIANJIAN 2012 (劳动统计年鉴 2012) [Labor Yearbook 2012] (2012), at p. 368, tbl. 9-1.

¹¹⁹ See David H. Autor, *Outsourcing at Will: The Contribution of Unjust Dismissal Doctrine to the Growth of Employment Outsourcing*, 21 J. of Lab. Econ. 1, 32 (2003) (arguing that U.S. state "courts' efforts to protect workers against unjust dismissal have fostered the growth of temporary help employment—nonpreferred jobs that offer less job security and lower pay than standard positions."); Lars

“labor dispatch” agency, and thereby avoid the LCL’s restrictions on termination.¹²⁰ Studies indicate that labor dispatch use at least doubled after 2008, and that by 2011 it included one-fifth of China’s 300 million urban workers.¹²¹ The growth of labor dispatch parallels trends toward “casualization” of labor that are seen across the world, not only in China and not only in the wake of new labor regulations.¹²² But the explosion of labor dispatch in China since the LCL is too dramatic to be a coincidence.¹²³

Paradoxically, there are glimmers of good news in the labor dispatch story. The fact that so many employers in China sought to circumvent the LCL’s restrictions, rather than simply ignoring them, suggests that labor law is becoming a real constraint for private sector employers in China. The fact that Chinese policymakers responded to the explosion of labor dispatch by amending the LCL to restrict its use suggests that they are increasingly serious about regulating labor standards and improving job security.¹²⁴ And the fact that dispatch workers are explicitly accorded representation within China’s SWRCs suggests a serious effort to keep “democratic management” structures aligned with emerging employment practices.¹²⁵

W. Mitlacher, *The Role of Temporary Agency Work in Different Industrial Relations Systems—a Comparison between Germany and the USA*, 45 BRIT. J. INDUS. REL. 581, 584-86 (2007) (arguing that in Germany, “strict regulation of the standard employment relationship positively influences the decision to deploy agency workers” who will not be covered by these regulations).

¹²⁰ See Virginia Harper Ho & Huang Qiaoyan, *The Recursivity of Reform: China’s Amended Labor Contract Law*, 37 FORDHAM INT’L L.J. --- (forthcoming 2014) (manuscript at 16) (on file with author). Labor dispatch agencies are required to comply with the LCL, and legitimate agencies have agreements with user employers allocating responsibility for the costs and liabilities associated with compliance.

¹²¹ *Id.* at 8 & n.37. In Dongguan, a southern manufacturing center in Guangdong Province, the number of labor dispatch agencies increased by at least 500% after 2008. *Id.*

¹²² See generally SAROSH KURUVILLA, CHING KWAN LEE, & MARY GALLAGHER (EDS.), FROM IRON RICE BOWL TO INFORMALIZATION 1-7 (2011).

¹²³ See Ho & Huang, *supra* note --, at 17. Ho and Huang suggest that the vague attempt in the LCL to regulate the use of dispatched labor, the LCL actually “affirm[ed]” the practice and helped “open[] the door for an over-expansion of labor dispatch.”

¹²⁴ Labor Contract Law of the People’s Republic of China (2012 Amendment) (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 28, 2012, effective Jan. 1, 2008) (Lawinfochina) [hereinafter Amended LCL]. Article 57 of the new law requires labor dispatch agencies to be licensed and to have a minimum amount of registered capital. Article 66 restricts employers’ use of labor dispatch to “provisional, auxiliary, or substituting positions.” Under draft regulations issued in January 2014, dispatch workers can make up no more than 10% of the employer’s total work force. *Laowu Paiqian Zanzing Guiding* (劳务派遣暂行规定) [Interim Provisions on Labor Dispatch] (promulgated by the Ministry of Human Resources and Social Services, Jan. 24, 2014, effective March 1, 2014), art. 4, available at http://www.mohrss.gov.cn/gkml/xxgk/201401/t20140126_123297.htm. This restriction does not apply to Chinese representative offices of foreign entities. *Id.* art. 25. *Laowu Paiqian Ruogan Guiding (Zhengqiu Yijian Gao)* [Draft Provisions on Labor Dispatch (Seeking Comments)], CHINALAW.GOV (August 8, 2013, 10:08 AM), <http://www.chinalaw.gov.cn/article/cazjgg/201308/20130800389847.shtml>.

¹²⁵ Provisions on Democratic Management, art. 9 (“employees dispatched for labor shall have an appropriate proportion of representatives” within the SWRC). It is also interesting that, in view of the difficulty of defining “auxiliary” positions across industries, the draft regulations provide that those positions are to be defined in each enterprise through the SWRC. Provisions on Democratic Management, Feb. 13, 2012, art. 13.

Can Chinese workers achieve European-style job security rights in the foreseeable future? Given worldwide trends toward casual and contingent forms of labor, that seems unlikely. Many European workers no longer enjoy “European-style” job security rights.¹²⁶ Already some companies in China have reportedly responded to tighter rules on labor dispatch by outsourcing some jobs altogether.¹²⁷ On the other hand, given the progress that China has made since first beginning to regulate labor standards a few decades ago, it does not seem impossible that at least a sizable core of China’s workforce will enjoy real job security in the foreseeable future.

Two other major areas of difference between the SWRCs and the German WCs – the role and nature of both the trade union and the state – are more intractable because they are closer to the heart of China’s one-party system of governance.

B. *The nature and role of the trade unions*

The SWRCs' functions are formally exercised by the enterprise trade union in between the SWRCs’ infrequent meetings, while German unions are formally separate from the WCs; yet German unions do much more to energize WCs on behalf of the workers than Chinese trade unions do to energize SWRCs.¹²⁸ That is not surprising. German unions are comparatively strong, independent of both management and the state, and accountable to workers, while China's official trade union federation and its enterprise chapters have often been described as "useless" to workers, and no other trade unions are permitted to exist.

The nature of the ACFTU, China's only lawful trade union, is a large topic.¹²⁹ Here it is enough to know that, while the union is charged with “representing” workers, it is not actually accountable to the workers at any level of the organization. The ACFTU is subordinate to the corresponding Party branch, from the local level up to the national level, and its officers are appointed by the Party.¹³⁰ Similarly, the enterprise trade unions

¹²⁶ Manfred Antoni & Elke J. Jahn, *Do Changes in Regulation Affect Employment Duration in Temporary Help Agencies*, 62 *INDUS. & LAB. REL. REV.* 226, 226 (2009) (describing a significant increase in the use of temporary workers in European Union countries).

¹²⁷ Zhang Yuanyuan, *Yu Guibi Xin Laodongfa Xiangguan Xianzhi Qiye Laowu PaiqianTubian “Laowu Waibao”* (欲规避新劳动法相关限制 企业劳务派遣突变 “劳务外包”) [*To Circumvent New Labor Law Restrictions, Companies Replace Dispatch Labor with “Outsourced Labor”*], *YOUTH.CN* (June 24, 2013, 11:51 AM), http://finance.youth.cn/finance_gdxw/201306/t20130624_3413854.htm

¹²⁸ Unions support works councils in Germany by providing them with expertise, guidance and advice, and by calling official and unofficial strikes—a power works councils are denied. Streek, *supra* note --, at 339, 343, 345.

¹²⁹ For an overview, see Rudolf Traub-Merz, *All China Federation of Trade Unions: Structure, Functions and the Challenge of Collective Bargaining*, in RUDOLF TRAUB-MERZ AND KINGLUN NGOK (EDS.), *INDUSTRIAL DEMOCRACY IN CHINA 11* (Beijing: China Social Sciences Press, 2012) (PDF version available online at <http://library.fes.de/pdf-files/bueros/china/09128/09128-english%20version.pdf>). For an in-depth account that emphasizes both deep problems and glimmers of innovation and reform, see TIM PRINGLE, *TRADE UNIONS IN CHINA: THE CHALLENGE OF LABOUR UNREST* (London & New York: Routledge, 2011).

¹³⁰ Traub-Merz, *supra* note --, at 18-21.

are subordinate to enterprise Party cadres, as well as to the ACFTU branch that sits above it. As we have noted, however, the enterprise trade unions have almost invariably been dominated by firm management; at least until recently, most trade union chairs were high-level managers for the employer.¹³¹ It is little surprise, then, that the unions have done little in most cases to strengthen workers' hand in the SWRCs or to make effective use of their powers. That being the case, there is something to be said for the idea of separating the SWRC from the trade union.¹³²

An alternative strategy would be to make the grassroots unions more democratic and responsive to workers.¹³³ The idea of independent trade unions remains totally off the table in China; indeed, virtually every aspect of China's labor policy is shaped by the regime's commitment to avoiding the rise of independent labor organizations.¹³⁴ But workers are demanding, and some policymakers are promising, reform of the official union, including more democratic elections at the grassroots level.¹³⁵ Effective reform of the ACFTU at any level will be a long, uphill battle at best. It might occur only in scattered enterprises where striking workers exact democratizing reforms from local officials and employers as the price of industrial peace – and it might last only as long as workers remain on high alert. Or it might eventually be embraced and institutionalized if employers and officials come to believe that the problem of labor unrest in China cannot be solved without reasonably responsive unions that can represent (and regulate) the workers. But however and to whatever degree the enterprise unions become more responsive to workers, they might then make the SWRCs into more effective and responsive institutions as well.

China's current system, unlike Germany's, combines the economic issues over which management and workers are most likely to be at odds with other issues on which workers' participation might contribute to a more productive enterprise; and China deals with both through linked institutions – the enterprise trade union and the SWRC – that managers currently dominate. If the trade unions were to become more energetic and responsive representatives of the workers, there will still be the problem of injecting economic conflict into areas of potential cooperation. That is a problem that unionized workplaces face in the U.S. Both China and the U.S. would do well to consider the German system's logic of separating distributional conflict from the cooperative pursuit of mutual gains.

C. The role of the state, and political parties, in labor relations

¹³¹ *Id.* at 31-33.

¹³² *See* Jin, *supra* note __ at 36. According to Jin, Article 2 of the Trade Union Law, which holds that the Trade Union is to be the working body of the SWRC, is in conflict with Article 30 of that law, which holds that trade unions are composed only of those who voluntarily join them. *Id.* at 35-36.

¹³³ Professor Feng agrees. Feng, *supra* note --, at 204-05.

¹³⁴ That is the thesis I am developing in a book-in-progress.

¹³⁵ Explored in Estlund & Gurgel, *supra* note ---.

The different role of trade unions in German WCs and Chinese SWRCs is intertwined with the distinct role of the respective states in labor relations. A brief glimpse of the latter is all that is possible here, but that will suffice to make some basic points.

We may start with some similarities: In Germany (and much of Europe), as in China, the state creates the legal framework for WCs/SWRCs and defines their powers. In both Germany and China, the trade unions play a large role, formal or informal, in the WCs or SWRCs. Moreover, in both Germany and China (and elsewhere), the trade unions are more closely intertwined with political parties and the state than they are in the U.S.¹³⁶ Most European trade unions are affiliated with political parties, including some that exercise state power from time to time.¹³⁷ And the trade unions are themselves integral participants, as “social partners,” in the “social dialogue” that functions as part of the policymaking process in many European countries and in the European Union.¹³⁸

But Western-style multi-party democracy and associational freedoms obviously make an enormous difference: European trade unions are elected and ultimately accountable to their worker-members. They are fairly autonomous from the political parties with which they are affiliated. And those political parties have to compete for citizens’ votes in periodic multi-party elections. China is of course a one-party state. The ruling Party controls the ACFTU and its branches at least down to the local level and potentially, through enterprise Party chapters, all the way down to the enterprise level; and workers are prohibited from forming their own independent unions.

Through its control over the unions, the party-state in China potentially controls or constrains the SWRCs in ways that have no close parallel in Europe’s WCs. The formal lines of authority, direct though attenuated, between the SWRC and the CPC are one striking difference between the Chinese and European version of the works council system. That obviously does not mean that CPC leaders in Beijing call the shots; Party-state power is mostly decentralized or “fragmented,”¹³⁹ and central control of local Party officials has often been quite weak. Moreover, since the rise of markets and managerialism in China, the theoretical power that the party-state wields over or through the SWRCs has been eclipsed on the ground by managerial power. Whether and how

¹³⁶ In Germany the unions are not formally affiliated with a political party, though they are allied closely with the Social Democratic Party. See Behrens, *supra* note --, at [462-63].

¹³⁷ An ACFTU official makes this point in contending for greater foreign acceptance of the ACFTU as a legitimate trade union. Kong Xianghong, *Capacity-building and Reform of Chinese Trade Unions: Using Legal and Democratic Means to Resolve the Conflict of Roles of Trade Union Chairs*, in TRAUB-MERZ & NGOK, *supra* note --. But the CPC’s strict monopoly on political power is a rather significant distinguishing factor.

¹³⁸ See generally NICHOLAS MOUSSIS, *ACCESS TO THE EUROPEAN UNION: LAW, ECONOMICS, POLICIES* -- (19th ed., 2011) (overview of “social dialogue” available online at http://europedia.moussis.eu/books/Book_2/5/13/05/01/index.tkl?all=1&pos=159)

¹³⁹ See KENNETH G. LIEBERTHAL AND MICHEL OKSENBERG, *POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES* (Princeton: Princeton Univ. Press, 1988); Andrew C. Mertha, “*Fragmented Authoritarianism 2.0*”: *Political Pluralization in the Chinese Policy Process*, 200 THE CHINA Q. 995 (2009).

that might change in the future is a crucial question that goes to the heart of what China is becoming, and what it means to become. But first let us sum up the story for today's workers in China.

With all of their institutional limitations – a vague legal framework, workers' vulnerability to reprisals, enterprise unions' domination by management, and the local Party-state's undependable posture toward workers – it is hard to see how the SWRCs could offer workers an institutional voice in workplace governance. It is possible to imagine a future in which those institutional limitations are addressed – through clearer laws, stronger employment protections, more responsive unions, and a stronger Party-state commitment to delivering these improvements to workers. Unless and until that happens, however, SWRCs and China's constitutional commitment to democratic management appear doomed to wither into a formalistic charade.

For now, the real question is not whether the formal proliferation of SWRCs in private sector firms will democratize industry – clearly it will not – but whether it can create usable mechanisms for worker participation when workers or managers or both are motivated to make use of them. Forward-looking managers can choose to engage constructively with SWRCs, and to use them to improve communication and cooperation with workers. And astute workers are occasionally able to make use of SWRCs as politically safe vehicles for pursuing their own interests when they have mustered their own collective power. Professor Feng offers several examples.¹⁴⁰ Manfred Elfstrom and Sarosh Kuruvilla report that, in 2007, workers of a city-owned paper mill managed to organize around the mill's SWRC to reverse its privatization.¹⁴¹ And in January 2011, when workers at a machine parts factory (a mostly-foreign-owned joint venture) learned that they would not be receiving year-end bonuses, the enterprise's 22-member SWRC helped to both lead the resulting strike and successfully negotiate for the workers to end the strike.¹⁴² These appear to be rare episodes. But they show that where and when workers themselves manage to marshal enough collective economic power to stand up to management, the SWRC may prove to be a viable mechanism of worker voice.

Are these the last gasps of a fading relic of the planned economy, or is there a real future for "democratic management" and SWRCs in China? That question might be unanswerable, but we can get closer to an answer by taking up a related set of questions: Why are some policymakers pressing to revive and expand the SWRCs? What do they hope to accomplish and what future do they envision? Those questions may not be directly answerable either; but some informed speculation may be illuminating.

¹⁴⁰ See Feng, *supra* note --, at 205-07.

¹⁴¹ Manfred Elfstrom & Sarosh Kuruvilla, *The Changing Nature of Labor Unrest in China* 28-29, 38 (2012), available at <http://ilera2012.wharton.upenn.edu/NonRefereedPapers/Kuruvilla,%20Sarosh%20and%20Elfstrom,%20Manfred.pdf>. For a more detailed report, see Stephen Phillion, *Workers' Democracy vs. Privatization in China*, 21 *SOCIALISM & DEMOCRACY* 37 (2007).

¹⁴² Elfstrom & Kuruvilla, *supra* note --.

V. What Does the Rising Profile of SWRCs Suggest about China’s “Socialist Market Economy”?

The revival of SWRCs will modestly constrain company managers’ power by forcing them to jump through the legally-prescribed hoops of SWRC consultation and approval on a variety of matters. But to what degree and to what end will managerial power be constrained? We cannot yet judge the matter of degree, for reasons explored above. But we can surmise about ends.

One end could be the further consolidation of Party power in the the economy. On this view, the establishment of SWRCs is an extension of the CPC and ACFTU organizing drives that preceded it, and serves to institutionalize Party power within the burgeoning private sector of the economy. Although the enterprises’ trade union and CPC chapters have historically been closely allied with management, they are formally accountable to the Party, and can in turn influence the SWRC’s composition and conduct. But the SWRCs would seem to be an oddly attenuated way to promote Party control within the enterprise. They are one step further removed from the Party than is the ACFTU and its enterprise chapters, and the SWRCs’ composition and conduct is less easily controlled by the Party. If the SWRCs are intended to consolidate Party power, they must do so indirectly by accomplishing other aims.

One such aim is “stability maintenance.” Recall Deng’s characterization of the SWRC system as “an effective method of correctly handling contradictions among the people.”¹⁴³ The SWRCs may be seen as useful vehicles for mediating labor disputes inside the enterprise and preventing them from spilling into the streets. There is no doubt that maintaining social stability and promoting “harmonious labor relations” is a central goal of the regime. That goal is hardly unique to China, of course. “Labor peace” – reducing the incidence and intensity of socially and economically disruptive industrial conflict – has been a major goal of all industrial nations, and a major motivating factor in reforming industrial relations regimes.¹⁴⁴ Reducing labor conflict is not only a political priority for China but also an economic priority if it is to develop an advanced industrial relations system and a more productive economy. All this is to say that, if SWRCs were indeed able to help avoid and resolve workers’ grievances and to reduce labor conflict, they would serve a number of China’s major policy priorities. Again, it would appear that the SWRCs can only do that if they actually enable workers to resolve grievances satisfactorily, sooner, and with less headaches.

The SWRCs could also be part of China’s regulatory modernization project. Western regulatory scholars have long contended that effective regulation of modern corporations cannot be a wholly top-down affair, and that it requires representation of stakeholders inside regulated entities.¹⁴⁵ The SWRCs might serve that end, as evinced by

¹⁴³ Kuei, *supra* note 2 .

¹⁴⁴ See Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383 (1990).

¹⁴⁵ See JOHN BRAITHWAITE, *REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER* (2008); CHRISTINE PARKER, *THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND*

their explicit powers and prerogatives with regard to the enforcement of labor standards within the enterprise.¹⁴⁶ It might seem unlikely that the revival of institutions with roots in China's pre-market past is part of a forward-thinking regulatory project. "New Governance" is not a prominent part of the Chinese lexicon; and its signature insistence on activating civil society organizations in support of bottom-up enforcement pressures is in sharp tension with China's general approach to social control and "stability maintenance."¹⁴⁷ But the SWRCs may be relatively "safe" vehicles for bottom-up enforcement, from the regime's standpoint: They are contained within particular enterprises, where they are subject to both management and Party oversight, and they pose little risk of spreading worker activism from one enterprise to another. Improving the enforcement of workers' legal rights and labor standards would also reinforce the effort to promote stability by addressing worker grievances that might generate unrest.

If the SWRCs can help to resolve workplace disputes and enforce workers' legal rights inside the enterprise, they would promote social and political stability both in the short term, by avoiding outbursts of protest, and in the longer term by preempting independent worker organizing. For if workers are better able to resolve their rights and interest disputes through official channels of representation, then they will be less likely to turn to unofficial and independent forms of labor activism. If SWRCs can do all those things, then it is no wonder that they are being revived. But of course they can do none of those things unless they are more than paper institutions – unless they actually empower workers to address their concerns at work. As we have seen, that will be challenging. But we can now see several overlapping and compelling reasons for China's leaders to press forward with the project of making the SWRCs work for workers.

On this account, the revival and spread of SWRCs might offer clues about some Chinese leaders' conception of the "socialist market economy." One element of the socialist market economy is clearly a large state-owned sector, with monopolies or protected positions in several strategic or highly lucrative industries.¹⁴⁸ That is among

DEMOCRACY (2002); CYNTHIA ESTLUND, *RECOVERING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* (2010).

¹⁴⁶ See Regulations on State-owned Industrial Enterprise Worker Representatives Congress (effective as of 1 October 1986), Art.7.

¹⁴⁷ See Jessica C. Teets, *Let Many Civil Societies Bloom: The Rise of Consultative Authoritarianism in China*, 213 CHINA Q. 19 (2013).

¹⁴⁸ Arthur R. Kroeber, *Xi Jinping's Ambitious Agenda for Reform in China*, BROOKINGS (Nov. 17, 2013), <http://www.brookings.edu/research/opinions/2013/11/17-xi-jinping-economic-agenda-kroeber> (arguing that the Decision makes clear that SOEs will still play a "leading role" in the economy, but that they will be subjected to much greater competition and regulation). See also Keith Bradsher, *China's Grip on Economy Will Test New Leaders*, N.Y. TIMES, Nov. 9, 2012, available at <http://www.nytimes.com/2012/11/10/world/asia/state-enterprises-pose-test-for-chinas-new-leaders.html?pagewanted=all> (reporting that "the broader network of state-owned enterprises in the service sector, like telecommunications, banking, health care and electricity distribution, is likely to remain 'virtually unchanged' for the next few years."); John Bussey, *Tackling the Many Dangers of China's State Capitalism*, WALL ST. J. ONLINE (Sept. 27, 2012), <http://online.wsj.com/article/SB10000872396390444549204578022710399534602.html> ("SOEs account for about 96% of China's telecom industry, 92% of power and 74% of autos).

the central features of the Chinese political economic model that some observers describe as "state capitalism."¹⁴⁹ But the revival of the SWRCs suggests that the "socialist market economy" means more than that, particularly with respect to the governance of the enterprises that populate China's mixed economy. It suggests that China's leaders mean not merely to expand the role of capitalist enterprises, nor to mimic them within the state sector, but also to reform those enterprises by giving workers a (modestly) greater voice in workplace governance. I will refer to this possible development as the "socialization" of the non-state sector.

In the early "reform and opening" period, the growth of nearly-unregulated, market-driven private and foreign-invested industry created a glaring divergence between those grim factories and the as-yet-unrestructured SOEs, whose relatively privileged workers were still protected by the "iron rice bowl." Conditions in the new factory areas grossly belied the regime's professions of socialist ideology, and earned China a reputation among labor advocates in the West as a center of gloves-off, capitalist exploitation of workers.¹⁵⁰ China had a centrally planned socialist economy and a bare-knuckled market economy, but no effective regulation.

Since the early 1990s, however, China's two economies have converged to a significant degree. One half of the convergence – the "corporatization" of the SOEs, the commodification of labor, and the smashing of the "iron rice bowl" – has been widely analyzed, most brilliantly by Professor Mary Gallagher.¹⁵¹ Clearly the SOEs and their restructured and privatized successors came to behave much more like private firms, particularly in their labor relations, than in the planned economy. The other half of the convergence – the shift in the non-state sector toward greater regulation and control – began in the 1990s.¹⁵² The Labor Law of 1994 was a watershed in its imposition of a

¹⁴⁹ For recent accounts of China's "state capitalism," see IAN BREMMER, *THE END OF THE FREE MARKET: WHO WINS THE WAR BETWEEN STATES AND CORPORATIONS?* (2010); JAMES MCGREGOR, *NO ANCIENT WISDOM, NO FOLLOWERS: THE CHALLENGES OF CHINESE AUTHORITARIAN CAPITALISM* (2012); USHA C. V. HALEY AND GEORGE T. HALEY, *SUBSIDIES TO CHINESE INDUSTRY: STATE CAPITALISM, BUSINESS STRATEGY AND TRADE POLICY* (Oxford University Press, 2013). On the complex nature of China's "state sector" see *infra* note --.

¹⁵⁰ See generally ANITA CHAN, *CHINA'S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY* (2001) (cataloguing the numerous abuses suffered by Chinese workers). Official rhetoric tries to square the circle by describing China as being in "the primary stage of socialism" now and for the foreseeable future. See, for example, China's constitution: Xianfa pmbl. (2004), available at http://english.gov.cn/2005-08/05/content_20813.htm. The phrase, which originated with Mao Zedong, see LI GUCHENG, *A GLOSSARY OF POLITICAL TERMS OF THE PEOPLE'S REPUBLIC OF CHINA* 399-400 (1995), is notoriously flexible, and has been put to various uses by a number of Chinese leaders in response to the changing Chinese economy. See Alan R. Kluver, *LEGITIMATING THE CHINESE ECONOMIC REFORMS: A RHETORIC OF MYTH AND ORTHODOXY* 72 (1996).

¹⁵¹ See MARY GALLAGHER, *CONTAGIOUS CAPITALISM: GLOBALIZATION AND THE POLITICS OF LABOR IN CHINA* -- (Princeton U. Press 2005). For a close look at the "corporatization" process in the state-owned factories, as well as the labour unrest that followed in its wake, see PRINGLE, *supra* note --, at 56-86; WILLIAM HURST, *THE CHINESE WORKER AFTER SOCIALISM* (2009).

¹⁵² As many have recognized, China's path from liberalization of markets to popular discontent and the rise of regulation and social protection exemplifies Karl Polanyi's "double-movement." KARL POLANYI,

single regulatory regime across the state and non-state sectors. The Labor Law's embrace of the "labor contract system" formalized and furthered the decline of worker security in the state sector; but it also adopted a regulatory framework for that system that began the process of improving standards in the non-state sector.¹⁵³ The development of labor standards, regulatory structures, and official channels for adjudication of employment disputes continued with the Labor Contract Law of 2008, which tracks modern European labor standards in many respects (apart from actual wage levels).¹⁵⁴ Enforcement still lags for many reasons, but the trend toward greater regulation is clear and steady.

So most elements of the unified labor law regime suggest a convergence toward modern regulatory capitalism.¹⁵⁵ But the revival of the SWRCs and their extension to the non-state sector might signal something new in the evolution of workplace governance in China – not a rejection of regulatory capitalism but a variant of it that might look more familiar to Europeans than to Americans. If the SWRCs are to be anything more than paper institutions, they might suggest that China intends not only to regulate enterprises through traditional administrative mechanisms, but to shift their internal modes of governance in a pro-worker direction. In short, after initially “corporatizing” the SOEs, or restructuring them to mimic the capitalist firms of the West, China (or some of its leaders) might now be seeking to “socialize” those capitalist firms to a modest degree – to restructure them to give workers a greater role in enterprise governance.

The “socialization” story would begin with establishment of CPC chapters within large private companies.¹⁵⁶ That facilitated the ACFTU's drive to “organize” trade union chapters, and in turn the recent press to establish SWRCs, in those companies. The net

THE GREAT TRANSFORMATION (1944). See, e.g., Wang Shaoguang, *Double Movement in China*, 43 *ECON. & POL. WKLY.* 51-59 (2009), available at <http://www.jstor.org/stable/40278334>.

¹⁵³ See Gallagher & Dong, *supra* note __, at 39.

¹⁵⁴ See generally COONEY, BIDDULPH & ZHU, *supra* note __; Ho & Huang, *supra* note ---.

¹⁵⁵ Other elements of China's emerging political economy suggest a convergence of a different kind. See Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 *GEORGETOWN L. J.* --- (forthcoming 2015) (describing a complex common “ecology” of state- and non-state-owned enterprises that includes multiple mechanisms of state control). The “socialization” story described here is broadly consistent with their account insofar as it foretells both convergence between China's state and non-state sectors and a continuing divergence between China and market-dominated forms of “regulatory capitalism.” But the “socialization” story told here emphasizes the potential empowerment of workers -- albeit mostly for politically instrumental reasons and through mechanisms of indirect state control.

¹⁵⁶ See RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS* 214 (2010). According to an official Chinese account: “Since the ‘Three Represents’ were written into the Party constitution at the 16th CPC Congress, a growing number of private business owners have requested the establishment of CPC chapters within their organizations and accepted the leadership of higher-ranking CPC chapters.” Ji Ming & Shen Haixiong, *Zhongguo Siying Qiye Chengli “Jibie” Zuigaode Dangwei* [*Chinese Private Enterprise Establishes Highest Ranking CPC Committee*], *XINHUA* (June 6, 2004, 10:46 PM), http://news.xinhuanet.com/fortune/2004-06/01/content_1502457.htm. This organizing process was prefaced by the official opening of the CPC in 2002 to include business owners and managers, and their recruitment into the Party. See MCGREGOR, *supra* note __, at 208. See also Cheng Li, *The Chinese Communist Party: Recruiting and Controlling the New Elites*, *J. CURRENT CHINESE AFF.*, 2009, at 20 (on the influx of private business owners into the Party members over the past 15 years).

result has been to reproduce in the larger enterprises of the market economy the forms (though far from the full substance) of Party authority and worker representation that had been established within the planned economy, including the SWRCs. As already discussed, that might promote several interconnected goals of the regime – short term and long term stability maintenance through more effective official channels for conflict resolution and rights enforcement within the enterprise. But the accomplishment of those ends depends on re-empowering workers vis-à-vis employers, at least to a modest degree, in an era of commodified labor. That is what I am calling the "socialization" story, and it overlaps more than it competes with the other explanations offered above for the SWRCs' revival. The socialization story resonates with some of the regime's own rhetoric, and with the continuing invocation of "democratic management" as an integral part of its pro-worker ideology, enshrined in the Constitution and recurring throughout its legislative enactments and policy documents, including in the recent "Decision" of the Third Plenum under Xi Jinping.¹⁵⁷

The "socialization" story would suggest that the SWRCs should be seen as analogous to European works councils, but with an important difference: The SWRCs have a different and *potentially* powerful support system – not an independent trade union, but the party-state. If workers are to exercise meaningful influence within the operations of powerful transnational corporations, or within any profit-driven enterprises in the modern global economy, they need powerful support from outside the enterprise. In the West, independent trade unions sometimes provide that support; and in Europe they sometimes provide that support through works councils as well as through collective bargaining.¹⁵⁸ But trade unions' power ultimately stems from workers' collective economic power, and the latter is waning. In a world where capital and managers are gaining ground against workers and their unions, something more – something like affirmative state backing – might be needed to give workers a real voice in governance. The Chinese model *potentially* supplies affirmative state backing to workers and SWRCs through the CPC and ACFTU chapters within the enterprise as well as the other forms of leverage that the party-state exercises from outside the enterprise.

"Potential" is the key, of course. The ACFTU has largely failed to perform this function because of its multiple conflicting missions, its lack of accountability to workers, and its coziness with managers, both inside the enterprise and at the local level. In the first few decades of "reform and opening" and the regime's pursuit of growth above all, the ACFTU's nature as a branch of the Party made it an ineffectual voice for workers. But there is no doubt that the party-state and its various organs have enormous leverage that could be, and lately has been, deployed in the interest of workers, at least

¹⁵⁷ See CPC Decision on Major Issues Concerning Comprehensively Deepening Reforms (adopted at the Third Plenary Session of the 18th CPC Central Committee, Nov. 12, 2013), art. 29, *available at* http://www.china.org.cn/china/third_plenary_session/2013-11/16/content_30620736.htm. The Decision specifically mentioned SWRCs as a method of strengthening democratic management. *Id.*

¹⁵⁸ German WCs are said to work well for workers when they operate in tandem with an independent trade union. See Müller-Jentsch, *supra* note ____, at 61.

when the workers noisily demand it. So *if* the party-state is determined to give workers more clout within private firms through the SWRCs, and *if* that determination filters down to the local level, then the SWRCs could actually help to democratize workplace governance. Those are big “ifs,” of course.

There are other “ifs” as well. For if the party-state in China were to overcome its discouraging history of local protectionism and cronyism, and to give real teeth to measures that empower workers and constrain management discretion, private employers would be likely to resist, and might even flee to friendlier shores. That is the threat that private firms loudly proclaim in response to every pro-worker reform in China (and elsewhere), from the LCL to recent collective bargaining measures.¹⁵⁹ And that threat might well lead the proponents of worker empowerment to trim their sails. There are obviously limits to the ability of any jurisdiction to impose costly conditions on private firms that can choose to operate elsewhere or not at all. But China – with its gigantic and growing population of both skilled workers and acquisitive consumers, and its impressive infrastructure – might have the latitude to impose conditions that other countries do not. Moreover, the “costs” of these particular conditions are hardly transparent. Employers might even discover that well-designed mechanisms of worker participation can stabilize workplace governance and improve firm performance.¹⁶⁰

VI. Conclusion

In the end, China’s tentative moves toward reviving the SWRCs probably reflect an overlapping consensus and a mix of motives and aims that are both ideological and pragmatic, and both public-regarding and self-serving. But part of the mix may be a genuine desire to empower workers through the SWRCs and their Party-state support mechanisms as China moves toward the next phase of “socialism with Chinese characteristics.” That aspiration is often proclaimed, and often contradicted by realities on the ground; but it has a following within the CPC. The recent “democratic management” measures might represent a victory by, or a concession to, those in the Party who seek to restore what they regard as a salutary side of Mao’s legacy – the egalitarian and pro-worker commitments that were shunted aside during the first decades of economic liberalization.¹⁶¹ Whether real or symbolic, the revival of the SWRCs might be part of an effort to enhance the regime’s popular legitimacy by honoring a pro-worker ideology that many citizens and some Party members share.

¹⁵⁹ For a striking illustration, see the vociferous criticism of China's proposed Labor Contract Law in 2007 by the American Chamber of Commerce in China: AmCham-China, "Comments on the Draft Labor Contract Law of the People's Republic of China," April 19, 2006 (available at http://lawprofessors.typepad.com/china_law_prof_blog/files/AmChamChinaLaborLawComments.pdf) (accessed 6/3/14).

¹⁶⁰ As German employers are said to have done, see Müller-Jentsch, *Reassessing*, *supra* note --, at 53, and as Xie argues that Chinese employers can do.

¹⁶¹ For insight into the range of contemporary currents of thought within China's elite, see CHINA 3.0 -- WHAT DOES THE NEW CHINA THINK AND WHAT DOES IT MEAN FOR EUROPE?, European Council on Foreign Relations (2012) (available at http://www.ecfr.eu/page/-/ECFR66_CHINA_30_final.pdf); and MARK LEONARD, WHAT DOES CHINA THINK? (2008).

Even if one is convinced, however, that China's official ideology is nothing but a thin veneer for a steadfast determination to maintain power, it still matters both how and why the regime seeks to maintain power. If China's leadership is seeking to perpetuate its hold on political power in part by better living up to its pro-worker ideology and by improving the lives and enhancing the voices of discontented workers, then both the employers and the workers of the world, and those who care about their fate, will have to take another look at China, and perhaps re-envision the future that China is shaping.