

# NON-DEMOCRATIC STATE LEARNING OF UNIVERSAL HUMAN RIGHTS: RECONFIGURING CHINESE PATTERNS

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## I. INTRODUCTION

Chinese modern history is replete with political twists and turns. There has been an abundance of ideological and institutional swings. The most recent transformation has featured a dramatic shift from impassioned communism and isolationism to market-friendly pragmatism and international engagement. The transition has involved inevitable spillovers into domains other than the economy and foreign policy. The regime has grown more benign and less arbitrary; the rule of man has become a thing of the past; individual freedoms have been selectively restored; a semi-autonomous civil society has emerged; and personal and collective uncertainty has diminished.<sup>1</sup>

Although economic liberalization has been far-reaching, progress toward democracy and effective legal mechanisms has been halting and uneven, particularly the former.<sup>2</sup> The term “unbalanced development” is typically invoked to portray a situation whereby the economy does not follow a uniform path across regions and sectors.<sup>3</sup> In this case, the imbalances can also be said to acutely manifest themselves across the politico-economic space, with one of these two interrelated and interdependent societal segments seriously lagging behind the other.

Qualitatively, democracy is a thoroughly understood institutional configuration.<sup>4</sup> Quantitatively, assessing its dimensions in specific circumstances is

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1. *See generally* RANDALL P. PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 450–57 (2002); KENNETH G. LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION TO REFORM 123–68, 201–05 (2d ed. 2004); TONY SAICH, GOVERNANCE AND POLITICS OF CHINA 67–107, 297–335 (3d ed. 2011).

2. *See generally* Miron Mushkat & Roda Mushkat, *Economic Growth, Democracy, the Rule of Law, and China’s Future*, 29 FORDHAM INT’L L.J. 229, 254–58 (2005); ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA (4th ed. 2011).

3. *See generally* ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT (1958).

4. *See, e.g.*, ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 1–16 (1971); ROBERT A. DAHL, DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE (4th ed. 1981); ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989); ROBERT A. DAHL, ON DEMOCRACY (1998); THE DEMOCRACY SOURCEBOOK (Robert A. Dahl, Ian Shapiro, & Jose A.

a more challenging task. Nevertheless, it is not regarded as an insurmountable difficulty. For instance, a research team at *The Economist* magazine, also known as its Intelligence Unit (EIU), has developed a tool for this purpose, referred to as the “democracy index.”<sup>5</sup> It classifies political systems into full democracies, flawed democracies, hybrid regimes, and authoritarian regimes.<sup>6</sup> According to this screening device, China remains firmly ensconced in authoritarian territory.<sup>7</sup>

It is also an undisputed world power—the only developing country to have achieved this status<sup>8</sup>—one potentially capable of dislodging the United States from its once comfortable position at the top of the international pecking order.<sup>9</sup> Chinese authoritarianism is no longer of the harsh variety, and its “softness” can be observed, both abroad and at home, albeit not in equal measure.<sup>10</sup> However, a combination of high scores on some hypothetical (economic and military) power

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Cheibub eds., 2003).

5. *Democracy Index 2012: Democracy at a Standstill*, THE ECONOMIST INTELLIGENCE UNIT (2013).

6. *Id.*

7. *Id.*

8. Ronald C. Keith, *China as a Rising World Power and its Response to 'Globalization,'* 3 REV. OF INT'L AFF. 507 (2004).

9. *See generally* DAVID KANG, CHINA RISING 3–17, 183–203 (2007); ARVIND SUBRAMANIAN, ECLIPSE: LIVING IN THE SHADOW OF CHINA'S ECONOMIC DOMINANCE 169–88 (2012); BRANTLY WOMACK, CHINA AMONG UNEQUALS: ASYMMETRIC FOREIGN RELATIONSHIPS IN ASIA 277–368 (2010); MARTIN JAQUES, WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER 316–413 (2d ed. 2009). *See also* THE RISE OF CHINA: AN INTERNATIONAL SECURITY READER (Michael E. Brown et al. eds., 2000); CHINA'S PLACE IN GLOBAL GEOPOLITICS: INTERNATIONAL AND GLOBAL CHALLENGES (Kjeld E. Brodsgaard & Bertel Heurlin eds., 2002); NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY (2002); ROBERT G. STUTTER, CHINA'S RISE IN ASIA: PROMISES AND PERILS (2005); CHINA'S “PEACEFUL RISE” IN THE 21ST CENTURY: DOMESTIC AND INTERNATIONAL CONDITIONS (Sujian Guo ed., 2006); RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST (2007); C. FRED BERGSTEN ET AL., CHINA'S RISE: CHALLENGES AND OPPORTUNITIES (2008); “HARMONIOUS WORLD” AND CHINA'S NEW FOREIGN POLICY (Sujian Guo & Jean-Marc F. Blanchard eds., 2008); JOSHUA KURLANTZICK, CHARM OFFENSIVE: HOW CHINA'S SOFT POWER IS TRANSFORMING THE WORLD (2008); DAVID M. LAMPTON, THE THREE FACES OF CHINESE POWER: MIGHT, MONEY, AND MINDS (2008); CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS (Robert S. Ross & Zhu Feng eds., 2008); DAVID SCOTT, THE CHINESE CENTURY? THE CHALLENGE TO GLOBAL ORDER (2008); AARON L. FRIEDBERG, A CONTEST FOR SUPREMACY: CHINA, AMERICA, AND THE STRUGGLE FOR MASTERY IN ASIA (2011); CHINA'S RISE IN HISTORICAL PERSPECTIVE (Brantly Womack ed., 2010); IVAN TSELICHTCHEV, CHINA VERSUS THE WEST: THE GLOBAL POWER SHIFT OF THE 21<sup>ST</sup> CENTURY (2012).

10. *See generally* CHINA'S NEW DIPLOMACY: TACTICAL OR FUNDAMENTAL CHANGE? 33–106, 151–208 (Pauline Kerr et al. eds., 2009); JENNY CLEGG, CHINA'S GLOBAL STRATEGY: TOWARD A MULTIPOLAR WORLD 166–220 (2009). *See also* PEERENBOOM, *supra* note 9; KURLANTZICK, *supra* note 9; Mushkat & Mushkat, *supra* note 2, at 255 (noting China's efforts in reform and decentralization); CHINA AND THE NEW INTERNATIONAL ORDER (Wang Gungwu & Zheng Yongnian eds., 2008); CHINA TURNS TO MULTILATERALISM: FOREIGN POLICY AND NATIONAL SECURITY (Guoguang Wu & Helen Lansdowne eds., 2008); CHIEN-PENG CHUNG, CHINA'S MULTILATERAL COOPERATION IN ASIA AND THE PACIFIC: INSTITUTIONALIZING BEIJING'S GOOD NEIGHBOR POLICY (2010).

scale and low ones on an index of democratic attainment is unavoidably fraught with risks. An authoritarian player that enjoys prominence in the global arena, an actual or would-be superpower, could reshape the international landscape in a way that might legitimately be considered problematic.<sup>11</sup>

As matters stand, this pattern is unlikely to change materially in the foreseeable future. The “third wave of democracy” that began with the 1974 collapse of the Portuguese *Estado Novo* (New State) dictatorship following the Carnation Revolution continues unabated, although the disintegration of an authoritarian regime does not always result in democratic consolidation.<sup>12</sup> For China to join the trend, it is believed that one of three conditions or some mixture thereof needs to occur: a full-blown crisis, probably economic in nature; large-scale mobilization of a significant segment of society; or defection by a sizeable faction within the ruling elite.<sup>13</sup> Presently, these are not considered to be high-probability scenarios.<sup>14</sup>

Democracy and the rule of law are thought to be inextricably linked, both in theory and in practice.<sup>15</sup> The relationship is an empirical fact, but it may not be as tight as often assumed.<sup>16</sup> An obvious concrete example is Singapore, a hybrid regime in terms of the EIU criteria, but one blessed with a robust legal system.<sup>17</sup> While it may appear to defy common sense, this is not a historical aberration. If another specific illustration is required to dispel understandable doubts, then the experience of a similar political entity in the Asian region, albeit not a state, the executive-led yet rule-driven Hong Kong global metropolis may be relied upon for analytical reinforcement.<sup>18</sup>

Indeed, the Chinese long-term institutional blueprint envisions an elaborate and sturdy legal system, but coupled with extensive consultative political mechanisms rather than full-fledged democracy.<sup>19</sup> It is expected to feature a neutral civil service, an autonomous judiciary, multiple channels to engage in political consultation (to enhance responsiveness to grassroots demands and needs), an

11. PEERENBOOM, *supra* note 9, at 282–88.

12. See generally BRUCE GILLEY, CHINA’S DEMOCRATIC FUTURE: HOW WILL IT HAPPEN AND WHERE WILL IT LEAD 110, 114, 135 (2004).

13. *Id.*

14. See generally *id.*; Mushkat & Mushkat, *supra* note 2, at 233–34, 245–46, 252–53.

15. See generally Daren Acemoglu & James A. Robinson, *Paths of Economic and Political Development*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 673, 674–82 (Barry R. Weinsgast & Donald A. Wittman eds., 2006).

16. See Mushkat & Mushkat, *supra* note 2, at 231 (explaining that other factors such as economics could drive democracy). See generally PEERENBOOM, *supra* note 1, at 513–57.

17. See generally THE SINGAPORE LEGAL SYSTEM (Kevin Y.L. Tan ed., 2d ed. 1999); BILVEER SINGH, POLITICS AND GOVERNANCE IN SINGAPORE: AN INTRODUCTION (2d ed. 2011).

18. See generally PETER WESLEY-SMITH, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM (3d ed. 1998); MA NGOK, POLITICAL DEVELOPMENT IN HONG KONG: STATE, POLITICAL SOCIETY, AND CIVIL SOCIETY (2007).

19. See generally Wei Pan, *Toward a Consultative Rule of Law Regime in China*, 12 J. CONTEMPORARY CHINA 3, 3–4 (2003).

independent anti-corruption body, an effective audit unit, and key civil and political liberties (freedoms of assembly, association, press, and speech being the most salient).<sup>20</sup> This institutional configuration may be portrayed as a “consultative (as distinct from democratic) rule of law system.”<sup>21</sup>

It should be further noted that such a seemingly distinct organizational edifice is not without precedent in China’s intricate and lengthy imperial era. Specifically, the country had a legalist tradition—the Law School of Thought, which was promoted by Guan Zhong, a seventh century B.C. prime minister of the State of Qi—exhibiting broadly similar characteristics.<sup>22</sup> It had a measurable impact on legal trends in China until the Liu Che period in the Han dynasty, which witnessed the emergence of a more enduring school of thought, Confucianism, around 130 B.C., more than 2000 years ago.<sup>23</sup> A version of the rule of law existed during that five-century-long period and it was supported by consultative procedures designed to obtain meaningful feedback from the people and their representatives.<sup>24</sup>

The gap between current practices and this historically underpinned lofty, although imperfect from a liberal democratic perspective, vision is the subject of ongoing debate among legal scholars.<sup>25</sup> With that said, the argument is about whether the proverbial glass is half empty or half full, not about whether it is filled to the brim.<sup>26</sup> While the divergence of opinion should not be minimized, the views expressed can be said to fall within a range whose central point consists of an institutional pattern that corresponds neither to the rule of man nor to the rule of law, but a rule by law.

Whereas the core of rule of law is the ability of law and legal system to impose meaningful restraints on the state and individual members of the ruling elite, rule by law refers to an instrumental conception of law in which law is merely a tool to be used as the state sees fit.<sup>27</sup>

The protection of human rights is an element in this delicate equation. Again, that is moderately contested territory. There is some disagreement about the effect (i.e., negative versus positive, and to what degree) of cultural heritage, notably the Confucian tradition,<sup>28</sup> on present policies and about the headway made on the

20. *Id.* at 34–38.

21. *Id.* at 33.

22. *Id.*

23. *Id.* at 33–34.

24. Pan, *supra* note 19, at 34.

25. Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43, 50–73 (2001). *See also* PEERENBOOM, *supra* note 1; Mushkat & Mushkat, *supra* note 2; Larry Cata Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 29, 37–38 (2006) (analyzing the rule of law in China).

26. *See generally* Orts, *supra* note 25; Mushkat & Mushkat, *supra* note 2; Cata Backer, *supra* note 25.

27. Mushkat & Mushkat, *supra* note 2, at 7.

28. *See* PEERENBOOM, *supra* note 1, at 513–57; Andrew J. Nathan, *Sources of Chinese Rights Thinking*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 125–64 (R. Randle Edwards et al. eds., 1986). *See also* HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES (Michael Davis ed., 1995); WM. THEODORE DE BARY, ASIAN VALUES

human rights front, as well as the appropriate yardsticks for assessing it.<sup>29</sup> However, regarding the latter area of mild dispute, it would not be inaccurate to suggest that Chinese human rights practices are generally deemed to be substandard, even when comparison is drawn with the prevailing picture in other parts of the domestic legal space.<sup>30</sup>

This is amply reflected in repeatedly expressed concerns, both abroad and at home, about the imprisonment, arbitrary detention, and house arrest of people who hold certain political beliefs and who have not incited or engaged in violence. Concerns also exist regarding such persons' involuntary exiles; unlawful and politically-motivated killings; torture, religious repression; censorship; deficient criminal procedure; forced resettlement; suppression of dissent, and violation of labor rights in implementation of large-scale projects—notably the construction of the controversial Three Gorges dam. Additional concerns involve coercive family planning; frequent recourse to capital punishment without adequate safeguards; harvesting of organs from condemned prisoners without conformity to principles of due process; kidnapping, trafficking, and abuse of females; cultural genocide—particularly in Tibet; and export of prison labor products.<sup>31</sup>

Current conditions may leave much to be desired from an ethical perspective grounded in liberal-democratic values, but they constitute a palpable improvement over those witnessed in the past. This may be attributable to a variety of factors, including impulses originating outside the domestic political arena. In the sizeable literature on the subject, considerable importance is attached to two external

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AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); ROBERT WEATHERLEY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES* (1999); Marina Svensson, *The Chinese Debate on Asian Values and Human Rights*, in *HUMAN RIGHTS AND ASIAN VALUES: CONTESTING NATIONAL IDENTITIES AND CULTURAL REPRESENTATIONS IN ASIA* 199 (Michael Jacobsen & Ole Bruun eds., 2000); STEPHEN C. ANGLE, *HUMAN RIGHTS AND CHINESE THOUGHT: A CROSS-CULTURAL INQUIRY* (2002); MARINA SVENSSON, *DEBATING HUMAN RIGHTS IN CHINA: A CONCEPTUAL AND POLITICAL HISTORY* (2002); *REALMS OF FREEDOM IN MODERN CHINA* (William C. Kirby ed., 2004); XIA YONG, *PHILOSOPHY OF CIVIL RIGHTS IN THE CONTEXT OF CHINA* (2011).

29. See Randall P. Peerenboom, *Economic and Social Rights: The Role of Courts in China*, 12 *SAN DIEGO INT'L L.J.* 303, 306–08 (2011). See generally KENNETH CHRISTIE & DENY ROY, *THE POLITICS OF HUMAN RIGHTS IN EAST ASIA* 219–23 (2001); Randall P. Peerenboom, *Human Rights in China*, in *HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE, AND THE USA* 413–51 (Randall Peerenboom et al. eds., 2006). See also Nathan, *supra* note 28; PEERENBOOM, *supra* note 1; *HUMAN RIGHTS IN CHINA* (Lee R. Massingdale ed., 2009); XIAOBING LI, *CIVIL LIBERTIES IN CHINA* (2010).

30. See Peerenboom, *Economic and Social Rights*, *supra* note 29, at 303–04 (noting that Chinese courts typically play an ineffectual role in implementing economic and social rights). See generally CHRISTIE & ROY, *supra* note 29, at 219–33; Massingdale, *supra* note 29, 1–44. See also Nathan, *supra* note 28; PEERENBOOM, *supra* note 1; LI, *supra* note 29.

31. See Thomas Lum & Hannah Fisher, *Human Rights in China: Trends and Policy Implications*, in *HUMAN RIGHTS IN CHINA* 1, 4–5 (Lee R. Massingdale ed., 2009); Andrew J. Nathan, *China and the International Human Rights Regime*, in *CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS* 136, 141–45 (Elizabeth Economy & Michel Oksenberg eds., 1999).

catalysts for change: pressures exerted by other countries individually or collectively—one is inclined to add, systematically or haphazardly—euphemistically referred to as “human rights diplomacy,” and China’s active and growing participation in the international human rights regime.<sup>32</sup>

The potential impact of the less coercive of these two influences has duly been acknowledged in academic work focused on state adaptation to governance regimes that are global in scope.<sup>33</sup> The coercive variant, which bears the hallmarks

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32. See MICHAEL A. SANTORO, CHINA 2020: HOW WESTERN BUSINESSES CAN—AND SHOULD—INFLUENCE SOCIAL AND POLITICAL CHANGE IN THE COMING DECADE 13–25 (2009) (describing China’s efforts to respond to the sweatshop issue); Ann Kent, *Chinese Values and Human Rights*, in HUMAN RIGHTS IN ASIA: A REASSESSMENT OF THE ASIAN VALUES DEBATE 83 (Leena Avonius & Damien Kingsbury eds., 2008) (describing the history of human rights in China); ANN KENT, BEYOND COMPLIANCE: CHINA, INTERNATIONAL ORGANIZATIONS, AND GLOBAL SECURITY 2 (2007) (noting that China, formerly castigated as a rogue, has now changed its international behavior due to impact of international institutions); MICHAEL A. SANTORO, PROFITS AND PRINCIPLES: GLOBAL CAPITALISM AND HUMAN RIGHTS IN CHINA 1–12 (2000) (noting that perceptions and attitudes of human rights in Asia are evolving); ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE 194–205 (1999) (noting that China’s increasing implementation of human rights and how China has complied with international treaties to improve human rights); Zhou Wei, *The Study of Human Rights in the People’s Republic of China*, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 89–90 (James T. H. Tang ed., 1995) (discussing the relationship between collective and individual rights in China and individual rights); Andrew J. Nathan, *Human Rights in Chinese Foreign Policy*, 139 CHINA Q. 622 (1994) (describing China’s use of human rights to justify foreign policies); ANN KENT, BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS 213–30 (1993) (discussing how China responded to the various international pressures). See generally Yuchao Zhu, *China and International “Human Rights Diplomacy”*, 9 CHINA: AN INT’L J. 217 (2011); Chen Ding, *China’s Participation in the International Human Rights Regime: A State Identity Perspective*, 2 CHINESE J. INT’L POL. 399 (2009); Ming Wan, *Human Rights Lawmaking in China: Domestic Politics, International Law, and International Politics*, 29 HUM. RTS. Q. 727 (2007); Pitman B. Potter, *Selective Adaptation and Institutional Capacity*, 61 INT’L J. 390 (2006); Lesley Jacobs & Pitman B. Potter, *Selective Adaptation and Human Rights to Health in China*, 9 HEALTH & HUM. RTS. 112 (2006); Ann Kent, *China’s Growth Treadmill: Globalization, Human Rights, and International Relations*, 3 REV. INT’L AFF. 524 (2004); STIJN DEKLERCK, *Human Rights in China: Tradition, Politics, and Change*, 54 STUDIA DIPLOMATICA 53, 71–78 (2003); Ann Kent, *States Monitoring States: The United States, Australia, and China’s Human Rights, 1990–2001*, 23 HUM. RTS. Q. 583 (2001); Steve Chan, *Human Rights in China and the United States: Competing Visions and Discrepant Performances*, 24 HUM. RTS. Q. 1035 (2002); Jeffrey N. Wasserstrom, *Beyond Ping-Pong Diplomacy: China and Human Rights*, 17 WORLD POL’Y J. 61 (2000); Donald C. Clarke & James V. Finerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 CHINA Q. 135 (1995); James V. Finerman, *Chinese Participation in the International Legal Order: Rogue Elephant or Team Player?*, 141 CHINA Q. 186 (1995).

33. See generally Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold H. Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599 (1997); Harold H. Koh, *How Is International Human Rights Law Enforced*, 74 IND. J. L. 1397 (1999); Mary E. O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334 (1999); THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al. eds., 1999); TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES (Michael Likosky ed., 2002); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); RICHARD P. CLAUDE & BURNS H. WESTON, HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION (3d ed. 2006); Richard H. Steinberg & Jonathan M. Zasloff, *Power and*

of realist formulations, has deeper historical roots.<sup>34</sup> The initial impetus was provided by researchers in the field of international relations who embraced constructivism as an effective conceptual tool,<sup>35</sup> but international law scholars also have fruitfully pursued this line of inquiry by identifying evolving patterns of increasingly cooperative state behavior on a sufficient scale to warrant laying a foundation for a new school of thought—transnational legal process theory (TLPT).<sup>36</sup>

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*International Law*, 100 AM. J. INT'L L. 64 (2006); GERRY NAGTAAZM, *THE MAKING OF INTERNATIONAL ENVIRONMENTAL TREATIES: NEOLIBERAL AND CONSTRUCTIVIST ANALYSES OF NORMATIVE EVOLUTION* (2009); AFSHIN AKHTARKHAVARI, *GLOBAL GOVERNANCE OF THE ENVIRONMENT: ENVIRONMENTAL PRINCIPLES AND CHANGE IN INTERNATIONAL LAW AND POLITICS* (2010).

34. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 28–29 (2005) (providing examples of coercion).

35. See MAJA ZEHEFUSS, *CONSTRUCTIVISM AND INTERNATIONAL RELATIONS: THE POLITICS OF REALITY* 6 (2002) (noting the significance of constructivism); SAMUEL BARKIN, *REALIST CONSTRUCTIVISM: RETHINKING INTERNATIONAL RELATIONS THEORY* 3 (2010) (explaining and defining the concept of constructivism); NICHOLAS G. ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS* 37–43 (1989) (describing the origins of constructivism). See generally Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L. ORG. 391 (1992); Jeffrey Checkel, *The Constructivist Turn in International Relations Theory*, 50 WORLD POL. 324 (1998); Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23 INT'L SEC. 171 (1998); John G. Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L. ORG. 855 (1998); ALEXANDER WENDT, *SOCIAL THEORY AND INTERNATIONAL POLITICS* (1999); J. Samuel Barkin, *Realist Constructivism*, 5 INT'L STUD. REV. 325 (2003); DENISE GARCIA, *SMALL ARMS AND SECURITY: NEW EMERGING INTERNATIONAL NORMS* (2006); ODED LOWENHEIM, *PREDATORS AND PARASITES: PERSISTENT AGENTS OF TRANSNATIONAL HARM AND GREAT POWER AUTHORITY* (2007); RICHARD N. LEBOW, *A CULTURAL THEORY OF INTERNATIONAL RELATIONS* (2008); PETRICE R. FLOWERS, *REFUGEES, WOMEN, AND WEAPONS: INTERNATIONAL NORM ADOPTION AND COMPLIANCE IN JAPAN* (2009); WAYNE SANDHOLTZ & KENDALL STILES, *INTERNATIONAL NORMS AND CYCLES OF CHANGE* (2009); *PSYCHOLOGY AND CONSTRUCTIVISM IN INTERNATIONAL RELATIONS: AN IDEATIONAL ALLIANCE* (Vaughn P. Shannon & Paul A. Kowert eds., 2011). See also FRIEDRICH V. KRATOCHWIL, *RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* (1989); Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asia Controversy*, 92 AM. J. INT'L. L. 414 (1998); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L. L. 367 (1998); ANTHONY C. AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* (1999); Jutta Brunnee & Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); Phillip A. Karber, *"Constructivism" as a Method in International Law*, 94 AM. SOC. INT'L. L. PROC. 189 (2000); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Martin V. Totaro, *Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development*, 48 VA. J. INT'L. L. 719 (2008); ADRIANA SINCLAIR, *INTERNATIONAL RELATIONS THEORY AND INTERNATIONAL LAW: A CRITICAL APPROACH* (2010).

36. See generally Kingsbury, *supra* note 35; AREND, *supra* note 35; Brunnee & Toope, *supra* note 35; Karber, *supra* note 35; Totaro, *supra* note 35; SINCLAIR, *supra* note 35; Koh,

This has been a productive intellectual journey but with relatively few detailed empirical pauses along the way. Interestingly, some of the most elaborate fact-based investigations have been undertaken in the Chinese human rights context.<sup>37</sup> Their importance is twofold. First, they constitute a vital part of the ongoing idea refinement and testing exercise. Second, to the extent that China's human rights practices do not fully conform to the letter and spirit of the international ("universal") human rights regime,<sup>38</sup> they may furnish concrete insights as to how to narrow the gap. Since the knowledge accumulated in that domain is substantial but incomplete, the aim of this Article is to explore ways to augment it. The task is addressed in a stepwise fashion, beginning with an examination of the analytical foundation upon which the research conducted rests.

## II. CONCEPTUAL BACKDROP

A governance regime, whether domestic or international, is broadly assumed to have four key components—principles, norms, rules, and decision-making and operating procedures—which are relied upon to regulate and coordinate action in a specific policy realm.<sup>39</sup> By definition, actor (individual, group, or state) adaptation

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*Transnational Legal Process*, *supra* note 33; Koh, *Why Do Nations Obey International Law*, *supra* note 33; Koh, *How Is International Human Rights Law Enforced*, *supra* note 33; O'Connell, *supra* note 33; Risse, *supra* note 33; Likosky, *supra* note 33; SLAUGHTER, *supra* note 33; CLAUDE & WESTON, *supra* note 33; Steinberg & Zasloff, *supra* note 33; NAGTAAZM, *supra* note 33; AKHTARKHAVARI, *supra* note 33. *See generally* KENT, THE LIMITS OF COMPLIANCE, *supra* note 32; GERALD CHAN, CHINA'S COMPLIANCE IN GLOBAL AFFAIRS: TRADE, ARMS CONTROL, ENVIRONMENTAL PROTECTION, HUMAN RIGHTS (2006); Jacobs & Potter, *supra* note 32; Potter, *supra* note 32; KENT, BEYOND COMPLIANCE, *supra* note 32; Chen Ding, *supra* note 32.

37. *See generally* KENT, THE LIMITS OF COMPLIANCE, *supra* note 32; CHAN, CHINA'S COMPLIANCE IN GLOBAL AFFAIRS, *supra* note 36; Jacobs & Potter, *supra* note 32; Potter, *supra* note 32; KENT, BEYOND COMPLIANCE, *supra* note 32; Chen Ding, *supra* note 32.

38. *See, e.g.*, John G. Ruggie, *Human Rights and the Future International Community*, 112 HUM. RTS. 93 (1983); N.G. Onuf & V. Spike Peterson, *Human Rights from an International Regimes Perspective*, 37 INT'L. AFF. 329 (1984); David P. Forsythe, *The United Nations and Human Rights, 1945–1985*, 100 POL. SCI. Q. 249 (1985); Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L. ORG. 599 (1986); Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT'L. REL. 157 (1995); Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510 (1997); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L. ORG. 217 (2000); Philip Alston, *Reconceiving the UN Human Rights Regime: Challenges Confronting the New Human Rights Council*, 7 MELBOURNE J. INT'L. L. 185 (2006); HUMAN RIGHTS REGIMES IN THE AMERICAS (Monica Serrano & Vasselin Popvski eds., 2010).

39. GABRIELLA KUTTING, ENVIRONMENT, SOCIETY, AND INTERNATIONAL RELATIONS: TOWARD MORE EFFECTIVE INTERNATIONAL ENVIRONMENTAL AGREEMENTS 17 (2000) (noting that "regimes" is defined as "sets of implicit and explicit principles, norms rules and decision-making procedures around which actors' expectations converge in a given area of international relations."); THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS 1 (Oran R. Young ed., 1999) ("All international environmental regimes are social institutions consisting of agreed upon principles, norms, rules, procedures, and programs that govern the integrations of actors in specific issue areas"). *See also* ORAN R. YOUNG, INSTITUTIONAL DYNAMICS: EMERGENT PATTERNS IN INTERNATIONAL



to such an institutional entity entails unqualified or partial acceptance and implementation of its content (i.e., principles, norms, rules, and decision-making and operating procedures). Refraining from commitment and outright rejection are clearly alternative options, and meaningful engagement implies that adaptation need not be passive in nature. It may involve efforts, successful or otherwise, to reshape the content.

Traditionally, heavy emphasis has been placed in academic writings on identifying varieties of content and their sources. A distinction is thus commonly drawn between legal and non-legal (e.g., moral rules, rules of etiquette, rules of the game, and descriptive rules) forms of content.<sup>40</sup> International governance regimes obviously have a salient legal dimension, albeit one that does not fully correspond to that of their domestic counterparts (given the absence of an overarching lawmaking body and limited enforcement).<sup>41</sup> Content-centered portrayals typically highlight this feature. For instance: “I believe that international law is most appropriately and accurately defined as *a set of legal rules that seek to regulate the behavior of international actors.*”<sup>42</sup>

There is a multiplicity of international governance regimes, whose content inevitably differs. In the Chinese context, in addition to participation in the human rights variant, close attention has been accorded to involvement in the arms control, environmental, and trade regimes, with their distinct characteristics.<sup>43</sup> Where that is the case, the unique content of each such entity needs to be duly outlined. The international human rights regime has consequently been set apart from parallel systems in terms of its strong normative orientation (reflected in frequent invocation of adjectives such as “fundamental,” “inalienable,” and “indefeasible”)<sup>44</sup> and the fact that, “[u]nlike international institutions governing trade, monetary, environmental, or security policy, [it is] not designed primarily to regulate policy externalities arising from social interactions across borders, but to hold governments accountable for purely internal activities.”<sup>45</sup>

In addressing the sources of international governance regimes, there has

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ENVIRONMENTAL GOVERNANCE 1 (2010) (noting that environmental and resource regimes consists of rights, rules, and decision-making procedures);

MARCUS FRANDA, GOVERNING THE INTERNET: THE EMERGENCE OF AN INTERNATIONAL REGIME (2001) (noting the stages of international regimes include agenda setting, negotiation, and operationalization); JORGEN WETTESTAD, DESIGNING EFFECTIVE ENVIRONMENTAL REGIMES: THE KEY CONDITIONS 7 (1999) (describing rules and procedures as the main components of the regime); ORAN R. YOUNG, GOVERNANCE IN WORLD AFFAIRS 24–49 (1999) (discussing the different types of regimes types); ORAN R. YOUNG, CREATING REGIMES: ARCTIC ACCORDS AND INTERNATIONAL GOVERNANCE (1998) (describing the decision making process by the Arctic Environmental Protection Strategy (AEPS)).

40. See AREND, *supra* note 35, at 16–25.

41. *Id.* at 28–35.

42. *Id.* at 26 (emphasis added).

43. See generally CHAN, CHINA’S COMPLIANCE IN GLOBAL AFFAIRS, *supra* note 36; KENT, BEYOND COMPLIANCE, *supra* note 32.

44. Onuf & Peterson, *supra* note 38, at 333.

45. Moravcsik, *supra* note 38, at 217.

recently been a slight shift in the traditional academic literature, which has begun paying greater heed to the role of non-state actors—notably international organizations and “peoples”—in the law-making or regime creation process.<sup>46</sup> However, the focus principally remains on well-established mechanisms such as international conventions, customary international law, general principles of international law, scholarly writings, judicial decisions, binding resolutions of international organizations—particularly those of the U.N. General Assembly, and unilateral state declarations—ones that do not involve the consent of more than one party.<sup>47</sup>

The issue of individual state adaptation to the content of an international governance regime is scarcely explored in traditional-style legal work, although it has long been a recurring theme in related political science research.<sup>48</sup> Interest in the subject has intensified as behavioral-type theoretical propositions have entered into international law discourse. Some have highlighted the pervasive influence of the rational pursuit by states of goals designed to maximize their advantage, at home and abroad.<sup>49</sup> These goals need not be confined to power, economic, and military interests, and may include reputation, a less tangible asset.<sup>50</sup>

Other, broadly similar writings—sharing the rationalist vision—underline the benefits that states derive from cooperation or participation in international governance regimes, without necessarily abandoning the assumption of consistent and deliberate “utility maximization,” which may be inspired, *inter alia*, by “egoistic self-interest.”<sup>51</sup> A refinement of this approach entails a decomposition of the state into groups (i.e., jettisoning the “unitary actor hypothesis”) and posits that adaptation to the content of an international governance regime is a product of the interplay between a number of domestic utility-maximizing entities, rather than merely the machinations of one dominant party (i.e., the ubiquitous government).<sup>52</sup>

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46. See AREND, *supra* note 35, at 43–45 (discussing the involvement of non-state actors such as intergovernmental organizations and people in law making).

47. See *id.* at 45–58 (discussing the traditional sources of law).

48. See generally INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS (Basak Cali ed., 2010); DAVID ARMSTRONG, THEO FARRELL & HELENE LAMBERT, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (2007); INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (Robert J. Beck, Anthony C. Arend & Robert D. Vander Lugt eds., 1996).

49. See GOLDSMITH & POSNER, *supra* note 34, at 7 (stating that the author’s theory of international law assumes that states act rationally to maximize their interest).

50. See ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 34 (2008) (discussing how a state that complies with international law will develop a good reputation and be viewed as a good partner).

51. See INTERNATIONAL REGIMES 11 (Stephen D. Krasner, ed., 1983) (stating that the prevailing explanation for the existence of international regimes is egoistic self-interest, which is the desire to maximize one’s own utility function).

52. See Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, *supra* note 38, at 225 (stating that most theories predict that governments, interest groups, and public opinion spearhead efforts to form and enforce international human rights regimes); Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT’L ORG. 363, 365 (2005) (stating that regarding compliance with environmental agreements, industries and environmental groups often take opposing stands); XINYUAN DAI,

Not all behaviorally-oriented legal scholars embrace the rationalist blueprint. Those who do not, or who follow a normative path, tend to argue that state adaptation to an international legal regime depends on its perceived fairness and legitimacy.<sup>53</sup> The former is the belief that the more a system displays this quality, the greater the willingness to accept and implement its content.<sup>54</sup> A parallel stance is that states basically value the prevailing world order, including the normative underpinnings of the global institutional architecture, and that manifestations of poor adaptation are the result of various managerial failures (e.g., ambiguity of regime content, inadequate state capacity, and socio-economic constraints, shocks, and transformations).<sup>55</sup>

All of these illuminating analytical perspectives have considerable explanatory power, particularly when viewed in tandem, but lack a genuine cognitive and evolutionary dimension. With one exception—the rational model that explicitly accommodates domestic political diversity—they also conveniently, yet problematically, postulate that the state is a cohesive and purposeful entity. While international law offers few insights in this respect, ample evidence is available elsewhere, notably in relation to China, to suggest that cognitive factors play a tangible role in determining state adaptation to the content of an international governance regime,<sup>56</sup> and that it is unproductive to overlook the

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INTERNATIONAL INSTITUTIONS AND NATIONAL POLICIES 98 (2007) (discussing how policy makers, in choosing compliance policies, takes into account whether choosing such policy will enable him to be re-elected by various interests groups); JOEL P. TRACHTMAN, THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW 252 (2008) (discussing interest group domination); Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127, 152 (2010) (stating that domestic determinants of foreign policy includes parties, social classes, interest groups, legislators, public opinion and elections, not simply executive officials and institutional arrangements).

53. See generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); THOMAS M. FRANK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1998).

54. See generally FRANCK, *supra* note 53.

55. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 197–200 (1995) (discussing instrument of management, including capacity building and technical assistance).

56. See ALLEN S. WHITING, CHINA EYES JAPAN (1989); CHIH-YU SHIH, THE SPIRIT OF CHINESE FOREIGN POLICY: A PSYCHOCULTURAL VIEW 59–61 (1990) (discussing the role thinking patterns associated with social norms and historical experience in China has on China's diplomacy); DAVID SHAMBAUGH, BEAUTIFUL IMPERIALIST: CHINA PERCEIVES AMERICA 1972–1990 20 (1991) (discussing the cognitive consistency and cognitive dissonance on China's foreign policy decision making); Richard W. Wilson, *Change and Continuity in Chinese Cultural Identity: The Filial Ideal and the Transformation of an Ethic*, in CHINA'S QUEST FOR NATIONAL IDENTITY 104, 105 (Lowell Dittmer & Samuel S. Kim eds., 1993) (discussing the role cognitive development has in determining cultural meanings); Samuel S. Kim, *Sovereignty in the Chinese Image of World Order*, in ESSAYS IN HONOR OF WANG TIEYA 425, 425–46 (Ronald S.J. Macdonald ed., 1994); ALASTAIR I. JOHNSTON, CULTURAL REALISM: STRATEGIC CULTURE AND GRAND STRATEGY IN CHINESE HISTORY (1995); ZHANG YONGJIN, CHINA IN INTERNATIONAL SOCIETY SINCE 1949: ALIENATION AND BEYOND (1998); GERALD CHAN, CHINESE PERSPECTIVES ON INTERNATIONAL RELATIONS (1999); George T. Crane, *Imagining the Economic Nation: Globalization in China* 4 NEW POLITICAL ECONOMY 215, 215–31 (1999);

impact of domestic forces in this context.<sup>57</sup> By the same token, adherents to the

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Jianwei Wang, *Managing Conflict: Chinese Perspectives on Multilateral Diplomacy and Collective Security*, in *IN THE EYES OF THE DRAGON: CHINA VIEWS THE WORLD* 73, 79 (Yong Deng & Fei-ling Wang eds., 1999) (stating that China is often struggling with the cognitive dissonance between its strong views on national sovereignty and the perceived necessity of collective secrecy in international conflict resolution); Gilbert Rozman, *China's Quest for Great Power Identity*, 43 *ORBIS* 383, 383–403 (1999); YONGNIAN ZHENG, *DISCOVERING CHINESE NATIONALISM IN CHINA: MODERNIZATION, IDENTITY, AND INTERNATIONAL RELATIONS* (1999); BAOGANG HE & YINGJIE GUO, *NATIONALISM, NATIONAL IDENTITY, AND DEMOCRATIZATION IN CHINA* (2000), *CHINA'S INTERNATIONAL RELATIONS IN THE 21<sup>ST</sup> CENTURY* (Weixing Hu, Gerald Chan & Daojing Zha eds., 2000); Tiejun Zhang, *Self-Identity Construction in Present China*, 23 *COMPARATIVE STRATEGY* 281, 281–301 (2004); SUISHENG ZHAO, *A NATION STATE BY CONSTRUCTION: DYNAMICS OF MODERN CHINESE NATIONALISM* (2004); Chen Zhimin, *Nationalism, Internationalism, and Chinese Foreign Policy* 14 *J. OF CONTEMP. CHINA* 35, 35–53 (2005); Nick Night, *Reflecting the Paradox of Globalization: China's Search for Cultural Identity and Coherence*, 4 *CHINA: AN INTERNATIONAL JOURNAL* 1–31 (2006); Huiyun Feng, *CHINESE STRATEGIC CULTURE AND FOREIGN POLICY DECISION-MAKING: CONFUCIANISM, LEADERSHIP, AND WAR* 128 (2007) (discussing cognitive heuristics and cognitive short cuts that leaders use in decision making); DAVID SCOTT, *CHINA STANDS UP: THE PRC AND THE INTERNATIONAL SYSTEM* 97 (2007) (stating that liberal values are expanding China's discourse on international relations is facilitating at least tactical if not cognitive learning); IS THERE A GREATER CHINA IDENTITY? *SECURITY AND ECONOMIC DILEMMA* (I. Yuan ed., 2007); Guoguang Wu, *Identity, Sovereignty, and Economic Penetration: Beijing's Responses to Offshore Chinese Democracies*, 16 *J. OF CONTEMP. CHINA* 295, 295–313 (2007); REX LI, *RISING CHINA AND SECURITY IN EAST ASIA: IDENTITY CONSTRUCTION AND SECURITY DISCOURSE* 7 (2009) (stating that the cognitive dimension of foreign policy is important in informing and shaping the decisions of political leaders); PRASENJIT DUARA, *THE GLOBAL AND REGIONAL IN CHINA'S NATION-FORMATION* 38 (2009) (stating that China is an agent of globalization especially at the cognitive level); Qin Yaking, *Struggle for Identity: A Political Psychology of China's Rise*, in *CHINA'S RISE IN HISTORICAL PERSPECTIVE* 249, 249–69 (Brantley Womack ed., 2010); BIWU ZHANG, *CHINESE PERCEPTIONS OF THE U.S.: AN EXPLORATION OF CHINA'S FOREIGN POLICY MOTIVATIONS* 29 (2012) (stating that the cognitive approach can be applied to decision making process before policy is made while the realistic approach explains the success or failure of the policy after it is made).

57. See BRUCE B. DE MESQUITA, DAVID NEWMAN & ALVIN RABUSHKA, *FORECASTING POLITICAL EVENTS: THE FUTURE OF HONG KONG* (1985); Barry Naughton, *The Foreign Policy Implications of China's Economic Development Strategy*, in *CHINESE FOREIGN POLICY: THEORY AND PRACTICE* 47, 50 (Thomas W. Robinson & David Shambaugh eds., 1994) (stating that once a domestic strategy was chosen, it reinforces the international policy orientation from which it emerged); BRUCE B. DE MESQUITA, DAVID NEWMAN & ALVIN RABUSHKA, *RED FLAG OVER HONG KONG* (1996); QUANSHENG ZHAO, *INTERPRETING CHINESE FOREIGN POLICY: THE MICRO-MACRO LINKAGE APPROACH* 13 (1996) (stating that domestic factors have had a greater impact than international factors in shaping Chinese foreign policy); Krishna P. Jayakar, *The United States China Copyright Dispute: Two-Level Games Analysis*, 2 *COMMUNICATION L. AND POL'Y* 527, 530 (1997) (stating that there are many interest groups at the national level that seek to influence international decision-making according to their own agendas); LU NING, *THE DYNAMICS OF FOREIGN-POLICY DECISION MAKING IN CHINA* 8–17 (2000) (discussing China's foreign policy decision making structure); Lu Ning, *The Central Leadership, Supraministry Coordinating Bodies, State Council Ministries and Party Departments*, in *THE MAKING OF CHINESE FOREIGN AND SECURITY POLICY IN THE ERA OF REFORM, 1978–2000* 39, 40–49 (David M. Lampton ed., 2001) (discussing China's foreign policy decision making structure); CHIEN-PENG CHUNG, *DOMESTIC POLITICS, INTERNATIONAL BARGAINING, AND CHINA'S TERRITORIAL DISPUTES* (2004); Albert S. Yee, *Semantic Ambiguity and Joint Deflections in Hainan Negotiations*, 2 *CHINA: AN INTERNATIONAL JOURNAL* 53, 53–82 (2004) (discussing the domestic

theoretically prominent New Haven School have compellingly asserted and demonstrated that international legal dynamics cannot effectively be grasped without incorporating an evolutionary process element into the equation.<sup>58</sup>

The notion that competitive domestic politics may impinge on state adaptation to the content of an international governance regime continues to be consigned to the conceptual periphery in the field of international law. On the other hand, the proposition that cooperation, direct and indirect, overt and tacit, among multiple actors at home and abroad as “cooperative domestic and international politics,” appears to be gaining intellectual traction. However, constructivism and TLPT have squarely placed cognitive influences and an evolutionary standpoint on the scholarly agenda. The latter has also elevated diversity across the global institutional space to the status of a pivotal variable, albeit mostly in its cooperative form.

Constructivism has deep historical roots. Its origins may be traced to the late nineteenth and early to mid-twentieth century sociological explorations of Emile Durkheim and Max Weber.<sup>59</sup> The former was the first modern-style researcher to methodically examine the manifold effects of ideas and cognitive expressions on social structure and functioning.<sup>60</sup> His focus was not on the patterns the ideas assume in the human mind, but on the widespread role they play in society.<sup>61</sup> He posited that ideas are not merely abstract constructs, but also concrete entities that are transformed through social interaction—an evolutionary process—into “social

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political conflicts within states that produce foreign policy decisions); Albert S. Yee, *Domestic Support Ratios in Two-Level Bargaining: The US-China WTO Negotiations*, 4 CHINA REV. 129, 129–63 (2004) (discussing the domestic constraints in inter-state negotiations); Junhao Hong, *The Internet and China's Foreign Policy Making: The Impact of Online Public Opinions as a New Societal Force*, in CHINA'S FOREIGN POLICY MAKING: SOCIETAL FORCE AND CHINESE AMERICAN POLICY 93, 97–103 (Yufan Hao & Lin Su eds., 2005) (discussing the impact of online public opinions in China on its foreign policy making); Alastair Iain Johnston, *The Correlates of Beijing Public Opinion Toward the United States, 1998–2004*, in NEW DIRECTIONS IN THE STUDY OF CHINA'S FOREIGN POLICY 340–45 (Alastair I. Johnston & Robert S. Ross eds., 2006) (discussing the impact of domestic public opinion in China on its foreign policy); Chien-peng Chung, *Resolving China's Island Disputes: A Two-Level Game Analysis*, 12 J. OF CHINESE POL. SCI. 49, 49–70 (2007) (discussing the role of domestic nationalistic group in policy making); ROBERT S. ROSS, CHINESE SECURITY POLICY: STRUCTURE, POWER, AND POLITICS 181–82 (2009) (discussing the role of domestic politics in international bargaining); HONGYI LAI, THE DOMESTIC SOURCES OF CHINA'S FOREIGN POLICY: REGIMES, LEADERSHIP, PRIORITIES, AND PROCESS 9–15 (2010) (discussing how China's foreign policy is driven by external factors such as political and economic regimes).

58. See generally Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 113 (Robert J. Beck, Anthony Clark Arend & Robert D. Vander Lugt eds., 1996).

59. See Ruggie, *supra* note 35, at 857–62 (describing the history the roots of constructivism).

60. *Id.* at 857–59.

61. *Id.*

facts” (e.g., religious beliefs).<sup>62</sup> Once they crystallize as such, ideas materially shape human behavior.<sup>63</sup> Weber extended this theoretical scheme further by demonstrating how the meaning of social facts for individual actors may account for the conduct observed in specific social contexts.<sup>64</sup>

The corollary is that cognitive maps, acquired in the course of dynamic social interaction, largely determine preferences and behavior, selfish (i.e., realist-style) or otherwise.<sup>65</sup> The process of socially-driven cognitive learning also entails identity formation, which is a crucial mechanism because, within the constructivist edifice, identities precede (again, realist-style) interests, not the other way around.<sup>66</sup> An oft-invoked example to bolster the argument is that of resource-constrained Sweden, which apparently waged the Thirty Years War against the powerful Habsburg Empire to confirm its identity as a significant player in seventeenth century Europe rather than to maximize concrete economic or military interests.<sup>67</sup>

Constructivism and its offshoots may claim to be the sole international legal theoretical system, not merely to embrace identity, but also to turn it into a prominent component of the explanatory architecture. The contention that it has reintroduced norms—as distinct from those ever-recurring realist-style interests—on a meaningful scale into socio-legal discourse is less compelling because this reflects an analytical disposition seen elsewhere—notably, in the domain of institutionalism and neo-institutionalism. It is nevertheless legitimate to argue that constructivism goes further, and in different directions, than competing and complementary schools of thought in dissecting norms (this is not necessarily true of other elements of regime content) as social facts and, interestingly, in endeavoring to shed light on how actors and states are socialized into faithfully adhering to them. If successful, then this may result in norm-compliant behavior even when incentives, positive/carrots or negative/sticks, including realist-style coercion, are lacking.<sup>68</sup>

The structural underpinnings of the constructivist paradigm markedly diverge from those of its realist counterpart. Identities and norms are the key ingredients of

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62. *Id.*

63. *Id.*

64. See generally Ruggie, *supra* note 35, at 859–62.

65. See Wendt, *Anarchy is What States Make of It*, *supra* note 35, at 391–425 (discussing cognition and behavior); WENDT, *SOCIAL THEORY AND INTERNATIONAL POLITICS*, *supra* note 35, at 122–30 (discussing the cognitive basis of desire).

66. See Wendt, *Anarchy is What States Make of It*, *supra* note 35, at 391–425 (discussing identity formation and interests); WENDT, *SOCIAL THEORY AND INTERNATIONAL POLITICS*, *supra* note 35, at 170–71 (discussing identity formation, interest formation, and socialization).

67. See generally ERIK RINGMAR, *IDENTITY, INTEREST, AND ACTION: A CULTURAL EXPLANATION OF SWEDEN’S INTERVENTION IN THE THIRTY YEARS’ WAR* (1996).

68. See generally Goodman & Jinks, *supra* note 35; Joseph S. Nye, Jr., *Nuclear Learning and US-Soviet Security Regimes*, 41 INT’L ORG. 371, 371–402 (1987); G. John Ikenberry & Charles A. Kupchan, *Socialization and Hegemonic Power*, 44 INT’L ORG. 283, 283–315 (1990); MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 887–917 (1998).

the international fabric, according to the former, whereas material factors, notably the distribution of power, dominate the latter.<sup>69</sup> This reflects the notion that “material resources only acquire meaning for human action through the structure of shared knowledge in which they are embedded.”<sup>70</sup> An illustration offered to lend credence to this assertion involves American anxieties about North Korean nuclear capabilities, coupled with an absence of any concerns about the British arsenal—one is registered in the cognitive apparatus as a foe and the other as an ally.<sup>71</sup>

On the face of it, these deeply-entrenched and intricate socio-psychological structures leave little room for agent and actor autonomy, discretion, and maneuverability. Prevailing international governance regimes are sustained through tight networks of identities and norms into which agents are duly absorbed or socialized. By pursuing activities that give concrete expression to these identities and norms, agents validate and reproduce the regimes and structures in which they participate. However, the relationship between agents and structures is thought to be mutually constituted, rather than one-way in nature.<sup>72</sup>

Regime transformation, the evolutionary component of the theory, is thus a feature of international system functioning. The most common catalyst assumes the form of fresh initiatives by norm entrepreneurs, or change agents, who seek ways to reshape the content of the system, for reasons that vary from one context to another and may involve smooth or abrupt cognitive readjustment;<sup>73</sup> persistent misalignment between regime elements;<sup>74</sup> or some exogenous shock like the German and Japanese defeat in the Second World War.<sup>75</sup> The recognition that this may not constitute a significant improvement over realist-style power transition theory<sup>76</sup> has prompted efforts to devise more elaborate constructivist-type models

69. See Wendt, *Anarchy is What States Make of It*, *supra* note 35, at 391–425 (discussing the views of constructivist and realist); WENDT, *SOCIAL THEORY AND INTERNATIONAL POLITICS*, *supra* note 35, at 47–91 (discussing realism and constructivism); Alexander Wendt, *The Agent-Structure Problem in International Relations Theory*, 41 INT’L ORG. 335, 335–70 (1987) (discussing the realist philosophy).

70. Alexander Wendt, *Constructing International Politics*, 20 INT’L SECURITY 71, 73 (1995).

71. See *id.* at 73 (stating that 500 British nuclear weapons are less threatening to the United States than five North Korean nuclear weapons, because the British are friends of the United States and the North Koreans are not).

72. See Wendt, *The Agent-Structure Problem in International Relations Theory*, *supra* note 69, at 339 (stating that agents and structures are in some way mutually implicating).

73. See generally *id.*

74. See generally JEFFREY W. LEGRO, *RETHINKING THE WORLD: GREAT POWER STRATEGIES AND INTERNATIONAL ORDER* (2005); THEO FARRELL, *THE NORMS OF WAR: CULTURAL NORMS AND MODERN CONFLICT* (2005).

75. See generally PETER J. KATZENSTEIN, *CULTURAL NORMS AND NATIONAL SECURITY: POLICE AND MILITARY IN POSTWAR JAPAN* 153–91 (1996); THOMAS U. BERGER, *CULTURES OF ANTIMILITARISM: NATIONAL SECURITY IN GERMANY AND JAPAN* (1998).

76. See Randall L. Schweller, *Managing the Rise of Great Powers: History and Theory*, in *ENGAGING CHINA: THE MANAGEMENT OF AN EMERGING POWER* 1, 1–31 (Alastair I. Johnston and Robert S. Ross eds., 1999); Douglas Lemke, *Power Transition Theory and the Rise of China*, 29 INT’L INTERACTIONS 269, 269–71 (2003); Steve Chan, *Is There a Power Transition between*

of international system dynamics.<sup>77</sup>

TLPT is constructivist at its core, in that it focuses on how norms are internalized in the global arena in the course of social interaction. Interestingly, TLPT is less state-centered than other norm-oriented schools of thought in international law. Not just constructivism in its pure form, but also the fairness and legitimacy paradigm and managerialism—because it views the content of international legal regimes as a product of an interplay between a multitude of public and private actors, norm entrepreneurs, and norm sponsors. Their cooperative endeavors lead to norm identification and specification in law-declaring forums, prompt interpretation and enunciation of the norms embraced, a set of circumstances whereby other parties are compelled to internalize these norms, and a situation whereby those parties feel bound to conform to what has crystallized in the four-step (interaction, interpretation, internalization, and compliance) process.<sup>78</sup>

Such analytical formulations have potentially substantial implications for the study of state adaptation to the content of an international governance regime since they highlight the role played by non-realist forces (i.e., influences other than interest, power, and the like) in sustaining the prevailing global order. Notably, they offer scope for exploring the impact of persuasion (e.g., by entities such as Greenpeace, Human Rights Watch, and Internal Committee of the Red Cross/ICRC) and congruence (between the norm enunciated and that of the compliant or non-compliant state/norm match versus norm clash).<sup>79</sup> They also offer scope for exploring the impact of sheer habit: when international law has been internalized in the domestic legal system “through executive action, judicial interpretation, legislative action, or some combination of the three,”<sup>80</sup> it generates “[i]nstitutional habits that lead nations into default patterns of compliance.”<sup>81</sup>

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*the U.S. and China? The Different Faces of National Power*, 45 ASIAN SURVEY 687, 687–705 (2005); Ronald L. Tammen & Jacek Kugler, *Power Transition and China US Conflicts*, 1 CHINESE J. OF INT'L POLITICS 35, 35–55 (2006); STEVE CHAN, CHINA, THE US, AND THE POWER-TRANSITION THEORY: A CRITIQUE (2008); Renee Jeffrey, *Evaluating the “China Threat”: Power Transition Theory, the Successor State Image, and the Dangers of Historical Analogies*, 63 AUSTRALIAN J. OF INT'L AFF. 309, 309–24 (2009).

77. See, e.g., GARCIA, *supra* note 35; LOWENHEIM, *supra* note 35; FLOWERS, *supra* note 35; NAGTAAZM, *supra* note 33; SANDHOLTZ & STILES, *supra* note 35; PRESLEVA STOEVA, NEW NORMS AND KNOWLEDGE IN WORLD POLITICS: PROTECTING PEOPLE, INTELLECTUAL PROPERTY, AND THE ENVIRONMENT (2009).

78. See generally Koh, *Transnational Legal Process*, *supra* note 33, at 181–207; Koh, *Why Do Nations Obey International Law*, *supra* note 33, at 2599–659; Koh, *How Is International Human Rights Law Enforced*, *supra* note 33, at 1397–417.

79. See Jeffrey Checkel, *Norms, Institutions, and Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83, 84–114 (1999) (discussing the impact of Greenpeace and congruence between international and domestic norms); Andrew P. Cortell & James W. Davis, *Understanding the Domestic Impact of International Norms: A Research Agenda*, 2 INT'L STUD. REV. 65, 65–87 (2000) (discussing domestic impact of international norms and congruence with domestic culture).

80. Koh, *Why Do Nations Obey International Law?*, *supra* note 33, at 2657.

81. *Id.* at 2655. See also TED HOPF, SOCIAL CONSTRUCTION OF INTERNATIONAL POLITICS: IDENTITIES AND FOREIGN POLICIES, MOSCOW, 1955 AND 1999 (2002).



There have been some illuminating detailed empirical examinations of constructivist propositions in the area of international relations. Those that stand out include studies of norm formation regarding control of small arms;<sup>82</sup> transnational harm (PATHs) and Great Powers' responses thereto;<sup>83</sup> refugees, women, and weapons;<sup>84</sup> environmental governance;<sup>85</sup> sovereignty norms (pertaining to piracy, conquest, protection of cultural treasures in wartime, terrorism, and extraterritoriality) and liberal ones (relating to slavery, genocide, refugees and asylum, humanitarian intervention, and the right to democracy);<sup>86</sup> and protection of people, intellectual property, and the environment.<sup>87</sup>

There have also been some, albeit fewer, such inquiries in the more traditionally positioned, from a conceptual and methodological perspective, field of international law. Two examples that qualify as full-fledged, fact-based constructivist investigations are surveys of the evolution of the approaches to the issue of "indigenous peoples," with special reference to the Asian experience,<sup>88</sup> and participatory development.<sup>89</sup> In the case of TLPT, there are mostly general, empirically grounded, and theoretically underpinned overviews, supported by relevant illustrations rather than painstaking dissections of a well-delineated question.<sup>90</sup>

The international human rights governance regime, and the responses it engenders on the part of states, has been of one of the keystones of the prevailing world order subjected to close constructivist and TLPT-style analytical scrutiny, coupled with references to concrete illustrations.<sup>91</sup> The researchers involved in this investigative venture have sought to shed light, in that particular context, on the "process through which principled ideas ('beliefs about right and wrong held by individuals') become norms ('collective expectations about proper behavior for a given identity') which in turn influence the behavior and domestic structure of states."<sup>92</sup>

They have chosen to portray this process as "socialization,"<sup>93</sup> which crucially entails the "induction of new members . . . into the ways of behavior that are preferred in a society."<sup>94</sup> For purposes of legally and politically-oriented exploration, it is assumed that the notion of an international society of states is a

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82. *See generally* GARCIA, *supra* note 35.

83. *See generally* LOWENHEIM, *supra* note 35.

84. *See generally* FLOWERS, *supra* note 35.

85. *See generally* NAGTZAAM, *supra* note 33.

86. *See generally* SANDHOLTZ & STILES, *supra* note 35.

87. *See generally* STOEVA, *supra* note 77.

88. *See generally* Kingsbury, *supra* note 35.

89. *See generally* Totaro, *supra* note 35.

90. *See, e.g.*, SLAUGHTER, *supra* note 33.

91. *See generally* THE POWER OF HUMAN RIGHTS, *supra* note 33.

92. *Id.* at 7.

93. *Id.* at 11.

94. *Id.*

meaningful one, but that this entity is smaller in size than the total number of states in the global arena would suggest.<sup>95</sup> The acquisition, or learning, of the norms of that group is thus the essential “process through which a state becomes a member of the international society.”<sup>96</sup> The underlying goal of the undertaking is believed to be “for actors to internalize norms, so that external pressure is no longer needed to ensure compliance.”<sup>97</sup>

The socialization effort in the international human rights domain is thought to proceed through three sequentially linked channels. First would be overt pressures that lead to a combination of instrumental adaptation and strategic bargaining.<sup>98</sup> Second, socialization assumes the form of moral discourse, which consists of argumentation, dialogue, persuasion, and shaming.<sup>99</sup> Finally, the effort proceeds through institutionalization and habituation—whereby norms become embedded in the domestic institutional edifice and operating procedures.<sup>100</sup> The sequence tends to evolve in a stepwise fashion—with reliance on the first channel giving way to the second one and, ultimately, the third. A point at which “[n]orms are implemented independently from the consciousness of actors,”<sup>101</sup> or are “simply ‘taken for granted.’”<sup>102</sup>

It is further posited that transnational advocacy networks (TANs)—consisting of “those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services”<sup>103</sup>—may play a decisive role in this multistage process by combining “to bring pressure ‘from above’ and ‘from below’ to accomplish human rights change.”<sup>104</sup> When this pattern is observed in meaningful form, it can be said to exert something akin to a “boomerang effect.”<sup>105</sup>

State adaptation in such a political milieu may be neither instantaneous nor straightforward. It may entail repression, which coincides with activation of a TAN.<sup>106</sup> It may entail denial, which “means that the norm-violating government refuses to accept the validity of international human rights norms themselves, and opposes the suggestion that its national practices in this area are the subject to

95. *Id.* at 11.

96. *Id.*

97. THE POWER OF HUMAN RIGHTS, *supra* note 33, at 11.

98. *Id.* at 12 (“Governments accused of violating human rights norms frequently adjust to pressures by making some tactical concessions . . . . They might also engage in bargaining processes with the international community and/or the domestic opposition.”).

99. *Id.* at 13–16.

100. *Id.* at 16–17.

101. *Id.* at 17.

102. *Id.*

103. THE POWER OF HUMAN RIGHTS, *supra* note 33, at 18.

104. *Id.*

105. *Id.* (“A boomerang pattern of influence exists when domestic groups in a repressive state bypass their state and directly search out international allies to try to bring pressure on their states from outside.”).

106. *Id.* at 22 (“The levels of repression vary among the countries in the volume, from extreme repression bordering on genocide . . . to much lower levels of repression.”).

international jurisdiction.”<sup>107</sup> Of further import are tactical concessions— “[i]f international pressures escalate, the norm-violating state seeks cosmetic changes to pacify international criticism.”<sup>108</sup> It may also entail both “prescriptive status”—whereby “the actors involved regularly refer to the human rights norms to describe and comment on their own behavior and that of others,”<sup>109</sup> and rule-consistent behavior—which extends beyond prescriptive status, because the latter may feature acceptance without observance.<sup>110</sup>

Constructivism is not without its stern critics. Some contend that it has no significant explanatory power due to its inability to adequately come to grips with the competitive dynamics witnessed in the global arena.<sup>111</sup> It is also pointed out that the absence of a genuinely competitive element is not the sole gap in the constructivist armor and that several other influences are not properly accounted for.<sup>112</sup> Even proponents of the paradigm acknowledge that it may not stand on its own and may need to be integrated with complementary perspectives.<sup>113</sup> If so, then it remains to be seen what status (central versus peripheral) constructivism is likely to be accorded within any multifaceted theoretical international law framework.<sup>114</sup>

The position taken here is that consigning the paradigm to oblivion, in an analytical setting characterized by a proliferation of schools of thoughts and lingering intellectual uncertainty, would be inappropriate. There is sufficient evidence to suggest that constructivism, including TLPT, may selectively shed considerable light on international legal phenomena. Unfortunately, the fact-finding journey has not progressed as far as it has elsewhere. For instance, time-honored realist formulations and even their institutionally grounded counterparts possess firmer historical roots and exhibit a greater sense of continuity. Given the level of abstraction and the lack of a solid empirical foundation, constructivism may at times come across as a meta-theory—i.e., theory about theory or social theory, or theory about the social world—rather than a substantive theory addressing specific international law issues. Concepts such as norms, socialization and learning, and identity—but not necessarily norms entrepreneurs and norms sponsors—are also inherently difficult to grapple with in a concrete fashion at the aggregate and state (as distinct from individual) levels.

The picture is mixed, but the corollary arguably is that the journey should be sustained rather than aborted, or pursued at a much more moderate pace. As

107. *Id.* at 23.

108. *Id.* at 25.

109. THE POWER OF HUMAN RIGHTS, *supra* note 33, at 29.

110. *Id.* at 31 (“Governments might accept the validity of human rights norms, but still continue to torture prisoners or detain people without trial and so on.”).

111. *See generally* GOLDSMITH & POSNER, *supra* note 34.

112. *See generally* CONSTRUCTIVISM AND INTERNATIONAL RELATIONS: ALEXANDER WENDT AND HIS CRITICS (Stefano Guzzini and Anna Leander eds., 2006).

113. *See generally id.*; THE POWER OF HUMAN RIGHTS, *supra* note 33; Barkin, *supra* note 35.

114. *See generally* THE POWER OF HUMAN RIGHTS, *supra* note 33; Barkin, *supra* note 35; Guzzini & Leander, *supra* note 112.

indicated, interestingly, the Chinese human rights scene is a domain where constructivist and TLPT-style propositions have been put to the test consistently and on a reasonable scale. The findings may serve as a vehicle for assessing their potential, limitations, and scope for further enhancement. They may also provide additional insights into how China is adapting to the content of the international human rights governance regime and how this process may be managed more effectively. A re-examination of those findings may thus prove to be a rewarding undertaking, from a theoretical and policy perspective.

### III. LEARNING THE CHINESE WAY: FIRST APPROXIMATION

The available relevant Chinese empirical material is not voluminous and is largely, although not exclusively, qualitative in nature. Moreover, qualitative should not be equated with methodologically-based in this context because formal tenets of qualitative inquiry<sup>115</sup> have not been systematically followed. By the same token, the quantitatively generated insights, which have been produced on a limited scale, have not been obtained by relying on elaborate research designs.<sup>116</sup> Nevertheless, this human rights research inventory is information rich and, cumulatively, probably exceeds in scope that of any other country. Revisiting it for purposes of gaining a broader and deeper conceptual appreciation of the subject, a strategy commonly employed in socio-legal investigation,<sup>117</sup> may turn out to be a fruitful exercise.

Impressions to the contrary, a literature review is seldom the equivalent of a random walk during which general patterns are discerned serendipitously. A degree of planning is normally involved and a set of criteria, even if implicit and not rigorously articulated, typically guides the process.<sup>118</sup> This is partly due to the fact that those involved typically do not embark on the journey without some familiarity with the topic and pertinent writings.<sup>119</sup> Previous exposure to the topic inevitably breeds preconceptions, which act as cognitive filters. The nature of the project (e.g., basic research, applied research, summative evaluation, formative evaluation, action research, illuminative evaluation, ethno-methodology, exploratory research, descriptive research, and explanatory research) may serve a similar function.<sup>120</sup>

The realization that this is the case has prompted socio-legal scholars to seek ways to address the literature survey task in a more standardized manner than traditionally observed. Two distinct approaches have emerged: narrative-centered

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115. See ALAN BRYMAN, SOCIAL RESEARCH METHODS 296–304 (3d ed. 2008).

116. See DAVID A. DE VAUS, RESEARCH DESIGN IN SOCIAL RESEARCH (2001) (discussing quantitatively generated insights).

117. See BRYMAN, *supra* note 115, at 296–304 (for an elaboration on socio-legal research methods).

118. See CHRIS HART, DOING A LITERATURE REVIEW: RELEASING THE SOCIAL SCIENCE IMAGINATION 32 (1998) (discussing the purpose of the literature review in research).

119. *Id.* at 27.

120. *Id.*

and systematically organized.<sup>121</sup> Interpretative researchers, whose principal aim is to enrich human discourse, rather than accumulate knowledge, in the strict sense of the term, favor the former.<sup>122</sup> For these researchers, a literature review serves as a vehicle for acquiring an initial impression of a subject of potential academic or practical interest—one they hope to come to grips with in the course of scientific inquiry.<sup>123</sup> A narrative exploration is thus a process of discovery—a journey with no specific destination. It is inherently open-ended and wide-ranging in nature. No criteria are explicitly adopted *ex ante* for inclusion or exclusion of previous work on the topic.<sup>124</sup>

A narrative review is particularly suited for inductive inquiries. In such a context, theoretical insights do not inform the empirical undertaking, but are its product.<sup>125</sup> As scholars sift through the literature, relevant conceptual structures emerge, some of which may not have been anticipated and may even possess novel attributes.<sup>126</sup> Others, which may have been tentatively considered as relevant, end up being discarded.<sup>127</sup> This is a fluid enterprise, whereby those engaged in inductive interpretation do not hesitate to alter their theoretical perspective and redefine the boundaries of the subject.<sup>128</sup>

Systematic review, which lies at the other end of the loose-tight structure continuum, leaves much less room for maneuvering in surveying the cumulative results of an analytical endeavor in a particular area of interest.<sup>129</sup> If the method is adhered to scrupulously, then it constitutes “a replicable, scientific, and transparent process . . . that aims to minimize bias through exhaustive literature searches of published and unpublished studies and by providing an audit trail of the reviewer’s decisions, procedures, and conclusions.”<sup>130</sup>

It is believed that researchers who employ this organizing tool are more likely to produce transparent and unbiased accounts of the literature than those who rely on the narrative-centered alternative.<sup>131</sup> A systematic review may progress to a

121. See BRYMAN, *supra* note 115, at 103–13 (elaborating on systematic and narrative review).

122. *Id.* at 110.

123. *Id.*

124. *Id.*

125. *Id.* at 111.

126. *Id.* at 102.

127. BRYMAN, *supra* note 115, at 92–95.

128. See *id.* at 94 (stating that “[i]nterpretative researchers are [] more likely . . . to change their view of the theory or literature as a result of the analysis of collected data . . .”).

129. See *id.* at 91 (providing a discussion regarding the limitations of systematic review). See generally MARK PETTICREW & HELEN ROBERTS, SYSTEMATIC REVIEWS IN THE SOCIAL SCIENCES: A PRACTICAL GUIDE 2–3 (2006) (providing a brief overview of systematic review).

130. David Tranfield et al., *Towards a Methodology for Developing Evidence-Informed Management Knowledge by Means of Systematic Review*, 14 BRITISH J. MGMT. 209 (2003).

131. PETTICREW & ROBERTS, *supra* note 129, at 11; see also BRYMAN, *supra* note 115, at 102 (“proponents of systematic review are more likely to generate unbiased and comprehensive accounts . . .”).

point whereby it assumes the form of meta-analysis—a highly rigorous form of this technique relied upon when data can be manipulated quantitatively.<sup>132</sup> Meta-ethnography or qualitative meta-synthesis—a less mathematically and statistically oriented vehicle—is another possible component of a literature survey which is structured in accordance with the broad principles of that approach.<sup>133</sup> However, a systematic review need not entail one or the other.<sup>134</sup>

A survey of the writings on China's adaptation to the content of the international human rights regime (learning) is pursued in this Article in two steps. First, in this Part, the relevant studies are summarized and subjected to a narrative-centered review—the corollary being that an attempt is made to determine whether there is some potential for drawing theoretical inferences, or offering interpretative insights, that extend beyond or may be at variance with those originally provided by the authors. Second, in the following Part, a systematic examination of the same body of work is undertaken, employing pertinent criteria specified in advance.

The starting point in discussion of the Chinese human rights experience in the international context is typically the abrupt change brought about by the jettisoning of revolutionary socialism in favor of economic reform in the late 1970s and subsequent developments.<sup>135</sup> This has induced a shift from strategies featuring aggressive coalition building designed to minimize potential damage stemming from repressive practices at home to defensive ones geared toward containing external pressures directed at those practices.<sup>136</sup> The former tended to be executed in a decisive fashion and the latter in a less determined manner.<sup>137</sup> As a leading Sinologist has elaborated:

For decades, human rights [were] a useful, if minor, tool of Chinese diplomacy. Placing its emphasis on the rights of self-determination and

132. See PETTICREW & ROBERTS, *supra* note 129, at 192–93 (“[Meta-analysis] is now used to describe a range of statistical methods for combining the results of empirical studies, where each study tests the same hypothesis.”); BRYMAN, *supra* note 115, at 88–89 (providing a brief description of what meta-analysis entails); NOEL A. CARD, APPLIED META-ANALYSIS FOR SOCIAL SCIENCE RESEARCH 5–8 (2012) (“Meta-analyses . . . focus on research outcomes.”).

133. See BRYMAN, *supra* note 115, at 89–90 (“Meta-ethnography . . . [provides] a counterpart to meta-analysis in quantitative research”).

134. See BRYMAN, *supra* note 115, at 85 (stating that while there are both quantitative and qualitative types of systematic reviews, “currently there are several different methods, none of which is in widespread use.”); PETTICREW & ROBERTS, *supra* note 129, at 164 (“For some systematic reviews . . . it may be possible to carry out a meta analysis . . . . However . . . [some systematic reviews are] too heterogeneous to permit such a statistical summary . . .”).

135. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 622 (“Since the late 1970s . . . and especially after 1989, the issue of human rights has turned from a shield of China's sovereignty into a spear pointed against it.”); Nathan, *China and the International Human Rights Regime*, *supra* note 31 (providing a discussion about China and the international human rights regime).

136. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 623 (discussing a new “trend towards increased international activism in [defense] of human rights.”); Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 147 (stating that China's human rights policy combined “resistance and selective concession”).

137. See generally Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32; Nathan, *China and the International Human Rights Regime*, *supra* note 31.

development, Beijing used human rights advocacy to strengthen friendships with revolutionary movements and Third World nations who shared its interest in opposing domination by the big powers. Since the late 1970s, however, and especially after 1989, the issue of human rights has turned from a shield of China's sovereignty into a spear pointed against it. Chinese diplomats have struggled to reinvigorate old alliances, find new sympathizers, and divide critics. China finds itself cast as a conservative against a trend toward increased international activism in defense of human rights.<sup>138</sup>

Four observations are in order. First, while constructivist and TLPT-style formulations acknowledge that the repression and denial stages of State adaptation to the content of the international human rights regime, accompanied by no or little learning, may persist for long periods of time, they commonly see at least a tentative activation of a transnational advocacy network to serve as a countervailing force.<sup>139</sup> Denial is also portrayed as a form of socialization and learning because “the fact that the state feels compelled to deny charges demonstrates that a process of international socialization is already under way.”<sup>140</sup> Yet, in the Chinese case, until economic reform materially progressed, there was no compelling evidence that repression and denial coincided with a formation of a meaningful TAN and that genuine learning took place.<sup>141</sup>

Indeed, denial is an oversimplification of a multifaceted phenomenon that has offensive, as well as defensive, manifestations. The former may be indicative of the limits of socialization and learning during early and intermediate phases of state adaptation to the content of the international human rights regime. It has thus been noted that “[w]hile stressing national rights, Beijing did not hesitate to criticize adversaries’ civil rights practices.”<sup>142</sup> Such criticism was insistent, severe, sustained, and widespread,<sup>143</sup> and it would be inappropriate to portray this as merely a form of delaying tactics not duly reflecting cognitive adjustment behind the policy façade. It may have to some extent constituted a genuine effort to socialize and teach the opposing side.

Second, constructivists and their intellectual brethren, for all intents and purposes, treat all norm-violating states alike. Countries such as Myanmar and North Korea have somehow avoided significant deflection from course despite

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138. Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 622–23.

139. See Risse, *supra* note 33, at 22–24 (providing a discussion regarding the repression and denial stages).

140. *Id.* at 23.

141. See generally Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 630–32 (focusing on China's economic reform in the 1970s, which stemmed from the international human rights pressures); Nathan, *China and the International Human Rights Regime*, *supra* note 31.

142. Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 625.

143. See *id.* at 625 (providing examples of certain civil rights practices the Chinese government has criticized or denounced); Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 145–52 (discussing China's management of the human right's issue and how it mounted various ideological attacks against its critics).

their vulnerabilities, but this has been a challenging experience for the two resource-constrained small states. China, on the other hand, is a different proposition, a country with far greater and growing capabilities—one less susceptible to external pressures, however intense.<sup>144</sup> The corollary is that power, a quintessentially realist variable, plays a crucial role in the adaptation process.

Third, the thrust (as distinct from the content) of the international human rights regime, again for all intents and purposes, is wrongly assumed to be a static variable rather than a dynamic one. Clearly, as the above account suggests, external pressures, direct or indirect, obvious or subtle, may escalate or subside over time, and transitions from one state to another need not follow a linear pattern or be irreversible in nature, although it appears that international human rights activism is steadily increasing. Once more, omitting power from TANs and depicting them as purely normative entities, as well as overlooking (other than for constructivist purposes) the material setting in which they are embedded, is not consistent with trends long witnessed on the Chinese front.<sup>145</sup>

Finally, and paradoxically, the opening up of the economy in the late 1970s, or the intensification of external linkages, has visibly complicated the picture for China, which has unexpectedly found itself on the defensive. This is a classic example of “subsystem spillovers,”<sup>146</sup> rather than “systematic perturbations.”<sup>147</sup> Unlike the latter, the former occur when key developments in one policy domain (i.e., integration into the global economy) inevitably result in substantial adjustments elsewhere (i.e., by creating new interdependencies and shared platforms), potentially accelerating broad-based learning.

Subsystems’ convergence may be incomplete, and marked imbalances

144. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 630–35 (detailing the international human rights pressures on China and how some of the international concerns did not have strong support in China); Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 152–55 (discussing China’s prosperity and how foreign nations have an “economic stake” in China, which makes China less susceptible to external pressures in comparison to smaller countries). See generally Wan, *supra* note 32, at 727–53 (providing additional insights into China’s human rights law development); Joon B. Pae, *Sovereignty, Power, and Human Rights Treaties*, 5 NW. J. OF INT’L HUM. RTS. 71–95 (2006) (providing an in-depth discussion regarding the correlation between international human rights and economic concerns).

145. See generally Chen Ding, *supra* note 32; Wan, *supra* note 32; ROSEMARY FOOT, RIGHTS BEYOND BORDERS: THE GLOBAL COMMUNITY AND THE STRUGGLE OVER HUMAN RIGHTS IN CHINA (2000); see also David A. Lake & Wendy Wong, *The Politics of Networks: Interests, Power, and Human Rights Norms*, available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1004199](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004199) (arguing that a “network which eventually emerges is not a function of the inherent ‘goodness’ of one set of norms over another, since the quality of any norm is difficult to judge prior to its manifestation in a network of shared adherents”).

146. See MICHAEL HOWLETT ET AL., STUDYING PUBLIC POLICY: POLICY CYCLES AND POLICY SUBSYSTEMS 205 (3d ed. 2009) (defining “subsystem spillovers” as an “exogenous change [process] that occur[s] when activities in otherwise distinct subsystems transcend old boundaries and affect the structure or [behavior] of other subsystems”).

147. See *id.* (defining “systemic perturbations” as “external crises that upset established policy routines”).



between seemingly interrelated sectors may not readily diminish. This may well be the case in the Chinese context where adaptation to the international human rights regime has greatly lagged behind integration into the global economy. It has been noted that such divergences become unsustainable at China's current level of development.<sup>148</sup> Again, it remains to be seen whether additional (rather than other) variables are at work in such circumstances and whether the country's complexity, cultural heritage, size, and status may turn it into an exception to the rule, or a statistical outlier, in this respect.

Systematic perturbations, mostly in the form of strains within the authoritarian polity that periodically escalate into crises—full-blown or limited—have been accorded close attention in the literature on Chinese adaptation to the international human rights regime. The unfolding and ramifications of one event in particular, the violent suppression of the student-led pro-democracy protest on June 4, 1989, known as the Tiananmen Square Incident, has been explored in painstaking detail.<sup>149</sup> The use of overwhelming force against a peaceful expression of voice—resulting in extensive bloodshed—was accompanied by a massive security clampdown and cleansing of the party and government apparatus.<sup>150</sup>

The military, police-type, organizational, and ideological onslaught produced a harsh reaction on the part of developed nations and their allies.<sup>151</sup> Many proceeded to “impose . . . sanctions, including diplomatic cold shoulders of one kind or another, cancellation of cultural exchanges, freezes on bilateral aid and loans, voting for temporary suspension of World Bank and Asian Development Bank loans, and interruption of military sales and links.”<sup>152</sup> Even after the sanctions “were eased, Western governments and politicians felt it necessary to maintain verbal pressure.”<sup>153</sup>

Such softer prodding was coupled with selective recourse to the proverbial

148. See Minxin Pei, *How Much Longer Will the East Be Red?*, WALL ST. J. (May 2, 2012) [http://online.wsj.com/article/SB10001424052702304746604577379581753753906.html?mod=googlenews\\_wsjs](http://online.wsj.com/article/SB10001424052702304746604577379581753753906.html?mod=googlenews_wsjs) (“[T]he Chinese Communist Party's rule is entering its most perilous phase.”).

149. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 643 (“In the aftermath of Tiananmen, Chinese lawyers, scholars, journalists and Party liberals formed . . . [a consensus] on the cultural universality of human rights . . . .”); Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 145–52 (discussing the Tiananmen incident and how it was the catalyst in making China the “major target” of other countries' human rights diplomacy).

150. See Richard Bernstein, *Beijing Orders Its Ambassadors Home for a Meeting*, THE NEW YORK TIMES, June 29, 1989.

151. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 635 (“Many countries imposed sanctions, including diplomatic cold shoulders of one kind or another, cancellation of cultural exchanges, freezes on bilateral aid and loans, voting for temporary suspension of World Bank and Asian Development Bank loans, and interruption of military sales and links.”); Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 146 (providing further support on how China became a “target of other countries' human rights diplomacy”).

152. Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 146.

153. *Id.*

stick.<sup>154</sup> Several developed nations thus “gave sanctuary to refugee dissidents, and some gave permanent residency to Chinese visiting scholars and students.”<sup>155</sup> Perhaps more importantly, in the wake of the Tiananmen Square Incident, “China experienced a two-year decline in its credit rating, foreign investment, export orders, and tourism.”<sup>156</sup> By the same token, “[t]he renewal of normal trading rights with the United States (most-favored-nation [MFN] privileges) was threatened annually from 1990 through 1994 by public and congressional desires to push China toward human rights improvements.”<sup>157</sup> To aggravate the pain, Beijing’s “1993 . . . bid to host the 2000 Olympics encountered international opposition on human rights grounds and was defeated.”<sup>158</sup>

Misgivings persistently conveyed through bilateral channels were not the sole source of image dilution and strategic discomfort.<sup>159</sup> Reservations were also expressed in established multilateral forums, and China had the distinction of being the first permanent member of the U.N. Security Council to be censured for its human rights record in such a symbolically prominent and visible organizational setting.<sup>160</sup> Moreover, Chinese interests were undermined in related policy domains, notably on the Taiwan and trade (with special reference to intellectual property and market access) fronts, with issues high on Beijing’s strategic agenda being relegated to the periphery.<sup>161</sup>

The combined pressure exerted through this array of channels was considerable but not crippling.<sup>162</sup> Realist arguments—“human rights as

154. See *id.* at 145–52 (providing a discussion of the “verbal pressures” from foreign governments China faced, which included an “endless procession” of important foreign governments making “public and private representations on human rights” in China); Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 636–38 (“Some industrialized nations gave sanctuary to refugee dissidents.”).

155. Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 146.

156. *Id.*

157. *Id.*

158. *Id.*

159. See *id.* at 146 (stating that foreign governments, such as France, Japan, Australia and the U.S., had aired their misgivings about China’s human rights issues); Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 637 (stating that China was “humiliated by advanced nations around the world”).

160. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 636–38 (“In August 1989 the UN Subcommission on Prevention of Discrimination and Protection of Minorities adopted by secret ballot a resolution mildly critical of China, marking the first time that a permanent member of the Security Council had been censured for its human rights performance in a UN forum.”); Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 146–47 (stating that China “came under criticism in U.N. bodies concerned with human rights”).

161. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 638 (“ . . . Tiananmen combined with the trade deficit and arms exports to create a synergy of anti-Beijing sentiments that thrust China’s preferred priority issue, Taiwan, so far down the agenda of bilateral issues that it was hardly discussed . . . .”); Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 147 (stating that the “anti-China atmosphere also weakened Beijing’s negotiating position in talks over intellectual property rights and market access . . . .”).

162. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 638 (“The

*realpolitik*<sup>163</sup>—tinged with a degree of institutionalism, rather than constructivist ones, were invoked to account for this configuration.<sup>164</sup> Specifically, it was asserted that the international community had an interest—a realist concept—in propelling China toward the liberal-democratic vision of human rights, yet that this country was too powerful a link in the global politico-economic chain—another realist notion—to uncompromisingly pursue confrontational tactics and lightly overlook the long-term benefits of cooperation, a proposition rooted in institutionalism.<sup>165</sup> Thus, containment overshadowed engagement at that particular juncture without, however, neutralizing it.<sup>166</sup>

The Chinese response to the implemented punitive measures was consistent with both realist—again, not entirely devoid of manifestations of institutionalism—and constructivist explanations of state behavior.<sup>167</sup> As in similar past circumstances, China “mounted a variety of ideological counterattacks on its critics.”<sup>168</sup> In addition, like on previous occasions, its spokespersons emphatically claimed, “cultural standards differ.”<sup>169</sup> Such propaganda efforts “dovetailed with diplomatic activity carried out in conjunction with like-minded governments.”<sup>170</sup> Notably, cooperation was sought “with other governments to resist strengthening the international machinery.”<sup>171</sup>

The government also dealt with the challenge by selectively flexing its muscles, or taking a hard line in handling certain human rights cases.<sup>172</sup> However, this strategy coincided with the offering of “a series of measured, timed

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human rights issue did no damage to China's relations with ASEAN, India and some other countries who would have been vulnerable to similar charges and pressures.”).

163. Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 152.

164. *See id.* at 152–55 (discussing the connection between Western values of human rights and China's policies from a *realpolitik* viewpoint).

165. *See id.* at 155 (stating that the human rights interest in China is greater than in other nations, because of China's “demographic and geographic size, its strategic and economic importance, its U.N. Permanent Five status, and its position of leadership in the Third World” and, as a result, it is important how China is dealt with because of its potential impact on the rest of the world).

166. *See id.* at 146 (stating that China became a target of other countries' human rights diplomacy after the Tiananmen Square Incident of 1989); Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32 at 635–38 (presenting that the impact of the Tiananmen Square Incident included a decrease in bargaining power with other nations).

167. *See* Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 148 (stating that China's response to international human rights pressures demonstrated “realism, central coordination, strategic consistency, and tactical flexibility”); Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 638–39 (noting that China responded that Western nations presented a series of double standards, that human rights issues are a matter of domestic Chinese policy, and that its human rights record was excellent).

168. Nathan, *China and the International Human Rights Regime*, *supra* note 31, at 148.

169. *Id.*

170. *Id.* at 149.

171. *Id.*

172. *Id.*

concessions,<sup>173</sup>—both direct and indirect—which were packaged “in such a way as to divide its critics.”<sup>174</sup> In the same vein, Chinese representatives “amplified [the] position that human rights are a valid subject of international dialogue, and within certain limits are a subject of international law, as long as there is no trespass on the internal affairs of states.”<sup>175</sup>

An analytical issue that merits close consideration is whether the Tiananmen Square Incident and its aftermath amounted to a “punctuated equilibrium,”<sup>176</sup> like a deep shock and profound lesson that subsequently transformed China’s fundamental human rights practices for the better. No compelling evidence is available to suggest that this result has been the case.<sup>177</sup> Rather, there has been modest and uneven improvement towards transforming China’s human rights practices, coupled with frequent setbacks.<sup>178</sup> The constructivist path, leading in a sequential but linear fashion from repression to rule-consistent behavior, has not been readily apparent in the aftermath of the Tiananmen Square Incident, although one may eventually validate the spiral-like model as the more appropriate path to this situation.<sup>179</sup> The difficulty here lies in the fact that if a multi-decade perspective is adopted, then history may lend support to virtually any socio-legal proposition.

Crises, either of domestic origin or externally induced, are not the only events with the potential to punctuate the prevailing policy equilibrium. Positive initiatives and their impacts, which may substantially accelerate the pace of state adaptation to the content of the international human rights regime, are almost completely overlooked in writings on the subject. A notable example is the 2008 Beijing Olympics, which prompted the Chinese government to tread carefully in this domain to avoid precipitating a disruptive backlash at a delicate juncture.<sup>180</sup> Again, however, no marked shift in the evolutionary dynamics seems to have taken

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173. Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 640 (presenting a list of Chinese human rights concessions throughout the 1990s).

174. *Id.* at 641.

175. *Id.*

176. See HOWLETT, *supra* note 146, at 207–08 (describing that normal and atypical policy dynamics are connected in an overarching pattern of policy change that can be described as a “punctual equilibrium”).

177. See FRANK CHING, CHINA: THE TRUTH ABOUT ITS HUMAN RIGHTS RECORD 6–14 (2008) (outlining a series of topics since the Tiananmen Square Incident in which the Chinese government made egregious violations or significant progress).

178. *Id.*

179. See Risse, *supra* note 33, at 17–35 (developing a five-phase “spiral model” of human rights change by incorporating simultaneous activities into one framework).

180. See generally Massingdale, *supra* note 29; Minky Worden, *Overview: China’s Race for Reform*, in CHINA’S GREAT LEAP: THE BEIJING GAMES AND OLYMPIAN HUMAN RIGHTS CHALLENGES 25, 26 (Minky Worden ed., 2008) (discussing China’s commitment to major reforms for human rights improvement to secure Olympic host responsibilities); IMPACT OF 2008 OLYMPIC GAMES ON HUMAN RIGHTS AND LAW IN CHINA (John Garrison ed., 2009) (compiling a series of excerpted statements from the Congressional Executive Commission on China to determine if the 2008 Olympics brought any benefits, or any lasting benefits, to the Chinese people by enhancing human rights).

place in the following years.<sup>181</sup> It appears that a high degree of continuity or path dependency characterizes China's human rights practices.<sup>182</sup>

Path dependency should not be equated to an interrupted trend—flat or steep. The underlying trajectory may periodically adjust upward or downward. The Tiananmen Square Incident serves as a poignant reminder that the liberal-democratic vision of inexorable worldwide progress toward democracy, rule of law, and respect for human rights, as well as globalization, while laudable, may not be entirely realistic. Chinese history is replete with paradigmatic changes—some ushering in path dependency, while others brought policy oscillations.<sup>183</sup> One may detect secular trends, but these trends may not persist indefinitely, and they may overlap with cycles, either characterized by path-dependency—e.g., post-1978 reform era—or volatility—e.g., pre-1978 revolutionary period.<sup>184</sup> The presence of secular trends implies that the constructivist linear, spiral-like model of state adaptation to the content of the international human rights regime may need to be recalibrated to reconcile secular realities with cyclical ones,<sup>185</sup> as well as to accommodate more effectively the phenomenon of path dependency.

Even in domains where internal security and political survival are at stake, single events may have a far-reaching effect on policy direction. However, macro-level learning is typically a drawn-out process where outcomes are cumulative, and one may only observe the cumulation following a long gestation period.<sup>186</sup> This

181. See generally Massingdale, *supra* note 29.

182. See Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 183 (2001) (discussing that although China has signed numerous international human rights treaties, including the International Covenant on Civil and Political Rights, “the government continues to promote an Asian Values variant of human rights that challenges the universality of rights and exposes fundamental differences in the way rights are conceived and the purposes they are meant to serve”).

183. See Andrew J. Nathan, *Policy Oscillations in the People's Republic of China: A Critique*, 68 CHINA Q. 720, 720 (1976) (arguing that the assumption of Chinese policy since 1949 has been characterized by a pattern of left-right oscillations is under-examined, and only convenient for summarizing). *But see* Edwin A. Winckler, *Policy Oscillations in the People's Republic of China: A Reply*, 68 CHINA Q. 734, 734–50 (1976) (providing arguments against Nathan's policy oscillations arguments and finding that his analysis goes “too far”). *See also* Lawrence C. Reardon, *Learning How to Open the Door: A Reassessment of China's “Opening” Strategy*, 155 CHINA Q. 479, 479–511 (1998) (examining the development of three major foreign economic policy initiatives as part of China's “Open Strategy” which resulted from two decades of interaction with the global economy).

184. See Nathan, *Policy Oscillations in the People's Republic of China: A Critique*, *supra* note 183, at 720 (acknowledging that since 1949 there have been secular changes in China both in what has been accomplished and in the terms of policy debate); Winckler, *supra* note 183; Reardon, *supra* note 183.

185. For such an attempt, see SANDHOLTZ & STILES, *supra* note 35.

186. See HOWLETT, *supra* note 146, at 179–80 (describing that the overall process of policy learning generates an educational dynamic to stimulate policymakers to deliberate assessment of how past stages of the policy cycle affected both the original goals adopted by governments and the means implemented to assess them). *See also* HUGH HECLLO, MODERN SOCIAL POLITICS IN BRITAIN AND SWEDEN: FROM RELIEF TO INCOME MAINTENANCE 306 (1974) (stating that a

premise serves as the basis for perhaps the most illuminating work on China's adaptation to the content of the international human rights regime, touching on occasional upheavals and moments of deep, positive engagement on a global scale, but mostly focusing on ongoing socialization and learning over extended stretches of time.<sup>187</sup>

The studies in question cover developments preceding and well beyond the 1989 crisis. The studies provide insights into Chinese adaptation in international forums such as the U.N. Commission on Human Rights,<sup>188</sup> the U.N. Sub-Commission on Human Rights,<sup>189</sup> torture-related treaty bodies and Special Rapporteurs,<sup>190</sup> the International Labor Organization,<sup>191</sup> the 1993 U.N. World Human Rights Conference held in Vienna and its aftermath,<sup>192</sup> the U.N. Committee Against Torture,<sup>193</sup> and, eclectically, almost the entire international human rights space,<sup>194</sup> including healthcare.<sup>195</sup>

The core writings present considerable evidence supporting the notion of a potential causal linkage between participation in the international human rights

review of social policy development suggests the “fruitfulness of viewing politics through the concept of learning”); Peter Hall, *Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain*, 25 COMP. POL. 275, 279 (1993 (examining macroeconomic policy-making in Britain between 1970 and 1989 and arguing that a broad concept such as social learning needs to be examined in many contexts).

187. See generally KENT, THE LIMITS OF COMPLIANCE, *supra* note 32 (analyzing China's compliance with international treaty obligations, China's gradual socialization through interaction with treaty bodies, and China's preparedness to moderate its urge to independence in response to contemporary pressures for political and economic interdependence); KENT, BEYOND COMPLIANCE, *supra* note 32 (examining China's overall compliance levels and attitudes from the Cold War to the mid-2000s). See also Jacobs & Potter, *supra* note 32 (analyzing China's compliance with international health and human rights obligations after the outbreaks of SARS and HIV/AIDS by advancing a “selective adaptation” paradigm); Chen Ding, *supra* note 32 (exploring China's international identity transformation and expansion in international human rights regimes since the late 1970s).

188. See KENT, THE LIMITS OF COMPLIANCE, *supra* note 32, at 49–83 (analyzing China's interest in the U.N. human rights bodies before and after the Tiananmen Square Incident).

189. See *id.*

190. See *id.* at 84–116 (providing context and an analysis of the evolution of China and the practice of torture).

191. *Id.* at 117–45 (providing a discussion regarding the relationship between the International Labor Organization and China and how the organization has monitored China's human rights); KENT, BEYOND COMPLIANCE, *supra* note 32, at 183–202.

192. See KENT, THE LIMITS OF COMPLIANCE, *supra* note 32, at 170–231 (providing a discussion regarding the relationship between China and the U.N. World Human Rights Conference at Vienna).

193. See KENT, BEYOND COMPLIANCE, *supra* note 32, at 202–16 (describing the U.N. Committee Against Torture as one of two treaty bodies in place to monitor states' actions to ensure they abstain from torture).

194. See generally Chen Ding, *supra* note 32, at 418 (arguing that since 1978 China has expanded its participation in international human rights by focusing on the identity transformation that continues to advance).

195. See generally Jacobs & Potter, *supra* note 32, at 13–15 (analyzing China's compliance with international health and human rights obligations after the outbreaks of SARS and HIV/AIDS by advancing a “selective adaptation” paradigm).

regime and behavior increasingly consistent with its content, with socialization and learning playing crucial roles in the complicated multiyear process.<sup>196</sup> It should be noted that one should not view adaptation in this context, as merely an abstract concept reflected in hidden or unobservable attitudes, but as a concrete concept with manifestations such as legislative and institutional implementation, compliance, and cooperation.

Reassuringly, no one has presented an overly simplistic picture of a large and proud nation being irresistibly drawn into the international liberal-democratic mainstream. Rather, the authors portray China as a country that is selectively socialized, or one that absorbs certain external stimuli, filtering others. Alternatively, in relevant theoretical terms, Chinese learning of the content of the international human rights regime appears to have followed two paths: one is cognitive and normative and the other is adaptive and instrumental.<sup>197</sup> Therefore, the force that has pulled China, a previously recalcitrant player, toward the global arena's ideational center may have been a combination of the former—an acceptance of the system's intrinsic values—and the latter, an adoption of hard-nosed tactical considerations. Also, China seems not to have confined itself to the passive role of a rule taker or “docile pupil.” Additionally, it has operated as an active rule maker—“assertive teacher”—endeavoring to influence the evolution of the international human rights regime.<sup>198</sup>

No one can claim another country's adaptation to this crucial system's content has been explored as painstakingly or methodically. Nevertheless, rejecting complementary and explanatory schemes for constructivist, TLPT-style schemes, is a problematic strategy. First, correlation does not imply causation. Historical analysis, even if it is longitudinal in nature, is not akin to a controlled laboratory experiment. Participation in the international human rights regime may have increased in tandem with acceptance of the international human rights regime's

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196. See KENT, *THE LIMITS OF COMPLIANCE*, *supra* note 32, at 2 (describing that China's participation in the international human rights regime provides evidence of its readiness to accept political interdependence). See also ALASTAIR I. JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS 1980–2000* 145 (2008) (stating that social influence and identity language will lead China to incorporate civil and political liberties for each individual because today's society stresses respect for human rights).

197. See KENT, *THE LIMITS OF COMPLIANCE*, *supra* note 32, at 240 (arguing that China has experienced organizational learning in the human rights regime in an instrumental or adaptive sense, but the alternative is a cognitive sense, exhibited in China's conscious incorporation of international standards in its domestic level of legal implementation).

198. See *id.* (“Strategically, China strategically realized that to avoid becoming a loser in the serious game of human rights, it had to reassert its initiative and leadership and establish its own human rights priorities, with which to attract the Third World and debate the First and Second.”). See also Alastair I. Johnston, *Learning versus Adaptation: Explaining Change in Chinese Arms Control Policy in the 1980s and 1990s*, 35 *CHINA J.* 27, 29–30 (1996) (analyzing whether China's arms control policy is more consistent with adaptive explanations, proposing that much of policy activism is a result of a basic shift in how China understands its role of arms control or learning explanations, evidencing changes that reflect a recalculation of the means to avoid placing China's capabilities on the arms control tables).

content, without being a principal determinant for acceptance. Participation may have merely been an intervening and mediating factor, amplifying the effect of other, more potent variables.

Competing conceptions of policy learning lie at the heart of this inevitable question. At one end of the theoretical continuum, there are scholars who lean toward the position that policy learning is an endogenous process in the course of which a deliberate attempt is made to adjust the goals or techniques of policy in the light of the consequences of past policy and new information so as to better attain the ultimate objects of governance.<sup>199</sup> At its other end, there are those scholars who prefer the view that policy learning is an exogenously-shaped experience, influenced by forces emanating from the external environment.<sup>200</sup>

The former stance is closer to rationalist formulations—realism and institutionalism in their various incarnations—and the latter to constructivist, TLPT-style ones. It is difficult to determine precisely the degree to which endogenous or exogenous factors drive Chinese adaptation to the international human rights regime's content. However, there is reason to believe that endogenous factors may have played a vital role in the policy dynamics. For instance, in roughly the past three decades, perhaps China's most critical decision—to loosen the reins on the human rights front, or shift from hard to soft authoritarianism, following the rolling out of the Open-Door Strategy in the late 1970s—was internally induced.<sup>201</sup>

Second, the balance between instrumental and normative learning is a relevant issue. If the former persists for a long time and on a large scale, then instrumental learning may dovetail more closely with rationalist interpretations than with ones grounded in constructivist, TLPT-style logic. From the perspective of the analytical framework underpinned by the latter, notably the spiral-like model, normative learning becomes paramount in some finite time period.<sup>202</sup> It arguably remains a moot point whether China's human rights practices in the past thirty years lend greater credence to a particular school of thought. Evidently, and this is a recurring theme, scholarship needs a synthesis of the different approaches.

The third problem is the unavoidably narrow foundation of the Chinese human rights TAN. The picture may vary from one policy realm to another, but in this particular sphere, the key players appear to be states and international organizations, the latter of which can also be said to be dominated by states. The non-state-affiliated actors—for example, intellectuals and civil society, including

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199. See Hall, *supra* note 186, at 277–78 (discussing the focus of learning and its effect on policy changes, including attainable goals in a particular field, the methods employed to achieve those goals, and the instrument settings).

200. See HECLO, *supra* note 186, at 306 (“[A] great deal of policy development . . . has been settled prior to or outside of substantial exercises of power”).

201. See Nathan, *Human Rights in Chinese Foreign Policy*, *supra* note 32, at 630–31 (explaining that China had previously ignored internal human rights violations until the late 1970s when the State's human rights conditions began to improve).

202. See Risse, *supra* note 33, at 21 (suggesting that during period of 1973 to 1990, and especially after 1985, the world began a process of a genuine international “norms cascade”).



NGOs—are occasionally referred to in passing.<sup>203</sup> Yet, the literature on the subject conveys the impression that they occupy peripheral positions in the network. Is this impression to some extent due to power asymmetries, such as China’s relative size, resource capabilities, steely determination, enormous pressure, and international status? Moreover, who exactly are the norm entrepreneurs and sponsors? Similarly, how precisely are norms diffused through the TAN? More research may be required to shed light on these matters and draw clearer inferences regarding the weight to be accorded to the individual components of the available and possibly new paradigms.

The fourth difficulty encountered in seeking such a resolution stems from the elusive nature of concepts like “legislative and institutional implementation” and “compliance and cooperation.” The ongoing controversy with respect to the Chinese human rights record, where some observers see the proverbial glass as half full, attests to the challenges faced by scholars and policy-makers when they seek to determine a taken action’s effectiveness and extent of progress made. Scholars have highlighted some of the ambiguities involved in broadly similar circumstances in the environmental protection field.<sup>204</sup> In turn, these highlights have advised socio-legal researchers to exercise greater caution, or to follow more methodologically robust strategies to arrive at theoretical generalizations regarding state adaptation to the international governance regime’s content.<sup>205</sup>

Another constructivist, TLPT-style proposition that some have elaborately explored in this context is the existence of a positive relationship between participation, identity formation, and rule-consistent behavior.<sup>206</sup> Specifically, researchers have gathered considerable evidence to suggest implicitly that China’s involvement in international governance regimes, including the human rights variant, has fostered a sense of global responsibility. In other words, the experience gained in the process has been instrumental in shaping its identity as a “responsible power.” In turn, this sense of global responsibility has led to a closer adherence to regime content than would have otherwise been the case. While this is the core

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203. See, e.g., DEKLERCK, *supra* note 32, at 80–84 (explaining the roles of scholars and NGOs in the development of human rights and more democratic societies).

204. See Roda Mushkat, *Implementing Environmental Law in Transitional Settings: The Chinese Experience*, 18 S. CAL. INTERDISC. L.J. 45, 69–78 (2008) (noting that a lack of clear definitions within Chinese environmental law and an unavailability of a significant body of authoritative judicial precedents contribute to policy incoherence and ambiguity).

205. See generally Roda Mushkat, *China’s Compliance with International Law: What Has Been Learned and the Gaps Remaining*, 20 PAC. RIM L. & POL’Y J. 41, 41–69 (2011) (demonstrating that methodological robustness and theoretical elucidation are currently used ineffectively and the approach needs to be improved).

206. See generally CHAN, CHINA’S COMPLIANCE IN GLOBAL AFFAIRS, *supra* note 36 (discussing the idea of China’s responsibility based on its perceived responsibility in global affairs, its compliance with international rules, and its participation in international organizations). See also Chen Ding, *supra* note 32, at 418 (stating that China focused on identity transformation in shifting their participation in international human rights and focused on both active involvement in international organizations and improved relationships with Western powers).

argument, the causal chain is posited to run in the opposite direction as well, from identity to participation, and then once more to rule conformity.<sup>207</sup>

A commendable feature of the key work focused on this aspect of state adaptation to the international human rights regime's content and similar entities has been the reliance on quantitative indicators regarding exercise of responsibility and external involvement.<sup>208</sup> Researches have utilized measures such as membership in multilateral institutions, material contributions—human resources, money, and policy inputs—and willingness to act as host to headquarters and secretariats of such organizations.<sup>209</sup> Chinese performance has been satisfactory, insofar as membership is concerned, but mixed otherwise.<sup>210</sup> However, responsible conduct may be increasingly discerned,<sup>211</sup> which would have favorable implications for compliance.<sup>212</sup>

A minor caveat is that studies have empirically shown that involvement in an international governance regime, even if wide-ranging, does not necessarily amount to an unambiguous embracing of its letter and spirit.<sup>213</sup> Paradoxically, in certain circumstances, authoritarian countries may assume formal human rights commitments more willingly than their democratic counterparts because their rulers are aware that backtracking and renegeing through lax enforcement and non-enforcement is an available option in a political environment lacking adequate institutional constraints.<sup>214</sup>

More importantly, the problem of endogenous versus exogenous learning resurfaces. Was the decision to play a responsible power role taken internally, following an assessment of relevant strategic alternatives, or was the decision the natural outgrowth of progressively deeper immersion in international institutional life? Furthermore, is the responsible power identity the inevitable product of China's economic takeoff and military might, where power is the cause and identity is the effect, or are the driving forces external dynamics? Once again,

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207. See generally CHAN, CHINA'S COMPLIANCE IN GLOBAL AFFAIRS, *supra* note 36 (noting that China's participation in international organizations and its membership of international regimes and treaties serve as useful measures to gauge its global responsibility, but compliance with the international norms and rules that are embodied in these organizations regimes is a more refined measure of its global responsibility).

208. See *id.* at 43–57.

209. See *id.*

210. See *id.*

211. See *id.* at 33–61.

212. See *id.* at 63–76 (discussing various theories for state compliance including enforcement, managerialism, fairness theory, and reputational theory).

213. See generally Oona Hathaway, *Why Do Countries Commit to Human Rights Treaties*, 51 J. CONFLICT RESOL. 588, 588–631 (2007) (arguing that a state's willingness to commit to an international governance regime is determined by the domestic enforcement of it and its collateral consequences).

214. See BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 77–80 (2009) (discussing broadly the issue of commitment to an international governance regime and that some governments will gamble on ratification for benefits if those governments believe that, in the years to come, they will never be forced to fulfill their commitments to treaties).

ambiguities abound, highlighting the appeal of a multifaceted approach and the desirability of generating additional empirical insights.

The Chinese socio-political scene is interesting because the country is believed to have as many as four distinct identities rather than one, as is commonly hypothesized in the constructivist, TLPT-style literature.<sup>215</sup> There is the responsible world power image, but it seems to coexist with a still materially disadvantaged society whose allegiances ultimately lie with the developing South rather than the developed North. A third identity is that of a socialist system with unique, quasi-capitalist characteristics, and, lastly, a non-bureaucratic and Weberian milieu, where simple, culturally-inspired informal coordination mechanisms continue to overshadow elaborate, formal ones.<sup>216</sup>

These four identities have different origins, trajectories, strengths, and vulnerabilities.<sup>217</sup> Additionally, they do not necessarily coexist harmoniously.<sup>218</sup> A notable example is the persistent tension between the responsible world power image and the one reflecting a reluctance to abandon the global periphery from where China is at times spearheading the interests of developing countries.<sup>219</sup> As one identity crystallizes, another may recede into the background.<sup>220</sup> This is a matter that requires further exploration and a more intricate conception of the multidirectional learning process involved in state adaptation to the content of an international governance, human rights regime.

State identity is by no means a straightforward notion. Its proper examination is challenging without survey-based data which, understandably, is not widely available in the Chinese context. Even if the paucity of suitable empirical material did not pose practical difficulties, then knotty methodological questions that arise in multi-level analysis, involving individuals, groups, and the state, would have to be analyzed.<sup>221</sup> The corollary is that this study, too, is territory that should be

215. See ZHANG YONGJIN, *supra* note 56, at 282 (stating that China's four faces of identity evidence of a weak-strong mentality of China's policy makers).

216. *Id.* at 290.

217. See *generally id.* at 286–96 (discussing the various beginnings, strengths, and weaknesses of the four faces of China's self-identity).

218. See *id.* at 289 (explaining that China's roles in are re-conceived and its identity restructured by Chinese leaders and other intellectuals four differing and separate faces).

219. See *id.* at 294 (discussing two differing views of China's international role including one that suggests that China wants to be a "world power" through the democratization of international politics and relations, and a second view that states China's intent to be a responsible state).

220. See *generally* Yong Deng, *Escaping the Periphery: China's National Identity in World Politics*, in CHINA'S INTERNATIONAL RELATIONS IN THE 21<sup>ST</sup> CENTURY 41, 41–61 (Weixing Hu et al. eds., 2000) (broadly discussing China's changing identity and the notion that international identity can always be reconstructed suggesting that its current leadership may again reshape China's identity through a commitment to economic interdependence).

221. See MULTILEVEL ANALYSIS OF INDIVIDUALS AND CULTURES 14 (Fons J.R. van de Vijver et al. eds., 2008) ("The main methodological issues in aggregation and disaggregation are validity concerns in cross-level inferences, identifying structure in cross-cultural datasets, and developing a taxonomy of multilevel fallacies.").

approached from multiple theoretical perspectives and, at the present juncture, as part of an ongoing process of intellectual discovery.

#### IV. LEARNING THE CHINESE WAY: SECOND APPROXIMATION

The illuminating, but still evolving and not devoid of gaps, scholarly writings surveyed in the previous Part draw heavily on analytical generalizations about state behavior available in the international law and relations fields. Scholars have embraced few of these analytical generalizations and have rejected most for providing insufficient explanatory power. The former category primarily encompasses constructivism and TLPT, either considered separately or in tandem. The narrative-centered review undertaken suggests that: (1) following this rather narrow path is not entirely productive, and (2) it would be more fruitful to seek to achieve a measure of synthesis across the fragmented conceptual space consisting of several schools of thought.<sup>222</sup> In addition, scholarship may need to expand the constructivist, TLPT-style agenda, both theoretically and empirically, to gain a better understanding of the socialization and learning experienced by China on the human rights front.

Concerns dominating analytical discourse in international law and international relations cannot sufficiently guide research agenda enhancement. Scholarship needs somehow to harmonize those concerns with conceptual perspectives consistently brought to bear on Chinese politico-economic realities. More often than not, these perspectives do not significantly rely on realist and constructivist, TLPT-style formulations to shed light on China's development, including the country's responses to an array of external stimuli, or adaption in the global arena. Thus, it may prove rewarding to identify key themes in the literature employing those cultural perspectives and derive from them relevant criteria to pursue further inquiry via a systematic review—distinct from a narrative-based review—of the studies surveyed in the previous Part, along with related academic work that has been afforded insufficient attention.

Over the past thirty years, Chinese officials have principally geared their domestic and international strategies toward maximizing economic growth and attaining deep integration into the global economy.<sup>223</sup> This policy paradigm euphemistically has been referred to as “GDPism.”<sup>224</sup> It follows that, while not the sole frame of reference, theoretical insights, which underpin scholarly efforts to shed light on the internationalization of China's formerly closed economic system, are more logical starting points for the exploration of China's adaptation to externally originating governance regimes, including the human rights edifice, than

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222. See generally JIANRONG HUANG, *THE DYNAMICS OF CHINA'S REJUVENATION* (2004).

223. See generally Kinglun Ngok, *Redefining Development in China: Towards a New Policy Paradigm for the New Century?*, in *CHANGING GOVERNANCE AND PUBLIC POLICY IN EAST ASIA* 49 (Ka H. Mok & Ray Forrest eds. 2009) (describing a unilateral market-oriented economic reform by all levels of the Chinese government that calls for a more comprehensive development).

224. See *id.* at 54–56 (colloquializing a policy paradigm of unilateral economic growth as “GDPism”).

those concepts that constitute the core of the international law and international relations mainstream, including realism despite its “materialistic” orientation. This brings us back to the issue touched upon earlier of subsystem spillovers, from one sector to another: the economy to human rights.

From multiple viewpoints, ranging from bottom-up to top-down and external to internal, analysts have examined the absorption of the Chinese economic system into its global counterpart.<sup>225</sup> Specifically, sinologists have studied bottom-up forces independent of the state and multilateral organizations; top-down forces emanating from the latter, institutional milieu; forces exerting influence from outside, a category including international governance regimes; and forces operating within the domestic political system. Influences originating from all four sources have been methodically looked at as catalysts for integration and impediments to it—i.e., positive and reinforcing elements in opposition to negative and antagonistic elements.<sup>226</sup>

Sinologists have borrowed some of the political economy approaches inspiring this conceptual undertaking without substantial modification. These approaches include the neoliberal,<sup>227</sup> network capital,<sup>228</sup> East Asian developmental state,<sup>229</sup> and regulatory control<sup>230</sup> explanatory schemes. Respectively, they emphasize the role played by purveyors of international capital,<sup>231</sup> overseas Chinese business community—“Diaspora capitalism”<sup>232</sup>—modernization-oriented, rather than “rent-seeking,” local bureaucrats,<sup>233</sup> administrative constraints, and

225. See generally DAVID ZWEIG, *INTERNATIONALIZING CHINA: DOMESTIC INTERESTS AND GLOBAL LINKAGES* 2–3 (2002) (asserting that, since 1978, China has become engaged in global commerce marked by gradual changes with regulatory controls). See also David Zweig & Chen Zhimin, *Introduction: International Political Economy and Explanations of China’s Globalization*, in CHINA’S REFORMS AND INTERNATIONAL POLITICAL ECONOMY 1, 12–15 (David Zweig & Chen Zhimin eds., 2007) (stating that there is a continuum reflecting the extent to which China has chosen to integrate globally under its own volition and the extent to which China succumbed to external pressure).

226. See Zweig & Zhimin, *supra* note 225 (discussing the various quadrants of internal and external forces and their effect on integration and regulation).

227. See ZWEIG, *supra* note 225, at 11–12 (discussing the neoliberal explanations for any effects international forces may or may not have on domestic behavior).

228. See *id.* at 13–14 (stating that network capitalism is sensitive to international forces particularly in regards to the global economy).

229. See *id.* at 12–13 (explaining that in using the East Asian model of development, if the state maintains a close yet independent relationship with domestic economic interests then they will be able to avoid bureaucrat rent-seeking behavior).

230. See *id.* at 8–11 (discussing the regulations in place for the control of transnational exchanges and the political institutions that limit internationalization).

231. See *id.* at 11–12 (“[D]ecreases in the costs or increases in the rewards of international exchange change . . . the relative prices of resources and create new opportunities for domestic actors who push for liberalization, regardless of the regime’s domestic structure”).

232. See *id.* at 13–14 (explaining that overseas Chinese business networks that have facilitated East Asia’s economic dynamism and China’s global economic linkages play essential roles in the network capital model).

233. See ZWEIG, *supra* note 225, at 12–13 (stating that the East Asian model of

“separation fences,” introduced by the government to manage transnational exchanges, which tend to have a life of their own.<sup>234</sup>

Five factors have supplemented the theoretical imports: (1) homemade perspectives that focus on political bargaining and particularistic contracting between the central leadership and coastal and provincial elites—the latter are advocates of integration and gain from it,<sup>235</sup> (2) bureaucratic resistance of the mercantilist and nationalist variety, contrary to the prescriptions of the East Asian developmental state model,<sup>236</sup> (3) cyclical forces, such as overstimulation of the economy resulting in overheating and a subsequent shift into a restrictive mode,<sup>237</sup> (4) local initiatives favoring opening up and integration,<sup>238</sup> and (5) persistent erosion of (i) domestic regulatory mechanisms as a consequence of growing foreign economic penetration and (ii) autonomy because of greater scope to establish wholly-owned subsidiaries rather than predominantly relying on joint ventures with Chinese partners.<sup>239</sup>

It is important to highlight the internal dynamics for two reasons. First, notwithstanding China’s dramatic post-1978 opening up, China is a large and proud nation—“Middle Kingdom”—which remains highly susceptible to domestic influences.<sup>240</sup> Second, the practice of heavily stressing the critical input of the international “socialization community,” which is not uncommon among proponents of constructivism, TLPT, runs the risk of painting an overly optimistic, and partially unrealistic picture. Acknowledgment of both the positive and negative complexities of the home front may assist in maintaining a sense of delicate balance.

Indeed, Chinese policy process models have unambiguously leaned toward the domestic side of the equation for a long time.<sup>241</sup> A wide array of such analytical

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development labels bureaucrats as promoters of development and industrialization rather than rent-seekers).

234. *Id.* at 8–11.

235. *See id.* at 15–16 (arguing that the political bargaining model has been persuasive beyond the China field and that through particularistic contracting, China’s central elites have, in return for aid in impending political battles, allowed selective coastal leaders connect with the global economy).

236. *See id.* at 16 (discussing how while China’s elites have been mercantilist, and that local and international pressures may contribute to China’s continuing loosening of control over global transactions).

237. *See id.* (describing the effects that decentralized control of global transactions can have on future domestic and international commerce and resource exchanges).

238. *See id.* at 15–16 (asserting that each locality offers to dismantle administrative constraints in its region to attract foreign investors).

239. *See* ZWEIG, *supra* note 225, at 16 (stating that the regulatory regime is breaking down because instead of being required to enter into ventures with Chinese partners, foreign businesses began to establish wholly owned companies).

240. *See* FLEMMING CHRISTIANSEN & SHIRIN M. RAI, CHINESE POLITICS AND SOCIETY: AN INTRODUCTION xiii (1996) (arguing that the Chinese have both originated and rejected interaction with the other states by fighting against with outside notions and pressures).

241. *See id.* at 2–24 (highlighting broadly the most important models and conceptual frameworks for analyzing China).

vehicles has been generated.<sup>242</sup> Some may have outlived their usefulness, for historical or structural reasons. However, a number continue to be regularly invoked and applied in key sectors of government activity.<sup>243</sup> Those that definitely remain in vogue include conceptual constructs that focus on cultural—particularly Confucian—legacy,<sup>244</sup> elite conflict and factionalism,<sup>245</sup> clientalism, or links between factions and their clients,<sup>246</sup> interest groups, their proliferation, influence, divergence, and conflict,<sup>247</sup> semi-autonomous but not cohesive civil society,<sup>248</sup> institutional fragmentation,<sup>249</sup> and decision-making style.<sup>250</sup>

Two of these models may require further elaboration. The fragmented authoritarianism construct pinpoints the loose horizontal and vertical links that connect the manifold segments of China's institutional façade.<sup>251</sup> The distinctly weak organizational integration, in turn, renders policy formulation and implementation a highly intricate and painfully slow bargaining exercise, which often produces unexpected, unintended, and not entirely effective outcomes.<sup>252</sup>

242. *See id.* at 1–24 (describing various models, from clientalism to the political economy approach, utilized in order to study the Chinese political system); Huang Jianrong, THE APPLICABILITY OF POLICY MAKING THEORIES IN POST-MAO CHINA 59–103 (1999) (reviewing the Sinologists' policy models, which detail integral components in China's policy development).

243. *See* CHRISTIANSEN & RAI, *supra* note 240, at 4–5 (referring broadly to factionalism models and the models used in analyzing leadership conflicts). *See also* Jianrong, *supra* note 242, at 69–72, 78–80, 92–96 (citing various models, including power-conflicts-oriented model, interest group model, and model stresses the effects of bureaucratic structures).

244. CHRISTIANSEN & RAI, *supra* note 240, at 20–23 (stating cultural interpretations, particularly Confucianism, are often utilized to understand Chinese policy).

245. *Id.* at 4–5. *See* Jianrong, *supra* note 242, at 69–72 (discussing the power-conflicts-oriented model, focusing on the conflicts between China's elite class, the factions that are ultimately created within this model, and the goals of those factions).

246. *See* CHRISTIANSEN & RAI, *supra* note 240, at 5–9 (discussing clientalism, its major features, and how it aids in the comprehension of Chinese politics).

247. *See id.* at 12–15 (explaining the interest group model, its focus on people's assertion of interests to influence politics, and its recognition of society's heterogeneous organization); Jianrong, *supra* note 242, at 78–80 (discussing interaction among China's widespread socio-economic groups and the influence those interactions have on Chinese policy making processes).

248. *See* CHRISTIANSEN & RAI, *supra* note 240, at 15–16 (asserting that civil society plays a large role in carrying out political action and it may be beneficial to evaluate social standing independent of the state itself to allow for it to influence policy).

249. *See id.* at 19–20 (discussing complex bureaucracies model in which there exists a fragmentation between the processes of decision-making and state power, whereby each bureaucratic institution forms alliances and enemies in order to develop policies). *See also* Jianrong, *supra* note 242, at 92–96 (reviewing China's bureaucratic structure, the different groups of authority within that structure, and the effect that policy change has on fragmentation).

250. *See* Jianrong, *supra* note 242, at 104–42 (exploring various theories that evaluate how Chinese policy should be crafted).

251. *Id.* at 92. *See* CHRISTIANSEN & RAI, *supra* note 240, at 19–20 (referencing complex bureaucracies model, its complexity, and the effect it has on decision-making processes).

252. CHRISTIANSEN & RAI, *supra* note 240, at 19. *See* Jianrong, *supra* note 242, at 96 (evaluating the fragmented authoritarian model as requiring broad negotiations and bargaining, which some suggest provides evidence that this model is insufficient).

Decision-making style, in this context, refers to whether Chinese policy makers typically proceed in a rational-comprehensive fashion, less systematic—by merely aiming at results that are good enough or following a satisfying pattern—manner, or in accordance with the “garbage can” model, which features “organized anarchy” that is comprehensive rationality’s polar opposite in that choices are not made on the basis of clearly defined and shared goals and procedures.<sup>253</sup>

Such theoretical extensions arguably provide a robust platform for seeking additional avenues to gain a broader and deeper understanding of China’s adaptation to the content of the international human rights regime. Unfortunately, as matters stand, there is a rather modest foundation to build upon because this remains lightly explored territory. One serious gap is the lack of sufficient, let alone solid, information about the structure of the Chinese human rights regulatory apparatus. There are illuminating surveys of the entire legal system,<sup>254</sup> defense establishment,<sup>255</sup> foreign policy-making machinery,<sup>256</sup> and police force,<sup>257</sup> but not specifically of the human rights regime. This means, for example, that it is difficult to determine how centralized or decentralized, or how cohesive or fragmented the structure is, a pivotal issue in institutional socialization and learning investigations.<sup>258</sup>

Given such constraints, for purposes of a systematic literature review, it is necessary to be selective, or strictly driven by the available body of academic work, however limited. Three relevant areas have been studied on a scale that allows at least tentative generalizations regarding further determinants of China’s adaptation to the content of the international human rights regime: ample and growing foreign investment—neoliberal claims with respect to the impact, positive for the most part, of activities of purveyors of international capital or, more broadly speaking, foreign businesses; elite factionalism; and decision-making style, including special reference to incrementalism and path dependency. The

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253. See Jianrong, *supra* note 242, at 104–07, 123–28 (discussing broadly the use and effectiveness of the rationalism theory and the garbage can theory).

254. See generally PEERENBOOM, *supra* note 1, at 126–87 (reviewing the current state of the legal system within China); JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION (2008); CHEN, *supra* note 2.

255. See generally John Frankenstein & Bates Gill, *Current and Future Challenges Facing Chinese Defence Industries*, in CHINA’S MILITARY IN TRANSITION 130, 130–63 (David Shambaugh & Richard H. Yang eds., 1997) (discussing the effects that socio-economic change has on overall security development and environment and the challenges that the Chinese military will have to overcome in the future).

256. See generally Ning, *supra* note 57 (discussing broadly Chinese decision-making policies, the overall structure, and the four components of leadership that influence policy making).

257. See generally KAM C. WONG, POLICE REFORM IN CHINA 71–117 (2012) (articulating numerous studies on policing, police reform, public safety, and public relations, while also setting forth the goals in changing the policy and culture of Chinese policing).

258. See, e.g., Stanton Wheeler, *The Structure of Formally Organized Socialization Settings*, in SOCIALIZATION AFTER CHILDHOOD: TWO ESSAYS 81–83 (1966) (discussing the difficulty in examining patterns of interactions between recruits and agent to determine the type of authority relationship that exists and how crucial social climate is in understanding organizations of people).



writings on the subject are thus revisited in this Part with a view to establishing the dimensions of the influence of those factors, which constitute the *ex ante* criteria guiding the narrowly targeted survey.

The neoliberal angle is rather intriguing. On the face of it, one might be inclined to assume that the presence of businesses from countries with democratic institutions, coupled with the rule of law, would be conducive to the development of political competition and political participation—the two primary attributes of polyarchal systems—putting aside momentarily the question of human rights. Yet, this is a controversial issue in the Chinese context because of the contention that, unlike elsewhere in East Asia, the heavy reliance on foreign investment has impeded the emergence of a large and assertive local bourgeoisie and has thus indirectly retarded the transition to democracy.<sup>259</sup>

This position has not been explicitly challenged, but propositions with different implications have been articulated. Notably, it has been argued that large-scale penetration by foreign investment has inevitably undermined state sovereignty and control.<sup>260</sup> This has had the effect of facilitating the growth of semi-autonomous pockets of political activity and loosening the overall power structure.<sup>261</sup> The resulting configuration by no means amounts to a fully-fledged democratic structure, but it may correspond to a pattern portrayed as authoritarian pluralism.<sup>262</sup>

Similar ambivalence has been displayed with respect to human rights where, on the business front, the appropriateness of economic and social practices looms large, and the issue of civil and political liberties cannot always be entirely avoided.<sup>263</sup> The image of foreign investment has traditionally not been favorable because “the word ‘sweatshop’ immediately comes to mind.”<sup>264</sup> The perception of the expatriate, mostly Western manager has also largely been negative: “Who is this loathsome creature who has traveled to a distant land to take advantage of the unfortunate Chinese workers?”<sup>265</sup> Both views have moderated as a shift has taken

259. Mary E. Gallagher, *Reform and Openness: Why China’s Economic Reforms Have Delayed Democracy*, 54 *WORLD POL.* 338, 345–46 (2002).

260. See MARGARET M. PEARSON, *JOINT VENTURES IN THE PEOPLE’S REPUBLIC OF CHINA: THE CONTROL OF FOREIGN DIRECT INVESTMENT UNDER SOCIALISM 199–224* (1991) (arguing foreign investment schemes forced China’s government to loosen, even slightly, its overall controls under socialism).

261. *Id.*

262. See, e.g., Robert A. Scalapino, *Political Trends in Asia and their Implications for the Region*, in *ASIA AND THE MAJOR POWERS: DOMESTIC POLITICS AND FOREIGN POLICY* 365–84 (Robert A. Scalapino et al. eds., 1988) (explaining authoritarian pluralism as an elitist-centered, restrictive political order combined with social and economic institutions, which have different degrees of independence).

263. See SANTORO, *PROFITS AND PRINCIPLES*, *supra* note 32, at 87 (stating Chinese citizens are beginning to recognize and demonstrate their civil liberties); SANTORO, *CHINA 2020*, *supra* note 32, at 5 (discussing the increasing focus “Westerners” place on China’s overall human rights development).

264. SANTORO, *PROFITS AND PRINCIPLES*, *supra* note 32, at 1.

265. *Id.*

place “[fr]om the [s]weatshop to the [o]ffice [s]uite,”<sup>266</sup> and greater familiarity has been gained with actual conditions on the ground, but a residue of ambiguity and unease continues to linger.<sup>267</sup>

Beyond popular images, valid or otherwise, from an analytical perspective, a distinction has crystallized between foreign businesses whose strategy in China is geared toward cost minimization and those engaged in market building.<sup>268</sup> The former may be involved, indirectly if not consciously, in labor abuses, a problem aggravated by widespread subcontracting, which diffuses moral responsibility for such transgressions.<sup>269</sup> The latter tend to promote human rights selectively: “Whereas the pressures of globalization tempt cost-minimizing firms to abuse the human rights of workers, an entirely different set of forces emanating from the same global economy compels market-building companies to invest in training their workers to assume managerial roles.”<sup>270</sup> Or, to express it more succinctly, “the forces of globalization compel multinational companies [MNCs] that want to capture market share in China to do good in order to do well.”<sup>271</sup>

The corollary is that the “spin-off hypothesis,” which states that when MNCs conduct business in developing countries, they indirectly help to improve local human rights practices, or that there is an inevitable human rights spin-off from their normal day-to-day operations, should be qualified.<sup>272</sup> This is a delicate balancing act rather than a steady movement in one direction.<sup>273</sup> Nevertheless, the pendulum appears to be swinging toward the positive end of the ethical continuum because the appeal of the cost-minimization strategy, in terms of advantages versus disadvantages, seems to be diminishing over time due to market-based changes that are structural in nature, escalating costs being merely one of them.<sup>274</sup> From a neoliberal standpoint, the Chinese economic environment may thus increasingly become a platform for doing more good than harm in the years ahead.<sup>275</sup>

Elite factionalism remains rife, but is frowned upon, and defiantly is said not to exist in China.<sup>276</sup> This phenomenon is believed to stem partly from cultural

266. *Id.*

267. *See id.* at 1–12 (articulating while many examples concerning the working conditions within China, which are at the hands of Western corporations are obvious, such conditions are often evolving, leaving room for ambiguity).

268. *See id.* at 13–32 (stating corporations that focus on market building construct more hospitable atmospheres, wherein workers actively participate in creating favorable work environments).

269. *Id.* at 18–21.

270. SANTORO, PROFITS AND PRINCIPLES, *supra* note 32, at 28.

271. *Id.*

272. *See id.* at 33–71 (discussing the theoretical and broad foreign policy consequences of the human rights “spin-off” hypothesis, particularly concerning relations with the United States).

273. *Id.*

274. *See generally* SHAUN REIN, THE END OF CHEAP CHINA: ECONOMIC AND CULTURAL TRENDS THAT WILL DISRUPT THE WORLD (2012).

275. *See generally* SANTORO, CHINA 2020, *supra* note 32.

276. *See* Lucian W. Pye, *Factions and the Politics of Guanxi: Paradoxes in Chinese Administrative and Political Behaviour*, in THE NATURE OF CHINESE POLITICS: FROM MAO TO JIANG 38–57 (Jonathan Unger ed., 2002) (stating that China, across numerous eras, has been

roots: “Chinese political cultures have made the very idea of factions an abomination.”<sup>277</sup> The reason lies in the fact that “[h]onest officials were never supposed to band together, and any hint of the existence of factions was taken as a sign of trouble for the political system.”<sup>278</sup> This attitude is thought to be at variance with that in other countries, where “factions have a normal, even honoured, place in politics.”<sup>279</sup> By contrast, “in China there is a general conspiracy either to deny their existence or to denigrate opponents by calling them a faction.”<sup>280</sup> The cultural taboo against factions is anathema to advocates of competitive politics, but it “is far too strong to be . . . easily wished away.”<sup>281</sup> As noted by a leading observer of the Asian psycho-social landscape:

It is a profound taboo because it is encased in an even stronger taboo, that against giving any legitimacy to *guanxi* [instrumental reliance on social connections]. The need to pretend that factions do not exist, or that they are only the mischief of bad officials, is fundamentally related to the profound ambivalence that Chinese have about *guanxi*. They know that they have to use it, but they also have a deep sense of shame over that need.<sup>282</sup>

It is often asserted that such similar influences notwithstanding, the scope and intensity of factional politics has significantly declined during the reform era.<sup>283</sup> Several have challenged this claim by showing that the reverse has in fact been true.<sup>284</sup> According to this position, factions have ceased being almost exclusively focused on particularistic interests of elite members and have turned their attention to a wider range of policy issues.<sup>285</sup> The corollary is that there are more questions over which opinion is potentially divided, and thus, there is greater factional diversity.<sup>286</sup> A somewhat contrarian view put forward at the height of the debate on the subject is that the proliferation of issues is the cause and the multiplicity of factions is the effect,<sup>287</sup> but whether it is valid or not, the exact nature of the relationship is largely immaterial in this context.

The question faced here is whether factionalism, irrespective of how precisely the interaction with issues unfolds, impinges on China’s adaptation to the content

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reluctant to address rampant factionalism within its politics).

277. *Id.* at 48.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. Pye, *supra* note 276, at 48.

283. *See generally* Lowell Dittmer & Yu-Shan Wu, *The Modernization of Factionalism in Chinese Politics*, 47 *WORLD POL.* 467, 467–94 (1995).

284. *Id.* at 467.

285. *See id.* (stating factions have increased interest in broader economic and policy issues).

286. *See generally id.*

287. *See* JIN HUANG, *FACTIONALISM IN CHINESE COMMUNIST POLITICS* 28–29 (2000) (arguing Chinese politics are strongly divided, branching off into factions, and not the perceived united entity).

of the international human rights regime. “The Tiananmen Papers,” a rich collection of documents relating to the 1989 crisis, are a poignant reminder of how pervasive and vehement it may be.<sup>288</sup> The argument that it was an isolated incident is scarcely credible as the recent Bo Xilai scandal illustrates.<sup>289</sup> The overt manifestations of factional politics may be tightly managed, but it continues to flourish both below and above the visible surface, occasionally coming fully into the open and erupting violently.<sup>290</sup>

The Tiananmen Square Incident did not end up in a stalemate. The pro-change group was defeated and the pro-stability group won.<sup>291</sup> Subsequent years have been devoted to damage control, rebuilding the C.C.P., and shoring up its defenses.<sup>292</sup> Great sensitivity has been exhibited throughout this period to any expressions of dissent. A recent case in point was the reaction (“pre-emptive suppression”) to the aborted dissident-led Jasmine Revolution, which began to take shape and threatened to gain momentum in the wake of the Arab Spring.<sup>293</sup>

This serves to illustrate the importance of endogenous, as distinct from exogenous, learning rooted in the experience of the enormous faction-centered turmoil that nearly tore the C.C.P. apart and dislodged it from its position of undisputed power. Stability has been restored and maintained, but it is reasonable to assume that any broadly similar risks to the political status quo are assessed in light of that experience.<sup>294</sup> This implies that elite factionalism was and remains an element in the evolution of human rights policy, playing a negative restraining role

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288. See generally LIANG ZHANG ET AL., *THE TIANANMEN PAPERS* 1158 (2001) (exploring, in detail, the Chinese government’s decision to engage with massive force to quell protestors at Tiananmen Square, and its relationship to factionalism).

289. Bo was an audacious and high-profile C.C.P. politician who rose to the top layers of the party structure and abruptly fell from grace under suspicious circumstances. *The Bo Xilai Case: Shattering the Façade*, *THE ECONOMIST* (Apr. 14, 2012), <http://www.economist.com/node/21552575>.

290. See HUANG, *supra* note 287, at 23 (stating when one faction is challenged, often a “ruthless showdown of power” occurs); Pye, *supra* note 276, at 48 (articulating while Chinese society strives to hide the existence of factions, factions permeate and struggle throughout Chinese politics).

291. See generally LIANG ZHANG, *supra* note 288 (stating the overall events of the Tiananmen Square Incident led to defeat of student-led “radicals” and triumph of Communist government forces).

292. See generally *DAMAGE CONTROL: THE CHINESE COMMUNIST PARTY IN THE JIANG ZEMIN ERA* (Wang Gungwu & Zheng Yongnian eds., 2003).

293. See Steven W. Mosher, *The Chinese Government and the Management of Dissent*, *SECOND LINE OF DEFENSE FORUM* (June 15, 2011), <http://www.sldforum.com/2011/06/the-chinese-government-and-the-management-of-dissent/> (stating in the beginning stages of the Jasmine Revolution, China’s government immediately reacted with military initiatives to quiet dissenters).

294. See SANTORO, *CHINA 2020*, *supra* note 32, at 1–19 (discussing the impact such turmoil has on foreign business opportunities within China). See generally *THE IMPACT OF CHINA’S 1989 TIANANMEN MASSACRE* (Jean-Philippe Béja ed., 2011) (surveying political, economic and social effects of the Tiananmen Incident and how such effects continue to permeate throughout China).

in the process.<sup>295</sup>

Decision-making style is emerging as a theme in the field of international law, where it is relied upon to assess the implications of a gradual, stepwise approach to addressing problems such as international bankruptcy,<sup>296</sup> global law making,<sup>297</sup> global public procurement,<sup>298</sup> and global warming.<sup>299</sup> The post-1978 Chinese leadership, belying the notion that institutional reform is an inherently fast-paced and thorough-going undertaking, is said to have deliberately and consistently favored an incremental approach, or path dependency (crossing the river by groping stones), in navigating the economy, polity, and society toward prosperity and stability.<sup>300</sup>

The deliberate and consistent nature of this strategy has been elaborately highlighted.<sup>301</sup> Regarding pace, it has been noted that “[i]nstead of rushing ahead with a comprehensive, radical transformation of the entire system that would

295. See DEKLERCK, *supra* note 32, at 53–54 (expressing external criticisms of China’s human rights was warranted).

296. See generally John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 VA. J. INT’L L. 935 (2004–2005) (proposing a system to combat international bankruptcy on a universal scale).

297. See generally Susan Block-Lieb & Terence C. Halliday, *Incrementalism in Global Law Making*, 32 BROOK. J. INT’L L. 851 (2007) (discussing the evolution and positive aspects of incrementalism in international legal development).

298. See generally Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 GEO. J. INT’L L. 529 (2007) (proposing methods to greater expand and simplify the international procurement market).

299. See generally Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL’Y REV. 245 (2010) (evaluating the effects of domestic legislation, shaped by incrementalism, on global environmental legislation).

300. See generally SUSAN L. SHIRK, *THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA* 125 (1993) (stating communist regimes tend to operate under policies that support incremental change); Icksoo Kim, *The Political Economy of Investment Control in Post-1978 China*, in *CHINA’S ECONOMIC REFORM: THE COSTS AND BENEFITS OF INCREMENTALISM* 74–103 (Qimiao Fan & Peter Nolan eds., 1994) (discussing the relationship between incrementalist policy and economics within China); SUSAN L. SHIRK, *HOW CHINA OPENED ITS DOOR: THE POLITICAL SUCCESS OF THE PRC’S FOREIGN TRADE AND INVESTMENT REFORMS* 19–20 (2004) (evaluating the implications of China’s “delegation by consensus” approach, which fostered incremental economic change); Yongnian Zheng, *China’s Incremental Political Reform: Lessons and Experiences*, in *CHINA: TWO DECADES OF REFORM AND CHANGE* 17 (Wang Gungwu & John Wong eds., 1999) (asserting political evolution in China has taken the shape of political incrementalism); Yongnian Zheng, *Political Incrementalism: Political Lessons from China’s 20 Years of Reform*, 20 THIRD WORLD Q. 1157 (1999) (discussing how political incrementalism has allowed China to adapt to reforms while simultaneously quelling democratic process); JINGLIAN WU, *UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM* 43–85 (2005) (evaluating the evolution of political reform in China focusing on the impact on incrementalism); Jean-Germain Gros, *“Big Think,” Disjointed Incrementalism: Chinese Economic Success and Policy Lessons for Africa, or the Case for Pan-Africanism*, 11 AFR. J. INT’L AFF. 55 (2008) (stating China’s economic dominance is largely the result of dominant policies reflecting incrementalism).

301. See generally SHIRK, *THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA*, *supra* note 300; SHIRK, *HOW CHINA OPENED ITS DOOR*, *supra* note 300.

threaten the vested interests of many groups, Deng Xiaoping and his reformist lieutenants were extremely cautious, ‘taking one step forward and looking around before taking another.’<sup>302</sup> With respect to sequencing, it has been observed that this “reflected the difficulties in achieving bureaucratic consensus,”<sup>303</sup> and perhaps constituted performing a factional balancing act. “*Redistributive policies that created the most intense conflict within the bureaucracy were [thus] continually postponed and never got off the ground because it was impossible to achieve a consensus on them.*”<sup>304</sup>

To complicate matters, or to impose institutional constraints designed to prevent the type of arbitrary use of political authority that was witnessed during the revolutionary era, well-defined decision rules were introduced to diffuse organizational power.<sup>305</sup> The two most important comprised of “delegation by consensus”<sup>306</sup> where “[t]he CCP delegates to the State Council the authority to make specific . . . decisions . . . [and] [t]he State Council leaders at the top of the bureaucratic hierarchy [then] delegate to their subordinates the authority to make decision[s] if the agents can agree,”<sup>307</sup> and “reciprocal accountability,” where “[t]he leaders appoint the officials and the officials . . . choose (or at least ratify the choice of) the leaders . . . [o]fficials [then] hold their positions at the pleasure of the party leadership, but party leaders hold their positions at the pleasure of the officials in the selectorate.”<sup>308</sup> Such rules are doubtlessly conducive to political stability, but they inevitably slow down the decision-making process.

Policy incrementalism, or path dependency, varies from one issue-area to another. It is pursued less faithfully in the economic domain, where bold action that departs from past patterns is at times observed.<sup>309</sup> In the political realm, institutional inertia is more pronounced.<sup>310</sup> The divergence “has long puzzled scholars and policy makers outside China since Deng Xiaoping initiated economic reforms [three] decades ago. . . [who] hypothesized that economic reform would go together with political reform, and that marketisation would necessarily lead to

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302. SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA, *supra* note 300, at 129.

303. *Id.* at 131.

304. *Id.* (emphasis added).

305. *See id.* at 82–91, 117–28 (discussing reciprocal accountability process, stating it is not a pure hierarchy because of the reciprocity relationship); SHIRK, HOW CHINA OPENED ITS DOOR, *supra* note 300, at 17–22 (discussing the delegation by consensus hierarchical policy process).

306. SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA, *supra* note 300, at 116 (quoting Edward E. Lawler III., *Control Systems in Organizations*, in HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (Marvin Dunnette, ed., 1976)).

307. *Id.*

308. *Id.* at 83.

309. *See* WU, *supra* note 300, at 74–89 (discussing Deng Xiaoping’s reform initiatives from 1984 until 1986).

310. *See* Yongnian Zheng, *China’s Incremental Political Reform*, *supra* note 300, at 11–40 (stating in spite of burgeoning social change, China’s political elite have continued to address such change through incrementalism); Zheng, *Political Incrementalism*, *supra* note 300, at 1160 (arguing China’s political reform did not coincide with economic reform).

political democratisation.”<sup>311</sup> They have since come to regard the Chinese institutional experiment as a “model of ‘economic reform without political reform.’”<sup>312</sup> The latter has proceeded at a snail’s pace, entailing “progress by trial and error.”<sup>313</sup>

Detailed empirical studies of the decision-making style impinging on policy outcomes in the legal sphere are few and far between. Indeed, only one inquiry that meets these criteria has been conducted.<sup>314</sup> It has focused specifically on administrative law reform and has generated ample evidence in support of path dependency.<sup>315</sup> While a more solid empirical foundation is needed to provide strong generalizations, it may tentatively be inferred that incremental movement, featuring baby steps, is the *modus operandi* in the highly sensitive human rights segment of the politico-legal space.<sup>316</sup>

As indicated, this is merely a sample drawn from a potentially rich reservoir offering paths that might lead to an array of theoretical destinations, rather than a single target. The content is modest at this juncture because only some of the roads available have been explored, the challenge of coming to grips with the subject in a multifaceted fashion is enormous; resources are limited; and access to relevant information is difficult. Nevertheless, sufficient insights have been generated to suggest that scholarly horizons ought to be widened and a range of analytical perspectives should be embraced.

## V. CONCLUSION

The question of what track China follows in adapting to the content of the international human rights regime is of considerable importance on practical, as well as, ethical grounds. It is a populous country enjoying a rapidly improving standard of living, and thus substantial economic capabilities. Its military power is equally impressive, which gives it further leeway in the global arena. The distinct Chinese strategy of politico-economic development may also serve as a model that other developing nations may wish to emulate.<sup>317</sup>

This is not a new issue or one that has surfaced only to be relegated to the conceptual periphery. Both academic researchers and policy analysts have

311. Zheng, *Political Incrementalism*, *supra* note 300, at 1160.

312. *Id.*

313. *Id.* at 1160–61.

314. See PEERENBOOM, *supra* note 1, at 17–19, 399–410, 431–38 (presenting statistics regarding the “administrative law regime” of China); Peerenboom, *Globalization, Path Dependency and the Limits of Law*, *supra* note 182, at 162 (introducing administrative law reforms within China).

315. PEERENBOOM, *supra* note 1, at 17–19, 399–410, 431–38; Peerenboom, *Globalization, Path Dependency and the Limits of Law*, *supra* note 182, at 162.

316. See generally Massingdale, *supra* note 29; LI, *supra* note 29.

317. See, e.g., Gros, *supra* note 300, at 61 (stating Africa should adopt the strategies of incrementalism employed by China in the economic and political context to improve its development).

accorded it ample attention. However, one school of thought, constructivism, TLPT, has come to dominate the field and, to its credit, has done so on a scale and in a sophisticated manner not witnessed elsewhere. This is true of both the legal<sup>318</sup> and social science<sup>319</sup> components of the illuminating theoretical edifice built.

Proponents of complementary paradigms have prematurely turned to other intellectual pursuits. This is undesirable because of the importance of the topic and the fact that it is too intricate to be dissected with one set of instruments. Moreover, these instruments may need to undergo further refinement, a fate shared with any of their counterparts. A particular concern is the level of abstractness and the difficulty of translating the complex analytical observations provided into concrete policy prescriptions, as to how to enhance the effectiveness of the socialization and learning effort.<sup>320</sup>

The road ahead may not be well-mapped, but there are indications of what possible avenues are available to extract additional value from the constructivist, TLPT-style framework and how to draw on other sources, ideally in tandem rather than one at a time. Some strategies may be easier to implement and may yield more tangible results than those whose application poses greater challenges. An obvious, but not sole, feasible example is the role of foreign investment and business in the adaptation, socialization, and learning process, a subject that may readily be conceptualized, addressed, and employed as a platform for seeking ways to eliminate or reduce ethically unpalatable practices.

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318. See KENT, *THE LIMITS OF COMPLIANCE*, *supra* note 32; KENT, *BEYOND COMPLIANCE*, *supra* note 32, at 10–11 (discussing constructivism's applicability to Chinese human rights issues).

319. See generally CHAN, *CHINA'S COMPLIANCE IN GLOBAL AFFAIRS*, *supra* note 36; JOHNSTON, *SOCIAL STATES*, *supra* note 196.

320. Ronald Lippitt, *Improving the Socialization Process*, in *SOCIALIZATION AND SOCIETY* (John A. Clausen ed., 1968), 321–74.