

7-1-2012

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Recommended Citation

Miron Mushkat and Roda Mushkat, *The Political Economy of China's Regulatory State: A Reappraisal*, 27 BYU J. Pub. L. 1245 (2012).
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The Political Economy of China's Regulatory State: A Reappraisal

Miron Mushkat* & Roda Mushkat**

ABSTRACT

The revolutionary Chinese institutional order has given way to a more liberal governance regime, which continues to evolve. Nevertheless, as changing patterns of micro-economic regulation illustrate, this has not been a linear and straightforward process. Rather, waves of decentralization and recentralization have unfolded in close succession, and liberalization and reregulation have often been pursued simultaneously. This apparently unique policy configuration seems to be impinging on governance in other parts of the world, given that the “emerging giant” responsible for the “product” is increasingly acting as an active global “rule maker,” as distinct from a merely passive “rule taker.” Yet, it is inadequately understood and is subject to insufficiently critical evaluation. A detailed and probing examination of the substantial academic literature on the subject reveals lingering ambiguities, noticeable gaps, a significant scope for further integration of the various threads, and an uneven picture pointing to potentially less favorable lessons than commonly drawn.

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I. INTRODUCTION

Reflecting the conventional wisdom regarding policy initiatives embarked upon by aggressively reformist leaders in Anglo-Saxon countries, notably Margaret Thatcher and Ronald Reagan, the past three decades are perceived as a period characterized, for better or for worse, by “rolling back the frontiers of the State.”¹ This is a fundamentally apt and largely valid portrayal, but it obscures the fact that the ideas and strategies that have come to shape institutional realities in a genuinely large number of national settings have not been embraced universally and that their adoption, where it has taken place, has at times been a complicated and protracted undertaking.² Nor can it be said that the process has invariably followed an even path, as evidenced by reversals witnessed in the wake of the severe 2008–09 global economic crisis, which prompted governments to resort to far-reaching stabilization measures in order to offset pronounced private sector frailty.³

From the particular angle the subject is approached here, the deep structural transformation sought has turned out to be an unbalanced venture. In some key domains, progress has been sustained, even if not always smoothly, but this has not been the case across the entire policy spectrum. For example, the redistributive realm and public ownership are spheres of government activity where, for the most part, there has been no persistent and significant bidirectional, or multidirectional movement. The “great society” or comprehensive welfare State blueprint has been steadily scaled down and infused with utilitarian spirit.⁴ By the same token, despite occasional setbacks, the trend toward corporatization, privatization, and similar reconfiguration of property rights (e.g., private provision of public services) has not been dampened—let alone reversed⁵—other than perhaps se-

1. See STEPHEN J. BAILEY, *LOCAL GOVERNMENT ECONOMICS: PRINCIPLES AND PRACTICE* (2d ed. 1999); STEPHEN J. BAILEY, *PUBLIC SECTOR ECONOMICS: THEORY, POLICY, AND PRACTICE* (2002); STEPHEN J. BAILEY, *STRATEGIC PUBLIC FINANCE* (2004).

2. See, e.g., *INDIA IN THE ERA OF ECONOMIC REFORMS* (Jeffrey D. Sachs et al. eds., 1999); T.N. SRINIVASAN, *GROWTH, SUSTAINABILITY, AND INDIA'S ECONOMIC REFORMS* (2011).

3. See CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009).

4. See Michael Moran, *Review Article: Understanding the Regulatory State*, 32 *BRIT. J. POL. SCI.* 391–413 (2002).

5. *Id.*

lectively and temporarily in the face of overwhelming pressures induced by severe economic crises.⁶

In addition, the more direct and inherently expansionary Keynesian demand management approaches have fallen out of favor and their less palpable and resource intensive monetarist counterparts have gained ascendancy, without necessarily leading to fiscal consolidation in all circumstances, because the drive to reduce the burden of taxation has often not been matched by a strong determination to curtail public expenditure.⁷ Supply-side strategies, firmly wedded to the notion that the market is a vastly superior economic coordination mechanism to government, have also risen to prominence.⁸ By contrast, the regulatory function has displayed a mixed pattern, combining retrenchment with growth, and shifting backward and forward in a manner that has featured regulation, deregulation, and reregulation.⁹

Creeping, perhaps even galloping, reregulation has prompted legal scholars and social scientists to often approvingly invoke the concept of a “regulatory State.”¹⁰ The term is relied upon to convey the

6. See REINHART & ROGOFF, *supra* note 3.

7. See TIM CONGDON, KEYNES, THE KEYNESIANS, AND MONETARISM (2007).

8. See BRIAN DOMITROVIC, ECONOCLASTS: THE REBELS WHO SPARKED THE SUPPLY-SIDE REVOLUTION AND RESTORED AMERICAN PROSPERITY (2009).

9. See REGULATION, DEREGULATION, AND REREGULATION: INSTITUTIONAL PERSPECTIVES (Claude Menard & Michael Ghertman eds., 2009) [hereinafter INSTITUTIONAL PERSPECTIVES].

10. *E.g., id.*; see A READER ON REGULATION (Robert Baldwin et al. eds., 1998); CHRIS BERG, THE GROWTH OF AUSTRALIA’S REGULATORY STATE: IDEOLOGY, ACCOUNTABILITY, AND MEGA-REGULATORS (2008); CHRISTOPHER HOOD ET AL., REGULATION INSIDE GOVERNMENT: WASTE-WATCHERS, QUALITY POLICE, AND SLEAZE-BUSTERS (1999) [hereinafter HOOD ET AL., REGULATION INSIDE GOVERNMENT]; ROGER KING, THE REGULATORY STATE IN AN AGE OF GOVERNANCE: SOFT WORDS AND BIG STICKS (2007); BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION: CREATING, DESIGNING, AND REMOVING REGULATORY FORMS (1980); MICHAEL MORAN, THE BRITISH REGULATORY STATE: HIGH MODERNISM AND HYPER INNOVATION (2003); REGULATING EUROPE (Giandomenico Majone ed., 1996); REGULATORY POLICY AND THE SOCIAL SCIENCES (Roger G. Noll ed., 1985); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RE-CONCEIVING THE REGULATORY STATE (1990); John Braithwaite, *The New Regulatory State and the Transformation of Criminology*, 40 BRIT. J. CRIMINOLOGY 222 (2000); Adam Crawford, *Networked Governance and the Post-Regulatory State? Steering, Rowing, and Anchoring the Provision of Policy and Security*, 10 THEORETICAL CRIMINOLOGY 449 (2006); Simeon Djankov et al., *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003); Dagmar Eberle, *Development Paths of the Regulatory State: Comparison Between the United States and Canada*, 44 POL. Q. 483 (2003); Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002) [hereinafter Glaeser & Shleifer, *Legal Origins*]; Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE 401 (2003) [hereinafter Glaeser & Shleifer, *Regulatory State*]; David Levi-Faur & Sharon Gilad, *The Rise of the British Regula-*

primacy, in the current policy environment—both in the qualitative and quantitative sense of the word—of regulatory activity over other forms of government initiative, rather than merely the selective acceleration in its pace.¹¹ The corollary is that a State qualifying as regulatory in nature is one that acknowledges, where appropriate, the inevitability of regulation, then structures its agenda accordingly, exhibits less restraint on this front than elsewhere, and places regulatory endeavor at the epicenter of its strategic framework for managing the economy at the micro and macro level.¹²

This is not just a matter of primacy or the relative emphasis given to different clusters of government activities. In a regulatory State, a functional substitution occurs when growing reliance on standard-setting and enforcement agencies coincides with the shedding of operational responsibilities for the delivery of public services by government departments to executive bodies that are overseen by ministers or their equivalent by means of framework agreements.¹³ This elaborate, but looser than the tight top-down traditional form organizational steering-and-control architecture, pattern is broadly duplicated inside the public bureaucracy.¹⁴ That government institution is increasingly penetrated by supranational regulatory entities (e.g., the European Union's administrative organs and the European Court of Justice, in that particular geographic context).¹⁵

tory State: Transcending the Privatization Debate, 37 *COMP. POL.* 105 (2004); Martin Loughlin & Colin Scott, *The Regulatory State*, in *DEVELOPMENTS IN BRITISH POLITICS* 5, 205–19 (Patrick Dunleavy et al. eds., 1997); Giandomenico Majone, *From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance*, 17 *J. PUB. POL'Y* 139 (1997); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 *W. EUR. POL.* 77–101 (1994) [hereinafter Majone, *Regulatory State in Europe*]; Moran, *supra* note 4; see also IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); ROBERT BALDWIN & MARTIN CAVE, *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* (2d ed. 2011); JULIA BLACK, *RULES AND REGULATORS* (1997); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000); *CONTROLLING MODERN GOVERNMENT: VARIETY, COMMUNALITY, AND CHANGE* (Christopher Hood et al. eds., 2004) [hereinafter *CONTROLLING MODERN GOVERNMENT*]; *GLOBAL REGULATION: MANAGING CRISES AFTER THE IMPERIAL TURN* (Kees van der Pijl et al. eds., 2004) [hereinafter *MANAGING CRISES*]; CHRISTOPHER HOOD ET AL., *THE GOVERNMENT OF RISK: UNDERSTANDING RISK REGULATION REGIMES* (2001); BRONWEN MORGAN & KAREN YEUNG, *AN INTRODUCTION TO LAW AND REGULATION* (2007); ANTHONY I. OGUS, *REGULATION: LEGAL FORM AND ECONOMIC THEORY* (2d ed. 2004).

11. See Levi-Faur & Gilad, *supra* note 10; Moran, *supra* note 4.

12. See sources cited *supra* note 11.

13. See KING, *supra* note 10.

14. See *CONTROLLING MODERN GOVERNMENT*, *supra* note 10.

15. See BRAITHWAITE & DRAHOS, *supra* note 10; KING, *supra* note 10; *MANAGING CRISES*,

Despite considerable decentralization and flexibility, a regulatory State is inevitably characterized by a proliferation of rules that, though a feature of rule-based governance, should be distinguished from regulations. The former tend to be non-discretionary measures of wide application in legally underpinned decision-making.¹⁶ They serve the purpose of providing high predictability in relations between individuals, and between individuals and the State (e.g., rules of the road).¹⁷ Regulations can also be said to be rule-like in that they are intended to guide and order human behavior. Nevertheless, such policy instruments commonly draw on a broader array of sources and are more encompassing in their incorporation of public and private institutional inputs.¹⁸ A wider range of actors is thus generally involved and the law, in the formal sense of the term, typically plays a less prominent role.¹⁹

Multiple explanations have been offered by economists, legal scholars, organization theorists, and political scientists for the shifts from regulation to deregulation and vice versa including the simultaneous pursuit of both strategies.²⁰ Concepts such as “market failure,” “regulatory cycle,” “regulatory capture,” “regulatory cartelization,” “coordination costs,” “interest group alignment,” “regulatory entry,” “regulatory exit,” “transaction costs,” “satisficing,” “sequential decision making,” “government failure,” “backlash,” and “first/second/third order changes” have been effectively invoked for this purpose and subjected, with some success, to empirical scrutiny.²¹ It has also been argued that the scope of regulation is so broad and the supply and demand equation is driven by so many factors, that some forms of activity may encounter headwinds (e.g., the economic type), while others may be propelled by tailwinds (e.g., the so-

supra note 10.

16. See DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* (2005).

17. See GEOFFREY BRENNAN & JAMES BUCHANAN, *THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY* (1985).

18. See KING, *supra* note 10.

19. *Id.*

20. For a comprehensive survey see Michael Ghertman, *The Puzzle of Regulation, Deregulation, and Reregulation*, in *INSTITUTIONAL PERSPECTIVES*, *supra* note 9, at 351–73.

21. *Id.*

cial variant).²² Here, it is sufficient to note that the phenomenon does not necessarily constitute an unfathomable paradox.

The notion of a regulatory State is a convenient and simple abstraction of complex and evolving reality. It does not manifest itself in a uniform fashion and is not associated with a well-defined and inelastic set of challenges and problems. The American,²³ British,²⁴ and European²⁵ versions have been portrayed along lines that do not fully converge. In different geographic or institutional milieus, legal scholars and social scientists have chosen to focus on different dimensions of the policy landscape and address different opportunities or threats. Nevertheless, a common foundation, as outlined above, may be discerned. Moreover and inevitably, accelerating globalization has had the impact of blurring the significant distinctions without completely eliminating them.²⁶

The academic literature on the regulatory State is substantial in terms of scope, scale, and analytical rigor. Still, this is a dynamic field of socio-legal inquiry and a number of gaps remain. Notably, the focus has primarily been on institutional patterns in North America, the United Kingdom, and developed European countries. Relatively modest attention has been accorded to Africa, Asia, Eastern Europe, Latin America, and South America (with the possible exception of Australasia²⁷ and some other isolated cases).²⁸ A recent and welcome departure from this trend is the ongoing and thorough examination

22. See Levi-Faur & Gilad, *supra* note 10; Moran, *supra* note 4.

23. See SUNSTEIN, *supra* note 10; Eberle, *supra* note 10; see also STEVEN KELMAN, *REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY* (1981).

24. See HOOD ET AL., *REGULATION INSIDE GOVERNMENT*, *supra* note 10; MORAN, *supra* note 10; Levi-Faur & Gilad, *supra* note 10; Loughlin & Scott, *supra* note 10; see also DAVID VOGEL, *NATIONAL STYLES OF REGULATION: ENVIRONMENTAL POLICY IN GREAT BRITAIN AND THE UNITED STATES* (1986).

25. See, e.g., Majone, *Regulatory State in Europe*, *supra* note 10; see also ADRIENNE HERITIER, *POLICY-MAKING AND DIVERSITY IN EUROPE: ESCAPE FROM DEADLOCK* (1999); ADRIENNE HERITIER ET AL., *RINGING THE CHANGES IN EUROPE: REGULATORY COMPETITION AND THE TRANSFORMATION OF THE STATE: BRITAIN, FRANCE, AND GERMANY* (1996); NEW MODES OF GOVERNANCE IN EUROPE: GOVERNING IN THE SHADOW OF HIERARCHY (Adrienne Heritier & Martin Rhodes eds., 2010); FRITZ W. SCHARPF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* (1999).

26. See BRAITHWAITE & DRAHOS, *supra* note 10; KING, *supra* note 10, *MANAGING CRISES*, *supra* note 10.

27. See, e.g., BERG, *supra* note 10; Braithwaite, *supra* note 10.

28. See, e.g., Declan Roche, *Restorative Justice and the Regulatory State in South African Townships*, 42 BRIT. J. CRIMINOLOGY 514 (2002).

of the policy environment in China from that particular perspective.²⁹ The aim of this paper is to selectively assess progress on that

29. See ENVIRONMENTAL GOVERNANCE IN CHINA (Neil T. Carter & Arthur P.J. Mol eds., 2007); CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT (Kristen A. Day ed., 2005); DIC LO, MARKET AND INSTITUTIONAL REGULATION IN CHINESE INDUSTRIALIZATION, 1978-94 (1997); DING LU & ZHIMIN TANG, STATE INTERVENTION AND BUSINESS IN CHINA: THE ROLE OF PREFERENTIAL POLICIES (1997); ELIZABETH C. ECONOMY, THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE (2d ed. 2010); MANAGING THE CHINESE ENVIRONMENT (Richard L. Edmonds ed., 2000); ECONOMIC ANALYSIS OF LAW IN CHINA (Thomas Eger et al. eds., 2007); COMPETITION POLICY AND REGULATION: RECENT DEVELOPMENTS IN CHINA, THE US, AND EUROPE (Michael Faure & Xinzhu Zhang eds., 2011); CHALLENGES FACING CHINESE POLITICAL DEVELOPMENT (Sujian Guo ed., 2007); CHEN GANG, POLITICS OF CHINA'S ENVIRONMENTAL PROTECTION: PROBLEMS AND PROGRESS (2009); HARWIT, CHINA'S TELECOMMUNICATIONS REVOLUTION (2008); ROSELYN HSUEH, CHINA'S REGULATORY STATE: A NEW STRATEGY FOR GLOBALIZATION (2011); GOVERNANCE, REGULATION, AND PRIVATIZATION IN THE ASIA-PACIFIC REGION (Takatoshi Ito & Anne O. Krueger eds., 2004); CHINA'S ENVIRONMENTAL CRISIS: DOMESTIC AND GLOBAL IMPACTS AND RESPONSES (Joel J. Kassiola & Sujian Guo eds., 2010); ECONOMIC GROWTH AND ENVIRONMENTAL REGULATION: THE PEOPLE'S REPUBLIC OF CHINA'S PATH TO A BRIGHTER FUTURE (Tun Lin & Timothy Swanson eds., 2010); XIAOYING MA & LEONARD ORTOLANO, ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT, AND COMPLIANCE (2000); GREATER CHINA AREA: MAINLAND CHINA, TAIWAN, AND HONG KONG SAR (Joseph J. Norton et al. eds., 2000); GEOFFREY MURRAY & IAN G. COOK, GREEN CHINA: SEEKING ECOLOGICAL ALTERNATIVES (2002); BENJAMIN VAN ROOIJ, REGULATING LAND AND POLLUTION IN CHINA: LAWMAKING, COMPLIANCE, AND ENFORCEMENT: THEORY AND CASES (2006); ERIC LESTER ROSS, ENVIRONMENTAL POLICY IN CHINA (1988); BARBARA J. SINKULE & LEONARD ORTOLANO, IMPLEMENTING ENVIRONMENTAL POLICY IN CHINA (1995); PHILLIP STALLEY, FOREIGN FIRMS, INVESTMENT, AND ENVIRONMENTAL REGULATION IN THE PEOPLE'S REPUBLIC OF CHINA (2010); XU YAN & DOUGLAS PITT, CHINESE TELECOMMUNICATIONS POLICY (2002); DALI L. YANG, REMAKING THE CHINESE LEVIATHAN: MARKET TRANSITION AND THE POLITICS OF GOVERNANCE IN CHINA (2004); XIN ZHANG, INTERNATIONAL TRADE REGULATION IN CHINA: LAW AND POLICY (2006); David Bach et al., *The International Implications of China's Fledgling Regulatory State: From Product Maker to Rule Maker*, 11 NEW POL. ECON. 499-518 (2006); ; Sebastian Heilmann, *Regulatory Innovation by Leninist Means: Communist Party Supervision in China's Financial Industry*, 181 CHINA Q. 1-21 (2005); Kenneth G. Lieberthal, *China's Governing System and Its Impact on Environmental Policy Implementation*, CHINA ENV'T SERIES 3-8 (1997); Peng Liu, *From Decentralized Developmental State toward Authoritarian Regulatory State: A Case Study on Drug Safety Regulation in China*, 8 CHINA: INT'L J. 110-37 (2010); Miron Mushkat & Roda Mushkat, *The Economics of Environmental Policy Implementation: Chinese Insights*, 53 ECON. & POL'Y ENERGY & ENV'T 105-27 (2010); Roda Mushkat, *Contextualizing Environmental Human Rights: A Relativist Perspective*, 26 PACE ENVTL L. REV. 119-77 (2009) [hereinafter Mushkat, *Contextualizing Environmental Human Rights*]; Roda Mushkat, *Implementing Environmental Law in Transitional Settings: The Chinese Experience*, 18 S. CAL. INTERDISC. L.J. 45-94 (2008) [hereinafter Mushkat, *Implementing Environmental Law*]; Margaret M. Pearson, *Governing the Chinese Economy: Regulatory Reform in the Service of the State*, 67 PUB. ADMIN. REV. 718-30 (2007) [hereinafter Pearson, *Governing the Chinese Economy*]; Margaret M. Pearson, *The Business of Governing Business in China: Institutions and Norms of the Emerging Regulatory State*, 57 WORLD POL. 296-322 (2005) [hereinafter Pearson, *The Business of Governing Business in China*]; Lester Ross, *The Implementation of Environmental Policy in China*, 15 ADMIN. & SOC'Y 489-516 (1984); Hakon U. Steen, *Limits to the Regulatory*

front by evaluating some of the key insights generated in the process. A review of the studies highlighted for this purpose precedes the appraisal. We subsequently show that the rich picture collectively painted in the work on the subject is not without ambiguities and gaps, that the mainstream and peripheral elements may need to be better aligned, and that a more critical approach to the practices observed may be warranted.

II. CHINESE MODEL

A. Historical Backdrop

Following its 1949 military victory over the Nationalist forces and subsequent consolidation of power, the Communist Party (CCP) did not proceed forthwith to dismantle market structures, embrace bureaucratic resource allocation mechanisms, and eliminate private ownership of the means of production in China.³⁰ Unlike in the political domain, the tightening of top-down economic controls and nationalization of the means of production for the most part was initially undertaken in a gradual and non-abrupt fashion. The pace accelerated markedly and structural transformation assumed an increasingly coercive character from the mid-1950s onwards.³¹ But no consistent strategy was pursued in the following years.³² Instead,

State in the Rule-Making of Digital Convergence: A Case Study of Mobile TV Standards in the European Union and China, 23 *TECH. ANALYSIS & STRATEGIC MGMT.* 759–72 (2011); Waikeng Tam & Dali L. Yang, *Food Safety and the Development of Regulatory Institutions in China*, 29 *ASIAN PERSP.* 5–36 (2005); Dali L. Yang, *Regulatory Learning and Its Discontents in China: Promise and Tragedy at the State Food and Drug Administration*, in *REGULATION IN ASIA: PUSHING BACK ON GLOBALIZATION* 139–62 (John Gillespie & Randall Peerenboom eds., 2009) [hereinafter Yang, *Regulatory Learning and Its Discontents*]; Yukyung Yeo, *Between Owner and Regulator: Governing the Business of China's Telecommunications Service Industry*, 200 *CHINA Q.* 1013–32 (2009); Yukyung Yeo & Martin Painter, *Diffusion, Transmutation, and Regulatory Regime in Socialist Market Economies: Comparing China and Vietnam*, 24 *PAC. REV.* 375–95 (2011); Yukyung Yeo & Margaret M. Pearson, *Regulating Decentralized Industries: China's Auto Industry*, 8 *CHINA REV.* 231–59 (2008).

30. See GREGORY C. CHOW, *CHINA'S ECONOMIC TRANSFORMATION* (2d ed. 2007) [hereinafter CHOW, *ECONOMIC TRANSFORMATION*]; GREGORY C. CHOW, *INTERPRETING CHINA'S ECONOMY* (2010) [hereinafter CHOW, *INTERPRETING CHINA'S ECONOMY*]; CAI FANG ET AL., *THE CHINESE ECONOMY: REFORM AND DEVELOPMENT* (2009); KENNETH G. LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION TO REFORM* (2d ed. 2004); BARRY NAUGHTON, *THE CHINESE ECONOMY: TRANSITIONS AND GROWTH* (2007); TONY SAICH, *GOVERNANCE AND POLITICS OF CHINA* (3d ed. 2010); JINGLIAN WU, *UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM* (2005).

31. See sources cited *supra* note 30.

32. See sources cited *supra* note 30.

waves of centralization and decentralization ensued.³³ Nevertheless, the loosening of central authority was primarily an administrative and temporary phenomenon, and marketization and privatization were never contemplated other than on a modest scale and for predominantly tactical reasons (i.e., in order to restore efficiency and stability in the aftermath of disastrous policy experiments, such as the Great Leap Forward and the Cultural Revolution).³⁴

Genuine economic reform had to await the death of Chairman Mao Zedong in 1976 and the adoption of the Open Door Policy by his successors (spearheaded by paramount leader Deng Xiaoping) two years following that event. Some spectacular adjustments to the macro and micro steering framework were promptly made, but this has again been a rather uneven process (albeit not by the fluid standards of the revolutionary era).³⁵ Gradualism was a feature of the period up to 1993 and the scope of liberalization has significantly broadened thereafter.³⁶ Yet, the occasional pauses and sideways movement should not obscure the fact that the commitment to change and forward momentum has remained basically intact for more than three decades.³⁷ Despite a certain lack of strategic coherence at times, the reform era has not seen the kind of sharp policy swings witnessed previously.³⁸

The overhaul of the mode of governance has not been an exclusively economic undertaking. A distinctly “dilettante” form of public administration can be said to have given way to one of the “bureaucratic” (i.e., professional or semi-professional) variety.³⁹ A “totalistic” State has staged a partial retreat, and a more “participatory” type has emerged.⁴⁰ But the transformation in the economic domain has been by far the most dramatic.⁴¹ Macro and micro intervention has grown less intensive and less prevalent, privatization has steadily increased in scale, and regulation has evolved into a more flexible and subtle ad-

33. See sources cited *supra* note 30.

34. See sources cited *supra* note 30.

35. See sources cited *supra* note 30.

36. See sources cited *supra* note 30.

37. See sources cited *supra* note 30.

38. See sources cited *supra* note 30.

39. See Qinghua Wang, *The “State of the State” in Reform Era China*, 35 *ASIAN PERSP.* 89, 96–97 (2011).

40. *Id.* at 97–98.

41. *Id.* at 98–99.

ministrative tool.⁴² Notably, consistent with patterns observed in regulatory states, essentially indirect regulation has generally come to be preferred over elaborate top-down guidance and oversight.⁴³

B. Changing Governance Modes

It is thus legitimate to argue that deregulation trends have fundamentally diverged from their privatization counterparts. In the latter case, the noted shifts—while not entirely smooth—have displayed greater persistence and less ambiguity.⁴⁴ In the former case, they have been more multi-directional and not as easy to read in that the tentative rise of rule-based governance has meant that the rolling back of the State in this respect has coincided with an expansion of regulatory activity, although not necessarily organized along the lines of the traditional-style command-and-control model.⁴⁵ The corollary is that the term “deregulation” perhaps does not fully reflect the post-1978 Chinese economic experience because an array of mostly new regulatory initiatives has come into being at the same time that others have been relegated to the periphery.⁴⁶

This is not to imply that deregulation, when and where it has been implemented, has typically been half-hearted, narrowly focused, shallow, and short-lived. Often the opposite pattern has been seen. The experience of the telecommunications sector is an illuminating example. Even the pre-1994 journey from the contractual responsibility scheme to the economic accounting system, material incentives,

42. *Id.*

43. *Id.*; see also CHINA'S DEEP REFORM: DOMESTIC POLITICS IN TRANSITION (Lowell Dittmer & Guoli Li eds., 2006); CHINA TODAY, CHINA TOMORROW: DOMESTIC POLITICS, ECONOMY AND SOCIETY (Joseph Fewsmith ed., 2010) [hereinafter CHINA TODAY, CHINA TOMORROW]; CHOW, CHINA'S ECONOMIC TRANSFORMATION, *supra* note 30; CHOW, INTERPRETING CHINA'S ECONOMY, *supra* note 30; FANG ET AL., *supra* note 30; TRANSFORMING THE CHINESE ECONOMY (Cai Fang ed., 2010); INTERPRETING CHINA'S DEVELOPMENT (Wang Gungwu & John Wong eds., 2007); HOW FAR ACROSS THE RIVER: CHINESE POLICY REFORM AT THE MILLENNIUM (Nicholas C. Hope et al. eds., 2003); LIEBERTHAL, *supra* note 30; NAUGHTON, *supra* note 30; SAICH, *supra* note 30; WU, *supra* note 30.

44. See, e.g., CHINA TODAY, CHINA TOMORROW, *supra* note 43; CHINA'S DEEP REFORM: DOMESTIC POLITICS IN TRANSITION, *supra* note 43; CHOW, CHINA'S ECONOMIC TRANSFORMATION, *supra* note 30; CHOW, INTERPRETING CHINA'S ECONOMY, *supra* note 30; FANG ET AL., *supra* note 30; Hope et al., *supra* note 43; INTERPRETING CHINA'S DEVELOPMENT, *supra* note 43; NAUGHTON, *supra* note 30; TRANSFORMING THE CHINESE ECONOMY, *supra* note 43; WU, *supra* note 30.

45. See HSUEH, *supra* note 29; Pearson, *The Business of Governing Business in China*, *supra* note 29; Pearson, *Governing the Chinese Economy*, *supra* note 29.

46. See sources cited *supra* note 45.

and eventual flexible financial policy was accompanied by progressive widening and deepening of the liberalization agenda, and it exhibited a considerable degree of consistency and interconnectedness.⁴⁷ Subsequent strategies have entailed further revamping that has thoroughly transformed the structure of this particular sector.⁴⁸ The resulting configuration has aptly been portrayed as “China’s telecommunications revolution.”⁴⁹ But this commonly invoked and extensively researched case of policy evolution apparently has another side to it, which is equally telling. The mode of governance has indeed undergone fundamental change. Private operators have emerged, competition has intensified, and government intervention (including support) has markedly diminished.⁵⁰ This seems to have consequently become a truly decentralized segment of the economy where the regulator’s proverbial “hand” is, on the face of it, largely “invisible.”⁵¹ Nevertheless, the reins of public control may not have been substantially relaxed. Rather, they may have merely assumed less rigid forms.⁵² Regulation may have thus given way to deregulation, which broadly speaking may have been deprived of much of its essence by reregulation.⁵³

C. Theoretical Viewpoint

The telecommunications sector experience is not an isolated case. Similar trends have been witnessed across the policy spectrum.⁵⁴ In order to imbue them with analytical meaning, a typology of state control has been constructed by an empirically-oriented social scientist, featuring four distinct regulatory schemes that reflect changing institutional realities during the reform era: expansionary, strategic, delegated, and decentralized.⁵⁵ The first is characterized by deliberate (goal) orientation, enhances central control (from the perspective

47. See XU & PITT, *supra* note 29, at 9–39.

48. *Id.* at 41–63.

49. See HARWIT, *supra* note 29.

50. See *id.* at 43–111; HSUEH, *supra* note 29, at 45–58; XU & PITT, *supra* note 29, at 41–63.

51. See HARWIT, *supra* note 29, at 79–111; HSUEH, *supra* note 29, at 45–58; XU & PITT, *supra* note 29, at 41–63.

52. See HARWIT, *supra* note 29, at 79–111; HSUEH, *supra* note 29, at 45–58; Steen, *supra* note 29; Yeo, *supra* note 29; Yeo & Painter, *supra* note 29.

53. See sources cited *supra* note 52.

54. See HSUEH, *supra* note 29.

55. See *id.* at 21–24.

of government-business relations), and emphasizes reregulation (whereby new and reformulated rules increase central discretion). The second diverges from the expansionary mode in only its emphasis on liberalization (whereby rules increase central discretion and achieve sector-specific goals). The third is characterized by mixed orientation, produces mixed outcomes, and like the expansionary variant, emphasizes reregulation (but this is a pattern whereby rules delegate regulatory enforcement to lower level of government).⁵⁶ The fourth is characterized by incidental orientation, undermines government control, and emphasizes liberalization and deregulation (whereby rules relinquish rule making and enforcement to local government).⁵⁷

A switch from one institutional configuration to another may be likened to a paradigm or regime shift. Comprehensive and far-reaching deregulation, in the strict sense of the term, is realized when a decentralized system is thoroughly embraced. But the four categories entail different degrees of “regulatory tightness” or centralization/decentralization. The act of crossing regime “boundaries” is thus a step that, from a relative standpoint, involves stiffening or relaxation of public controls over private sector activities in virtually all circumstances. Irrespective of whether the issue is conceptualized as a dichotomy (regulation/reregulation versus deregulation) or a continuum (consisting of categories that vary in the extent to which goals, business-government relations, and rules combine to determine the direction, flexibility, and openness of the regime), the picture that emerges in the post-1978 Chinese context is one of ongoing structural transformation, with periodic swings from deregulation-liberalization to reregulation, along the lines generally observed in other regulatory states.⁵⁸

Specifically, the 1979–2010 period may effectively be divided into six distinct phases: (1) 1979–83 Liberalization (1978 Open Door Policy, which initiated agricultural reforms, household responsibility system; 1979 Joint Venture Law; 1980 creation of special economic zones); (2) 1984–91 Reregulation (1984–87 urban reforms and experimentations, fiscal reforms/revenue sharing/tax responsibility system, rise of quasi-State, quasi-private enterprises, and opening of fourteen

56. *See id.*

57. *See id.*

58. *See id.* at 26–28.

coastal cities and Hainan Island to foreign direct investment (FDI); 1986 Law on Wholly Foreign-Owned Enterprises, 1988 Law on Sino-Foreign Cooperative Joint Ventures, separation of administrative from party functions; 1988 State sector restructuring); (3) 1992–97 Liberalization (Deng Xiaoping’s 1992 Southern Tour, coastal development strategy/influx of FDI; 1993 administrative and State sector restructuring; 1994 Foreign Trade Law; 1994 unification of official and market exchange rates; 1996 current account convertibility; 1994 Company Law/corporatization and privatization of state owned enterprises (SOEs), separation of ownership from regulatory functions; tax and fiscal reforms/decentralization, Western Development Strategy); (4) 1998–2001 Reregulation (administrative and State sector restructuring, including Grab Large Release Small, foreign market entry/business scope and investment level recalibrated; 1999 World Trade Organization (WTO) accession protocol agreements on FDI and market liberalization, separation of ownership from regulatory functions); (5) 2002–05 Liberalization (2003 administrative and State sector restructuring, 2004 Foreign Trade Law and other WTO implementation rules, 2003 “Harmonious Society Strategy”); and (6) 2006–10 Reregulation (reformulated laws, focusing on bankruptcy/government, procurement/labor, contract/mergers, and acquisitions; measures to enhance orderliness of foreign-driven mergers and acquisitions, 2008 administrative and State sector restructuring).⁵⁹

One obvious conclusion shown from these institutional dynamics is that, as widely seen elsewhere, China’s regulatory State is characterized by a mixture of punctuated equilibriums⁶⁰ and path dependence.⁶¹ Strains within the system induce regime shifts (regulation-deregulation, liberalization-reregulation) or disturb its equilibrium, but the system tends to oscillate within a well-defined range, without necessarily returning to the point of departure (it evolves rather than stagnates). Differentiation or evolution over time may take place because of the multidimensional nature of the typology. Had it been confined to just two categories or institutional configurations and regimes, the scope for genuine change would have been quite limited,

59. *See id.*

60. For an elaboration, see PAUL CAIRNEY, UNDERSTANDING PUBLIC POLICY: THEORIES AND ISSUES 175–99 (2012); MICHAEL HOWLETT ET AL., STUDYING PUBLIC POLICY: POLICY CYCLES & POLICY SUBSYSTEMS 207–08 (3d ed. 2009).

61. For an elaboration, see CAIRNEY, *supra* note 60, at 76–78, 107, 127; HOWLETT ET AL., *supra* note 60, at 192, 200.

merely allowing swings from one set of conditions to another and back to the point of origin (subject to the qualification that the categories are sufficiently broad to accommodate some variation).

To arrive at conclusions regarding the individual phases requires a more detailed examination of the thrust of policies pursued on a multiyear basis. Such a perusal reveals a propensity—most apparent during the latest reregulation drive—to follow a bifurcated approach with respect to State control over the economy: essentially expansionary for strategic sectors (cars, energy, financial services, and telecommunications) and fundamentally decentralized for non-strategic ones (consumer electronics, food, paper, and textiles).⁶² The former element seems to eclipse the latter and the overall pattern is thus portrayed as possessing attributes akin to reregulation rather than liberalization.⁶³ The approach is believed to have been adopted in order to cope optimally with pressures stemming from globalization—particularly those associated with WTO membership—and manage them in a manner conducive to the preservation of the political regime.⁶⁴

Within this policy framework, strategic sectors are subject to initiatives such as separation of enterprises from government bureaucracy, corporatization, business restructuring or creation of SOE groups, public listing, introduction of competition between SOEs and sometimes the non-State sector, and strict rules on entry (no non-State entry, domestic sector only, or foreign investment through joint ventures).⁶⁵ The non-strategic sectors, on the other hand, enjoy greater freedom of action by virtue of experiencing a divestment of State assets to former managers, corporatization, business restructuring, public listing (the last three measures extend beyond what is witnessed in the focal category), liberalization of market entry, private sector dynamism (encompassing quasi-State, quasi private firms, and FDI), and local approval of market entry and licensure of business scope.⁶⁶

This institutional configuration, characterized by policy oscillation and sectoral duality, has not been conjured up by a lone scholar grasping at intellectual straws—it has been widely acknowledged and

62. See HSUEH, *supra* note 29.

63. See *id.*

64. See *id.*

65. See *id.* at 255.

66. See *id.*

documented.⁶⁷ The picture consistently painted is one showing a normative preference for fostering a more competitive economy while deploying State assets along lines supporting State goals.⁶⁸ This manifests itself repeatedly in market restructuring designed to avoid “harmful competition.”⁶⁹ China’s most valued State firms in strategic sectors (the economic lifeline, or *jingji mingmai*) are at the heart of the deregulation-liberalization-reregulation seesaw movement. They are corporatized, distanced from the ministries overseeing them (some of which have been downgraded or abolished), and undergo a degree of diversification in their ownership.⁷⁰ Moreover, new, supposedly less restrictive, mechanisms are ushered in to steer them.⁷¹ But at the same time, parallel steps are taken to bolster central authority and tighten supervision of such firms and sectors.⁷²

This type of a policy response to encroaching forces of globalization, or any exogenous pressures, is by no means uncommon and cannot be depicted as uniquely Chinese in every respect. It is true that some states choose to adapt as fully and unambiguously as realistically possible, which essentially amounts to “letting external/other regimes rule,” and a possible withering away of the State.⁷³ “Communitarianism, deliberation, direct democracy, and governance” (i.e., allowing or encouraging greater citizen participation in the policy process) have also been touted as a viable strategy to counter the homogenizing influences of globalization.⁷⁴ But not all states succumb entirely to such influences. Those that do not give in try to resist or reassert control,⁷⁵ and it may be argued that China and its regulatory policy fall into this category.

67. *Id.*; Pearson, *The Business of Governing Business in China*, *supra* note 29; Pearson, *Governing the Chinese Economy*, *supra* note 29; Yeo, *supra* note 29; Yeo & Painter, *supra* note 29; Yeo & Pearson, *supra* note 29.

68. See HSUEH, *supra* note 29; Pearson, *The Business of Governing Business in China*, *supra* note 29; Pearson, *Governing the Chinese Economy*, *supra* note 29; Yeo, *supra* note 29; Yeo & Painter, *supra* note 29; Yeo & Pearson, *supra* note 29.

69. See sources cited *supra* note 68.

70. See sources cited *supra* note 68.

71. See sources cited *supra* note 68.

72. See sources cited *supra* note 68.

73. See JON PIERRE & B. GUY PETERS, *GOVERNANCE, POLITICS, AND THE STATE* 114–36 (2000).

74. *Id.* at 137–59.

75. See *id.* at 94–113.

The (partial) resistance model looms large in the economics and political science literature. The former body of academic work currently accords a prominent place to strategic trade theory, a marked departure from mainstream formulations that emphasize gains accruing to participants in unfettered international economic exchanges.⁷⁶ Its proponents assume that in certain sectors featuring a small number of players (i.e., oligopoly-like conditions), increasing returns to scale, and substantial network effects, government intervention in the form of an active industrial policy and a judicious use of external barriers (i.e., tariffs and the like) may enhance national comparative advantage and thus boost the welfare of a country.⁷⁷ It is not unreasonable to suggest that the Chinese regulatory State, as portrayed by scholars who dissect its *modus operandi*, may somehow draw its inspiration from this school of thought.

Political scientists address the issue from a broadly similar angle by invoking the concept of an East Asian developmental State.⁷⁸ This institutional pattern combines strong government direction, a measure of civil society and private sector initiative, and a fairly high degree of organizational certainty and transparency.⁷⁹ The key participants in the policy process share common goals (with economic growth being favored over redistribution), and enjoy close cooperation.⁸⁰ The State machinery is insulated from exogenous pressures

76. For a wide-ranging survey, see James A. Brander, *Strategic Trade Policy*, in 3 *HANDBOOK INT'L ECON.* 1395 (1995).

77. *Id.*

78. See generally ALICE H. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989); *BEYOND THE DEVELOPMENTAL STATE: EAST ASIA'S ECONOMIES RECONSIDERED* (Chan et al. eds., 1998) [hereinafter *ECONOMIES RECONSIDERED*]; *BUSINESS AND GOVERNMENT IN INDUSTRIALIZING ASIA* (Andrew J. Macintyre ed., 1994); *CHANGING GOVERNANCE AND PUBLIC POLICY IN EAST ASIA* (Ka H. Mok & Ray Forrest eds., 2009) [hereinafter *GOVERNANCE AND PUBLIC POLICY*]; *THE DEVELOPMENTAL STATE* (Meredith Woo-Cumings ed., 1999); PETER B. EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* (1995); CHALMERS A. JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-73* (1982); *THE POLITICAL ECONOMY OF NEW ASIAN INDUSTRIALISM* (Frederic C. Deyo ed., 1987) [hereinafter *NEW ASIAN INDUSTRIALISM*]; ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990); WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* (1993); MING XIA, *THE DUAL DEVELOPMENTAL STATE: DEVELOPMENT STRATEGY AND INSTITUTIONAL ARRANGEMENTS FOR CHINA'S TRANSITION* (2000).

79. See AMSDEN, *supra* note 78; *THE DEVELOPMENTAL STATE*, *supra* note 78; *ECONOMIES RECONSIDERED*, *supra* note 78; EVANS, *supra* note 78; *GOVERNANCE AND PUBLIC POLICY*, *supra* note 78; JOHNSON, *supra* note 78; *NEW ASIAN INDUSTRIALISM*, *supra* note 78; ; WADE, *supra* note 78; WORLD BANK, *supra* note 78.

80. See sources cited *supra* note 79.

along Weberian lines (and thus displays neutrality), but at the same time it is deeply immersed in the surrounding social milieu.⁸¹ The barriers shielding it from partisan pressures, reinforced by firm embeddedness in the community, provide it with the transformative capacity to foster change through governed interdependence between public authorities and private agents.⁸² It can be said that China's regulatory State selectively exhibits such strategically focused interventionism and neo-mercantilism.

An empirically-oriented social scientist has put forward a counter-argument asserting that the parallels should not be overstated because the divergences are as notable as the convergences.⁸³ Importantly, the post-1978 Chinese variant has been far more positively disposed toward FDI than its East Asian counterparts and has, in fact, pursued a growth strategy according it a leading role.⁸⁴ The "strong state, weak society" configuration, whereby a powerful central authority drives an (initially) amorphous social body, has also been less discernible in China due to the empowerment of local interests, typically at the expense of the national government apparatus.⁸⁵ In addition, the Chinese regulatory State has acted more arbitrarily in allocating credit (often discriminating against the private sector in favor of SOEs), has been less inclined to respect property rights, and has generally not adhered as strictly to market-conforming principles.⁸⁶

But this is not a clear-cut picture and some socio-legal scholars—while acknowledging that China may not fully correspond to the East Asian model (which is by no means homogeneous) and may even be portrayed as a "paradoxical developmental State"—nevertheless contend that it is not a distant outlier and displays sufficient similarities to be placed in this broad category.⁸⁷ Such differences of opinion highlight the complexity and dynamic nature of the Chinese regulatory State, an institutional entity that is unique in some respects, but one that reflects politico-economic influences that have region-wide underpinnings. It is a phenomenon that has evoked much intellectual

81. See sources cited *supra* note 79.

82. See sources cited *supra* note 79.

83. See HSUEH, *supra* note 29, at 14–16.

84. See *id.*

85. See *id.* at 13–15.

86. See *id.* at 17–18.

87. See Mark Beeson, *Developmental States in East Asia: A Comparison of the Japanese and Chinese Experiences*, 33 ASIAN PERSP. 5 (2009).

curiosity and has attracted considerable academic attention. The research on the subject is substantial and still ongoing. Yet certain aspects may have been left unattended, and some questions remain unanswered. The literature has evolved to a point whereby it may be appropriate to bring this into focus.

III. AMBIGUITIES AND GAPS

A. Common Analytical Assumptions

For the most part, studies exploring China's regulatory State depict it as a cohesive player that systematically pursues a coherent strategy designed to fulfill clearly articulated goals. There is no implication that the purpose is necessarily to serve the public interest in the technical sense of the term.⁸⁸ The CCP or the ruling elite may be partly motivated by a desire to preserve the political regime in its present form in the face of strong international (particularly those stemming from globalization) and domestic headwinds. But it is not unreasonable to conclude that the structure of the argument inevitably leads, albeit not unambiguously, in this direction. It is legitimate to infer that the policy mix chosen is, to some extent, a product of the perception that this is the "best" course of action for the country to follow in the prevailing politico-economic circumstances.

This conception has its origins in a number of sources, theories of public interest⁸⁹ being merely one of them. There are traces of classical microeconomic thinking, which treats commercial organizations and firms as profit-maximizing holistic entities.⁹⁰ Similar linkages may be established to realist/neo-realist theories of international relations and liberal institutionalism. Both of these theories view the State as a unitary actor, either driven by narrow self-interest (which may or may not be equated with the public interest) in a competitive fashion, or propelled by a somewhat broader set of factors, including an appreciation of the merits of international cooperation.⁹¹ Above all perhaps, a close relationship may be identified with the compre-

88. For an elaboration, see MITNICK, *supra* note 10, at 91–108.

89. *See id.*

90. *See* SYTSE DOUMA & HEIN SCHREUDER, *ECONOMIC APPROACHES TO ORGANIZATIONS* 117 (4th ed. 2008); ROBERT J. MICHAELS, *TRANSACTIONS AND STRATEGIES: ECONOMICS FOR MANAGEMENT* 6–13 (2011).

91. *See* CHRIS BROWN & KIRSTEN AINLEY, *UNDERSTANDING INTERNATIONAL RELATIONS* 23–26, 41–47 (2009).

hensive-rational decision-making model embraced by social scientists of various disciplinary backgrounds sympathetic to the notion that individuals and collective entities (groups, organizations, states, and the like) typically proceed cohesively and effectively to attain well-defined goals.⁹²

B. Missing Elements

Without abandoning or modifying this (partly) credible and time-honored analytical framework, it is entirely possible to take a path that may diverge in some respects from that normally chosen by students of the Chinese regulatory State. The point is that post-1978 China has generally preferred, even after 1993, to restructure its economic and political system gradually rather than through sweeping reforms, and has tended to address comparatively “easy” problems before tackling relatively “difficult” ones.⁹³ This penchant for strategic incrementalism has apparently been rooted in finely-honed logic predicated on the assumption that orderly stepwise adjustment (“crossing the river by groping stones”) is a productive form of policy experimentation that (*ex ante*) minimizes disruption induced by uncertainty, (*ex post*) facilitates error correction, and (both *ex ante* and *ex post*) maximizes political acceptability.⁹⁴

When examined from this perspective, the intricate and protracted regulation-deregulation-reregulation process may be merely in its intermediate stages. The regulatory State may have crystallized into a selectively decentralized, but predominantly centralized, institutional structure not because it reflects the ultimate strategic blueprint, if any, but due to the fact that prevailing conditions militate against further evolution. Or, to express it differently, the regulatory State may be a tactically-inspired transitional arrangement rather than a deeply entrenched system destined to serve as a long-term mechanism for promoting integration on Chinese terms into the global economy.

92. See CAIRNEY, *supra* note 60, at 96–97; HOWLETT ET AL., *supra* note 60, at 142–46.

93. See CHINA’S ECONOMIC REFORMS: THE COSTS AND BENEFITS OF INCREMENTALISM (Qimiao Fan & Peter Nolan eds., 1994); SUSAN L. SHIRK, HOW CHINA OPENED ITS DOOR: THE POLITICAL SUCCESS OF THE PRC’S FOREIGN TRADE AND INVESTMENT REFORMS 27–33 (1994); SUSAN L. SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA 129–239 (1993); WU, *supra* note 30, at 57–64; see also Justin Yifu Lin & Yan Wang, *China’s Integration with the World: Development as a Process of Learning and Industrial Upgrading*, in TRANSFORMING THE CHINESE ECONOMY 201 (Cai Fang ed., 2010); Yongnian Zheng, *Political Incrementalism: Political Lessons from China’s 20 Years of Reform*, 20 THIRD WORLD Q. 1157 (1999).

94. See sources cited *supra* note 93.

Indeed, there is a small body of academic work suggesting that China may be diverging from the East Asian developmental State, which itself is in throes of transition.⁹⁵ The proposition is that this regional power may be differentiating itself in a fundamental respect by slowly progressing toward the much looser Anglo-Saxon regulatory model—a significantly smaller micro-level/sector-specific form of government intervention.⁹⁶ It follows that this domain of socio-legal inquiry may be one where researchers face more imponderables than commonly believed.

C. Incomplete Picture Painted

In addition to such lingering ambiguities, the Chinese regulatory State, as presented in the mainstream literature, may be a one-dimensional construct, or at least an analytical vehicle that is overly narrow in scope. Scholarly attention focuses almost exclusively on government-business relations (i.e., economic regulation). Patterns of authority inside the public bureaucracy are either largely overlooked or inadequately explored. Insights and empirical findings regarding environmental and social regulation, which cannot be discarded as modest and scarcely illuminating, are not consistently and systematically incorporated into the research agenda. Most of the enlightening, but highly concentrated discussion, revolves around policy content (i.e., strategies, laws, regulations, and the like), with limited resources being channeled toward the examination of other key facets and phases of the policy architecture and cycle (e.g., context, agenda setting, formulation, decision making, implementation, evaluation, and the like). A thoroughly critical appraisal of institutional realities is seldom offered.

Rule-based direction and control inside the boundaries of the (modern) regulatory State (i.e., internally standard-driven as distinct from external guidance and oversight) is one of its salient characteristics.⁹⁷ This is not a widely recognized and studied phenomenon: “We

95. See Anthony B.L. Cheung, *Interpreting East Asian Social Policy Development: Paradigm Shifts or Policy 'Steadiness'?*, in *CHANGING GOVERNANCE AND PUBLIC POLICY IN EAST ASIA* 25 (Ka Ho Mok & Ray Forrest eds., 2009).

96. See Keun Lee et al., *Is China Following the East Asian Model? A "Comparative Institutional Analysis" Perspective*, 2 *CHINA REV.* 85 (2002).

97. See *CONTROLLING MODERN GOVERNMENT*, *supra* note 10; HOOD ET AL., *REGULATION INSIDE GOVERNMENT*, *supra* note 10;

are not accustomed to think of government as ‘regulating’ itself.”⁹⁸ By the same token, “[t]he word regulation is not generally used to denote the various ways in which public organizations are shaped by rules and standards emanating from arm’s-length authorities.”⁹⁹ Nevertheless, “there is a range of regulation processes inside government,”¹⁰⁰ which are now an integral component of the socio-legal research agenda. Moreover, their effective development is deemed to be essential for a smooth functioning of the regulatory State.¹⁰¹

China’s leaders are not oblivious to this fact. Since 1993, they have undertaken a number of rounds of “administrative and State sector restructuring,” some more comprehensive than others.¹⁰² Scholars who dissect the workings of the Chinese regulatory State

98. See HOOD ET AL., REGULATION INSIDE GOVERNMENT, *supra* note 10, at 3.

99. *Id.* at 3–4.

100. *Id.* at 4.

101. See *id.*

102. See, e.g., BILL K.P. CHOU, GOVERNMENT AND POLICY-MAKING REFORM IN CHINA: THE IMPLICATIONS OF GOVERNING CAPACITY (2009) [hereinafter CHOU, GOVERNING CAPACITY]; GOVERNANCE IN CHINA (Jude Howell ed., 2004); ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, GOVERNANCE IN CHINA (2005); MINXIN PEI, CHINA’S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY (2006); CHOU KWOK PING, CHINA’S CIVIL SERVICE REFORM: SUCCESS AND PITFALLS (2007); REMAKING CHINA’S PUBLIC MANAGEMENT (Peter N.S. Lee & Carlos W.H. Lo eds., 2001); WANG XIAOQI, CHINA’S CIVIL SERVICE REFORM (2012); John P. Burns, *Changing Environmental Impacts on Civil Service Systems: The Cases of China and Hong Kong*, in HANDBOOK OF COMPARATIVE PUBLIC ADMINISTRATION IN THE ASIA-PACIFIC BASIN 179 (Hoi-kwok Wong & Hon S. Chan eds., 1999); John P. Burns, *The Civil Service of China: The Impact of the Environment*, in CIVIL SERVICE SYSTEMS IN ASIA 79 (John P. Burns & Bidhya Bowornwathana eds., 2001); John P. Burns & Wang Xiaoqi, *Civil Service Reform in China: Impacts on Civil Servants’ Behavior*, 201 CHINA Q. 58 (2010); John P. Burns, *Governance and Public Sector Reform in the People’s Republic of China*, in GOVERNANCE AND PUBLIC SECTOR REFORM IN ASIA: PARADIGM SHIFTS OR BUSINESS AS USUAL? 67 (Anthony B.L. Cheung & Ian Scott eds., 2003); Bill K.P. Chou, *Civil Service Reform in China, 1993–2001: A Case of Implementation Failure*, 2 CHINA: INT’L J. 210 (2004) [hereinafter Chou, *Civil Service Reform in China*]; Bill K.P. Chou, *Does “Good Governance” Matter? Civil Service Reform in China*, 31 INT’L J. PUB. ADMIN. 54 (2008) [hereinafter Chou, *Does “Good Governance” Matter?*]; Bill K.P. Chou, *Implementing the Reform of Performance Appraisal in China’s Civil Service*, 19 CHINA INFO. 39 (2005) [hereinafter Chou, *Reform of Performance Appraisal*]; Gavin Drewry & Chee-Po Chan, *Civil Service Reform in the People’s Republic of China: Another Mirage of the New Global Paradigm of Public Administration?*, 67 INT’L REV. ADMIN. SCI. 461 (2001); Dai Guangqian, *The Establishment of an Examination and Recruitment System with Chinese Characteristics in the People’s Republic of China*, in ASIAN CIVIL SERVICE SYSTEMS: IMPROVING EFFICIENCY AND PRODUCTIVITY 189 (John P. Burns ed., 1994); Wang Hailong, *Building a Position Classification System with Chinese Characteristics in the People’s Republic of China*, in ASIAN CIVIL SERVICE SYSTEMS: IMPROVING EFFICIENCY AND PRODUCTIVITY 202 (John P. Burns ed., 1994); Koutsai T. Liou, *Issues and Lessons of Chinese Civil Service Reform*, 26 PUB. PERSONNEL MGMT. 505 (1997).

outline them in considerable detail.¹⁰³ But the issue of adequacy and impact is not fully addressed. Most students of public administration do not consider these institutional re-engineering efforts to be far-reaching enough or sufficiently successful.¹⁰⁴ A minority of researchers in the field—employing an elaborate principal-agent framework—produce a somewhat less negative verdict, but without necessarily painting an entirely reassuring picture.¹⁰⁵ Whatever the quality of the external rule-based governance blueprint and machinery, it may thus be argued that the internal element does not rest on a truly solid foundation.

D. Regime Performance Overstated

This lies at the heart of the question of China's State capacity. Empirical work on the subject has yielded inconclusive insights.¹⁰⁶ But the weight of the evidence suggests that, despite the impressive post-1978 economic record, the government's ability to perform regulatory functions leaves something to be desired; this observation is

103. See HSUEH, *supra* note 29, at 26–28.

104. See CHOU, GOVERNING CAPACITY, *supra* note 102; Chou, *Civil Service Reform in China*, *supra* note 102; Chou, *Does "Good Governance" Matter?*, *supra* note 102; Chou, *Reform of Performance Appraisal*, *supra* note 102; Drewry & Chan, *supra* note 102; PEI, *supra* note 102.

105. See XIAOQI, *supra* note 102; Burns & Xiaoqi, *supra* note 102; *see also* Ping, *supra* note 102; ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *supra* note 102.

106. See, e.g., CHOU, GOVERNING CAPACITY, *supra* note 102; FORGING ENVIRONMENTALISM: JUSTICE, LIVELIHOOD, AND CONTESTED ENVIRONMENTS (Joanne Bauer ed., 2006); HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA (Barry J. Naughton & Dali L. Yang eds., 2004); PEI, *supra* note 102; WANG SHAOGUANG & HU ANGANG, THE CHINESE ECONOMY IN CRISIS: STATE CAPACITY AND TAX REFORM (2001); VIVIENNE SHUE, THE REACH OF THE STATE: SKETCHES OF THE CHINESE BODY POLITIC (1988); STATE CAPACITY IN EAST ASIA: JAPAN, TAIWAN, CHINA, TAIWAN, AND VIETNAM (Kjeld E. Brodsgaard & Susan Young eds., 2000); STATE POWER AND SOCIAL FORCES: DOMINATION AND TRANSFORMATION IN THE THIRD WORLD (Joel S. Migdal et al. eds., 1994); Paul Collins & Hon S. Chan, *State Capacity Building in China: An Introduction*, 29 PUB. ADMIN. & DEV. 1 (2009); Yanzhong Huang & Dali L. Yang, *Population Control and State Coercion in China*, in HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA, *supra*, at 6; W. Li & Hon S. Chan, *Clear Air in Urban China: The Case of Inter-Agency Coordination in Chongqing's Blue Sky Program*, 29 PUB. ADMIN. & DEV. 55 (2009); Mushkat, *Contextualizing Environmental Human Rights*, *supra* note 29; Mushkat, *Implementing Environmental Law*, *supra* note 29; Mushkat & Mushkat, *supra* note 29; Wang Shaoguang, *The Problem of State Weakness*, 14 J. DEMOCRACY 36 (2003); Wang Shaoguang, *Regulating Death at Coalmines: Changing Mode of Governance in China*, 15 J. CONTEMP. CHINA 1 (2006); Jonathan Schwartz & Gregory Evans, *Causes of Effective Policy Implementation: China's Public Response to SARS*, 16 J. CONTEMP. CHINA 195 (2007); Jonathan Schwartz, *The Impact of State Capacity on Enforcement of Environmental Policies: The Case of China*, 12 J. ENV'T & DEV. 50 (2003).

valid even though, as a crisis erupts, it typically manages to mobilize sufficient resources decisively enough to eventually contain it.¹⁰⁷ Whether or not this combination of endeavoring to overhaul flawed institutional structures, ultimately falling short, proceeding in a step-wise fashion, and responding forcefully to serious perturbations may ensure satisfactory evolution of the regulatory State, in a manner largely or fully commensurate with exogenous and endogenous challenges, merits closer attention than it has received thus far. This is true both in general and in this particular context, notably at the two levels in relation to policy implementation (including enforcement).

Relevant lessons may also be drawn in light of experience in the environmental and social management domains. In the former realm, certain problematic features stand out. One is the persistently (albeit decreasingly so), ambiguous, goading, non-transparent, and provisional nature of key visible components (laws, regulations, and the like) of the governance edifice. This was poignantly highlighted in the 1990s when a legal scholar noted that the Environmental Protection Law was designed “only to outline China’s basic policies on environmental matters.”¹⁰⁸ He proceeded to observe it obscurely stipulated that “[t]he waters of rivers, lakes, seas, and reservoirs must be protected and a good quality of water maintained,”¹⁰⁹ and that it loosely required that “[e]ffective measures . . . be taken to eliminate smoke and dust from all smoke-emitting equipment, industrial kilns and furnaces, motor-driven vehicles, and boats and ships.”¹¹⁰ This prompted him to assert that “statutes still perform a rhetorical role in China, offering direction to those whose activities implicate the environmental issues described in the statute, but not necessarily anticipating litigation over the application of the statute in particular cas-

107. See RUTH ALAS & JUNHONG GAO, *CRISIS MANAGEMENT IN CHINESE ORGANIZATIONS: BENEFITING FROM THE CHANGES* (2012); ZENOBIA C.Y. CHAN, *CRISIS MANAGEMENT IN CHINESE CONTEXTS* (2011); CHINA’S CRISIS MANAGEMENT (Jae H. Chung ed., 2012); CHEN FUJIN & TANG TIEHAN, *PUBLIC CRISIS MANAGEMENT IN CHINA* (2008); THE SARS EPIDEMIC: CHALLENGES TO CHINA’S CRISIS MANAGEMENT (John Wong & Zheng Yongnian eds., 2004); Schwartz & Evans, *supra* note 106.

108. John C. Nagle, *The Missing Chinese Environmental Law Statutory Interpretation Cases*, 5 N.Y.U. ENVTL. L.J. 517, 546 (1996) (quoting Bruce L. Ottley & Charles C. Valauskas, *China’s Developing Environmental Law: Policies, Practices, and Legislation*, 6 B.C. INT’L & COMP. L. REV. 81, 84–85 (1983)).

109. *Id.* (quoting Environmental Protection Law of the People’s Republic of China, art. 11 (1979)).

110. *Id.* (quoting Environmental Protection Law of the People’s Republic of China, art. 19 (1979)).

es.”¹¹¹ A decade later, another legal researcher furnished an essentially similar assessment:

Numerous environmental laws suffer from vagueness and put forward general, almost exhortational terms. Even the amended Air Pollution Prevention and Control Law provides, in article 19, that “enterprises shall give priority to the adoption of clean production techniques” and, according to Article 30, enterprises “shall gradually adopt measures to control nitrogen oxide,” while the local governments “shall redouble their efforts in afforestation, grass-planting, urban and rural greening, and take effective measures to do well the work [of prevention and control].”¹¹²

Such opaque policy content undermines implementation in general and enforcement in particular. The difficulties are compounded by the often indeterminate status of key legislative acts;¹¹³ their lack of visibility (statutes are not always published, particularly those enacted at the regional and local level);¹¹⁴ unavailability of a significant body of authoritative judicial precedents;¹¹⁵ absence of an authoritative and coherent statutory interpretation structure;¹¹⁶ inadequate conversion of statutory provisions into workable regulatory mechanisms and standards;¹¹⁷ a weak deterrence system;¹¹⁸ and a judiciary that is organizationally, politically, and technically feeble, deprived of resources, and marginalized because of a widespread preference for alternative modes (both formal and informal) of dispute resolution.¹¹⁹

Another notable characteristic of the environmental segment of the Chinese regulatory State is the inherent tension between the strategic goals that shape its operations and its vertical fragmentation. Regarding the first factor, the simultaneous pursuit of the twin objectives of economic betterment and ecological preservation is a source of enduring conflicts that require difficult trade-offs.¹²⁰ The former

111. *Id.*

112. Stefanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 205 (2006) (quoting Air Pollution Prevention and Control Law, art. 10).

113. See Nagle, *supra* note 108, at 547.

114. See *id.* at 550.

115. See Beyer, *supra* note 112, at 206.

116. See Nagle, *supra* note 108, at 525–27.

117. See Beyer, *supra* note 112, at 206.

118. See Nagle, *supra* note 108, at 540–41.

119. See *id.* at 550–51; Beyer, *supra* note 112, at 189–91.

120. See CHINA'S ENVIRONMENTAL CRISIS: DOMESTIC AND GLOBAL IMPACTS AND RESPONSES, *supra* note 29; ECONOMY, *supra* note 29; MANAGING THE CHINESE ENVIRONMENT,

goal has traditionally dominated, but this is becoming an increasingly challenging balancing act.¹²¹ The point to emphasize is that institutional development is subject to multiple influences and that regulation in its various forms may be a less coherent strategic undertaking than implied in the literature on the subject (and in sources associated with theoretical antecedents, such as classical microeconomics, realist/neo-realist school of international relations, liberal institutionalism, and the rational-comprehensive decision model).

Vertical fragmentation is a pervasive phenomenon commonly attributable to excessively long organizational chains.¹²² In a large and diverse country like China, it is bound to manifest itself more acutely than in other institutional milieus. Yet in this case, it is deemed to be the product of additional factors—some the result of deliberate design and some reflecting the impact of semi-autonomous forces.¹²³ Whatever the underlying causes, and irrespective of how they coalesce to produce specific policy outcomes, vertical fragmentation in the environmental sphere is typically seen when strategic signals emanating from the national regulatory center do not affect, or do so modestly, the behavior of agents at the local and regional periphery. Broadly speaking, this stems from the unwillingness or inability (tantamount to inadequate State capacity) of the center to implement or enforce its ecological agenda through vital local channels. A legal scholar has described the problem in the following terms:

Generally, the success or failure of laws depends on how effectively they are enforced, especially at the local level. But local governments are often major shareholders of polluting enterprises creating an inherent conflict of interest. Nevertheless, the laws presume that environmental protection bureaus representing a part of local governments will successfully coordinate with the national body, SEPA

supra note 29; MURRAY & COOK, *supra* note 29; Mushkat & Mushkat, *supra* note 29; Mushkat, *Contextualizing Environmental Human Rights*, *supra* note 29; Mushkat, *Implementing Environmental Law*, *supra* note 29.

121. See Kinglun Ngok, *Redefining Development in China: Toward a New Policy Paradigm for the New Century?*, in *CHANGING GOVERNANCE AND PUBLIC POLICY IN EAST ASIA*, *supra* note 78, at 49–66.

122. See JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR, WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL, THIS BEING THE SAGA OF THE ECONOMIC DEVELOPMENT ADMINISTRATION AS TOLD BY TWO SYMPATHETIC OBSERVERS WHO SEEK TO BUILD MORALS ON A FOUNDATION* (3d ed. 1984).

123. See Beyer, *supra* note 112, at 207.

[State Environmental Protection Agency upgraded in 2008 to a Ministry of Environmental Protection/MEP]. In theory, the People's Republic of China operates a unitary national [S]tate where legislation and directives emanate from central Beijing to which sub-national units of governments must adhere. In practice, however, this high degree of administrative cohesion does not exist. The laws fail to anticipate the possibility that certain government interests might diverge sharply from those of the environment department and create a major obstacle to strict enforcement of both national and local environmental legislation.¹²⁴

And as she has further elaborated:

In reality, the sub-national administrative departments rather tend to look to the people's governments at their own level than to central authorities since their funding and enforcement powers rely on local district authorities. The fact that local governments very often sponsor or own industries themselves and consider environmental regulations to be incompatible with economic growth makes it difficult for environmental protection bureaus to enforce their policy. Although the State Environmental Protection Agency[/Ministry of Environmental Protection] has formal authority over lower-level agencies, this national agency does not have much leverage in ensuring that national regulations and standards are enforced at the local level. It is common practice that environmental issues are treated more as a matter of policy rather than law and personal relations are often decisive. Fees and fines are rarely determined authoritatively; instead, they are often negotiated and fall far below the cost of damage that the harmful activity has caused, as well as below expenses for pollution control facilities.¹²⁵

Institutional fragmentation has a horizontal as well as a vertical dimension. The former manifests itself in the insufficiently elevated status of MEP and its SEPA predecessor (particularly the latter), their rather loose integration into the overall strategic management structure, and weak intra- and inter-organizational coordination mechanisms at lower levels of the administrative apparatus.¹²⁶ This is not a predicament faced exclusively by decision makers in the environmental domain, but a widespread phenomenon witnessed across

124. *Id.*

125. *Id.*

126. See *id.* at 208; Miron Mushkat & Roda Mushkat, *Regime Transformation and Environmental Policy Innovation in China*, 12 INTERDISC. ENVTL. REV. 349, 363–66 (2011).

the entire policy spectrum.¹²⁷ The high degree of vertical and horizontal segmentation observed inside the politico-bureaucratic machinery has prompted social scientists to conclude that, superficial appearances to the contrary notwithstanding, the system could aptly be portrayed as one of “fragmented authoritarianism.”¹²⁸ Both government fragmentation and authoritarian control have moderated somewhat as the post-1978 reforms have broadened and deepened, and it is now more common to employ the more palatable (as well as encompassing) expression “negotiated State” in depicting the Chinese institutional milieu.¹²⁹

In this complex and diverse setting, power is diffuse and providing strategic direction in an effective fashion poses a considerable challenge.¹³⁰ Moreover, conditions encourage regulatory cartelization (whereby policies are designed to placate special interests)¹³¹ and regulatory capture (whereby regulated parties heavily influence regulators),¹³² both of which are amply seen in the environmental realm in China.¹³³ The lesson to be drawn on the basis of experience in this policy sphere is that assuming an invariably high degree of strategic cohesion, coherence, and control in seeking to distil the essence of the Chinese regulatory State may not be an entirely viable line of inquiry. There is an acknowledgement in the literature on the subject that this is an element in the intricate analytical equation,¹³⁴ but the issue is generally accorded modest attention and the picture that emerges does not duly reflect the fluidity of a constantly renegotiated political order buffeted by strong centrifugal forces.

127. See BUREAUCRACY, POLITICS, AND DECISION MAKING IN CHINA (Kenneth G. Lieberthal & David M. Lampton eds., 1992); FLEMMING CHRISTIANSEN & SHIRIN RAI, CHINESE POLITICS AND SOCIETY: AN INTRODUCTION (1996); GORILD HEGGELUND, ENVIRONMENT AND RESETTLEMENT POLITICS IN CHINA: THE THREE GORGES PROJECT (2004); JIANRONG HUANG, THE APPLICABILITY OF POLICY-MAKING THEORIES IN POST-MAO CHINA (1999); KENNETH G. LIEBERTHAL & MICHEL OKSENBERG, POLICYMAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES (1988); LIEBERTHAL, *supra* note 30; POLICY IMPLEMENTATION IN POST-MAO CHINA (David M. Lampton ed., 1987); David M. Lampton, *Chinese Politics: The Bargaining Treadmill*, 23 ISSUES & STUD. 11 (1987).

128. See sources cited *supra* note 127.

129. See SAICH, *supra* note 30, at 250–55; Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 CHINA Q. 124, 139 (2000).

130. See sources cited *supra* note 129.

131. See Roger G. Noll, *Government Regulatory Behavior: A Multidisciplinary Survey and Synthesis*, in REGULATORY POLICY AND THE SOCIAL SCIENCES, *supra* note 10, at 24–27.

132. See *id.*

133. See Lieberthal, *supra* note 29.

134. HSUEH, *supra* note 29, at 13–16.

Research on social regulation furnishes complementary insights. Importantly, it offers substantial support to the argument that the governance regime is characterized by pervasive fragmentation. It has thus been noted that the “most salient feature of China’s food safety regulatory system is the fragmentation of regulatory authority among different government agencies.”¹³⁵ Specifically, at the time of writing, “the Ministry of Health (MoH), the Ministry of Agriculture (MoA), the General Administration of Quality Supervision, Inspection and Quarantine (GAQSIQ), the State Administration for Industry and Commerce (SAIC), the Ministry of Commerce (MoC), and the State Food and Drug Administration (SFDA) are actively involved in regulating food safety.”¹³⁶ This loose institutional pattern has few parallels and “is in sharp contrast with the regulatory regime in the United States.”¹³⁷ It may be attributed to the often acclaimed piecemeal organizational reform process not undertaken within a comprehensive strategic framework and selectively responsible for the myriad implementation failures encountered in the social policy field.

The fragmentation of the food safety regulatory regime in China is partly a legacy of stop-and-go changes in both legislation and institutional reforms. China’s Food Hygiene Law (*Shipin weishengfa*), promulgated in 1995, puts the MoH in charge of supervision and management of food hygiene. The MoH’s principal regulatory authorities include issuing hygiene licenses to businesses engaged in food production, marketing or sales; monitoring, inspecting, and providing technical guidance for food hygiene; appraising and publicizing the status of food hygiene; investigating and dealing with food poisoning or food contamination incidents; and imposing financial penalties or revoking the hygiene license of violators of the Food Hygiene Law. The MoA is responsible for formulating and enforcing quality and safety standards for agricultural inputs and farm products. For instance, the MoA sets the limits for pesticide residues in agricultural products and monitors compliance with such standards.

The GAQSIQ and the SAIC are also influential players in food safety regulation. The Product Quality Law (*Chanpin zhiliangfa*), enacted in 2000, authorizes the GAQSIQ to take the lead in regulating

135. Tam & Yang, *supra* note 29, at 10.

136. *Id.*

137. *Id.*

product quality, including the quality of foodstuffs. The GAQSIQ issues production permits for food processors and producers, supervises licensed food enterprises for compliance with regulations concerning food manufacturing, packaging and labeling; and is empowered to crack down on unlicensed food processing and production. It can issue fines, confiscate products, and ban food manufacturers from continuing production if they have violated the relevant rules. The SAIC oversees food safety in the “circulation” area. It issues business licenses and oversees food hygiene in urban and rural markets. Like the GAQSIQ, the SAIC is empowered to fine and revoke the business license of violators. The MoC can enact and amend standards and rules regarding the procedures for food processing, packaging, storage, transportation, and sales.

It should be noted that other bureaucratic agencies play some role in food safety regulation as well. For example, the China Petroleum and Chemical Industry Association (formerly the Ministry of Chemical Industry) and the Ministry of Public Security, two vital components of the regulatory façade, have effective authority to oversee production, storage, and sales of methanol and industrial alcohol.¹³⁸

Institutional fragmentation in this crucial domain is believed to be a source of a host of serious problems, notably inadequate information sharing,¹³⁹ incongruities among the regulations and standards adopted by the different agencies involved,¹⁴⁰ and widespread shirking and buck-passing.¹⁴¹ Regulatory cartelization and capture are also rife and manifest themselves in tolerance of counterfeiting (which may bring considerable economic benefits to localities) by local government officials,¹⁴² lax enforcement of food safety regulations,¹⁴³ and regulatory forbearance (ascribed to the revenue imperative and corruption) by agencies charged with regulation.¹⁴⁴ The heavy emphasis on revenue-sharing is the product of flawed policy design (cartelization and capture may, however, compound the problem) rather than fragmentation per se. It results in discriminatory and harmful

138. *Id.* at 11–12.

139. *Id.* at 14–15.

140. *Id.* at 15.

141. *Id.* at 15–16.

142. *See id.* at 17.

143. *See id.*

144. *Id.* at 17–18.

practices (e.g., imposition of financial penalties on lawbreakers, but reluctance to crack down on counterfeit foodstuffs),¹⁴⁵ and excessive issuing of business licenses for purposes of collecting fees and charges.¹⁴⁶ The intense competition among regulatory agencies for a slice of the revenue pie compounds such difficulties.¹⁴⁷

As in the environmental realm, this configuration, to some extent, reflects the inherent tension between conflicting (in the short term) goals: robust economic expansion and satisfactory human safety.¹⁴⁸ It has marginally diminished in urban areas, where regulatory oversight has slowly improved and consumers have grown more affluent and less docile.¹⁴⁹ The picture in rural areas remains challenging because of spotty controls,¹⁵⁰ low purchasing power of villagers that sustains demand for cheap but sub-standard goods,¹⁵¹ villagers' typically modest education level, and weak rights consciousness.¹⁵² Such divergences should not be discarded lightly, since they aggravate the urban-rural divide and, in the long run, undermine social stability.¹⁵³ The corollary again is that, contrary to views at times expressed by students of economic regulation,¹⁵⁴ a degree of caution needs to be exercised in assessing the organizational underpinnings, capacity, and effectiveness of the Chinese regulatory State.

Nor should the adverse consequences of such institutional practices be allowed to go unheeded. A number of (belatedly) well-publicized incidents, involving severe impact on human welfare, have now been subjected to careful scrutiny by social scientists.¹⁵⁵ They

145. *Id.* at 18.

146. *Id.* at 19.

147. *Id.* at 20.

148. *Id.* at 21–25. This broad issue is dynamically and fully explored in Ngok, *supra* note 121, at 49–66.

149. See Tam & Yang, *supra* note 29, at 21, 23–24.

150. *Id.* at 23.

151. *Id.* at 22.

152. *Id.*

153. *Id.* at 21–25; see also Liu, *supra* note 29; Yang, *Regulatory Learning and Its Discontents*, *supra* note 29. The relationship between the urban-rural divide and social stability is comprehensively and systematically examined in JOHN B. KNIGHT & LINA SONG, *THE RURAL-URBAN DIVIDE: ECONOMIC DISPARITIES AND INTERACTIONS IN CHINA* (1999); ONE COUNTRY, TWO SOCIETIES: *RURAL-URBAN INEQUALITY IN CONTEMPORARY CHINA* (Martin King Whyte ed., 2010).

154. See, e.g., Andrew C. Mertha, *Policy Enforcement Markets: How Bureaucratic Redundancy Contributes to Effective Intellectual Property Implementation in China*, 38 *COMP. POL.* 295 (2006).

155. See John Balzano, *China's Food Safety Law: Administrative Innovation and Institutional Design in Comparative Perspective*, 13 *ASIAN-PAC. L. & POL'Y J.* 23 (2012); Tam & Yang, *supra*

highlight the origins and scope of the 2004 fake infant milk scandal in Anhui's Fuyang Municipality, which resulted in the death of at least twelve babies and hundreds of cases of serious infant malnutrition (e.g., big head and small body syndrome) from consuming substandard milk powder.¹⁵⁶ This tragic loss of life and severe human suffering subsequently turned out to be the local tip of a national iceberg, highlighting a string of blatant irregularities in the drug registration and approval process overseen by the State Food and Drug Administration (SFDA).¹⁵⁷

The SFDA experience is worth exploring further since it initially showed some promise when an aggressive and apparently forward-looking (yet prone to mobilize support through informal channels) official, Zheng Xiaoyu, was appointed as head of the State Pharmaceutical Administration (SPA), which was subordinated at that juncture to the State Economic and Trade Commission (SETC).¹⁵⁸ The SPA was not a modern-style drug regulator, but a body that primarily acted as the government's steward of the pharmaceutical industry and was thus legitimately regarded as the "mother-in-law of China's leading pharmaceutical enterprises."¹⁵⁹ Over time, it acquired some regulatory functions, including "supervision of the production and operation of pharmaceutical products, the right to approve licenses for the production and sale of medical devices, and the setting and implementation of national standards for medical devices, materials, machinery, and packaging."¹⁶⁰

The SPA's regulatory activities came quickly to overlap with those of the MoH, and this proved to be a source of constant friction.¹⁶¹ Zheng was, naturally, not content with that state of affairs, particularly the higher bureaucratic status enjoyed by the MoH relative to his own agency and the chaotic conditions prevailing in the burgeoning pharmaceutical industry.¹⁶² He advocated reforms inspired by the U.S. Food and Drug Administration model that ap-

note 29; Drew Thompson & Hu Ying, *Food Safety in China: New Strategies*, GLOBAL HEALTH GOVERNANCE, Fall 2007, at 1; Yang, *Regulatory Learning and Its Discontents*, *supra* note 29.

156. Tam & Yang, *supra* note 29, at 7–9.

157. See Yang, *Regulatory Learning and Its Discontents*, *supra* note 29.

158. *Id.* at 141.

159. *Id.*

160. *Id.* at 142.

161. *Id.*

162. *Id.*

pealed to the country's top decision makers, who opted in 1998 to merge regulatory functions over drugs and medical devices under one roof in the newly constituted State Drug Administration (SDA).¹⁶³ That body was presided over by Zheng, who was catapulted to vice-ministerial rank, comfortably above that of the head of the MoH's Drug Administration Bureau (DAB).¹⁶⁴ Before long, the SDA assumed responsibility for food safety regulation and was transformed into the SFDA in 2003.¹⁶⁵

Upon being elevated as the SDA's first commissioner, Zheng embarked on a series of ambitious and progressive reforms that included nationalizing standards for drugs, streamlining drug registration procedures, and vigorously promoting and expediting adoption of good practices for manufacturing (GMP), research (GLP), and sales (GSP).¹⁶⁶ As a leading critic poignantly pointed out, "[h]ad this agenda been realized, it would have had an enormously positive impact on the development of China's pharmaceutical industry."¹⁶⁷ Unfortunately, "[a]s it transpired, . . . every one of the major reform initiatives launched on Zheng's watch went awry."¹⁶⁸ From a regulatory perspective, the explanation for this regrettable turn of events is consistent with the problematic socio-environmental trends outlined and accounted for previously.

In the face of severe resource constraints, logistic hurdles, and enormous pressures exerted by pharmaceutical companies—rent-seeking, paving the way for regulatory capture—the national drug approval, re-certification, and re-registration process was rapidly derailed and engulfed by a wave of corruption.¹⁶⁹ Centralization of authority and nationalization of standards—desirable undertakings in principle—concentrated enormous power in the hands of a few strategically positioned, unscrupulous, and unsupervised SDA and SFDA officials, allowing them to convert these two regulatory vehicles into rent-seeking machines. "In the absence of well-designed processes, the regulators had much discretion."¹⁷⁰ On the other side, "[f]or drug

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 143.

167. *Id.*

168. *Id.*

169. *Id.* at 143–45.

170. *Id.* at 145.

companies, their livelihood entirely depended on whether or not [regulators] gave approval to their new drug applications and how fast the approvals were given.”¹⁷¹ Consequently, “[t]o get the approvals speedily, the companies would seek to bribe [the regulators]”¹⁷² who were only too happy to oblige.¹⁷³

In the end, the distortions and transgressions were brought to the attention of relevant parties, who proceeded to take short-term corrective actions and implement medium-term remedial measures.¹⁷⁴ Whether or not entirely effective, the outcome illustrates that the Chinese regulatory State has a capacity for learning and renewal.¹⁷⁵ But the principal conclusion to be drawn in light of this costly and disruptive episode is once more that the governance regime is structurally too fragile to be considered as a strategically focused, tightly managed, and vigorously-shielded-from-undue-influences entity. If not wholly, then at least in part, its functioning may perhaps be best captured by the “garbage can,” rather than comprehensive-rational model of decision making, which portrays formal institutions as “organized anarchies.”¹⁷⁶

Another dimension of the picture that merits close attention is the personal nature of the seemingly professional relationships among key players within this amorphous and readily manipulated system. The point to note is that Zheng and his close associates relied heavily on informal social networks, consisting predominantly of family members and trusted acquaintances, often employed in the pharmaceutical industry, to sustain their corrupt activities.¹⁷⁷ The most vivid example involved Zheng’s wife, Liu Naixue, who followed him from Zhejiang to Beijing and became a highly compensated manager at the Beijing Jinsaishi biotech company.¹⁷⁸ The bribes Zheng took were typically for approval of new drug applications, often collected by her and their son, Zheng Hairong.¹⁷⁹

171. *Id.*

172. *Id.*

173. *See id.*

174. *Id.* at 150–56.

175. *See id.*; Lin & Wang, *supra* note 93, at 297–310.

176. HOWLETT ET AL., *supra* note 60, at 151–53; *see also* CAIRNEY, *supra* note 60, at 232–33.

177. *See* Yang, *Regulatory Learning and Its Discontents*, *supra* note 29, at 149–50.

178. *Id.* at 149.

179. *Id.*

Regulatory theory does not comprehensively address this phenomenon. Even the concepts of regulatory cartelization and capture, as well as rent-seeking, do not fully reflect its essence. The attempt to come to grips with goal displacement in regulatory agencies by depicting them as enterprises dominated by insiders whose objectives eventually come to dominate the policy agenda arguably does not go far enough in this respect.¹⁸⁰ The incorporation of a network perspective into the analytical framework may potentially enrich it and make it more widely applicable. It has its origins in microeconomics, or the economics of the firm (now refashioned as organizational economics),¹⁸¹ where the traditional distinction between markets and hierarchies (as the two dominant social coordination mechanisms)¹⁸² has given way to broader conceptual schemes that encompass network (hence network institutionalism)¹⁸³ and even bazaar-like forms of governance.¹⁸⁴ In an enlightened milieu, networks entail productively organized cooperation, including reciprocity and gift exchange.¹⁸⁵

It has been amply demonstrated that networking has long been at the heart of China's social life in all its forms and that it has remarkably withstood the effects of massive shocks, both exogenous and endogenous, and deep political transformations.¹⁸⁶ The proposition has also been put forward that the social network, based on personal connections and particularistic favors, remains the undisputed fulcrum of the Chinese governance regime.¹⁸⁷ This may have negative as well as positive ramifications, especially if the analogy is stretched toward the bazaar end of the continuum. Wherever the emphasis is ultimately

180. See Noll, *supra* note 131, at 28–41.

181. See DOUMA & SCHREUDER, *supra* note 90; PETER-J. JOST, *THE ECONOMICS OF ORGANIZATION AND COORDINATION* (2011); MICHAELS, *supra* note 90.

182. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTI-TRUST IMPLICATIONS—A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION* (1975); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985).

183. See CAIRNEY, *supra* note 60, at 87–91.

184. See Benoît Demil & Xavier Lecocq, *Neither Market nor Hierarchy nor Network: The Emergence of Bazaar Governance*, 27 *ORG. STUD.* 1447 (2006).

185. See Crawford, *supra* note 10; Victor Nee, *Norms and Networks in Economic and Organizational Performance*, 88 *AM. ECON. REV.* 85 (1998).

186. See LUCIAN W. PYE, *THE DYNAMICS OF CHINESE POLITICS* (1981); LUCIAN W. PYE, *THE SPIRIT OF CHINESE POLITICS* (2d ed. 1992).

187. See MING XIA, *THE PEOPLE'S CONGRESSES AND GOVERNANCE IN CHINA: TOWARD A NETWORK MODE OF GOVERNANCE* 13–24 (2008).

placed, the Chinese regulatory State may not be properly fathomed unless viewed as an elaborate and tangled policy network.

As matters stand, the focus in the economically-oriented academic writings on the subject is primarily on description and explanation, with evaluation playing a peripheral role. Scholars in the general field of law and economics posit and show that, in engineering a transition to a market economy, policy architects may choose to rely on private orderings, private litigation through courts, or regulation.¹⁸⁸ Despite the dangers of cartelization, capture, rent-seeking, corruption, goal displacement, and other adverse consequences, the last and most government-dependent of these institutional mechanisms is not necessarily an “inefficient” option.¹⁸⁹ The regulatory space, however, is replete with different policy designs whose effectiveness hinges, inter alia, on a variety of factors such as State capacity, particularly with respect to implementation, which clearly poses a serious challenge in China.

Scant empirical findings are available to shed light on this significant issue. A detailed case study has been produced documenting the “failures” of Chinese-style economic regulation in the strategic telecommunications sector.¹⁹⁰ This is a policy domain where, initially at least, contradictory initiatives were pursued, with the negative obstacles largely offsetting the positive steps.¹⁹¹ Specifically, the sector was opened up to competition in a half-hearted and tentative fashion such that, in an unprecedented manner, the new market entrant, rather than the incumbent, was handicapped by a plethora of regulatory constraints, prompting analysts to portray the experiment as an exercise in “asymmetric regulation.”¹⁹² This illustrates the perils of flawed design and haphazard implementation.

On the other hand, in a yet unpublished paper, three economists show empirically that China’s regulatory State can make a difference for the better.¹⁹³ They first measure the power of government (proxied by its ability to resolve business disputes) in a sample of markets

188. See Djankov et al., *supra* note 10; Glaeser & Shleifer, *Legal Origins*, *supra* note 10; Glaeser & Shleifer, *Regulatory State*, *supra* note 10.

189. See sources cited *supra* note 188.

190. XU & PITT, *supra* note 29, at 65–90.

191. *Id.*

192. *Id.*

193. See Julian Du et al., *China as a Regulatory State*, BOFIT DISCUSSION PAPERS, Jan. 2009, at 1–40, available at http://www.suomenpankki.fi/bofit_en/tutkimus/tutkimusjulkaisut/dp/Documents/DP1709.pdf.

and then proceed to determine its impact on enterprise performance.¹⁹⁴ After controlling for the influence of a number of intervening variables (entrepreneurial characteristics, enterprise features, regional characteristics, industry dummies, and rent-seeking), they conclude that there is a positive correlation/relationship between the hypothesized “cause” and “effect.”¹⁹⁵ It would be premature to draw any general inferences about the Chinese regulatory State on that basis, but the research suggests that it may selectively play a constructive role in certain circumstances.

A broadly similar institutional configuration in Japan has been subjected to extensive scrutiny. It is commonly believed that selective industrial policy interventions in that country have had at best a modest, if any, positive impact on economic growth, productivity, and welfare.¹⁹⁶ Massive resources appear to have predominantly been channeled to large, politically strong, “backward sectors,” possibly implying that “public interest” has not been the principal motivating factor, or that parochial politics (cartelization, capture, and rent-seeking) may have driven the strategy.¹⁹⁷ The Japanese government has consequently been urged to abandon its traditional industrial (including science and technology) policy and embrace financial and labor market reforms with a view to spurring innovative activities.¹⁹⁸ It remains to be seen whether a similar diagnosis and prognosis awaits China’s much vaunted regulatory State.¹⁹⁹

IV. CONCLUSION

The post-1978 Chinese leadership has been restructuring the country’s governance regime for over three decades now. This has been an ambitious undertaking, generally pursued with a sense of purpose, determination, considerable skill, and flexibility. Understandably, given the economic uncertainties and political impedi-

194. *Id.* at 3–6.

195. *Id.* at 9–17.

196. See Marcus Noland, *Industrial Policy, Innovation, Policy, and Japanese Competitiveness* (Peterson Inst. Int’l Econ., Working Paper No. 07-4, 2007), available at <http://ssrn.com/abstract=989594>.

197. See *id.*

198. See *id.*

199. See PEI, *supra* note 102; SUSAN L. SHIRK, *CHINA: FRAGILE SUPERPOWER* (2007); CARL E. WALTER & FRASER J.T. HOWIE, *RED CAPITALISM: THE FRAGILE FINANCIAL FOUNDATION OF CHINA’S EXTRAORDINARY RISE* (2011).

ments, the revamping of the ossified institutional edifice inherited from the revolutionary era was initially selective, but the scope of reforms has gradually broadened and has been carried out in an increasingly bold fashion. Regardless, it remains a delicate balancing act, performed in an uneven manner. Consistently robust economic expansion, enjoyed in a stable socio-political climate, may legitimately be viewed as a mark of great success. The apparent success of the uninterrupted three-decade long forward thrust, however, has not been achieved without heavy costs and alternative explanations are available to account for this outcome.²⁰⁰

The quest for a thorough understanding of the process, the results, and the relationship between the two factors, continues on a large scale consistent with China's vast size and enormous economic and political importance. In addition to the seemingly successful outcome, the uniqueness of the strategy adopted or process followed on several fronts is consistently highlighted. This seems to be a fascinating social experiment with distinct "Chinese characteristics." The on-the-face-of-it contradictory, but perhaps entirely logical, patterns observed in the crucial regulatory domain are commonly approached from a similar perspective. Indeed, it is argued that, as an assertive "rule maker" in the global arena, rather than merely a docile "rule taker," China is inevitably beginning to "export" its particular brand of economic regulation.²⁰¹

If that is the case, fully grasping the essence of the *modus operandi* of the Chinese regulatory State is an even more vital intellectual task than typically assumed. The position taken in this paper is that, despite the substantial headway made, the insights generated fall short of providing a comprehensive picture in terms of description, explanation, and critical appraisal. The scholarly output produced by socio-legal scholars conducting research in this field may legitimately be regarded as work in progress. Analytical ambiguities and gaps persist, hampering effective diagnosis and prognosis. This is not just a matter of undertaking wider exploration, but also seeking better integration of mainstream and non-mainstream empirical material, as well as information garnered from complementary economic and so-

200. See JOHN MARANGOS, *ALTERNATIVE POLITICAL ECONOMY MODELS OF TRANSITION* (2008); Justin Y. Lin et al., *The Lessons of China's Transition to a Market Economy*, 16 CATO J. 201-31 (1996).

201. See Bach et al., *supra* note 29.

cial policy sources, and learning from the experience of “early industrializers” in East Asia.

