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Legality in Contemporary Chinese Politics

Taisu Zhang

Tom Ginsburg*

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Abstract

The picture of Chinese law that many Western scholars and commentators portray is an increasingly bleak one: since the mid-2000s, China has been retreating from legal reform back into unchecked authoritarianism. This article argues that, much to the contrary, Chinese politics have in fact become substantially more law-oriented over the past five years. The Chinese Communist Party under Xi Jinping has indeed centralized power and control to an almost unprecedented extent, but it has done this in a highly legalistic way, empowering courts against other state and Party entities, insisting on legal professionalism, and bringing political powers that were formerly the exclusive possession of the Party under legal authorization and regulation. In fact, nowhere is this “legalism” more powerfully expressed than in the 2018 amendments to the Chinese Constitution, which show that, even if China is indeed deepening its dictatorship, it is nonetheless doing so through harnessing the organizational and legitimizing capacities of law, rather than circumventing it.

We argue that both top-down political considerations and bottom-up social demand are driving this recent turn towards legality: first, as a purely instrumental matter, governing China in a centralized, top-down manner requires a strong commitment to bureaucratic legalization. The sheer size of the country and its population creates severe principal-agent and resource allocation problems that force central authorities to either recognize some version of de-facto federalism, or to combat local corruption and abuse through rigorous law enforcement. With the recent political turn away from decentralized administration, the Party leadership must pursue the latter strategy of investing in legality. Second, and perhaps more interestingly, the Chinese population increasingly seems to attach significant amounts of sociopolitical legitimacy to law and legality. As a result, empowering legal institutions and positioning the Party leadership as a champion of legality against traditional bureaucratic corruption has been a major source of both personal status and popular political legitimacy.

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Introduction

The picture of Chinese law that Western scholars and commentators portray is often an increasingly bleak one: since the mid-2000s, China has been retreating from political and legal reform, back into unchecked authoritarianism and dictatorship.¹ With this retreat, law and formal governmental institutions are increasingly subordinated to the control of Chinese Communist Party (CCP) leaders, rendering them politically insignificant. Correspondingly, whatever glimmer of

¹ Recent scholarly writings that strike a distinctly pessimistic tone include: CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* (2018) [hereinafter MINZNER, *END OF AN ERA*], Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 936 (2011) [hereinafter Minzner, *Turn Against Law*]; Carl Minzner, *Legal Reform in the Xi Jinping Era*, 20 ASIA POL. 4, 4 (2015) [hereinafter Minzner, *Legal Reform*] (noting that “liberal reforms remain off the table”); Zhang Qianfan, *Judicial Reform in China, An Overview*, in CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING (John Garrick and Yan Chang Barrett, eds. 2016) (arguing that there was a turn against legality under Hu Jintao, and expressing pessimism that it can be effectively reversed under Xi Jinping); Suisheng Zhao, *Xi Jinping's Maoist Revival*, 27 J. DEMOCRACY 83, 92-96 (2016); Susan Shirk, *The Return to Personalistic Rule*, 29 J. DEM. 22 (2018); STEN RINGEN, *THE PERFECT DICTATORSHIP: CHINA IN THE 21ST CENTURY* (2018). EVA PILS, *HUMAN RIGHTS IN CHINA: A SOCIAL PRACTICE IN THE SHADOWS OF AUTHORITARIANISM* (2017); Donald C. Clarke, *China's Legal System and the Fourth Plenum*, 20 ASIA POL'Y 10 (2015), available at: <http://ssrn.com/abstract=2631042> (expressing pessimism at the prospects of post-2014 Chinese legal reform); Jerome Cohen, *A Looming Crisis for China's Legal System*, FOREIGN POL'Y (Feb. 22, 2016, 10:15 AM), <https://foreignpolicy.com/2016/02/22/a-looming-crisis-for-chinas-legal-system/>; Stanley Lubman, *After Crackdown on Rights Lawyers, China's Legal Reform Path Uncertain*, WALL ST. J.: CHINA REAL TIME REP. (July 31, 2015, 10:26 AM), <https://blogs.wsj.com/chinarealtime/2015/07/31/after-crackdown-on-rights-lawyers-chinas-legal-reform-path-uncertain/> [hereinafter Lubman, *After Crackdown Reform Path Uncertain*]. Minzner's article on China's purported “turn against law,” *supra*, which makes the strongest case that Chinese legal reform has regressed since 2008, is the single most cited and influential article on Chinese law over the past decade. His arguments echo an earlier body of literature that criticized pre-2008 Chinese legal reform as underdeveloped and contaminated by Party control and administrative interference at every level. See, e.g., STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (2000) [hereinafter LUBMAN, *BIRD IN A CAGE*]; Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620 (2008) [hereinafter Liebman, *Restricted Reform*]; Fu Hualing & Richard Cullen, *From Mediatorial to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, in CHINESE JUSTICE, CIVIL DISPUTE RESOLUTION IN CHINA 78 (Margaret Y.K. Woo & Mary E. Gallagher eds., Cambridge University Press, 2011) (discussing events and structural limitations that foreshadowed the “turn against law”); Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145 (1993). Randall Peerenboom has attempted to push back against this kind of pessimism, *The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?*, (August 12, 2014), available at <https://ssrn.com/abstract=2479716> or <http://dx.doi.org/10.2139/ssrn.2479716> (arguing that Chinese legal reform continues to progress at a steady pace), but his tempered optimism has been far less influential than the pessimism he argues against. Some other accounts seek to balance the two sides in various ways. See Benjamin L. Liebman, *China's Law-Stability Paradox*, 143 DAEDALUS 96 (2014) [hereinafter Liebman, *Law-Stability Paradox*] (acknowledging the swing away from law under Hu Jintao, but suggesting that it may be temporary); Fu Hualing, *Building Judicial Integrity in China*, 39 HASTINGS INT'L COMP. L. REV. 167 (2016) (offering a more positive assessment of Chinese legal reform, tempered with warnings about the ongoing dominance of Party politics over legality); Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism under Xi Jinping*, 26 J. CONTEMP. CHINA 68 (2017) (arguing that the role of law in Chinese governance remains “narrowly instrumentalist,” but has been becoming moderately more “legalist” under Xi Jinping than under his predecessor). A summary of some of these debates can be found at Albert H.Y. Chen, *China's Long March Towards Rule of Law or Turn Against Law?*, 4 CHINESE J. COMP. L. 1 (2016). All in all, the field currently contains a very vocal set of scholars who believe that China has turned against legal reform, a much less vocal set of scholars who argue for some continuity between the current situation and earlier reform trajectories (both of which, in their assessment, saw the Party maintain political dominance over the legal system), but virtually no one who has systemically argued for a sharp and significant turn *towards* law and legality—which is what this article attempts to accomplish.

constitutionalism and the rule of law that the 1990s and early 2000s offered is now extinguished, replaced with despotism and escalating levels of repression. With the removal in early 2018 of constitutional term-limits for the presidency—a move which may allow current president Xi Jinping to rule for life—such pessimism has reached a crescendo.² As one scholar puts it, China’s “reform era” has ended, and its legal and political future are likely no brighter than its Maoist past.³

This article offers a very different take on these developments. It argues that, contrary to conventional accusations that China has “turned against law,”⁴ Chinese politics have become substantially more law-oriented over the past 5 years, and that several core legal institutions, including the judiciary and the Constitution, are now more politically significant than at any point in the 69-year history of the People’s Republic of China (PRC). The CCP under Xi Jinping has indeed centralized power and control to an almost unprecedented extent, but it has done this in a highly legalistic way, empowering courts against other state and Party entities, insisting on legal professionalism, and bringing political powers that were formerly the exclusive possession of the Party under legal authorization and regulation. In fact, nowhere is this “legalism” —defined here as a willingness to both operate in accordance with the written law and to strengthen the institutions charged with its enforcement—more powerfully expressed than in the 2018 constitutional amendments. The amendments show that, even if China is deepening its dictatorship, it is nonetheless doing so through harnessing the organizational and legitimizing capacities of law, rather than circumventing it.

These developments promise to fundamentally change the delicate balance between Party, State, law, and society that has shaped Chinese politics and policymaking since Mao Zedong’s death in 1976.⁵ Whereas, until quite recently, there was genuine uncertainty about the role that law could play in political and social life—and indeed a long tradition of overriding or ignoring legal institutions in modern Chinese politics—legal institutions have now assumed a position of central importance and, in all likelihood, will continue to gain stature moving forward. In that sense, China’s post-Mao “reform era” is indeed coming to an end,⁶ but it will likely be followed by an

² Given the very recent nature of these amendments, they have yet to appear in any academic article or book—this article is the very first—although scholars have written many commentaries in media outlets: *See, e.g.*, Andrew Nathan, *China: Back to the Future*, N.Y. REV. BOOKS (May 10, 2018), <http://www.nybooks.com/articles/2018/05/10/china-back-to-the-future/>; Jerome Cohen, *China is Likely to Enter Another Long Period of Severe Dictatorship*, JERRY’S BLOG (Feb. 26, 2018) <http://www.jeromecohen.net/jerrys-blog/china-is-likely-to-enter-another-long-period-of-severe-dictatorship> [hereinafter Cohen, *China Likely to Enter Period of Severe Dictatorship*]; Jerome Cohen, *Xi Jinping Amends China’s Constitution*, LAWFARE (Mar. 7, 2018, 12:21 PM), <https://www.lawfareblog.com/xi-jinping-amends-chinas-constitution>; Noah Feldman, *China Now Faces the Downsides of Dictatorship*, BLOOMBERG (Feb. 26, 2018, 5:00 PM), <https://www.bloomberg.com/view/articles/2018-02-26/china-and-xi-jinping-toss-aside-their-experiment-with-stability>; Jiayang Fan, *Xi Jiping and the Perils of One-Person Rule in China*, THE NEW YORKER (Mar. 1, 2018), <https://www.newyorker.com/news/daily-comment/xi-jinping-and-the-perils-of-one-person-rule-in-china>.

³ *See* MINZNER, END OF AN ERA, *supra* note 1.

⁴ Minzner, *Turn Against Law*, *supra* note 1.

⁵ The most comprehensive overview of Chinese legal development since 1976 remains RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002). *See also*, Benjamin Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, in MAO’S INVISIBLE HAND (Elizabeth J. Perry & Sebastian Heilmann eds., 2011); LUBMAN, BIRD IN A CAGE, *supra* note 1.

⁶ MINZNER, END OF AN ERA, *supra* note 1.

era in which law plays a greater, not lesser, sociopolitical role in a consolidated and resilient authoritarian regime.

These observations echo a growing recognition among political scientists and legal scholars that law and courts are critically important institutions in authoritarian regimes.⁷ The Chinese example shows, in particular, that legal institutions, and even genuine commitment to legality in governmental operations, can empower authoritarianism just as well as constrain it. In fact, not only has the Party leadership under Xi acknowledged the political significance of law, it has actively tried to strengthen it, and has reaped immense benefits along the way. Law, we argue below, is strengthening both Party and state in China. Nonetheless, over the long term, the sociopolitical entrenchment of legal institutions may very well constrain the Party's exercise of power—indeed, we might argue that it has already begun to do so—even if these constraints do not necessarily conform to the normative expectations of liberal democracies.

One basic but crucial clarification needs to be made immediately: our argument here is that the Party-state is moving towards *legality*, in which the technical letter of the law is enforced more rigorously and afforded greater political respect,⁸ rather than towards the *rule of law*, in which the exercise of regular political power⁹ at all levels is effectively constrained and regulated by law, or towards some sort of substantive checks-and-balances constitutionalism. It is implausible to argue that the Party leadership in general and Xi Jinping in particular is *legally* constrained in any real sense.¹⁰ On its own terms, Chinese law, including the Constitution, simply does not attempt to do that,¹¹ and we observe no distinct trend towards substantive constitutionalism. Our descriptive claims are much narrower: that the judiciary has become much more independent, professional, and powerful under Xi; that the Constitution now plays a larger role in high politics and the

⁷ MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA* (2017); Peter Solomon, *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China*, 43 *COMMUNIST & POST-COMMUNIST STUD.* 351 (2010); JOTHIE RAJAH, *AUTHORITARIAN RULE BY LAW: LEGISLATION, DISCOURSE, AND LEGITIMACY IN SINGAPORE* (2012); YUHUA WANG, *TYING THE AUTOCRAT'S HANDS* (2015). A survey of pre-2014 academic writings can be found in Tamir Moustafa, *Law and Courts in Authoritarian Regimes* 10 *ANN. REV. L. SOC. SCI.* 281 (2014).

⁸ We use “legality” in the most conventional sense of the word: “attachment to or observance of law.” *Legality*, *MERRIAM-WEBSTER DICTIONARY*, <https://www.merriam-webster.com/dictionary/legality>.

⁹ As distinguished from constitutional politics. On this distinction, see, for example, BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* (1993); JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* (2005).

¹⁰ Xi Jinping's main slogan regarding the connection between the Party's political leadership and legality is “ruling the country according to law” (“yifa zhiguo”), which under Chinese political conventions means that “power relations are ultimately under Xi Jinping as the core of the party,” but also that written laws should be rigorously obeyed and enforced. Susan Trevaskes, *A Law unto Itself: Chinese Communist Party Leadership and Yifa Zhiguo in the Xi Era*, 44 *MOD. CHINA* 347, 354-55 (2018). Arguably the most prominent academic defender of the Party's legal vision is Peking University professor Jiang Shigong, whose theory of Chinese constitutionalism nonetheless includes no substantive restrictions on the Party leadership. Larry Catá Backer, *Toward a Robust Theory of the Chinese Constitutionalist State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism*, 40 *MOD. CHINA* 168 (2014).

¹¹ This is especially true after the 2018 constitutional amendments, which wrote the Party's leadership into the Constitution, but places no formal constraints on how the Party should exercise that leadership. But even before, the consensus among scholars was the Constitution simply did not touch upon the Party leadership. Xin He, *The Party's Leadership as a Living Constitution in China*, 42 *HONG KONG L.J.* 73 (Mar. 2012). See discussion *infra* at Part III, Section C, pp. --.

construction of political legitimacy; and that increasing legalism is to be observed in both the Party and state apparatus. These changes likely facilitate legal compliance by other governmental entities, including lower Party offices, but they create no direct constraint on the Party leadership's authority—if anything, they probably enhance it.

In this article, we first document the broad and powerful trend in recent Chinese politics towards legality, and then provide several reasons for its emergence. First, we lay out the wide array of political and institutional gains made by the judiciary since Xi Jinping took power in 2012, many at the expense of other governmental entities: growing financial independence from local governments, expanding jurisdiction over administrative disputes, the creation of circuit courts, greater statutory interpretation authority, substantially stronger enforcement powers, and heightened levels of legal proficiency and professionalism among judges. It is probably safe to say that the courts have never been as independent, professional, and powerful in PRC history as they currently are.¹² As many scholars have pointed out, the political position of the judiciary has traditionally been very vulnerable, and may even have been in decline as recently as 5 or 6 years ago.¹³ Under Xi, however, the Party leadership has made a concerted effort to empower the judiciary against other governmental entities, engineering a quick and dramatic turnaround in its institutional status and capacity.

Second, we argue that the Chinese Constitution, long thought to be a politically insignificant document, now carries substantial and steadily growing weight. Comparisons to political behavior in previous decades suggest, moreover, that this is a recent development.¹⁴ Our analysis centers around the 2018 constitutional amendments,¹⁵ which ended term limits and created a new branch of government: although some commentators suggest that they demonstrate Xi's disregard, if not outright disdain, for rules and norms,¹⁶ we believe that the opposite is likely true. Properly understood, the removal of presidential term limits was an attempt to solidify Xi Jinping's personal authority through constitutional legitimation—but the significant political cost it extracted would hardly have been worth it had the Constitution not already carried a good deal of legitimizing authority in the Party leadership's eyes.

In addition, the amendments consolidate a multi-year push to transfer some of the Party's most important political functions, especially its anti-corruption investigation powers, to constitutionally empowered and legally regulated state “supervisory” institutions. The creation of

¹² For a brief history of the development of courts up to 1978, see PEERENBOOM, *supra* note 5, at 27-54. Clearly, the status of courts rose substantially after 1978, and continuously so until 2007-2008. See Shen Kui, *Commentary on “China’s Courts: Restricted Reforms”*, 191 CHINA Q. 639 (2007). See also, Jonas Grimheden, *The Reform Path of the Chinese Judiciary: Progress or Stand-Still?*, 30 FORDHAM INT’L L.J. 1000 (2006); Ling Li, *The Chinese Communist Party and People’s Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37 (2016). We argue in Part Two that they have now gained powers and status that they have never possessed, even before the 2008-2013 “turn against law,” and are therefore *unprecedentedly* powerful and independent, at least in the history of the PRC.

¹³ Minzner, *Turn against Law*, *supra* note 1; Liebman, *Restricted Reform*, *supra* note 1.

¹⁴ See discussion at *infra* Part Three, Section B.

¹⁵ ZHONGHUA RENMIN GONGHE GUO XIANFA XIUZHENGAN [CONSTITUTIONAL AMENDMENT OF THE PEOPLE’S REPUBLIC OF CHINA] (Passed on March 11, 2018 by the First Meeting of the Thirteenth National People’s Congress), available at http://www.xinhuanet.com/politics/2018lh/2018-03/11/c_1122521235.htm.

¹⁶ E.g., Feldman, *supra* note 2; Nathan, *supra* note 2.

a National Supervision Commission seems to signal a growing belief within the Party leadership that certain kinds of political authority are more effective and, perhaps more importantly, more legitimate when wielded—at least in part—by a constitutionally sanctioned governmental entity, rather than solely by a Party organ. Rather than diluting the sociopolitical salience and significance of the Constitution, these developments are much more likely to strengthen them.

We then identify and discuss two kinds of rationales for this “turn towards law”: first, as a purely instrumental matter, governing China in a centralized, top-down manner requires a strong commitment to bureaucratic legalization. The sheer size of the country and its population creates severe principal-agent problems that force central authorities to either recognize some version of de-facto federalism, or to combat local corruption and abuse through rigorous law enforcement.¹⁷ Whereas previous regimes in the 1980s and 1990s were happy to allow the former,¹⁸ Xi has conspicuously turned against federalism,¹⁹ and must therefore pursue the latter strategy of enhancing control through legal reform.²⁰ In addition, the ever-increasing levels of demographic and commercial mobility in the Chinese economy generate both enormous demand and enormous difficulties for institutionalized information collection and contractual enforcement.²¹ Because informal, community-based institutions are less functional under conditions of high demographic mobility,²² empowering legal institutions is arguably the best way—possibly the only way—to effectively address these challenges.

Second, and perhaps more importantly, the Chinese population increasingly seems to attach significant amounts of sociopolitical legitimacy to law and legal institutions. As the explosion of civil and administrative litigation in recent years suggests, it has undergone a sort of “legal awakening.”²³ This has given the legal system—even the aloof and rarely invoked Constitution—

¹⁷ Maria Edin, *State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective*, 173 CHINA Q. 35 (2003); Murray Scot Tanner & Eric Green, *Principals and Secret Agents: Central Versus Local Control Over Policing and Obstacles to “Rule of Law” in China*, 191 CHINA Q. 644 (2007); Zheng, *supra* note 18; DAVID M. LAMPTON ED., POLICY IMPLEMENTATION IN POST-MAO CHINA (Stud. on China, Vol. 7, 1987).

¹⁸ David Shambaugh, *The Chinese State in the Post-Mao Era*, in THE MODERN CHINESE STATE (David Shambaugh, ed. 2000); PIERRE F. LANDRY, DECENTRALIZED AUTHORITARIANISM IN CHINA: THE COMMUNIST PARTY’S CONTROL OF LOCAL ELITES IN THE POST-MAO ERA (2008); Gabriella Montinola, Yingyi Qian & Barry R. Weingast, *Federalism, Chinese Style*, 48 WORLD POL. 50 (1995); YONGNIAN ZHENG, DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS (2007).

¹⁹ For an overview of political developments under Xi, see ELIZABETH C. ECONOMY, THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE (2018); Zhao, *supra* note 1; CHENG LI, CHINESE POLITICS IN THE XI JINPING ERA: REASSESSING COLLECTIVE LEADERSHIP (2016).

²⁰ Compare ECONOMY, *supra* note 19, at 38 (Federalism one of the “five nos” announced in 2011); and ZHENG, *supra* note 18 (discussing de facto federalism in earlier eras).

²¹ See Montinola, Qian & Weingast, *supra* note 18; Chenggang Xu, *The Fundamental Institutions of China’s Reforms and Development*, 49 J. ECON. LITERATURE 1076 (2011); Xiaodong Zhu, *Understanding China’s Growth: Past, Present, and Future*, 26 J. ECON. PERSP. 103 (2012). One recent effort to combat these problems involves the construction of a “national credit rating system.” See Xin Dai, *Toward a Reputation State: The Social Credit System Project of China* (June 10, 2018) (manuscript on file with authors).

²² The classic work on communal disintegration under conditions of commercialization remains JAMES SCOTT, THE MORAL ECONOMY OF THE PEASANT (1977). For a more recent discussion of a similar process, see BARAK D. RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE (2017).

²³ See discussion at *infra* Part II, Section D; Part IV, Section B.

a social significance and prestige that Party leaders have come to grips with only in the past several years.²⁴ As a result, empowering legal institutions has now become an important and often effective political strategy: positioning the Party leadership as a champion of law and legalization against traditional bureaucratic corruption has been a major source of both personal status for Xi and general political legitimacy for the Party. Not only does it allow Xi to prosecute his enemies in a socially popular manner, but it also favorably distinguishes his regime from its immediate predecessor, in which, according to some scholars legal institutions were treated with evident skepticism, even hostility.²⁵

The new political emphasis on legality and legal legitimation is therefore, at least in part, a straightforward response to underlying changes in social sentiment, which were in turn encouraged by policy choices made as far back as the early PRC, or even before that. After decades of on-and-off ideological and institutional investment in building “the socialist rule of law,”²⁶ the legal system now provides a powerful opportunity structure for the Party to respond to. But by responding in this fashion, the Party will likely further increase the sociopolitical salience and importance of legal institutions. This dynamic suggests a self-reinforcing cycle in which legalistic social sentiments create the institutional conditions for their own entrenchment and expansion.

These two rationales, one rooted in political economy, the other in social sentiment and ideology, are mutually complementary. On the one hand, the ever-increasing scale, complexity and mobility of the Chinese economy tends to generate social demand for strong legal institutions, which in turn boosts their social and political prestige. On the other hand, any growth in the sociopolitical prestige of legal institutions tends to strengthen their instrumental functionality, while simultaneously weakening the functionality of extra-legal forms of administration and dispute resolution. In all likelihood, the two rationales coexist in a sort of “virtuous” cycle.

This coexistence demonstrates why it is deeply problematic to say that the Xi and the Party leadership are merely using law as a top-down tool for *control*—that they are simply instrumentally investing in “rule by law” as conventionally understood in the authoritarian legality literature.²⁷ The bottom-up, popular legitimation-type incentives for legality are at least as strong as the supply side ones, and are likely more durable over the long run. The sociopolitical prestige

²⁴ See discussion at *infra* Part IV, Section B.

²⁵ See discussion at *infra* pp. --.

²⁶ Fu, *supra* note 1; CHINA’S LONG MARCH TOWARD RULE OF LAW, *supra* note 5; AUTHORITARIAN LEGALITY IN CHINA, *supra* note 7; Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT’L L. 43 (2001). On pre-1978 investment, see JENNIFER ALTEHENDER, LEGAL LESSONS: POPULARIZING LAWS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949-1989 (Harv. East Asian Monographs, 411, 2018) (discussing legal education campaigns in the Mao Era).

²⁷ Note that this use of “rule by law”—commonly understood to be a top-down vision of sociopolitical control through law enforcement—is substantially narrower than the concept of “rational-legal authority” in the Weberian sense, which emphasizes the social legitimizing capacity of legal professionalism and “rational” governance. MAX WEBER, *ECONOMICS AND SOCIETY* 243 (Roth & Wittich eds., 1968). For discussion on the finer implications of “rule by law” in the contemporary authoritarian legality literature, see PEERENBOOM, *supra* note 5, at 138-39; see generally TOM GINSBURG & TAMIR MOUSTAFA, EDs., *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008) [hereinafter *RULE BY LAW*]; see also Xin Chunying, *Postmodern Jurisprudence: An Inquiry into the Future of Rule by Law*, 2000-5 SOC. SCI. CHINA 59 (2000), for a discussion on the Chinese jurisprudence related to this concept.

and status of law has, as noted above, a tendency to self-reinforce. The more political leaders empower legal institutions, the more they boost their social and political salience, and the greater the costs of “turning against law.” Over the long term, this could potentially impose *political* constraints, if not necessarily legal ones, on the Party-state that are both powerful and highly durable.

This article makes a number of empirical and theoretical contributions: for scholars of Chinese law, it provides the most comprehensive survey to date of judicial and constitutional developments in the Xi Jinping era.²⁸ More importantly, it pushes strongly against the conventional wisdom that law is, and is increasingly, politically unimportant in China,²⁹ and instead seeks to place it firmly at the center of recent political developments. This produces a fundamentally new picture of Chinese law and politics—one that ties together multiple dimensions of economic, social, and ideological change through their common engagement with law—and generates very different predictions for their future development. We also elucidate some previously underappreciated features of the Party-state, explaining how its current structural layout demands higher levels of legality in both the Party and the state.

On a more theoretical level, the article seeks to expand our understanding of when and how highly authoritarian regimes feel compelled to strengthen their legal institutions. Traditionally, scholars have assumed that the empowerment of courts and constitutions is a unique feature of liberal democracies,³⁰ but a growing literature shows that autocracies, even budding dictatorships, not only *can* co-exist with such empowerment, but are often particularly eager to pursue it.³¹ In fact, the inherent factional instability of autocracies, especially when an aspiring dictator is attempting to centralize power against the preexisting status quo, can create social and political conditions in which legal organization and legitimation are crucially important.³² The Chinese case adds much

²⁸ Scholars have provided shorter comments on judicial reform, see Liebman, *Law-Stability Paradox*, *supra* note 1; Peerenboom, *supra* note 1; Minzner, *Legal Reform*, *supra* note 1; deLisle, *supra* note 1; but no systemic survey. There have been no articles on the 2018 constitutional amendments, and only a few on post-2012 constitutional discourse: Rogier Creemers, *China’s Constitutionalism Debate: Content, Context And Implications*, 74 CHINA J. 91 (2015); Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the “Urgency” of Political Reform*, 11 U. PA. ASIAN L. REV. 337 (2015). We leave out surveys written in Chinese because, given the increasingly tight political control over the Mainland Chinese legal academy in recent years, it is increasingly difficult to separate genuine scholarly assessment from political rhetoric in general surveys of legal and judicial reform. For an example, see Long Zongzhi, *Sifa Gaige: Huigu, Jianshi, yu Qianzhan [Judicial Reform: Looking Back, Reflection, and Looking Forward]*, 2017(7) FAXUE [LEGAL STUDIES] 11. Academic writing on constitutionalism in general, and the 2018 amendments in particular, is almost completely banned in the Mainland at the moment.

²⁹ E.g., Minzner, *Turn Against Law*, *supra* note 1; MINZNER, *END OF AN ERA*, *supra* note 1; LUBMAN, *BIRD IN A CAGE*, *supra* note 1; Qianfan, *supra* note 1.

³⁰ Moustafa, *supra* note 7, at 1 (“Until recently, courts in authoritarian regimes were generally regarded as little more than window dressing for dictators. The assumption was so widely accepted that research on judicial politics in nondemocracies was rare prior to the 1990s.”)

³¹ See sources cited at *supra* note 7. See also, ROBERT BARROS, *CONSTITUTIONALISM AND DICTATORSHIP* (2000); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015); TOM GINSBURG & ALBERTO SIMPSON, *EDS.*, *CONSTITUTIONS IN AUTHORITARIAN REGIMES* (2014).

³² Previous scholarship has highlighted how factional turnover or the prospect of factional turnover can incentivize those in power to invest in legality and constitutionalism as a safeguard against possible future persecution. See GINSBURG & SIMPSON, *supra* note 31. In this article, we highlight a different kind of incentive to do so: the need for rulers who are challenging the factional *status quo* to invest in legality to garner *populist* support—in order to appeal

to our understanding of authoritarian legality, in that it is observably grounded *both* in the Party-state and in society, responding to both “supply side” planning concerns, and, perhaps more importantly, to “demand side” social sentiment.³³

This last point leads to a final caveat before we begin. The Chinese Party-State is clearly engaged in acts of severe repression, particularly in the western regions of Xinjiang and Tibet, but also against religious minorities and dissidents in the core regions of China.³⁴ Much of this repression is carried out under explicit legal authorization, while other aspects of it are perhaps better characterized by what Ernst Fraenkel called “the prerogative state” in his classic study of authoritarian legality: not quite *illegal*, but nonetheless operating without clear legal regulation and definition.³⁵ Our reference to societal demand for greater legality is focused on the routine interactions of citizens with government and the judiciary, and we take no position on whether popular opinion supports these repressive acts or not. Nor, for that matter, are we offering any normative defense of Chinese legal practices. Instead, we simply articulate a positive and explanatory account of the increasing role of law in sustaining China’s authoritarian regime.

The remainder of the paper is structured as follows: Part I summarizes both the preexisting academic literature and several major trends in legal development prior to the Xi Jinping era. Part II examines the empowerment of the judiciary since 2012. Part III discusses changes in constitutional law and discourse. Part IV identifies possible rationales for this recent wave of legalistic politics, surveying both top-down political economy-oriented possibilities and bottom-up ideological ones. The Conclusion briefly discusses the article’s theoretical and practical implications.

I. A “Turn Against Law,” or Towards It?

to a population that demands law-oriented governance and considers it a condition of political legitimacy. See discussion *infra* at Part IV, Section B.

³³ On Xi’s political style, *cf.* Shirk, *supra* note 1; and Jerome Cohen, *Xi Jinping’s Aspirations*, JERRY’S BLOG (March 17, 2018), <http://www.jeromecohen.net/jerrys-blog/2018/3/16/xi-jinpings-aspirations> (“personalistic one-man rule enhanced by efficient Party controls of all aspects of life”).

³⁴ The crackdowns in Xinjiang and Tibet are often attacked as “illegal” or “extralegal,” but they are not entirely without legal basis: large-scale government activity in both cases was preceded by provincial legislation/regulation that could somewhat plausibly be interpreted as legally authorizing that activity, including the construction and operation of “reeducation camps” in Xinjiang. Certainly, these authorizations are often vague and imprecise, and their exact boundaries impossible to pinpoint, but their existence nonetheless urges against an understanding of recent developments as completely outside the sphere of the law, or actually “illegal.” See, e.g., Human Rights Watch, *Illegal organizations: China’s Crackdown on Tibetan Social Groups*, July 30, 2018, available at <https://www.hrw.org/report/2018/07/30/illegal-organizations/chinas-crackdown-tibetan-social-groups> [last accessed Aug. 1, 2018] (Tibet); Nicholas Becquelin, *Criminalizing Ethnicity: Political Repression in Xinjiang*, CHINA RIGHTS FILE, available at https://www.hrichina.org/sites/default/files/PDFs/CRF.1.2004/b1_Criminalizing1.2004.pdf [last accessed Aug. 1, 2018] (Xinjiang); Tom Phillips, *In China’s Far West the “Perfect Police State” is Emerging*, THE GUARDIAN, June 22, 2017 [last accessed Aug. 1, 2018]

³⁵ ERNST FRAENKEL, *THE DUAL STATE* (1941).

In an influential article written in the waning years of the Hu Jintao regime, legal scholar Carl Minzner warned of a “turn against law” in China.³⁶ He argued that post-1978 legal reforms, which had largely relied on building up capacity in the legal system as a basis for economic development, had generated unwanted by-products from the perspective of the CCP. These included wide-spread use of litigation, social protest, and, most disturbingly of all, the emergence of a set of rights-promoting *weiquan* lawyers, who sought to use the law to constrain the Party-state itself in the early 2000s.³⁷ As Minzner documented, this led to a backlash under President Hu Jintao, which included a de-emphasis on formal law and court adjudication, and the subjugation of judicial power to political imperatives. The shift was perhaps encapsulated in the appointment of Wang Shengjun, a man with no legal training, as the President of the Supreme People’s Court in 2008.³⁸ Instead of formal law, the Party sought to promote mediation as the preferred means of resolving social disputes, indeed as an institutional embodiment of the “Harmonious Society” promoted by President Hu Jintao.³⁹ Minzner projected this forward to suggest that legality was on a long-term path of decline.⁴⁰

Minzner was not alone in his criticism of Chinese courts. Many scholars have been consistent critics of China’s judiciary and legal institutions, which Stanley Lubman famously characterized as a “bird in a cage.”⁴¹ While noting the significant legislative and institutional reforms initiated during the Deng Xiaoping period, Lubman remained deeply skeptical that China’s judges would ever develop significant institutional autonomy from the Party-state.⁴² Benjamin Liebman, too, has noted that China’s leaders had turned away from legal institutions in the Hu Jintao era, after significant investment for the first decades of reform, because they saw law as potentially destabilizing.⁴³ Unlike Minzner, however, he described this as a “law-stability paradox” in which

³⁶ Minzner, *Turn Against Law*, *supra* note 1; see also MINZNER, *END OF AN ERA*, *supra* note 1.

³⁷ Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case*, 43 SUFFOLK UNIV. L. REV. 101, 103-06 (2010); Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT. J. CON. L. 215, 220-26 (2009); Keith Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People’s Republic of China*, 45 COLUM. J. TRANSNAT’L L. 114 (2006); Fu Hualing, *Embedded Socio-Legal Activism in China: The Case of Yirenping*, (U.H.K. Fac. L., Research Paper No. 2012/029), <https://ssrn.com/abstract=2096998>.

³⁸ Taisu Zhang, *Reinterpreting the Supreme People’s Court of China*, 62 COLUM. J. ASIAN L. 1 (2012). The Chinese scholarly reaction to Wang’s appointment was immediate and negative. See, e.g., Wang Liping, *Sifa gaige wu lu ketui* [There is No Way Back for Judicial Reform], HE WEIFANG DE BOLUOGE [HE WEIFANG’S BLOG], Sep. 5, 2008, http://blog.sina.com.cn/s/blog_488663200100awek.html.

³⁹ Yongnian Zheng & Sow Keat Tok, *‘Harmonious Society’ and ‘Harmonious World’: China’s Policy Discourse Under Hu Jintao*, CHINA POL’Y INST. BRIEFING SERIES ISSUE 26 (2007); Minzner, *Turn Against Law*, *supra* note 1; Liebman, *supra* note 5.

⁴⁰ Minzner, *Turn Against Law*, *supra* note 1.

⁴¹ LUBMAN, *BIRD IN A CAGE*, *supra* note 1. See also, Jerome A. Cohen, *Reforming China’s Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793 (1997); PILS, *supra* note 1; Donald Clarke, *The Chinese Legal System Since 1995: Steady Development, Striking Continuities*, 191 CHINA Q. 555 (2007) (arguing that the Party’s commitment to legality has been continuously inconsistent and weak).

⁴² Lubman, *BIRD IN A CAGE* *supra* note 1; but see Stanley Lubman, *The Evolution of Law Reform in China: An Uncertain Path*, in THE EVOLUTION OF CHINESE LAW REFORM xvii, lxvi (Stanley Lubman, ed., 2012) (“legal institutions have developed, albeit within boundaries enforced by the Party-State.”)

⁴³ Liebman, *supra* note 5.

the capacity and independence of the legal system oscillated over time between growth and regression.⁴⁴

These arguments represent the most recent wave of an English-language literature on Chinese law that emphasizes the marginalized position of law in Chinese politics and administration. The conventional wisdom has long been that, while the Party-state rhetorically recognizes the “rule of law,” it regularly overrides and undermines legal institutions up and down the governmental hierarchy for political reasons and, in the end, has no reliable commitment to legality at any level, much less real “rule of law.”⁴⁵ As a result, the judicial system is regularly portrayed as weak and politicized, despite some efforts to change that,⁴⁶ while the Chinese Constitution is regarded as almost completely ineffective.⁴⁷

For decades, scholars have emphasized the Chinese judiciary’s limitations and inadequacies: most Chinese law experts would likely acknowledge that, until the “turn against law” under Hu Jintao, some progress had been made in terms of institutional independence and judicial professionalism,⁴⁸ but they would also hasten to point out that much of this progress has stagnated in recent years and that, in any case, the courts remain fundamentally incapable of challenging most other governmental and Party entities of the same bureaucratic rank.⁴⁹ The Supreme People’s Court (SPC) is, of course, clearly incapable of challenging the Party leadership,⁵⁰ but the claim is that this weakness extends all the way down to local courts and governments. Empirical studies of judicial behavior have, for example, identified high levels of regularity and predictability in the conduct of local courts, but nonetheless emphasize that political interference remains regular and institutionally unchecked.⁵¹ Scholars who survey this literature are therefore sympathetic to the

⁴⁴ *Id.*

⁴⁵ *E.g.*, Lubman, *BIRD IN A CAGE*, *supra* note 1; Donald C. Clarke, *The Execution of Civil Judgements in China*, 141 CHINA Q. 65 (1995); Ling Li, *The Chinese Communist Party and People’s Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37 (2016); WANG, *supra* note 7 (portraying judicial behavior as politically motivated, and independent of local governmental interference only to the extent that it is fiscally beneficial to provincial and city-level authorities); Ji Li, *The Power Logic of Justice in China*, AM. J. COMP. L. (forthcoming 2016) (arguing that Chinese judicial decision-making is fundamentally driven by power considerations); Fu Yulin & Randall Peerenboom, *A New Analytic Framework for Understanding and Promoting Judicial Independence in China*, in JUDICIAL INDEPENDENCE IN CHINA 95 (Randall Peerenboom ed., 2010); Stéphanie Balme, *Local Courts in Western China*, in JUDICIAL INDEPENDENCE IN CHINA, *supra*, at 154; Xin He, *The Judiciary Pushes Back*, in JUDICIAL INDEPENDENCE IN CHINA, *supra*, at 180. *But see* Randall Peerenboom, *Judicial Independence in China*, in JUDICIAL INDEPENDENCE IN CHINA, *supra*, at 69, 69.

⁴⁶ Li, *supra* note 45; Xin He, *The Politics of Courts in China*, 2 CHINA L. SOC’Y REV. 129 (2017).

⁴⁷ Kellogg, *supra* note 37; Stéphanie Balme & Michael W. Dowdle, *Introduction: Exploring for Constitutionalism in 21st Century China*, in BUILDING CONSTITUTIONALISM IN CHINA (Stéphanie Balme & Michael W. Dowdle eds., 2009); Qianfan Zhang, *A Constitution without Constitutionalism? The Paths of Constitutional Development in China*, 8 INT’L J. CONST. L. 950 (2010); Qianfan Zhang, *On the Selective Application of the Chinese Constitution*, 2 Peking U. L.J. 4, 6 (2014).

⁴⁸ Donald C. Clarke, *Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?* In UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN 93 (C. Stephen Hsu ed., 2003); Peerenboom, *supra* note 1.

⁴⁹ Li, *supra* note 45.

⁵⁰ Judicial constitutional review does not exist in China. Kellogg, *supra* note 37. Beyond that, the Court simply has no political capacity to review or even question any decision made by the Party leadership. *See* Zhang, *supra* note 38, at 30-3238.

⁵¹ He, *supra* note 46.

conventional position that Chinese courts, like courts in other authoritarian regimes, are all too often mere pawns of the state and thus have little judicial independence,⁵² even as they observe that “the regime and the judiciary have long emphasized judicial fairness and experienced progress in dispute resolution.”⁵³

Somewhat more stridently, since the enactment of the current Constitution in 1982—or, for that matter, the enactment of the PRC’s first Constitution in 1954—the dominant academic view has been that the document wields virtually no influence over high politics.⁵⁴ Whereas scholars have debated whether the document functions effectively as a signal of general socioeconomic policy or as a coordinator of regular governmental activity, almost none would argue that it plays any major role in high politics.⁵⁵ Indeed, even at the lower levels of government, an enormous portion of the Party-state—that is, the entire Party apparatus—has traditionally functioned without any constitutional recognition whatsoever. Prior to 2018, the Constitution mentioned the Party only in its Preamble, and had literally nothing to say about its institutional composition or sociopolitical position.⁵⁶ The true seat of power in Chinese politics, the Party’s Politburo Standing Committee (PSC), goes completely unmentioned.⁵⁷ Add to this the fact that the courts possessed no authority of constitutional review, and that the entity formally imbued with this power, the Standing Committee of the National People’s Congress (NPCSC), was directly controlled by a member of the PSC,⁵⁸ and it is altogether unsurprising that scholars attached meager to no political or legal significance to the Constitution. Even those who have attempted to argue that the NPCSC does conduct some *a priori* constitutional review have found of such review only in relatively marginal matters, rather than major policy areas.⁵⁹ Under this conventional wisdom, the Party leadership rarely, if ever, took the Constitution into account when making decisions, knowing that it imposed almost no formal constraints on their power—and if it ever did, that they could remove or circumvent them very easily.⁶⁰

⁵² See Tamir Moustafa & Tom Ginsburg, *Introduction*, in *RULE BY LAW*, *supra* note 27, at 1, 2 (summarizing and criticizing the conventional wisdom that authoritarian courts are mere “pawns”); He, *supra* note 46, at 131, 135 (“[Counterarguments] may have some merit, but they cannot alter the fact that Chinese courts indeed lack judicial independence.”).

⁵³ He, *supra* note 46.

⁵⁴ See sources cited at *supra* note 47; Suisheng Zhao, *The China Model: Can It Replace the Western Model of Modernization?*, 19 J. CONTEMP. CHINA 419 (2010); JAMES C.F. WANG, *CONTEMPORARY CHINESE POLITICS: AN INTRODUCTION* (7th ed. 2001); John P. Burns, *The People’s Republic of China at 50: National Political Reform*, 159 CHINA Q. 580 (1999); Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 CHINA Q. 673 (1999).

⁵⁵ Clarke, *supra* note 48, at 103-09 (PRC Constitution “perhaps the least important document” in the legal system.)

⁵⁶ CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA (after amendment on March 14, 2004) [*hereinafter* 2004 CONSTITUTION], available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

⁵⁷ *Id.*

⁵⁸ A list of NPCSC Chairmen can be found at National People’s Congress of the People’s Republic of China, Standing Committee, http://www.npc.gov.cn/englishnpc/Organization/node_2847.htm. On Politburo control, see Sophia Woodman, *Legislative Interpretation by China’s National People’s Congress Standing Committee*, in *INTERPRETING HONG KONG’S BASIC LAW: THE STRUGGLE FOR COHERENCE* (Fu Hualing, Lison Harris & Simon N.M. Young eds., 2007); TONY SAICH, *NATIONAL PEOPLE’S CONGRESS: FUNCTIONS AND MEMBERSHIP* (2015).

⁵⁹ See, e.g., Yan Lin & Tom Ginsburg, *Constitutional Interpretation in Law-Making: China’s Invisible Constitutional Enforcement Mechanism*, 63 AM. J. COMP. L. 467 (2015).

⁶⁰ See sources cited at *supra* note 54.

The ascent of Xi Jinping to the position of General Secretary of the Chinese Communist Party in later 2012 marked a major turning point for both China in general and for the role of the legal system in particular. Under the banner of restoring China to “great power” status,⁶¹ Xi has concentrated extraordinary personal power, but at the same time, has championed law-oriented governance as a pathway to stability, growth, and development. Under his watch, the Party leadership has launched a vigorous and unprecedentedly broad anti-corruption campaign⁶² and pushed through a sweeping set of reforms with long-term implications for the judiciary, the Constitution, and many other legal institutions.

Scholarly interpretation of these institutional developments has been sparse and uneven: the most common position, expressed by Jerome Cohen and others through opinion pieces in various media outlets, is that Xi’s concentration of personal power has undermined “the rule of law” by increasing the “arbitrary” exercise of power by government agents and eroding some of the legal protections that citizens previously enjoyed.⁶³ This altogether pessimistic position emphasizes, in particular, the ongoing crackdown on civil rights activism by lawyers and advocacy groups and the escalation of state censorship, but makes little mention of more positive developments in law enforcement. In such a narrative, the deterioration of Chinese legal institutions, which began under Hu, has only accelerated under Xi.

Liebman and Fu Hualing, on the other hand, have recently penned short essays that articulate a more nuanced view: despite these crackdowns, in their view, the Chinese government does reap substantial benefits from political investment in legality, including more effective socioeconomic dispute resolution, stronger control over local agents, and some measure of political legitimacy.⁶⁴ It therefore sincerely pursues legal reform from time to time, including at the beginning of the Xi Jinping regime. Both scholars are, however, quick to temper this more positive assessment with nods towards the Party-state’s authoritarian nature: Fu acknowledges that the Party leadership’s desire to maintain absolute power causes it to resist social demand for political legality.⁶⁵ Liebman, as noted above, emphasizes the cyclical nature of Chinese state behavior, in which its positive commitment to legal reform is diluted and periodically overridden by a deep mistrust of legality.⁶⁶

⁶¹ Xi Jinping *Addresses the American Public*, National Committee on US-China Relations, <https://www.ncuscr.org/content/full-text-president-xi-jinpings-speech> (last visited July 25, 2018).

⁶² Shirk, *supra* note 1; Cohen, *supra* note 33; LI, *supra* note 19, at 7-40; Samson Yuen, *Disciplining the Party: Xi Jinping’s Anti-Corruption Campaign and its Limits*, 2014 CHINA PERSP. 41; Fu Hualing, *Wielding the Sword: President Xi’s New Anti-Corruption Campaign*, in GREED, CORRUPTION, AND THE MODERN STATE (Susan Rose-Ackerman & Paul Felipe Lagunes eds., 2015).

⁶³ E.g., Jerome Cohen, *China’s Latest Legislative Effort and the Rule of Law*, JERRY’S BLOG (March 10, 2017), <http://www.jeromecohen.net/jerrys-blog/chinas-latest-legislative-effort>; Cohen, *China Likely to Enter Period of Severe Dictatorship*, *supra* note 2; Lubman, *After Crackdown Reform Path Uncertain*, *supra* note 1; Nancy Tang, Keith Hand, Eva Pils, Taisu Zhang & Thomas Kellogg, *China’s ‘Rule by Law’ Takes an Ugly Turn*, FOREIGN POLICY: CHINAFILE (July 14, 2015, 2:17 PM), <https://foreignpolicy.com/2015/07/14/chinas-rule-by-law-takes-an-ugly-turn-rights-lawyers-crackdown-xi-jinping/>; Orville Schell, *Crackdown in China: Worse and Worse*, N.Y. REV. BOOKS (Apr. 21, 2016), <https://www.nybooks.com/articles/2016/04/21/crackdown-in-china-worse-and-worse/>. Such criticism has, of course, spiked after the 2018 constitutional amendments. See sources cited at *supra* note 2.

⁶⁴ Liebman, *Law-Stability Paradox*, *supra* note 1; Fu, *supra* note 62; Fu, *supra* note 1.

⁶⁵ Fu, *supra* note 1.

⁶⁶ Liebman, *Law-Stability Paradox*, *supra* note 1.

The differences between these positions remain, at present, impressionistic rather than empirical. Five years into the Xi regime, scholars have produced brief comments on its legal reform agenda, but no robust factual account capable of either reaffirming the “turn against law” narrative or substantially revising it. There has been no comprehensive analysis of post-2012 judicial reforms, nor a survey of constitutional discourse and practice.⁶⁷ Scholars have therefore been slow and more than a little hesitant in coming to terms with the scope and significance of recent developments.

This has allowed some enormously important changes to fly under the academic radar. The past five years have, in fact, seen China turn *towards* law and legality in a decisive and often dramatic manner. Here, we provide a comprehensive assessment of judicial and constitutional developments under the Xi regime, and discuss their long and short term causes. Our findings run directly contrary to any notion that China has turned or is turning “against law,” and instead show that the Party leadership now places greater emphasis—real, substantial emphasis—on legality than ever before. Moreover, a closer look at the underlying causes of this turn suggest that it is likely more durable and serious than even more sympathetic observers have acknowledged,⁶⁸ and that China is entering a phase of institutional development where the sociopolitical status of law and courts has become largely self-reinforcing.

II. Empowering the Courts

The conventional view of the Chinese judiciary among academics is, with some exceptions, one of institutional weakness, lack of independence, and political irrelevance.⁶⁹ We argue here that this view is increasingly outdated. Over the past five years, the Party Leadership has strategically expanded the courts’ institutional capacity and political independence, with the express objective of building them into an effective check against most other governmental entities—not including, of course, the Party Leadership itself. Thus, the judiciary remains limited in many ways, and the prospect of constitutional review by the courts as distant as ever, but it would nonetheless be accurate to say that it has never been as professional, independent, and politically powerful in PRC history as it currently is. Moreover, this upward trend shows no sign of subsiding any time soon.

This Part surveys the major court-related developments in the Xi era, and, in doing so, provides a much-needed correction to the conventional assumption of Chinese judicial weakness. It organizes these developments into three major categories, each occupying its own Section: reforms that boost the judiciary’s professionalism and institutional capacity, reforms that strengthen its independence, and reforms that expand its review powers over state and Party organs. A final section summarizes and considers possible counterarguments.

⁶⁷ Kellogg, *supra* note 28, discusses one particular episode in post-2012 Constitutional discourse.

⁶⁸ See *infra* Part IV, Section B, and Conclusion.

⁶⁹ See discussions surrounding *supra* notes 45-53.

A. Professionalism and Institutional Capacity

As many scholars have noted, the five to six years preceding Xi Jinping's rise to power were marked by stagnation, or perhaps even regression, in judicial reform.⁷⁰ Instead, the Party leadership expressed a strong interest in promoting mediation as the primary means of dispute resolution, and pressured courts to function less as enforcers of the law and more as managers of personal ties and conflicts.⁷¹ As part of a general program to increase the courts' responsiveness to "the feelings of the masses," judges were systemically evaluated on the percentage of their cases—the more the better—that were either mediated or voluntarily withdrawn.⁷² In many ways, these measures echoed the broader effort made by the Hu Jintao regime to create a "harmonious society" in which private conflict receded and state-society relationships improved.⁷³ Under this general agenda, courts were directed to seek out less antagonistic and divisive means of dispute resolution, and therefore to prioritize mediation, which gave at least the appearance of mutual consent, over formal adjudication.⁷⁴

For reasons discussed below, this "turn against law" was never very popular, and may even have deepened the population's fear and resentment towards judicial corruption and bias.⁷⁵ It was discarded, in any case, almost as soon as Xi Jinping rose to power in 2012-13, and replaced with a renewed and, in many ways, heightened commitment towards increasing legal professionalism and judicial capacity.⁷⁶ Since 2014, language emphasizing the need to build a "modern" and professional judiciary has occupied a prominent position in virtually every government document related to legal reform, while "allowing judges to adjudicate and holding them responsible for their decisions" has systemically replaced "mediate if possible, adjudicate if appropriate" as the new

⁷⁰ Minzer, *Turn Against Law*, *supra* note 1; Liebman, *supra* note 5; Fu & Cullen, *supra* note 1.

⁷¹ Guanyu Jin Yi Bu Fahui Susong Tiaojie zai Goujian Shehui Zhuyi Hexie Shehui zhong Jiji Zuoyong de Ruogan Yijian (关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见) [Several Opinions on Further Enhancing the Positive Effect of Court-Directed Mediation in the Construction of a Harmonious Socialist Society] (promulgated by the Sup. People's Ct., Mar. 6, 2007, effective Mar. 6, 2007), SUP. PEOPLE'S CT. GAZ., Apr. 1, 2007, at 25, available at <http://rmfyb.chinacourt.org/public/detail.php?id=106477>; Minzer, *Turn Against Law*, *supra* note 1; Liebman, *supra* note 5; Zang Dongsheng, *Rise of Political Populism and the Trouble with the Legal Profession in China*, 6 HARV. CHINA REV. 79 (2010); Randall Peerenboom, *Between Global Norms and Domestic Realities: Judicial Reforms in China*, 2010 LAWASIA J. 1; Eva Pils, *Yang Jia and China's Unpopular Criminal Justice System*, CHINA RTS. F., Mar. 2009, at 59, available at http://hrichina.org/public/PDFs/CRF.1.2009/CRF-2009-1_Pils.pdf (discussing the SPC's embracement of populism under Wang Shengjun)

⁷² Jiedu Zuigao Fayuan "26 Xiang Zhibiao" (解读最高法院"26项指标") [*Interpreting the "26 Indicators" Issued by the Supreme Court*], Shijiazhuang Shi Yuhua Qu Renmin Fayuan Wang (石家庄市雨花区人民法院网) [PEOPLE'S CT. OF YUHUA DISTRICT, SHIJIAZHUANG NET], <http://www.yhqfy.com/show.asp?id=178> (last visited Dec. 24, 2017)

⁷³ See sources cited at *supra* note 71.

⁷⁴ Tiaopan Jiehe Hexie Sifa (调判结合 和谐司法) [*Unify Mediation and Adjudication, Judicial Harmony*], Renmin Wang (人民网) [PEOPLE'S NET] (March 7, 2007, 3:49 PM), <http://www.people.com.cn/GB/32306/54155/57487/5448606.html> (interview with SPC justice Wan Exiang). For academic commentary, see Yi Zhongfa (易忠法), Lun "Anjie Shiliao" (论"案结事了") [*Discussing "Deciding the Case and Solving the Problem"*], 2 Fazhi yu Shehui (法制与社会) [LAW & SOC'Y] 194 (2008).

⁷⁵ See discussion at *infra* pp. --.

⁷⁶ Liebman, *Law-Stability paradox*, *supra* note 1.

slogan for desirable judicial behavior.⁷⁷ The *People's Daily*, the Party's primary newspaper, went as far as to openly criticize "pursuing mediation and withdrawal in an unbalanced manner," and cautioned against the use of numerical quotas to evaluate judicial performance.⁷⁸ The seriousness of this rhetorical change is reflected in the fact that nationwide mediation and withdrawal rates—which increased from around 55% to nearly 70% during the Hu Jintao era—plummeted back to 57% over the first two years of the "Xi era."⁷⁹

In subsequent years, numerous reforms were implemented to increase the judiciary's capacity to both adjudicate professionally and effectively enforce their decisions. The watershed moment that drew the most outside attention was a decision issued in late 2014 by the Fourth Plenum of the CCP Central Committee on "ruling the country according to law" ("*yifa zhiguo*"), which laid out a number of principles and objectives for legislative, judicial, and constitutional reform.⁸⁰ This was, as scholars were quick to point out, the first time that the Central Committee had ever directly addressed the issue of "rule of law," and seemed to elevate legal reform to an unprecedentedly high political platform.⁸¹ Despite its symbolic importance, the document was actually an *ex post* acknowledgment of institutional work that had already begun many months before beforehand: by the time of its issuance, the Party leadership had already made a number of major changes to the judicial system.

One of the first issues addressed was the mundane but nonetheless critical problem of judge compensation and personnel recruitment. The drive to increase judicial compensation reaches back to at least the early 2000s, when it was first listed as an institutional objective in the Supreme People's Court's (SPC) five-year work plans, but its intensity has increased substantially over the past five years.⁸² Around 2010, scholars, media outlets, and judges began to express concern that the judiciary was increasingly incapable of attracting top-tier legal talent due to comparatively low

⁷⁷ Supreme People's Court of China, *Remin Fayuan Disige Wunian Gaige Gangyao* (2014-2018) [Fourth Five-Year Plan of the People's Courts] [hereinafter Fourth Five-Year Plan], 2015(12) ZUIGAO RENMIN FAYUAN GONGBAO [PUBLIC ANNOUNCEMENTS OF THE SUPREME PEOPLE'S COURT] 4, available at <http://www.iolaw.org.cn/showNews.aspx?id=41327>.

⁷⁸ Wang Bixue, *Qiero Pianmian Zhuiqiu Tiaojielü Chesulü* [Never Pursue Mediation Rates and Case Withdrawal Rates for Their Own Sake], RENMIN WANG [PEOPLE'S DAILY ONLINE] (Jan. 22, 2014), <http://opinion.people.com.cn/n/2014/0122/c1003-24190158.html>

⁷⁹ Ma Jian, *Shixian Shenpan Fuwu Shehui Jingji Fazhan de Xin Changtai* [Realizing the New Normal of Using Adjudication to Support Social and Economic Development], May 14, 2015, RENMIN FAYUAN BAO [PEOPLE'S COURT DAILY] 5, available at <https://www.chinacourt.org/article/detail/2015/05/id/1617615.shtml> To be sure, the decline began in 2011, when Hu was still in power and Wang Shengjun was still heading the Supreme Court. But our argument is not that the patterns we are describing are all attributable to Xi personally.

⁸⁰ *Zhonggong Zhongyang guanyu Quanmian Tuijin Yifa Zhiguo ruogan Zhongda Wenti de Jueding* [Decision of the CCP Central Commission on Several Major Issues in the Comprehensive Advancement of Ruling the Country by Law] [hereinafter *Decision of the 4th Plenum of the CCP Central Committee*], Oct. 29, 2014, RENMIN RIBAO [PEOPLE'S DAILY] at 1, available at <http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html>.

⁸¹ Randall Peerenboom, *Fly High the Banner of Socialist Rule of Law With Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?*, 7 HAGUE J. RULE L. 49 (2015). ASIA POLICY later published an entire symposium on the Fourth Plenum's decision, <http://nbr.org/publications/element.aspx?id=815>.

⁸² Supreme People's Court of China, *Remin Fayuan Dierge Wunian Gaige Gangyao* (2004-2008) [The Second Five-Year Plan of the People's Courts] [hereinafter Second Five-Year Plan], 2005(12) ZUIGAO RENMIN FAYUAN GONGBAO [PUBLIC ANNOUNCEMENTS OF THE SUPREME PEOPLE'S COURT] 5, available at http://www.law-lib.com/law/law_view.asp?id=120832; Fourth Five-Year Plan, *supra* note 77.

compensation levels—relative to both lawyers and, more alarmingly, other government employees.⁸³ Although judges were technically on the same pay scale as other government employees, the lower political stature of courts generally meant that their budgets were smaller, and therefore that judges enjoyed fewer perquisites beyond their standard salaries: smaller bonuses and less access to state-subsidized housing.⁸⁴ Morale was therefore low and personnel attrition relatively high.⁸⁵

To be fair, this was a long-term problem—courts had flagged the attrition problem as early as 2004, when they noted that they had lost 20,000 judges between 1998 and 2002, and judicial compensation had always been comparatively low—but the Party leadership’s response had been distinctly lukewarm during the Hu Jintao years, and no major changes were made.⁸⁶ Shortly after Xi’s ascension, however, things had taken a sharp turn for the better: in 2014 and 2015, the Central Leading Group for Deepening Overall Reform (CLGDOR), a policy formulation and implementation body under the Politburo, issued a set of experimental measures expressly designed to boost the attractiveness of judicial employment.⁸⁷ Most importantly, judge and prosecutor salary levels would be detached from the standard government employee schedule and placed on a higher plane. This dovetailed with another central campaign to establish fixed “judge quotas” (*faguan yuan’e zhi*) that would reduce dramatically—by over a third—the number of

⁸³ Xia Zhou, *Faguan de Zunronggan Na Qule?* [Have Judges Lost Their Sense of Prestige?], May 27, 2010, NANFANG ZHOUMO [SOUTHERN WEEKEND] 8, <http://www.infzm.com/content/45484>; *Yunnan Gaoyuan Yuanzhang: Fayuan Zhengzhi Daiyu yu Faguan Jingji Daiyu xu Tigao* [The Chief Judge of the Yunnan High Court: The Political Treatment of Courts and the Economic Treatment of Judges both Need to Be Improved], RENMIN WANG [PEOPLE’S DAILY ONLINE] (March 13, 2014), <http://politics.people.com.cn/n/2014/0313/c70731-24619650.html>; *Rencai Liushi Kaoyan Zhongguo Sifa Gaige* [The Loss of Personnel Poses a Challenge for Chinese Legal Reform], XINHUA NET (May 25, 2015), http://www.xinhuanet.com/legal/2015-05/25/c_1115399272.htm.

⁸⁴ *Yunnan Gaoyuan Yuanzhang*, *supra* note 83; *Rencai Liushi*, *supra* note 83.

⁸⁵ *Rencai Liushi*, *supra* note 83.

⁸⁶ The problem of personnel attrition was flagged in Second Five-Year Plan, *supra* note 82; but as official media sources observed, the SPC raised the issue again in every annual report it gave over the next decade, employing language that suggested that little progress had been made: Zhou Dongxu, *Zuigao Fayuan Gongzuo Baogao Lianxu Shinian Ti “Rencai Liushi”* [The Supreme People’s Court’s Work Report Raise the Issue of “Personnel Attrition” Ten Years in a Row], CAIXIN NET (March 13, 2016), <http://topics.caixin.com/2016-03-13/100919588.html?sourceEntityId=100920637>.

⁸⁷ Zhongyang Quanmian Shenhua Gaige Lingdao Xiaozu [Central Leading Group for Deepening Overall Reform] [hereinafter CLGDOR], *Guanyu Sifa Tizhi Gaige Shidian Ruogan Wenti de Kuangjia Yijian* [Framework Opinion on Experimental Reforms Concerning Legal Institutions] [hereinafter Framework Opinion], ZUTONGZI [PUBLICATIONS OF THE CLGDOR] 2014-14; CLGDOR, *Faguan, Jianchaguan Dandu Zhiwu Xulie Shidian Gaige Fangan* [Experimental Plan on Establishing an Independent Administrative Scale for Judges and Prosecutors] [hereinafter Plan for Independent Administrative Scale], ZUTONGZI [PUBLICATIONS OF THE CLGDOR] 2015-36; CLGDOR, *Faguan, Jianchaguan Gongzi Zhidu Shidian Gaige Fangan* [Experimental Plan on Salary Reform for Judges and Prosecutors] [hereinafter Plan on Salary Reform], ZUTONGZI [PUBLICATIONS OF THE CLGDOR] 2015-37. The SPC’s implementation plans in response to these documents are summarized at *Sifa Gaige Redian Wenda* [Questions and Answers on Hot Topics in Legal Reform], May 3, 2017, RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY] 2, available at http://rmfyb.chinacourt.org/paper/html/2017-05/03/content_125001.htm?div=-1. Note that in February 2018, the Third Plenum of the 19th Central Committee established a “Central Committee on Fully Ruling the Country according to Law” (Zhingyan quanmian yifa zhiguo weiyuanhui) which may replace the CLGDOR as the primary body implementing legal reform.

judges that could independently adjudicate cases.⁸⁸ Judges that were denied a position in the new quotas would keep their old compensation levels, but would only be allowed to play a supporting role in adjudication.⁸⁹ Essentially, these reforms aimed to reward high performers with substantially higher salaries and greater responsibilities, while retaining other personnel in less prestigious positions. Raising the prestige of judges would presumably attract more qualified individuals into the judiciary, thereby expanding its legal expertise and adjudicatory capacity.⁹⁰

Once the basic principles were in place, implementation was swift: by early 2017, nearly 90 percent of judges nationwide were now subject to the new quota system.⁹¹ By June of the same year, 23 provincial-level regions had implemented the new judicial pay scale, with nation-wide implementation soon to follow.⁹² In some regions, judicial salaries now were some 40% higher than other government officials of the same rank. Following these reforms, although complaints about “losing talent” still appeared in the SPC’s yearly work reports, the language employed became substantially milder: “some courts have suffered unusual losses of talent,”⁹³ rather than “as a general matter, the loss of talent is a serious problem.”⁹⁴

The rise in compensation levels have allowed the courts to recruit more ambitiously. After the previous major revision of the Judges’ Law in 2002, the baseline credentials needed to become a judge were to hold a bachelor’s degree or above, have legal expertise, and have 1-3 years—depending on which one’s educational level—of legal work experience.⁹⁵ Under special circumstances, the law allows the SPC to authorize exceptions permitting the employment of judges with only a vocational degree.⁹⁶ In late 2017, however, the National People’s Congress announced plans to increase the minimum work experience requirement to 5 years, and to remove the vocational degree exception altogether.⁹⁷

⁸⁸ On the history of these quotas, see Song Yongpan, *Faguan Yuan’e Zhi jiqi Peizhi Jizhi Wenti Yanjiu* [A Study of Judge Quotas and Their Accompanying Institutions], March 23, 2016, ZHONGGUO FAYUAN WANG [CHINA COURTS NET], <https://www.chinacourt.org/article/detail/2016/03/id/1827042.shtml>.

⁸⁹ *Id.*

⁹⁰ NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* (2015).

⁹¹ *Woguo Fayuan Faguan Yuan’e zhi Gaige Shidian Gongzuo Jiben Wancheng* [The Experimental Establishment of Judge Quotas Is Basically Completed], Feb. 13, 2017, XINHUA NET, http://www.xinhuanet.com/legal/2017-02/13/c_1120459608.htm.

⁹² Zhou Qiang, *Zuigao Renmin Fayuan guanyu Renmin Fayuan Quanmian Shenhua Sifa Gaige Qingkuang de Baogao* [Report of the Supreme People’s Court on Comprehensively Deepening Legal Reform], Nov. 1, 2017, NATIONAL PEOPLE’S CONGRESS NET, http://www.npc.gov.cn/npc/xinwen/2017-11/01/content_2030821.htm (report of the SPC Chief Justice to the NPCSC).

⁹³ Zhou Qiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Annual Work Report of the Supreme People’s Court], March 9, 2018, NATIONAL PEOPLE’S CONGRESS OF THE PEOPLE’S REPUBLIC OF CHINA OFFICIAL WEBSITE, http://www.npc.gov.cn/npc/dbdhhhy/13_1/2018-03/26/content_2052568.htm (report of the SPC Chief Justice to the full NPC).

⁹⁴ Wang Shengjun, *Zuigao Renmin Fayuan Gongzuo Baogao* [Annual Work Report of the Supreme People’s Court], March 11, 2012, CENTRAL PEOPLE’S GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA OFFICIAL WEBSITE, http://www.gov.cn/test/2012-03/19/content_2094709.htm (report of the SPC Chief Justice to the full NPC).

⁹⁵ ZHONGHUA RENMIN GONGHEGUO FAGUAN FA [JUDGES LAW OF THE PEOPLE’S REPUBLIC OF CHINA] (as amended on Jan. 1, 2002), art. 9, available at http://big5.gov.cn/gate/big5/www.gov.cn/banshi/2005-05/26/content_1026.htm.

⁹⁶ *Id.*

⁹⁷ ZHONGHUA RENMIN GONGHEGUO FAGUAN FA [JUDGES LAW OF THE PEOPLE’S REPUBLIC OF CHINA] (as amended on Sep. 1, 2017), arts. 9, available at http://www.npc.gov.cn/npc/xinwen/2017-09/12/content_2028694.htm.

Beyond these personnel-related reforms, the Party Leadership has also worked to fortify the SPC's administrative and legal control over lower level courts, with the apparent objective of strengthening the consistency and quality of lower level adjudication. The primary means of accomplishing this has been to establish six circuit courts, staffed by one justice and around a dozen SPC judges, that each cover three to five provincial-level entities.⁹⁸ Beginning in early 2015, these circuit courts established offices in one of the provincial capitals within their jurisdiction, and now exercise review powers over about a dozen categories of provincial-level cases.⁹⁹ Their decisions hold the same legal authority as a regular SPC decision—in other words, they have the final word on any case that comes before them—and they are administratively treated as direct extensions of the Court.¹⁰⁰ Strictly speaking, the creation of circuit courts adds nothing to the SPC's jurisdiction—it already had appellate jurisdiction over all cases currently handled by the circuit courts—but it nonetheless enhances its ability to monitor and control provincial and local courts: the circuit courts specialize in one or two economic macroregions in ways that the SPC itself generally cannot, and are therefore burdened with significantly lower information and enforcement costs when dealing with lower courts.

Relatedly, the SPC has also stepped up its use of the relatively new “guiding cases” system to control lower court behavior. Created in late 2010 and first utilized a year later,¹⁰¹ the system allows the SPC to identify certain case as “guiding cases” for lower level adjudication. Although these are not quite “binding” in the same manner as are precedents in common law jurisdictions, they nonetheless have a substantial amount of normative authority, and carry an expectation of conformity.¹⁰² Essentially, they share a similar function with formal judicial interpretations, but are far easier and politically cheaper to issue. Since 2013, the volume of guiding cases issued by the Court has increased by around 35 percent to some 16-18 a year.¹⁰³ Combined with the creation of circuit courts, they provide the SPC with a substantially more powerful toolkit to strengthen lower court compliance and adjudicative consistency.

Finally, the Party Leadership has also taken significant steps to bolster the judiciary's enforcement powers in civil disputes. A central feature in this regard is the creation of a Social Credit System, announced in 2014 by the State Council. This ambitious and somewhat misunderstood effort attempts to integrate currently disjointed sources of governmental information on private

⁹⁸ Fu Yulin, *Zuigao Renmin Fayuan Xunhui Fating de Zhineng Dingwei yu Quanwei Xingcheng* [The Role and Authority of the Circuit Courts of the Supreme People's Court], 2014(4) CHINA. L. REV. 158.; Fang Le, *Zuigao Renmin Fayuan Xunhui Fating de Yunxing Jizhi* [The Operational Institutions of the Circuit Courts of the Supreme People's Court], 2017(4) FAXUE [LEGAL STUD.] 99.

⁹⁹ Le, *supra* note 98; Lin Ping, *Zuigao Fa: Yijidu Duban jin Liuwan Zhixing An, Xunhui Fating Banli jin Bacheng Xinfang An* [The Supreme People's Court: Handles Nearly 60000 Enforcement Cases in the First Quarter, Circuit Courts Handle Nearly 80 Percent of Xinfang Cases], May 7, 2018, THE PAPER, https://www.thepaper.cn/newsDetail_forward_2116445.

¹⁰⁰ Yulin, *supra* note 98.

¹⁰¹ While there are some historical precedents for such a system in the Qing, see WANG ZHIQIANG, QINGDAI GUOJIA FA: DUOYUAN CHAYI YU JIQUAN TONGYI [THE LAW OF THE QING STATE: PLURALIST DIFFERENCES AND AUTHORITARIAN UNIFICATION] (2d Ed., 2017), this was the first time a PRC court had been allowed to issue guiding cases. Mark Jia, *Note: Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213.

¹⁰² Jia, *supra* note 101.

¹⁰³ Supreme People's Court of the People's Republic of China, Zhidaoxing Anli [Guiding Cases], SUPREME PEOPLE'S COURT OFFICIAL WEBSITE, <http://www.court.gov.cn/fabu-gengduo-77.html>.

behavior—financial and business behavior, legal compliance, even some information on personal ethics and character—into a score available for regulators and the public alike.¹⁰⁴ Loosely designed on credit reporting systems in finance, the mechanism is far broader in scope and concept.¹⁰⁵

The judiciary stands to reap enormous institutional benefits from this new information-sharing infrastructure. Because private non-compliance with court orders and judgments are a core component of the rating scheme, the Social Credit System essentially allows the judiciary to outsource some of the enforcement of its decisions to other public entities, such as banks and public transportation authorities.¹⁰⁶ While some scholars have raised fears that this will subject some people to duplicative punishments,¹⁰⁷ for our purposes the crucial thing is that it will almost certainly improve compliance with court judgments and orders.¹⁰⁸ It has, in fact, already led to sanctions ranging from being barred from engaging in certain kinds of business and being denied financial credit, to being prevented from boarding flights and playing golf.¹⁰⁹ In this way, the judiciary has leveraged the resources of China's powerful executive enforcement authority to advance its own effectiveness, in turn making it a more attractive partner for other agencies.

Combined, this laundry list of reform measures has raised the judiciary's institutional capacity, professionalism, and internal coherence to perhaps unprecedented levels. Certainly at no other point in PRC history has the SPC ever had this level of control over lower court adjudication, nor have courts in the PRC ever been able to recruit highly educated legal professionals quite as aggressively. Enforcement of judicial decisions has long been on a slow but steady upward trek over the past few decades, but the creation of the credit score system promises to sharply accelerate its progress.

B. Institutional Independence

Whereas the last Section focused on the judiciary's internal professionalism and coherence, the following two sections turn their attention to its political status relative to other governmental and Party entities. This section argues that it has become more independent from these entities, whereas the next section argues that it has also gained greater authority to review their actions.

¹⁰⁴ State Council of the People's Republic of China, *Shehui Xinyong Tixi Jianshe Guihua Gangyao* [Principles of Planning and Constructing a Social Credit System], 2014 GUOFA [PUBLICATIONS OF THE STATE COUNCIL] 21, Part II.4, available at http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm.

¹⁰⁵ See Dai, *supra* note 21.

¹⁰⁶ Indeed, the Supreme People's Court was part of the Interministerial Joint Conference that developed the SCS scheme laid out in 2014. And non-payment of judgments was one of the first areas in which the blacklist system was laid out. *Id.*

¹⁰⁷ *Id.*, text at note 228.

¹⁰⁸ Dai, *supra* note 21, at n. 277.

¹⁰⁹ *Id.*, at n. 278. This was facilitated by revisions of the Civil Litigation Law in 2012, providing that individuals who did not carry out requirements of a court judgment could be barred from leaving the country, among other vaguely worded sanctions. In 2013 the SPC created a blacklist of those who had not carried out court judgments or administrative decisions. The blacklist is governed by procedures and a joint memorandum of understanding among several agencies and party entities.

Put together, these developments clearly indicate that the judiciary has made major external political gains over the past five years, in addition to its internal institutional development.

Two developments that seemingly relate to the judiciary's growing political independence have already been mentioned in the previous section: the decline of top-down political pressure to mediate, and the detachment of judicial compensation from the standard governmental scale.¹¹⁰ That said, neither of these changes, on their own, truly indicate a major shift in the judiciary's political stature: although the Party Leadership has withdrawn the mediation-related pressures it previously exerted, it nonetheless retains the political ability to reinstate it at any moment. In fact, the Party Leadership's control over the courts has arguably increased under Xi, as has its control over all governmental and Party organs.¹¹¹ It has simply chosen not to exercise this control in ways that interfere with legal professionalism. When we argue that the courts have become more *institutionally* independent, we mean relative to political entities other than the Party Leadership: in other words, we are focusing on horizontal, rather than vertical, independence. Within a one-party system, this is precisely the dimension that matters most.

The creation of a separate judicial compensation scale, on the other hand, *is* a sign of growing institutional independence, but only when combined with a different set of reforms that we have yet to mention. Until very recently, the budgets of all courts were made by governmental entities of the same level. Local, city, and provincial governments controlled the purse strings of lower courts in the same way that the central government controlled the SPC's budget,¹¹² allowing them to exert an enormous amount of influence over judicial behavior. Since 2013, however, the Party Leadership has implemented a number of measures designed to substantially reduce this influence, primarily through removing all judicial budgetary decisions to the provincial level or above.¹¹³

¹¹⁰ See discussion surrounding *supra* notes 77, 78, 87-90.

¹¹¹ Shirk, *supra* note 1; Cohen, *supra* note 33; Li, *supra* note 19; Yuen, *supra* note 62; Fu, *supra* note 62; see also Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37 (2016).

¹¹² , He Weifang (贺卫方), Sifa Gaige de Bada Nanti (司法改革的八大难题) [*Eight Great Difficulties with Judicial Reform*], Haikou Shenpan (海口审判) [HAIKOU TRIAL], no. 1, 2002, at 4, available at http://article.chinalawinfo.com/article_print.asp?articleid=19684; Wang Yaxin (王亚新), Sifa Chengben yu Xifa Xiaoli: Zhongguo Fayuan de Caizheng Baozhang yu Faguan Jili (司法成本与司法效率: 中国法院的财政保障与法官激励) [*Judicial Cost and Efficiency: The Securing of Finances and the Motivation of Judges in China's Courts*], Faxuejia (法学家) [LEGAL SCHOLAR], no. 4, 2010, at 132, available at <http://www.civillaw.com.cn/article/default.asp?id=51198>; Su Yongqin (苏永钦), Sifa Xingzheng Zuzhi de Fazhan Qushi: Cong Shenpan Duli yu Guojia Geifu Sifa Yiwu de Jinzhang Guanxi Tan Qi (司法行政组织的发展趋势: 从审判独立与国家给付司法义务的紧张关系谈起) [*Development Trends in the Administrative Organization of the Judiciary: Starting from the Tense Relationship Between Judicial Independence and the State's Obligation to Financially Support the Judiciary*], in Fazhi yu Xiandai Xingzheng Faxue (法治与现代行政法学) [THE RULE OF LAW AND MODERN ADMINISTRATIVE LEGAL STUDIES] 45 (Yuanzhao Chubanshe [元照出版社] [Yuanzhao Press] ed., 2004).

¹¹³ Zhonggong Zhongyang guanyu Quanmian Shenhua Gaige ruogan Zhongda Wenti de Jueding [Decision by the Central Party Leadership on Comprehensively Deepening Several Reform Areas] [*hereinafter* Decision on Deepening Reform], Nov. 15, 2013, CENTRAL PEOPLE'S GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA OFFICIAL WEBSITE, http://www.gov.cn/jrzq/2013-11/15/content_2528179.htm (identifying the removal of judicial budgets to the provincial level as a central area of reform); CLGDOR, Framework Opinion, *supra* note 87 (initiating reforms to remove judicial budgets to the provincial level); sources cited at *supra* note 87.

Without these broader fiscal changes, simply detaching judicial salaries from the usual government compensation scale would have done very little for lower court independence—and, given the traditional reluctance of local governments to fund judicial activity,¹¹⁴ may not have resulted in any systemic increase in judicial salaries at all.

It is therefore intuitive that the push for judicial financial independence began at the same time as the initial floating of a separate judicial compensation scale—in the very same document, in fact. In June 2014, the CLGDOR issued a set of “framework opinions” on experimenting with judicial reform at the provincial level, which, following Chinese political convention, meant that several provinces would implement experimental measures, followed by reassessment and potential nation-wide implementation a few years later.¹¹⁵ The opinions flagged the need to establish a separate fiscal apparatus for judges and prosecutors, but provided few details, and it was not until 2015 that the Leading Group laid out concrete plans to create a separate pay scale.¹¹⁶ What the 2014 opinion focused on instead was moving all judicial and procuratorial budget and personnel decisions to the provincial level, in order to “solve the deeper structural problems that impede judicial fairness and limit judicial capacity.”¹¹⁷ Within a month, the SPC followed up with more detailed measures in its fourth five-year work plan: provincial high courts would collaborate with provincial governments to create judicial personnel commissions to determine all court-related hiring and promotions, while the SPC itself would work with both central and provincial authorities on budgetary reforms.¹¹⁸ Three months later, the Fourth Plenum of the 18th Party Congress formalized the framework opinions into official Party directives,¹¹⁹ and by mid-2017, the SPC reported that 18 provincial-level governments had completed the experimental reforms, with nationwide implementation presumably only a few years away.¹²⁰

Although these measures fall short of full horizontal financial and personnel independence for lower courts—at the very least, provincial and local courts remain financially dependent on provincial governments—they nonetheless represent a major step forward from the status quo. Compared to city or county level governments, provincial level governments are both more detached from local adjudication and more sensitive to pressure from the center.¹²¹ From the perspective of the central government, there are over 2000 county-level entities under its control, but only 31 provincial-level entities, excluding Hong Kong and Macau.¹²² It goes without saying

¹¹⁴ Wang Yaxin, *supra* note 112.

¹¹⁵ CLGDOR, Framework Opinion, *supra* note 87.

¹¹⁶ CLGDOR, Plan for Independent Administrative Scale, *supra* note 87; CLGDOR, Plan for Salary Reform, *supra* note 87.

¹¹⁷ CLGDOR, Framework Opinion, *supra* note 87

¹¹⁸ SPC, Fourth Five-Year Plan, *supra* note 77.

¹¹⁹ Clarke, *supra* note 1.

¹²⁰ Lin Ping, *Zuigao Fa: Quanguo 18 ge Shen Qu Shi Wancheng Sheng Yixia Fayuan Bianzhi Tongyi Guanli Gaige [Supreme People’s Court: 18 Provincial-Level Governments Have Completed Reforms Removing Judicial Budgets and Personnel Decisions to the Provincial Level]*, July 3, 2017, THE PAPER, https://www.thepaper.cn/newsDetail_forward_1723657.

¹²¹ This is an obvious point, but for a general discussion on center-local relations in China, see YANG ZHONG, LOCAL GOVERNMENT AND POLITICS IN CHINA: CHALLENGES FROM BELOW (2001).

¹²² *Zhonghua Renmin Gongheguo Xingzheng Quhua [Administrative Divisions of the People’s Republic of China]*, CENTRAL PEOPLE’S GOVERNMENT OF THE PEOPLE’S REPUBLIC OF CHINA OFFICIAL WEBSITE, http://www.gov.cn/test/2005-06/15/content_18253.htm.

that the information and enforcement costs needed to ensure compliance at the former level is exponentially higher than at the latter. Especially in the Xi Jinping era, central control over provincial governance has escalated dramatically.¹²³

This assumes, of course, that the center *does* care about preventing provincial level officials from interfering with lower courts: in March 2015, the Party leadership and the State Council jointly issued a set of regulations designed specifically to cut down on political interference with judicial activity at all levels.¹²⁴ Under these regulations, all courts would be required—under pain of formal administrative sanction—to compile records of any undue political interference, whether external or internal, and submit them to either a higher court or to the local Party Law and Political Affairs Office (LPAO) for review and action.¹²⁵ The regulations also laid out basic investigatory procedures and a fairly detailed set of penalties, including demotion, public shaming, removal of party membership, and criminal prosecution.¹²⁶ Within a year of this initial announcement, most provincial governments had published detailed plans to implement the regulations.¹²⁷ Unsurprisingly, the SPC was even more enthusiastic, following up with not only an implementation plan, but also numerous directives to provincial courts to track and oversee local progress.¹²⁸ By 2016, a number of officials had already been publicly shamed under the new provisions, and many more had likely received internal sanction.¹²⁹

Placed within this broader regulatory context, the decision to remove judicial budgetary decisions to the provincial level—rather than all the way to Beijing—more probably reflects the central government’s confidence that it can contain provincial level interference, rather than any lack of commitment to full horizontal judicial independence. Removal to Beijing would have entailed vastly greater administrative costs in return for only a moderate boost to judicial independence, which suggests that removal to the provincial level may very well have represented the optimal balance.

¹²³ Shirk, *supra* note 33; Elizabeth C. Economy, *China’s Imperial President: Xi Jinping Tightens His Grip*, 93 FOREIGN POL’Y 80 (2014).

¹²⁴ Central Party Leadership Administrative Office & State Council Administrative Office, Lingdao Ganbu Ganyu Sifa Huodong, Chashou Juti Anjian Chuli de Jilu, Tongbao he Zeren Zhuijiu [Regulations on Documenting, Reporting, and Sanctioning Interference with Judicial Activity by Government Officials] [*hereinafter* Regulations Against Interference], ZHONGBAN FA [PUBLICATIONS OF THE CENTRAL PARTY LEADERSHIP ADMINISTRATIVE OFFICE] 2015-23 (March 30, 2015), available at http://www.xinhuanet.com/2015-03/30/c_1114812232.htm.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ E.g., Sichuan Province Party Commission Administrative Office & Sichuan Province People’s Government Administrative Office, Sichuan Sheng Lingdao Ganbu Ganyu Sifa Huodong, Chashou Juti Anjian Chuli de Jilu, Tongbao he Zeren Zhuijiu Shishi Banfa [Implementation Methods on Documenting, Reporting, and Sanctioning Interference with Judicial Activity by Sichuan Province Government Officials], August 1, 2016, available at <http://news.sina.com.cn/c/2016-08-16/doc-ifyxhas2008596.shtml>; Zhao Yang & Wei Lei, *Guangdong dui “Lingdao Ganbu Ganyu Sifa” Chu Xize* [Guangdong Issues Detailed Rules on “Officials Intervening with Judicial Work”], Nov. 7, 2015, THE PAPER, http://www.thepaper.cn/newsDetail_forward_1393972.

¹²⁸ Zhou Qiang, *Fangzhi Lingdao Ganbu Ganyu Sifa Gongzuo Shuping* [An Evaluation of Reform Measures Against Officials Intervening with Judicial Work], Dec. 16, 2015, RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY] 1, available at <http://www.court.gov.cn/shenpan-xiangqing-16333.html> (summarizing measures taken by the SPC).

¹²⁹ *Shui zai Ganyu Sifa? Zhongzheng Wei Zaici Tongbao 7 Qi Dianxing Anli 20 Ren She’an* [Who is Interfering with Judicial Work? The Central Party Political Commission Again Publishes 7 Typical Cases Involving 20 People], Feb. 1, 2016, XINHUA NET, http://www.xinhuanet.com/local/2016-02/01/c_1117960559.htm.

All things considered, the Party leadership now seems strongly committed to shoring up the judiciary's institutional independence vis-a-vis all state and Party entities, but with the major exception of itself. In fact, since Xi's ascension, the SPC has expressly vowed to reject judicial review and "constitutionalism under the Western model," and to diligently follow "the Party's leadership."¹³⁰ Properly understood, "the Party" referred to here is the central Party leadership in Beijing, rather than Party offices of the same administrative level—lower Party offices are expressly banned from interfering with judicial work under the 2015 regulations discussed above¹³¹—but it nonetheless extinguishes any possibility of full judicial independence for the foreseeable future.

That said, this exception is not quite as big a detriment to the judiciary's functional independence as it might seem at first glance: of any governmental entity within the Chinese Party-state, the central Party leadership is arguably the most distant, and therefore the most detached, from the day-to-day operation of courts. So long as it continues to support legal professionalism and overall Party policy—and as discussed below, that is unlikely to change any time soon¹³²—the courts will enjoy increasing levels of institutional independence as they gain financial security and regulatory protection. The bottom line is that recent reforms have strengthened both judicial professionalism and judicial independence.

C. Judicial Checks and Balances

Beyond the increase in judicial independence vis-à-vis most of the government, the past several years have also seen a significant expansion of the judiciary's authority to review and penalize illegal administrative activity, making it a much more effective check against governmental abuse and overreach. This area has seen less activity—and certainly less decisive activity—than those discussed in the previous two sections, but that is simply because the political significance of constructing judicial checks against governmental action is larger than merely promoting judicial professionalism and independence. In both theory and practice, one can have the latter without the former, but in such cases the judiciary will likely remain politically marginalized and confined to narrow roles focused on society, rather than on the state. Until very recently, this was exactly the strategy that the Party leadership pursued: with the partial exception of the Hu Jintao-era "turn against law," the Party at least maintained a consistent rhetorical commitment to judicial professionalism—and for the most part, did indeed take steps to strengthen it.¹³³ The development of judicial checks and balances, on the other hand, was both rhetorically and institutionally muted.¹³⁴ Judicial constitutional review, for example, remains politically unthinkable, and the one

¹³⁰ Michael Forsythe, *China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/world/asia/china-chief-justice-courts-zhou-qiang.html>.

¹³¹ Regulations Against Interference, *supra* note 124.

¹³² See discussion at *infra* pp. _-_-.

¹³³ Clarke, *supra* note 48; Peerenboom, *supra* note 1.

¹³⁴ Li, *supra* note 45; He, *supra* note 46; He, *supra* note 45; HOU MENG, ZUIGAO RENMIN FAYUAN YANJIU: YI SIFA DE YINGXIANGLI QIERU [A STUDY OF THE SUPREME PEOPLE'S COURT OF CHINA: FROM THE ANGLE OF JUDICIAL

fledging attempt by the SPC to apply constitutional principles in adjudication—the 2001 Qi Yuling case—drew such a strong rebuke that the SPC formally withdrew that interpretation in 2008.¹³⁵

The passage of the Administrative Litigation Law (ALL) in 1989 was arguably the only substantial step forward in this area throughout the pre-Xi Jinping era,¹³⁶ but it was nonetheless a very limited step. As scholars have long argued, the ALL gave the courts very limited jurisdiction to review administrative activity—only over eight specific categories of individual administrative enforcement, and none over administrative regulations that possess any kind of “general binding force.”¹³⁷ Combine this with a general ban on mediation in administrative cases, which excluded a number of potentially pro-plaintiff litigation strategies, and it is altogether unsurprising that the total volume of administrative cases experienced fairly little growth after 1998, when the impact of the ALL’s initial passage seemed to plateau at around 100,000 cases a year.¹³⁸ The courts themselves, still vulnerable to financial and personnel interference from local governments, were reluctant to take on these cases, and reports abounded of lower courts that refused to accept otherwise legitimate case filings.¹³⁹

Placed within this context, the 2014 revision of the ALL represents the most substantial expansion of judicial checks and balances in at least 25 years.¹⁴⁰ Issued a few months later after the aforementioned directive to boost judicial financial independence, the revision focused on two major issues: first, it sought to lower external political interference with administrative litigation;

INFLUENCE] (2007); Zhang, *supra* note 38; Eric Ip, *Article: The Supreme People’s Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN L. 367 (2011).

¹³⁵ Tong, *supra* note 37; Kellogg, *supra* note 37.

¹³⁶ ZHONGHUA RENMIN GONGHEGUO XINGZHENG SUSONG FA [ADMINISTRATIVE PROCEDURE LAW OF THE PEOPLE’S REPUBLIC OF CHINA] [*hereinafter* ALL], as amended on June 27, 2017, available at http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024894.htm.

¹³⁷ Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832 (1997); Ginsburg, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes*, in *RULE BY LAW*, *supra* note 27, at 58; He, *supra* note 45.

¹³⁸ Taisu Zhang, *Why the Chinese Prefer Administrative Petitioning Over Litigation*, 2009 Soc. Stud. 139. To put this number in perspective, it was roughly comparable to the number of “social disturbances”—a euphemism for riots and protests—reported by the government during the same period. CHRISTIAN GOEBEL & LYNETTE H. ONG, *SOCIAL UNREST IN CHINA 37* (Long Briefing, Europe China Research and Academic Network, 2012), available at https://www.chathamhouse.org/sites/default/files/public/Research/Asia/1012ecran_gobelong.pdf [last accessed July 20, 2018].

¹³⁹ Jiang Bixin, *Wanshan Xingzheng Susong Zhidu de Ruogan Sikao [Thoughts on How to Perfect the Administrative Litigation System]*, 2013(1) ZHONGGUO FAXUE [CHINESE LEGAL STUD.] 5.

¹⁴⁰ National People’s Congress Standing Committee, *Guanyu Xugai Zhonghua Renmin Gongheguo Xingzheng Susong Fa de Jueding [Decision on Revising the Administrative Procedure Law of the People’s Republic of China]* [*hereinafter* 2014 ALL Revision], Nov. 1, 2014, NATIONAL PEOPLE’S CONGRESS OFFICIAL WEBSITE, http://www.npc.gov.cn/npc/xinwen/2014-11/02/content_1884662.htm. A minor revision in 2017 gave prosecutors the authority to bring administrative suits against other governmental entities in cases concerning environmental protection, food and drug safety, used of state-owned assets, and the transfer of state-owned property usage rights. National People’s Congress Standing Committee, *Guanyu Xugai Zhonghua Renmin Gongheguo Minshi Susong Fa he Zhonghua Renmin Gongheguo Xingzheng Susong Fa de Jueding [Decision on Revising the Civil Procedure Law of the People’s Republic of China and the Administrative Procedure Law of the People’s Republic of China]*, June 27, 2017, NATIONAL PEOPLE’S CONGRESS OFFICIAL WEBSITE, http://www.npc.gov.cn/npc/xinwen/2017-06/27/content_2024517.htm.

and, second, it substantially expanded the scope of the judiciary's review power.¹⁴¹ The former was, as noted above, part of a general push to eliminate political interference¹⁴²—except by the Party leadership itself—but it was a particularly pressing problem in the context of administrative litigation, where governmental incentives to intervene were often at their highest.¹⁴³ In response, the revised ALL incorporated a new “general principle” that specifically banned external interference of all kinds, and also mandated that courts “should protect the right of citizens, legal persons, and other organizations to lawfully initiate litigation, and must therefore lawfully accept all cases that it should accept.”¹⁴⁴ The latter clause, despite its somewhat circular phrasing, formally eliminates whatever discretion courts originally thought they had to turn away “undesirable” cases: not only were lawmakers removing external obstacles against judicial review, but they also wanted to make sure courts exercised it more often.

The expansion of scope was accomplished through adding four more categories of administrative action that were now specifically subject to judicial review: administrative decisions concerning ownership or usage rights over land and some other natural resources; any exercise of eminent domain; any interference by a governmental entity on agricultural land use rights; and any issuance of compensation following an act of eminent domain.¹⁴⁵ The common issue underlying these new categories is the conversion of agricultural land into urban real estate: in general, this can only be accomplished through an act of eminent domain exercised by an appropriate governmental entity.¹⁴⁶ Lower-level governments are usually extremely eager to convert rural land for urban use, both because of its enormous benefit to short-term GDP growth, and because it is now a critically important source of revenue.¹⁴⁷ On the other hand, rural collectives and landholders—who respectively hold ownership and usage rights over all agricultural land—are often severely undercompensated in such proceedings, making them arguably the single largest source of rural and suburban social unrest in China.¹⁴⁸ In other words, the new ALL not only expanded the judiciary's administrative review power, but in such a way to address one of China's most serious sociopolitical problems.

¹⁴¹ 2014 ALL Revision, *supra* note 140. The new ALL also gave the courts some more flexibility in how to handle administrative cases, but the increase was marginal. Whereas court-directed mediation was formally banned in all forms, the revisions now allowed mediation in administrative compensation cases and other disputes in which the defendant—that is, the government entity being sued—possessed some measure of discretionary judgment power. *Id.*

¹⁴² See discussion at *supra* p. _.

¹⁴³ He Haibo, *Xingzheng Susong Chesu Kao* [A Study of Withdrawal in Administrative Litigation Cases], 2001(2) ZHONGWAI FAXUE [PEKING UNIV. L.J.] 129.; He Haibo, *Kundun de Xingzheng Susong* [Administrative Litigation in Difficult Times], 2012(2) HUADONG ZHENGFA DAXUE XUEBAO [J. OF THE EAST CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW] 57.

¹⁴⁴ 2014 ALL Revision, *supra* note 140.

¹⁴⁵ *Id.* It should be noted that a considerable expansion of the scope of judicial review of administrative action had already been effectuated by the Supreme People's Court's Interpretation (promulgated in 2000) on Several Questions regarding the Implementation of the Law of Administrative Litigation, which expanded coverage to most concrete administrative actions affecting citizens' rights and interests. ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (4th ed. 2011), at 297)

¹⁴⁶ Taisu Zhang & Xiaoxue Zhao, *Do Kinship Networks Strengthen Private Property? Evidence From Rural China*, 11 J. EMPIRICAL LEGAL STUD. 505 (2014)

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

One could argue that the power to review eminent domain was already implicit in the eight categories recognized by the previous ALL—specifically, in the relatively vague category of “administrative actions that affect other personal and property rights”¹⁴⁹—but explicit recognition makes an enormous difference in the practical application of Chinese law. Prior to the 2014 revision, there was genuine debate within the legal world over whether, and to what extent, the ALL covered rural land takings: in practice, at least, both lower courts and other governmental entities were often resistant to such coverage, and higher courts were generally unwilling to systemically push back.¹⁵⁰ Scholarly opinion seemed to tentatively coalesce around the shapeless position that whether any specific incident was covered by the ALL depended on its severity and scale, but there was ultimately little legal authority to support it.¹⁵¹ The 2014 revisions put an end to these debates and immediately generated a significant increase in the volume of land takings-related litigation—within two years of its passage, some government observers claimed that they were now “the primary source” of administrative cases in some jurisdictions.¹⁵²

Following these changes, the overall volume of Chinese administrative litigation shot upward from some 130,000 cases closed in 2014 to around 200,000 in 2015, and then to almost 240,000 in 2017.¹⁵³ At the same time, victory rates for plaintiffs in these cases, which had tumbled downwards for nearly a decade prior to the revision, until falling below 10 percent in 2013, moved back up to around 15 percent in 2016, suggesting that external political interference had indeed receded somewhat.¹⁵⁴ In another public display of the Party leadership’s new commitment to constraining lower-level governmental entities through administrative litigation, the People’s Daily immediately cheered these new developments as major sign of progress: “any minor increase

¹⁴⁹ ZHONGHUA RENMIN GONGHEGUO XINGZHENG SUSONG FA [ADMINISTRATIVE PROCEDURE LAW OF THE PEOPLE’S REPUBLIC OF CHINA], as enacted on Apr. 4, 1989, available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4519.htm.

¹⁵⁰ Zhang Yu, *Nongcun Tudi Zhengshou Buchang Jiufen Xingzheng Susong Anjian Tanxi* [An Exploration of Administrative Litigation Cases Related to Rural Land Takings Compensation], Oct. 8 2012, ZHONGGUO FAYUAN WANG, JIANGXI SHENG JIUJIANG SHI ZHONGJI RENMIN FAYUAN [OFFICIAL WEBSITE OF THE JIUJIANG INTERMEDIATE PEOPLE’S COURT, CHINA COURT NET], <http://jjzy.chinacourt.org/article/detail/2012/10/id/2606044.shtml>.

¹⁵¹ *Id.*

¹⁵² Zhou Mingqin, *Nongcun Jiti Tudi Zhengshou zhong Xingzheng Xingwei Kesuxing Yanjiu* [A Study on the Plausibility of Litigating Administrative Action in Rural Collective Land Takings], Jan. 6, 2017, WUSONG YUEDU, XUESHU TANG [WUSONG READING, ACADEMIC HALL], <https://victory.itslaw.com/victory/api/v1/articles/article/f238c613-26a0-4223-9347-242d4a32d1bb> [observations by a member of the Legal Office of the Changsha City Government].

¹⁵³ Qiang, *2018 Work Report*, *supra* note 93; Zhou Qiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Annual Work Report of the Supreme People’s Court], March 21, 2016, SUPREME PEOPLE’S COURT OF CHINA OFFICIAL WEBSITE, <http://www.court.gov.cn/zixun-xiangqing-17712.html> (2016 work report); Zhou Qiang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Annual Work Report of the Supreme People’s Court], March 15, 2015, SUPREME PEOPLE’S COURT OF CHINA OFFICIAL WEBSITE, <http://gongbao.court.gov.cn/Details/41bf882b379cb6f24540decdf70250.html> (2015 work report).

¹⁵⁴ Li Yingfeng, *Min Gao Guan Shengsulü Shangsheng Shifang Jiji Xinhao* [The Rise of Plaintiffs’ Victory Rates in Administrative Litigation Sends a Positive Signal], June 15, 2017, FAZHI RIBAO [LEGAL DAILY] at 3, available at <http://opinion.people.com.cn/n1/2017/0615/c1003-29340775.html>; Zhang Yu, *Zhongguo “Min Gao Guan” An Yuangao Shengsulü cong 10 Nian Qian 30% Jiangdao 10%* [Plaintiffs’ Win Rate in Administrative Litigation Cases Has Declined from 30% to 10% in 10 Years], Nov. 5, 2014, PEOPLE’S DAILY NET, <http://finance.people.com.cn/n/2014/1105/c66323-25975462.html>.

in the loss rate for administrative entities in the courts,” it crowed, “represents a major step forward for judicial work.”¹⁵⁵

Even after these changes, judicial review of governmental activity remains fairly weak. The number of cases remains small for a country of China’s size, and courts are still prohibited from reviewing general rules and regulations.¹⁵⁶ But the upward trend in ambit and scale of review activity is unmistakable, and will likely persist into the foreseeable future. The SPC, for example, issued yet another set of judicial interpretations on the ALL in early 2018 and once again expanded the judiciary’s jurisdiction, this time by, first, resolving in the affirmative a long-time debate among government entities over whether courts could review village-level administrative actions under the ALL and, second, allowing courts to compel local governmental entities of the same level to issue formal explanations for any informal political decision.¹⁵⁷ The latter, in particular, has drawn academic attention as a way for courts to potentially influence and constrain administrative regulations of “general binding force.”¹⁵⁸ The judiciary can now realistically claim to be a central component of Xi Jinping’s general campaign to “place (governmental) power within a cage.”¹⁵⁹ Although that campaign—discussed in greater detail in Part III—has largely been focused against corruption,¹⁶⁰ both the courts and other governmental organs have increasingly advocated administrative litigation as another important bar in the “cage,”¹⁶¹ and as the judiciary steps further into that role, its relative political stature will continue to rise.

D. How Legalistic are Chinese Courts?

Looking back at the developments laid out in the previous sections, 2014 clearly was an enormously significant turning point for the Chinese judiciary. Prior to that point, it had just undergone a five-year stretch in which central authorities were, by many accounts, systematically diluting its core adjudicative function and lessening its professional prestige. Whatever the merits of that description, judicial morale was indeed low, as the institutional problems that had plagued courts for decades showed no signs of improving, and may even have been deteriorating further.¹⁶²

¹⁵⁵ Yingfeng, *supra* note 154.

¹⁵⁶ ALL, *supra* note 136, at art. 13.

¹⁵⁷ Supreme People’s Court of China, *Xingzheng Susong Fa Sifa Jieshi* [Interpretation of the Administrative Procedure Law], Feb. 7, 2018, SUPREME PEOPLE’S COURT OF CHINA OFFICIAL WEBSITE, <http://www.court.gov.cn/zixun-xiangqing-80542.html>. On the previous debate over jurisdiction, see He Xin, *Why did they not take on the disputes? Law, Power and Politics in the Decision-Making of Chinese Courts*, 3 INT’L J.L. CONTEXT 203 (2007).

¹⁵⁸ Cui, Cheng & Wiesner, *Judicial Review of Government Actions in China* (2018).

¹⁵⁹ Supreme People’s Court of China, *Shi ge Jingji Xingzheng Dianxing Anli* [Ten Model Cases on Economic and Administrative Litigation], Oct. 22, 2015, SUPREME PEOPLE’S COURT OF CHINA OFFICIAL WEBSITE, <http://www.court.gov.cn/zixun-xiangqing-15843.html> [hereinafter SPC, *Ten Model Cases*]

¹⁶⁰ Neimenggu Zizhiq Zhongguo Tese Shehui Zhuyi Lilun Yanjiu ZHONGXIN [Inner Mongolia Autonomous Region Research Center on Socialist Theory with Chinese Characteristics], “Longzi Lun”: *Ba Quanli Zhuangjin Zhidu de Longzi li* [“The Cage Theory”: Putting Power in an Institutional Cage], Sep. 7, 2015, PEOPLE’S DAILY NET, <http://theory.people.com.cn/n/2015/0907/c40531-27552282.html>.

¹⁶¹ SPC, *Ten Model Cases*, *supra* note 159.

¹⁶² Dongxu, *supra* note 86.

The first year of Xi Jinping's rule, 2013, had offered a change in rhetoric,¹⁶³ but it was not until 2014 that a huge wave of institutional reforms happened almost all at once, spearheaded by the CLGDR's framework opinions and the revision of the ALL.¹⁶⁴ As a result, courts are now more professional, independent, and politically powerful than at any point in PRC history. Of course, they remain far weaker in most respects than their American or Western European counterparts, and may very well never have the power of constitutional review, but sweeping, paradigm-shifting progress in judicial professionalism and independence has indeed been made under an increasingly centralized and autocratic regime.

These reforms are almost certainly responsible—partially, at least—for the dramatic increase in judicial caseload over the past 5 years. Intuitively, the more professional and independent the courts are, the more effective and fair they will be in adjudicating socioeconomic disputes, and, assuming that there is consistent social demand for such services, the greater their caseload will likely be.¹⁶⁵ This has indeed been the case: since 2014, with the major exception of criminal cases, the judiciary has experienced unusually explosive growth in its caseload. Civil and commercial cases now exceed 12 million a year, nearly double the 6-7 million cases it was handling yearly before 2014.¹⁶⁶ In comparison, the annual civil and commercial caseload only grew by around 1.5 million cases across the entire Hu Jintao era (2003-2013).¹⁶⁷ Administrative litigation, as noted above, has shown a similar trend—not to mention that the courts have been able to handle all this while reducing the number of judges authorized to directly adjudicate by some 40 percent. By all indications, the courts operate much more efficiently and effectively now than they used to, and the general public seems to have responded by litigating much more aggressively.

Some scholars might argue that bolstering the institutional status and independence of the courts does not necessarily amount to a “turn towards law” or any major shift in central policy towards legality. Chinese courts have struggled with judicial fairness in the past, favoring parties with

¹⁶³ *Xi Jinping Pledges to Implement Rule of Law*, CHINA DAILY (Dec. 5, 2012), http://www.chinadaily.com.cn/china/2012-12/05/content_15985873.htm (“To fully implement the Constitution needs to be the sole task and the basic work in building a socialist nation ruled by law”). See discussion surrounding *supra* notes 76-78.

¹⁶⁴ Framework Opinion, *supra* note 87; ALL, *supra* note 136.

¹⁶⁵ As some economists will doubtlessly point out, if people are completely rational, information costs nonexistent, and the courts completely predictable—predictability being a side-effect of professionalism—then no one would sue. Instead, parties would know beforehand what the outcome of a case would be, and would bargain on that basis. In that case, there might actually be a negative relationship between judicial professionalism and the volume of litigation. Needless to say, none of these conditions exist in China today, and nearly all legal actors, including the judiciary, tend to assume that rising caseloads correlates to more effective adjudication (or at least the social perception of effective adjudication). *E.g.*, Zhou Qiang, 2018 Report, *supra* note 93. The underlying assumptions seem to be that the overall socioeconomic demand for dispute resolution is either stable or rising due to commercialization and demographic mobility, and if adjudication were widely perceived to be ineffective, then parties would simply settle their disputes through other means.

¹⁶⁶ Qiang, 2015 Report, *supra* note 93; Qiang, 2018 Report, *supra* note 93.

¹⁶⁷ Xiao Yang, *Zuigao Renmin Fayuan Gongzuo Baogao* [Annual Work Report of the Supreme People's Court], March 11, 2003, SUPREME PEOPLE'S COURT OF CHINA OFFICIAL WEBSITE, <http://gongbao.court.gov.cn/Details/54e6bcf2941a766a043afde548717a.html>; Wang Shengjun, *Zuigao Renmin Fayuan Gongzuo Baogao* [Annual Work Report of the Supreme People's Court], March 10, 2013, SUPREME PEOPLE'S COURT OF CHINA OFFICIAL WEBSITE, <http://gongbao.court.gov.cn/Details/9f1655cc4ce302bc9a1ef28902f9c0.html>.

strong political connections or economic backgrounds over those that do not—but if the courts themselves are insufficiently committed to legality, then strengthening them may not amount to a strengthening of law.¹⁶⁸ That is, if courts become stronger and more effective, it is possible that they are becoming more effective at something other than applying the law. Governmental rhetoric may speak aspirationally of legal professionalism, but in reality, the courts may ignore legal rules as much as any other governmental organ—and even if the Chinese population is litigating in ever-increasing numbers, perhaps what it wants from the courts is not enforcement of legal rules, but something more “culturally Chinese.”¹⁶⁹

We consider such skepticism severely overblown. Scholars who study Chinese courts have generally agreed that, in the vast majority of cases, and specifically in nearly all civil and commercial cases, courts tend to operate in a highly professional, law-oriented manner.¹⁷⁰ The sheer caseload that lower courts face on a day-to-day basis renders extralegal behavior too costly to bear on any regular basis. The basic fact that richer or more politically connected litigants systemically fare better in courts does not distinguish Chinese courts from nearly any other court system in the world.¹⁷¹ For the most part, these patterns are readily explained by the fact that richer or more powerful litigants simply possess superior resources and therefore better access to legal counsel, rather than by any conscious rule-bending on behalf of the courts.

As for the small minority of socially or politically charged cases where the courts are under significant outside pressure to reach specific outcomes,¹⁷² the overwhelming direction of post-2014 reforms has been to reduce such pressure, and at least some of these reforms, specifically those related to court finances and personnel, have almost certainly had positive and substantial effects. The design imperfections in the World Bank’s Rule of Law Governance Indicator are well known,¹⁷³ but it bears mention that China’s Rule of Law rank has, following a significant decrease during the later Hu Jintao era, increased every single year under Xi, and has now reached new

¹⁶⁸ For such accusations, see, for example, LUBMAN, *BIRD IN A CAGE*, *supra* note 1; Clarke, *supra* note 45; Li Ling, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State*, 37 L. & SOC. INQUIRY 848 (2012); Pitman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI 179 (Thomas Gold, Doug Guthrie & David Wank eds., 2002); Xin He & Kwai Hang Ng, *It Must Be Rock Strong: Guanxi’s Impact on Judicial Decision Making in China*, 65 Am. J. Comp. L. 841 (2017); Xin He & Yang Su, *Do the “Haves” Come Out Ahead in Shanghai Courts*, 10 J. EMPIRICAL L. STUD. 120 (2013).

¹⁶⁹ This kind of argument is especially common in articles that study the role of “guanxi” (“social relationships”) in Chinese legal behavior. See, e.g., Potter, *supra* note 168; He & Ng, *supra* note 168.

¹⁷⁰ Fu, *supra* note 1; He, *supra* note 46, at 132 (“[Studies] are generally consistent with the analysis that enforcement of relevant laws is taking place and local protectionism is not rampant.”)

¹⁷¹ Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320 (1997); MARY L. VOLCANSEK, MARIA ELISABETTA DE FRANCISCIS & JACQUELINE LUCIENNE LAFON, *JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON* (1996)

¹⁷² Fu Hualing, *Mapping Terrorist Threats in China and the Political and Legal Responses* (2010) (developing a typology of cases that involve external political pressure); Li, *supra* note 45; Rachel Stern, *The Political Logic of China’s New Environmental Courts*, 72 CHINA J. 53 (2014).

¹⁷³ World Bank Governance Indicators, WORLD BANK OFFICIAL WEBSITE <http://info.worldbank.org/governance/WGI/#home> (last visited July 26, 2018). For criticism and responses, see Daniel Kaufman, Aart Kraay & Massimo Mastruzzi, *Worldwide Governance Indicators Project: Answering the Critics* (World Bank Policy Research Paper No. 4149), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=965077.

heights. At the very least, this indicates a general sense among legal professionals that Chinese courts are indeed applying the law now in a significantly more rigorous and predictable manner.¹⁷⁴

Past problems, however deep and serious, do not mean that current attempts to resolve them are either insincere or ineffective. Whether China is currently experiencing a “turn towards law” depends ultimately on whether the current regime is serious about promoting professional law enforcement and adjudication, not on whether previous regimes did a good job in this area, and there is no good reason to believe that the current Party leadership is anything but extremely serious. The sheer amount of administrative resources thrown into judicial reform in the few years since 2014 likely dwarfs comparable investment across the entire Hu Jintao-era. As more than one scholar has noted, some of these reforms, most notably the fiscal and personnel reforms, require immense institutional change and have encountered substantial opposition¹⁷⁵—and yet, by 2018, substantial progress has been made on nearly all fronts.

Then there are the institutional incentives of the judiciary itself: the judiciary, and especially the SPC, has probably been the strongest and most consistent supporter of legal professionalism in China—even during the Hu Jintao era “turn against law”—for the very straightforward and pragmatic reason that it has the most to gain from it.¹⁷⁶ Legal expertise and professionalism are ultimately what distinguish the courts from other branches of the government, and are therefore their primary source of sociopolitical prestige. As the judiciary becomes more cohesive, well-educated, and legally experienced, it would be extremely surprising if it voluntarily moved away from reliable law-based adjudication, especially when the Party Leadership itself seems to be promoting higher levels of legal professionalism.

Finally, we would also strongly disagree with any suggestion that the general population does not care about legal professionalism. As discussed in greater detail below, evidence from the past decade strongly suggests that it does care, and to such an extent that a serious lack of legal professionalism in the courts would be a fundamental threat to the Party-state’s sociopolitical legitimacy.¹⁷⁷ The best interpretation of the developments presented in this section is simply the most intuitive one: that the courts have become more legally professionalized, independent, and powerful, that the general population has rewarded them with a dramatically higher rate of usage and socioeconomic importance—and, therefore, that this almost certainly constitutes a major turn towards greater legality in Chinese governance.

¹⁷⁴ Another source of corroborating data is the World Justice Project, <https://worldjusticeproject.org/> (last visited July 26, 2018), which surveys thousands of citizens in over 100 countries on many dimensions of the justice system—and largely reaffirms the findings of the Rule of Law Governance Indicator. It has shown improvements over the Xi era, with impressions of judicial corruption and governmental interference in the courts falling significantly.

¹⁷⁵ See, e.g., Minzner, *Legal Reform*, *supra* note 1; deLisle, *supra* note 1; Clarke, *supra* note 1.

¹⁷⁶ See, e.g., HOU MENG, ZUIGAO RENMIN FAYUAN YANJIU: YI SIFA DE YINGXIANGLI QIERU [A STUDY OF THE SUPREME PEOPLE’S COURT OF CHINA: FROM THE ANGLE OF JUDICIAL INFLUENCE] (2007); Zhang, *supra* note 38; Eric Ip, *supra* note 134; Tong, *supra* note 37 (discussing the SPC’s motivations behind the Qi Yuling case); He, *supra* note 45.

¹⁷⁷ See discussion at *infra* pp. --.

III. Engaging the Constitution

The judiciary is not the only legal institution that has experienced a major increase in political status under the Xi Jinping regime. We argue in this part that the Chinese Constitution, long thought to be an insignificant and politically dormant document,¹⁷⁸ has also experienced such a status boost, both in terms of governmental rhetoric and in terms of actual political activity. Within the institutional framework of Party-state, the judiciary and the Constitution are functionally unrelated entities due to the former's lack of constitutional interpretation powers, but as argued below, there are common sociopolitical forces that underlie the political rise of both. They represent different dimensions of a general shift in socioeconomic demand—and, in response, political movement—towards institutional regularity, accountability, and, ultimately, legality.

We argue here that the Constitution already carries much more political weight than scholars have previously given it credit for, indeed at the highest levels of the Party-state, and that recent developments have only further bolstered its influence and significance.¹⁷⁹ Much of this argument rests upon our analysis—the first of its kind in any kind of academic publication—of the 2018 constitutional amendments, but we also place great emphasis on the post-2012 buildup to that moment, which allow interesting glimpses into what we believe has been a long-term trend in Chinese politics.

To be clear, we are not arguing that these recent developments amount, in any way, to a rise of “constitutionalism” in Chinese politics.¹⁸⁰ There is little evidence to suggest that the Party leadership has internalized the normative authority of the Constitution in any fashion, and the rigor and impact of constitutional review remains, for now, as poor as it has always been. “Western style constitutionalism” remains a concept *non grata*, as does any notion of creating formal checks against the Party leadership's power.¹⁸¹ Nonetheless, we do believe there is evidence that the document has become more instrumentally important: that is, emphasizing its authority now brings greater political benefits than in the not-so-distant past, whereas disregarding it now carries much greater political cost. Party leaders need not have normatively internalized any version of constitutionalism for this to happen.

A. A Change in Rhetoric

The Constitution has always occupied an awkward position in Chinese political discourse. Since the 1980s, a significant number of Party elites have clearly believed that, for reasons related to both internal political coordination and external image, the country needed a visible and at least

¹⁷⁸ See sources cited at *supra* note 54.

¹⁷⁹ *But see* Clarke, *supra* note. 48, at 103-09 (explaining that the Constitution has a legitimating function despite its legal irrelevance).

¹⁸⁰ Compare Backer, *supra* note **Error! Bookmark not defined.** (using the constitutionalism term to describe China).

¹⁸¹ Forsythe, *supra* note 130; Economy, *supra* note 19, at 37-38.

potentially respectable Constitution.¹⁸² At the same time, the document’s nominal guarantee of basic rights and freedoms, although provided for in highly ambiguous and malleable language, was nonetheless inconvenient for an autocratic regime.¹⁸³ Functionally, formal constitutional review, if it existed at all, was at best unpredictable and usually insignificant.¹⁸⁴ Constitutional amendment was used to ratify policy decisions that had already been reached, and to bless ideological formulae that had been adopted by the party. For example, in 1993 Deng’s formula of “socialism with Chinese characteristics” was added to the preamble, and in 2004, Jiang Zemin’s “Three Represents” was added, along with formal protection of property rights—which, at that point, had already been in statutory existence for years.¹⁸⁵

Rhetorically, Party leaders did mention the Constitution occasionally in speeches and essays, but almost always superficially. For example, Hu Jintao used the term “Constitution” in some 25 speeches over his 10 years of rule, but apart from an early speech delivered on the 20th anniversary of the 1982 Constitution, never discussed it in any substantial way.¹⁸⁶

Xi has diverged from this pattern in terms of both frequency and substance. He has mentioned the term almost as many times in just 5 years at the helm as Hu did in 10, but much more importantly, has made it the centerpiece of at least six speeches and essays, as early as 2012 and as recent as 2018.¹⁸⁷ The language employed is usually generic—for example, “the Constitution is our

¹⁸² William C. Jones, *The Constitution of the People’s Republic of China*, 63 WASH. U. L. Q. 707 (1985); Richard Baum, *Modernization and Legal Reform in Post-Mao China: The Rebirth of Socialist Legality*, 19 STUD. COMP. COMMUNISM 69 (1986); Hungdah Chiu, *The 1982 Chinese Constitution and the Rule of Law*, 11 REV. SOCIALIST L. 143 (1985).

¹⁸³ See sources cited at *supra* note 54.

¹⁸⁴ Lin & Ginsburg, *supra* note 59.

¹⁸⁵ CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA (as amended on March 14, 2004), available at http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm. On the development of property rights in China, see Donald Clarke, *China’s Stealth Urban Land Revolution*, 62 AM. J. COMP. L. 323 (2014).

¹⁸⁶ Hu Jintao, *Zai Shoudu Gejie Jinian Zhonghua Renmin Gongheguo Xianfa Gongbu Shishi Ershi Zhounian Dahui Shang de Jianghua* [Speech Delivered at the Beijing Meeting to Commemorate the 20th Anniversary of the Enactment of the Constitution of the People’s Republic of China], 2002(1) GAOXIAO LILUN ZHANXIAN [BATTLELINES OF THEORY IN HIGHER LEARNING] 1. The total speech count is a rough number derived from searching for articles authored by 胡锦涛 (Hu Jintao) in Google Scholar, <https://scholar.google.com/>, using the keyword 宪法 (constitution).

¹⁸⁷ *Guanyu Xianfa, Xi Jinping zhe 10 ju Hua Fa Ren Shenxing* [On the Constitution, These 10 Lines in Xi Jinping’s Speeches Inspire Deep Reflection], March 12, 2018, XINHUA NET, http://www.xinhuanet.com/politics/2018-03/12/c_1122527222.htm (identifying 10 important statements on the Constitution derived from four of Xi’s speeches); Xi Jinping, *Zai Shoudu Gejie Jinian Xianxing Xianfa Gongbu Shishi 30 Zhounian Dahui Shang de Jianghua* [Speech in the Capital Commemorating the 30th Anniversary of the Promulgation and Implementation of the 1982 Constitution (Dec. 4, 2012), XINHUA NET http://news.xinhuanet.com/politics/2012-12/04/c_113907206.htm, translation at <http://lbackerblog.blogspot.com/2013/05/xi-jingpings-constitutional-vision.html>; Xi Jinping, *Wei hu Xianfa Quanwei, Tuijin Xianzheng Fazhan* [Protect the Constitution’s Authority, Promote the Development of Constitutionalism], 2013(1) JIGOU YU XINGZHENG [INSTITUTIONS AND ADMINISTRATION] 1, available at <http://www.cqvip.com/qk/71320x/2013001/74718890504849514849484850.html>; Xi Jinping, *Keshou Xianfa Yuanze, Hongyang Xianfa Jingshen, Lixing Xianfa Shiming* [Obey the Constitution’s Principles, Enhance the Constitution’s Spirit, Realize the Constitution’s Destiny], 2012(24) RENMIN JIANCHA [THE PEOPLE’S PROCURATORATE] 1, available at <http://www.cqvip.com/qk/81238x/201224/44414056.html>. The total speech count is a rough number derived from searching for articles authored by 习近平 (Xi Jinping) in Google Scholar, <https://scholar.google.com/>, using the keyword 宪法 (constitution).

fundamental law, the principle guideline for stable and peaceful rule, and the concentrated manifestation of the Party's and the People's will"¹⁸⁸—but he has clearly displayed a far stronger and more consistent interest in publicly valorizing the document than his predecessors did.

The rest of the Chinese political and intellectual elite has clearly caught on. Sociopolitical discourse on the Constitution and socialist constitutionalism (“*xianzheng*”) has increased substantially since 2012.¹⁸⁹ A crude but effective measure of this is the frequency of discussion in major political newspapers: for example, the word “Constitution” appeared in some 4500 *People's Daily* articles during Hu Jintao's 10-year reign, but appeared in roughly 2800 articles during the first 5 years of Xi's rule, which represents a frequency increase of around 30%.¹⁹⁰ Picking up on Xi's apparent interest in the concept, a highly unusual public debate, arguably the only one of its kind in PRC history, over constitutionalism broke out in the Chinese media, including several state-run or Party-run outlets, from 2012 to 2013, drawing widespread interest from scholars, judges, and government officials.¹⁹¹ Participants staked out positions that ranged from the mainstream and conventional—that “socialist constitutionalism” was desirable, but full blown “Western” constitutionalism was not—to the more extreme—either that China should adopt liberal constitutionalism, complete with judicial review, or that any form of constitutionalism would amount to a “color revolution” and therefore destroy the Party's rule.¹⁹² For the most part, the moderate view seemed to dominate. Even the most established Party newspapers ran op-eds that offered qualified support for “ruling the country according to the Constitution.”¹⁹³ Although this kind of language was not qualitatively unprecedented, the mere fact that such high-profile public debate was allowed to run its course for over a year and, in the end, trend towards a moderately pro-constitution position nevertheless suggested a significant measure of government tolerance, and almost certainly boosted the Constitution's social visibility.¹⁹⁴

Several months after the debate wound down, Xi again sparked widespread social interest in the constitution by openly declaring that “the Constitution is our country's fundamental law. Governing the country by law means, most importantly, governing it according to the Constitution; wielding political power by law means, most importantly, wielding it according to the

¹⁸⁸ *Guanyu Xianfa*, *supra* note 187.

¹⁸⁹ Creemers, *supra* note 28.

¹⁹⁰ These numbers are derived from a quick search for 宪法 (constitution), in the PEOPLE'S DAILY TEXT AND IMAGE DATABASE, <http://data.people.com.cn/rmrb/20180714/1?code=2>, using the date parameters Nov. 8, 2002-Nov. 7, 2012, and Nov. 8, 2012-Nov. 7, 2017.

¹⁹¹ Creemers, *supra* note 28; Kellogg, *supra* note 28.

¹⁹² Zheng Yongnian (郑永年), *Zhongguo de Xianzheng Zhi Zheng Shuoming le Shenme?* (中国的“宪政”之争说明了什么?) [What Does China's 'Constitutional Governance' Debate Mean?], AI SIXIANG (爱思想) [LOVE THOUGHT] (June 18, 2013), <http://www.aisixiang.com/data/64914.html>; *For China to Rise, so Must Status of Its Constitution*, CAIXIN ONLINE (Dec. 12, 2012), <http://english.caixin.com/2012-12-12/100471777.html>; Kellogg, (2015), *supra* note 28, at 367-97.

¹⁹³ Qiu Shi, *Gonggu Dang He Renmin Tuanjie Fendou de Gongtong Sixiang Jichu* [Consolidate the Common Intellectual Foundation of the United Struggle of the Party and the People], QIU SHI [SEEKING TRUTH] (Oct. 16, 2013), http://www.qsttheory.cn/zxdk/2013/201320/201310/t20131012_278250.htm; Guo Ping, *Yixian Zhizheng yu Xifang Xianzheng Burong Hunxiao* [Governing According to the Constitution Must Not Be Confused with Western 'Constitutionalism,'], RENMIN RIBAO [PEOPLE'S DAILY] (Oct. 24, 2014), <http://politics.people.com.cn/n/2014/1024/c70731-25904899.html>.

¹⁹⁴ Creemers, *supra* note 28; Kellogg, *supra* note 28.

Constitution.”¹⁹⁵ Shrewd observers would probably note that the same speech also emphasized the need for “Party leadership”¹⁹⁶—which might seem inconsistent with promoting the political supremacy of a document that makes almost no mention of the Party—but when compared to the previous status quo, the amount of rhetorical emphasis Xi placed on the Constitution and the “rule of law” was nonetheless highly unusual. One month later, the 4th Plenum of the Party Congress issued a major decision that not only, as discussed in Part II, promised sweeping changes to judicial institutions, but also repeated Xi’s emphasis on ruling and governing “in accordance to the Constitution.”¹⁹⁷

Perhaps as a way of giving this rhetoric some social substance, the Plenum took the extra step of creating a new public holiday: it designated December 4, the anniversary of the Constitution’s enactment in 1982, as China’s “Constitution Day,” and made plans for a sweeping propaganda campaign aimed at increasing societal awareness of and respect for the document.¹⁹⁸ Soon after, the Ministry of Education directed all elementary, middle, and high schools to compile a “constitutional education curriculum,” and—in an unusually strong signal of seriousness—announced plans to include questions about the Constitution in all future high school admissions examinations.¹⁹⁹

While all this was going on, the Party-controlled media took considerable pains to emphasize that the model of the socialist constitution advocated by Xi and other Party leaders was fundamentally different from “Western ‘Constitutionalism’” (*xifang “xianzheng”*).²⁰⁰ Western systems, a *People’s Daily* op-ed argued, placed too much emphasis on “the separation of powers, rotations between political parties, and interest-group politics,” whereas the Chinese model stressed the stable and unchallenged leadership of a politically advanced and publicly-minded Communist Party.²⁰¹ The “basic spirit” of the Constitution was therefore not against one-party domination, but instead focused on regulating politics and governance within the one-party framework. These qualifications were later echoed by SPC Chief Justice Zhou Qiang in a well-publicized 2017 speech, in which he expressed mistrust towards Western institutions, and argued for a kind of Chinese constitutional exceptionalism based on socialism and China’s “special political circumstances.”²⁰²

¹⁹⁵ Xi Jinping, *Zai Qingzhu Quanguo Renmin Daibiao Dahui Chengli Liushi Zhounian Dahui Shang de Jianghua* [Speech at the Conference to Celebrate the 60th Anniversary of the Establishment of the National People’s Congress], RENMIN RIBAO [PEOPLE’S DAILY] (Sept. 5, 2014), <http://cpc.people.com.cn/n/2014/0906/c64093-25615123.html>.

¹⁹⁶ *Id.*

¹⁹⁷ *Decision of the 4th Plenum of the CCP Central Committee*, *supra* note 80.

¹⁹⁸ *Id.*

¹⁹⁹ *Jiaoyu Bu guanyu zai Guojia Xianfa Ri Shenru Kaizhan Xianfa Xuexi Xuanchuan Jiaoyu Huodong de Tongzhi* [Notification by the Ministry of Education on Conducting Constitutional Study, Propaganda, and Education Activities on National Constitution Day], JIAO ZHENG FA [PUBLICATIONS OF THE STATE COUNCIL MINISTRIES OF EDUCATION, POLITICS, AND LAW] 2014-12, available at http://www.moe.gov.cn/srcsite/A02/s7049/201411/t20141121_178775.html.

²⁰⁰ Ping, *supra* note 193; see also Albert H.Y. Chen, *Review of Tong Zhiwei, The Reform and Renewal of China’s Constitutional System*, 16 INT’L J CONST. L 682 (2018).

²⁰¹ Ping, *supra* note 193.

²⁰² Forsythe, *supra* note 130.

One might be skeptical as to whether “constitutionalism” thus defined is really “constitutionalism” at all, but that is not our concern here. Our argument is simply that Xi Jinping-era political discourse and rhetoric—including even the kind of cautionary note discussed in the previous paragraph—has substantially boosted the Constitution’s social and political profile, placing greater and more consistent emphasis on the document than ever before in PRC politics. Clearly, the Constitution can acquire sociopolitical salience despite the absence of “real” constitutionalism, however defined, and despite the official condemnation of “Western constitutionalism.” Compared with previous eras, when “Party leadership” was emphasized at least as strongly but serious public discussion of constitutionalism was often absent,²⁰³ post-2012 political discourse has provided a major dose of stimulus to those who have argued, normatively and positively, for the political “activation” of the Constitution.²⁰⁴ The simultaneous emphasis on the Party’s control actually *reinforces* this interpretation: evidently, the Party now considered it something that needed to be controlled ever more carefully and explicitly.²⁰⁵

Naturally, critics continue to exist in large numbers: many would claim, for example, that the CCP has yet to show any concrete interest, beyond rhetorical valorization, of giving the document real political significance.²⁰⁶ We believe, however, that the post-2012 rhetorical shift was more substantive than such skepticism acknowledges, and that the 2018 constitutional amendments decisively confirm this view. As the following sections argue, the amendments constitute both an open acknowledgement by the Party leadership that the Constitution already *is* politically significant, and a clear signal that they plan to make it even more so.

B. Removing Term Limits

Speculation over a possible constitutional amendment began almost immediately after the CCP’s 19th Party Congress in October, 2017. The Congress established Xi Jinping as the Party’s “core,” a political designation indicating supreme status and power that was previously denied to Hu Jintao, and observers quickly turned their attention to how he would entrench his new status.²⁰⁷ Since the enactment of the 1982 Constitution, most Party Congresses have in fact led to constitutional amendments a few years later, sometimes to valorize the achievements of previous leaders by putting their core political doctrines, such as Mao Zedong Thought or Deng Xiaoping Theory,²⁰⁸ into the Constitution, but more often to complement major changes in official economic or social policy. The State Owned Enterprise reforms of the 1990s, for example, were accompanied by a number of changes to the constitutional text that allowed for market-oriented management of state

²⁰³ Kellogg, *supra* note 28, at 339 (“[T]he first ten months of 2013 saw a level of conversation on constitutionalism not seen in China in nearly a decade.”)

²⁰⁴ At the very least, the sociopolitical salience of the issue has clearly risen significantly. Creemers *supra* note 28; Kellogg, *supra* note 28.

²⁰⁵ Ping, *supra* note 193; Shi, *supra* note 193.

²⁰⁶ Kellogg, *supra* note 28, at 344-46.

²⁰⁷ Chris Buckley, *Xi Jinping Is China’s ‘Core’ Leader: Here’s What It Means*, N.Y. TIMES (Oct. 30, 2016), <https://www.nytimes.com/2016/10/31/world/asia/china-xi-jinping-communist-party.html>.

²⁰⁸ 2004 CONSTITUTION, *supra* note 56.

assets.²⁰⁹ Given that Xi had already elevated his own somewhat ambiguously defined political doctrine, “Xi Jinping Thought,” to the same status as Mao Zedong Thought in the Constitution of the Chinese Communist Party,²¹⁰ most observers were expecting at least a similar change in the national Constitution.

The real center of focus, however, was over presidential term limits. Prior to 2018, the Constitution prohibited any President of the PRC to serve for more than two terms, for a total of ten years.²¹¹ While this was only binding over the presidency, and not over the more powerful position of Party Secretary, no Party Secretary had ever served for more than two regular terms after Mao’s death in 1976.²¹² The “two term rule” was therefore widely considered a “meta-norm” of Chinese politics that both formally bound the country’s nominal leader, the President, and informally bound its actual one, the Party Secretary.²¹³ In fact, since 1993, the two positions have always been held by the same person. As early as 2016, speculation had begun to emerge that Xi might want to abandon this norm and potentially rule for much longer. There were two layers to such speculation: first, whether he would try to rule for longer than the customary two terms, and second, how he might actually accomplish this.²¹⁴ The latter, in particular, included the legal issue of whether he would remove the two-term limit from the Constitution, which would formally allow him to serve as both Party Secretary and President for life.

The formal announcement of a constitutional amendment to remove Presidential term limits on February 25, 2018 and its eventual enactment on March 11 came as a surprise to most China watchers,²¹⁵ ourselves included. The most common prediction had been that Xi would likely attempt to stay in power for more than two terms, but would do so by keeping the Party Secretary

²⁰⁹ *Id.*

²¹⁰ An Baijie, *Xi Jinping Thought Approved for Party Constitution*, China Daily (Oct. 24, 2017), http://www.chinadaily.com.cn/china/19thcpnationalcongress/2017-10/24/content_33644524.htm.

²¹¹ 2004 CONSTITUTION, *supra* note 56.

²¹² ZHONGGUO GONGCHAN DANG DANZHANG [CONSTITUTION OF THE CHINESE COMMUNIST PARTY], as amended on Oct. 24 2017 by the 19th Congress of the Chinese Communist Party, available at [http://www.12371.cn/special/zggcdzc/\[hereinafter 2017 CCP CONSTITUTION\]](http://www.12371.cn/special/zggcdzc/[hereinafter 2017 CCP CONSTITUTION]). Jiang Zemin did serve an extra three years in the position from 1989 to 1992, during which the emergency sacking of Zhao Ziyang after the Tiananmen Incident made it necessary to parachute him in from Shanghai to serve as an emergency stopgap. During this time, he was generally subordinate to Deng in the Party hierarchy during this period, and did not ascend to real leadership until 1992, which marked the beginning of his first “true” term as Party Secretary. Mao, of course, was Party Chairman until his death in 1976, after which the position was soon replaced by that of Party Secretary, which no one, not even Deng, has ever held for more than 10 years.

²¹³ Ben Blanchard & Sue-Lin Wong, *China Sets Stage for Xi to Stay in Office Indefinitely*, REUTERS (Feb. 25, 2018), <https://www.reuters.com/article/us-china-politics/china-sets-stage-for-xi-to-stay-in-office-indefinitely-idUSKCN1G906W> (“There is no limit on his tenure as the party and military chief, though a maximum 10-year term is the norm.”).

²¹⁴ Chris Buckley, *Xi Jinping May Delay Picking China’s Next Leader, Stoking Speculation*, N.Y. Times (Oct. 4, 2016), <https://www.nytimes.com/2016/10/05/world/asia/china-president-xi-jinping-successor.html>; Tom Mitchell, *Speculation Grows Xi Jinping Will Defy China Rule on Leadership Retirement*, FINANCIAL TIMES (Oct. 11, 2016), <https://www.ft.com/content/09cc1044-8f77-11e6-a72e-b428cb934b78>.

²¹⁵ *CPC Proposes Change on Chinese President’s Term in Constitution*, Feb. 25, 2018, XINHUA NET, http://www.xinhuanet.com/english/2018-02/25/c_136998770.htm. For immediate reactions, see Xi Won’t Go, CHINAFILE, <http://www.chinafile.com/conversation/xi-wont-go>. Ratification came on March 11, 2018. ZHONGHUA RENMIN GONGHEGUO XIANFA [CONSTITUTION OF THE PEOPLE’S REPUBLIC OF CHINA], as amended on March 11, 2018 [*hereinafter* 2018 CONSTITUTION], available at http://www.npc.gov.cn/npc/xinwen/node_505.htm.

position and the chairmanship of the Central Military Commission, while entrusting the presidency to a trusted ally. The reason for this was a simple and straightforward cost-benefit calculation: of the three positions that the “top leader” has generally held since 1993—Party Secretary, Military Commission Chairman, and President—the President is by far the least important position, having few regular political powers.²¹⁶ Its main constitutional role is, in theory, diplomacy and foreign policy, but this has never been an exclusive authority, and the PRC has a long history of Party Secretaries and Military Chairmen directly conducting diplomacy and controlling foreign policy despite not holding the presidency.²¹⁷ In effect, Xi could have relinquished the presidency while retaining nearly all his “real” authority. If, on the other hand, he moved to amend the Constitution, it would be an ostentatious tactic that would provoke a tremendous amount of public discussion, and therefore provide a potential focal point for political and social resistance. Xi was, in all likelihood, more than powerful enough to deal with such resistance, but the cost would be high and the returns moderate. A constitutional amendment would, in essence, be a luxury good, and therefore probably not worth it.

Looking back, there are two possible explanations for Xi’s pursuit of the amendment—and for the mistaken predictions made by scholars and analysts. The simpler and more obvious one is that we had underestimated Xi’s power and, in the same vein, overestimated the strength of potential societal or political opposition. In other words, he possessed so much power that he really could afford to “waste” some of it on a luxury good, cost-benefit analyses notwithstanding. After all, the most decisive way to set up potentially lifelong rule would be to eliminate, rather than circumvent, institutional obstacles, regardless of their functional significance.

This explanation is likely attractive to most outsiders who lament the decline of factional checks and balances in Chinese politics, and who see Xi’s rise as simply one man’s brutal and efficient seizure of power.²¹⁸ It rests, however, on some fairly questionable factual assumptions: most importantly, there is no evidence to suggest that the removal of constitutional term limits was, in fact, painless or easy. Instead, there is reason to suspect that Xi had actually encountered opposition that was only overcome with some difficulty. To understand why, one must have a basic understanding of Chinese political timing: following a Party Congress, which are held in October every five years, the Party leadership hosts a series of plenums to discuss and decide major policy items. The first of these is held immediately after the Party Congress, the second almost always at the beginning of the following calendar year, and the third almost always towards the end of that year.²¹⁹ The Second Plenum of the 19th Party Congress, held in January 2018, focused

²¹⁶ The President’s powers are almost purely ritualistic, and nearly any substantive decision he makes must be approved by the NPC before taking effect. The major exception is foreign relations, where he has the power to conduct diplomacy as head of state. See 2004 CONSTITUTION, *supra* note 56, at arts. 79-84.

²¹⁷ For example, both Mao and Deng played prominent diplomatic roles, with such foreign leaders as Richard Nixon and Margaret Thatcher, in the 1970s and 1980s without holding the presidency. Yizhou Wang, *Six Decades of China’s Diplomacy*, 1 *ECON. & POL. STUD.* 120 (2013).

²¹⁸ See discussion surrounding *supra* notes 2 & 63.

²¹⁹ The timing of the Third Plenum, in particular, is something that is steeped in tradition, given the historical importance of Third Plenums over the past 40 years. See *Lici Sanzhong Quanhui zenme Kai [How Have the Third Plenums Historically Been Conducted?]*, Aug. 28, 2013, COMMUNIST PARTY OF CHINA NEWS NETWORK, <http://dangshi.people.com.cn/n/2013/0828/c85037-22718349.html> (noting that all seven Third Plenums in the post-Mao era have been held in the Fall).

on constitutional amendment, and afterwards produced a public report that mentioned virtually every other item on the eventual March amendment except the removal of term limits.²²⁰ A week later, the Central Committee voted on a formal proposal to amend the Constitution, but quite unusually, did not immediately publish its contents.²²¹ Barely a month later, the Third Plenum took place under a shroud of unusual secrecy and urgency, more than eight months before it would normally be held. At the same time, state media finally published the full amendment proposal, including the proposed removal of term limits.²²²

Given the severe lack of transparency, there is only so much information that one can glean from this chain of events, but it would seem to suggest that Xi was not comfortable enough with the level of support he had received at the Second Plenum. Otherwise, it would be rather difficult to explain why there was no announcement in January, or why the Third Plenum had to be rushed through in this unprecedented fashion. As a result, outside speculation ran rampant that Xi had called an emergency session of the Third Plenum to shore up support for the amendment.²²³ While one might be tempted to dismiss this as a mere conspiracy theory, the circumstances surrounding the amendment's proposal and passage were indeed irregular enough to justify some suspicion. At the very least, it seems reasonable to suspect that the amendment's passage was not entirely smooth sailing for Xi and his allies—and if so, then it becomes much harder to argue that he was so awash in political power that luxury goods were readily affordable.

The second and perhaps sounder explanation is, therefore, that the amendment was not a luxury good at all. In other words, scholars and other observers have seriously underestimated the political importance of the Constitution, and perhaps of law in general: if Xi were to stay on for a third term without removing the two-term presidency rule, he would be—subjectively, at least—taking on substantial political risks that outsiders fail to appreciate. The simplest and most powerful of these could be that the office of the presidency might empower whoever occupies it to challenge Xi's authority, even if that person was initially a trusted ally. This kind of argument would necessarily assume that, within the political imagination of the Party leadership, and

²²⁰ *Zhonggong Shijiu Jie Erzhong Quanhui Gonggao* [Announcement of the Second Plenum of the Nineteenth Party Congress] (Jan. 19, 2018), available at <http://www.caixin.com/2018-01-19/101200293.html>.

²²¹ *Zhongguo Gongchan Dang Zhongyang Weiyuanhui Guanyu Xiugai Xianfa Bufen Neirong de Jianyi* [Proposal by the CCP Central Committee to Amend Parts of the Constitution], Feb. 25, 2018, Xinhua Net, http://www.xinhuanet.com/2018-02/25/c_1122451187.htm (document dated Jan. 26, 2018, but published on Feb. 25).

²²² *Id.*

²²³ While we do not usually deal in Pekingology, the severe lack of transparency surrounding the amendment, combined with the major implications that internal Party power struggles potentially hold for constitutional interpretation, demands that we do so in this particular circumstance. The anti-CCP Epoch Times ran an op-ed that specifically discussed this possibility. Annie Wu, *Chinese Communist Party to Eliminate Leader Term Limit, While Xi Jinping Battles with Faction*, THE EPOCH TIMES (Feb. 28, 2018), <http://printarchive.epochtimes.com/a1/en/ca/yvr/2018/03/01/Page05%20CHINA.pdf>. It is hard to place too much trust on this particular source given its traditional hostility to the CCP, but for once, its hypotheses were echoed in other, somewhat more credible observers. See, e.g., *Yaozuo 21 Shiji de Mao Zedong, Haiyou Liangda Paixi de Zuli* [If Xi Wants to Become the 21st Century's Mao Zedong, He Must Deal with Opposition from Two Major Factions], Feb. 27, 2018, BOXUN, <https://boxun.com/news/gb/china/2018/02/201802270345.shtml>; *Mei Zhuanjia: Zhonggong Quxiao Zhuxi Renqi de Tiyi Yu Zuli* [American Experts: The CCP's Proposal to Remove Presidential Term Limits Has Encountered Opposition], Feb. 27, 2018, VOICE OF AMERICA, <https://www.voachinese.com/a/china-presidential-20180226/4271604.html>.

specifically of Xi himself, the office holds much greater sociopolitical significance than outsiders conventionally assign to it.

But where does this significance come from? As we argue in Part IV, there is very good reason to believe that the Chinese public now attaches a much greater level of sociopolitical legitimacy to law and legality than it did even as recently as 15 years ago, and that this “legalization” of social sentiment is only accelerating.²²⁴ As both the Party leadership’s post-2013 judicial reform campaign and its ramping up of constitutional discourse suggest, it may very well be acutely aware of these changes and has, in fact, already adjusted its political behavior to accommodate them. A society that attaches increasing amounts of political legitimacy to law, however, is also likely to be one in which a constitutionally sanctioned presidency is gaining sociopolitical stature relative to the essentially extra-legal office of Party Secretary. In such an environment, the political risks of “delegating” the presidency to an ally, however trusted he or she may be, are constantly growing, independent of the specific governmental functions that the office performs. This suggests, among other things, that the Constitution’s political weight was considerably lower in the 1970s and 1980s than it is now: whereas both Mao and Deng were content to let a colleague be the constitutional head-of-state while ruling securely from the perch of either Party Chairman or Military Commission Chairman,²²⁵ Xi can no longer afford this kind of “nominal power sharing” precisely because the Presidency has become less nominal and more substantial.

None of this is to suggest that Xi and other Party leaders are somehow enlightened constitutionalists who deeply and normatively care about the rule of law in any genuine sense. Instead, the argument here is only that they seem to understand how important law and the Constitution are as sources of sociopolitical legitimacy in contemporary China, and are therefore eager to remove any incompatibility between personal political ambitions and the formal legal structure of the state. In that sense, the constitutional amendment is still a power play, but it is a power play made under the assumption that law in general and the Constitution in particular *matter*—both politically and socially.

The major pro-legality and pro-Constitution propaganda campaign that accompanied the amendment lends further support to this interpretation. The state and Party media went all out to praise and defend the political wisdom and necessity of the amendment, but that was only one side of a surprisingly broad and complex campaign.²²⁶ Party officials and media commentators spent

²²⁴ See discussion at *infra* Part Four, Section B.

²²⁵ Mao, even after consolidating power in the late 1960s, allowed a lower ranked colleague—first Dong Biwu, then Zhu De, to be the nominal head of state, while retaining ultimate control as Party Chairman. For this part of Mao’s life and career, the best English account remains JONATHAN SPENCE, *MAO ZEDONG: A LIFE* (1990). Deng never occupied either the Party Secretary position or the presidency during his time in power, instead occupying the Military Commission Chairman position. The heads of state during this period were, in order, Ye Jianying, Song Qingling, Li Xiannian, and Yang Shangkun. On Deng’s later political career, see EZRA VOGEL, *DENG XIAOPING AND THE TRANSFORMATION OF CHINA* (2013).

²²⁶ See, e.g., *Xianfa Xiugai Shi Tuijin Quannian Yifa Zhiguo de Zhongda Jucuo* [The Constitutional Amendment is a Major Step in Comprehensively Governing the Country According to Law], 2018(6) QIU SHI [SEEKING TRUTH] 1, available at http://www.qstheory.cn/dukan/qs/2018-03/15/c_1122534637.htm; Li Lin, *Yi Xianfa Shishi Tuijin Quannian Yifa Zhiguo* [Advancing “Comprehensively Governing the Country According to Law” by Implementing the Constitution], March 9, 2018, GUANGMING DAILY, at 5, available at http://epaper.gmw.cn/gmrb/html/2018-03/09/nw.D110000gmrb_20180309_1-05.htm; *Yifa Zhiguo Shouxian Yao Yixian Zhiguo* [Ruling the Country

at least as much energy—probably more, in fact—in advocating general principles such as “ruling the country according to law” and “ruling the country according to the Constitution” as they did in defending the actual constitutional amendments.²²⁷ In fact, many major pieces of political commentary make no specific mention of the amendments at all, but are entirely devoted to the former: for example, “successful governance is only possible if the country is ruled in strict accordance to written laws, and the most important step towards this general objective is ruling it in strict accordance to the Constitution.”²²⁸ These kinds of arguments, which flooded Chinese media platforms from late February to early April, may very well have emerged primarily to support the amendments, but they nonetheless reflect a political mentality in which the amendments are only deemed publically acceptable if they are both preceded and reinforced by a general commitment to legality.

C. Legalizing the Party

Given its outsized political implications, the removal of term limits has accounted for the lion’s share of media and academic attention on the 2018 constitutional amendments, but it is, in fact, only one out of several changes. Some of these changes appear cosmetic, such as the enshrining of “Xi Jinping Thought” and Hu Jintao’s “Scientific Outlook on Development” into the Constitution,²²⁹ or the new requirement that all civil servants must swear an oath of allegiance to the Constitution when entering office,²³⁰ but others bring more fundamental changes to the Party-state. Changes in this latter category primarily focus on giving the CCP a stronger constitutional foundation for leadership, and on formalizing some of its most important political functions.²³¹

As noted above, the Constitution had previously mentioned the CCP only in its preamble.²³² This has always been a source of embarrassment for those who would otherwise like to argue that China is morphing into a “constitutional state,”²³³ but the 2018 amendments provided these people with some measure of validation: the new version of the Constitution now states in its very first article that “the socialist system is the basic system of the People’s Republic of China,” and that “the defining feature of socialism with Chinese characteristics is the leadership of the Communist Party

According to Law First Requires Ruling the Country According to the Constitution], Feb. 27, 2018, PEOPLE’S DAILY ONLINE, <http://opinion.people.com.cn/n1/2018/0227/c1003-29837965.html>.

²²⁷ E.g., *Quanmian Yifa Zhiguo Maixiang Xin Gaodu* [Comprehensively Governing the Country According to Law Reaches new Heights], Apr. 5, 2018, XINHUA NET, http://www.xinhuanet.com/politics/2018-04/05/c_1122642359.htm

²²⁸ *Id.*

²²⁹ 2018 CONSTITUTION, *supra* note 215, at Preamble.

²³⁰ *Id.*, at art. 27.

²³¹ *Id.*, at arts. 1, 123-27 (writing the Party’s leadership into the Constitution and establishing the Supervisory Commission).

²³² See JUSTIN O. FROSINI, CONSTITUTIONAL PREAMBLES: A COMPARATIVE ANALYSIS (2011).

²³³ See Larry Catá Backer, *supra* note **Error! Bookmark not defined.**

of China.”²³⁴ This gives the CCP the clear constitutional status it previously lacked, and effectively makes any move to a true multi-party political system unconstitutional.

More substantively, the amendments also provided for the creation of an entirely new governmental entity, the Supervisory Commission, that exercised investigation powers parallel, and sometimes superior, to other constitutionally recognized branches of government.²³⁵ The Commission would exercise supervision powers over all public employees, including government officials, state owned enterprises, other government managed institutions, and public schools and universities, and would investigate any “illegal or criminal conduct abusing public office.”²³⁶ In effect, this was a new anti-corruption agency: one that is directly enshrined in the Constitution as a peer institution to the Judiciary and Procuracy, and is governed by formal procedural rules concerning investigation, detention, and eventual prosecution.²³⁷

Anti-corruption work has been Xi Jinping’s hallmark political achievement over the past 5 years. From the minute he ascended to the Party’s top position, he has made “placing power within a cage” a central—arguably *the* central—component of his political vision.²³⁸ By this he likely means the power of others in the Party-state and not his own, but the crackdown in government corruption has nonetheless been serious and highly effective: A sweeping and lengthy campaign that began in late 2012 has punished nearly 1.4 million members of the Party, including top level officials, both civilian and military, previously considered to be untouchable.²³⁹ As scholars have noted, Xi’s first two years saw more high-ranking party members removed than had occurred in the previous ten years combined.²⁴⁰ Many quantitative measures of corruption—such as spending on luxury goods—have plummeted as a result.²⁴¹

Prior to the creation of the Supervisory Commission, the campaign had been led by the CCP’s Central Discipline Commission (CDC), which correspondingly became perhaps the single most widely feared entity among public servants.²⁴² Although there were a number of state organs that

²³⁴ 2018 CONSTITUTION, *supra* note 215, at art. 1.

²³⁵ *Id.*, at arts. 123-27.

²³⁶ *Id.* See also the legal statute that laid out the Supervisory Commission’s structure and powers in full detail: ZHONGHUA RENMIN GONGHEGUO JIANCHA FA [SUPERVISION LAW OF THE PEOPLE’S REPUBLIC OF CHINA], enacted on March 20, 2018 [*hereinafter* SUPERVISION LAW], available at http://www.npc.gov.cn/npc/xinwen/2018-03/21/content_2052362.htm.

²³⁷ See SUPERVISION LAW, *supra* note 236.

²³⁸ See, e.g., Xi Jinping: Ba Quanli Guanjin Zhidu Longzi li [Xi Jinping: Put Power Within an Institutional Cage], Jan. 23, 2013, SOHU NEWS, <http://news.sohu.com/20130123/n364371479.shtml>; Neimenggu Zizhiqu Zhongguo Tese Shehui Zhuyi Lilun Yanjiu Zhongxin, *supra* note 160 **Error! Bookmark not defined.**

²³⁹ Shirk, *supra* note 1, at 24.

²⁴⁰ CHENG LI, *supra* note 19, at 1.

²⁴¹ Evan Osnos, *China Targets Corruption, Luxury Brands Mourn*, THE NEW YORKER (Feb. 7, 2013), <https://www.newyorker.com/news/evan-osnos/china-targets-corruption-luxury-brands-mourn>.

²⁴² Xuezhi Guo, *Controlling Corruption in the Party: China’s Central Discipline Inspection Commission*, 219 CHINA Q. 597 (2014); Li Ling, *The Rise of the Discipline and Inspection Commission, 1927-2012: Anticorruption Investigation and Decision-Making in the Chinese Communist Party* 42 MOD. CHINA 447 (2016). See also, Jiangnan Zhu, Huang Huang & Dong Zhang, “Big Tigers, Big Data”: Learning Social Reactions to China’s Anticorruption Campaign Through Online Feedback, PUB. ADMIN. REV. (Oct. 24, 2017), available at <https://doi.org/10.1111/puar.12866>;

engaged in some anti-corruption work, such as the Anti-Corruption Bureau of the Procuracy and the State Council's Ministry of Supervision, they were all clearly subordinate to the CDC, which not only had a higher administrative rank, but also enjoyed a much broader set of investigatory and punitive powers.²⁴³ The Supervisory Commission, in contrast, is designed to be a peer institution, possessing both equal administrative rank and an even broader jurisdiction than the CDC: whereas the CDC's jurisdiction is limited to Party members, the Commission can investigate any public employee.²⁴⁴ As part of a general restructuring campaign to merge and connect functionally overlapping Party and state institutions,²⁴⁵ the two entities now share both an office building and a formal administrative partnership (*heshu bangong*).²⁴⁶

The 2018 amendments were therefore a rather mixed blessing for the CDC: they gave it a substantially more powerful and constitutionally sanctioned partner, but also seriously diluted its hegemony over anti-corruption investigations. This likely reflects a new political consensus that anti-corruption work requires a stronger *legal* foundation than the CDC alone was able to provide. The Party leadership has long spoken of the need to “institutionalize” anti-corruption work (*zhidu fanfu*),²⁴⁷ but until the 2018 amendment, there were at least three different ways to interpret this slogan: first, it could simply mean that anti-corruption investigations needed to become more frequent and predictable; second, it could mean that investigative procedures needed become more regularized and, in some ways, transparent; or, third, it could mean that legally sanctioned government institutions needed to play a more prominent role, rather than having a Party organ dominate the process. A direct expansion of the CDC's personnel and administrative capacity, for

Lyric Chen, *Who Enforces China's Anti-corruption Laws? Recent Reforms of China's Criminal Prosecution Agencies and the Chinese Communist Party's Quest for Control*, 40 LOY. L.A. INT'L & COMP. L. REV. 139 (2017). Available at: <http://digitalcommons.lmu.edu/ilr/vol40/iss2/1>.

²⁴³ The CDC's rank and powers are laid out in 2017 CCP CONSTITUTION, *supra* note 212, at arts. 45-48.

²⁴⁴ SUPERVISION LAW, *supra* note 236.

²⁴⁵ *Guowu Yuan Jigou Gaige Fang'an* [Plan to Restructure the State Council], March 17, 2018, STATE COUNCIL OFFICIAL WEBSITE, http://www.gov.cn/guowuyuan/2018-03/17/content_5275116.htm. In March, 2018, the Party leadership initiated a broader campaign to merge functionally overlapping Party and state entities. Several preexisting Party entities such as the Propaganda Department were merged with corresponding state institutions. This round of restructuring—one of the largest in post-Mao history—had two major consequences: first, it gave the Party a much larger role in the day-to-day governance of the country—in other words, it strengthened “the leadership of the Party.” It facilitated an expansion of the Party's *administrative capacity* by giving it some direct control over state bureaucratic institutions. Second, the merging of Party and State institutions at the same time that “governing according to law” was becoming arguably *the* ascendant political campaign in China also imposed a much stronger dose of legality on the Party. Party operations, especially those that were conducted under the name of an incorporated state institution or those that involved joint exercises with an independent state organ, would presumably become more rule-oriented and bureaucratically formal. Some scholars believe that the merger would actually allow citizens to sue Party entities under the Administrative Litigation Law, so long as they were issuing decisions through the state institutions that they had merged with. See Interview with He Haibo, Professor of Law, Tsinghua University, conducted by Taisu Zhang (Jun. 30, 2018) (on file with authors).

²⁴⁶ *Yang Xiaodu: Guojia Jiancha Wei he Zhongyang Jiwei Heshu Bangong* [Yang Xiaodu: The National Supervisory Commission Will Share an Office and Administrative Infrastructure with the Central Disciplinary Commission of the Party], March 5, 2018, SINA NEWS, <http://news.sina.com.cn/sf/news/fzrd/2018-03-05/doc-ifixipenn1003650.shtml>.

²⁴⁷ *Liuzhong Quanhui: Cong Zhengzhi Fanfu Zouxiang Zhidu Fanfu de Zhongyao Zhuanzhe* [The Sixth Plenum of the Central Commission: A Major Turning Point in the Transformation of Political Anti-Corruption into Institutional Anti-Corruption], Oct. 28, 2016, FENGHUANG ZIXUN [PHOENIX MEDIA], http://news.ifeng.com/a/20161028/50170122_0.shtml.

example, would satisfy the first interpretation, but not the latter two; whereas such an expansion coupled with stronger internal regulations that were then publicized would satisfy the first two, but not the last. Instead of these options, the Party leadership chose a path that potentially satisfies all three: the creation of the Supervisory Commission not only promises to make anti-corruption investigations more frequent, predictable, and procedurally transparent, but also does that through formal constitutional authorization. Whereas the CDC had been both the public face of Xi's anti-corruption campaign and its functional leader, it now shares those roles with the Supervisory Commission.

Prior to the amendment, the CDC had actually been making substantial progress on the procedural regularity and transparency front.²⁴⁸ Over the past-five years, it has developed fairly sophisticated quasi-legal procedures for investigations and internal punishment. The system was used to develop evidence that is then used in some formal prosecutions. As early as 2013, the system had established an internal set of regulations, regular procedures for opening cases and gathering evidence, hearings, and appeals by disciplined officials.²⁴⁹ But at the same time, its detention system remained extra-legal, and those who have been subject to it describe harrowing intimidation and torture. Under the system of "double-designated detention" (*shuanggui*), officials under investigation were detained—disappeared, rather—for a period and at a place of the party's designation, with no formal legal protection.²⁵⁰

Such opacity eventually generated enough outcry that, in 2017, Xi announced that the CDC would no longer use *shuanggui*.²⁵¹ Even so, the extra-legal nature of the CDC continued to be a liability in terms of social perception, prodding the Party leadership to eventually create a separate anti-corruption institution that possessed both formal constitutional authorization and a legally enshrined code of conduct. Looking back, these developments were arguably foreshadowed in a 2013 Xi Jinping speech that claimed: "[We] have to become good at using... the rule of law to fight corruption, [and] to strengthen national anti-corruption legislation."²⁵² This move towards "the rule of law" and legislation involved, first, the intra-Party formalization of relatively informal investigatory procedures, followed by full-blown constitutional formalization. Clearly, the former alone was deemed insufficient.

The CDC is less prominent after the amendment than it was before, but this actually leaves the Party leadership in a *stronger* position: not only will the Commission, with its expanded

²⁴⁸ See Guo, *supra* note 242; Ting Gong, *The Party Discipline Inspection In China: Its Evolving Trajectory And Embedded Dilemmas*, 49 CRIME, L. & SOC. CHANGE 139 (2008); Ling, *supra* note 242, (tracing the history of the CDC).

²⁴⁹ Guo, *supra* note 242, at n. 19.

²⁵⁰ Yuen, *supra* note 62.

²⁵¹ The announcement was made in his speech to the 19th Party Congress. Xi Jinping, *Speech to the 19th Party Congress of the Chinese Communist Party* (Official English Translation) [*hereinafter* 19th Party Congress Speech], Oct. 18, 2017, XINHUA NET, http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

²⁵² HUM. RTS. WATCH, "SPECIAL MEASURES": DETENTION AND TORTURE IN THE CHINESE COMMUNIST PARTY'S SHUANGGUI SYSTEM, (Sophie Richardson, Megan McLemore & Brian Root eds., 2016), available at <https://www.hrw.org/report/2016/12/06/special-measures/detention-and-torture-chinese-communist-partys-shuanggui-system>.

bureaucratic capacity, strengthen the Party leadership's control over other branches and levels of government, but it also does so in an openly legal fashion that helps ward off the complaints of procedural opacity and informality previously lodged against the CDC. A direct expansion of the CDC may very well have provided the former, but no expansion of Party institutions alone could have supplied the latter—instead, a *constitutional amendment* was deemed necessary.

D. Interpreting the Amendments

The 2018 amendments put the Constitution front and center in two of the most important developments in post-1978 Chinese politics: the institutionalization and legal formalization of anti-corruption work, and the removal of leadership term limits. Placing the amendments within a somewhat wider context of post-2012 developments, they appear to be the culmination of a multi-year process in which the Party leadership trumpeted the Constitution's political importance. What is clear from these developments is that the Party leadership, for reasons we will explore in Part IV, now places enormous political emphasis on the Constitution: both the amendments themselves and the rhetorical campaign that preceded them were probably made under the recognition that valorizing and engaging the document would generate substantial political benefits, whereas ignoring or circumventing it would be highly risky. To a large extent, these are the same rationales that explain the judicial reforms discussed in Part II.

A related but more difficult question is whether the Party leaders are comfortable with the Constitution's rising political stature: whether they would prefer to reinforce or weaken it. The argument for the former is fairly straightforward: the amendments have ostensibly, and probably intentionally, elevated the document from something that, back in the 1970s and 1980s, could be easily be ignored in high politics,²⁵³ to something that is at least politically inconvenient to ignore. Moreover, the amendment almost certainly increases the Constitution's sociopolitical salience. The enormous media campaign launched in conjunction with the amendment's proposal and passage has, in all likelihood, only cemented and reinforced the Party leadership's rhetorical efforts since 2012 to bolster constitutional awareness and prestige.²⁵⁴ The newly constitutionalized requirement of constitution oath-swearing also formalizes a recently introduced ritualistic and performative element to the document, and gives it a stronger sense of political romanticism. If the intent were to sabotage the document's status, this would be an extremely curious and counterproductive way to do that.

Skeptics might argue, however, that by expanding his personal power through constitutional amendment, Xi Jinping has intentionally exposed the Constitution as fundamentally unstable and overly political, and has therefore done substantial damage to its sociopolitical prestige and status.²⁵⁵ The problem with this interpretation is that it necessarily presupposes that there was something approaching a consensus among either the general public or the political elite that the

²⁵³ See discussion surrounding *supra* note 225.

²⁵⁴ See discussion surrounding *supra* notes 226-228.

²⁵⁵ See discussion surrounding *supra* note 2.

Constitution was immune—either normatively or in fact—from these kinds of politically-motivated amendments in the first place. In other words, people had to have believed that there was something constitutionally improper about the amendments. This is implausible: there was nothing *legally* improper about the amendments, which were proposed and ratified in full accordance with the preexisting text of the Constitution. If there is any argument to be made about impropriety, it must rely on some unwritten “spirit of the Constitution” that prohibits this kind of amendment. But this cannot be the case: the Constitution has nearly always and universally been understood as a politically malleable document, both in fact and by design.²⁵⁶ Critics of the amendments may very well be disappointed by their content, but they are unlikely to believe that they were somehow *unconstitutional*.

That said, such critics may very well hold the Constitution in lower regard now that its content is less acceptable to them. In other words, what is being damaged is not some abstract sense of political immunity or substantive constitutionality, but rather simple normative compatibility: if one does not like the possibility of life-long rule, for example, one might consider an amendment that facilitates it to be less just, and therefore less legitimate. Even if this is true, it tells us nothing about the Party leadership’s intentions. If the goal was ultimately to set Xi up for potentially lifelong rule, then it is hard to see how they could have done less damage to the Constitution’s sociopolitical standing while still pursuing that goal: if he had simply stayed on as President without amending the Constitution, that would be a formal breach of the document. If, on the other hand, he had remained Party Secretary while giving up the Presidency, that would have made the office—and, by extension, the Constitution—appear politically *irrelevant*, which is much worse. Of the various options available, formal amendment would actually have done the *least* damage to the Constitution’s stature, even sending a positive signal about its political importance. Moreover, most Chinese citizens, while increasingly “legalistic,” are hardly liberal, and it is unclear whether they disliked the amendments’ substantive content in the first place.²⁵⁷

IV. Explaining China’s Turn Towards Law

Parts II and III have argued that there has been a distinct and powerful move towards legality in Chinese politics and governance since 2012: the judiciary and the Constitution have gained political stature under Xi’s rule —dramatically so, in some dimensions—and their rapid ascension both reflects and further facilitates a higher level of legality and rule-awareness in the operations of the Party-state. The contrast between these developments and the so-called “turn against law”

²⁵⁶ See discussion surrounding *supra* notes 54-60. See also ZACHARY ELKINS, ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 174-76 (2009) (providing history of changes).

²⁵⁷ On the ideological distribution of the Chinese population, see Jennifer Pan & Yiqing Xu, *China’s Ideological Spectrum*, 80 J. POL. 254 (2018), <https://doi.org/10.1086/694255>. For further discussion, see Taisu Zhang, *What it Means to be ‘Liberal’ or ‘Conservative’ in China*, FOREIGN POLICY: CHINAFILE (Apr. 24, 2015, 2:17PM), <https://foreignpolicy.com/2015/04/24/what-it-means-to-be-liberal-or-conservative-in-china/>. See also discussion at *infra* Part Four, Section B.

that seemed to dominate the previous regime is stark and powerful, but how should we understand their emergence? This Part attempts to supply some plausible explanations.

Unsurprisingly, given its general lack of transparency, the Party leadership has been vague about its reasons for promoting “governing the country according to law.” At the 19th Party Congress, for example, Xi simply stated that “governing the country according to law is a fundamental requirement and important safeguard of Socialism with Chinese Characteristics.”²⁵⁸ The closest he or any other Politburo Standing Committee member has ever come to supplying a detailed rationale is in a 2014 speech that introduced the series of judicial reforms discussed above in Part II, where Xi stated: “we [the Party leadership] share a consensus that ... [ruling the country according to law] ... meets the demands created by both the Party’s and the country’s development, and also meets the expectations expressed by all Party members and the People themselves.”²⁵⁹ Correspondingly, the Party leadership “made top-level structural designs for the construction of a Socialist Rule-of-law Country,” by “focusing in a rigorous fashion to those stand-out issues that the masses have expressed strong opinions on.”²⁶⁰ Taking this literally, which of course should always be done with great caution in China, means accepting that some amount of public demand shaped the decision.

A widely circulated and reposted 2017 Party-issued “study guide” on Xi’s 19th Party Congress speech provides some further insights into the official rationales: “only by governing the country according to law,” the document states, “can we liberate and strengthen the productive energies of society, promote social justice, maintain social harmony and stability, and sustain the long-term peace and viability of both the Party and the country at large.”²⁶¹ By doing so, China can repel the ideological offensive lodged by “hostile Western forces” and “some ill-intentioned [Chinese citizens],” who use “the rule of law” as a “weapon” to “delegitimize the Party’s leadership and our Socialist institutions.”²⁶²

These texts identify two analytically distinct kinds of rationales: first, promoting the “rule of law” provides functional benefits in political governance and socioeconomic management—“the demands created by the Party’s and the country’s development” and the “liberation” of the “productive energies of society”; second, it responds to institutional demands made by regular Party members and “the People,” thereby preserving “social harmony.” Both, but especially the latter, ultimately bolster the Party-state’s political and ideological legitimacy by, essentially,

²⁵⁸ 19th Party Congress Speech, *supra* note 251.

²⁵⁹ Xi Jinping, *Guanyu Zhonggong Zhongyang guanyu Quanmian Tuijin Yifa Zhiguo ruogan Zhongda Wenti de Jueding de Shuoming* [A Commentary on *Decision of the CCP Central Commission on Several Major Issues in the Comprehensive Advancement of Ruling the Country by Law*], Speech to the CCP Central Committee, Oct. 28, 2014, available at http://www.xinhuanet.com/politics/2014-10/28/c_1113015372.htm.

²⁶⁰ *Id.*

²⁶¹ *Weishenme Yao Jianchi Quanmian Yifa Zhiguo* [Why We Need to Persist in Comprehensively Ruling the Country According to Law], in DANG DE SHIJIU DA BAOGAO XUEXI FUDAO BAIWEN [A HUNDRED QUESTIONS AND ANSWERS RELATED TO THE STUDY OF THE PARTY’S NINETEENTH CONGRESS REPORT] 53 (2017), available at <http://cpc.people.com.cn/n1/2017/1130/c415067-29677669.html>.

²⁶² *Id.*

strengthening its popularity among the general population and repelling the attempts at ideological persuasion made by its foreign and domestic adversaries.

The remainder of this Part adopts this basic categorization and differentiates between top-down “instrumentalist” benefits of promoting legality and bottom-up “populist” benefits. The former, discussed in Section A, focuses on the benefits the Party leadership reaps in terms of both political control of other governmental entities and economic performance. The latter, discussed in Section B, focuses on the Chinese population’s bottom-up demand for legality and how the political elite are motivated to meet that demand.

A. Governance and Economic Benefits

This section summarizes the “supply side” instrumental benefits of legal ordering for the Party-state. We draw on and extend the literature here on courts in authoritarian regimes, which has, to date, largely proceeded through a functionalist, principal-agent framework.²⁶³ Scholars have identified several functions that law and courts can play that may be attractive to authoritarian regimes. These include, most prominently, providing credible commitments and lowering transaction costs in the economic sphere; and solving principal-agent problems in administration—both of which then strengthen the regime’s capacity for social control.²⁶⁴

With the ascendance of the new institutional economics in the 1980s and 1990s, an enormous amount of writing has been devoted to the economic benefits of legality, especially under conditions of commercialization and high demographic mobility: stronger enforcement of contracts, more predictable economic behavior by both governmental and private actors, easier conveyance of regulatory and institutional information—all of which lead to lower transaction costs and information costs in everyday economic activity, and therefore to more efficient allocation and use of resources.²⁶⁵ In the Chinese context, many scholars have argued that legal reform has been a major driving force behind the unprecedented economic growth China has experienced over the past four decades, and, regardless of whether they are indeed correct, it is abundantly clear that the current Party leadership shares their view.²⁶⁶ Moreover, effective and

²⁶³ Moustafa & Ginsburg, *supra* note 52.

²⁶⁴ *Id.*, *supra* note 52, at n. **Error! Bookmark not defined.**

²⁶⁵ See, e.g., AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY (2006) (summarizing the long-term economic benefits of developing strong legal institutions); KENNETH DAM, THE LAW-GROWTH NEXUS (2006) (arguing that developing economies in general, and China in particular, benefit from investment in legality); MICHAEL G. HELLER, CAPITALISM, INSTITUTIONS, AND ECONOMIC DEVELOPMENT (2009). Much of the relevant literature is summarized in Stephan M. Haggard & Lydia Brashear Tiede, *The Rule of Law and Economic Growth: Where Are We?*, 39 WORLD DEV. 673 (2011); Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *The Rule of Law and Economic Development*, 11 ANN. REV. POL. SCI. 205 (2008). But see Dani Rodrik, *Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank’s Economic Growth in the 1990s: Learning From A Decade of Reform*, 44 J. ECON. LITERATURE 973 (2006) (arguing that the conventional view on the connection between legal reform and economic growth is highly oversimplified).

²⁶⁶ See, e.g., DAM, *supra* note 265; Zhao, *supra* note 54; Iftekhar Hasan, Paul Wachtel & Mingming Zhou, *Institutional Development, Financial Deepening, and Economic Growth: Evidence from China*, 33 J. BANKING & FIN. 157 (2009); Donald Clarke, Peter Murrell & Susan Whiting, *The Role of Law in China’s Economic*

professional law enforcement can increase the willingness of private actors to pursue judicial solutions to local disputes, which then supplies the government with more information—and therefore more control—over private social, economic, and political behavior.

Law is also commonly seen as an important, perhaps indispensable tool in administrative management, especially in large and demographically diverse societies like China. For rulers at the top, imposing legality upon governmental behavior is one of the most effective ways to ensure that their commands will be faithfully carried out in local administration.²⁶⁷ In a country the size of China, with its vast number of local governmental units, it is arguably the *only* effective way.²⁶⁸ Not only does legality help the central government clearly convey its expectations and demands to both local governmental and private actors, but it also encourages the general population to report—through mechanisms such as administrative litigation—illegal or extra-legal governmental behavior to the center, thereby enhancing the center’s information collection capacity vis-à-vis its local agents. This, in turn, enhances the center’s capacity to enforce its own rules—as opposed to rules created by local agents—against local private actors.

Now, an authoritarian state is not necessarily a centralized one, and if the central government favors some version of “de facto federalism,” then it would have less need and incentive to tackle principal-agent control problems through legalization. But whereas previous PRC regimes in the 1980s and 1990s were happy to allow a measure of political decentralization,²⁶⁹ Xi has shown the opposite political instinct.²⁷⁰ This reemphasis on central control would, in theory, simultaneously enhance his appetite for legality.

One might think that these features would make legality universally attractive in authoritarian regimes that emphasize top-down control—and they do indeed feature prominently within the Chinese Party-state—but there are some complicating characteristics of its traditionally Leninist political structure that, in theory, would hamper the pursuit of legality. We provide, therefore, a somewhat thicker account here, drawing loosely on work in political sociology that focuses on state-society relations.²⁷¹ All states strive for social control, but their ability to achieve it depends on relations with social forces with different goals and aims. In the conventional theories of

Development, in CHINA’S GREAT ECONOMIC TRANSFORMATION 375 (Loren Brandt & Thomas G. Rawski eds., 2008); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89 (2003) (revising some part of law and economic development hypothesis but reinforcing others). For counterarguments, see, for example, Franklin Allen, Jun Qian & Meijun Qian, *Law, Finance, and Economic Growth in China*, 77 J. FIN. ECON. 57 (2005) (arguing that China is a counterexample to the conventional wisdom on law and development); Susan Feng Lu & Yang Yao, *The Effectiveness of Law, Financial Development, and Economic Growth in an Economy of Financial Repression: Evidence from China*, 37 WORLD DEV. 763 (2009) (arguing that there is no evidence that legal institution building had a positive effective on Chinese GDP growth). The Party leadership’s view is nicely summarized in 19th Party Congress Speech, *supra* note 251, which expresses a strong belief in the positive relation between legality and economic development.

²⁶⁷ Moustafa & Ginsburg, *supra* note 52; JAN-ERIK LANE, PUBLIC ADMINISTRATION AND PUBLIC MANAGEMENT: THE PRINCIPAL-AGENT PERSPECTIVE (2006);

²⁶⁸ Moustafa & Ginsburg, *supra* note 52; LANDRY, *supra* note 18.

²⁶⁹ See sources cited at *supra* note 18.

²⁷⁰ See sources cited at *supra* note 19.

²⁷¹ JOEL S. MIGDAL, STRONG SOCIETIES AND WEAK STATES: STATE-SOCIETY RELATIONS AND STATE CAPABILITIES IN THE THIRD WORLD (1988); Elizabeth J. Perry, *Trends in the Study of Chinese Politics: State-Society Relations*, 139 CHINA Q. 704 (1994).

authoritarian legality discussed above, courts are a crucially important site of state-society interaction, simultaneously providing a mechanism of social control while also disciplining the state itself.²⁷²

A Leninist account of state-society and law-society relations is substantially more complex, in that it separates what would otherwise be a unified state structure into “Party” and “state.” In Marxist theory, both the legal system and the broader state apparatus are part of the “superstructure” that is supposed to “wither away” as society is gradually perfected.²⁷³ Society will eventually become a self-organizing system in which the state is unnecessary. Until that time, Leninism advocates a theory of political leadership, in which a vanguard Party supervises and penetrates a less politically advanced but more administratively expansive “state.”²⁷⁴ The Party controls political doctrine—and the political indoctrination of society—while the state directly manages socioeconomic life until such a time that society becomes politically advanced enough to manage itself.

The Party leadership faces two central challenges, or agency problems, in this effort. The first is to ensure that the Party itself acts in a coordinated fashion, a kind of internal coordination problem to ensure collective unity. The second is to keep the functionally differentiated sub-parts of the state from becoming alternative power centers. The Party leadership’s traditional and preferred solution to its internal agency problem is ideological homogeneity: by ensuring that individual members internalize the “Party line”, the Party resolves its internal tensions to act in a unified fashion. But relations with the “state” are innately more complex. How does the Party effectively control a less ideologically and politically homogenous state apparatus?

The solution has often been to invest in some degree of legality: if the ideological “purity” of the state apparatus cannot be guaranteed, then it must be controlled through institutional oversight and rule-based conduct, both of which, as discussed above, benefit from political investment in legality.²⁷⁵ The most interesting thing about this line of thought is that it sees legality as, effectively, a “second-best” functional substitute for ideological homogeneity: ideally, society becomes ideologically advanced enough so that legality—and the state itself—is no longer needed, but when ideological homogeneity cannot yet be obtained, then legality must step in as a substitute.²⁷⁶

²⁷² TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT* (2007). See also MIGDAL, *supra* note 271, at _ (taxation, military and courts are “essential tentacles” of state power.)

²⁷³ EVGENY PASHUKANIS, *THE GENERAL THEORY OF LAW AND MARXISM* (1924).

²⁷⁴ *Id.* See also BARRETT L. MCCORMICK, *POLITICAL REFORM IN POST-MAO CHINA: DEMOCRACY AND BUREAUCRACY IN A LENINIST STATE* at 3-12 (1990); Perry, *supra* note 271; deLisle, *supra* note 1; Sarah Biddulph, *Democratic Centralism and Administration in China*, in *SOCIALIST LAW IN EAST ASIA* 195 (Hualing Fu, et al., eds. 2018)

²⁷⁵ There are particularly strong echoes of this idea in the PRC’s early political history. See PITMAN B. POTTER, *FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM* (2003); see also Bui Ngoc Son, *Constitutional Dualism*, in *SOCIALIST LAW IN EAST ASIA* 164, 191-92 (Hualing Fu, et al., eds. 2018) (instrumentalist function of constitutions in socialist regime).

²⁷⁶ See deLisle, *supra* note 1; Liebman, *Law-Stability Paradox*, *supra* note 1; Ginsburg, *supra* note 137..

But this begs a further question: what happens if the ideological homogeneity of the Party itself begins to recede, but the Party-state system continues to exist? Under such circumstances, must the Party then apply the “second-best” strategy of legality to itself?

The history of modern Chinese politics since 1979 is, to a very large extent, a story of how legality has supplanted ideology as the Party leadership’s primary means of control. Somewhat surprisingly, Party-state relations have not been much analyzed in the study of post-Mao politics.²⁷⁷ One recent exception is Dingping Guo, who, quoting Hannah Arendt on Nazi Germany, notes that “even an expert would be driven mad if he tried to unravel the relationships between Party and State.”²⁷⁸ Guo offers a fourfold typology of Party-state relations in different regimes, in which both Party and state can be either weak or strong.²⁷⁹ In a strong state-weak party regimes, typical of democracies, parties struggle to obtain power, and may find themselves confronted by administrative resistance once they obtain it.²⁸⁰ The very certainty of rotation in power that characterizes democracies means that there is the possibility of bureaucratic resistance to political control. The differentiation of the state that characterizes a separation of powers regime further entrenches this as a matter of constitutional design. In a strong Party-weak state regime, by contrast, an all-powerful Party seizes control of the state, for example in Nazi Germany and Stalinist Russia. Weak Party-weak state regimes are exemplified by personalist dictatorships, in which a charismatic leader overrides both Party and state.²⁸¹ This, Guo points out, reflects the situation of China under Mao after he launched the Cultural Revolution against elites in both party and state. The Party’s central organs ceased to function even as the state structure atrophied, and, in the end, the ideological unity of the Party itself began to fall apart.²⁸²

Guo’s framework is useful for understanding the current moment. Party-state relations have changed dramatically since the end of the Cultural Revolution, as Deng Xiaoping and his colleagues sought to provide a more stable and orderly basis for Chinese governance.²⁸³ Among their innovations were the idea of collective leadership and the regular rotation of top personnel. By providing for orderly leadership succession within the Party, the approach allowed for greater institutionalization and capacity, for example through the CDC with its semi-legalistic procedures and processes.²⁸⁴ These moves marked a shift away from ideological mechanisms of internalized social control, largely discredited after the Mao era, towards more formally hierarchical and semi-legalistic mechanisms *within the Party*. When traditional ideological solutions to the first agency problem, that of intra-Party coordination, faltered, institutionalization and semi-legality stepped in to share the burden. The result was a Party apparatus that became stronger than the one inherited at Mao’s death.

²⁷⁷ One exception is Dingping Guo, *The Changing Patterns of Communist Party-State Relations in China: Comparative Perspective*, 31 J. E. ASIAN AFF. 65, 67 (2015).

²⁷⁸ *Id.* at 66.

²⁷⁹ *Id.* at 70-75 (providing typology).

²⁸⁰ *Id.* at 70.

²⁸¹ *Id.* at 71.

²⁸² RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO’S LAST REVOLUTION (2006).

²⁸³ An excellent summary can be found at Elizabeth J. Perry, *Studying Chinese Politics: Farewell to Revolution?*, 57 CHINA J. 1 (2007).

²⁸⁴ See text at *infra* pp. --.

Having shored up the Party's institutional coherence, the Deng regime then orchestrated the return of the state and its differentiation from the Party. Relative to the Mao era, the Party not only became stronger but also withdrew from society. This configuration was distinct from the "weak Party, strong state" paradigm characteristic of democracies, but had some features in common because of the emphasis on the state's structural development.²⁸⁵ Nearly all references to the Communist Party were dropped from the 1982 Constitution, even as the development of legal infrastructure, under the banner of "socialist rule of law", emphasized formal *state* institutions rather than more informal *Party* tools for controlling society.²⁸⁶ This effort restructured and strengthened the legal system, and provided the institutional basis for 30 years of rapid and largely stable economic growth.²⁸⁷

From this perspective, China is now moving towards a *strong Party-strong state* regime, in which both state capacity and Party control are strengthened through investment in legality. Relative to the early years of the Deng era, the Party has struck back under Xi, with a new rhetorical emphasis on its political control and penetration of society.²⁸⁸ But if the Party leadership is to maintain effective control over its newly empowered cadres, it needs a better set of tools to coordinate Party activity. As much as Xi might want to accomplish this through ideological indoctrination alone, the current ideological diversity both within the Party and across society in general—an unavoidable consequence of several decades of "opening up"—makes that unrealistic.²⁸⁹ For at least the short to medium term, the Party leadership must instead rely on legal reform and legality: to facilitate routinized and relatively transparent control of society on the one hand, and to instill discipline on wayward agents within both the Party *and* the state on the other.

The primary difference between the present situation and the Deng era is, therefore, a greater need to manage a politically resurgent but no longer ideologically homogenous Party apparatus: whereas Deng-era legal reforms could largely afford to ignore the Party due to its retreat from direct socioeconomic management, Xi era reforms must cope with the opposite situation. As a result, they seek to legalize and institutionalize Party activity just as much as they seek to formalize the operation of state institutions.²⁹⁰ The resulting institutional arrangements, such as the collaboration between the Supervisory Commission and the CDC, facilitate the joint penetration of both Party and state into society in a controlled and regularized fashion.

²⁸⁵ Shambaugh, *supra* note 18.

²⁸⁶ ZHONGHUA RENMIN GONGHEGUO XIANFA [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA], as enacted on Dec. 4, 1982 [*hereinafter* 1982 CONSTITUTION], available at http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4421.htm. For further discussion of subsequent developments, see Perry, *supra* note 283; PEERENBOOM, *supra* note 5; Larry Catá Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (The Three Represents), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 29 (2006).

²⁸⁷ See generally PEERENBOOM, *supra* note 5 and Peerenboom, *supra* note 1.

²⁸⁸ See discussion surrounding *supra* note 245; Chris Buckley, China Gives Communist Party more Control over Policy and Media, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/world/asia/china-communist-party-xi-jinping.html>.

²⁸⁹ On ideological diversity, see Pan & Xu, *supra* note 257.

²⁹⁰ See discussion at *supra* Part Three, Section C.

The technological innovations of the social credit system are helpful here as well.²⁹¹ Besides its obvious utility as a tool of social control, that system solves two aspects of the agency problem for the center. First, by allowing the public to provide information on the performance of state agencies, it improves the ability of the Party to monitor the state (while incidentally enhancing the legitimacy of both in the eyes of the society). Second, by improving general incentives to comply with judgements, it reinforces the power of legal tools to discipline personnel and to incentivize performance. The suite of tools in China's new techno-legal authoritarian system are a significant innovation in the history of authoritarian legality, and collectively allow the Party leadership to accomplish the tasks identified in the authoritarian legality literature—social control, credible economic commitment, control of agents—more effectively, while preserving, and even reinforcing, the Leninist Party-state model. It gives the regime the power to allocate and reallocate powers and tasks to Party and state, with the knowledge that both will be able to operate in predictable fashion vis-à-vis and increasingly complex society.

One could argue, in fact, that Xi's pursuit of potential lifelong rule further intensifies the Party leadership's need for legality. As noted above, one of the major accomplishments of the Deng era was to establish collective leadership and the regular rotation of top personnel. This helped regularize and institutionalize political succession, providing much needed stability and order. Xi's dismantling of these institutions introduces a strong element of instability into succession politics and damages the Party's long term political cohesion.²⁹² This puts even greater pressure on the Party leadership to maintain tight control over both Party and state entities, and therefore enhances its incentive to invest in legal reform and law-based governance.

All in all, there are fairly powerful incentives for authoritarian regimes to invest in legality, which can generate well-documented benefits in terms of economic development and sociopolitical control. China's Leninist political structure introduces some complications into this general calculus, but current circumstances—in which Xi is attempting to construct a “strong Party-strong state” paradigm under conditions of significant ideological diversity—nonetheless give the Party leadership strong “supply side” reasons to emphasize legality in both Party and state operations. This leaves open, however, the question of how a move towards legality will be received by the general public: nothing in the above discussion touches upon “demand side” considerations created by social attitudes towards law and legality, but such considerations are indisputably a central part of the Party leadership's political calculus. They are the subject of the following section.

B. Ideological Winds and Social Perceptions of Legitimacy

The instrumental rationales discussed in Section A go a long way towards explaining the recent turn towards legality in Chinese politics, but they work better with some parts of the picture than

²⁹¹ See text at notes 105-108, *supra*.

²⁹² These issues are discussed in greater detail at Taisu Zhang, *Succession Politics and the Cost of Eliminating Presidential Term Limits in China*, LAWFARE (Mar. 9, 2018, 10:00 AM), <https://www.lawfareblog.com/succession-politics-and-cost-eliminating-presidential-term-limits-china>.

others: the empowerment of courts, for example, has a straightforward connection with the Party leadership's interest in sociopolitical control and economic development, but the Constitutional amendments do not. The removal of presidential terms limits *through constitutional amendment* simply bears no connection to either top-down control or economic development, and, as suggested above, may in fact run counter to both. If the explanation is simply that Xi desires more personal power, that merely begs the question of why he pursued it through formal constitutional means, when, as argued above, there were extra-legal paths of lesser resistance available. None of the instrumental rationales provide a compelling answer. Similarly, the creation of the Supervisory Commission, again through constitutional amendment, is—when compared to a simple expansion of the CDC's administrative capacity—less about advancing central control *per se* than about doing so in a formally constitutional manner. The Party leadership does not necessarily gain more top-down control through constitutional amendment than through lesser legal or regulatory means. Why, then, choose the most formal and publically visible route?

Furthermore, these top-down instrumentalist explanations are innately incomplete: they argue, in essence, that if the Party leadership cared about things like economic development and top-down control over local Party and state agents, then it would have strong incentives to invest in legality. But why does it care about those things in the first place? Take, for example, the enormous resources the Party leadership has sunk into judicial professionalization: on the one hand, professionalized adjudication generates enormous benefits for economic development, but, on the other, Party leaders belong to the elite segment of society that benefits most from judicial corruption and bias. They have often been accused, especially during the Hu Jintao era, of facilitating crony capitalism for personal economic gain,²⁹³ which, if true, would lessen their incentive to bolster judicial professionalism. Given these competing incentives, what swung their calculations in favor of investing in legality?

One could raise a similar objection about central control over provincial and local authorities: just how badly does the Party leadership really want it, and why? Although some might argue that central authorities naturally desire more control over lower-level agents, decentralization is not without its socioeconomic benefits: for example, scholars have long credited decentralized governance and “de-facto federalism” for spurring Chinese economic growth in the 1980s and 1990s.²⁹⁴ This has, as noted above, recently changed, but one nonetheless has to wonder if there is a deeper layer of Chinese politics that we overlook by focusing on mid-level incentives like “strengthening top-down control” or “boosting economic development.” Are there possible rationales for the shift towards legality that draw from other, perhaps more fundamental, political interests?

This Section discusses one such possibility: the shift is a straightforward response to rapidly increasing demand for legality—for law-based and legally accountable governance, for lower levels of corruption, and for more reliable enforcement of private legal rights—among the general

²⁹³ See, e.g., *The Panama Papers Embarrass China's Leaders*, THE ECONOMIST (Apr. 7 2016), <https://www.economist.com/news/2016/04/07/the-panama-papers-embarrass-chinas-leaders>; David Barboza, *Billions in Hidden Riches for Family of Chinese Leader*, THE NEW YORK TIMES (Oct. 25, 2012), <https://www.nytimes.com/2012/10/26/business/global/family-of-wen-jiabao-holds-a-hidden-fortune-in-china.html>.

²⁹⁴ See Montinola, Qian & Weingast, *supra* note 18; Xu, *supra* note 21.

population. In other words, legality has become a much more significant source of popular legitimacy, and the Party leadership has responded by tapping into it more aggressively. This explanation would fill in all the analytical gaps identified in the previous paragraphs: the acquisition of public support and popular legitimacy, inextricably tied to long-term political survival as it tends to be in modern societies, is surely a fundamental interest, arguably *the* fundamental interest, of the Party leadership. Higher social demand for legality would reward political investments in judicial professionalism and independence with higher levels of popular support and perceived legitimacy. It would also put greater pressure on the Party leadership to “legalize” the Party’s political dominance in publically visible ways, which supplies a strong rationale for both the 2018 constitutional amendment and the multi-year media campaign that preceded it.

This bottom-up account also gives a cleaner and more plausible explanation of timing and the policy reversal from Hu to Xi—in which a “turn against law” was replaced with a powerful “turn towards law”—than do the top-down theories discussed in the previous section. Whereas the instrumental incentives discussed above tend to be long-term considerations that do not easily explain short-term swings, elite political awareness of societal ideological developments is a fickle thing that easily differs from regime to regime and from politician to politician. There are indeed, as discussed below, signs that the Party leadership underwent such a transformation in awareness from Hu to Xi.

A growing body of academic literature argues that Chinese social demand for legality has sharply increased in recent years, to the point where it now exerts major influence over government popularity and support.²⁹⁵ As a number of sociological studies have shown, rights and legal consciousness among the general population has grown dramatically over the past 30 years, and was already a major driver of socioeconomic behavior by the early 2000s.²⁹⁶ One particularly interesting finding of these studies was that the rise in legal consciousness was largely unrelated to the law’s material effectiveness: whereas positive litigation experiences generally encouraged further engagement with the court system, negative experiences were actually more likely to spur pro-legal reform activism than to discourage future litigation.²⁹⁷ In other words, encountering problematic legal institutions made people want to reform them, rather than ignore them, which suggests that the legal consciousness they exhibited was deeply *normative*, rather than merely instrumental, in nature. This echoes the findings of a 2018 study on “why the Chinese obey the law,” which argues that, not only is the Chinese population now a law-abiding one, but their reasons for doing so are predominantly moral or legitimacy-based, with procedural justice playing a surprisingly large role.²⁹⁸

²⁹⁵ Some of this literature is summarized at YA-WEN LEI, *THE CONTENTIOUS PUBLIC SPHERE: LAW, MEDIA, AND AUTHORITARIAN RULE IN CHINA* 35-37 (2017).

²⁹⁶ GALLAGHER, *supra* note 7; MERLE GOLDMAN, *FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA* (2005); KEVIN J. O’BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006).

²⁹⁷ Mary E. Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 L. & SOC’Y REV. 783 (2006).

²⁹⁸ Jingkang Gao & Jinhua Zhao, *Legitimacy versus Morality: Why Do the Chinese Obey the Law?*, 42 L. & HUM. BEHAV. 167 (2018).

Other studies have shown that, by around 2008, most of the Chinese public had come to identify legality as a central component of political legitimacy. In the 2008 Asia Barometer Survey, for example, 55 percent of Chinese respondents disagreed that the government could “disregard the law for policy considerations”—a higher percentage than in most other surveyed countries, including Singapore, and an increase of some 15 to 20 percent from the early 2000s.²⁹⁹ A recent social experiment conducted by Susan Whiting further strengthens this connection between law and political legitimacy: her study finds that state investment in legal services significantly enhanced the popularity and perceived legitimacy of county governments, especially when paired with media campaigns that boosted popular awareness of legal institutions.³⁰⁰ As one scholar puts it, Chinese people now tend to “demand that the state follow the law.”³⁰¹

The Party leadership began to publically acknowledge these sociopolitical trends by the end of the Hu Jintao era. Although one could characterize law enforcement under Hu as perhaps moving away from legality, by 2012, Hu himself openly acknowledged that a new strategy was necessary if the Party was to maintain its political viability. In the lead-up to the 18th Party Congress, Hu spoke of the need to “devote more attention...to the important uses of rule of law in national governance and social management.”³⁰² By the Party Congress, he had ramped up this rhetoric to something that bordered on alarmism: if the Party could not curb corruption and ensure that officials followed the law, that “could prove fatal to the Party and even cause the collapse of the Party and the fall of the state.”³⁰³ In the same speech, he listed “the rule of law” as one of the fundamental demands of “the People,” and argued that “the Party and the state must operate strictly according to the law.”³⁰⁴ For a leader who had spent much of the past decade deemphasizing professionalized adjudication, this amounted to a startling admission of failure. Given that outgoing leaders usually attempt the exact opposite, it likely took enormous sociopolitical pressure for Hu to openly advocate a sharp departure from one of the core institutional characteristics of his regime. One can only hypothesize over the nature of such pressure, but widespread social unhappiness over ineffective law enforcement and governmental corruption, or at least the political perception of such unhappiness, was very likely a major source.

The irony in all of this is that the purported “turn against law” was also ostensibly designed to be a populist measure, something that was supposed to bolster the Party-state’s reputation through promoting private reconciliation and “social harmony.”³⁰⁵ Instead, citizens seemed to interpret politically or socially motivated behavior by courts as a sign of judicial corruption, rather than as a sign of judicial responsiveness, and seemed to favor giving courts higher levels of financial and

²⁹⁹ LEI, *supra* note 295, at 36-37.

³⁰⁰ Susan Whiting, *Authoritarian “Rule of Law” and Regime Legitimacy*, 50 COMP. POL. STUD. 1907 (2017)

³⁰¹ LEI (2017), *supra* note 295, at 36.

³⁰² Speech summarized and discussed at Carl Minzner, *What Direction for Legal Reform Under Xi Jinping*, 13 CHINA BRIEF 6 (2013), <https://jamestown.org/program/what-direction-for-legal-reform-under-xi-jinping/>.

³⁰³ Hu Jintao, *Zai Zhongguo Gongchan Dang di Shiba Ci Quanguo Daibiao Dahui shang de Baogao* [Report at the 18th National Congress of the Chinese Communist Party], Nov. 17, 2012, XINHUA NET, http://news.china.com.cn/politics/2012-11/20/content_27165856_9.htm

³⁰⁴ *Id.*

³⁰⁵ See Minzner, *Turn Against Law*, *supra* note 1; Liebman, *supra* note 5.

institutional independence.³⁰⁶ Seen from this perspective, the “turn against law” under Hu is best understood as a simple miscalculation of social sentiment: the Party leadership made a judgment call that it could win popularity through deemphasizing legality, and by 2012, had acknowledged that this was a mistake. In their defense, much of the currently available evidence on pro-legality social sentiment only emerged around or after 2008, after the “turn against law” had already begun. Prior to that, a sizeable share of Chinese political and intellectual elites seemed to believe that the Chinese population was “non-litigious” and distrusted legal institutions.³⁰⁷

Xi Jinping was, of course, all too happy to take Hu’s 2012 concession and run with it, swiftly making legal reform and “the rule of law” cornerstones of his new political agenda. Not only did this allow him to distinguish himself from the relatively unpopular preceding regime—which had been embroiled in reports of corruption and infighting during its last few years—but it also allowed him to tap into a major source of populist support and legitimacy. Xi spent much of his first 5 years in power challenging the political *status quo* and breaking major norms that had stood since the Deng era, such as prosecuting previous members of the Politburo Standing Committee and later setting himself up for lifelong rule.³⁰⁸ He therefore needed, much more so than his predecessors, sources of political capital and support outside of the traditional political establishment. In other words, Xi badly needed *popular* support. Nearly all observers agree that his anti-corruption campaign has done just that—and if the explosion in litigation over the past 5 years is any indication, so has the campaign to boost judicial professionalism and independence.³⁰⁹ By all observable signs, Xi is highly popular among the general population,³¹⁰ and the general push towards legality documented above is one of the most important achievements, arguably *the* most important achievement, of his first term. These two things are almost certainly interconnected.³¹¹ At least on the issue of legality, Xi has consistently shown far superior political instincts and judgment than his predecessor.

There is unfortunately no room in this article to systemically explain how the Chinese population came to adopt this highly legalistic attitude towards political legitimacy, but we can at least flag some of the more promising candidates—none of which necessarily exclude the others. The first possibility is that the population values legality for the same kinds of instrumental reasons that we

³⁰⁶ See Yuhua Wang, *Court Funding and Judicial Corruption in China*, 69 CHINA J. 43 (2013); see also Ling Li, *Corruption in China’s Courts*, in JUDICIAL INDEPENDENCE IN CHINA (Randall Peerenboom, ed., 2010).

³⁰⁷ See Minzner, *Turn Against Law*, *supra* note 1; Liebman, *supra* note 5. See also discussion surrounding *supra* note 169.

³⁰⁸ LI, *supra* note 19.

³⁰⁹ On the impact of the anti-corruption campaign, see sources cited in *supra* note 242. On the rise in litigation and how to interpret it, see *supra* Part Two, section D.

³¹⁰ See, e.g., Shannon Tiezzi, *The World’s Most Popular Leader: China’s President Xi*, THE DIPLOMAT: CHINA POWER (Dec. 20, 2014), <https://thediplomat.com/2014/12/the-worlds-most-popular-leader-chinas-president-xi/>; Tom Phillips, *Chairman Xi Crushes Dissent But Poor Believe He’s Making China Great*, THE GUARDIAN: THE OBSERVER (Oct. 14, 2017, 4:00 PM), <https://www.theguardian.com/world/2017/oct/14/xi-jinping-crushes-dissent-but-making-china-great-again>; Salvatore Babones, *Xi Jinping: Communist China’s First Populist President*, FORBES (Oct. 20, 2017, 3:29 AM), <https://www.forbes.com/sites/salvatorebabones/2017/10/20/populism-chinese-style-xi-jinping-celebrates-his-status-as-chinas-first-populist-president/>; Ben Westcott, *How Xi Jinping Became One of Modern China’s Most Powerful Leaders*, CNN (Oct. 18, 2017, 2:52 AM), <https://www.cnn.com/2017/10/17/asia/xi-jinping-profile-national-congress/index.html>.

³¹¹ See ECONOMY, *supra* note 19, at 32-33 (discussing the popularity of Xi’s legal reforms).

identified in Section One: they believe that it enhances the predictability and reliability of governmental action, and perhaps that it is critical for economic growth and personal enrichment. Chinese citizens have long displayed a deep-rooted fear of governmental abuse of power.³¹² More recently, they have also consistently shown higher trust in central level officials than in local ones, and tend to believe that local divergence from central directives is source of corruption, rather than innovation and prudence.³¹³ Given these general attitudes, it would only be natural if they favored the “rule of law” over “the rule of man”—to use two concepts that have long occupied a central position in Chinese sociopolitical discourse³¹⁴—and therefore considered judicial professionalism, independence, and a general commitment to legality as necessary conditions of good governance.

The vast wave of domestic migration and corresponding disintegration of local communities that has swept over China in the past 40 years adds another dimension to these social demands. Until the end of the Cultural Revolution, stable local communities, both urban and rural, were able to supply many basic social goods such as financing, dispute resolution, childcare, employment, and local norm enforcement. With the uprooting of some 40 percent of the population from the countryside since 1978, many of these communities are no longer able to perform these functions, forcing large portions of the population to rely instead on governmental or commercial institutions.³¹⁵ As scholars have long argued, social disintegration tends to create greater bottom-up demand for reliable and institutionalized state behavior—which feeds naturally into greater demand for legality³¹⁶—and the contemporary Chinese case is likely no exception.

Parallel and perhaps related to these socioeconomic developments, Chinese intellectuals have long bought into the conventional wisdom that an independent and professional court system is

³¹² In PRC history, such fear was a major source of social unrest as early as the 1980s, see Lucian W. Pye, *China: Erratic State, Frustrated Society*, 69 FOREIGN AFF. 56 (1990).

³¹³ See, e.g., Hsin-hao Huang, *Explaining Hierarchical Government Trust in China: The Perspectives of Institutional Shaping and Perceived Performance*, 59 TAIWAN J. POL. SCI. 137 (2014), http://politics.ntu.edu.tw/psr/?post_type=english&p=3115; Cary Wu & Rima Wilkes, *Local-National Political Trust Patterns: Why China is an Exception*, 2017 INT’L POL. SCI. REV. 221, <http://journals.sagepub.com/doi/abs/10.1177/0192512116677587>.

³¹⁴ “Rule of law” was favorably compared to “rule of man” as early as the late 19th Century, see Leigh K. Jenco, *“Rule by Man” and “Rule by Law” in Early Republican China: Contributions to a Theoretical Debate*, 69 J. ASIAN STUD. 181 (2010), <https://www.cambridge.org/core/journals/journal-of-asian-studies/article/rule-by-man-and-rule-by-law-in-early-republican-china-contributions-to-a-theoretical-debate/26CB9E5995A081A168A78C0B7ABFD96D>. On post-Mao political discourse related to the two concepts, see Yufan Hao, *From Rule of Man to Rule of Law: An Unintended Consequence of Corruption in China in the 1990s*, 8 J. CONTEMP. CHINA 405 (1999), <https://www.tandfonline.com/doi/abs/10.1080/10670569908724355>. The government’s position, has always been that rule of law is superior, see Xin Chunying, *It’s Time for the Rule of Law in China*, THE HUFFINGTON POST: THE BLOG (Nov. 20, 2014, 2:25 PM), https://www.huffingtonpost.com/xin-chunying/china-rule-of-law_b_6178836.html.

³¹⁵ <https://academic.oup.com/esr/article/31/4/502/496925>;
<https://izajold.springeropen.com/articles/10.1186/s40175-015-0026-6>;
<https://academic.oup.com/ajae/article/100/2/521/4762591>; <https://www.cambridge.org/core/journals/china-quarterly/article/hukou-system-and-ruralurban-migration-in-china-processes-and-changes/64180F68ABC54EDF984DEB31EFFE7A64>; <https://www.jstor.org/stable/pdf/117121.pdf>.

³¹⁶ Polanyi, *Great Transformation*; Scott, *Moral Economy*; Greif, *JPE* (1998).

necessary for modern economic development,³¹⁷ and it would be unsurprising if much of the general population shared their conviction. In the 1990s, Chinese intellectuals and political elites were some of the most avid consumers of the post-Cold War Western “liberal consensus,” including the belief that secure economic rights, reliable contract enforcement, and the rule of law in general is a prerequisite for growth.³¹⁸ At the forefront of this tendency were activist lawyers of the *weiquan* movement, who sought to hold the state accountable for its formal legal promises.³¹⁹ While the enthusiasm for American-style democracy and constitutionalism has waned somewhat in recent years, the general belief that sustainable economic development requires a high level of legality, including legal checks on governmental power, remains fairly robust.³²⁰ It seems quite likely, therefore, that a significant slice of the Chinese population—especially its most intellectually active, economically affluent slice—believes deeply in the economic benefits of legality. As the college-educated Chinese middle class has rapidly expanded over the past two decades,³²¹ such beliefs have penetrated more deeply into society.

A second possibility is that the general population has simply accepted and internalized the pro-legality rhetoric propagated by the government since at least the early 1980s—and arguably earlier. As multiple scholars have argued, the CCP has long devoted substantial resources to the legal education of the general public: the enactment of both the 1950 Marriage Law and the 1954 Constitution were followed by nation-wide campaigns to disseminate legal knowledge.³²² Even at this early stage, many Party leaders believed that “the rule of law,” as opposed to “the rule of man,” was a critical component of any sustainable sociopolitical order. Such beliefs receded during the political turbulence of the late 1960s and 1970s, but, as noted above, made a large-scale comeback under Deng. The late 1970s were widely perceived to be a moment of deep crisis by the Party leadership, in which the very survival of the Party-state was at question. The diagnosis they arrived at highlighted weak institutionalization and the arbitrary “rule of man” as one of the fundamental problems of the Mao era, and as a fundamental threat to the Party’s legitimacy.³²³ In

³¹⁷ For summaries and critiques of these trends, see, for example, DENG ZHENGLAI, *ZHONGGUO FAXUE XIANG HECHU QU [WITHER LEGAL STUDIES IN CHINA?]* (2006); SAMULI SEPPANEN, *IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA* 36-49 (2016).

³¹⁸ See, e.g., Cao Jianming, *Wei Jingji Chixu Jiankang Fazhan Tigong Youli Fazhi Baozhang [Providing a Firm Rule of Law Foundation for Sustainable Economic Growth]*, 2015(23) *QIU SHI [SEEKING TRUTH]* 5, available at http://www.qstheory.cn/dukan/qs/2015-11/30/c_1117268616.htm; Chen Su et al., *Ru Shi Shinian Zhongguo de Shichang Jingji Fazhi [China’s Market Economy Rule of Law in the Decade After Joining the WTO]*, in 10 *ZHONGGUO FAZHI FAZHAN BAOGAO [REPORT ON THE DEVELOPMENT OF THE RULE OF LAW IN CHINA]* 30 (Li Lin ed., 2012). Much of this is reflected in the positive way that institutional economics and law and economics has been received in China. See Xiaoli Zhao & Han Liu, *The Chicago School in Beijing: Two Faces of Law and Economics in China*, Paper Presented at the 2018 Chicago-Tsinghua Young Faculty Forum, June 1, 2018, Beijing, China (on file with authors).

³¹⁹ Hualing Fu and Richard Cullen, *Weiquan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-Interest Lawyering*, 59 *CHINA J.* 111 (2008).

³²⁰ See Han Liu, *Regime-Centered and Court-Centered Understandings: The Reception of American Constitutional Law in China* (Tsinghua University School of Law working paper, on file with authors).

³²¹ See JIE CHEN, *A MIDDLE CLASS WITHOUT DEMOCRACY: ECONOMIC GROWTH AND THE PROSPECTS FOR DEMOCRATIZATION IN CHINA* (2013).

³²² ALTEHENGER, *supra* note 26; Glenn D. Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s* (2009), <https://escholarship.org/content/qt0rm248nk/qt0rm248nk.pdf>.

³²³ VOGEL, *supra* note 225; RICHARD BAUM, *BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING* (1996); MERLE GOLDMAN, *SOWING THE SEEDS OF DEMOCRACY IN CHINA: POLITICAL REFORM IN THE DENG*

response, the Party leadership committed itself to strengthening legal institutions, and to educating the general population of the need for law-based governance. What followed was a three decade-long process in which the “rule of law,” often paired with anti-corruption campaigns in the 1980s and 1990s, almost always occupied a central position in the Party’s sociopolitical rhetoric as one of the primary objectives of reform.³²⁴ Not even the Hu Jintao regime, despite its relative de-emphasis of legality, substantively disavowed “the rule of law” as a normatively desirable sociopolitical end—quite the opposite, it regularly reaffirmed the Party’s rhetorical commitment to it, suggesting that Minzner’s characterization is overdrawn.³²⁵

This kind of sustained rhetorical reinforcement—despite generating deep skepticism among scholars—may very well have made a lasting and profound impression on the general public. In recent years, some scholars have suggested that, over time, the Chinese public has responded positively to this “rule of law” rhetoric, and that this created a positive feedback loop in which the government could reap further legitimacy benefits from social conditions created by its own prior rhetoric.³²⁶ Although much of the general population treats certain kinds of government rhetoric, such as those related to censorship or loyalty to the Party, with regular scorn and mockery, by all indications this particular strand of propaganda has generated widespread enthusiasm.³²⁷ At the very least, the government’s rhetorical campaign has reinforced, if not quite created from scratch, a highly favorable social disposition towards legality.

This brings up the question of whether there was any prior social sentiment to be reinforced, which would constitute a third possible explanation—that is, “long-term social tradition,” rather than “post-1949 political creation.” Although some scholars have characterized late imperial China as a “lawless” society,³²⁸ a characterization that generations of historians have vigorously resisted,³²⁹ even the most ardent legal orientalist would have to agree that, by at least the late 19th Century, there was enormous social and political demand for the legalization of both governmental activity and socioeconomic relations.³³⁰ Following a series of geopolitical and domestic catastrophes in the 1840s and 1850s, central and local elites swiftly coalesced around a basic consensus that China needed to “modernize,” and to do so, it needed to import both Western law and Western legal culture. The underlying reasons for this were often functionalist: Chinese elites bought into a sort of progressive mindset that saw legalization as a core component of “modernization,” which would

XIAOPING ERA (1994); LEI, *supra* note 295, at 35. Some of the earlier assessments now seem grossly overoptimistic, but they do reflect a general atmosphere of optimism on Chinese institutional development in the 1980s and 1990s, even after the 1989 Tiananmen Incident.

³²⁴ See PEERENBOOM, *supra* note 5; discussion surrounding *supra* note 48.

³²⁵ Minzner, *Turn against Law*, *supra* note 1.

³²⁶ Fu, *supra* note 1.

³²⁷ GALLAGHER, *supra* note 7; LEI, *supra* note 295.

³²⁸ See discussion and criticism in William P. Alford, *Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say About Its Law*, 23 MOD. CHINA 398 (1997).

³²⁹ E.g., Alford, *supra* note 328; TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* (2013); PHILIP HUANG, *CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED* (2002).

³³⁰ See Taisu Zhang, *The Development of Comparative Law in China*, in OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann ed., 2d ed., forthcoming, Oxford University Press, London: 2019) (on file with author).

then bring about rapid economic growth, sociopolitical stability, and geopolitical stature.³³¹ Consequently, an enormous wave of lawmaking and state-building materialized in the late 19th and early 20th Centuries, transforming Chinese legal institutions into an amalgam of German, Japanese, and British institutions.³³² Ironically, this eventually created a political culture in which Western law and Western legal culture came to possess something approaching deontological legitimacy: independent of any truly functionalist considerations, it simply represented “modernity” and “progress.”³³³ By the 1930s, as more and more Chinese lawmakers and judges began to receive training in Western Europe and the United States, the move towards legalization in the Western image became unstoppable.³³⁴

After the creation of the PRC, the Communist Party, as noted above, continued to pursue a sociopolitical program of law-oriented state building and legal education. The dominant source of foreign legal transplants became the Soviet Union, but the Party continued to valorize “the rule of law” until the Anti-Rightist campaign of 1957, and picked up right where it left off after 1978.³³⁵ In other words, apart from the Cultural Revolution year, the history of Chinese politics in the 20th Century is essentially a history of elite-driven legalization. This may well have created a pro-legality social consensus well before 1949, and even if it did not, there was at least a fairly clear consensus among the educated elite that carried directly into the legal education programs in the early PRC. Thus, the origins of today’s highly legalistic social culture reach back at least to the early 20th Century, and perhaps much earlier—after all, as many historians have argued, late imperial China was a heavily rules-oriented society in which legal institutions of various kinds carried substantial socioeconomic weight.

None of these explanations necessarily exclude the others. Much more likely, they worked together to generate today’s sociopolitical environment, in which the Party leadership gains popularity and social legitimacy through legalizing politics and governance. From this perspective, the Hu Jintao era was more of a temporary counter-movement in a long-term shift towards legality—not quite a “long march towards the rule of law,” as Randall Peerenboom once argued,³³⁶ but nonetheless a decades-long process in which written legal rules gained significance at all levels of politics. This kind of shift can, in theory, be self-reinforcing: it incentivizes government investment in institutionalization and legality, which then reinforces the social consensus in favor of legality, which further incentivizes governmental legality. While it is perfectly possible that some leaders will temporarily misjudge social sentiment, they will nonetheless tend to move, out of simple self-interest, in a pro-legality direction over the long run. This seems to be a rather accurate description of the modern history of Chinese legal development.

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* See generally Albert H.Y. Chen, *Legal Thought and Legal Development in the People’s Republic of China 1949-2008*, in John Gillespie and Albert H.Y. Chen (eds), LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES 51, 53 (2010).

³³⁶ PEERENBOOM, *supra* note 5, at 1.

Conclusion: Implications for Authoritarian Governance

Our analysis holds major implications for understanding China's current political and institutional direction. Many China-watchers have decried Xi's concentration of power, formalized in the recent constitutional reforms, as a return to personalistic and anti-institutionalist rule in the style of Mao. We disagree. To analogize Xi to Mao in this regard is to ignore the tremendous institutional development that has occurred over the last three decades, and especially over the past five years. Xi has presided over the strengthening of an increasingly routinized, resilient, and independent set of judicial institutions that are both able to render complex legal rules legible to society and, increasingly, capable of managing administrative compliance problems within the governing apparatus. At the same time, he has politically activated the Constitution to provide a firmer legal basis for the Party's rule, while also using it to create new institutions for intra-government oversight. As a result, the Party-state has actually strengthened its capacity to accomplish core governance tasks of controlling local agents, settling disputes, and producing social order. Both Party and state are stronger and more institutionalized. The risks of Xi's consolidated power—while still substantial—are therefore substantially less than what they were in the Mao era: If, hypothetically, Xi were to disappear tomorrow, the institutions he has built and reinforced would nonetheless remain in place, and China would retain much more of its governance capacity than it could plausibly have managed had something similar happened in the Mao years.

What this implies at a more theoretical level is that the personal consolidation of power in authoritarian states is not necessarily incompatible with the strengthening of legal institutions. Quite the opposite, an ascendant authoritarian ruler who seeks to gain power at the expense of his former peers faces enormous challenges of political stability, which can create very strong incentives to invest in legal reform as a monitoring and control mechanism. The larger the country, the greater the difficulty of maintaining control, and therefore the greater the incentive for judicial empowerment. Perhaps even more importantly, such a ruler is often in dire need of populist legitimacy—his dismantling of the political status quo often dilutes his ability to draw support from within the establishment—and, depending on sociocultural perceptions of law and legality, legal reform can be a particularly potent way to acquire it.

This kind of legal reform—driven, as it is, by a desire to establish personal political dominance—is unlikely to trend towards political liberalism, nor is it likely to overtly constrain the ruler in a true “rule of law” sense. In the Chinese case, what it has produced is simply “legalism”: stronger compliance with written legal rules, even as the rules, on their own terms, fail to constrain the Party leadership in any substantial way. There has been no accompanying turn towards liberalism: Western values are increasingly dismissed as decadent or simply incompatible, and topics like press freedom, judicial independence and constitutionalism are included in lists of forbidden topics for discussion.³³⁷ Relatedly, the intimidation and arrest of *weiquan* (“rights protecting”) lawyers and has had a major chilling effect on rights-activism, and reduces the possibility of rising legality serving as a “double-edged sword” that leads to political liberalization and robust protection of

³³⁷ Shirk, *supra* note 1, at 25; ECONOMY, *supra* note 19, at 38-39.

civil rights.³³⁸ For these reasons, most scholars continue to characterize the Chinese regime as a “rule by law” state—an increasingly nuanced and sophisticated one, perhaps—rather than a “rule of law” one.

But it is also potentially much more than that, in the sense that legality is not merely something that strengthens the Party-state’s political control, but also a condition that society now imposes on the Party-state. The study of courts in authoritarian regimes has traditionally focused on the relatively simple but fundamental question of why an authoritarian regime would accept any modicum of judicial independence: what purpose does it serve? What function does it provide?³³⁹ The answers that scholars have given encompass both the top-down and the bottom-up, but rarely both: some emphasize endogenous “supply-side” motivations for legal empowerment, in which the regime pursues higher levels of local control, more effective dispute resolution, and stronger economic growth;³⁴⁰ whereas others prefer “demand-side” theories, in which private parties, both domestic and foreign, demand judicial independence and professionalization for their own reasons—and the government simply responds.³⁴¹

We have taken a more synthesized and fluid approach in this article, integrating both supply and demand in a framework for understanding authoritarian judicial empowerment. Instead of a relatively fixed “principal” making a rational decision to adopt, or not adopt, legal ordering at a single point in time, the Chinese case provides an example of a dynamic set of calculations that have been changing over time. Our argument is that there has been a strong path-dependency in the regime’s use of law, even as its ideological justification and position has changed over time. In this account, supply-side and demand-side factors mutually reinforce. Having sought to develop a legal system for purposes of economic development and political control, the Chinese Party-state has seen the use of law and legal forms of sociopolitical legitimation expand rapidly, such that “turning away from law” is no longer really an option, either socially or administratively.³⁴² The Party-state has indeed sought to steer the legal system to its own ends, but it is not merely a principal directing the system. Instead, the system—once it has been embraced, both instrumentally and ideologically, by private socioeconomic actors—has changed the Party-state as much as the reverse, making it stronger and more resilient, and therefore creates the sociopolitical conditions for its own reproduction and entrenchment.

Regardless of whether China was ever a “lawless” or “rule of man”-oriented society,³⁴³ it is now, by almost all indications, a highly legalistic one in which the great majority of people—including, and especially, intellectual and political elites—both desire and increasingly assume a basic political commitment towards law and rules-oriented governance and adjudication. Violating that assumption carries sociopolitical costs of such magnitude, in terms of both instrumental

³³⁸ MOUSTAFA, *supra* note 272272, at _.

³³⁹ Ginsburg, *supra* note 137; He Xin, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in BUILDING CONSTITUTIONALISM IN CHINA, *supra* note 47, at 143; PEERENBOOM, *supra* note 5 (legitimizing ideal and control of provincial government); Fu, *supra* note 1.

³⁴⁰ See sources cited at *supra* notes 263-268.

³⁴¹ Apart from the sources cited at *supra* Part Four, Section B, see also WANG, *supra* note 7 (arguing that foreign investment can be a key driver of improvement in courts).

³⁴² Cf. MINZNER, END OF AN ERA, *supra* note 1.

³⁴³ See sources cited at *supra* notes 328-330.

inefficiency and ideological furor, that it is hard to imagine how the Party leadership could afford to do so. Attempting to impose mediation or informal settlement on a population for whom professional adjudication is a baseline expectation creates deep social confusion, higher economic transaction costs, and serious administrative waste. Given the trajectory of Chinese legal and social culture over the past century, the “political legitimacy bonus” of legal reform is already enormous, and will almost certainly continue to grow into the foreseeable future. As noted above, a pro-legality, “law and order”-oriented social culture is often self-reinforcing, placing heavy pressure on the state, especially one that seems to be moving in a populist direction, to make institutional reforms that further deepen the culture of legality, which then creates even stronger incentives for the state to invest heavily, both rhetorically and actually, in judicial professionalism and rules-based governance.

The only plausible reason for the Party leadership to reverse this trend now would be, as Liebman suggests, a need for political stability:³⁴⁴ a culture of legality might, for example, encourage the general population to challenge the Party’s control, which might incentivize Party leaders to take preventive measures before any such movements gets off the ground. This seems, however, like a relatively remote possibility at the moment: as the strengthening of administrative litigation indicates, the Party leadership seems perfectly happy to sacrifice some measure of administrative flexibility in return for stronger adherence to legal rules by local officials, under the theory that this will actually strengthen its legitimacy.³⁴⁵ It clearly believes that legal investment reinforces, rather than undermines, social support for the Party—and, moreover, that social demand for legality can be disentangled from social demand for democracy, civil liberties, or “Western style constitutional review.”³⁴⁶ Xi’s robust personal popularity seems to suggest that, at least for now, this assessment is correct.

This leads us to conclude that this trend towards legality is not easily reversed, nor likely to be. For the somewhat foreseeable future—the next one or two decades of Xi Jinping’s rule, at least—we expect the Chinese judiciary to become increasingly professional, independent, and powerful and the Constitution to become more political salient and significant. As a result, we expect everyday administration, law enforcement, and adjudication to become more rules-based, to the extent that most individual interactions with the Party-state become regularized and predictable. Civil liberties and political checks-and-balances within the Party leadership may very well deteriorate over the same period, but they will probably do so in a formally legal manner. The “turn towards law” under Xi is likely here to stay for the long term, bringing major political benefits to both Xi himself and the Party-state in general, but we unfortunately see no reason why legalistic authoritarian states are necessarily less oppressive for the common citizen than those in which power is exercised in a more discretionary fashion.

³⁴⁴ Liebman, *Law-Stability Paradox*, *supra* note 1.

³⁴⁵ See discussion at *supra* Part Two, Section C.

³⁴⁶ See discussion at *supra* Part Three, Section A.