ARTICLE

China's Turn Toward Law

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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. Thus, even if China is indeed deepening its dictatorship, it is 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 demands 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 populist political legitimacy.

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I. 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 perhaps, dictatorship. [1] With this retreat, law and formal governmental

1. Recent scholarly writings strike a distinctly pessimistic tone include. *See* 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. DEM. 83, 92-96 (2016); Susan Shirk, *The Return to Personalistic Rule,* 29 J. DEM. 22 (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), 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. (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 of 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*]; Hualing Fu & Richard Cullen, *From Mediatory 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., 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. *See* Randall Peerenboonm, *The Battle Over Legal Reforms in China: Has There Been a Turn Against Law?*, (Aug. 12, 2014), https://ssrn.com/abstract=2479716 (arguing that Chinese legal reform continues to progress at a steady pace). Peerenboom's 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 generally* 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); Hualing Fu, *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

institutions are increasingly subordinated to the control of Chinese Communist Party (CCP) leaders, rendering them politically insignificant. Correspondingly, whatever glimmer of constitutionalism and the rule of law that the 1990s and early 2000s offered is now extinguished, replaced with despotism and escalating levels of repression. [2] 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.[3] 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.[4]

This Article offers a very different take on these developments. It argues that, contrary to conventional accusations that China has "turned against law,"[5] 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,

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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.

2. On the 1990s, see RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 55-124 (2002).

3. 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.

4. *See* MINZNER, END OF AN ERA, *supra* note 1, at 14.

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

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 them.

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.[6] 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—but 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,[7] but it will likely be followed by an era in which law plays a greater, not lesser, sociopolitical role in a consolidated 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.[8] 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 but it has actively tried to strengthen it and has reaped immense benefits along the way. Nonetheless, the

6. The most comprehensive overview of Chinese legal development since 1976 remains PEERENBOOM, supra note 2. *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.

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

8. *See generally* MARY E. GALLAGHER, AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS AND THE STATE (2017); Peter Solomon, *Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China,* 43(4) COMMUNIST & POST-COMMUNIST STUD. 351 (2010); RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustafa eds., 2008) [hereinafter RULE BY LAW]; 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 Regime*s, 10 ANN. REV. L. SOC. SCI. 281 (2014).

sociopolitical entrenchment of legal institutions over the long term may very well constrain the Party's exercise of power—indeed, we would argue that it has already begun to do so—even if these constraints do not necessarily conform to the normative expectations of liberal democracies.

In this Article, we document the broad and powerful trend in Chinese politics toward legality and 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. These include increased financial independence from local governments, expanded jurisdiction over administrative disputes, the creation of circuit courts, greater authority to interpret statutes, substantially stronger enforcement powers, and heightened levels of legal proficiency and professionalism among judges.[9] It is probably safe to say that the courts have never in PRC history been as independent, professional, and powerful as they currently are.[10] 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 five or six years ago.[11] 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.[12] Our analysis centers around the 2018 constitutional amendments,[13] which ended term limits and created a new branch of government. Although some commentators suggest that they

9. *See infra* Section B.

10. For a brief history of the development of courts up to 1978, see PEERENBOOM, *supra* note 2, at 27-54. The status of courts rose substantially after 1978 and continuously so until 2007-2008. *See generally* Shen Kui, *Commentary on "China's Courts: Restricted Reform,"* 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). We argue in Part II that courts 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.

11. Minzner, *Turn Against Law*, *supra* note 1; Liebman, *Restricted Reform*, *supra* note 1.

12. *See* discussion *infra* Section III.B.

13. Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) (Constitution of the People's Republic of China) (2018).

demonstrate Xi's disregard, if not outright disdain, for rules and norms,[14] 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 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. Far from diluting the constitution's sociopolitical salience and significance, 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.[15] Whereas previous regimes in the 1980s and 1990s were happy to allow the former,[16] Xi has conspicuously turned against federalism,[17] and must therefore pursue the latter

14. *See, e.g.*, Feldman, *supra* note 3; Nathan, *supra* note 3.

15. *See* Maria Edin, *State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective*, 173 CHINA Q. 35 (2003); *see also* 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); 7 POLICY IMPLEMENTATION IN POST-MAO CHINA (David M. Lampton ed., 1987); Zheng, *supra* note 16.

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

17. For an overview of political developments under Xi, see ELIZABETH C. ECONOMY, THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE

strategy of enhancing control through legal reform.[18] 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.[19] Because informal community-based institutions are less functional under conditions of high demographic mobility,[20] 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, the people of China have undergone a sort of "legal awakening."[21] This has given the legal system—even the aloof and rarely invoked Constitution—a social significance and prestige that Party leaders have come to grips with only in the past several years.[22] 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, during which legal institutions were treated with evident skepticism, even hostility.[23]

The new political emphasis on legality and legal legitimation is therefore, at least in part, a straightforward response to underlying

(2018); CHENG LI, CHINESE POLITICS IN THE XI JINPING ERA: REASSESSING COLLECTIVE LEADERSHIP (2016); Zhao, *supra* note 1.

18. *Compare* ECONOMY, *supra* note 17, at 38 (Federalism one of the "five nos" announced in 2011), *with* ZHENG, *supra* note 16, at 31-72 (discussing de facto federalism in earlier eras).

19. *See* Montinola, Qian & Weingast, *supra* note 16; *see also* Xiaodong Zhu, *Understanding China's Growth: Past, Present, and Future*, 26 J. ECON. PERSP. 103 (2012; Chenggang Xu, *The Fundamental Institutions of China's Reforms and Development*, 49 J. ECON. LITERATURE 1076 (2011). 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) (unpublished manuscript) (on file with authors).

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

21. *See* discussion *infra* Section II.D.

22. *See* discussion *infra* Part IV.

23. *See* discussion *infra* pp. 12-14.

changes in social sentiment, which were in turn encouraged by policy choices made as far back as the early 1950s, or even earlier.[24] After decades of on-and-off ideological and institutional investment in building "the socialist rule of law,"[25] the legal system now provides a powerful opportunity structure for the Party to draw on for legitimacy. Furthermore, by turning to the law now, the Party will likely continue to increase the sociopolitical salience and importance of legal institutions down the road. 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 and the other in social sentiment and ideology—are 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 Article makes a number of empirical and theoretical contributions. For scholars of Chinese law, it provides the first comprehensive survey of judicial and constitutional developments in the Xi Jinping era.[26] More importantly, it pushes strongly against

24. LUBMAN, *supra* note 1, at 75-79 (discussing tentative steps toward "regularization of law in early 1950s).

25. *See* Fu, *supra* note 1; CHINA'S LONG MARCH TOWARD RULE OF LAW, *supra* note 2; AUTHORITARIAN LEGALITY IN CHINA, *supra* note 8; *see also* Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43 (2001). On pre-1978 investment, see JENNIFER ALTEHENGER, LEGAL LESSONS: POPULARIZING LAWS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1989 (2018) (discussing legal education campaigns in the Mao Era).

26. Scholars have provided shorter comments on judicial reform but no systematic survey. *See* Liebman, *Law-Stability Paradox*, *supra* note 1; Peerenboom, *supra* note 1; Minzner, *Legal Reform*, *supra* note 1; deLisle, *supra* note 1. There have been no articles on the 2018 constitutional amendments, and only a few on post-2012 constitutional discourse. *See* 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.

the conventional wisdom that law is increasingly, politically unimportant in China,[27] 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,[28] 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.[29] In fact, the factional instability that is inherent in 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.[30] The Chinese case adds much 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" political and economic planning

27. *See* 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.

28. Moustafa, *supra* note 8, at 1 ("[U]ntil 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.").

29. *See* sources cited *supra* note 8.; *see also* CONSTITUTIONS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Alberto Simpser eds., 2014); ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP (2000); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391 (2015).

30. 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 & SIMPSER, *supra* note 29. 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 a population that demands law-oriented governance and considers it a condition of political legitimacy. *See* discussion *infra* Part IV.

concerns and, perhaps more importantly, "demand side" social sentiment.[31]

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 letter of the law is enforced more rigorously and afforded greater political respect.[32] We are not asserting that the Party-state is moving toward the *rule of law* in which the exercise of regular political power[33] at all levels is effectively constrained and regulated by law, or toward some sort of 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.[34] On its own terms, Chinese law, including the constitution, simply does not attempt to do that,[35] and we observe no distinct trend towards that kind of substantive constitutionalism. Our descriptive claims are much narrower: the judiciary has become much more independent, professional, and powerful under Xi, and the Constitution now plays a larger role in high politics and the construction of political legitimacy. These changes likely facilitate legal compliance by other governmental entities, including lower Party offices, but they create no direct

31. *Cf.* Jerome Cohen, *Xi Jinping's Aspirations,* JERRY'S BLOG (Mar. 17, 2018), http://www.jeromecohen.net/jerrys-blog/2018/3/16/xi-jinpings-aspirations ("[P]ersonalistic one-man rule enhanced by efficient Party controls of all aspects of life."); Shirk, *supra* note 1 (on Xi's political style).

32. We use "legality" in the most conventional sense of the word: "attachment to or observance of law." *Legality*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003).

33. We contrast this with constitutional politics. On this distinction, see JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW (2005); BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 1: FOUNDATIONS (1993).

34. 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. *See* 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. *See* 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).

35. This is especially true after the 2018 constitutional amendments, which wrote the Party's leadership into the constitution but placed no formal constraints on how the Party should exercise that leadership. But even before then the consensus among scholars was that the constitution simply did not touch upon the Party leadership. *See* Xin He, *The Party's Leadership as a Living Constitution in China*, 42 HONG KONG L.J. 73 (2012); *see also* discussion *infra* Section II.C.3.

constraint on the Party leadership's authority. If anything, they probably enhance it.

That said, we also believe that it is a serious mischaracterization to say that 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."[36] The bottom-up, demand-side 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 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.

The remainder of the Article 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.

II. "TURN AGAINST LAW," OR TOWARD IT?

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.[37] He argued that, from the perspective of the CCP, post-1978 legal reforms had generated unwanted by-products. These legal reforms, which had largely relied on building up capacity in the legal system as a basis for economic development, included widespread use of litigation, social protest, and, most disturbingly of all, the emergence in the early 2000s of a set of rights-promoting *weiquan* lawyers, who sought to use the law to constrain the Party-

36. For a discussion of the finer implications of the concept "rule by law," see PEERENBOOM, *supra* note 2, at 138-39; *see also* Xin Chunying, *Postmodern Jurisprudence: An Inquiry into the Future of Rule by Law*, 5 SOC. SCI. CHINA 59 (2000) (discussing Chinese jurisprudence related to this concept).

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

state itself.[38] As Minzner documented, this led to a backlash under President Hu Jintao, which included a deemphasis on formal law and court adjudication and the subjugation of judicial power to political imperatives.[39] The shift was perhaps best encapsulated by the appointment of Wang Shengjun, a man with no legal training, as the President of the Supreme People's Court in 2008.[40] The Party sought to promote mediation instead of formal law as the preferred means of resolving social disputes, an institutional embodiment of President Hu Jintao's "Harmonious Society."[41] Minzner projected these efforts forward to suggest that legality was on a long-term path of decline.[42]

Minzner was not alone in his criticism of the 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."[43] 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.[44] Benjamin Liebman, too, noted that China's leaders 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.[45] Unlike Minzner, however, he described this as a "law-stability paradox" in which the capacity and

38. Hualing Fu, *Embedded Socio-Legal Activism in China: The Case of Yirenping*, 42 HONG KONG L.J. 245 (2012); 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. 669, 673-79 (2010); Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. 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).

39. Minzner, *Turn Against Law*, *supra* note 1, at 943-47.

40. Taisu Zhang, *Reinterpreting the Supreme People's Court of China*, 62 COLUM. J. ASIAN L. 1, 4 (2012).

41. 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 6.

42. Minzner, *Turn Against Law*, *supra* note 1; *see also* MINZNER, END OF AN ERA *supra* note 1, at 102-105 (providing and rejecting an account of increasing institutionalization of the legal system).

43. LUBMAN, BIRD IN A CAGE, *supra* note 1; *see also* 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); Jerome A. Cohen, *Reforming China's Civil Procedure: Judging the Courts*, 45 AM. J. COMP. L. 793 (1997); PILS, *supra* note 1.

44. LUBMAN, BIRD IN A CAGE, *supra* note 1.

45. Liebman, *supra* note 6.

independence of the legal system oscillated over time between growth and regression.[46]

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."[47] As a result, the literature regularly portrays the judicial system as weak and politicized, despite some efforts to change it,[48] and regards the Chinese Constitution as almost completely ineffective.[49]

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,[50] 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

46. *Id.*

47. *See, e.g.*, Stéphanie Balme, *Local Courts in Western China: The Quest for Independence and Dignity*, *in* JUDICIAL INDEPENDENCE IN CHINA 154 (Randall Peerenboom ed., 2010); 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); Xin He, *The Judiciary Pushes Back: Law, Power, and Politics in Chinese Courts*, *in* JUDICIAL INDEPENDENCE IN CHINA 180 (Randall Peerenboom ed., 2010); LUBMAN, BIRD IN A CAGE, *supra* note 1; WANG, *supra* note 8 (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); *see also* Ji Li, *The Power Logic of Justice in China*, 65 AM. J. COMP. L. 95 (2017) (arguing that Chinese judicial decision-making is fundamentally driven by power considerations); Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37 (2016) (same); Donald C. Clarke, *The Execution of Civil Judgements in China*, 141 CHINA Q. 65 (1995). *But see* Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions*, *in* JUDICIAL INDEPENDENCE IN CHINA 69 (Randall Peerenboom ed., 2010).

48. Xin He, *The Politics of Courts in China*, 2 CHINA L. SOC'Y REV. 129 (2017); Ling Li, *supra* note 47.

49. Kellogg, *supra* note 38; *see also* Qianfan Zhang, *On the Selective Application of the Chinese Constitution*, 2 PEKING U. L.J. 4, 6 (2014); Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 INT'L J. CONST. L. 950 (2010; 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).

50. 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, 97 (C. Stephen Hsu ed., 2003); Peerenboom, *supra* note 1.

of the same bureaucratic rank.[51] The Supreme People's Court (SPC) is, of course, clearly incapable of challenging the Party leadership,[52] but the claim is that this weakness extends all the way down to local courts and governments.[53] 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.[54] Some scholars conclude that Chinese courts, like courts in other authoritarian regimes, are often mere pawns of the state and have little judicial independence,[55] even as they observe that "the regime and the judiciary have long emphasized judicial fairness and experienced progress in dispute resolution."[56]

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 Constitution wields virtually no influence over high politics.[57] 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 no one would argue that it plays any major role in high politics.[58] 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,

51. Ling Li, *supra* note 47.

52. The Supreme People's Court is the highest judicial organ in the PRC, and embedded in the broader institutional and political context of Chinese politics. Zhang, supra note 40. Judicial constitutional review does not exist in China. Kellogg, *supra* note 38. Beyond that, the Court simply has no political capacity to review or even question any decision made by the Party leadership. Zhang, *supra* note 40, at 6.

53. Minzner, *Turn Against Law*, *supra* note 1, at 958.

54. He, *supra* note 48.

55. *Compare* RULE BY LAW, *supra* note 8, at 1-2 (summarizing and criticizing the conventional wisdom that authoritarian courts are mere "pawns"), *with* He, *supra* note 48, at 131, 135 ("[Counterarguments] may have some merit, but they cannot alter the fact that Chinese courts indeed lack judicial independence.").

56. He, *supra* note 48, at 131.

57. *See* Suisheng Zhao, *The China Model: Can It Replace the Western Model of Modernization?*, 19 J. CONTEMP. CHINA 419 (2010); *see also* 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); *see also* sources cited *supra* note 47.

58. Clarke, *supra* note 50, at 103-09 (arguing that the PRC Constitution is "perhaps the least important document" in the legal system).

and said nothing about its institutional composition or sociopolitical position.[59] The true seat of power in Chinese politics, the Party's Politburo Standing Committee (PSC), goes completely unmentioned.[60] Add to this the fact that the courts possess no authority of constitutional review, and that the entity formally imbued with this power, the Standing Committee of the National People's Congress (NPCSC), is directly controlled by a member of the PSC,[61] and it is altogether unsurprising that scholars have attached meager to no political or legal significance to the constitution. Even those who have argued that the NPCSC does perform a kind of *a priori* constitutional review have found such review only in relatively marginal matters, rather than major policy areas.[62] Under this conventional wisdom, the Party leadership has rarely, if ever, taken 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.[63]

The ascent of Xi Jinping to the position of General Secretary of the Chinese Communist Party in the latter part of 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,[64] 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 campaign[65] and pushed

59. Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) (Constitution of the People's Republic of China) (2004) [hereinafter 2004 Constitution].

60. *Id.*

61. 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 (Hualing Fu et al. eds., 2007); *see also* TONY SAICH, NATIONAL PEOPLE'S CONGRESS: FUNCTIONS AND MEMBERSHIP 2-5 (2015).

62. *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).

63. *See* sources cited *supra* note 57.

64. Taylor Soper, *Full Text: China President Xi Gives Policy Speech in Seattle, Wants to Fight Cybercrime with the U.S.*, GEEKWIRE, (Sept. 22, 2015, 11:56 PM), https://www.geekwire.com/2015/full-text-china-president-xi-gives-policy-speech-in-seattle-pledges-to-fight-cybercrime-with-u-s/.

65. Hualing Fu, *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); LI, *supra* note 17, at 9; *see also* Samson Yuen, *Disciplining the Party: Xi Jinping's Anti-Corruption Campaign and its Limits*, 3 CHINA PERSP. 41 (2014); Shirk, *supra* note 1, at 65; Cohen, *supra* note 31.

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.[66] This altogether pessimistic position emphasizes, in particular, the ongoing crackdown on lawyers' and advocacy groups' civil rights activism 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 perspective: in their view, the Chinese government reaps substantial benefits from political investment in legality, despite these crackdowns, including more effective socioeconomic dispute resolution, stronger control over local agents, and some measure of political legitimacy.[67] The government therefore sincerely pursues legal reform from time to time, such as 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.[68] 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.[69]

66. Jerome Cohen, *China's Latest Legislative Effort and the Rule of Law*, JERRY'S BLOG (Mar. 10, 2017), http://www.jeromecohen.net/jerrys-blog/chinas-latest-legislative-effort; Lubman, *supra* note 1; Cohen, *supra* note 3; *see also* 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/./; Nancy Tang et al., *China's 'Rule by Law' Takes an Ugly Turn*, FOREIGNPOLICY.COM (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/. Such criticism has, of course, spiked after the 2018 constitutional amendments. *See* sources cited *supra* note 3.

67. Fu, *supra* note 65; Fu, *supra* note 1; Liebman, *Law-Stability Paradox*, *supra* note 1.

68. Fu, *supra* note 1.

69. 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.[70] Scholars have therefore been slow and more than a little hesitant in coming to terms with the scope and significance of recent developments under Xi.

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 the first 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. 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[71] and that China is entering a phase of institutional development where the sociopolitical status of law and courts has become largely self-reinforcing.

A. 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.[72] 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

70. Kellogg, *supra* note 26 (discussing an episode in post-2012 constitutional discourse).

71. *See infra* Section I.D.2.

72. *See supra* text accompanying notes 47-55.

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.

1. 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.[73] 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.[74] 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.[75] In many ways, these measures echoed the broader effort made by the Hu Jintao regime to create a "harmonious society" in which

73. Fu & Cullen, *supra* note 1; Minzner, *Turn Against Law*, *supra* note 1; Liebman, *supra* note 6.

74. 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, http://rmfyb.chinacourt.org/public/detail.php?id=106477; Minzner, *Turn Against Law*, *supra* note 1, at 937; Liebman, *supra* note 6; *see also* Zang Dongsheng, *Rise of Political Populism and the Trouble with the Legal Profession in China*, 6 HARV. CHINA REV. 79, 83 (2010); Randall Peerenboom, *Between Global Norms and Domestic Realities: Judicial Reforms in China*, LAWASIA J. 1, 7 (2010); Eva Pils, *Yang Jia and China's Unpopular Criminal Justice System*, HUMAN RIGHTS IN CHINA (Apr. 1, 2009) https://www.hrichina.org/en/content/3702 (discussing the SPC's embracement of populism under Wang Shengjun).

75. 26 Xiang Zhibiao Fangzhi Anjian Yinjiang Chaoshenxian (26 项指标防止案件隐形超审限) [The "26 indicators" Issued by the Supreme Court Prevent the Invisible Exceeding of Trial Limit of Cases], SICHUAN FAZHIBAO (四川法制报) [Legal Newspaper of Sichuan] (2014), http://legal.scol.com.cn/2012/03/16/20120316224149408551O.htm.

private conflict receded and state-society relationships improved.[76] 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.[77]

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.[78] 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.[79] 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 slogan for desirable judicial behavior.[80] The *People's Daily*, the Party's primary newspaper, went as far as to openly criticize the government for "pursuing mediation and withdrawal in an unbalanced manner," and cautioned against the use of numerical quotas to evaluate judicial performance.[81] 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."[82]

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76. *See* source cited *supra* note 74.

77. *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] (Mar. 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).

78. *See* discussion *infra* pp. 64-73.

79. *See* Liebman, *Law-Stability Paradox*, *supra* note 1.

80. Remin Fayuan Disige Wunian Gaige Gangyao [Fourth Five-Year Plan of the People's Courts], 2015(12) ZUIGAO RENMIN FAYUAN GONGBAO [Public Announcements of the Sup. People's Ct.] [hereinafter Fourth Five-Year Plan], SUP. PEOPLE'S CT. GAZ., http://www.iolaw.org.cn/showNews.aspx?id=41327.

81. Wang Bixue, *Qiemo Pianmian Zhuiqiu Tiaojielü Chesulü* [Never Pursue Mediation Rates and Case Wtihdrawal Rates for Their Own Sake], RENMIN WANG [People's Net] (Jan. 22, 2014), http://opinion.people.com.cn/n/2014/0122/c1003-24190158.html.

82. Ma Jian, *Shixian Shenpan Fuwu Shehui Jingji Fazhan de Xin Changtai* [Realizing the New Normal of Using Adjudication to Support Social and Economic Development],

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*"), in which the committee laid out a number of principles and objectives for legislative, judicial, and constitutional reform.[83] 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.[84] 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 reforms addressed 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.[85] 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 compensation levels—relative to both lawyers and, more alarmingly, other government employees.[86] Although judges were

RENMIN FAYUAN BAO [People's Daily] (May 14, 2015), https://www.chinacourt.org/article/detail/2015/05/id/1617615.shtml.

83. *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] RENMIN RIBAO [People's Daily] (Oct. 29, 2014), http://cpc.people.com.cn/n/2014/1029/c64387-25927606.html.

84. 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).

85. Remin Fayuan Dierge Wunian Gaige Gangyao [The Second Five-Year Plan of the People's Courts] [hereinafter Second Five-Year Plan], (promulgated by the Sup. People's Ct., Oct. 26, 2004, effective Jan. 1, 2005), SUP. PEOPLE'S CT. GAZ. 12, http://www.law-lib.com/law/law_view.asp?id=120832; Fourth Five-Year Plan, *supra* note 80.

86. Xia Zhou, *Faguan de Zunronggan liNa Qule?* [Have Judges Lost Their Sense of Prestige?], NANFANG ZHOUMO [Southern Weekend] (May 27, 2010), 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],

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, such as smaller bonuses and less access to state-subsidized housing.[87] As a result, morale was low and personnel attrition relatively high.[88]

To be fair, this was a long-standing 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. Nevertheless, the Party leadership's response had been distinctly lukewarm during the Hu Jintao years, and no major changes were made.[89] Shortly after Xi's ascension, however, things took 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.[90] Most importantly, judge and prosecutor salary levels would be detached from the standard government employee schedule and placed on a higher plane. This

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RENMIN WANG [People's Net] (Mar. 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//politics/2015-05/25/c_1115399272.htm.

87. *See* sources cited *supra* note 86.

88. *Id.*

89. The problem of personnel attrition was flagged in Second Five-Year Plan. *See supra* note 85. 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. *See* 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 (Mar. 13, 2016), http://topics.caixin.com/2016-03-13/100919588.html?sourceEntityId=100920637.

90. Zhongyang Quanmian Shenhua Gaige Lingdao Xiaozu [Central Leading Group for Deepening Overall Reform] [hereinafter CLGDOR], introduced the reforms. *See, e.g.*, 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); 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); 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). 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], RENMIN FAYUAN BAO [People's Daily] (May 3, 2017), http://rmfyb.chinacourt.org/paper/html/2017-05/03/content_125001.htm?div=-1.

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 judges that could independently adjudicate cases.[91] 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.[92] 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.[93]

Once the basic principles were in place, implementation was swift: by early 2017, nearly 90% of judges nationwide were now subject to the new quota system.[94] By June of the same year, 21 provincial-level regions had implemented uniform management of lower courts, and several had introduced the new judicial pay scale, with nation-wide implementation soon to follow.[95] In some regions that implemented these reforms, judicial salaries were some 40% higher than other government officials of the same rank. Although complaints about "losing talent" still appeared in the SPC's yearly work reports following these reforms, the language employed became substantially milder: "some courts have suffered unusual losses of talent,"[96] rather than "as a general matter, the loss of talent is a serious problem."[97]

The rise in compensation levels have allowed the courts to recruit more ambitiously. After the previous major revision of the

91. 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], ZHONGGUO FAYUAN WANG [China Courts Net] (Mar. 23, 2016), https://www.chinacourt.org/article/detail/2016/03/id/1827042.shtml.

92. *Id.*

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

94. *Woguo Fayuan Faguan Yuan'ezhi Gaige Shidian Gongzuo Jiben Wancheng* [Experimental Establishment of Judge Quotas Is Basically Completed], XINHUA NET (Feb. 13, 2017), http://www.xinhuanet.com/legal/2017-02/13/c_1120459608.htm.

95. Zhou Qiang, *Zuigao Renmin Fayuan guanyu Renmin Fayuan Quanmian Shenhua Sifa Gaige Qingkuang de Baogao* [Report of the Sup. People's Ct. on Comprehensively Deepening Legal Reform], NAT'L PEOPLE'S CONG. NET (Nov. 1, 2017), http://www.court.gov.cn/zixun-xiangqing-66802.html.

96. Zhou Qiang, Zuigao Renmin Fayuan Gongzuo Baogao [Annual Work Report of the Sup. People's Ct.] (Mar. 9, 2018), http://english.court.gov.cn/2018-03/09/content_35971310.htm.

97. Wang Shengjun, Zuigao Renmin Fayuan Gongzuo Baogao [Annual Work Report of the Sup. People's Ct.] (Mar. 11, 2012), http://www.gov.cn/test/2012-03/19/content_2094709.htm.

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—depending on one's educational level—have 1-3 years of legal work experience.[98]Under special circumstances, the law allowed the SPC to authorize exceptions permitting the employment of judges with only a vocational degree.[99] In late 2017, however, the National People's Congress announced plans to increase the minimum work experience requirement to five years and to remove the vocational degree exception.[100]

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 seven circuit courts, each staffed by one justice and around a dozen SPC judges, that each cover three to five provincial-level entities.[101] Beginning in early 2015, each circuit court established offices in one of the provincial capitals within their jurisdiction and exercises review powers over about a dozen categories of provincial-level cases. [102] These decisions carry the same legal authority as a regular SPC decision by offering the final word on any case that comes the circuit court. These decisions are also administratively treated as direct extensions of the SPC.[103] Strictly speaking, the creation of circuit courts adds nothing to the SPC's jurisdiction because it already had appellate jurisdiction over all

98. The Judges' Law is the basic statute governing selection, qualifications, and careers of judges. *See* Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国最高人民法院公报) [Judges Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Jan. 1, 2002, effective Jan. 1, 2002), SUP. PEOPLE'S CT. GAZ. 102, art. 9, http://big5.gov.cn/gate/big5/www.gov.cn/banshi/2005-05/26/content_1026.htm.

99. *Id.*

100. Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国最高人民法院公报) [Judges Law of the People's Republic of China] (promulgated by the Sup. People's Ct., Sept. 1, 2017, effective Sept. 1, 2017), SUP. PEOPLE'S CT. GAZ. 117, art. 9, http://www.npc.gov.cn/npc/xinwen/2017-09/12/content_2028694.htm.

101. Fu Yulin, *Zuigao Renmin Fayuan Xunhui Fating de Zhineng Dingwei yu Quanwei Xingcheng* [The Role and Authority of the Circuit Courts of the Sup. People's Ct.], 4 CHINA. L. REV. 158, 214 (2014); Fang Le, *Zuigao Renmin Fayuan Xunhui Fating de Yunxing Jizhi* [The Operational Institutions of the Circuit Courts of the Sup. People's Ct.], 4 FAXUE [Legal Stud.] 99 (2017).

102. Fang, *supra* note 101, at 99; *see also* Lin Ping, *Zuigao Fa: Yijidu Duban jin Liuwan Zhixing An, Xunhui Fating Banli jin Bacheng Xinfang An* [The Supreme People's Court Handles Nearly 60,000 Enforcement Cases in the First Quarter, Circuit Courts Handle Nearly 80 Percent of Xinfang Cases], THE PAPER (May 7, 2018), https://www.thepaper.cn/newsDetail_forward_2116445.

103. Fu, *supra* note 101, at 214.

cases currently handled by the circuit court. Nevertheless, the circuit courts enhance the SPC's ability to monitor and control provincial and local courts because the circuit courts specialize in one or two economic macro-regions 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,[104] 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 carry a substantial amount of normative authority and an expectation of conformity.[105] 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% to 16-18 a year.[106] Combined with the creation of circuit courts, the guiding cases system provides the SPC with a substantially more powerful toolkit to strengthen lower court compliance and adjudicative consistency than it had in the past.

Finally, the Party leadership has also taken significant steps to bolster the judiciary's enforcement powers in civil disputes. A central feature of this effort is the creation of a Social Credit System, announced in 2014 by the State Council. This ambitious and somewhat misunderstood effort attempts to integrate previously disjointed sources of governmental information on private 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.[107] While loosely based

104. There are some 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). Yet this was the first time a PRC court had been allowed to issue guiding cases. *See* Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2217-24 (2016).

105. Jia, *supra* note 104, at 2223-24.

106. Zhidaoxing Anli [Guiding Cases], Zuigao Renmin Fayuan Gongbao (中华人民共和国最高人民法院公报) [Sup. People's Ct.] (Dec. 25, 2014), http://www.court.gov.cn/fabu-gengduo-77.html.

107. Shehui Xinyong Tixi Jianshe Guihua Gangyao [Principles of Planning and Constructing a Social Credit System], Guowuyuan Gongbao (国务院公报) [St. Council Gaz.], 2014, at Part II.4, http://www.gov.cn/zhengce/content/2014-06/27/content_8913.htm.

on financial credit reporting systems, the mechanism is far broader in scope and concept.[108]

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.[109] While some scholars have raised fears that this will subject some people to duplicative punishments,[110] the system will almost certainly improve compliance with court judgements and orders.[111] It has, in fact, already led to a range of sanctions such as individuals being barred from engaging in certain kinds of business, being denied financial credit, and being prevented from boarding flights and playing golf.[112] 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.

This laundry list of reform measures has raised the judiciary's institutional capacity, professionalism, and internal coherence to perhaps unprecedented levels. 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 Social Credit System promises to sharply accelerate its progress.

2. Institutional Independence

Whereas the last Section focused on the judiciary's internal professionalism and coherence, the following two Sections turn their attention to the judiciary's political status relative to other

108. *See* Dai, *supra* note 19, at 3.

109. 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.* at 25-26.

110. *Id.* at 43.

111. *Id.* at n.277.

112. *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 judgements or administrative decisions. The blacklist is governed by procedures and a joint memorandum of understanding among several agencies and party entities.

governmental and Party entities. This Section argues that the judiciary has become more independent from these entities, whereas the next argues that it has also gained greater authority to review their actions. 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: the decline of top-down political pressure to mediate and the detachment of judicial compensation from the standard governmental scale.[113] That said, neither of these changes, on its own, truly indicates a major shift in the judiciary's political stature. Although the Party leadership has withdrawn the mediation-related pressure 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.[114] 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.[115] 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,[116] allowing them to exert an enormous amount of influence

113. *See* discussion *supra* notes 80-81, 90-93.

114. Shirk, *supra* note 1, at 26; Cohen, *supra* note 31; LI, *supra* note 17; Yuen, *supra* note 65, at 41; Fu, *supra* note 65, at 138-39.

115. Yuhua Wang, *Court Funding and Judicial Corruption in China,* 69 CHINA J. 43, 48 (2013).

116. He Weifang, 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] (2002), http://article.chinalawinfo.com/article_ print.asp?articleid=19684; Wang Yaxin, Sifa Chengben yu Xifa Xiaolü: 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] (2010), http://www.civillaw.com.cn/article/default.asp?id=51198; Su Yongqin, Sifa Xingzheng Zuzhi de Fazhan Qushi: Cong Shenpan Duli yu Guojia Geifu Sifa

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.[117] Without these broader fiscal changes, simply detaching judicial salaries from the usual government compensation scale would have done very little for lower courts' independence and, given the traditional reluctance of local governments to fund judicial activity,[118] 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. Following Chinese political convention, these opinions meant that several provinces would implement experimental measures, followed by reassessment and potential nation-wide implementation a few years later.[119] 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 CLGDOR laid out concrete plans to create a separate pay scale.[120] Instead, the 2014 opinion focused on moving all judicial and procuratorial budget and personnel decisions to the provincial level, in order to "solve the deeper structural problems that impede

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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).

117. 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] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 15, 2013, effective Nov. 15, 2013), http://www.gov.cn/jrzg/2013-11/15/content_2528179.htm (identifying the removal of judicial budgets to the provincial level as a central area of reform); *see also* sources cited *supra* note 90 (initiating reforms to remove judicial budgets to the provincial level). The SPC's implementation plans in response to these documents are summarized in *Sifa Gaige Redian Wenda* [Questions and Answers on Hot Topics in Legal Reform], RENMIN FAYUAN BAO [People's Daily] (May 3, 2017), http://rmfyb.chinacourt.org/paper/html/2017-05/03/content_125001.htm?div=-1.

118. Wang, *supra* note 116.

119. CLGDOR, Framework Opinion, *supra* note 90.

120. CLGDOR, Plan for Independent Administrative Scale, *supra* note 90; CLGDOR, Plan for Salary Reform, *supra* note 90.

judicial fairness and limit judicial capacity."[121] 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.[122] Three months later, the Fourth Plenum of the 18th Party Congress formalized the framework opinions into official Party directives,[123] and by mid-2017, the SPC reported that eighteen provincial-level governments had completed the experimental reforms, with nationwide implementation presumably only a few years away.[124]

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 governments, provincial governments are both more detached from local adjudication and more sensitive to pressure from the center.[125] 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.[126] It goes without saying that the information and enforcement costs needed to ensure compliance at the county level is exponentially higher than at the province level. Especially in the Xi Jinping era, central control over provincial governance has escalated dramatically.[127]

This assumes, of course, that the central government *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 to cut down on

121. CLGDOR, Framework Opinion, *supra* note 90.

122. Fourth Five-Year Plan, *supra* note 80.

123. Clarke, *supra* note 1.

124. 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], THE PAPER (July 3, 2017), https://www.thepaper.cn/newsDetail_forward_1723657.

125. For for a general discussion on center-local relations in China, see YANG ZHONG, LOCAL GOVERNMENT AND POLITICS IN CHINA: CHALLENGES FROM BELOW (2001).

126. Zhonghua Renmin Gongheguo Xingzheng Quhua [Administrative Divisions of the People's Republic of China] (promulgated by the St. Council on the Admin. of Admin. Divisions, Nov. 20, 2018, effective Jan. 1, 2019), ST. COUNCIL GAZ. 32, http://www.gov.cn/test/2005-06/15/content_18253.htm.

127. Elizabeth C. Economy, *China's Imperial President: Xi Jinping Tightens His Grip*, 93 FOREIGN AFFAIRS 80, 80-82 (2014); Shirk, *supra* note 31, at 26.

political interference with judicial activity at all levels.[128] Under these regulations, all courts would be required—under pain of formal administrative sanction—to compile records of any undue external or internal political interference and submit these records to either a higher court or to the local Party Law and Political Affairs Office (LPAO) for review and action.[129] 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. [130] Within a year of this initial announcement, most provincial governments had published detailed plans to implement the regulations.[131] 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.[132] By 2016, a number of officials had already been publicly shamed under the new provisions, and many more had likely received internal sanction.[133]

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 likely 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

128. 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], (promulgated by the Central Party Leadership Admin. Office & St. Council Admin. Office, Mar. 30, 2015),

http://english.www.gov.cn/policies/latest_releases/2018/11/01/content_281476371228670.htm.

129. *Id.*

130. *Id.*

131. *See, e.g.*, 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] (promulgated by Sichuan Province Party Comm. Admin. Office & Sichuan Province People's Gov't Admin. Office, Aug. 1, 2016), http://news.sina.com.cn/c/2016-08-16/doc-ifxuxhas2008596.shtml; Zhao Yang & Wei Lei, *Guangdong dui "Lingdao Ganbu Ganyu Sifa" Chu Xize* [Guangdong Issues Detailed Rules on "Officials Intervening with Judicial Work"], THE PAPER (Nov. 7, 2015), http://www.thepaper.cn/newsDetail_forward_1393972.

132. Zhou Qiang, *Fangzhi Lingdao Ganbu Ganyu Sifa Gongzuo Shuping* [An Evaluation of Reform Measures Against Officials Intervening with Judicial Work], RENMIN FAYUAN BAO [People's Daily] (Dec. 16, 2015), http://www.court.gov.cn/shenpan-xiangqing-16333.html (summarizing measures taken by the SPC).

133. *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], XINHUA NET (Feb. 1, 2016), http://www.xinhuanet.com/local/2016-02/01/c_1117960559.htm.

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.

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 independence and constitutionalism under the Western model, and to diligently follow the Party's leadership.[134] Properly understood, "the Party" referred to here is the central Party leadership in Beijing, rather than Party offices of lower administrative levels—lower Party offices are expressly banned from interfering with judicial work under the 2015 regulations discussed above. [135] Following the central Party's dictates 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 soon[136]—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.

3. Judicial Checks and Balances

Beyond the increase in judicial independence vis-à-vis most of the government, there has been a significant expansion of the judiciary's authority to review and penalize illegal administrative activity over the past several years, making the judiciary a much more effective check against governmental abuse and overreach. This area has seen less activity—and certainly less decisive activity—

134. 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.

135. Regulations Against Interference, *supra* note 128.

136. *See* discussion *infra* pp. 34-38.

than those areas 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 take steps to strengthen it.[137] The development of judicial checks and balances, on the other hand, was both rhetorically and institutionally muted.[138] Judicial constitutional review, for example, remains politically unthinkable, and the one 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.[139]

The passage of the Administrative Procedure Law (APL, also known as the Administrative Litigation Law) in 1989 was arguably the only substantial step forward in this area throughout the pre-Xi Jinping era,[140] but it was nonetheless a very limited step. As scholars have long argued, the APL gave the courts very limited jurisdiction to review administrative activity: courts were given authority over only eight specific categories of individual administrative

137. Clarke, *supra* note 50, at 103-09; Peerenboom, *supra* note 1, at 6-8.

138. *See* He, *supra* note 48; He, *supra* note 47, at 180-181; Li, *supra* note 47; *see also* 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); Eric Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN L. 367, 376-78 (2011); Zhang, *supra* note 40, at 2.

139. The Qi Yuling case involved a student who stole another's test scores and obtained an education and job under a false identity. The victim sued and claimed a violation of her constitutional right to education. The lower courts upheld this claim, which was endorsed by a Supreme Court justice. *See* Tong, *supra* note 38, at 670-71; Kellogg, *supra* note 38, at 231.

140. Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Procedure Law of the People's Republic of China] [hereinafter APL] (promulgated by the President of the People's Republic of China, Apr. 4, 1989, effective Apr. 4, 1989), http://english.court.gov.cn/2015-09/11/content_21845451.htm; *see also* Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai Zhonghua Renmin Gongheguo Xingzheng Susongfa de Jueding [Decision of the Standing Committee of the Nat'l People's Cong. on Revising the Administrative Procedure Law] [hereinafter APL 2014-15 Revision] (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015), http://www.loc.gov/law/foreign-news/article/china-administrative-procedure-law-revised/.

enforcement, and no authority over administrative regulations that possess any kind of general binding force.[141] 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 grew very little after 1998, when the impact of the APL's initial passage seemed to plateau at around 100,000 cases a year.[142] 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.[143]

Placed within this context, the 2014 revision of the APL represents the most substantial expansion of judicial checks and balances in at least 25 years.[144] 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; and, second, it substantially expanded the scope of the judiciary's review power.[145] The former was, as noted above, part of a general push to eliminate political interference[146]—except by the Party leadership itself—but it was a particularly pressing problem in the context of administrative litigation, where governmental incentives to

141. Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832, 833-34 (1997); RULE BY LAW, *supra* note 8, at 58; He, *supra* note 47, at 186.

142. *See generally* Taisu Zhang, *Why the Chinese Prefer Administrative Petitioning Over Litigation*, SOC. STUD. 139 (2009). 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 (2012).

143. Jiang Bixin, *Wanshan Xingzheng Susong Zhidu de Ruogan Sikao* [Thoughts on How to Perfect the Administrative Litigation System], 1 ZHONGGUO FAXUE [Chinese Legal Stud.] 5 (2013).

144. *See* APL 2014-15 Revision, *supra* note 144. 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. *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] (promulgated by Standing Comm. Nat'l People's Cong., June 27, 2017, effective July 1, 2017), http://www.lawinfochina.com/display.aspx?id=23601&lib=law.

145. *See* 2014-15 APL Revision, *supra* note 141. The new APL 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.*

146. *See* discussion *supra* p. 28.

intervene were often at their highest.[147] In response, the revised APL 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."[148] 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 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.[149] 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.[150] 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.[151] 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.[152] In other words, the new APL not only expanded the judiciary's administrative review power, but in such a way to address one of China's most serious sociopolitical problems.

147. He Haibo, *Xingzheng Susong Chesu Kao* [A Study of Withdrawal in Administrative Litigation Cases], 2 ZHONGWAI FAXUE [Peking Univ. L. REV.] 129 (2001); *see also* He Haibo, *Kundun de Xingzheng Susong* [Administrative Litigation in Difficult Times], 2 HUADONG ZHENGFA DAXUE XUEBAO [J. East China Univ. of Pol. Sci. and L.] 57 (2012).

148. 2014-15 APL Revision, *supra* note 144, art. 3.

149. *Id.* art. 4.

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

151. *Id.*

152. *Id.*

One could argue that the power to review eminent domain was already implicit in the eight categories recognized by the previous APL—specifically, in the relatively vague category of "administrative actions that affect other personal and property rights"[153]—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 APL 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.[154] Scholarly opinion seemed to tentatively coalesce around the shapeless position that whether any specific incident was covered by the APL depended on its severity and scale, but there was ultimately little legal authority to support it.[155] 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.[156]

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.[157] 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% in 2013, moved back up to around 15% in 2016, suggesting that external political interference had indeed receded somewhat.[158] In another public

153. APL, *supra* note 140, art. 11(8).

154. Zhang Yu, *Nongcun Tudi Zhengshou Buchang Jiufen Xingzheng Susong Anjian Tanxi* [An Exploration of Administrative Litigation Cases Related to Rural Land Takings Compensation], JIANGXI SHENG JIUJIANG SHI ZHONGJI RENMIN FAYUAN [China Court Net] (Oct. 8 2012), http://jjzy.chinacourt.org/article/detail/2012/10/id/2606044.shtml.

155. *Id.*

156. 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], 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) (last visited Sept. 9, 2019).

157. Zhou Qiang, Zuigao Renmin Fayuan Gongzuo Baogao [Annual Work Report of the Sup. People's Ct.] (Mar. 21, 2016), http://www.court.gov.cn/zixun-xiangqing-17712.html (2016 report); Zhou Qiang, Zuigao Renmin Fayuan Gongzuo Baogao [Annual Work Report of the Sup. People's Ct.] (Mar. 15, 2015), http://gongbao.court.gov.cn/Details/41bf882b379cb6f24540decdf70250.html (2015 report); *see also* Qiang, *2018 Work Report*, *supra* note 96.

158. Li Yingfeng, *Min Gao Guan Shengsulü Shangsheng Shifang Jiji Xinhao* [The Rise of Plaintiffs' Victory Rates in Administrative Litigation Sends a Positive Signal], FAZHI RIBAO

display of the Party leadership's new commitment to constraining lower-level governmental entities through administrative litigation, the Legal Daily immediately cheered these new developments as major sign of progress: "any minor increase in the loss rate for administrative entities in the courts," it crowed, "represents a major step forward for judicial work."[159]

Even after these changes, judicial review of governmental activity remains 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.[160] 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 another set of judicial interpretations on the APL in early 2018 and once again expanded the judiciary's jurisdiction, this time by resolving in the affirmative a long-time debate among government entities over whether courts could review village-level administrative actions under the APL.[161] The judiciary can now realistically claim to be a central component of Xi Jinping's general campaign to "place [governmental] power within a cage."[162] Although that campaign—discussed in detail in Part III—has largely been focused against corruption,[163] both the courts and other governmental organs have advocated administrative litigation as another important bar in the "cage,"[164] and as the judiciary steps further into that role, its relative political stature will continue

[Legal Daily] (June 15, 2017), 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], PEOPLE'S DAILY (Nov. 5, 2014), http://finance.people.com.cn/n/2014/1105/c66323-25975462.html.

159. Li, *supra* note 158.

160. APL, *supra* note 140, art. 13.

161. Xingzheng Susong Fa Sifa Jieshi [Interpretation of the Administrative Procedure Law] (promulgated by the Sup. People's Ct., Feb. 7, 2018), SUP. PEOPLE'S CT. GAZ., 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).

162. Shi ge Jingji Xingzheng Dianxing Anli [Ten Model Cases on Economic and Administrative Litigation] [hereinafter SPC, *Ten Model Cases*] (promulgated by the Sup. People's Ct., Oct. 22, 2015), SUP. PEOPLE'S CT. GAZ., http://www.court.gov.cn/zixun-xiangqing-15843.html.

163. Neimenggu Zizhiqu 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], PEOPLE'S DAILY (Sept. 7, 2015), http://theory.people.com.cn/n/2015/0907/c40531-27552282.html.

164. SPC, *Ten Model Cases*, *supra* note 162.

to rise.

4. 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. By many accounts, during the five years prior to 2014, the central authorities systematically diluted the judiciary's core adjudicative functions and lessened its professional prestige.[165] Whatever the merits of that description, by 2014 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.[166] The first year of Xi Jinping's rule, 2013, had offered a change in rhetoric,[167] but it was not until 2014 that a huge wave of institutional reforms took place almost all at once, spearheaded by the CLGDR's framework opinions and the revision of the APL.[168] 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 been made under an increasingly centralized and autocratic regime.

These reforms are responsible—partially, at least—for the dramatic increase in judicial caseload over the past five years. Intuitively, the more professional and independent the courts are, the fairer and more effective they will be in adjudicating socioeconomic disputes and—assuming there is consistent social demand for such services—the greater their caseload will likely be.[169] This has indeed been the case: since 2014, with the major

165. *See, e.g.*, Minzner, *Turn Against Law*, *supra* note 1.

166. Zhou, *supra* note 89.

167. *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 *supra* notes 79-81.

168. Framework Opinion, *supra* note 90; APL, *supra* note 140.

169. 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

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.[170] By comparison, the annual civil and commercial caseload only grew by around 1.5 million cases across the entire Hu Jintao era (2003-2013).[171] Administrative litigation, as noted above, has shown a similar trend—not to mention that the courts have been able to handle all of this while reducing the number of judges authorized to directly adjudicate by some 40%. 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.[172] Chinese courts have struggled with judicial fairness in the past, favoring parties with 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.[173] 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

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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). *See* Zhou, 2018 Report, *supra* note 96. 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.

170. Qiang, 2015 Report, *supra* note 157; Qiang, 2018 Report, supra note 96.

171. Xiao Yang, Zuigao Renmin Fayuan Gongzuo Baogao [Annual Work Report of the Sup. People's Ct.] (Mar. 11, 2003), http://gongbao.court.gov.cn/Details/54e6bcf2941a766a043afde548717a.html (2003 report); Wang Shengjun, Zuigao Renmin Fayuan Gongzuo Baogao [Annual Work Report of the Sup. People's Ct.] (Mar. 10, 2013), http://gongbao.court.gov.cn/Details/9f1655cc4ce302bc9a1ef28902f9c0.html (2013 report).

172. *See* MINZNER, END OF AN ERA, *supra* note 1, at 103-09.

173. *See* LUBMAN, BIRD IN A CAGE, *supra* note 1; Clarke, *supra* note 47; *see also* 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 LEGAL STUD. 120 (2013); Ling Li, *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).

professionalism, but in reality, the courts may ignore legal rules as much as any other governmental organ. 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."[174]

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.[175] 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.[176] 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,[177] the overwhelming direction of post-2014 reforms has been to reduce such pressure. 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 Indicators are well known,[178] but it bears mention that China's ranking on this metric has, following a significant decrease during the latter part of the Hu Jintao era, increased every single year under Xi, and has now reached a new high. At the very least, this indicates

174. 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 173; He & Ng, *supra* note 173, at 845.

175. Fu, *supra* note 1; *see also* He, *supra* note 48, at 132 ("[Studies] are generally consistent with the analysis that enforcement of relevant laws is taking place and local protectionism is not rampant.").

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

177. *See generally* HUALING FU, MAPPING TERRORIST THREATS IN CHINA AND THE POLITICAL AND LEGAL RESPONSES (2010) (developing a typology of cases that involve external political pressure); Rachel Stern, *The Political Logic of China's New Environmental Courts*, 72 CHINA J. 53 (2014); *see also* Li, *Judicial Dependence in China*, *supra* note 47.

178 WORLD BANK GOVERNANCE INDICATORS, http://info.worldbank.org/governance/WGI/#home (last visited Sept. 9, 2019). For criticism and responses, see Daniel Kaufman, Aart Kraay & Massimo Mastruzzi, *Worldwide Governance Indicators Project: Answering the Critics* (World Bank Policy Research, Working Paper No. 4149, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=965077.

a general sense among legal professionals that Chinese courts are indeed applying the law now in a significantly more rigorous and predictable manner.[179]

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 toward 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. We do not have reason to believe that the current Party leadership is anything but extremely serious. The amount of administrative resources thrown into judicial reform in the few years since 2014 has been impressive. 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 opposition[180]—and yet, as of 2018, real 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.[181] Legal expertise and professionalism are ultimately what distinguish the courts from other branches of the government and are, therefore, the courts' 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.

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179. Another source of corroborating data is the World Justice Project, which surveys thousands of citizens in over 100 countries on many dimensions of the justice system—and large reaffirms the findings of the Rule of Law Governance Indicator. *See* WORLD JUSTICE PROJECT, https://worldjusticeproject.org/ (last visited Sept. 9, 2019). For comparisons between China and other countries, see WORLD JUSTICE PROJECT RULE OF LAW INDEX 2019, https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2019 (last visited Sept. 9, 2019).

180. *See* Minzner, *Legal Reform*, *supra* note 1; deLisle, *supra* note 1; Clarke, *supra* note 1.

181. *See* 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); Eric Ip, *supra* note 138, at 381-87; He, *supra* note 47, at 180-81; Zhang, *supra* note 40, at 2-3; Tong, *supra* note 38, at 671-74 (discussing the SPC's motivations behind the Qi Yuling case).

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 that it cares 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.[182] 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.

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,[183] 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 the 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

182. *See* discussion *infra* pp. 64-73.

183. *See* LUBMAN, BIRD IN A CAGE, *supra* note 1; Wang, *supra* note 8 (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); Ling Li, *Judicial Dependence in China*, *supra* note 47; Yulin & Randall, *supra* note 47; Balme, *supra* note 47, at 154; He, *supra* note 47, at 180; sources cited *supra* note 57; *see also* Ji Li, *The Power Logic of Justice in China*, 65 AM. J. COMP. L. 95 (2017) (arguing that Chinese judicial decision-making is fundamentally driven by power considerations); Donald C. Clarke, *The Execution of Civil Judgements in China*, 141 CHINA Q. 65 (1995). *But see* Peerenboom, supra *note* 47, at 69.

developments have only further bolstered its influence and significance.[184] Much of this argument rests upon our analysis—the first of its kind in any kind of academic publication—of the 2018 constitutional amendments. 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.[185] 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.[186] 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 potentially respectable constitution.[187] 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.[188] Functionally, formal constitutional review, if it existed at all, was at best unpredictable and usually insignificant.[189]

184. *But see* Clarke, *supra* note 50, at 103-09 (explaining that the constitution has a legitimating function despite its legal irrelevance).

185. Contrast this with Backer, *supra* note 34, at 4 (using the constitutionalism term to describe China).

186. Forsythe, *supra* note 134; Economy, *supra* note 17, at 37-38.

187. William C. Jones, *The Constitution of the People's Republic of China*, 63 WASH. U. L. Q. 707, 724 (1985); *see also* 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, 143-44 (1985).

188. *See* sources cited *supra* note 183.

189. Lin & Ginsburg, *supra* note 62, at 467.

Constitutional amendments were 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.[190]

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 twenty-five speeches over his ten 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.[191]

Xi has diverged from this pattern in terms of both frequency and substance. He has mentioned the term almost as many times in just five years at the helm as Hu did in ten, 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.[192] The language he has employed is usually generic—for example, "the Constitution is our fundamental law, the principle guideline for stable and peaceful rule, and the concentrated manifestation of the Party's and the

190. *See* 2004 Constitution, *supra* note 59. On the development of property rights in China, see Donald C. Clarke, *China's Stealth Urban Land Revolution*, 62 AM. J. COMP. L. 323 (2014).

191. 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). The total speech count is a rough number derived from searching for articles authored by Hu Jintao in Google Scholar using the keyword "宪法" (constitution).

192. *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], XINHUA NET (Mar. 12, 2018) [hereinafter *Guanyu Xianfa*], http://www.xinhuanet.com/politics/2018-03/12/c_1122527222.htm (identifying ten important statements on the constitution derived from four of Xi's speeches in particular); *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], XINHUA NET (Dec. 4, 2012), http://news.xinhuanet.com/politics/2012-12/04/c_113907206.htm, *translated in* http://lcbackerblog.blogspot.com/2013/05/xi-jingpings-constitutional-vision.html; *see also* Xi Jinping, Weihu Xianfa Quanwei, Tuijin Xianzheng Fazhan [Protect the Constitution's Authority, Promote the Development of Constitutionalism] (2013), http://www.cqvip.com/qk/71320x/2013001/747188905048495148494848 50.html; Xi Jinping, Keshou Xianfa Yuanze, Hongyang Xianfa Jingshen, Lüxing Xianfa Shiming [Obey the Constitution's Principles, Enhance the Constitution's Spirit, Realize the Constitution's Destiny] (2012), http://www.cqvip.com/qk/81238x/201224/44414056.html.

People's will"[193]—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.[194] 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 five years of Xi's rule, which represents a frequency increase of around 30%.[195] Picking up on Xi's apparent interest in the concept, a highly unusual public debate over constitutionalism, arguably the only one of its kind in PRC history, broke out in the Chinese media, including in several state-run or Party-run outlets, from 2012 to 2013, drawing widespread interest from scholars, judges, and government officials.[196] Participants staked out positions that ranged from mainstream and conventional—that "socialist constitutionalism" was desirable, but full blown "Western" constitutionalism was not—to 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.[197] 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."[198]

193. *Guanyu Xianfa*, *supra* note 192.

194. Creemers, *supra* note 26, at 91.

195. These numbers are derived from a search for "宪法" (constitution) in PEOPLE'S DAILY TEXT AND IMAGE DATABASE, http://data.people.com.cn/rmrb/20180714/1?code=2 (last visited Sept. 11, 2019), using the parameters "Nov. 8, 2002-Nov. 7, 2012" and "Nov. 8, 2012-Nov. 7, 2017."

196. *See* Creemers, *supra* note 26; Kellogg, *supra* note 26.

197. 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, supra note 26, at 367-97.

198. 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.qstheory.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

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-constitutionalism position nevertheless suggested a significant measure of government tolerance, and almost certainly boosted the constitution's social visibility.[199]

Several months after the debate wound down, Xi again sparked widespread social interest in constitutionalism 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 Constitution."[200] Shrewd observers would probably note that the same speech also emphasized the need for "Party leadership"[201]—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."[202]

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.[203] 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

[People's Daily] (Oct. 24, 2014), http://politics.people.com.cn/n/2014/1024/c70731-25904899.html.

199. Creemers, *supra* note 26; Kellogg, *supra* note 26.

200. 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 Nat'l People's Cong.] (Sept. 5, 2014), http://cpc.people.com.cn/n/2014/0906/c64093-25615123.html.

201. *Id.*

202. *Decision of the 4th Plenum of the CCP Central Committee*, *supra* note 83.

203. *Id.*

include questions about the constitution in all future high school admissions examinations.[204]

While all of this was going on, the Party-controlled media took considerable pains to emphasize that the model of socialist constitutionalism advocated for by Xi and other Party leaders was fundamentally different from "Western 'Constitutionalism.'" [205] 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.[206] 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."[207]

One might be skeptical as to whether "constitutionalism" thus defined is really "constitutionalism" at all, but that is not our concern in this Article. 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. Compared with previous eras, when "Party leadership" was emphasized at least as strongly but serious public discussion of constitutionalism was often absent,[208] post-2012 political discourse has provided a major dose of stimulus to those who have argued, normatively and positively, for the

204. 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] (promulgated by the Ministry of Education, Nov. 21, 2014), http://www.moe.gov.cn/srcsite/A02/s7049/201411/t20141121_178775.html.

205. Guo, *supra* note 198.

206. *Id.*

207. Forsythe, *supra* note 134.

208. Kellogg, *supra* note 26, at 339 ("[T]he first ten months of 2013 saw a level of conversation on constitutionalism not seen in China in nearly a decade.").

political "activation" of the constitution.[209] The simultaneous emphasis on the Party's control actually *reinforces* this interpretation: evidently, the Party now considers it something that needs to be controlled ever more carefully and explicitly.[210]

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.[211] 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 amending the constitution began almost immediately after the CCP's 19th Party Congress in October of 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.[212] 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,[213] 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 assets.[214] Given that Xi had already elevated his own somewhat ambiguously defined political doctrine, "Xi Jinping Thought," to the same status

209. At the very least, the sociopolitical salience of the issue has risen significantly. *See* Creemers, *supra* note 26; Kellogg, *supra* note 26.

210. Guo, *supra* note 198; Qiu, *supra* note 198.

211. Kellogg, *supra* note 26, at 344-46.

212. 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.

213. 2004 Constitution, *supra* note 59.

214. *Id.*

as Mao Zedong Thought in the Constitution of the Chinese Communist Party,[215] 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.[216] 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.[217] 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.[218] In fact, since 1993, the two positions have always been held by the same person. As early as 2016, speculation emerged that Xi might want to abandon this norm and potentially rule for much longer. There were two layers to the speculation: first, whether he would try to rule for longer than the customary two terms, and second, how he might accomplish that.[219] 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.

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215. An Baijie, *Xi Jinping Thought Approved for Party Constitution*, CHINA DAILY (Oct. 24, 2017), http://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-10/24/content_33644524.htm.

216. 2004 Constitution, *supra* note 59.

217. Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) (Constitution of the People's Republic of China) (2017) [hereinafter 2017 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.

218. 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.").

219. Tom Mitchell, *Speculation Grows Xi Jinping Will Defy China Rule on Leadership Retirement*, FIN. TIMES (Oct. 11, 2016), https://www.ft.com/content/09cc1044-8f77-11e6-a72e-b428cb934b78; 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.

The formal announcement of a constitutional amendment to remove presidential term limits on February 25, 2018, and its eventual enactment on March 11, 2018, came as a surprise to most China watchers, [220] 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 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.[221] 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.[222] 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 costs 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 this 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 could afford to "waste" some of it on a luxury good, cost-benefit

220. *CPC Proposes Change on Chinese President's Term in Constitution*, XINHUA NET (Feb. 25, 2018), http://www.xinhuanet.com/english/2018-02/25/c_136998770.htm. For immediate reactions, see *Xi Won't Go*, CHINAFILE (Feb. 25, 2018), http://www.chinafile.com/conversation/xi-wont-go.

221. 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 59, art. 79-84.

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

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.[223] 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 is 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.[224] The Second Plenum of the 19th Party Congress, held in January 2018, focused on constitutional amendments, and afterwards produced a public report that mentioned virtually every other item in the eventual March amendments except the removal of term limits.[225] A week later, the Central Committee voted on a formal proposal to amend the constitution, but quite unusually, did not immediately publish its contents.[226] 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.[227]

223. *See* discussion *supra* notes 3, 66.

224. The timing of the Third Plenum, in particular, 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?], COMMUNIST PARTY OF CHINA NEWS NETWORK (Aug. 28, 2013), 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).

225. *Communique of the Second Plenary Session of the 19th CPC Central Committee (Full Text)*, CAIXIN (Jan. 19, 2018), http://www.caixin.com/2018-01-19/101200293.html.

226. *Proposal of the Central Committee of the Communist Party of China to Amend the Contents of the Constitution*, XINHUA NET (Feb. 25, 2018), http://www.xinhuanet.com/2018-02/25/c_1122451187.htm.

227. *Id.*

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 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.[228] 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 presumably be 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 specifically of Xi himself,

228. 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, demand 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), https://www.theepochtimes.com/chinese-communist-party-to-eliminate-leader-term-limit-while-xi-jinping-battles-with-faction_2451236.html. It is hard to place too much trust on this particular source given its traditional hostility to the CCP, but 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], BOXUN (Feb. 27, 2018), 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], VOICE OF AMERICA (Feb. 27, 2018), https://www.voachinese.com/a/china-presidential-20180226/4271604.html.

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 fifteen years ago and that this "legalization" of social sentiment is only accelerating.[229] As both the Party leadership's post-2013 judicial reform campaign and its ramping up of constitutional discourse suggest, the Party leadership 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 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,[230] 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. 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 they are, therefore, eager to remove any incompatibility between personal political ambitions and the formal

229. *See* discussion *infra* Part IV.

230. 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).

legal structure of the state. In that sense, the constitutional amendments are 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-constitutionalism propaganda campaign that accompanied the amendments 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.[231] Party officials and media commentators spent 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.[232] 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."[233] These kinds of arguments, which flooded Chinese media platforms from late February to early April in 2018, may very well have emerged primarily to support the amendments, but they nonetheless reflect a political mentality in which the amendments are only deemed publicly acceptable if they are both preceded and reinforced by a general commitment to legality.

231. *See, e.g.*, *Xianfa Xiugai Shi Tuijin Quanmian Yifa Zhiguo de Zhongda Jucuo* [The Constitutional Amendment is a Major Step in Comprehensively Governing the Country According to Law], QIU SHI [Seeking Truth] (June 2018), http://www.qstheory.cn/dukan/qs/2018-03/15/c_1122534637.htm; Li Lin, *Yi Xianfa Shishi Tuijin Quanmian Yifa Zhiguo* [Advancing "Comprehensively Governing the Country According to Law" by Implementing the Constitution], GUANGMING DAILY (Mar. 9, 2018), http://epaper.gmw.cn/gmrb/html/2018-03/09/nw.D110000gmrb_20180309_1-05.htm; *Yifa Zhiguo Shouxian Yao Yixian Zhiguo* [Ruling the Country According to Law First Requires Ruling the Country According to the Constitution], PEOPLE'S DAILY (Feb. 27, 2018), http://opinion.people.com.cn/n1/2018/0227/c1003-29837965.html.

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

233. *Id.*

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,[234] or the new requirement that all civil servants must swear an oath of allegiance to the constitution when entering office,[235] 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.[236]

As noted above, the constitution had previously mentioned the CCP only in its preamble. [237] This has always been a source of embarrassment for those who would otherwise like to argue that China is morphing into a "constitutional state,"[238] 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 of China." [239] This gives the CCP the clear constitutional status it previous 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 exercises investigation powers parallel, and sometimes superior, to other constitutionally-recognized branches of government. [240] The Commission now exercises supervision powers over all public employees, including government officials, state owned enterprises, other government managed institutions,

234. Zhonghua Renmin Gongheguo Xianfa Xiuzheng An [People's Republic of China Constitutional Amendment] (promulgated by the Nat'l People's Cong., Mar. 11, 2018) [hereinafter 2018 CONSTITUTION] (preamble).

235. *Id.* art. 27.

236. *Id.* art. 1, 123-27 (writing the Party's leadership into the constitution and establishing the Supervisory Commission).

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

238. *See* Larry Catá Backer, *supra* note 34.

239. 2018 CONSTITUTION, *supra* note 234, art. 1.

240. *Id.* art. 123-27.

and public schools and universities, and investigates any "illegal or criminal conduct abusing public office."[241] In effect, this is 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.[242]

Anti-corruption work has been Xi Jinping's hallmark political achievement over the past five 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.[243] 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 civilian and military officials previously considered to be untouchable.[244] As scholars have noted, Xi's first two years saw more high-ranking Party members removed than in the previous ten years combined.[245] Many quantitative measures of corruption—such as spending on luxury goods—plummeted as a result.[246]

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.[247] Although

241. *Id.*; *see also* Zhonghua Renmin Gongheguo Jiancha FA [Supervision Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., adopted and effective Mar. 20, 2018) [hereinafter Supervision Law], http://www.npc.gov.cn/npc/xinwen/2018-03/21/content_2052362.htm. *But see China: New Supervision law a Systematic Threat to Human Rights*, AMNESTY INTERNATIONAL (Mar. 20, 2018, 3:18 PM) (arguing that the Supervision Law sets up a secretive, unaccountable system of oversight over millions).

242. *See* Supervision Law, *supra* note 241.

243. *See Xi Jinping: Ba Quanli Guanjin Zhidu Longzi li* [Xi Jinping: Put Power Within an Institutional Cage], SOHU NEWS (Jan. 23, 2013), http://news.sohu.com/20130123/n364371479.shtml; *see also* sources cited *supra* note 163.

244. Shirk, *supra* note 1, at 24.

245. CHENG LI, *supra* note 17, at 1.

246. *See* 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.

247. 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); Xuezhi Guo, *Controlling Corruption in the Party: China's Central Discipline Inspection Commission*, 219 CHINA Q. 597 (2014); *see also*, Jiangnan Zhu, Huang Huang & Dong Zhang, *"Big Tigers, Big Data": Learning Social Reactions to China's Anticorruption Campaign Through Online Feedback*, 79 PUB. ADMIN. REV. 500 (2017); Lyric Chen, *Who Enforces China's Anti-corruption Laws?*

there were a number of state organs that 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 subordinate to the CDC, which not only had a higher administrative rank, but also enjoyed a much broader set of investigatory and punitive powers.[248] 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.[249] As part of a general restructuring campaign to merge and connect functionally overlapping Party and state institutions,[250] the two entities now share both an office building and a formal administrative partnership (*heshu bangong*).[251]

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.

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).

248. The CDC's rank and powers are defined in the 2017 CONSTITUTION, *supra* note 217, art. 45-48.

249. Supervision Law, *supra* note 241.

250. Han Yuchen, *Guowu Yuan Jigou Gaige Fang'an* [State Council Institutional Reform Plan], XINHAU (Mar. 17, 2018) http://www.gov.cn/guowuyuan/2018-03/17/content_5275116.htm. In March of 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 imposed a stronger degree 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. Interview with He Haibo, Professor of Law, Tsinghua Univ., Beijing (June 30, 2018).

251. *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], SINA NEWS (Mar. 5, 2018), http://news.sina.com.cn/sf/news/fzrd/2018-03-05/doc-ifxipenn1003650.shtml.

The Party leadership has long spoken of the need to "institutionalize" (*zhidu fanfu*) anti-corruption work,[252] 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 to 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 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 accomplishes this 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 made substantial progress on the procedural regularity and transparency front.[253] 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 and regular procedures for opening cases and gathering evidence, hearings, and appeals by disciplined officials.[254] At the same time, its detention system remained extra-legal, and those who have been subject to it describe harrowing intimidation and torture. [255] Under the system of "double-

252. *Liuzhong Quanhui: Cong Yundong 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.

253. *See Ting* Gong, *The Party Discipline Inspection In China: Its Evolving Trajectory And Embedded Dilemmas,* 49 CRIME, L. & SOC. CHANGE 139 (2008); Guo, *supra* note 247; Ling, *supra* note 247 (tracing the history of the CDC).

254. Guo, *supra* note 247, at n.19.

255. For an account of its extra-legal operations, see *"Special Measures": Detention and Torture in the Chinese Communist Party's Shuanggui System,* HUMAN RIGHTS WATCH (Dec. 6, 2016) [hereinafter HRW, *Special Measures*]

designated detention" (*shuanggui*), officials under investigation were detained—disappeared, rather—for a period and at a place of the party's choosing, with no formal legal protection.[256]

Such opacity eventually generated enough outcry that, in 2017, Xi announced that the CDC would no longer use *shuanggui*.[257] 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 speech that claimed: "[We] have to become good at using…the rule of law to fight corruption, [and] to strengthen national anti-corruption legislation."[258] This move toward "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 leaves the Party leadership in a *stronger* position. Not only will the Commission, with its expanded 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

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https://www.hrw.org/report/2016/12/06/special-measures/detention-and-torture-chinese-communist-partys-shuanggui-system#.

256. Yuen, *supra* note 65.

257. The announcement was made in his speech to the 19th Party Congress. *See* Xi Jinping, Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era (Oct. 18, 2017) [hereinafter 19th Party Congress Speech], http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

258. HRW, *Special Measures*, *supra* note 255.

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 and whether they would prefer to reinforce or weaken it. The argument for a preference to reinforce the constitution is fairly straightforward: the amendments have ostensibly, and probably intentionally, elevated the document from something that could easily have been ignored in high politics during the 1970s and 1980s, [259] to something that is, at a minimum, politically inconvenient to ignore. Moreover, the amendments almost certainly increase the constitution's sociopolitical salience. The enormous media campaign launched in conjunction with the amendments' proposal and passage has, in all likelihood, cemented and reinforced the Party leadership's rhetorical efforts since 2012 to bolster constitutional awareness and prestige.[260] The new requirement of constitution oath-swearing also introduces a previously non-existent 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, the amendments would be an extremely curious and counterproductive way to do that.

Skeptics might argue that, by expanding his personal power through constitutional amendment, Xi Jinping has exposed the constitution as fundamentally unstable and overly political and has in fact done substantial damage to its sociopolitical prestige and status.[261] The problem with this interpretation is that it presupposes that there was something approaching a consensus among either the general public or the political elite that the constitution was invulnerable—either normatively or in fact—from these kinds of (improper) politically-motivated amendments in the first place. This

259. *See* discussion *supra* note 230.
260. *See* discussion *supra* notes 231-233.
261. *See* discussion *supra* note 3.

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 such amendments. But this cannot be the case: the constitution has nearly always and universally been understood to be a politically-malleable document, in fact by design.[262] Critics of the amendments may be disappointed by their content but they are unlikely to believe that they were somehow *unconstitutional*.

Critics may hold the constitution with less regard now that its content is less acceptable to them, but what is being damaged is not some abstract sense of political immunity or substantive constitutionality but merely 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 normatively acceptable 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, perhaps 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.[263]

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262. *See* discussion *supra* notes 57-63; *see also* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 174-76 (2009) (providing a history of the changes).

263. On the ideological distribution of the Chinese population, see Jennifer Pan & Yiqing Xu, *China's Ideological Spectrum*, 80 J. POL. 254 (2018); Taisu Zhang, *What it Means to be 'Liberal' or 'Conservative' in China*, FOREIGN POLICY (Apr. 24, 2015, 2:17PM), https://foreignpolicy.com/2015/04/24/what-it-means-to-be-liberal-or-conservative-in-china/; *see also* discussion *infra* Part IV.

IV. EXPLAINING CHINA'S TURN TOWARD 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. During this period, 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" 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."[264] 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. In that speech, 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."[265] 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."[266] 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. "[O]nly by governing the country

264. *See* 19th Party Congress Speech, *supra* note 257.

265. 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"] (Oct. 28, 2014), http://www.xinhuanet.com/politics/2014-10/28/c_1113015372.htm.

266. *Id.*

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."[267] 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."[268]

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, bolster the Party-state's political and ideological legitimacy by 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.[269] Scholars have identified several functions that law

267. *Weishenme Yao Jianchi Quanmian Yifa Zhiguo* [Why We Need to Comprehensively Rule 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).

268. *Id.*

269. Moustafa & Ginsburg, *supra* note 55.

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.[270]

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.[271] These include stronger enforcement of contracts, more predictable economic behavior by both governmental and private actors, and easier conveyance of regulatory and institutional information—all of which lead to lower transaction and information costs in everyday economic activity, and therefore to more efficient allocation and use of resources.[272] 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,[273] and, regardless of whether they are correct, it is abundantly clear that the current Party leadership shares their

270. *Id.*; RULE BY LAW, *supra* note 1.

271. *See* KENNETH DAM, THE LAW-GROWTH NEXUS (2006).

272. *See, e.g.*, MICHAEL G. HELLER, CAPITALISM, INSTITUTIONS, AND ECONOMIC DEVELOPMENT (2009) (summarizing the long-term economic benefits of developing strong legal institutions); AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY (2006) (same); DAM, *supra* note 271 (arguing that developing economies in general, and China in particular, benefit from investment in legality). 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); *see also* 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).

273. *See* 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 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 parts of the law and economic development hypothesis but reinforcing others); DAM, *supra* note 271; Zhao, *supra* note 57. *But see* 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); 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).

view.[274] Moreover, effective and 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 and 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.[275] In a country the size of China, with its vast number of local governmental units, it is arguably the *only* effective way.[276] 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,[277] Xi has shown the opposite political instinct.[278] 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 feature prominently within the Chinese Party-state—but there are some complicating characteristics of its traditionally Leninist political structure that bear further analysis. We provide, therefore, a somewhat thicker account here, drawing loosely on work in political sociology that focuses on state-society

274. The Party leadership's view on the important relationship between legality and economic development in China is expressed in 19th Party Congress Speech, *supra* note 257.

275. JAN-ERIK LANE, PUBLIC ADMINISTRATION AND PUBLIC MANAGEMENT: THE PRINCIPAL-AGENT PERSPECTIVE (2006); Moustafa & Ginsburg, *supra* note 55.

276. Moustafa & Ginsburg, *supra* note 55; LANDRY, *supra* note 16.

277. *See* sources cites *supra* note 16.

278. *See* sources cites *supra* note 17.

relations.[279] 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 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.[280]

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."[281] In Marxist theory, both the legal system and the broader state apparatus are supposed to "wither away" as society is gradually perfected.[282] 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."[283] 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

279. 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).

280. TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS AND ECONOMIC DEVELOPMENT IN EGYPT (2007); MIGDAL, *supra* note 279, at 22-23 (taxation, military, and courts are "essential tentacles" of state power).

281. VLADIMIR LENIN, THE STATE AND REVOLUTION (1919).

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

283. *Id.*; BARRETT L. MCCORMICK, POLITICAL REFORM IN POST-MAO CHINA: DEMOCRACY AND BUREAUCRACY IN A LENINIST STATE 3-12 (1990); Perry, *supra* note 279; deLisle, *supra* note 1.

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.[284] The most interesting thing about this line of thought is that it sees legality as, effectively, a "second-best" functional substitute for ideological homogeneity. According to this line of thinking, society ideally 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.[285] If so, then what happens if the ideological homogeneity of the Party itself begins to recede while the Party-state system continues to exist? Under such circumstances, must the Party continue to utilize the "second-best" strategy of legality? Can it use it to resolve its internal coordination problems?

The history of modern Chinese politics is, to a very large extent, a story of how legality has supplanted ideological homogeneity 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.[286] 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."[287] Guo offers a fourfold typology of Party-state relations in different regimes, in which both Party and state can be either weak or strong.[288] In a strong state-weak Party regime, which is typical of democracies, parties struggle to obtain power, and may find themselves confronted by administrative resistance once they obtain it.[289] The very certainty of rotation in power that characterizes democracies means that there is the possibility of bureaucratic resistance to political control.[290] 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, however, an all-powerful Party seizes control of the state, as in Nazi Germany

284. There are particularly strong echoes of this idea in China's early political history. PITMAN B. POTTER, FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM (2003).

285. *See* deLisle, *supra* note 1; Liebman, *Law-Stability Paradox*, *supra* note 1.

286. 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).

287. *Id.* at 667.

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

289. *Id.* at 70.

290. *See, e.g.*, JUDITH E. GRUBER, CONTROLLING BUREAUCRACIES: DILEMMAS IN DEMOCRATIC GOVERNANCE (1986).

and Stalinist Russia.[291] Weak Party-weak state regimes are exemplified by personalist dictatorships, in which a charismatic leader overrides both Party and state.[292] This, Guo points out, reflects the situation of Mao after he launched the Cultural Revolution against elites in both party and state.[293] 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.[294]

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.[295] Among their innovations were the idea of collective leadership and the regular rotation of top personnel.[296] 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.[297] 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*.[298] When traditional ideological solutions to the first agency problem of intra-Party coordination faltered, institutionalization and semi-legality stepped in to share the burden.[299]

Having shored up the Party's internal political coherence, the Deng regime then orchestrated the return of the state and, relative to the Mao era, the Party's withdrawal from society.[300] This did not quite represent a complete leap to a "weak Party, strong state" paradigm but it certainly represented a move in that direction.[301] Nearly all references to the Communist Party were dropped from the 1982 Constitution, even as the development of legal

291. *Guo, supra* note 286, at 71.

292. *Id.* at 74.

293. *Id.*

294. *See, e.g.*, RODERICK MACFARQUHAR & MICHAEL SCHOENHALS, MAO'S LAST REVOLUTION (2006).

295. *See* Elizabeth J. Perry, *Studying Chinese Politics: Farewell to Revolution?*, 57 CHINA J. 1, 22 (2007) (supplying a summary of these changes). *But see* PEERENBOOM, *supra* note 2, at 188-238 (detailing the retreat of both party and state).

296. *See* DAVID SHAMBAUGH, CHINA'S COMMUNIST PARTY: ATROPHY AND ADAPTATION 125 (2008) (rotation); ECONOMY, *supra* note 17, at 7 (collective leadership).

297. *See supra* pp. 53-56.

298. Ginsburg, *supra* note141 (detailing different mechanisms of controlling agents).

299. *Id.*

300. Shambaugh, *supra* note 16, at 175.

301. *Id.*

infrastructure—under the banner of "socialist rule of law"—emphasized formal *state* institutions rather than more informal *Party* tools for controlling society.[302] This effort restructured and strengthened the legal system, and provided the institutional basis for twenty years of rapid and largely stable economic growth.[303]

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.[304] But if this "return of the Party" is not to overwhelm the state apparatus and cripple socioeconomic development, and if the Party leadership is to maintain control over its newly empowered cadres, then 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.[305] 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 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

302. Zhonghua Renmin Gongheguo Xianfa (中华人民共和国宪法) (Constitution of the People's Republic of China) (1982) [hereinafter 1982 Constitution]. For discussion of constitutional developments in China, see 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, 29-38 (2006); Perry, *supra* note 295, at 6; PEERENBOOM, *supra* note 2, at 6 (noting China's move towards "socialist rule of law").

303. *See* PEERENBOOM, *supra* note 2, at 1; Peerenboom, *supra* note 1, at 2.

304. *See* 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; *see also* discussion *supra* note 250.

305. *See* Pan & Xu, *supra* note 263, at 260-71 (detailing the ideological diversity of the Party).

the operation of state institutions.[306] 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. This allows 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.

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.[307] 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.[308] 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.

306. *See* discussion *supra* Part III.

307. *See* sources cited *supra* note 296.

308. 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.

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 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 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 publicly 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.[309] They have often been accused, especially during the Hu Jintao era, of facilitating

309. Archie Zariski and Changqing Shi, *Inside Out or Outside In?: Looking at Judges' Relations, in* THE RESPONSIVE JUDGE: INTERNATIONAL PERSPECTIVES 175, 190-97 (Tania Sourdin & Archie Zariski eds., 2018).

crony capitalism for personal economic gain,[310] 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: 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.[311] 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, lower levels of corruption, and more reliable enforcement of private legal rights—among the general 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 kind of 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 publicly visible ways, which supplies a strong rationale for both the 2018 constitutional amendment and the multi-year media campaign that preceded it.

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310. *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*, N.Y. TIMES (Oct. 25, 2012), https://www.nytimes.com/2012/10/26/business/global/family-of-wen-jiabao-holds-a-hidden-fortune-in-china.html.

311. Montinola, Qian & Weingast, *supra* note 16, at 52; Xu, *supra* note 19, at 1079.

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 toward 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 signs, as discussed below, 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.[312] As a number of sociological studies have shown, consciousness over law and rights among the general population has grown dramatically over the past thirty years and was already a major driver of socioeconomic behavior by the early 2000s.[313] 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.[314] 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.[315]

312. *See* YA-WEN LEI, THE CONTENTIOUS PUBLIC SPHERE: LAW, MEDIA, AND AUTHORITARIAN RULE IN CHINA 35-37 (2017) (summarizing relevant literature).

313. KEVIN J. O'BRIEN & LIANJIANG LI, RIGHTFUL RESISTANCE IN RURAL CHINA 6-7 (2006); MERLE GOLDMAN, FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA, 222-23 (2005); GALLAGHER, *supra* note 8, at 119-120.

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

315. Jingkang Gao & Jinhua Zhao, *Legitimacy versus Morality: Why Do the Chinese Obey the Law?*, 42 L. & HUMAN BEHAVIOR 167, 173 (2018) ("[M]orality was highly significant…and by far the strongest motivation for compliance.").

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.[316] In the 2008 Asia Barometer Survey, for example, 55% 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% from the early 2000s.[317] 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.[318] As one scholar puts it, Chinese people now tend to "demand that the state follow the law."[319]

The Party leadership began to publicly 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.[320] 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."[321] 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."[322] 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."[323] For a leader who had spent much of the past decade deemphasizing professionalized adjudication and formal legalism, this amounted to

316. LEI, *supra* note 312, at 36.

317. *Id.*

318. Susan Whiting, *Authoritarian "Rule of Law" and Regime Legitimacy*, 50 COMP. POL. STUD. 1907, 1934 (2017).

319. LEI, *supra* note 312, at 36.

320. Carl Minzner, *What Direction for Legal Reform Under Xi Jinping*, CHINA BRIEF (Jan. 4, 2013, 8:14 PM), https://jamestown.org/program/what-direction-for-legal-reform-under-xi-jinping/.

321. *Id.*

322. Hu Jintao, Zai Zhongguo Gongchan Dang di Shiba Ci Quanguo Daibiao Dahui shang de Baogao [Report at the 18th Nat'l Cong. of the Chinese Communist Party] (Nov. 17, 2012), http://news.china.com.cn/politics/2012-11/20/content_27165856_9.htm.

323. *Id.*

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 "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."[324] 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 institutional independence.[325] 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.[326]

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 five 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

324. *See* Minzner, *Turn Against Law*, *supra* note 1, at 983; Liebman, *supra* note 6, at 166.

325. Yuhua Wang, *Court Funding and Judicial Corruption in China*, 69 CHINA J. 43, 57 (2013).

326. *See* Minzner, *Turn Against Law*, *supra* note 1, at 947; *see also* discussion *supra* note 174.

lifelong rule.[327] He therefore needed sources of political capital and support outside of the traditional political establishment to a greater extent than his predecessors did. 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 five years is any indication, so has the campaign to boost judicial professionalism and independence.[328] By all observable signs, Xi is highly popular among the general population,[329] 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.[330] 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 excludes the others. The first possibility is that the population values legality for the same kinds of instrumental reasons that we identified in Section A: 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

327. LI, *supra* note 17.

328. *See* Chun Han Wong, *Xi Seeks Check on Graft, but Not Party*, WALL ST. J. (Oct. 26 2016), https://www.wsj.com/articles/chinas-corruption-campaign-likely-to-fall-short-of-communist-party-leadership-1477500111 (anti-corruption campaign); *see also* Rebecaa Liao, *Judicial Reform in China: How Progress Serves the Party,* FOREIGN AFFAIRS (Feb 2, 2017), https://www.foreignaffairs.com/articles/china/2017-02-02/judicial-reform-china. On the impact of the anti-corruption campaign, see sources cited *supra* note 247. On the rise in litigation and how to interpret it, see discussion *supra* Section II.A.2.

329. *See, e.g.*, Tom Phillips, *Chairman Xi Crushes Dissent But Poor Believe He's Making China Great*, THE GUARDIAN (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-cements-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; Shannon Tiezzi, *The World's Most Popular Leader: China's President Xi*, THE DIPLOMAT (Dec. 20, 2014), https://thediplomat.com/2014/12/the-worlds-most-popular-leader-chinas-president-xi/.

330. ECONOMY, *supra* note 17, at 32-33 (discussing the popularity of Xi's legal reforms).

power.[331] 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 a major social problem.[332] Given these 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 discourse [333] —and, therefore, considered judicial professionalism, independence, and a general commitment to legality as necessary conditions of good governance.

Similarly, Chinese intellectuals have long bought into the conventional wisdom that an independent and professional court system is necessary for modern economic development,[334] 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.[335] While their enthusiasm for American-style democracy and constitutionalism has waned

331. *See* Lucian W. Pye, *China: Erratic State, Frustrated Society*, 69 FOREIGN AFFAIRS 56 (1990) (noting that such a fear was a major source of social unrest as early as the 1980s).

332. *See* Cary Wu & Rima Wilkes, *Local-National Political Trust Patterns: Why China is an Exception*, 39 INT'L POL. SCI. REV. 436, 438 (2018); Hsin-hao Huang, *Explaining Hierarchical Government Trust in China: The Perspectives of Institutional Shaping and Perceived Performance*, 59 TAIWAN J. POL. SCI. 137 (2014).

333. "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, 181 (2010). 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). 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 (Nov. 20, 2014, 2:25 PM), https://www.huffingtonpost.com/xin-chunying/china-rule-of-law_b_6178836.html.

334. For summaries and critiques of these trends, see, for example, SAMULI SEPPANEN, IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA 36-49 (2016); DENG ZHENGLAI, ZHONGGUO FAXUE XIANG HECHU QU [Wither Legal Studies in China?] (2006).

335. *See, e.g.*, 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); Cao Jianming, *Wei Jingji Chixu Jiankang Fazhan Tigong Youli Fazhi Baozhang* [Providing a Firm Rule of Law Foundation for Sustainable Economic Growth], QIU SHI [Seeking Truth] (Nov. 30, 2015, 8:00 AM), http://www.qstheory.cn/dukan/qs/2015-11/30/c_1117268616.htm. 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 (June 18, 2018) (unpublished manuscript) (on file with authors) (presented at the Chicago-Tsinghau Young Faculty Forum in Beijing).

somewhat in recent years,[336] the general belief that sustainable economic development requires a high level of legality, including legal checks on governmental power, remains fairly robust. 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,[337] 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.[338] 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.[339] In 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 decades-long process in which the "rule of

336. Han Liu, *Regime-Centered and Court-Centered Understandings: The Reception of American Constitutional Law in China*, 67 AM. J. COMP. L. (forthcoming 2019) (manuscript at 54-56) (on file with author).

337. JIE CHEN, A MIDDLE CLASS WITHOUT DEMOCRACY: ECONOMIC GROWTH AND THE PROSPECTS FOR DEMOCRATIZATION IN CHINA 2 (2013).

338. ALTEHENGER, *supra* note 25, at 90-91, 124, 129; *see also* Glenn D. Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s*, *in* BUILDING CONSTITUTIONALISM IN CHINA 23 (Michael Dowdle & Stephanie Balme eds., 2009).

339. RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING 84-85 (1996); MERLE GOLDMAN, SOWING THE SEEDS OF DEMOCRACY IN CHINA: POLITICAL REFORM IN THE DENG XIAOPING ERA 7 (1994); LEI, *supra* note 312, 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.

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.[340] Not even the Hu Jintao regime, despite its institutional 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.[341]

This kind of sustained rhetorical reinforcement, despite generating deep skepticism among outsiders, may very well have made a lasting and profound impression on the general public.[342] 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.[343] Even if 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.[344] 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,[345] a characterization that generations of historians have vigorously resisted,[346] 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

340. *See* PEERENBOOM, *supra* note 2, at 6-7; *see also* discussion *supra* note 50.

341. Minzner, *Turn Against Law*, *supra* note 1, at 937.

342. Paul Gewirtz, *What China Means by 'Rule of Law'*, N.Y. TIMES (Oct. 19, 2014), https://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html.

343. Fu, *supra* note 1, at 173.

344. GALLAGHER, *supra* note 8 at 85; LEI, *supra* note 312, at 36.

345. 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, 399-400 (1997) (discussing and criticizing scholars' characterizations).

346. *Id.* at 399; *see also* TEEMU RUSKOLA, LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW 4 (2013); PHILIP HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED 3 (2001).

governmental activity and socioeconomic relations.[347] 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.[348] 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 then bring about rapid economic growth, sociopolitical stability, and geopolitical stature. [349] 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. [350] 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."[351] 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.[352]

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 1960s, and it picked up right where it left off after 1978.[353] In other words, apart from the Cultural Revolution years, 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

347. Taisu Zhang, *The Development of Comparative Law in China*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann ed., 2d ed. 2019).

348. *Id.*; PEERENBOOM, *supra* note 2, at 43.

349. Zhang, *supra* note 347, at 230-36.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

have argued, late imperial China was a heavily rules-oriented society in which legal institutions of various kinds carried substantial socioeconomic weight.[354]

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 rule of law," as Randall Peerenboom once argued[355]—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 regimes 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 culture.

V. 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, as 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

354. *See generally* TAISU ZHANG, THE LAWS AND ECONOMICS OF CONFUCIANISM: KINSHIP AND PROPERTY IN PREINDUSTRIAL CHINA AND ENGLAND (2017); PHILIP C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED (2001); PHILIP C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING (1996).

355. PEERENBOOM, *supra* note 2.

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. 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.[356] Relatedly, the intimidation and arrest of rights-protecting (*weiquan*) lawyers and has had a major chilling effect on rights-activism, and reduces the possibility of

356. Shirk, *supra* note 1, at 25; ECONOMY, *supra* note 17, at 38-39.

rising legalism serving as a "double-edged sword" that leads to political liberalization and robust protection of civil rights.[357] 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, and we would agree.

But it is also potentially 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?[358] 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.[359] 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.[360]

We have taken a more synthesized and fluid approach in this Article, integrating both supply and demand in a framework for understanding 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.[361] The Party-state has

357. MOUSTAFA, *supra* note 280280, at 32.

358. Ginsburg, *supra* note 141, at 58; Xin, *supra* note 49, at 143; Fu, *supra* note 1, at 167.

359. *See* sources cited *supra* notes 269-276.

360. *See* sources cited *supra* Section IV.B.

WANG, *supra* note 8, at 16-17 (arguing that foreign investment can be a key driver of improvement in courts).

361. *Cf.* Minzner, *Turn Against Law*, *supra* note 1.

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, 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,[362] 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 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.[363] A culture of legality might, for example, encourage the general population to challenge the Party's administrative capacity and 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

362. *See* sources cited *supra* notes 345-347.
363. Liebman, *Law-Stability Paradox*, *supra* note 1, at 97.

adherence to legal rules by local officials, under the theory that this will actually strengthen its legitimacy.[364] 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."[365] 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. Some 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 toward 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.

364. *See* discussion *supra* Section II.A.3.
365. *See* discussion *supra* Section III.A.3.