The Pragmatic Court: Reinterpreting the Supreme People’s Court of China
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Abstract:
This paper examines the institutional motivations that underlie several major developments in the Supreme People’s Court of China’s recent policymaking. Since 2007, the Court has sent off a collection of policy signals that escapes sweeping ideological labeling: It has publically embraced a populist view of legal reform, encouraging the use of mediation in dispute resolution and popular participation in judicial policymaking, but continues to advocate legal professionalization as a long-term policy objective. It has also eagerly attempted to enhance its own institutional competence by promoting judicial efficiency, simplifying key areas of civil law, and expanding its control over lower court adjudication. This paper argues that the strongest institutional motivation underlying this complex pattern of activity is, contrary to some common assumptions, neither simple obedience to the Party leadership nor internalized belief in some legal reform ideology, whether legal professionalism or populism. Instead, it is the pragmatic strengthening of the Court’s own financial security and sociopolitical status—the Court is, in many ways, a “rational actor” that pursues its institutional self-interest. This theory of “institutional pragmatism” brings unique analytical cohesion to the Court’s recent behavior, giving us a clearer sense of its current priorities and, perhaps, its future outlook.

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Introduction

Within Western scholarship on contemporary Chinese law, the Supreme People’s Court (SPC) of China is paradoxically both omnipresent yet curiously ignored. Given its status as the highest court in China, few articles on Chinese legal development can afford to ignore it. On the other hand, the institutional motivations behind the Court’s doctrinal and policy decision-making remain largely unknown: scholars have studied, in considerable detail, how the SPC acts, but rarely why. Secrecy certainly shrouds SPC decision-making, but secrecy is true of the entire Chinese Party-state, yet there is no lack of voluminous studies on the intentions of the Party leadership. A close study of the SPC’s institutional motivations seems especially necessary as the Chinese judiciary enters a new era of ideological uncertainty and tension, in which potentially contradictory ideals of legal reform sit side by side in the Court’s work agenda, hinting at highly complex considerations that lie beyond the rhetorical surface.

This is such a study. It argues that the strongest motivation underlying much of the Court’s recent activity is, contrary to common assumptions, neither obedience to the Party leadership nor implementation of any legal reform ideology—whether legal professionalism or some competing principle, but rather the pragmatic strengthening of its own financial security and sociopolitical status. This theory of “institutional pragmatism” brings unique analytical cohesion to the complicated, even contradictory, policy signals the Court has sent off in recent years, giving us a clearer sense of its current priorities and, perhaps, its future outlook.

Despite enormous political and institutional constraints, the Chinese judiciary seemed to be slowly advancing, as recently as 2007, towards greater judicial independence, legal professionalization, and perhaps even some power of constitutional review. Scholars fiercely

1 Articles that focus on certain subject matters, for example legislation or the public security apparatus, do tend to make less mention of the SPC. See, e.g., Donald C. Clarke, Legislating for a Market Economy in China, in CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 13 (Donald C. Clarke ed., 2008); Murray Scot Tanner & Eric Green, Principals and Secret Agents: Central versus Local Control Over Policing and Obstacles to “Rule of Law” in China, in CHINA’S LEGAL SYSTEM, supra at 90.


3 Certainly a few papers have discussed this issue, but even those analyses tend to be brief and somewhat speculative, rarely occupying a prominent place in the paper. See discussion at infra pp. __. Some scholars have discussed in considerable detail the institutional motivations of lower courts, but not the SPC, see, e.g., Nicholas C. Howson, Corporate Law in the Shanghai People’s Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State, 5 EAST ASIA L. REV. 330 (2010).


5 Virtually no study of the Chinese judiciary fails to mention these. See, e.g., Benjamin L. Liebman, China’s Courts: Restricted Reform, 21 COLUM. J. ASIAN L. 1, 21-29 (2007); PEERENBOOM, supra note 2, at 298-316; Finder, supra note 2, 148-59.

6 For a guardedly optimistic overview of Chinese legal development up to 2000, see PEERENBOOM, supra note 2, at 282, 318-22 (2002). Discussing the 1995 to 2005 period, Liebman points out that development towards legal professionalism and the rule of law has been “restricted,” but also notes that at least some significant progress was being made, often through the initiatives of lower courts. Liebman, supra note 5. Likewise, Fu Hualing and
debated the merits and future potential of these developments, but most agreed that the developments themselves were real. If the judiciary remained a “bird in a cage,” to borrow Stanley Lubman’s famous metaphor, then at least the cage was expanding.

2008, however, threatened to shatter such optimism. In March, the National People’s Congress appointed Wang Shengjun to replace the retiring Xiao Yang as SPC president. The “parachuting” of a party bureaucrat with no legal education or court experience into the nation’s top judicial post suggested that the party-state wished to impose closer political control over the judiciary. In a series of speeches made soon after his appointment, Wang argued that courts should follow the “Three Supremes”: the supremacy of the Party, the supremacy of popular interests, and the supremacy of the constitution and law. Dismayed legal scholars noted that that the list placed Party and popular interests ahead of constitution and law, and that Party interest was the “First Supreme.”

Richard Cullen argues that, prior to 2005, the judiciary was on the path towards greater judicial professionalism and “judicative” justice, although they also note that, due to Party interference, some of those trends were being challenged during the later Xiao Yang years. Hualing Fu & Richard Cullen, From Mediator to Adjudicatory Justice: The Limits of Civil Justice Reform in China (Nov. 25, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306800. Mainland Chinese scholars have argued that the Chinese judiciary actually deserves a more “positive assessment.” Shen Kui, Commentary on “China’s Courts: Restricted Reforms”, in CHINA’S LEGAL SYSTEM, supra note 1, at 85, 89. See also, Jonas Grimheden, The Reform Path of the Chinese Judiciary, 30 FORDHAM INT’L L.J. 1000 (2007) (“The reform process of the Chinese judiciary . . . is impressive. . . . [I]t has been making headway towards enhanced professionalism, stature and independence.”). Other American scholars point out that the Chinese party-state has clearly promoted the rule of law for much of the past decade, but primarily as a tool to enhance its own legitimacy. See 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. TRANSLAT’L L. 114, 116 (2006). Liebman would agree that the “[p]rofessionalization of legal actors and institutions is perhaps the single most significant accomplishment of China’s legal reforms.” Liebman, supra note 2, at 7.

Most western scholars would agree that the trend towards legal professionalism and the rule of law is positive, but not nearly strong enough. See, e.g., Liebman, supra note 5, at 41-44; Clarke, supra note 1; Grimheden, supra note 6. Mainland Chinese scholars, most famously Zhu Suli, have sometimes been critical of these assessments. See ZHU SULI, SONG FA XIAXIANG: ZHONGGUO JICENG SIFA ZHIHU YANJIU [SENDING LAW DOWN TO THE COUNTRYSIDE: A STUDY OF LOCAL JUDICIAL INSTITUTIONS IN CHINA] (2000). See also, Liu, Sida, Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court, 31 L. & SOC. INQUIRY 75 (2006) (providing empirical evidence to suggest that legal professionalism initiatives have limited effect on local courts). Other Chinese scholars have been more receptive to legal professionalism ideals. See, e.g., He Weifang, Zhongguo sifa guanlizhidu de liangge yuancang [Two Problems in China’s System of Judicial Administration], 1997(6) SOC. SCI. CHINA 117, available at http://www.boxun.com/sixiang/000218/10.htm; Xu Aiguo, Weifazhi er douzheng—Xi Suli de Fazhi ji bentuciyuan [The Struggle for the Rule of Law: An Analysis of Suli’s The Rule of Law and Native Resources], in 1 Peking Univ. L. ANTHOLOGY 274 (2002).


The “Second Supreme,” the supremacy of popular interests, has also had a powerful effect on SPC policy. Since 2008, scholars have commented on the reincarnation of “populism”—defined broadly as promoting judicial responsiveness to and incorporation of public opinion, and often tied to non-adjudicatory methods of dispute resolution—as a guiding SPC doctrine. The SPC’s advocacy of this doctrine actually began in the later Xiao Yang era, but few would dispute that such advocacy has intensified after Wang’s appointment. The doctrine has led to, most prominently, a stronger emphasis on mediation as a favored dispute resolution method and higher sensitivity towards popular opinion. Much of this agenda seems to push in the opposite direction of legal formality, professionalism and judicial independence.

There is, however, no indication that the SPC has given up on these latter ideals—the “supremacy of the constitution and laws” remains, at least, the “Third Supreme.” Quite the opposite, they remain firmly on the Court’s list of guiding principles, side by side with the promotion of populism. The Court continues to emphasize the need for objective, independent, and doctrinally consistent judicial decision-making by professionally trained judges. As Benjamin Liebman acutely points out in a recent paper, the Chinese judiciary, starting with the SPC, is now characterized by “tension between trends toward professionalism and populism.”

What institutional motivations drive the SPC’s recent “populist turn”? One fairly popular approach is to see the Court as essentially a loyal foot-soldier of the Party leadership: It is simply implementing a broader “turn against law” that the leadership asks of the entire law enforcement apparatus. Because it is just carrying out orders—and therefore lacks substantive agency in judicial policy-making, there is no pressing need to analyze the Court’s specific institutional motivations. This is undoubtedly true to some extent. Indeed, we know well the political and institutional constraints that the judiciary faces, which the recent reemphasis on “the supremacy of the Party” only reemphasizes.

It would, however, be a serious exaggeration to assume that these constraints and pressures leave no room at all for the SPC or other courts to develop and implement a “mind of their own”: The gradual development of legal professionalism over the past decade has undoubtedly increased the judiciary’s overall functional independence, if only because legal matters have become more complicated. Many acknowledge that the legal system is not

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12 Liebman, supra note 2, at 11, provides a basic description of “legal populism”: “The Ma Xiwu method embodied core elements of the CCP’s legal ideology. Law became inseparable from politics and was designed to advance Party policy. Law was practical and adaptable, not rigid or constraining. Legal institutions were neither independent nor specialized, and professionalism was explicitly rejected. Written law yielded to actual experiences; a correct decision was one that met the emotions of the masses.”


14 Liebman, supra note 2, at 1, 7.

15 See Minzner, supra note 4; Fu & Cullen, supra note 6, at 54-66 (discussing how the Party leadership pressured the judiciary to move away from “adjudicative justice”); Zang, supra note 12.

16 See discussion at supra note 6.
merely “a passive participant in the reform process,” and that the SPC in particular is capable of considerable “activism.”

While these observations are not fundamentally inconsistent with the basic presumption of Party control, they do highlight the need to take the SPC’s own interests and intentions more seriously. Directives from the Party leadership may well establish basic parameters for Court activity, but the technical complexity of the Chinese judiciary will usually create considerable room for maneuvering within those parameters. As the empirical evidence below repeatedly suggests, the SPC does possess substantive agency in determining China’s legal reform agenda.

If so, how should we interpret the SPC’s recent endorsement of legal populism? The technical complexity of reform measures that have fallen under this rhetorical umbrella suggests that something more than simple-minded adherence to higher policy directives is at work here. One possible approach is to more or less take the SPC at its word: if it claims to believe in populist ideals, then perhaps it actually does. One can certainly point to significant continuities between the Court’s recent populist rhetoric and dispute resolution practices from the Communist Party’s earlier years, which could suggest that there really is a genuine “Chinese socialist tradition” of populist lawmaking. It would not be entirely surprising, therefore, if the SPC leadership had internalized significant elements of this tradition, which then came into conflict with its partial internalization of legal professionalism ideals. In this view, the “tension between trends toward professionalism and populism” is ideologically genuine.

This approach encounters empirical difficulties, however, when we place the SPC’s populist rhetoric within a broader context of recent judicial developments. Despite the rhetorical emphasis placed on both populism and professionalism, some highly important developments in recent SPC doctrine and policy do not easily relate to either trend, or even to the party-state’s increased control over the judiciary. The SPC has shown, for example, increased interest in a “cost and efficiency” (“chengben yu xiaolü”) approach towards trial procedure and caseload management that has potentially enormous ramifications for civil and administrative adjudication. The most significant measures in this agenda, which encourage judges to coercively apply summary procedure to civil cases, actually contradict both ideological frameworks and, furthermore, show no clear relation to external political pressure. Likewise, a controversial recent draft interpretation of the Marriage Law that drastically cuts down on the scope of marital property does not logically derive from any ideological stance, but instead suggests a straightforward desire to simplify civil adjudication and, therefore, a deep concern with the potential overextension of judicial resources. The strength of this concern, also seen in the “cost and efficiency” reforms, seems disproportionate to any outright political pressure the SPC might have faced, any actual financial shortages, or any noticeable deficiency in case-processing speeds, but does reflect a strategic concern for the judiciary’s longer-term financial health under uncertain political conditions. On the other hand, with the recent establishment of a “guiding

17 Liebman, supra note 2, at 3.
18 Finder, supra note 2, at 223-24. The Court has actually drawn criticism for its “dangerous activism,” and for overstepping its constitutional boundaries. See discussion at infra notes 57, 58, 205, 206.
19 See discussion at infra pp. 223-24. See also, Liebman, supra note 2, at 24 (“Efforts to position the current work of the courts as consistent with revolutionary traditions may in significant part consist of using revolutionary language to pursue divergent and diffuse goals.”).
20 See Liebman, supra note 2, at 13-15, 16 (“Most aspects of the modern sifa weimin movement trace their roots to Ma Xiwu.”).
21 See discussion at infra pp. 223-24.
22 See discussion at infra pp. 223-24.
cases” system—which gives stare decisis-like authority to select cases, the SPC has strengthened its powers of judicial interpretation, although in a careful and low-key fashion that avoids the wrath of government branches or the Party leadership.\(^{23}\)

This paper argues that academic analysis of the current SPC legal reform agenda must recognize that the SPC, no less than any local court,\(^{24}\) is a deeply pragmatic institution keen on protecting and enhancing its own political, social and financial health. Self-interested pragmatism, rather than ideological commitment, underlies the developments discussed above: The initiative to accelerate and simplify case-processing decreases both the judiciary’s financial reliance on other branches of government and its exposure to potentially contentious social disputes. The pursuit of these objectives makes good sense for a politically vulnerable institution with very limited financial independence, especially after the various personnel changes in 2008 reemphasized that vulnerability, and when the Chinese party-state is entering a period of strong political, economic and fiscal uncertainty. The expansion of the SPC’s judicial interpretation capacity through “guiding cases” indicates, however, that the Court is certainly not adverse to expansions of its authority when the sociopolitical risk is low, which, of course, is entirely consistent with the overall impression of institutional pragmatism.

Furthermore, the SPC’s handling of both legal professionalism and populism over the past decade arguably derives as much from pragmatic maneuvering as it does from genuine ideological commitment. The judiciary stands to gain much and perhaps lose relatively little by promoting mediation, cooperation with other government institutions, and responsiveness to popular opinion: These measures help it avoid having to take a clear stance in socially or politically controversial disputes and, therefore, lower its exposure to criticism and pressure. The precise methods the Court has taken to promote mediation are, in fact, arguably more attuned with a theory of institutional pragmatism than with one that stresses the Court’s ideological internalization of populism.\(^{25}\) On the other hand, many have interpreted the SPC’s earlier eagerness to promote legal professionalism and constitutional review as a campaign to increase its own authority and power under relatively accommodating sociopolitical conditions.\(^{26}\) All things considered, institutional pragmatism is one of the strongest explanations—quite possibly the strongest—for the SPC’s recent activities, and therefore one of the best predictors of its future course.

Of course, institutional pragmatism is by no means the only factor that determines Court behavior. Certainly many SPC judges, including the handful of justices at the top, may genuinely believe in the intellectual or ideological validity of those positions, although this hardly means that realist calculations of interest are incapable of affecting, even dominating, SPC decision-making. Likewise, directives from the Party leadership may well set basic boundaries for acceptable judicial behavior, but there is usually considerable maneuvering room within those boundaries. This paper complements, not replaces, suggestions that the “tension” between professionalism and populism is ideologically genuine,\(^{27}\) or that the Party leadership

\(^{23}\) See discussion at infra pp. --.--.

\(^{24}\) For the strategic decision-making of lower courts, see, e.g., Howson, supra note 3.

\(^{25}\) See discussion at infra pp. --.--.

\(^{26}\) See, e.g., Zhiwei Tong, A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case, 43 SUFFOLK UNIV. L. REV. 101, 103-06 (2010) (discussing the SPC’s motivations behind the Qi Yuling case); Xin He, The Judiciary Pushes Back: Law, Power and Politics in Chinese Courts, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 180 (Randall Peerenboom ed. 2009) (discussing recent attempts by the judiciary to strengthen its political position vis-à-vis other government organs).

\(^{27}\) Such suggestions are discussed at infra, pp. --.--.
exerts significant control over judicial activity.\textsuperscript{28} It does, however, demonstrate the need to go beyond them if we are to accurately understand the SPC.

On a more theoretical and comparative note, the treatment of judiciaries as pragmatic and utilitarian institutions that actively pursue their institutional self-interest is fairly common in studies of pre-modern or early modern legal history.\textsuperscript{29} On the other hand, scholars seem somewhat more hesitant to attach such motivations to contemporary judiciaries in developed nations—with, of course, important exceptions, particularly in the corporate law realm.\textsuperscript{30} For

\begin{itemize}
  \item See supra note 15.
  \item To Western legal scholars, the most familiar example would probably be the late-medieval and early modern jurisdictional competition between various Western European legal systems, both secular and ecclesiastical. See, e.g., Harold Berman, Law and Revolution: The Formation of the Western Legal Tradition 10 (1983) (outlining the basic thesis of jurisdictional competition); Brian Tierney, The Crisis of Church and State, 1050–1300 (1964) (tracing the development of 12th Century Canon Law as a concentrated effort to expand Papal jurisdiction and authority). The relationship between these various courts was certainly more complex than just competition for influence, see, e.g., R.H. Helmholz, Canon Law and the Law of England 263-89 (1987) (discussing the intellectual exchanges and influences between judges of various jurisdictions); James Gordley, The Philosophical Origins of Modern Contract Doctrine (1991) (arguing that modern contract law has origins in modern philosophical developments), but that at least seemed to be one prevalent part of it. In England, some level of competition also emerged among various royal courts—between Common Law and Equity courts, but also between various common law courts. See Daniel Klerman, Jurisdictional Competition and the Evolution of the Common Law, 74 Univ. Chi. L. Rev. 1179 (2009); Todd Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW Univ. L. Rev. 1551, 1581-621 (2003) (arguing that jurisdictional competition drove Common Law courts to create more economically efficient legal doctrine); J.H. Baker, An Introduction to English Legal History 40-47 (Butterworths 4th ed., 2002) (describing the “internece struggle for business between the common-law courts” after 1550); Ron Harris, Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844, at 25-26 (2000) (noting that Seventeenth and Eighteenth Century common law courts “competed with each other over litigants”); Marjorie Blatcher, The Court of King’s Bench, 1450–1550: A Study in Self-Help (1978) (tracing the development of Common Law doctrine in the Court of King’s Bench as a conscious effort by the court to expand its influence and authority). But see S.F.C. Milsom, Historical Foundations of the Common Law (Butterworths 2d ed., 1981) (presenting the development of the Common Law largely as the intellectual development of legal doctrine by professionally-minded jurists); A.W.B. Simpson, A History of the Common Law of Contract: The Rise of the Action of Assumpsit 292-95 (1975) (arguing against the existence of substantial judicial competition). Backtracking chronologically, Roman judges also seemed to follow a highly pragmatic legal philosophy that saw adjudication and legal analysis primarily as means towards greater personal reputation and social prestige. See Alan Watson, The Spirit of Roman Law (1995). Within the Chinese context, scholars have long portrayed late-imperial local magistrates as pragmatic judges who were highly self-conscious about their sociopolitical standing and allowed such concerns to influence their legal decision-making, see Ch’u Tung-Tsu, Local Government in China Under the Ch’ing (1962); Bradley W. Reed, Talons and Teeth: County Clerks and Runners in the Qing Dynasty (2000); Tai Su Zhang, Property Rights in Land and the Relative Decline of Pre-Industrial China 31-36 (forthcoming, 13 San Diego Int. L.J., 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792061, although some have argued, with perhaps limited success, that they were in fact more professionally disciplined. Cf. Philip C.C. Huang, Civil Justice in China: Representation and Practice in the Qing 119 (1996) (arguing that magistrates rigorously followed legal rules in the vast majority of cases); Mark Allee, Code Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century County Court, in Civil Law in Qing and Republican China at 122, 126-27 (Philip C.C. Huang & Kathryn Bernhardt eds., 1994) (reaching the opposite conclusion of Huang based on similar sources); Zhang, supra (likewise).

example, while many constitutional scholars have accused United States Supreme Court justices of judicial activism, that is, of promoting their preferred sociopolitical ideology, fewer have considered whether they regularly attempt to enhance the Court’s institutional authority or political status. A possible explanation for this difference is that judiciaries in contemporary Western nations tend to enjoy considerable institutional security and are well-entrenched within a tradition of governance, whereas earlier judiciaries faced far greater sociopolitical uncertainty and theoretical ambiguity and, therefore, were more likely to engage in pragmatic maneuvering. In terms of institutional security, the Chinese judiciary has far more in common with these historical judiciaries than it does with, say, the Supreme Court of the United States, suggesting that our emphasis on its institutional pragmatism is not terribly unconventional.

The institutional pragmatism that we discuss here is quite different from the “legal pragmatism” and “flexibility” often attributed to Chinese legal reform in general. These latter

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31 See, e.g., James R. Rogers & Georg Vanberg, Resurrecting Lochner: A Defense of Unprincipled Judicial Activism, 23 J. L. ECON. & ORG. 442, 442 (2007) (noting that “the worst” we assume of activist judges is that “they are an unprincipled lot who seek only to implement narrow, class-based personal policy preferences’’); HOWARD GILLMAN, THE CONSTITUTION BESIEGED 3 (1993) (commenting that the problem with the activist courts of the early 20th Century was that they were “assaulting the doctrine of separation of powers by substituting its conception of good, effective policymaking for that of the legislature’’); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 138-39 (1993) (describing a tradition of constitutional legal scholarship, including Alexander Bickel, Robert Burt, Frank Michelman, and Michael Perry, that sees the Supreme Court as “playing the prophet of the modern American Republic’’). While critical of the portrayal of the Supreme Court as legal prophet, Ackerman nonetheless sees the Court’s major “constitutional moments” as good-faith attempts to participate in a process of constitutional change that has roots in the founding of the Republic. Id. at 140-62.

32 A common assumption is that the Court is so institutionally secure that such considerations are unnecessary. See discussion at infra note 266. For discussion and criticism of this trend, see BRUCE ACKERMAN, DECLINE AND FALL OF THE AMERICAN REPUBLIC 1, 1-4 (2010) (“Constitutional thought is in a triumphalist phase.’’). There are key exceptions. The most important is probably a group of articles on “strategic voting” in the Supreme Court, which examine the political considerations that limit and guide certain aspects of Supreme Court adjudication. This includes, among others, William N. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331 (1991) (analyzing how the anticipated reaction of other government organs influences the Supreme Court’s decision-making); John Ferejohn & Barry Weingast, A Positive Theory of Statutory Interpretation, 12 INT. REV. L. & ECON. 263 (1992); P.T. Spiller & E.H. Tiller, Decision Costs and the Strategic Design of Administrative Process and Judicial Review, 26 J. LEGAL STUD. 347 (1997); Michael E. Solimine & Rafael Gely, The Supreme Court and the DIG: An Empirical and Institutional Analysis, 2005 WISC. L. REV. 1421. See also JUDICIAL SELF-INTEREST: FEDERAL JUDGES AND COURT ADMINISTRATION (Christopher E. Smith ed. 1995), a collection of essays which examine the influence of political practicalities and institutional limitations on the federal judiciary’s doctrinal shifts. See also the discussion at infra note 263.

33 A fairly common observation made by the various authors cited in supra notes 29 and 32 is that pragmatic or “strategic” judicial decision-making often stems from the judiciary’s institutional vulnerabilities. See, e.g., Klerman, supra note 29 at 1186-87 (noting that the various English courts competed for legal fees because none had a reliably monopoly over a category of cases); BAKER, supra note 29, at 44 (likewise); BLÄTCHER, supra note 29 (focusing more specifically on the vulnerabilities of King’s Bench); Eskridge, supra note 32 (discussing how the Executive and Congress’ ability to override judicial interpretation prompts strategic decision-making by the Supreme Court). From there, it is but a small step to the thesis that more institutional security and authority decreases the need for strategic behavior.

conceptions of human whereas thicker versions incorporate certain elements of political morality, including free laws be “general, public, prospective, clear, consistent, capable of being followed, stable, and enforced,” classic work on this subject is 37

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without the use of trained professionals. legal professionalism, as it is at least conceptually possible to have general obedience to law Establishing professionalism‖ to cover the professionalization of both legal actors and institutions. Institutional pragmatism may have long institutional pragmatism in which law enforcement by trained professionals and, moreover, trends. That suggests, if only a long-term trend towards professionalism agrees with the Court’s institutional self-interest.

Part One of this paper reviews the 2008 SPC leadership change and the corresponding shift towards populism, surveying academic discussion of these developments. Part Two highlights the institutional pragmatism underlying the SPC’s ongoing “judicial cost and efficiency” initiative, the establishment of the “guiding cases” system, and several prominent judicial interpretations it has recently worked on. Part Three reexamines the SPC’s approach to legal professionalism and populism from the perspective of institutional self-interest, arguing that self-interest was conceivably a key concern in the court’s handling of these ideological trends. The Conclusion fits these themes into a broader theoretical discussion about the role of institutional pragmatism in judicial behavior and comments on how the SPC’s institutional pragmatism may have long-term consequences for legal reform in China.

A preliminary note on conceptual definition: We follow Liebman in understanding “legal professionalism” to cover the professionalization of both legal actors and institutions. It becomes, therefore, a broad ideal that incorporates both the monopolization of legal practice and law enforcement by trained professionals and, moreover, at least a “thin” version of the rule of law, in which legal rules, regardless of their precise content, effectively constrain state action. Establishing such a rule of law is a necessary, but not sufficient, condition for the realization of legal professionalism, as it is at least conceptually possible to have general obedience to law without the use of trained professionals.

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35 See sources at supra note 34.
36 Liebman, supra note 2, at 7.
37 Id. For discussion on “thick” and “thin” versions of the rule of law, see PEERENBOOM, supra note 2, at 2-6. The classic work on this subject is LON FULLER, THE MORALITY OF LAW (1976). Simply put, a “thin” version demands that laws be “general, public, prospective, clear, consistent, capable of being followed, stable, and enforced,” whereas thicker versions incorporate certain elements of political morality, including free-market ideals and various conceptions of human-rights. PEERENBOOM, supra note 2, at 3.
Part One: The SPC under New Leadership

For much of the Post-Mao era, Western observers seemed to feel that Chinese judicial reforms were, if slow, largely praise-worthy—greater legal professionalism, expanding civil and administrative jurisdiction, a slowly growing amount of judicial independence, and baby steps towards establishing some judicial power of constitutional review. The judiciary emphasized the importance of formal judicial education in its hiring process and intensified professional training for judges—for example, the SPC stated, in 2002, that all judges below the age of 40 must acquire a professional degree within 5 years, and that older judges must at least obtain some additional training. Increasingly, the judiciary attempted to assert independence from outside influences, including the media and some other government organs, by stressing the professionally legal nature of their work. The SPC moved to improve the quality and uniformity of judicial reasoning, and to strengthen the judiciary’s enforcement powers. In administrative cases, especially sensitive as they involve suits against government actors, the courts actually took tentative steps to expand their jurisdiction.

Of course, the judiciary’s relationship to other government organs or the Party underwent no fundamental change. Lower courts remained financially dependent on local governments, despite proposals by the SPC to centralize judicial funding, and at no time did the judiciary seem prepared to effectively constrain the Party’s authority. Many, perhaps most, legal reform

38 See sources discussed at supra notes 6, 7 and 26.
40 Liebman, supra note 5, at 14-19.
projects came with express government or party approval.\(^{44}\) Indeed, the courts may have played a lesser role in legal change compared to other government organs.\(^{45}\)

Nonetheless, one could sense that courts were not merely “passive” agents of the Party-state, obediently carrying out the policy directives they received.\(^{46}\) Instead, as discussed above, they actively pursued reforms that would boost judicial professionalism and institutional competence. While bemoaning the agonizingly slow pace of change, these were objectives that many Western observers supported—indeed, if one took a very long-term approach, the trend towards professionalization might eventually safeguard against political abuse of power.\(^{47}\) Even if this was impractical for the near future, greater legal consistency and broader judicial competence nonetheless bode well for China’s economic development and integration into the global market.\(^{48}\) Much of this came from “bottom-up” experimentation by lower courts,\(^{49}\) but the SPC, as indicated above, played a leading role in numerous issues.

The Qi Yuling case\(^{50}\) was, perhaps, the most controversial step the SPC took to expand judicial authority. As divisive as the case soon became in academic circles, it undeniably speaks volumes about the SPC’s institutional ambitions at the time. The case involved a young woman (Qi) who took a secondary school entrance examination and passed. Another woman intercepted her admissions letter, took on Qi’s identity to enroll I, and continued to use that identity as she found employment.\(^{51}\) Qi later discovered this and sued, claiming that she had suffered

\(^{44}\) Hand, supra note 6; Liebman, supra note 5, at 2, 37-39 (discussing the Party-state’s interest in developing a relatively effective and professional judiciary). If anything, Western scholars tend to overemphasize the Party-state’s control over the judiciary. Compare Minzner, supra note 4, and Zang, supra note 12, with the discussion at supra note 26.

\(^{45}\) The most economically significant changes to the Chinese legal system, for example, have been made via legislation, not judicial action. See Clarke, supra note 1.

\(^{46}\) See discussion at supra notes 16-18.

\(^{47}\) For more optimistic assessments, see PEERENBOOM, supra note 6; Grimheden, supra note 6. Others have expressed greater caution, see discussion at supra note 7.

\(^{48}\) See Donald C. Clarke, What’s Law Got to Do with It? Legal Institutions and Economic Development in China, 10 UCLA PAC. BASIN L.J. 1, 74-76 (1991) (discussing the value of stronger legal institutions to China’s economic development); Clarke, supra note 1 (discussing the role of stronger legal institutions in stimulating growth). There is, of course, a substantial literature on whether formal legal institutions have played, or need to play, a central role in promoting economic growth in China. Many authors emphasize that informal institutions and property rights have been just as important, if not more so, but few would go so far as to claim that further development of formal legal institutions is undesirable or unnecessary in the long run. See Katharina Pistor & Chenggang Xu, Governing Stock Markets in Transition Economies: Lessons from China, 7 AM. L. & ECON. REV. 1 (2005); Frank Allen, Jun Qian & Meijun Qian, Law, Finance and Economic Growth in China, 77 J. FINANCIAL ECON. 57 (2005); Donald C. Clarke, Economic Development and the Rights Hypothesis: The China Problem, 51 AM. J. OF COMP. L. 89 (2003); Minxin Pei, Does Legal Reform Protect Economic Transactions? Commercial Disputes in China, in ASSESSING THE VALUE OF LAW IN TRANSITION COUNTRIES 180 (Peter Murrell ed. 2001).

\(^{49}\) Liebman, supra note 5, at 30-36.


\(^{51}\) Qi Yuling v. Chen Xiaoqi, supra note 50.
“infringement of her right to her name and deprivation of her right to an education.”

At the time, the only plausible legal source for the latter claim was the Chinese constitution, leading the Provincial People's Court hearing the case to seek the SPC opinion on awarding damages for an infringement of a constitutional right. A year later, the SPC approved the damages, breaking away from the previous convention that courts should not cite or rely upon the constitution in their judgments. On the very same day, Huang Songyou, then chief judge of the SPC’s First Civil Tribunal, published an article in the SPC’s official newspaper, claiming that he hoped the Chinese judiciary would be able to find its own Marbury v. Madison and establish the power of constitutional review in ordinary courts.

Realizing that this article was essentially a commentary on the Qi Yuling decision, the academic world fervently debated whether the decision could really ignite judicial constitutional review in China. Many pointed out serious flaws in the SPC’s legal reasoning, noting that the Chinese Constitution gave no express powers of constitutional review to the courts, explicitly leaving them to the National People’s Congress (NPC) and its Standing Committee. Others found the decision dissatisfying, as it only recognized constitutional rights against another individual, not against the government. One thing did seem clear: by issuing the decision and simultaneously allowing Huang to publish his article in its official newspaper, the SPC leadership supported this rather audacious attempt to “expand judicial power.”

Qi Yuling fits into the general trend “towards professionalization and formality” that characterized judicial reforms from 1978 to the early 2000s. The SPC’s attempt to obtain constitutional review powers, if actually successful, would have strengthened judicial independence, itself a key component of legal professionalism—courts cannot stay true to their professional judgment without possessing some measure of institutional independence. Moreover, the SPC probably would not have attempted Qi Yuling without first making some progress in strengthening judicial competence and professionalism: An incompetent and unprofessional judiciary has no clear justification for seeking powers of constitutional review. The expansionist ambitions underlying Qi Yuling are therefore quite representative of the SPC’s general “institutional mentality” during this era.

The SPC leadership changes in 2008 seemed to indicate a turning point in the judiciary’s institutional development, although arguably “populist” trends had already emerged prior to

52 Id.


57 Tong, supra note 26.

58 Liebman, supra note 2, at 7.
Wang Shengjun’s appointment. The “justice for the people” slogan emerged in SPC documents as early as 2003, when Xiao Yang argued that courts should revive the legal traditions of the 1930s Jiangxi Soviet era by “carefully following and enforcing laws that served the fundamental interests of the people”—“serving the people,” rather than “private interests.” In other words, courts needed to become more responsive to the practical and sentimental needs of the general public: Courts should, for example, respond swiftly to appeals, conclude cases efficiently, apply simplified legal procedures when appropriate, remind litigants of procedural requirements beforehand, inform them of the risks associated with litigation, provide legal aid to those that qualify, reduce processing fees for the poor, strengthen control over court-direction mediation and boost its efficiency, and provide closer legal guidance to people’s mediation committees.

None of these measures clearly foreshadowed the SPC’s “mediate whenever possible” campaign that has drawn so much academic attention in recent years, but that was soon to follow. In 2004, the Court leadership began advocating a “mediate if possible, adjudicate if appropriate” (“neng tiao ze tiao, dang pan ze pan”) slogan in speeches and press releases. These eventually built up to a 2007 SPC opinion on “further enhancing the positive effect of court-directed mediation in the construction of a harmonious socialist society”: The “mediate if possible” slogan was declared a “guiding agenda” of the Chinese judiciary, along with a strong emphasis on “resolving cases and solving problems to promote social harmony” (“anjie shiliao, cujin hexie”). SPC leaders felt that “excessive attention to adjudication and emphasis on procedure ha[d] failed to resolve disputes or social contradictions” and, therefore, that “courts must take more pragmatic and involved approaches to solving problems.” On the other hand, the Court did initially take a reasonably moderate approach towards encouraging mediation, stating that mediation could not be coerced, and that courts should hesitate to use the percentage of cases settled via mediation as a standard for evaluating judicial performance.


60 The use of summary procedure is explained in greater detail at infra, p. __.

61 SPC, 23 Specific Measures, supra note 59.

62 See supra note 12.


64 Supreme People’s Court of China, Zuzhao Renshi Fayuan Guanyu Jinyibu Fahui Sushong Tiaojie zai Goujian Shehui Zhuyi Hexie Shehui zhong Ji Ji Zuoyong de Ruogan Yijian [Several Opinions on further Enhancing the Positive Effect of Court-Directed Mediation in the Construction of a Harmonious Socialist Society], RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY], Mar. 07, 2007, at

65 Liebman, supra note 2, at 17.

66 E.g. Wu, supra note 63.
From 2007 onwards, as Wang Shengjun replaced Xiao Yang as SPC President, these populist trends—populist in that they emphasize judicial responsiveness to public opinion—swiftly grew in visibility. The “Three Supremes” doctrine discussed above attracted a particularly large amount of controversy among lawyers and academics, as did Wang’s repeated praise for Ma Xiwu, a Communist judge from the 1930s famous for promoting mediated and informal means of dispute resolution over formal legal procedure. Wang’s express citation of Ma Xiwu’s example in his March 2009 Work Report to the National People’s Congress marked the first time an SPC work report had done that since at least 1978, causing a senior American scholar to comment that “the populist, from-the-masses-to-the-masses, procedure-be-dammed Ma Xiwu style is definitely making a rhetorical comeback.”

In the SPC’s third five-year legal reform plan, issued in 2009, “resolutely follow the mass line” (“jianchi quanzhong luxian”) became a central principle of judicial reform, requiring courts to accommodate public opinion and “willingly accept the review and inspection of the people.” Meanwhile, the SPC continued to promote mediation as the default dispute-resolution procedure in civil cases, leading to a steady increase in the percentage of civil cases resolved via mediation—66 percent in 2010, up from 55 percent in 2006. Highlighting the importance of mediation in the SPC’s policy agenda, Wang has argued that implementing the “Three Supremes” requires courts to “understand people’s needs in a timely fashion and adjust judicial policy accordingly,” and that promotion of mediation and “anjie shiliao” are keys to doing so.

Mediation is, of course, but one—if particularly visible—aspect of the Court’s “populist turn.” The promotion of “the mass line” naturally requires courts to establish and maintain avenues for the public to voice their concerns and demands, as SPC reform agendas have clearly emphasized. Wang has even suggested that judicial decisions in capital punishment cases should consider “the feelings of the masses,” and that judicial reforms should generally accept

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67 See Liebman, supra note 2, at 7 (discussing the courts’ professed desire to “better serve the people and to be proactive in response to disputes” by deemphasizing legal formality and promoting “populist” dispute-resolution methods).
68 See supra notes 10, 11.
70 Wang Shengjun, supra note 70.
75 THIRD FIVE YEAR PLAN, supra note 72, at §§ 2-25 to 2-30.
the inspection of the media.\textsuperscript{76} Other changes include the ongoing implementation of the initial 2003 “justice for the people” agenda: increasing case processing efficiency, requiring judges to provide procedural guidance to litigants, reducing litigation fees, and so on.\textsuperscript{77}

In addition to promoting responsiveness to public opinion and interests, the SPC has also stressed the importance of cooperating with other government organs and accepting the “supremacy of the Party.”\textsuperscript{78} The third five-year plan, for example, states that legal reform measures should “resolutely follow the leadership of the Party” and “accept the supervision of the people’s congresses,” so as to protect the “constitutional status and judicial authority” of the courts.\textsuperscript{79} In comparison, the previous five-year plan contained no such language.\textsuperscript{80}

Unlike the wide-ranging but fairly visible consequences of the “populist turn,” it is difficult to credit any actual changes in SPC policy to the emergence of the “First Supreme.” The courts have never strayed far from the Party’s control, and so perhaps there is little to change except the rhetoric. The judiciary’s gradual development of legal professionalism almost certainly received Party approval—in fact it fits in very well with the “rule the country according to law” (“yifa zhiguo”) rhetoric that the Party-state has trumpeted for over a decade now.\textsuperscript{81} The Qi Yuling case did veer away from established political conventions and might have attempted to expanded judicial authority beyond what Party leaders were comfortable with, but such cases have always been the extremely rare exception.\textsuperscript{82}

The latest turn in the Qi Yuling saga does, however, suggest that the Party has indeed strengthened its control over the judiciary. On December 18, 2008, in a batch of 27 judicial interpretations declared invalid, the SPC quietly threw out Qi Yuling, simply stating that it “no longer applied.”\textsuperscript{83} Scholars hastened to comment, generally arguing that the decision was a combination of external pressure and the self-interest of the new SPC leadership.\textsuperscript{84} As a prominent Chinese constitutional law scholar stated: “[The abolishment of Qi Yuling] indicates that the political leadership . . . recognized that allowing the courts a direct role in enforcement of the Constitution would undermine China’s political structure. . . . For the new leadership of

\textsuperscript{76} Qin Xudong, Zuigao Fayuan yuanzhang tan sixing yifu zhengyi [The President of the Supreme People’s Court’s Discussion of the Basis for Capital Punishment Stirs Up Controversy], CAIJING WANG, April 11, 2008, http://www.caijing.com.cn/20080411/56061.shtml.

\textsuperscript{77} SPC, 23 Specific Measures, supra note 59.

\textsuperscript{78} See supra note 10.

\textsuperscript{79} THIRD FIVE YEAR PLAN, supra note 72.


\textsuperscript{82} Kellogg, supra note 53, at 245 (noting that, although judicial activists have made numerous constitutional arguments in cases, the courts and the government generally do not respond to them).


\textsuperscript{84} See Tong, supra note 26, at 109; Clarke, supra note 56 (“An interesting political question: is this part of an attack on Xiao Yang, which has been him rumored, apparently falsely, to have been put under shuanggu (Party disciplinary detention) on suspicion of corruption, and may be connected with the downfall of Huang Songyou, a former SPC vice president, on corruption charges?”).
the Supreme Court, the Reply to Qi Yuling’s Case represented a political burden . . . ”.85 Others observed that, “despite the SPC’s best efforts to avoid crossing any political lines [in Qi Yuling], the response from above was negative.”86

At the same time, the SPC has, perhaps surprisingly, sustained its promotion of legal professionalism and judicial independence. The third five-year plan calls for leadership of the party and a promotion of the “mass line,” but also stresses that judges should continue to boost their level of professional training, and that courts should strengthen their ability to “independently and fairly exercise their power of adjudication.”87 While the judiciary is certainly familiar with the academic convention that populism may be incompatible with legal professionalism and judicial independence,88 it has been content to place these ideals side-by-side and, perhaps, hoping a workable balance will emerge in practice. Scholars therefore observe that the judiciary is characterized by “tension between trends toward professionalism and populism.”89 The heightened degree of political control by the Party is, of course, an “external limiting condition” that no one ignores.

Existing scholarship on the rise of legal populism and “Party supremacy” in recent SPC policy has generally done a better job of tracing these developments and debating their normative merits than explaining their underlying causes. While the increase in Party control is not terribly surprising—it is only natural for an authoritarian state to desire strong control over its legal apparatus, the motivations behind the promotion of legal populism are not well understood. Chinese scholars and lawyers have rarely attempted to pry into the SPC’s “original intent,” perhaps concerned with the political sensitiveness of the issue.90 Western scholars, on the other hand, are limited by their small numbers: Liebman’s “populism” paper, for example, was basically the first American piece to systematically examine the “populist turn” and, therefore, naturally focused more on the “how” than the “why.”91 It did identify a few potential underlying motives, but expends little energy in evaluating their relative importance, perhaps leaving those issues for future research.92 Few scholars have followed up on them.93

From the SPC’s point of view, there are three possible kinds of motivations, logically distinct but nonetheless capable of coexistence: First, it may simply be carrying out orders. The Party-state decides that legal populism is desirable and demands that the judiciary follows suit. The purest version of this theory would deny the judiciary any substantial agency in forming the populist reform agenda, although that is certainly an exaggeration. Second, the SPC, or at least

85 Tong, supra note 26, at 109.
87 THIRD FIVE YEAR PLAN, supra note 72, at § 2-10.
89 Liebman, supra note 2, at 1, 7.
90 Tong, supra note 26, is one of the extremely rare exceptions and, it must be noted, was published in an American law journal, rather than back in China.
91 Liebman, supra note 2, at 9-23.
92 Id., at 24-27.
93 I find only three articles that explicitly attempt to explain why the “populist turn” occurred: Minzner, supra note 4; Zang, supra note 12; Peerenboom, supra note 12.
much of its leadership, may have genuinely internalized populism as a guiding principle of legal reform. For whatever reason—ideology, tradition, or other factors, populism possesses normative, even moral, value, and simply deserves to be promoted. Third, the SPC may possess pragmatic ulterior motives: strengthening its finances, boosting its public reputation, or simply avoiding public or political controversy. Basically, this theory sees the SPC as a “rational actor” that pursues its institutional self-interest.

This brings up the preliminary point of whether the SPC is a consolidated institution that possesses coherent “self-interests” and is somewhat capable of advancing them. Given the strict bureaucratic hierarchy within the Court, it is, at the very least, an organized institution with a fairly clear system of command. Because the sociopolitical standing of SPC leaders are directly related to that of the judiciary and the Court, one would imagine that they usually have strong personal incentives to protect and enhance the political standing, social reputation and financial health of these institutions. Moreover, as stated above, the Chinese judiciary currently handles a legal apparatus far too complex in both legal and administrative dimensions for external political forces to directly dictate every substantive SPC decision. We must assume that the SPC possesses significant agency in developing and implementing judicial reform agendas. Certainly its leaders generally wish to please Party superiors, but they at least have considerable discretion in choosing how, precisely, to do that.

Liebman’s paper touches upon all three theories, but also seems to emphasize the second and third over the first, and the second in particular. It highlights the “historical continuities” between the SPC’s current promotion of populism and precedents set in the Ma Xiwu era, suggesting that there is a Chinese Communist “legal tradition” that guides and encourages recent developments. This suggests a fairly normative interpretation of the “populist turn”: By and large, the Chinese judiciary is simply connecting to its own normative traditions, which do not conform to western notions of legal professionalism. On the other hand, Liebman also briefly acknowledges that the promotion of populism “may in significant part consist of using revolutionary language to pursue divergent and diffuse goals,” including “show[ing] courts’ loyalty to Party leadership,” “protect[ing] courts from criticism,” and “facilitat[ing] innovation.” Populism can, therefore, become a “tool for legal institutions to promote their own authority and legitimacy.” The paper does not elaborate further.

Other studies of the Wang Shengjun Court have come down more firmly on the side of one specific theory. Based on a close reading of the SPC’s third five-year plan, Randall Peerenboom argues that the Court’s judicial reform agenda “reflects a pragmatic political compromise. The court accepts some limits on its powers and refrains from challenging other organs in exchange for cooperation on certain issues that enhance the power and authority of the judiciary.” One wonders, however, if an analysis of only the third five-year plan can adequately support a broad thesis of institutional pragmatism.

Zang Dongsheng has suggested a more pessimistic view: populism derives directly from the Party’s conviction that “the legal profession must be brought under control, repeatedly.”

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94 See Finder, supra note 2; Peerenboom, supra note 2.
95 See discussion surrounding supra notes 16-18.
96 Liebman, supra note 2, at 24-27.
97 Id. at 25-26.
98 Id. at 24.
99 Id. at 15.
100 Peerenboom, supra note 12, at 9.
101 Zang, supra note 12, at 93.
His paper therefore straightforwardly applies the second theory, but provides little analysis of actual SPC policy. A recent article by Carl Minzner likewise sees the Court’s “populist turn” as directly derivative of a broader “turn against law” that permeates the entire Chinese party-state.102 Minzner argues, surely correctly, that Party leaders have deemphasized formal legal procedure largely as a pragmatic response to growing social unrest.103 The SPC, like any other government organ, has simply been implementing these directives. Examining the conflict between “mediatory” and “adjudicatory” justice in the later Xiao Yang years, Fu Hualing and Richard Cullen also argue that the reemphasis on mediation is due to pressure from the Party leadership.104 While these observations are certainly accurate to some extent, they overlook, as argued both above and below, the SPC’s not-insubstantial agency in judicial policymaking.

To provide a thicker analysis of the institutional intent behind recent SPC policymaking, this paper places the Court’s “populist turn” within a broader context of judicial activity. Although academic studies of SPC policy have predominantly focused on developments related to legal professionalism, populism, or Party control, many of the Court’s most important and visible recent actions are largely unrelated—and indeed often contradictory—to these factors. Instead, they were simply designed to conserve the judiciary’s financial or human resources, avoid engagement with potentially controversial issues, and strengthen the SPC’s powers of judicial interpretation. The deep institutional pragmatism that underlies these actions strongly suggests that we reconsider, at least partially, the Court’s promotion of both legal populism and professionalism as strategic moves designed to enhance its sociopolitical standing. There is no denying that SPC judges are fully capable of internalizing one, or even both, of these ideologies, but one at least wonders if the SPC would have taken these steps without the lure of potential institutional benefits. Basically, we argue that the SPC has been, and will probably continue to be, a rational institutional actor that largely pursues its self-interest.

Part Two: Case Studies of Institutional Pragmatism

This part examines some of the SPC’s most significant legal reform projects and judicial interpretations of the past two years, including changes in legal procedure, substantive law, and the Court’s institutional authority. It argues that the straightforward pursuit of institutional self-interest is a far more persuasive explanation for these activities than external political pressure or ideological commitment to either professionalism or populism.

A. “Judicial Cost and Efficiency”

Within the SPC’s current work agenda, the phrase “judicial cost and efficiency” generally refers to a specific ongoing project undertaken by the Court’s Institute for Applied Legal Studies (IALS) and sponsored by both the European Union and the UNDP.105 This specific project is,
however, only one part of a broader SPC initiative to streamline case processing and prevent the buildup of docket backlogs. Like other developments discussed above, this initiative has roots in the Xiao Yang era, but noticeably intensified after 2008. It traces its rhetorical origins to a 2000 speech by Xiao Yang, which stated that “fairness and efficiency” would be the main themes of legal reform in the new century.\footnote{Zong Bian, Xiao Yang zai Bajisitan fabiao yanjiang: Weihu sifa gongzheng, tigao sifa xiaolü [Xiao Yang Speaks in Pakistan: Protect Judicial Fairness, Enhance Judicial Efficiency], RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY], June 19, 2001, http://oldfyb.chinacourt.org/public/detail.php?id=24975.} When Xiao put forth the “justice for the people” slogan three years later, he explained that the slogan represented the foundation and starting point of “fairness and efficiency” and, therefore, that the two slogans were fundamentally interconnected.\footnote{Mao, supra note 59.} One might see, for example, the various “access to justice” reforms discussed above also as attempts to boost judicial efficiency—once litigants were better informed, they probably would make better decisions and move the legal process along faster.

The most important move in this “judicial efficiency” initiative has so far been the enhanced application of “summary procedure” in both civil and criminal trials.\footnote{SPC higher-ups have explicitly stated this. Jiang Huiling, supra note 105. Some scholars have identified other measures in the efficiency program, including administrative emphasis on statutory deadlines for normal civil procedure, annual case-completion rates, and appeals rates for local adjudication, see Fu & Cullen, supra note 6, at 46–49. These measures focus, however, only on the handling of regular civil procedure, and are therefore less drastic “efficiency” measures than the push for summary procedure discussed here.} In 2003, the SPC issued an opinion on the application of such procedures in civil cases, while co-authoring, at roughly the same time, a separate opinion on criminal cases with the Supreme People’s Procuratorate and Ministry of Justice.\footnote{Supreme People’s Court of China, Zuigao Renmin Fayuan guanyu shiyong jianyi chengxu shenli minshi anjian de ruogan guiding [Several Regulations by the Supreme People’s Court of China Concerning the Application of Summary Procedure to Civil Cases], Sep. 10, 2003, available at http://www.lawlib.com/law/law_view.asp?id=80973; Supreme People’s Court, Supreme People’s Procuratorate & Ministry of Justice, Guanyu shiyong jianyi chengxu shenli gongsu anjian de ruogan guiding [Several Regulations Concerning the Application of Summary Procedure to Criminal Cases], Mar. 14, 2003, available at http://www.lawlib.com/law/law_view.asp?id=42942.} While both civil and criminal procedure laws had recognized summary procedures since the mid-1990s, the statutory language was vague and therefore hard to apply.\footnote{Zhonghua Renmin Gonghe Guo Minshi Chengxu Fa [Civil Procedure Law of the People’s Republic of China] §§ 142-146 (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 9, 1991, effective Apr. 9, 1991); Zhonghua Renmin Gonghe Guo Xingshi Chengxu Fa [Criminal Procedure Law of the People’s Republic of China] §§ 174-179 (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 17, 1996, effective Mar. 17, 1996).} As Huang Songyou explained, by providing detailed guidelines on when and how to apply summary procedure, the opinions enhanced its availability to litigants.\footnote{Tian Yu, Zuigao Fayuan gongbu minshi anjian shiyong jianyi chengxu sifa jieshi [The Supreme Court Issues a Judicial Interpretation Concerning the Application of Summary Procedure to Civil Cases], XINHUA NET, Sep. 19, 2003, http://news.xinhuanet.com/newscenter/2003-09/18/content_1088684.htm.}

The primary difference between summary and regular civil procedure was that the former generally must conclude within three months, whereas the latter could take six.\footnote{Civil Procedure law, supra note 110, at §§ 135, 146. These were the statutory rules in effect at the time of the SPC interpretations on summary procedure, which were later replaced in 2008—with no change to the time limits—by Zhonghua Renmin Gonghe Guo Minshi Chengxu Fa [Civil Procedure Law of the People’s Republic of China] §§ 135, 146 (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective Apr. 1, 2008).} To this end, summary procedure generally allowed for only one hearing before judgment, excluded the use of...
three-judge adjudication panels, and relaxed certain procedural requirements for the filing of motions, the presentation of evidence, and debate.\textsuperscript{113} The application of summary procedure in criminal cases had largely similar effects, but placed the deadline for case conclusion at twenty days.\textsuperscript{114} There were, of course, restrictions on when summary procedure could be used: In civil cases, both sides needed to consent and, furthermore, to agree on the basic facts.\textsuperscript{115} For criminal cases, summary procedure required the consent of the prosecutor, a “simple and clear” fact pattern, a guilty plea, and a charge that carried no more than three years imprisonment.\textsuperscript{116}

There is nothing controversial about these rules. Taken at face value, they non-coercively provide the option of simplifying trial procedure when there is little factual ambiguity. For most of the 2000s, there was no indication that judges were applying summary procedure unfairly or coercively. Indeed, application of summary procedure in local-level adjudication increased only modestly after 2003.\textsuperscript{117}

In 2008, however, the SPC began to increase pressure on local courts to apply summary procedure as often as possible. Early in the year, it issued an experimental set of guidelines designed to formalize the internal review of judicial performance.\textsuperscript{118} Most prominently, the guidelines laid out 33 statistical “indicators” that lower courts should use to evaluate and guide the work performance of their judges—basically, establishing “target levels” for each statistic and rewarding or reprimanding judges, often financially, based on their success or failure at meeting those levels.\textsuperscript{119} These included indicators on, for example, the percentage of cases appealed, overturned, mediated, and withdrawn, but also 11 indicators of “judicial efficiency”: for example, the percentage of cases closed within proper time limits, the average duration of each case, and the percentage of cases that used summary procedure.\textsuperscript{120}

The SPC then solidified these “experimental” measures in 2010 by establishing an annual national review procedure, in which all lower courts received evaluations and rankings based on statistical indicators.\textsuperscript{121} These evaluations introduced a mathematical formula based on 26

\textsuperscript{113} Civil Procedure law, supra note 110, at §§ 143-145; Regulations Concerning the Application of Summary Procedure to Civil Cases, supra note 109, at §§ 4-12, 21, 23, 27.  
\textsuperscript{114} Criminal Procedure law, supra note 110, at §§ 147-149, 178; Regulations Concerning the Application of Summary Procedure to Criminal Cases, supra note 109, at §§ 5, 7.  
\textsuperscript{115} Regulations Concerning the Application of Summary Procedure to Civil Cases, supra note 109, at § 1.  
\textsuperscript{116} Regulations Concerning the Application of Summary Procedure to Criminal Cases, supra note 109, at § 1.  
\textsuperscript{117} According to Tian Yu & Zhang Xiaojing, Quanguo jiceng fayuan 60% anjian shiyong jianyichengxu kuaiishen kuaiqian [60% of Cases in Local Courts Applied Summary Procedure to Adjudicate Swiftly], ZHONGGUO FALU JIAOYU WANG [CHINA LEGAL EDUCATION NET], July 2, 2004, http://www.chinalawedu.com/news/1000/3/2004/7/he08342438341274002156842_121965.htm, 60% of local cases applied summary procedure, including both civil and criminal cases, which meant that well over 60% of civil cases applied summary procedure, as the rate is generally much lower for criminal cases: According to Xiao Yang, Zuigao Renmin Fayuan Gongzuo Baogao (2007) [Supreme People’s Court Work Report (2007)], March 13, 2007, available at http://www.dffy.com/sifashijian/ziliao/200703/20070314162444.htm, the application rates had “increased” to around 70% for civil cases and around 40% for criminal cases. The increase must have been marginal.  
\textsuperscript{119} Id. at §§ 8-10.  
\textsuperscript{120} Id.  
\textsuperscript{121} Idelo Zuigao Fuyuan “26 xiang zhibiao” [Interpreting the “26 Indicators” Issued by the Supreme Court], SHIJIAZHUAN SHI YUHUA QU RENMIN FAYUAN WANG [PEOPLE’S COURT OF YUHUA DISTRICT, SHIJIAZHUANG NET], http://www.yhqfyy.com/show.asp?id=178 (last visited, May 10, 2011).
indicators—the other 7 were presumably eliminated—and, moreover, assigned “weights” to each indicator. This provided a statistical foundation for national rankings and comparisons. Within this new system, the percentage of cases that applied summary procedure and the percentage that issued verdicts immediately after the initial hearing occupied rather counter-intuitively heavy weights: 8 and 6 percent, respectively, of the total “score.” In comparison, the percentage of cases appealed and overturned both weighed 3 percent. Curiously, despite the public exposure that mediation and “justice for the people” have recently received, the percentage of cases mediated only weighed 5 percent. The introduction of this review system triggered a flurry of action in lower courts, as administrators scrambled to put together appropriate “target levels” for the designated indicators, conduct internal reviews, and boost corresponding performance levels.

Although lower Chinese courts had long used a variety of statistical indicators to measure judicial performance, prior to 2008, the SPC had rarely explicitly endorsed the establishment of what some have called “target responsibility systems.” Quite the opposite, in the late 1990s and early 2000s, it would sometimes caution lower courts against abuse of performance indicators “in violation of judicial fairness.” Moreover, even among lower courts, the use of summary procedure was rarely emphasized as a key measure of positive performance, unlike, for example, the percentage of cases adjudicated in court or, since at least 2003, the percentage of cases mediated.

By designating the application of summary procedure a key positive measure of judicial performance, the SPC created significant pressure on local courts to simplify case processing whenever possible. A relatively benign interpretation of these developments would be that they were simply rational reactions to some pressing necessity: Perhaps many cases that followed regular procedure were actually too simple to justify it. It seems unclear, however, whether the Court has any real grounds to make this assessment. Due to the limited availability of judicial appeal in China, the SPC relies predominantly on research projects to monitor local adjudication, but there has apparently been no concentrated effort in recent years to study the application of summary procedure. As far as prima facie evidence goes, a 70 percent application rate in civil cases and a 40 percent rate in criminal trials hardly seem unreasonably low. One could argue, in fact, that they already reflect a considerable effort by judges—who certainly have some incentive to lighten their own workload—to encourage simplified procedure.

A few Chinese scholars and judges have attempted to compare these numbers to the use of simplified legal procedures in Western courts, arguing that Chinese usage of summary procedure is dramatically lower than in “developed countries,” but with little academic rigor:

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122 Id.
123 Id.
124 Id.
125 Id.
126 Id.
128 See sources cited at supra note 63; Fu & Cullen, supra note 6, at 49-51 (noting how the SPC “was critical” of certain statistical performance indicators and was “challenging” their use).
129 Minzner, supra note 4, at 33-34.
130 Email correspondences between the author and research staff of the IALP, available upon request.
131 See supra note 117.
132 E.g., Song Zhaowu, Minshi Susong jianyi chengxu bijiao [A Comparison of Civil Summary Procedures], ZHONGGUO MINSHANG FALÜ WANG [CHINA CIVIL AND COMMERCIAL LAW NET], Feb. 5, 2011,
One paper absurdly compares the use of summary procedure in criminal cases to American plea-bargaining. 133 If one only looks at the average length of cases—the time between the initial filing of claims to the final conclusion, then Chinese courts actually compare favorably to most Western jurisdictions. According to a 2002 study by the World Bank, Chinese processing of civil claims, even before the 2003 SPC opinion boosted usage of summary procedure, was faster than nearly all Western European nations, the exception being the United Kingdom. 134 In the end, there does not seem to be much reason for the SPC to believe that regular trial procedures were being used “wastefully.”

Alternatively, the SPC might have believed that the total volume of litigation in China was rising too rapidly for local courts to continue applying regular procedure as often as they used to. After all, Chinese judges have regularly complained about rising case-loads for years. 135 There is some truth to this. Prior to 2007, the total caseload of the Chinese judiciary had hovered consistently at around 8 million cases for over five years. 136 This jumped to around 9 million in 2007, to 10 million in 2008, and finally to 11 million in 2009. In 2010, however, the trend reversed, with the total number of cases falling slightly. 137

A rising volume of litigation does not, however, mean that Chinese courts are overstretched. Even in 2009, the average Chinese trial judge handled less than 90 cases a year. 138 Considering that it actually takes less time to process a case in China than in most Western nations, this seems absurdly low: American trial judges routinely handle more than 400 cases a year, as do German criminal judges—German civil judges often take around 700. 139 Comparisons to other Asian jurisdictions are even starker: South Korean judges process over 700


133 Xie, supra note 132.
136 Liebman, supra note 5, at 6-7.
139 Liu, supra note 138.
cases each year, and Taipei civil judges often receive over 2000.\textsuperscript{140} Certainly, the distribution of cases among Chinese local courts is highly uneven, but even the busiest courts only receive around 140 cases per person.\textsuperscript{141} These facts are fairly well-known: legal scholars have frequently called for the judiciary to downsize, claiming that Chinese judges are severely underworked.\textsuperscript{142} Nor are there real grounds for the SPC to preemptively streamline judicial procedure in anticipation of future growth: the 2010 decline in caseload suggested that the 2007-09 increases were a short-term shock, not the start of a long-term trend. The SPC itself seems to acknowledge this, blaming the recent increases on “the global financial crisis,” rather than China’s long-term economic growth.\textsuperscript{143} Ultimately, the SPC has no good reason to aggressively push for further simplification of judicial procedure, especially when it potentially comes at the cost of fairness and accuracy.

Those costs could very well be hefty. In theory, litigants possess veto power over the application of summary procedure,\textsuperscript{144} but one cannot help but expect judges to encourage it much more aggressively, now that the new performance evaluation system looms constantly in the background. This is already noticeable in many local courts.\textsuperscript{145} By rewarding or punishing judges based on their summary procedure application rates, the evaluation system will very likely create a “race to the top”—or “race to the bottom,” depending on one’s point of view—to apply summary procedure. The potential for coercion is enormous.\textsuperscript{146} Given the relative lack of legal representation in China,\textsuperscript{147} many litigants turn to court personnel for basic legal advice.\textsuperscript{148}

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\textsuperscript{140} Id.; Cao Shibing, \textit{Anduo renshao de Hanguo fayuan [Overworked Courts in Korea]}, 2009(1) \textit{RENMIN SIFA [PEOPLE’S JUDICIAL JOURNAL]} 59.
\textsuperscript{141} Dudiao Hanjiang Xue, supra note 138.
\textsuperscript{142} Id. For a Western perspective on the extremely large size of the Chinese judiciary, see Jerome A. Cohen, \textit{The Court of Mass Appeal}, S. CHINA MORNING POST, Apr. 4, 2009, at A11.
\textsuperscript{143} See sources at supra note 137.
\textsuperscript{144} Regulations Concerning the Application of Summary Procedure to Civil Cases, supra note 109, at § 1 (requiring consent from all litigants); Regulations Concerning the Application of Summary Procedure to Criminal Cases, supra note 109, at § 1 (requiring a voluntary guilty plea).
\textsuperscript{146} Similar arguments have been made by Minzner, supra note 4, at 37-43, on the use of “target responsibility systems” to promote mediation, but his major criticisms, generally that it makes the choosing of procedural modes coercive and unresponsive to popular social needs, also apply to the promotion of summary procedure via similar methods.
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Judges therefore wield tremendous influence over procedural choices. It is hardly far-fetched to assume that many of them will now insistently recommend procedural simplicity even when the case deserves a more drawn-out and detailed treatment and, moreover, that many, if not most, litigants will be in no position to resist, or even to fully comprehend the problem.

If the establishment of judicial performance indicators do not respond to any pressing necessity, is it nonetheless possible that they derive from some overarching ideological commitment, perhaps to either legal professionalism or populism? This, too, seems exceedingly unlikely. Putting strong institutional pressure on judges to apply summary procedure is almost certainly inconsistent with legal professionalism, especially when there is no decent evidence that Chinese judges are overworked. Such pressure only prevents judges from approaching the selection of procedure with an open mind, diverting their attention from the accurate and appropriate application of legal rules. Ironically, the performance indicators also run afoul of legal populism: They intuitively make judges less sensitive, not more, to both public opinion and the specific needs of litigants. By giving judges substantial incentive to push for summary procedure almost regardless of circumstance, the indicators significantly damage the normative flexibility that legal populism so fervently advocates.

Nor is it very plausible to see the indicators as the result of pressure from Party leaders: It is hard to believe that they would have had much interest in exerting pressure on this kind of procedural detail. It generates no clear benefit for either the Party-state’s control over the judiciary or for the maintenance of social stability. Quite the opposite, the push towards summary procedure actually contradicts, as discussed above, the Party’s vocal support for the “justice for the people” initiative.

Having eliminated pressing necessity and ideological commitment, what is left to explain the SPC’s recent infatuation with summary procedure? However theoretically pedestrian it may seem, the best explanation is simply the pragmatic pursuit of institutional self-interest, most notably financial health. Although the Chinese judiciary does not currently face any noticeable fiscal deficit, it certainly suffers from a somewhat limited budget and a strong financial dependence on other branches of government.149 It has, therefore, a clear incentive to conserve expenses, especially at a time of considerable financial uncertainty. Part of this uncertainty stems from the broader financial problems of the Chinese state: Since at least the 2008 Financial Crisis, it has been running significant budget deficits—by some estimates, over 15 percent of GDP in 2009.150 Amid concerns about the housing market, high inflation, and “over-

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148 Courts are actually obligated to provide basic legal counsel to litigants, which certainly reflects the judiciary’s own grasp of the legal representation system: Supreme Court of China, Zuigao Renmin Fayuan guanyu jin yi bu jiaqiang sifa bianmin gongzuo de ruogan yijian [Several Opinions by the Supreme People’s Court of China Concerning the Providing of Convenient Justice to the People] § 1, Feb. 24, 2009, available at http://www.court.gov.cn/qwfb/sfwj/yj/201002/t20100224_1906.htm.
investment,” the central government has already planned to slow the expansion of government debt, while local governments face even tougher fiscal decisions.

Although the courts occupy only a miniscule portion of the overall budget, their relative political weakness nonetheless makes them particularly vulnerable to spending cuts, especially by local governments. Recent structural changes to judicial funding have further aggravated this vulnerability: Starting in 2007, the courts began to slash litigation fees as part of the “justice for the people” initiative, creating a substantial gap in the judicial budget. Although the central government pledged to fill it through various special subsidies, distributed to the courts via provincial and local governments, coordination proved complicated and costly. The judiciary lost a considerable amount of financial independence in this process.

The push for summary procedure does, at the very least, solidly advance the judiciary’s financial interests by saving time and resources devoted to individual cases. Theoretically, quicker processing of cases might encourage heavier use of courts, but the judiciary’s past experience suggests otherwise: the more frequent use of summary procedure after 2003, for example, did not generate any significant growth in caseload. There is, therefore, much financial upside and little downside to streamlining case procedure as much as possible. Even the most idealistic scholar would agree that the SPC might find this tempting.

Financial security has featured prominently in the SPC’s recent policy agenda, often in conjunction with various “judicial efficiency” measures. One noticeable difference between the Court’s third five-year plan and its previous two was that “strengthening the financial security of people’s courts” became an official priority: Courts should collaborate with other branches of government to normalize the approval and “regular increase” of judicial budgets and ensure a greater measure of financial security. Shortly afterwards, the connection between financial security and streamlining case procedure was made in numerous statements and speeches concerning the SPC’s recent “judicial cost and efficiency” project.

This project was initiated in 2008 by the Court’s Institute for Applied Legal Studies (IALS), and has yet to reach a conclusion. Thus far, the IALS has hosted three conferences, attended by a combination of SPC staff, lower court judges, and academics in related fields. In both of the past two conferences, SPC representatives and scholars have repeatedly highlighted the connection between judicial efficiency and the financial health of courts, arguing that their long term financial security very much depends on more efficient processing of cases. This

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154 Wang, supra note 149.
155 Id.
156 Third Five Year Plan, supra note 72, at §§ 2.22-2.24.
157 Jiang, supra note 105; Gu, supra note 105.
158 Gu, supra note 105: SUPREME PEOPLE’S COURT OF CHINA, ANLI ZHIDAO ZHU YU “SIFA CHENGBEN YU SIFA XIAOLU” YANTAOHUI: HUIYI LUNWEN HUIZONG (2010 NIAN 11 YUE, JILIN CHANGYI) [CONFERENCE ON THE GUIDING
sets the tone for discussion on more specific measures, such as the potential establishment of small-claims courts and broader application of summary procedure. The title of the project itself, of course, explicitly links the pursuit of “efficiency” with the cutting of “costs.”

The best explanation for the SPC’s recent promotion of “judicial efficiency” and the ensuing emphasis on summary procedure is, therefore, straightforward financial self-interest. This is, moreover, a rather strong and forward-looking form of institutional pragmatism that does not merely react passively to necessity, but also attempts to preempt latent problems even in the absence of immediate need: There is, as noted above, no good argument that Chinese courts face a scarcity of human or financial resources, nor is there evidence that they either apply regular procedure more often than appropriately, or that the Party leadership has applied pressure on these issues. The Court seems, therefore, to be planning strategically for its long-term financial security. The fact that these far-reaching policies actually do substantial damage to both professionalism and legal populism casts doubt upon the SPC’s commitment to either ideal.

B. Recent Developments in Marriage Law

The push towards greater “judicial efficiency” has influenced not only procedural issues, but also the SPC’s interpretation of substantive law. Recent developments on this front hint at a willingness to promote simplicity and clarity even when the broader socioeconomic costs arguably outweigh the benefits. The best-known example—largely due to the subject’s sensitivity—has been the Court’s drafting of the Third Judicial Interpretation of the Marriage Law, which has triggered heated public discussion since a draft was released for public comment in late 2010.

Since the ratification of China’s current marriage law in 1980, the SPC has issued two formal interpretations, clarifying various issues concerning registration, divorce procedures and marital property. As economic and social conditions changed, however, new problems concerning extramarital affairs, divorce, and the division of property began to emerge,

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159 CHANGYI CONFERENCE PAPERS, supra note 149, at i-ii (laying out conference schedule); ZHANGYE CONFERENCE PAPERS, supra note 149, at i-ii (laying out conference schedule).
160 See supra pp. –.
161 "Zuigao Renmin jiu hunyinfa sifa jieshi zhengqiu yijian (quanwen) [The Supreme Court Seeks Comments on a Judicial Interpretation of the Marriage Law (Complete Draft)]," RENMIN FAYUAN BAO [PEOPLE’S COURT DAILY], Nov. 16, 2010, at 1.
intensifying the pressure for further judicial interpretation. In response, the SPC began work on the third interpretation in 2007 and, by 2009, had put together a preliminary draft that was not publically released. After a few delays, the Court finally released a formal draft at the 2010 meeting of the Association of Marriage Law, seeking comments from experts in the field. Immediately afterwards, it made some changes and distributed the revised draft for public comment on November 16.

One of the most controversial aspects of this draft was that it placed significant restrictions on the scope of marital property: First, courts would consider any appreciation in value of individual property to be individual property unless the other spouse proves that he or she contributed to the appreciation. Even then, the language of the draft suggests that courts would have discretion to determine whether to categorize the appreciation as marital property. In comparison, previous judicial interpretations were silent on the issue of passive appreciation, but clearly stated that any returns from the investment of individual property should be considered marital property.

Second, courts would consider any real estate given, post-marriage, to one spouse by his or her parents, and registered under his or her name, to be individual property. The previous rule was that post-marriage gifts of real property by parents should be considered marital property unless the parents explicitly declared otherwise. The new draft essentially established that registration under one spouse’s name would constitute an explicit declaration of intent. Third, courts would consider any real estate purchased and registered, prior to marriage, under the name of one spouse to be individual property, provided that he or she also paid the down payment. If the other spouse contributed to mortgage payments after marriage, he or she may recover those payments, including any appreciation in value, but would still have no title in the property. The new interpretations would apply to any divorce proceeding, regardless of the time of marriage.

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165 Its contents did, however, leak out onto the internet, e.g., Hunyin Fa sifa jieshi (san) caoan [Third Judicial Interpretation on the Marriage Law, Draft], FALU SHIKONG [LEGAL TIME AND SPACE], May 25, 2009, http://hi.baidu.com/falvshiwu/blog/item/e8e1cedecfcd34778f055ab.html/cmtid/6be66f5cfe2e5370992457e5a, probably via scholars who had access to the SPC’s drafting process.

166 “Dangdai Zhongguo de jiating guannian yu hunyin anquan” yantaohui (Huixi zongshu) [Summary of the Seminar on the “The Concept of Family and the Security of Marriage in Contemporary China”] 3, Beijing Daxue Fazhi Yanju Zhongxin [Peking University Research Center on the Rule of Law], Dec. 4, 2010 (on file with author). This was not, of course, the first time the SPC had sought academic commentary on this interpretation. See “DANGDAI ZHONGGUO DE JIATING GUANNIAN YU HUNYIN ANQUAN” YANTAOHUI (HUIYI CAILIAO) [CONFERENCE MATERIALS FOR THE SEMINAR ON THE “THE CONCEPT OF FAMILY AND THE SECURITY OF MARRIAGE IN CONTEMPORARY CHINA”] 5-10 (Beijing Daxue Fazhi Yanju Zhongxin [Peking University Research Center on the Rule of Law] et al. eds., Nov. 2010) (on file with author).

167 SPC Seeks Comments, supra note 161.

168 Id. at § 6.

169 Interpretations on the Marriage Law (Two), supra note 163, at § 11.1.

170 SPC Seeks Comments, supra note 161, at § 8.

171 Marriage Law, supra note 162, at §§ 17.4, 18.3.

172 SPC Seeks Comments, supra note 161, at § 11.

173 Id.

174 Id. at § 21.
These measures drew fierce criticism upon their public release. A number of intellectuals that self-identified as “culturally conservative” lashed out at what they considered an attack against the institution of marriage: Modern Chinese marriages, they argued, relied heavily on marital property as a “binding force” within the family.\(^{175}\) By severely limiting the scope of such property, the SPC was weakening the durability of marriage: First, dividing marital property is inherently complex and difficult, whereas designating more items as individual property significantly simplifies the process of divorce.\(^{176}\) Especially in the case of real estate, dividing jointly owned property is far more complicated than simply ensuring that each side receives half the total value: There are numerous non-financial concerns to consider, including living habits, psychological comfort levels, and so on.\(^{177}\) By designating more real estate as individual, instead of marital, property, the SPC’s draft interpretation would substantially lower the “transaction costs” of divorce for many households. Second, by labeling more kinds of property as “individual,” the draft interpretation encourages spouses to think of themselves as “individuals,” rather than as “part of a family.”\(^{178}\) Complaints against the “cultural invasion” of “Western individualism”\(^{179}\) often accompany such arguments.

Dislike of the draft is not limited to “cultural conservatives.” Some marriage law experts have raised concerns about whether the new rules on the appreciation of individual property are consistent with “the general principles of Chinese marriage law,” which supposedly assume that all property is marital property unless clearly state otherwise.\(^{180}\) Others have questioned whether the rules are equitable to women. They argue that it is customary in China for the groom or his family to purchase the newly-weds’ first residence, while the bride’s family provides furnishings and daily appliances of roughly equal value.\(^{181}\) The social presumption in this case is that the spouses would share ownership of all items.\(^{182}\) The new draft interpretation contradicts this by categorizing the residence as the groom’s individual property. The problem is that real estate generally appreciates in value with the passage of time, whereas furnishings and appliances depreciate.\(^{183}\) Unless the real estate was registered under the bride’s name or under joint ownership, the groom would enjoy a substantial economic advantage, even though the initial monetary investment was largely equal for both spouses. Even if the new rules encourage newlyweds to take greater precautions when registering real estate, this does not justify applying them to marriages that predate their issuance, which the draft clearly intends to do.

This feeds into broader concerns over whether the draft interpretations exclude from “marital property” important items that are customarily understood to jointly owned, or at least complicated enough to warrant determination on a case-by-case basis. Considerable social ambiguity also surrounds, for example, post-marriage property conveyances by parents, who can

\(^{175}\) *Summary of Seminar, supra* note 157, at 4-6, 8-9, 11-14 (condemning the draft interpretation for weakening the institution of marriage by limiting the scope of marital property).

\(^{176}\) *Id.* at 3-4, 10 (discussing the economic and social complexity of marital property).

\(^{177}\) *Id.*

\(^{178}\) *Id.* at 4-6 (discussing the interpretation’s “assault on marriage”).

\(^{179}\) *Id.* at 11-14 (discussing the “Western” approach to marriage that dominates modern Chinese legal doctrine).

\(^{180}\) ADDITIONAL CONFERENCE MATERIALS, *supra* note 155, at 1-2.


\(^{182}\) ADDITIONAL CONFERENCE MATERIALS, *supra* note 155, at 1-2; *Yu, supra* note 181.

\(^{183}\) ADDITIONAL CONFERENCE MATERIALS, *supra* note 155, at 1.
be frustratingly vague in their intentions. The SPC should, perhaps, hesitate to artificially impose uniform norms over socially complex issues.\textsuperscript{184}

These criticisms may exaggerate the actual socioeconomic effect of the draft interpretation: Even if formally issued, the rules would only apply where the parties were unable reach a property division agreement among themselves.\textsuperscript{185} More importantly, whether legal norms actually wield significant influence over social marriage practices is, at least, highly questionable, especially given the myriad of marriage “customs” that saturate local Chinese society. Nonetheless, the criticisms do draw attention to the socioeconomic complexity of Chinese marriage practices, and to the wide variety of unintended consequences that the draft interpretations may eventually have. The point here is not to evaluate any specific consequence, but to highlight the tremendous practical uncertainties that surround the draft interpretations.

The question, then, is why the SPC decided to establish uniform rules for social practices of such complexity. What are the benefits of doing so? The Court itself has issued only a vague statement that the draft interpretation was designed to “protect the stability of marriage, protect each individual’s rights and freedoms, balance the interests of all family members, and balance the relationship between family and society.”\textsuperscript{186} Court officials were, however, apparently more candid during several counseling sessions they requested from a group of marriage law experts: Scholars returning from these sessions report that the officials were concerned, above all else, with simplifying and clarifying property division rules so that, should negotiation fail, the judge could issue a decision more swiftly and with less ambiguity.\textsuperscript{187} In other words, they wanted to make the judiciary’s job easier.

This seems quite believable. As noted above, by significantly compressing the scope of marital property, particularly real property, the draft interpretations eliminate the considerable complexity and uncertainty that marital property brings to the divorce process.\textsuperscript{188} Apart from the convenience it brings to judges, however, the merits of eliminating this ambiguity are at best unclear. The variety of criticisms discussed above certainly call into question whether the new rules indeed “protect the stability of marriage” or are equitable to all family members. Several scholars who have been involved in the drafting process since at least 2009 have repeatedly voiced such concerns to the SPC,\textsuperscript{189} but with no apparent effect.\textsuperscript{190} This attracted further complaints that the Court was overlooking broader socioeconomic consequences and express public disapproval in its single-minded pursuit of normative simplicity and judicial efficiency.\textsuperscript{191}

\textsuperscript{184}Summary of Seminar, supra note 157, at 3-4, 10.


\textsuperscript{186}ADDITIONAL CONFERENCE MATERIALS, supra note 155, at 7 (reprinting statements at the Annual Meeting of the Marriage Law Association by Du Wanting, head of the First Civil Division, Supreme People’s Court of China).

\textsuperscript{187}Summary of Seminar, supra note 157, at 3 (statement of Ma Yinan).

\textsuperscript{188}See discussion surrounding supra notes 175, 176.

\textsuperscript{189}CONFERENCE MATERIALS, supra note 157, at 5-10, 8 (reporting expert commentary on an earlier draft).

\textsuperscript{190}The designation of pre-marriage real estate purchases registered under one spouse’s name as personal property, arguably the most controversial item in the draft interpretation, Summary of Seminar, supra note 157, at 4 (noting that this item “attracted the most controversy”), existed at least as early as the 2009 leaked draft. See Hunyin Fa sifa jieshi (san) caoan, supra note 165, at § 13. A later draft, issued to experts in early 2010, kept this item and added the rule on gifts by parents. CONFERENCE MATERIALS, supra note 157, at 8, 9. Considering that the draft issued for public comment in November kept both these items while adding the rule on appreciation in value, it seems fair to say that the SPC’s stance on compressing marital property has actually strengthened over time, despite the controversy it has been attracting.

\textsuperscript{191}Summary of Seminar, supra note 157, at 2-4 (discussing scholarly responses to earlier drafts).
There is, therefore, considerable reason to believe that the SPC’s primary objective in pushing forth the new marriage law interpretations was the pursuit of doctrinal simplicity and judicial efficiency. It is unclear whether financial concerns were behind these objectives, as although the draft interpretation certainly would speed up a significant number of divorce proceedings. Perhaps more importantly, providing judges with a set of clear guidelines that limit the scope of marital property allows them to avoid entanglement with any number of practical complications commonly associated with the economic separation of a household. The ability to distance itself from socially complicated and emotionally charged disputes is probably just as valuable to the judiciary as the conservation of financial and human resources.192

The solicitation of public comments for the draft interpretation does suggest the influence of populist concerns, but populism explains only the solicitation of comments, and not the substantive content of the proposed draft. One could argue, in fact, that the solicitation of comments was pragmatically designed to absorb public criticism and controversy prior to the interpretation’s final publication.193 While few would deny that recent SPC activity has displayed significant shades of populism, it seems questionable, at least, whether populist concerns have heavily influenced the Court’s drafting of substantive legal rules. In this particular example, there is no logical connection between populism—or, for that matter, legal professionalism—and the doctrinal scope of marital property.194 Here again, institutional self-interest seems to be the strongest motivation.

C. “Guiding Cases”

Although the Party leadership has apparently strengthened its control over the judiciary in recent years, the SPC has by no means abandoned its pursuit of greater institutional authority. Quite the opposite, the recent establishment of the “guiding cases” system—which gives “guiding cases” approved by the Court stare decisis-like status—theoretically boosts its powers of judicial interpretation to unprecedented heights.195 Compared with the developments discussed in the previous two sections, the issuance of “guiding cases” has a weaker connection

192 This particular draft has been no slacker in this department, as the above discussion makes abundantly clear.

193 While this is largely speculation, there are certainly examples from the Chinese government’s past use of public comment mechanisms in which controversy after the issuance of a draft seemed to exhaust public attention enough that the finalized documents, which kept nearly all the controversial items, did not attract nearly as much attention. The most famous example is probably the controversy surrounding the Zhonghua Renmin Gongheguo Wuquan Fa [Property Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007). See Yu Zeyuan, Qibai duo mingren shangshu Hu Jintao, zhi Wuquan Fa reng weixian ying juzheng [Over Seven Hundred Celebrities Petition Hu Jintao, Arguing that the Property Law Remains Unconstitutional and Needs to Be Revised], LIANHE ZAOBAO, Dec. 14, 2006, available at http://www.wyzssx.com/Article/Class21/200612/12854.html. No comparable public outcry accompanied the issuance of the finalized legislation in 2007, even though it retained the same acknowledgment and protection of private property that critics had argued was unconstitutional.

194 Scholars have argued that public opinion is quite against the compression of marital property, at least through these specific measures. Summary of Seminar, supra note 157, at 3. A populist legal philosophy would therefore at least urge caution, whereas the SPC’s desire to limit marital property has apparently strengthened throughout the drafting process. See supra note 190. On the other hand, legal professionalism, as defined in supra notes 36 and 37, simply demands that judges enforce legal rules objectively, without expressly commenting on the substance of those rules.

with issues of substantive or procedural justice, but has far greater impact on the SPC’s judicial authority. Correspondingly, it also throws its institutional ambitions into much sharper relief.

The establishment of the “guiding cases” system was, by Chinese legal standards, a very drawn-out affair. As early as 1985, the SPC had begun to identify “standard cases” (“dianxing anli”) via its official bulletin, although the binding force of these cases was unclear and, moreover, they almost never touched upon ambiguities or gaps in judicial doctrine. Instead, the Court used them primarily as an advocacy tool for the correct application of well-established doctrine. Not until the publication of its Second Five-Year Plan in 2005 did the creation of a “guiding cases” system become a formal policy objective. Under this system, the SPC would select and publish “guiding cases” from lower court decisions, which would be explicitly binding over similar cases. From its earliest conception, the system was designed as a judicial interpretation mechanism, through which the Court could flexibly react to ambiguities and gaps in doctrine. As the Second Five-Year Plan rather ambitiously stated, the system would allow the Court to “enrich and develop jurisprudence.”

After some preliminary experimentation in local courts, the Court adjusted the posting of “standard cases” on its bulletin to incorporate cases that expanded, rather than simply reiterated, judicial doctrine. The slow pace of bulletin posting and uncertainties concerning the cases’ binding force, however, prevented these adjustments from making any significant doctrinal mark. By 2009, the Court had made little apparent progress in creating a workable “guiding cases” system. The Third Five-Year Plan made no mention of the system, fueling academic speculation that the project had been put on hiatus.

The project had, in fact, drawn much criticism during its four-year test run. Critics worried, in particular, about the project’s constitutional validity: They argued, first of all, that such a sweeping enhancement of the SPC’s institutional competence required formal legislation by the NPC. More provocatively, they contended that the system would give rise to a fresh wave of “dangerous” judicial activism: The issuance of “guiding cases” could make changes to judicial doctrine so swiftly and subtly that other party or government organs could not hope to monitor them. After the system failed to materialize by 2009, these critics wondered, with a hint of satisfaction, whether such concerns of institutional balance had led Party leaders to suspend the project.

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197 Id.
198 Id. at 62.
199 Id.
200 SECOND FIVE YEAR PLAN, supra note 80, at § 13.
201 Id., supra note 196, at 62-63. On the role of local courts, see id. at 66-67.
202 Id. at 63. See also, Li Shichun, Zhongguo anli zhidao zhidu de kunju ya chulu [The Current Difficulties and Potential Solutions for China’s Guiding Cases System], Speech at the Minshang Fa Qianyian Luntan (Forum on the Frontiers of Civil and Commercial Law) at Renmin University, Mar. 5, 2009, available at http://www.civillaw.com.cn/article/default.asp?id=44157 (discussing in greater detail the limited success of the SPC’s experimentation with guiding cases).
203 Id., supra note 196, at 63.
204 Id. at 60.
205 Id. at 71.
206 Id. at 72-73.
207 Id. at 60.
It came, therefore, as a surprise to many when Zhou Yongkang, the Politburo Standing Committee member in charge of the law enforcement apparatus, gave the project a public statement of approval in late 2009, breathing fresh life into what had seemed to be a dead initiative.\(^{208}\) Zhou’s support did come with a catch: All three branches of the law enforcement apparatus—the judiciary, the procuratorate and the public security bureaus—would establish a “guiding cases” system, perhaps to maintain the balance of power between them.\(^{209}\) Having secured the Party’s blessing, the SPC swiftly moved to formalize the system. On November 26, 2010, it finally issued the “Regulations Concerning the Use of Guiding Cases,” more than five years since its initial conception.\(^{210}\)

A “guiding case” can, at least in theory, come from any level of the judiciary: Only the adjudication committee of the SPC may formally approve “guiding cases,” but any lower court may recommend a case within its jurisdiction to its appellate court, until the case reaches the SPC.\(^{211}\) Any adjudicatory arm of the SPC may also recommend cases, with no jurisdictional limitations.\(^{212}\) Perhaps as a nod to populism, the Regulation also grants any “person interested in the work of the judiciary” the right to recommend a case, but only to the court that decided it.\(^{213}\)

To process the anticipated flow of case recommendations, the SPC also established a special “guiding cases office” to select and research cases for final approval by the adjudication committee.\(^{214}\) The Regulations are unclear on whether the office may directly select a case without any external recommendation, although their wording suggests that its predominant task will simply be the processing of recommendations.\(^{215}\) Approved “guiding cases” will be published via the Court’s website, its official bulletin or the People’s Court Daily, although, from time to time, the guiding cases office will gather and publish them in annotated volumes.\(^{216}\) Finally, the Court may choose to give formal “guiding case” status to any “standard case” it has previously published, without going through recommendation procedure.\(^{217}\)

A “guiding case” must be one that “has attracted broad public attention,” relies upon “legal principles that are not defined in detail,” is “representative” of similar cases, touches upon “difficult, complicated or unprecedented legal issues,” and “can serve as a guide for other cases.”\(^{218}\) These criteria make it manifestly clear that the Court sees the “guiding cases” system

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210 *Regulations on Guiding Cases*, supra note 195.

211 *Id.* at § 4.

212 *Id.*

213 *Id.* at § 5.

214 *Id.* at § 3.

215 *Id.*

216 *Id.* at § 6.

217 *Id.* at § 9.

218 *Id.* at § 2.
as an expansion of its judicial interpretation authority. All “guiding cases” are, of course, binding over lower court decisions until the approval of a new “guiding” paradigm.  

Despite the many similarities between a “guiding case” and a legal precedent in Common Law jurisdictions, the Court and scholars closely associated with it have repeatedly emphasized that the two are, in fact, “completely different,” as Common Law judges supposedly “make law,” whereas “guiding cases” are simply interpretations and applications of preexisting law. Whether this is a reasonable assessment would be a different paper altogether.

Similar to the previous two sections, the argument here is that the SPC’s lengthy pursuit of the “guiding cases” system reflects a deep-seated desire to strengthen its institutional competence, rather than ideological commitment to either populism or professionalism. The Court leadership has actually taken great care to portray the issuance of “guiding cases” as consistent with both ideals: The chief of the SPC Research Office, which drafted the Regulations, has recently stated that a guiding case must “receive the approval of the people,” but also “promote the rule of law.” This seems to echo Zhou Yongkang’s 2009 statement that “guiding cases” should address areas of law where “the enforcement of law is inconsistent, and where the public has expressed strong opinions.” As with the developments discussed in Part One, these statements reflect the ideological ambiguity of a legal system caught between two frequently contradictory models of legal reform. On the other hand, the SPC has never wavered in its pursuit of the authority to issue “guiding cases,” regardless of ideological shifts or leadership changes, suggesting that something more deeply rooted in the Court’s institutional mentality is at work here.

Regardless of which ideological direction the SPC rhetorically takes, it always has a fundamental and highly pragmatic interest in enhancing its own judicial interpretation powers. The establishment of the “guiding cases” system provides the Court with an interpretative mechanism that theoretically operates with far greater flexibility and efficiency, but draws less public attention, than formal interpretations or opinions—all highly desirable qualities. It also strengthens the Court’s control over lower courts, binding the judiciary into a tighter institutional unit. Indeed, the Second Five-Year Plan explicitly states that a primary objective of the “guiding cases” system would be to “guide the adjudicatory activities of lower courts.” Legal reform ideologies and chief justices may come and go, but the pragmatism that leads the SPC to protect its core interests amid political volatility is probably always there.

One could even argue, albeit speculatively, that the new SPC leadership has displayed a particularly sharp sense of political tact by negotiating the final arrangement to extend “guiding cases” to the procuratorate and the public security bureaus. We may never know the precise reason Zhou and other Party Leaders decided to establish the system in all three branches of the law enforcement apparatus, but the fact that the SPC’s long-stalled initiative only managed to win their approval in this particular form suggests that they might have felt uncomfortable about


221 An Jie, supra note 219.

222 Sun & Zhang, supra note 208.

223 SECOND FIVE YEAR PLAN, supra note 80, at § 13.
allowing the SPC to proceed unilaterally. The final arrangement shows, therefore, some signs of being a negotiated compromise, where the SPC agreed to, or perhaps even proposed, to share the expansion in institutional competence with other law enforcement branches in exchange for broader political support.

Part Three: Reinterpreting Professionalism and Populism

We have argued, therefore, that the SPC’s recent activities contain a strong dose of institutional pragmatism that often operates independently of, or even contrary to, its rhetorical embrace of legal populism or professionalism. Taking this one step further, this Part suggests that the Court’s recent stances towards populism and professionalism themselves derive as much from pragmatic maneuvering as they do from genuine ideological commitment: It is very much in the Court’s current self-interest to strengthen its political and popular legitimacy by advocating populism, while continuing to enhance its institutional status and competence through the long-term pursuit of legal professionalism and judicial independence. Several components of its “populist” agenda, particularly its zealous promotion of mediation, actually smack more of pragmatic self-interest than of genuine ideological commitment. The “tension between trends toward professionalism and populism” that scholars have observed may, therefore, reflect more the juggling of short-term versus long-term interests than real philosophical tension.

One can easily see the SPC’s promotion of legal populism as the judiciary’s response to a broader “ruling for the people” (“zhizheng wei min”) initiative that has permeated the entire party-state since 2002. Perhaps wary of rising levels of social unrest and feeling a greater need to enhance its public legitimacy, the Chinese state has, in recent years, taken great pains to present itself as responsive to the needs and opinions of the general public, a general trend that covers broad swathes of state activity—from seeking public comment on draft legislation and regulations to systematically soliciting feedback on government activity. Party Leaders in charge of the law enforcement system have likewise called for the judiciary to increase its

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224 Liebman, supra note 2, at 1.7.
responsiveness to the “people’s needs.”227 The SPC’s “populist turn” is, therefore, its way of participating in this general policy trend.

The actual policy measures the SPC has taken under the veil of populism respond, however, very much to the specific challenges it faces. For several years, one of the SPC leadership’s main policy objectives has been the reduction of “litigation-related petitions” via the “letters and visits” system (“shesu xinfang”).228 These involve dissatisfied litigants filing a complaint with either a higher court or some other government organ, usually to appeal an unfavorable decision. The petitioning system is not part of the formal process of adjudication, has few procedural obligations to the petitioner, and operates more or less as a black box that very rarely provides him or her with any real assistance.229 Its informal nature does, however, make it a relatively low-cost way for unhappy litigants to voice their “grievances.” The SPC has, therefore, often measured the volume of public unhappiness against the judiciary by the volume of litigation-related petitions, even as it portrays the petitioning system as a necessary means of accessing public opinion.230 Petitions are, of course, also irritating to courts because they often draw unwanted public attention and consume large amounts of time and energy. All things considered, the SPC has a very strong incentive to prevent litigation-related petitions to the extent possible, and has clearly expressed the desire to do so, particularly recently.231

Responding to these concerns, since probably 2008, the Court has advocated mediation not only as a move towards legal populism, but also as an effective way to reduce litigation-related petitions.232 The Party leadership gave this its public blessing in August 2009,233 setting

231 Chen & Yang, supra note 228.
232 Recent speeches by the SPC leadership suggest that it had internally encouraged the use of mediation to lower xinfang rates since 2008. See Qiu Lihua & Yang Weihan, Minshi anjian shesu xinfang liu, qiangji zhixing li “liang xiajiang” [The Xinfang Rate and Coercive Enforcement Rate of Civil Cases both Decline] XINHUA WANG [XINHUA NET], June 24, 2011, http://news.xinhuanet.com/legal/2011-06/24/c_i121577223.htm (reporting speech of Xi Xiaoming, SPC Vice President). Wang’s first work report in early 2009, for example, discussed litigation-related xinfang, the “Ma Xiwu method,” and mediation in immediate sequence, and made clear that the three were closely interconnected. Wang, supra note 69. This partially explains why local courts have repeatedly made the similar statements since 2008. See, e.g., Liang Zhibin, Shifayuan liyong Langfang jingyan jieue shesu xinfang anjian zuotanhui (zhaihu) [Panel on how the City Court Uses the Langfang Experience to Handle Litigation-Related Xinfang (Excerpts)], LANGFANG FAYUAN WANG [LANGFANG COURT NET], Sep. 5, 2008, http://hfyz.chinacourt.org/public/detail.php?id=181&apage=1: Xie Kang & Liu Xing, Jiangnan Qu Fayuan gousian shesu xinfang yufang jizhi [The Jiangnan District Court Establish Mechanisms to Preempt Litigation-Related
off a fresh wave of rigorous SPC advocacy. The basic rationale seems to be that mediated results are less likely to provoke petitions because they require the consent of both sides. Whether this is true in practice is unclear: the percentage of cases mediated, as discussed above, has leapt to over 60 percent after 2006, but the volume of litigation-related petitions still reputedly increased in most years, with the exception of a sharp drop in 2006-07 and a more moderate one in 2010. Nonetheless, the SPC continues to consider mediation an effective countermeasure against popular complaints.

The SPC’s recent establishment of a national performance evaluation system adds a fresh layer of institutional pressure to mediate. As noted above, although various local courts have experimented with such measures since at least 2003, this would be the first time that the SPC has formally sanctioned them—whereas previously it largely cautioned against abuse of performance indicators. As with the application of summary procedure, the indicator system sees a higher rate of mediation as, apparently, an unqualified positive that directly reflects the quality of a judge’s work.

The various inconsistencies discussed above between the use of target performance levels and both legal professionalism and populism also apply to the use of mediation statistics. By giving judges a strong personal interest to apply mediation as often as possible, the evaluation system not only runs a large risk of obstructing the accurate determination of facts and application of law, but also substantially increases the likelihood that judges will force procedural choices on litigants. Thus the SPC’s promotion of mediation, arguably the poster-child of Chinese judicial populism, ironically contains institutional mechanisms that severely violate populist ideals. This calls into question, once again, the depth and “purity” of the Court’s commitment to legal populism.

On the other hand, these mechanisms do fit into a pragmatic reading of SPC intent: As noted above, the Court seems to believe that, because mediated results represent mutual

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See supra note 73.


See discussion at supra notes 127, 128.

See discussion at supra notes 121-126.

See discussion at supra p.x.
compromises between the litigants, they can create significant psychological and social pressure on them to abide by it or, at least, refrain from bringing related disputes to government authorities, thereby lowering the likelihood of a “litigation-related petition.”

Some scholars would argue this is only part of the cost-benefit calculation: The potential increase in coerced mediation might trigger significant public dissatisfaction over the long run, but so far there is no indication that the SPC shares these concerns. Moreover, even coerced mediation can theoretically preempt some “litigation-related xinfang,” if only because it may seem harder to argue “the judge forced me into this compromise” than to argue that an adjudicated decision was wrong, especially if the presiding judge had some sense of tact. In other words, the greater perceived difficulty of proving their case might deter some unsatisfied litigants against further petitioning. An overemphasis on mediation could, therefore, lead to lower petitioning rates even without any corresponding increase in overall public satisfaction.

Whether this kind of deterrence tactic benefits the Party-state as a whole is unclear at best—it is worth noting that the Party leadership’s 2009 approval was devoid of technical details and, therefore, that it has not officially approved the use of target performance levels to semi-coercively boost mediation. Unexpressed discontent may well be more dangerous to its sociopolitical footing than expressed discontent. The SPC leadership, on the other hand, would reap considerable benefits from a short-term drop in “litigation-related petition,” which strengthens its political reputation and standing. This analysis suggests, therefore, that the SPC’s sanctioning of mediation “target levels” is more closely attuned to its institutional self-interest than to the general interests of the Party-state, further emphasizing the need to recognize the SPC’s “institutional agency” in shaping judicial policy.

The Court’s promotion of mediation is, at least, less blatantly utilitarian than some of its other populist measures. In late 2010, the Court actually commissioned the creation of a cartoon mascot for the Chinese judiciary, which serves no conceivable purpose except the “softening” of the SPC’s public image. At roughly the same time, the Court also announced the completion of a propaganda documentary called *The People’s Judges*. While these measures are certainly “populist,” the fact that the highest court in the nation would endorse these disturbingly undignified attempts to win public favor seems to suggest that the Court’s embrace of populism derives not only from ideological agreement, but also from strong pragmatic motivations.

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241 See supra note 235.
242 Minzner, supra note 4, at 42-43.
243 Liu, supra note 233.
244 Id. at 41-42.
245 Insofar as such petitions are a measure of public unhappiness with judicial outcomes—something the SPC seems to believe in, supra note 230, any decrease in their volume would naturally support the argument that the SPC is succeeding in its management of public opinion, an argument the SPC leadership has never failed to trumpet whenever xinfang rates drop. See Qiu & Yang, supra note 232; Xiao Yang, supra note 117; Wang Shengjun, supra note 73.
247 The Court at least does not pretend otherwise. Id.
There are limitations, however, to the pragmatic benefits of populism: Whatever short-term benefits it may provide the SPC, it cannot override the Court’s longer-term interest in promoting legal professionalism. Ultimately, the main institutional difference between the judiciary and other government organs is that it possesses the power of adjudication: many government organs can mediate a dispute—some, in fact, arguably do it better than the judiciary, but only the courts can regularly adjudicate. Whether the power of adjudication is socially or politically significant depends, however, on whether there is general adherence to legal norms, both substantive and procedural. In other words, it depends on whether there is at least a “thin” version of the rule of law. It is, therefore, usually in the judiciary’s institutional interest to enforce its decisions rigorously and, moreover, to encourage other government organs to obey legal norms. Moreover, because the judiciary’s normative or moral standing to take such action depends largely on its ability to apply the law fairly and consistently, the judiciary itself also has a considerable incentive to demand higher professional standards of its personnel. This does not mean that the judiciary will always prefer the legal status quo—historically, courts have often found it either desirable or necessary to push for significant legal change, but rather that its self-interest urges against “arbitrary” or “unjustifiable” breaches of established law. What specifically constitutes an “arbitrary” or “unjustifiable” breach depends on one’s theory of jurisprudence and legal change, but no matter which theory one abides by, the observation that courts have a vested interest in promoting legal professionalism, both personal and institutional, remains basically valid.

249 The main venues for mediation are supposedly specialized “people mediation committees,” not courts. See Vai Lo, Resolution of Civil Disputes in China, 18 UCLA PACIFIC BASIN L.J. 117 (2001).

250 For the definition of “thin” and “thick” versions of the rule of law, see supra note 37.

251 The empirical narrative provided in supra Part One is, to at least some significant extent, a narrative of doctrinal change initiated by and implemented through the judiciary. See particularly the series of pro-professionalism changes discussed at supra pp. _._.

252 It suffices to note that any law student who has taken an American legal history course will feel quite at home debating the merits of “formalist” versus “progressive” approaches towards legal change, a debate that has taken some new turns in recent years. See DAVID M. RABAN, LAW’S HISTORY (Cambridge Univ. Press) (forthcoming) (refuting the notion that legal thought during the so-called “formalist” era was preoccupied with abstract conceptions); BRIAN TAMANAH, BEYOND THE FORMALIST-REALIST DIVIDE (2010) (arguing that formalist portrayals of the era have limited explanatory power); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 33-64 (Oxford Univ. Press) (1992) (presenting a more traditional view of the formalist/progressive dichotomy). Despite drastically different sociopolitical settings and legal traditions, the same basic questions apply to Chinese legal reform: Who is allowed to instigate legal change, and under what circumstances? More specifically, are courts allowed to react independently to socioeconomic change by spearheading doctrinal reform? These questions inevitably lead to a broader debate on what, exactly, Chinese courts are designed to do, which any scholar in the Chinese law field is highly familiar with. For a brief summary of the various positions in this debate, see Donald C. Clarke, China’s Jasmine Crackdown and the Legal System, CHINESE LAW PROF BLOG, May 26, 2011, http://lawprofessors.typepad.com/china_law_prof_blog/2011/05/chinas-jasmine-crackdown-and-the-legal-system.html. See also Donald Clarke, Empirical Research into the Chinese Judicial System, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 171, 164-192 (Erik Jensen & Thomas Heller eds., Stanford University Press 2003) (“[P]erhaps Chinese courts are not designed to do, and should not do, the things Western courts do.”); PEERENBOOM, supra note 2 (presenting a more conventional “rule of law”-based evaluation of the Chinese judiciary). Such issues have more than just academic value, as the debate over the appropriate constitutional and legislative position of the SPC continues to be of central importance in the Chinese legal world—unsurprisingly, given the SPC’s broad authority to issue interpretations and regulations that very much resemble legislation. See, e.g., Li, supra note 196 (criticizing the SPC for overstepping its constitutional authority in experimenting with “guiding cases”); Zhang, supra note 220 (arguing that the issuance of guiding cases does not constitute legislation).
The judiciary does, of course, operate within strong institutional and social constraints that frequently demand concessions from its general interest in professionalism. Nonetheless, if the Court wishes to reliably enhance its institutional competence and importance relative to other state and party organs, it will, over the long run, inevitably need to boost the sociopolitical significance of the one function that is largely unique to it. If, therefore, we see the SPC as an institutional “rational actor,” we would expect it to maintain long-term advocacy of professionalization and judicial independence, while occasionally diverging from that basic stance to accommodate political necessity, public unhappiness, financial needs, or other pragmatic concerns. This is precisely what we see in recent SPC activity: Although the Court has certainly issued a substantial amount of populist rhetoric, the specific policies it has created under that rhetorical umbrella often seem unapologetically utilitarian, designed to handle specific sociopolitical needs. At the same time, a fair number of the Court’s most important policy initiatives have little to do with either populism or professionalism, but simply attempt to enhance its financial health and institutional power. Beneath all this pragmatic maneuvering, however, the Court continues to promote professionalism and the rule of law, placing them side-by-side with its populist rhetoric and apparently ignoring any theoretical inconsistencies.

This institutional “rational actor” model of SPC behavior also works reasonably well when applied to the Xiao Yang era. A number of legal scholars in Mainland China have, in fact, accused the SPC of power-hungry judicial activism during the early 2000s, particularly via the ill-fated Qi Yuling decision. Where western scholars have generally seen positive developments in judicial independence and professionalism, they saw an ambitious Court attempting to increase its own institutional authority relative to other state and Party organs. More recently, however, political pressures—perhaps the Party’s response to sprouts of “judicial activism”—and signs of social discontent have heightened the Court’s sense of vulnerability. It therefore entered into a period of more openly pragmatic maneuvering, accentuated by dashes of populism and a stronger emphasis on “judicial efficiency.” Essentially, the Court was willing to provide strong support for professionalism initiatives as long as the sociopolitical atmosphere remained largely benign. Once external pressures began to intensify, it swiftly adapted through a variety of measures that often escaped neat ideological categorization, while, at the same time, never quite giving up on the promotion of legal professionalism.

The interpretation of the SPC as a pure institutional “rational actor” is a “strong” version of the institutional pragmatism argument this paper has attempted to make. It would predict that pragmatic concerns of self-interest almost completely drown out other institutional motivations. A weaker but probably more realistic version of the argument would place institutional pragmatism alongside other, more ideological motivations. There is certainly no reason to doubt that many SPC judges have internalized either professional or populist ideals or, in some logically murky fashion, both. What this paper points out, however, is simply that numerous SPC activities bear no clear relationship to either ideal and, in fact, contradict both. Institutional self-interest is, therefore, almost certainly a key motivation for SPC policy-making. Moreover, nearly every major SPC policy trend of the past eight or nine years has made significant

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253 See discussion at supra pp. _-_.
254 See discussion at supra pp. _-_.
255 See discussion at supra pp. _-_.
256 See discussion at supra p._.
257 See discussion surrounding supra notes 55-57, 196.
258 See discussion surrounding supra notes 6, 7.
pragmatic sense for the Court. Other, more ideological, factors may well have enhanced or limited certain policy trends—perhaps, for example, the SPC might not have marched head-first into Qi Yuling if its leadership had not genuinely believed in constitutional rule-of-law ideals, but one can reasonably suggest, at least, that institutional pragmatism has been a necessary, if not entirely sufficient, condition for major Court activity.

Compared, on the other hand, to studies that see the SPC as a loyal foot soldier who simply carries out the party-state’s policy directives, the arguments made here place far greater emphasis on the Court’s ability to shape judicial policy based on its own interests, rather than those of the general Party-state. These are often quite different: The Party-state has no clear incentive to promote summary procedure or demand a simplified marriage law—quite the opposite, the Court’s recent activity in these areas may create significant socioeconomic inefficiencies that could eventually damage the social stability that the Party-state so prizes. It also seemed reluctant to sign onto the Court’s construction of the “guiding cases” system, perhaps wary of potential judicial activism. Even the Court’s promotion of mediation arguably promotes the Court’s short-term interests at significant long-term cost to the Party-state. Finally, the Court’s dogged promotion of legal professionalism, however tempered by populist rhetoric, suggests a clear awareness of where its fundamental institutional interests lie, regardless of the external sociopolitical atmosphere.

Conclusion

What institutional motivations drive judicial activity? What constitutes a conventional answer varies heavily with discipline and field. American scholars may, for example, hesitate to attach a self-interested motive to developments in recent American constitutional law. Constitutional scholars have certainly lodged accusations of blatant judicial activism against many justices, but such accusations nonetheless tend to be ideological in nature. Some scholars consider, for example, the Rehnquist Court “judicially activist” because it went against established precedent to promote a conservative legal ideology, not because it consciously attempted to expand the Supreme Court’s own institutional authority. Legal theories regularly consider whether justices act upon ideological bias, be it racism, sexism, or any number of “isms,” but somewhat rarer—with, of course, important exceptions—is the argument that

259 See discussion surrounding supra notes 207-209.
260 See discussion at supra note 31.
261 E.g., Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism 7 (2004); The Rehnquist Court: Judicial Activism on the Right (Herman Schwartz ed., 2003) (critically assessing the Rehnquist Court’s positions on civil rights and liberties, federalism, and institutional powers).
263 See supra note 32. More recently, scholars have debated whether a more assertive executive might intimidate the Court into a more permissive jurisprudence of executive power. See Ackerman, supra note 32, at 68-69 (2010) (arguing that this is an imminent danger); Trevor W. Morrison, Constitutional Alarmism, 124 Harv. L. Rev. 1688, 1701-06 (2011) (reviewing Ackerman’s arguments and arguing against them); Deborah N. Pearlstein, After
they issued a decision primarily to shore up the judiciary’s financial security, or enhance its position relative to other branches of government. In fact, by regularly speaking of the Supreme Court’s “jurisprudence,” scholars often seem to assume that the Court acts mainly out of genuine intellectual or ideological affiliations.264 This is unsurprising: After the turmoil of the 1930s,265 the Supreme Court has often seemed so secure in its institutional position and so embedded within a socio-politically legitimate tradition of government that it has little need to promote its institutional self-interest via Machiavellian maneuvers.266 Contemporary Western European judiciaries are often similarly situated.267

As we move away from supposedly strong, well-entrenched judiciaries in governments that face no significant legitimacy problem, however, this assumption swiftly ceases to apply. Perhaps the easiest way to see this is by going back in time: Legal historians have relatively few qualms about portraying, for example, Common Law and Equity judges in early modern England—or perhaps, more generally, royal and ecclesiastical courts across Western Europe—as engaging in “judicial competition” to strengthen their own institutional authority and influence.268 They would also point out, of course, the more intellectual considerations underlying the evolution of the writ of covenant or the expansion of King’s Bench jurisdiction via legal fictions, but the argument that pragmatic consideration of institutional self-interest was prominent in these developments is at least very respectable.269 Going further back in time, major theories of Roman law likewise acknowledge that Roman jurists were predominantly attracted by the personal prestige that legal service could bring, and were therefore less interested in the rational development of legal doctrine than in pragmatic problem solving.270

Scholars with extensive backgrounds in economics tend to apply “rational actor” assumptions particularly thoroughly: The famous “legal origins” thesis, for example, explicitly makes the assumption that late medieval judges and juries in England and France alike decided whether to convict a defendant by comparing the utility they would gain from a conviction with

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Deference: Formalizing the Judicial Power for Foreign Relations Law, 159 U. PA. L. REV. 783, 785–86 (2011) (noting that, in recent cases concerning war-on-terror decisions, “the Court has swept aside vigorous arguments by the executive that it refrain from engagement on abstention or political question grounds,” and that “the Court has scarcely noted any doctrinal tradition of interpretive ‘deference’ on the meaning of the laws”).

264 See discussion at supra note 31.


266 This is a prevalent but perhaps overly optimistic assumption. ACKERMAN, supra note 32, at 1. The secure life tenure of Supreme Court justices has been a source of concern for some constitutional law scholars, most famously ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986)—a problem that many Chinese jurists would probably love to have. Such concerns remain contentious today. See, e.g., Steven G. Calabresi & James Lindgren, Term Limits for Supreme Court Justices: Life Tenure Reconsidered, 29 HARV. J. L. & PUB. POL’Y 770 (2006); William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 AM. POL. SCI. REV. 87 (1993). But see supra notes 32, 33, and 263, which discuss important strands of legal scholarship that sees the Court as susceptible to political pressures and considerations even today.

267 The German Federal Constitutional Court, for example, is often considered the most powerful and respected constitutional court in the world. See GEORGE VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY (2005). For a more general review of the rise of constitutionalism in recent decades, particularly in the Western world, see Bruce Ackerman, The Rise of World Constitutionalism, 83 VA. L. REV. 771 (1997).

268 See discussion at supra note 29.

269 Id.

270 WATSON, supra note 29.
the retributive damage they could expect from the defendant’s relatives or social contacts.\textsuperscript{271} Similarly utilitarian views of institutional and personal decision-making are quite common in political economy theories of legal or institutional history, notably in more recent legal scholarship on “jurisdictional competition.”\textsuperscript{272} The basic justification for this seems to be that legal personnel and institutions in pre-modern or early modern societies enjoyed relatively weak security and influence within the broader state apparatus—a state apparatus that itself faced political, military and legal challenges.\textsuperscript{273} These judiciaries faced not only great uncertainties in external sociopolitical circumstances, but also considerable ambiguity in their self-identity. It seems natural, therefore, to assume that their decision-making incorporated strong elements of pragmatic self-interest.

This assumption continues to apply if we replace the temporal modifications with geographic ones—that is, if we study contemporary judiciaries in authoritarian, developing nations, especially those that have yet to establish a strong, well-entrenched judiciary and legal profession, and face some measure of potential political instability. If we assume that late medieval European jurists were willing to alter their judicial decisions based on concerns of personal safety or political standing, then, by basically the same logic, it seems reasonable to suspect that comparably vulnerable jurists in a young, modern authoritarian state might be willing to make similar concessions. Here, however, the legal literature is quite underdeveloped. Scholars have made, for example, significant progress in studying the judiciaries of authoritarian, developing nations, but have more often focused on identifying the functions that these judiciaries carry out for their respective states, rather than studying them as entities capable of acting in institutional self-interest.\textsuperscript{274} This is perhaps a natural consequence of the subject matter: given the authoritarian nature of the state, one may expect the judiciary to have relatively little room for self-interested maneuvering.

As we have attempted to demonstrate for the Chinese judiciary, however, these expectations sometimes miss the mark, and may miss more and more as governments stabilize and societies grow.\textsuperscript{275} One hypothetical but fairly plausible chain of events is as follows: As societies grow in economic and political complexity, laws governing sociopolitical behavior will likewise grow in complexity. By no means will they inevitably converge upon Western legal models,\textsuperscript{276} but institutions that specialize in legal affairs will still grow in authority and independence as the legal system expands and professional legal training becomes more valuable. As legal professionals come to enjoy greater sociopolitical influence, they will then push for


\textsuperscript{272}See, e.g., Klerman, \textit{supra} note 29; Zwywicki, \textit{supra} note 29.

\textsuperscript{273}These are particularly evident in Glaeser & Shleifer, \textit{supra} note 271. See also the discussion at \textit{supra} note 33.

\textsuperscript{274}See, for example, the various examples cited in \textit{supra} notes 3, 15. For a broader comparative perspective on judiciaries in authoritarian regimes, see Tom Ginsburg & Tamir Moustafa, \textit{Introduction, in Rule By Law: The Politics of Courts in Authoritarian Regimes} 1 (Tom Ginsburg & Tamir Moustafa eds., 2008), and the other essays in that volume. While certainly a significant academic achievement, apart from the final essay, Martin Shapiro, \textit{Courts in Authoritarian Regimes, in Id.} at 326, which lists some broad theoretical observations on judicial behavior and motivation, the other, more empirical, essays in the volume focus, perhaps justifiably, on the question of when and why authoritarian regimes grant substantive powers to courts—a question that may precede the examination of the judiciaries’ own institutional motivations in logical order.

\textsuperscript{275}See discussion surrounding \textit{supra} notes 16-18, 94, 95.

\textsuperscript{276}Within the Chinese context, see particularly Clarke (2011), \textit{supra} note 252; and Clarke (2003), \textit{supra} note 252. For a broader comparative and theoretical perspective, see Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, \textit{The Transplant Effect}, 51 AM. J. COMP. L. 163 (2003) (discussing the conditions under which cross-nation and cross-culture legal transplants are likely, plausible and successful).
greater expansion and professionalization of the legal system, partly because their training encourages them to internalize such norms, but also because it is in their own interest to do so—as pre-modern European jurists have found, time and time again. 277

There is, therefore, good reason to study judiciaries in authoritarian states as institutional “rational actors” that are capable of pragmatic maneuvering similar to what we regularly attribute to pre-modern or early modern European judiciaries. No one would deny that, compared to its democratic peers, an authoritarian state probably has greater incentive and ability to keep its judiciary under a relatively tight leash, but the appropriate mental image is at least that of a leash, and not a series of puppet strings that control every notable judicial development. 278

We have argued here that institutional pragmatism is the best explanation for a series of recent SPC activities, ranging from the enhancement of “judicial efficiency” to the establishment of “guiding cases.” It also does a surprisingly good job of explaining both the Court’s well-publicized promotion of legal populism and, perhaps ironically, its ongoing commitment to further professionalization. Returning now to the question we posed at the beginning of this paper: how can this help us predict, however vaguely, where Chinese legal reform is headed?

Assuming for the moment that greater legal professionalization is, in fact, a desirable objective, 279 perhaps there is greater reason for optimism under a theory of institutional pragmatism than if the SPC has actually internalized “legal populism” as a long-term ideal for judicial reform, or that it is simply a largely “mindless” extension of the party-state. This paper has presented the SPC as an entity both willing and capable of pursuing its institutional self-interest, but has also argued that the Court’s self-interest, over the long run, is very much congruent with legal professionalism. As much as we must recognize that the SPC has only limited maneuvering room within the constraints of general Party-state policy—and that the Party-state’s policymaking rests upon far more complex considerations of social stability, economic development, and political legitimacy, these arguments suggest that at least one important institutional player in the Chinese legal world will consistently possess a strong incentive to promote legal professionalization.

Barring drastic and unforeseeable sociopolitical shocks, it seems highly unlikely that the SPC will completely abandon its basic commitment to further professionalization. On the other hand, it probably will not hesitate to temporarily shelve that commitment for short-term institutional gain, recent examples including the promotion of populism and the decidedly utilitarian pursuit of “judicial efficiency.” This might cause judicial reform activists a fair amount of frustration and anxiety, but it probably does not foreshadow any long-term regression away from rule of law ideals. The SPC’s institutional self-interest is a reliable and reasonably powerful ally, and—over the long run, at least—the activists actually have it on their side.

277 See discussion at supra note 29.
278 See Ginsburg & Moustafa, supra note 274, at 2 (noting that more recent scholarship “cuts against” the traditional presumption that courts in authoritarian regimes were “mere pawns”).
279 At least in economic dimensions, this is not an absolute certainty. World Bank studies suggest, for example, that the more formalistic a judicial system is, the less economic efficient it becomes. Danjkov et al., supra note 134.