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Article

**Decentralized and Anomalous  
Interpretation of Chinese Private Law:  
Understanding a Bureaucratic and  
Political Judicial System**

**Yun-chien Chang<sup>†</sup> & Ke Xu<sup>††</sup>**

INTRODUCTION

China's dazzling economic development in the past few decades has increased the welfare of the Chinese people but caused headaches for legal and economic-development scholars. A widely shared view has been that delineation of rights is a prerequisite to market exchange and economic development.<sup>1</sup>

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Division of labor: Professor Chang came up with the research question. The two authors jointly came up with the examples that are used to support the hypothesis and designed the data structure. Professor Xu was responsible for the literature review. Most of the data analysis and writing was done by Professor Chang. Copyright © 2018 by Yun-chien Chang and Ke Xu.

1. For scholarship that emphasizes the importance of delineating rights, see generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000) (emphasizing the role of formal property rights in the transformation of dead capital into live capital); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 16 (1960) (arguing that “the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates”).

China, however, has developed mostly without clear entitlement delineation.<sup>2</sup> This phenomenon is called the China Puzzle, as it is contrary to the norm.<sup>3</sup> The prevailing explanation of China's success is that de facto fiscal federalism,<sup>4</sup> fostering jurisdictional competition at the *xian* level,<sup>5</sup> when combined with a unitary bureaucrat promotion system,<sup>6</sup> provides local bureaucrats with strong incentives to perform.<sup>7</sup> That is, public-law institutions account for China's growth, while the usefulness of private-law institutions is questioned.

Nonetheless, if China continues to grow, law and development scholars may have to ask a new question: should delineation of rights get credit now? In the first decade of this millennium, the National People's Congress of China enacted the Property Act of 2007,<sup>8</sup> the Labor Contract Act of 2007,<sup>9</sup> and the

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2. For a case study on Shenzhen, China that demonstrates economic development without clear, formal legal titles, see, for example, Shitong Qiao, *Planting Houses in Shenzhen: A Real Estate Market Without Legal Titles*, 29 CAN. J.L. & SOC'Y 253 (2014).

3. See, e.g., Wei Shen & Wen-yeu Wang, *Conclusion: A Tale of Two Jurisdictions—Is It an End to the Divergence of Private Law?*, in PRIVATE LAW IN CHINA AND TAIWAN: LEGAL AND ECONOMIC ANALYSES 304, 325 (Yun-chien Chang et al. eds., 2016); Frank K. Upham, *What Are Property Rights Good For? Surprising Lessons from the Chinese Experience*, in RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE 82, 85 (Guanghua Yu ed. 2013); Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 89–93 (2003); Frank K. Upham, *Speculations on Legal Informality: On Winn's "Relational Practices and the Marginalization of Law"*, 28 L. & SOC'Y REV. 233, 233–37 (1994).

4. See, e.g., Hehui Jin et al., *Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style*, 89 J. PUB. ECON. 1719, 1721 (2005); Gabriella Montinola et al., *Federalism, Chinese Style: The Political Basis for Economic Success in China*, 48 WORLD POL. 50, 63–65 (1995).

5. See generally Steven N.S. Cheung, *The Economic System of China*, 1 MAN & ECON. 1, 19 (2014) (stating that competition at the *xian* level is the "most intense" because economic power rests primarily at this level).

6. See Zhou Li-An (周黎安), *Zhongguo Difang Guangyuan de Jinsheng Jinbiaosai Moshi Yanjiu*, (中国地方官员的晋升锦标赛模式研究) [*Governing China's Local Officials: An Analysis of Promotion Tournament Model*], 7 JINGJI YANJIU (经济研究) [ECON. RES. J.] 36, 38 (2007).

7. See Roderick M. Hills Jr. & Shitong Qiao, *Voice and Exit as Accountability Mechanisms: Can Foot-Voting Be Made Safe for the Chinese Communist Party?*, 48 COLUM. HUM. RTS. L. REV. 158, 177–79 (2017).

8. *Zhonghua Renmin Gongheguo Wuquan Fa* (中华人民共和国物权法) [Property Rights Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) [hereinafter Property Rights Law], [http://www.gov.cn/flfg/2007-03/19/content\\_554452.htm](http://www.gov.cn/flfg/2007-03/19/content_554452.htm) (China).

9. *Zhonghua Renmin Gongheguo Laodong Hetong Fa* (中华人民共和国劳动合同法) [Labor Law of the People's Republic of China] (promulgated by the

Tort Liability Act of 2009.<sup>10</sup> The Contract Act was passed in 1999.<sup>11</sup> A political decision made in the Fourth Plenary Session of the 18th Central Committee of the Chinese Communist Party (CCP) has rekindled the effort to integrate these statutes into one civil code, and the General Principle part of the proposed Chinese Civil Code was passed in March 2017.<sup>12</sup> This means that at least the law on the books and, arguably, legal rights as well, have been delineated more clearly. Even when the statutes have fuzzy edges—such as whether “small property” (that is, illegal buildings) will be torn down<sup>13</sup>—the focal points derived from social norms and social understanding assure property holders that their rights will be protected.<sup>14</sup> Before declaring a belated victory for the delineation-of-rights thesis, we need to pause and remind ourselves of the old wisdom: the law on the books is not the law in action. More specifically, we should ask ourselves if a particular doctrine contained in a private-law stat-

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Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) [hereinafter Labor Law], [http://www.npc.gov.cn/wxzl/gongbao/2013-04/15/content\\_1811058.htm](http://www.npc.gov.cn/wxzl/gongbao/2013-04/15/content_1811058.htm) (China).

10. Zhonghua Renmin Gongheguo Qinquan Zeren Fa (中华人民共和国侵权责任法) [Tort Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), [http://www.gov.cn/flfg/2009-12/26/content\\_1497435.htm](http://www.gov.cn/flfg/2009-12/26/content_1497435.htm) (China).

11. Zhonghua Renmin Gongheguo Hetong Fa (中华人民共和国合同法) [Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), [http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content\\_4732.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/06/content_4732.htm) (China).

12. Zhonghua Renmin Gongheguo Minfa Zongze (中华人民共和国民法总则) [General Provisions of the Civil Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2017, effective Oct. 1, 2017) [hereinafter General Civil Law Provisions], [http://www.npc.gov.cn/npc/xinwen/2017-03/15/content\\_2018907.htm](http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018907.htm) (China).

13. According to the Ministry of Land and Resources, the government may not issue ownership certificates to buyers of small properties, which creates uncertainty regarding how the government should deal with them. *Guotu Ziyuanbu, Zhongyang Nongcun Gongzuo Lingdongxiaozu, Caizhengbu, Nongyebu Guanyu Nongcun Jiti Tudi Quequan Fazheng de Ruogan Yijian* (国土资源部、中央农村工作领导小组办公室、财政部、农业部关于农村集体土地确权登记发证的若干意见) [*Several Opinions of the Ministry of Land and Resources, Central Leading Group Office for Rural Work, by the Ministry of Finance, and the Ministry of Agriculture on Registration and Certification To Verify Collectively-Owned Rural Land*], MINISTRY LAND & RESOURCES CHINA (中华人民共和国国土资源部) (Nov. 10, 2011), [http://www.mlr.gov.cn/zwgk/zytz/201111/t20111110\\_1024313.htm](http://www.mlr.gov.cn/zwgk/zytz/201111/t20111110_1024313.htm) (China).

14. See, e.g., Shitong Qiao, *Small Property, Big Market: A Focal Point Explanation*, 63 AM. J. COMP. L. 197, 223–24 (2015); Shitong Qiao & Frank Upham, *The Evolution of Relational Property Rights: A Case of Chinese Rural Land Reform*, 100 IOWA L. REV. 2479, 2500–01 (2015).

ute will be interpreted in drastically different ways, will the contour of rights be clear enough to sustain economic development?<sup>15</sup>

There are three major scenarios in a large country with a unitary legal system: centralized interpretations, decentralized interpretations, and anomalous interpretations. A casual observer of the Chinese legal system may expect to find centralized interpretation of national statutes, as one would expect in an authoritarian regime with strong, centralized power. One-size-fits-all statutes and interpretations can contribute to economic development if the statutes are sensible enough and the transaction costs of working around the statutes are not prohibitive.<sup>16</sup>

Scholars who believe that local knowledge is more useful in dealing with local problems may expect to observe plenty of decentralized interpretations. China is the largest nonfederalist country in the world.<sup>17</sup> Social norms, natural environments, and economic development levels, among other factors, are very different across its provinces.<sup>18</sup> There is likely to be pressure to deviate from plain or obscure meanings of national statutes that do not meet local needs.<sup>19</sup> Decentralized interpretations of private laws could increase or decrease economic efficiency, thus adding fuel to, or putting a stop to, economic development.<sup>20</sup> If,

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15. During the Hong Kong symposium, Richard Epstein questioned our approach of using court cases to examine whether rights are clearly delineated, as court cases are not representative of all disputes. He further questioned whether it is more important, in terms of the delineation of rights, to assess whether many ordinary private arrangements have been interrupted. We recognize that the latter question is very important, but it is outside the scope of this Article. We contend that if court cases are known to be subject to political influence and people bargain under the shadow of court decisions, ordinary private arrangements will be affected, too.

16. See John Linarelli, *The Economics of Uniform Laws and Uniform Law-making*, 48 WAYNE L. REV. 1387, 1395–97 (2003).

17. See Thomas B. Foley, *A Devolution Revolution? Disputing De Facto Federalism in China*, 37 H.K. L.J. 951, 980–90 (2007) (listing the characteristics of federalism that China lacks, such as independent leaders and tax spending and autonomy).

18. See Tan Qixiang (谭其骧), *Zhongguo Wenhua de Shidaicahayi he Diqu Chayi* (中国文化的时代差异和地区差异) [*The Difference of Times and Areas in Chinese Culture*], 2 FUDAN XUEBAO (复旦学报) [FUDAN U.] 5–12 (1986).

19. See Foley, *supra* note 17, at 975 (explaining that homogeneity across Chinese provinces is “inefficient . . . because China’s vast size and diverse geography means needs and resources are different across the country”).

20. Compare *id.*, with Shitong Qiao, *Rights-Weakening Federalism*, 102 MINN. L. REV. 1673, 1676 (2018) (arguing that the central government in China protects property rights more than do local governments).

for example, the standard of care in tort law, the notice requirement in property law, and the statute of frauds in contract law are sufficiently different across provinces without much rational basis, heightened information costs may slow economic growth. By contrast, if local customs with low information costs are legally recognized, total social welfare in China is likely to increase.<sup>21</sup>

The worst case scenario is anomalous interpretations. Whereas decentralized interpretations largely follow geographic boundaries due to non-legal-institutional constraints and the jurisdictional boundaries of the thirty-one provincial high courts, anomalous interpretations are unconventional statutory interpretations that are without pattern. While there must be (unobservable) reasons for courts to render them, they are highly likely to harm economic development, as they create unpredictability that economic actors cannot plan around.

In this Article, we develop a positive theory of the decentralized and anomalous interpretations of Chinese private law. At the core of our theory is the observation that Chinese courts are both political and bureaucratic.<sup>22</sup> This dual nature makes them unique. Very few courts in the world are both political and bureaucratic. For instance, federal appellate courts in the United States, including the Supreme Court, are often political but not bureaucratic,<sup>23</sup> whereas Japanese courts are bureaucratic but not political.<sup>24</sup> Because of the political and bureaucratic court system in China, examples and instances of decentralized and anomalous interpretations are far more numerous than casual observers would expect. That is, decentralized and anomalous

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21. For discussions of property customs and information costs, see Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275 (2015); Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5 (2009).

22. See, e.g., SUGIAN GUO, CHINESE POLITICS AND GOVERNMENT: POWER, IDEOLOGY, AND ORGANIZATION 188 (2013) (observing that Chinese judges are appointed based on a political and ideological standard and are subject to a bureaucratic hierarchy).

23. See, e.g., LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 101 (2013) (observing that “[t]he Supreme Court is widely regarded, and not only by political scientists, as a political court”).

24. See, e.g., J. MARK RAMSEYER, SECOND-BEST JUSTICE: THE VIRTUES OF JAPANESE PRIVATE LAW 206–38 (2015); Shozo Ota, *Reform of Civil Procedure in Japan*, 49 AM. J. COMP. L. 561, 574 (2001).

interpretations in China have the same root: the sociopolitical pressure on courts, often from the political branch.

Courts have long been considered a part of the political branch by the CCP.<sup>25</sup> While in recent years, judges have become more professional,<sup>26</sup> court presidents are still political appointees and often staffed by former agency heads or party cadres.<sup>27</sup> Court presidents embrace local needs and political concerns, and prioritize them over interpreting statutes to be consistent with other courts or to best fit statutory text.<sup>28</sup> Judges nested in a highly bureaucratic system often succumb to the political needs internalized in courts via court presidents.<sup>29</sup> The result is that private-law statutes are sometimes bent to fit local needs. Should these needs be province-wide, even just in the short term, decentralized interpretations would be observed in opinions and other documents issued by the provincial high courts. If the political pressure is small in scale, idiosyncratic interpretations would only appear in isolated cases spread across the country.

One might challenge our thesis, countering that deviations from standard statutory interpretations will be suppressed and corrected through the unified judicial system; that is, by the Supreme People's Court (SPC).<sup>30</sup> But this is not the case in China. Provincial courts avoid the reversal of nonmainstream interpretations by the unified judicial system for two major reasons.<sup>31</sup>

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25. See Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 539–43 (2007).

26. See Zuo Weimin (左卫民), *Zhongguo Faguan Renyong Jizhi: Jiyu Linian de Chubu Pingxi* (中国法官任用机制: 基于理念的初步评析) [*Judges' Appointment in China: A Conceptual Comment and Analysis*], 5 XIANDAI FAXUE (现代法学) [MOD. L. SCI.] 43, 43–45 (2010).

27. For instance, one-third of the presidents of the thirty-one provincial high courts were promoted from outside the court system in 2008. See Liu Zhong (刘忠), *Zhengzhixing yu Sifa Jishu Zhijian: Fayuan Yuanzhang XuanRen de Fuhe Eryuan Jiegou* (政治性与司法技术之间: 法院院长选任的复合二元结构) [*Between Political Demands and Judicial Skills: Compounded Double Structure of Appointing Presidents of Courts*], 5 FALYU KEXUE (法律科学) [SCI. L.] 17, 17–29 (2015).

28. See, for example, the bold claim made by Ying Yong. See *infra* text accompanying note 61 (quoting the former President of the Shanghai High Court).

29. GUO, *supra* note 22, at 169–72 (describing the Chinese legal system as an “integral part of the executive branch”).

30. See *Case Law Chinese Style—Where Is It Going?*, SUPREME PEOPLE'S CT. MONITOR (Jan. 18, 2015), <https://supremepeoplescourtmonitor.com/2015/01/18/case-law-chinese-style-where-is-it-going> (discussing the “guiding cases” that the court president established to “unify[] the application of the law”).

31. Provincial courts also window-dress their opinions. See ZHENG YONGNIAN, *DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS* 12 (2007) (“A province might claim to be adapting

First, there are four levels of courts in China,<sup>32</sup> but a case becomes final in only two instances.<sup>33</sup> Low- or medium- stakes cases must first be filed with the provincial district courts or provincial intermediate courts and, pursuant to jurisdictional rules, will *never* go to the SPC.<sup>34</sup> Accordingly, most contract, property, and tort cases remain in the provincial courts. Essentially, private law is the domain of the provinces, just like state courts in the United States primarily handle state law cases. Additionally, in contrast to the U.S. Supreme Court, which prioritizes granting certiorari to cases that contain issues that have split the courts of appeals,<sup>35</sup> the SPC is inclined to avoid taking a position on contentious issues of statutory interpretation in the area of private law.<sup>36</sup> This leaves more room for provincial courts to work out differing solutions to the same legal issue.

To support our bold claim, we offer one of the very first large-scale empirical studies of Chinese court decisions to test our theory. Aided by powerful textual analysis of hundreds of millions of cases in China, we gleaned thousands of relevant cases to conduct further analysis. Our goal was to identify statutory interpretations of the Property Act of 2007 that are clearly wrong from a doctrinal perspective. In identifying errors, we only included those errors that were so obvious and fundamental that judicial incompetence was unlikely to be the sole reason for the decision. More specifically, this Article analyzes two issues. The first is the judicial recognition of *dian* right, an idiosyncratic,

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a central policy to local conditions when, in fact, its provincial implementation is intended to achieve some other goals.”).

32. The four levels are the provincial district courts, provincial intermediate courts, provincial high courts, and Supreme People’s Court (SPC).

33. See *infra* Part I.B.

34. See *infra* Table 1. Only disputes with extremely high stakes can go to the SPC. For jurisdictional rules, see Zuigao Renmin Fayuan Guanyu Tiaozheng Gaoji Renmin Fayuan he Zhongji Renmin Fayuan Guanxia Diyishen Minshangshi Anjian Biaozhun de Tongzhi (最高人民法院关于调整高级人民法院和中级人民法院管辖第一审民商事案件标准的通知) [Notice of the Supreme People’s Court on Adjusting the Standards for the Jurisdiction of the Higher People’s Courts and Intermediate People’s Courts over Civil and Commercial Cases of the First Instance] (promulgated by the Sup. People’s Ct., Apr. 30, 2015, effective May 1, 2015) [hereinafter Notice of Jurisdiction Standards Adjustment], <http://en.pkulaw.cn/display.aspx?id=967b38788f4b2931bdfb&lib=law#> (China).

35. See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 407 (2004).

36. See *infra* Part II.C.



mortgage-like Chinese property form not recognized by the Property Act of 2007 as a type of property right.<sup>37</sup> Second, we investigate whether courts have followed an explicit stipulation in the Property Act of 2007 to apply this Act instead of the previous Security Property Right Act of 1995. In both cases, we find unconventional statutory interpretations. As the judges who rendered these decisions often cited other provisions of the Property Act of 2007, it is unlikely that they were not aware of the provisions they violated. Since we did not find patterns in these decisions, it seems that delineation of rights is not entirely clear.

This Article is structured as follows: Part I elaborates on the unique institutional environment in China that has led to the decentralized development of private law in a unified system. We tell the story of the idiosyncratic features of Chinese courts, which lead to the political and bureaucratic nature of the courts in China. Part II summarizes the data and methodology of our empirical studies in property law and reports our findings. In addition, we draw on existing work that shows that provincial courts have taken different positions on contract law, tort law, and employment law from those taken by the SPC and other provincial courts. Statutes are often interpreted differently across provinces in China.

## I. POLITICS-DRIVEN INTERPRETATION OF PRIVATE LAW

This Part elaborates on our theory that decentralized and anomalous interpretations of private law in China are attributable to the influence of local politics. China does not have a Western separation-of-powers governmental structure. Instead, the Chinese system exhibits a division of labor between the courts and the administrative branch. While judges and low-ranking government employees do not change positions on a regular basis, agency heads and court presidents are comparable bureaucratic positions. Court presidents must be politically connected to maintain the normal function of their courts, causing political

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37. For an analysis of the *dian* right, see Taisu Zhang, *Property Rights in Land, Agricultural Capitalism, and the Relative Decline of Pre-Industrial China*, 13 *SAN DIEGO INT'L L.J.* 129, 138 (2011); see generally YUN-CHIEN CHANG ET AL., *PROPERTY AND TRUST LAW IN TAIWAN* 55–56 (2017); Robert C. Ellickson, *The Costs of Complex Land Titles: Two Examples from China*, 1 *BRIGHAM-KANNER PROP. RIGHTS CONF. J.* 281 (2012).

pressure to routinely enter the courts.<sup>38</sup> Statutes are thus interpreted in a nonstandard fashion, or simply ignored, in order to cater to local interests. If most cases could be appealed to the provincial high courts or even the SPC, these higher courts, which are relatively insulated from local politics, could correct wrongful statutory interpretations and unify the application of statutes. However, a seemingly neutral and technical jurisdictional rule<sup>39</sup> seriously limits the opportunities of the higher courts to review most private law cases. Moreover, even when the SPC can unify statutory interpretations through its own judicial interpretation, it often refrains from doing so, especially when there are competing interpretations. The following Parts elaborate on these points.

#### A. POLITICAL COURT PRESIDENTS ATTEND TO LOCAL NEEDS

Provincial judges have incentives to interpret statutes unconventionally because they are less legalistic and more pragmatic and bureaucratic than judges in other countries. Additionally, China's institutional environments and diverse local conditions foster differences across provincial courts. One of the most shocking features of the Chinese judicial system is that court presidents<sup>40</sup> often do not have any experience on the bench, or an undergraduate or graduate-level legal education.<sup>41</sup> Court presidents are often former party cadres or administrative agency heads.<sup>42</sup> They are appointed for the job not because they are respected jurists, but because they are seasoned politicians

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38. *But see* Liu Zhong (刘忠), *Sifa Difang Baohu Zhuyi Huayu Piping* (司法地方保护主义话语批评) [*A Critique of the Discourse on Local Protectionism in the Judiciary*], 132 FAZHI YU SHEHUI FAZHAN (法制与社会发展) [L. & SOC'Y DEV.] 22, 38 (2016) (explaining that pressure on courts of first instance comes not from local governments, but via courts of second instance from the parties).

39. *See* Notice of Jurisdiction Standards Adjustment, *supra* note 34.

40. The U.S. equivalents of court presidents are chief judges in federal courts. Court presidents in China, however, have arguably much greater administrative power than their American counterparts. *See infra* this Part.

41. *See* ZHU SULI (朱苏力), SONGFA XIAXIANG: ZHONGGUO JICENG SIFA ZHIDU YANJIU (送法下乡: 中国基层司法制度研究) [SENDING LAW TO THE COUNTRYSIDE: RESEARCH ON CHINA'S BASIC-LEVEL JUDICIAL SYSTEM] 82 (Revised ed. 2011) (explaining the limits on Chinese judges' reasoning and observational abilities); Zuo Weimin (左卫民), *Zhongguo Fayuan Yuanzhang Juese de Shizheng Yanjiu* (中国法院院长角色的实证研究) [*The Empirical Study of the Roles of the Courts' Presidents in China*], 132 ZHONGGUO FAXUE (中国法学) [CHINA L. SCI.] 5, 10–12 (2014).

42. *See supra* note 27.

who are expected to follow the lead of the CCP.<sup>43</sup> The judiciary, under China's political-legal tradition (政法传统), is considered part of the executive branch.<sup>44</sup> Court presidents, often being nonjurists, are not hesitant to adopt legal interpretations that cater to local needs or reduce adverse sociopolitical consequences.<sup>45</sup>

In developed Western countries, chief judges, unlike Chinese court presidents, cannot sway outcomes of individual cases handled by other judges. The PRC Constitution does not guarantee judges' independence, however; article 126 merely stipulates court independence (法院独立).<sup>46</sup> A court theoretically should be independent from other influences, but judges cannot (and often lack incentives to) disobey the orders of court presidents.<sup>47</sup> As a result, court presidents can informally dictate the outcomes of individual cases. Moreover, adjudication committees (审判委员会) within each court provide a formal regime

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43. See Zuo, *supra* note 41, at 7–8 (according to surveys to judges, attorneys, and citizens in one unspecified province, court presidents are recognized and expected to be first an administrator, second a politician, and third a lawyer).

44. See Zheng Zhihang (郑智航), *Zuigao Renmin Fayuan Ruhe Zhixing Gonggong Zhengce* (最高人民法院如何执行公共政策) [*How Does the SPC Enforce Public Policy?*], 3 FALYU KEXUE (XIBEI ZHENGFA DAXUE XUEBAO) (法律科学(西北政法大学学报)) [SCI. L.J. NORTHWEST U. POL. SCI. & L.] 11, 18 (2014).

45. Even federal judges in the United States have been found to have twisted procedural rules to attract cases in order to help the local economy. See Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 272–75 (2016).

46. Article 126 of the Constitution of the People's Republic of China stipulates that "[t]he people's courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual." (人民法院依照法律独立行使审判权, 不受行政机关, 社会团体和个人干涉。) XIANFA, art. 126 (2004) (China). For the official English translation, see *Constitution of the People's Republic of China*, NAT'L PEOPLE'S CONGRESS CHINA (Mar. 14, 2004), [http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content\\_1372991.htm](http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372991.htm). Mainstream constitutional scholarship in Taiwan takes the position that the people's courts, rather than individual judges, are independent. See, e.g., Chen Weidong (陈卫东), *Sifa Jiguan Yifa Duli Xingshi Zhiquan Yanjiu* (司法机关依法独立行使职权研究) [*On the Independence of the Judiciary*], 2014 ZHONGG FAXUE (中国法学) [CHINA L. SCI.] 20, 20–21 (2014).

47. Jiahui Ai has asked, à la Judge Posner, what Chinese judges maximize. Her first and foremost answer is: impressing the administrative leaders of the court in order to get promotions and other perks. See Ai Jiahui (艾佳慧), *Zhongguo Faguan Zuidahua Shenmo* (中国法官最大化什么) [*What Do Chinese Judges Maximize?*], 3 FALYU YU SHEHUI KEXUE (法律与社会科学) [L. & SOC. SCI.] 98, 121–24 (2008).

through which court presidents can systematically channel political influence into a case. An adjudication committee is chaired by the court president, and its members include several senior judges who have various administrative duties (and accompanying titles and ranks).<sup>48</sup> Its main function is to brainstorm on difficult cases and to advise judges responsible for those cases on how to reach sensible decisions.<sup>49</sup> Empirical studies on adjudication committees show that one primary motive of the committees is to ameliorate political and social pressure from higher courts, provincial, city, and county governments, and the press.<sup>50</sup> Moreover, “in many cases the [adjudication] committee went out of its way to cater to the government and the Party.”<sup>51</sup> If politically or socially influential persons prefer a certain outcome of a case, courts are likely to issue holdings in support of those preferences.<sup>52</sup> Should the source of external influence enact a formal policy in the form of “red letterhead” documents promulgated by

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48. See Zuigao Renmin Fayuan Guanyu Yinfa Guanyu Gaige he WanShan Renmin Fayuan Shenpan Weiyuanhui Zhidu de Shishi Yijian de Tongzhi (最高人民法院关于印发《关于改革和完善人民法院审判委员会制度的实施意见》的通知) [Notice of the Supreme People's Court on Issuing the Implementation Opinions on Reforming and Improving the Judicial Committee System of the People's Court] (promulgated by the Sup. People's Ct., Jan. 1, 2010, effective Jan. 1, 2010), arts. 6, 16, [http://www.pkulaw.cn/fulltext\\_form.aspx?Db=chl&Gid=127979](http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=127979) (China).

49. See Zuo Weimin (左卫民), *Shenpan Weiyuanhui Yunxing Zhuangkuang de Shizheng Yanjiu* (审判委员会运行状况的实证研究) [*The Empirical Study of the Operation of the Judicial Committee*], 3 FAXUE YANJIU (法学研究) [CHINESE J.L.] 160, 167 (2016).

50. See Wang Lungang (王伦刚) & Liu Sida (刘思达), *Jiceng Fayuan Shenpan Weiyuanhui Yali Anjian Juece de Shizheng Yanjiu* (基层法院审判委员会压力案件决策的实证研究) [*An Empirical Study on How the Adjudication Committee in Basic-Level Courts Makes Decisions on Cases with External Pressure*] 1 FAXUE YANJIU (法学研究) [CHINESE J.L.] 80, 82 (2017). *But see* Zhu, *supra* note 41, at 44–106 (offering a famous defense of the normative desirability of adjudication committees based on interviews); Zuo, *supra* note 26, at 159, 160–64 (using data from one unspecified province to argue that most adjudication committee members have more than ten years of experience on the bench, and adjudication committees deal with one to five percent of the total cases).

51. Xin He, *Black Hole of Responsibility: The Adjudication Committee's Role in a Chinese Court*, 46 LAW & SOC'Y REV. 681, 702 (2012) (coming to this conclusion based on analysis of archival minutes of an adjudication committee in a lower-level court in Shaanxi Province for 2009).

52. See Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 YALE L.J. 1675, 1711 (2005) (book review) (observing that “basic court judges act as specialized components of local bureaucracies dedicated to defusing social conflict by the effective resolution of local disputes. Instead of being insulated from society, they bargain with it”).

government agencies,<sup>53</sup> courts may even systematically deviate from the ordinary statutory interpretation of a given statute.

Beyond that, Chinese jurists are far less dogmatic than, for example, German jurists, and are arguably more liberal in statutory interpretations than their American colleagues to begin with. More specifically, several decades of a near legal vacuum since 1949 have made Chinese jurists less legalistic. The American style of jurisprudence, with its emphasis on pragmatic thinking and an interdisciplinary approach, has thrived in an era with lots of thorny legal issues but no statutes to solve them. Judges and legal scholars have subscribed to the Deng Xiaoping Theory (邓小平理论): “It does not matter whether it is a yellow cat or a black cat, as long as it catches mice.”<sup>54</sup> This type of pragmatic thinking does not ebb as the German-style doctrinal study of law gains ground in legal academia in China.<sup>55</sup> If Chinese judges were as doctrinal and legalistic as their German counterparts, they would seek to find the correct interpretation of a given statute,<sup>56</sup> but in our observation, very few Chinese judges think this way.

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53. In China, the CCP's policies *are treated as laws*. See Zhonghua Renmin Gongheguo Minfa Tongze (中华人民共和国民法通则) [General Principles of the Civil Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Apr. 27, 1986), art. 6, [http://www.pkulaw.cn/fulltext\\_form.aspx?Gid=2780](http://www.pkulaw.cn/fulltext_form.aspx?Gid=2780) (China) [hereinafter General Principals] (“Civil activities must be in compliance with the law; where there are no relevant provisions in the law, they shall be in compliance with State policies.”). The CCP's policies have always been viewed as an important part of state policies.

54. Deng Xiaoping, *Restore Agricultural Production* (July 7, 1962), in DENG XIAOPING, *SELECTED WORKS OF DENG XIAOPING (1938–1965)* 292, 293 (The Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Cent. Comm. of the Communist Party of China trans., Foreign Languages Press Beijing 1992) (1989); see also Wang Lungang (王伦刚) & Liu Sida (刘思达), *Cong Shiti Wenze dao Chengxu Zhi: Zhongguo Fayuan Cuoan Zuijiuzhi Yunxing de Shizheng Kaocha* (从实体问责到程序之治——中国法院错案追究制运行的实证考察) [*From Substantive Responsibility to the Rule of Procedure: An Empirical Study of the Operation of the Wrongful Case Responsibility System in China*], 2 FAXUE JIA (法学家) [JURIST] 27, 27–40 (2016).

55. For instance, several journals and scholars have started to champion the necessity of *Kommentar* (commentary on every article of a code). See Zhang Shuanggen (张双根), Zhu Mang (朱芒), Zhu Qingyu (朱庆育), & Huang Hui (黄卉), *Zhongguo Falyu Pingzhu de Xiangzhuang yu Weilai* (中国法律评注的现状与未来) [*The Present and Future of Kommentar in China*], 2 ZHONGGUO YINGYONG FAXUE (中国应用法学) [CHINA REV. ADMIN. JUST.] 161–73 (2017).

56. See generally Basil Markesinis, *Judicial Style and Judicial Reasoning in England and Germany*, 59 CAMBRIDGE L.J. 294, 296–304 (2000) (explaining the differences between the style and reasoning of German and English approaches to judicial thought).

Above all, judges in China appear to prioritize solving problems and maintaining social order (harmony) over simply following legal logic. Under the idiosyncratic lifetime wrongful case responsibility system<sup>57</sup> (终身负责制/错案追究制), courts, or the ombudsmen department within courts, may punish judges criminally or administratively, respectively, if they render incorrect decisions.<sup>58</sup> Therefore, for Chinese judges personally, as long as both parties are satisfied and no one appeals to a higher court or petitions to an administrative agency (a process called *xinfang*, or 信访),<sup>59</sup> the decision is good.<sup>60</sup> YING Yong, the former President of the Shanghai High Court and the current mayor of Shanghai, has publicly declared that, for courts, “to get it done is stability; to close a case is ability; and to have no trouble is capability” (搞定就是稳定, 摆平就是水平, 没事就是本事).<sup>61</sup> Correct statutory interpretation takes the back seat. In short, the guiding principle in the Chinese judiciary is solving problems rather than establishing rules.

#### B. JURISDICTIONAL RULE

Jurisdictional rules that assign original jurisdiction according to the amount at stake keep most private law cases in the provincial courts.<sup>62</sup> As described above, a case in China is reviewed at most by two levels of courts in a system that contains four levels.<sup>63</sup> Table 1 below summarizes the jurisdictional rules. In more economically developed provinces, the amount at stake must be higher to skip the lower levels of courts. In Beijing and Shanghai, for instance, if the amount at stake is less than fifteen million U.S. dollars, a provincial district court will be the court of first instance and its supervising provincial intermediate court will be the court of second instance if any party appeals.<sup>64</sup>

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57. For an overview of this regime and empirical studies of its effect, see generally Wang & Liu, *supra* note 54, at 27–40.

58. *Id.* at 27–28.

59. For a detailed explanation of *xinfang*, the unique administrative petitioning system, see Taisu Zhang, *The Xinfang Phenomenon: Why the Chinese Prefer Administrative Petitioning over Litigation*, 3 SOCIO. STUD. 139 (2009).

60. A vivid example of how judges and village cadres work together to mediate a loan case between a farmer and a credit union is offered in ZHU, *supra* note 41, at 3–23 and redescribed in Upham, *supra* note 52, at 1679–81.

61. See Guangdong Guo, *To Get It Done Is Stability; To Close a Case Is Ability; And To Have No Trouble Is Capability*, SOUTHERN WKLY., June 25, 2009, <http://www.infzm.com/content/30576>.

62. See *infra* Table 1.

63. See *supra* notes 21–24 and accompanying text.

64. See *supra* note 34.

In other words, the case will never be heard by a provincial high court. For a party in one of the most developed provinces to bring a case before the SPC, the amount at stake must exceed seventy-five million U.S. dollars; in the least developed provinces, that threshold is fifteen million U.S. dollars.<sup>65</sup> The chances of having a case heard by the SPC are low.<sup>66</sup>

To bolster our claim that private law cases are rarely heard by the SPC, we analyze three data sets provided to us by one of the leading legal service providers in China, ClassicLaw Institute.<sup>67</sup> We explain the data sets in more detail in Part II. For now, it should be sufficient to say that these data sets contain almost all publicly available cases regarding three mortgage law issues. We selected mortgage law to demonstrate our point because, among private law cases, mortgage disputes are more likely to have a higher amount at stake. As Figures 1, 2 and 3 show, the SPC rendered less than 0.2% of the mortgage law cases the authors of this Article studied.<sup>68</sup> Even if all the cases that went to provincial high courts as first instance cases had been appealed, the SPC would still have handled only a tiny fraction of such cases. The SPC's no-show policy in private-law matters provides critical space for provincial courts to interpret private-law statutes according to local needs.

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65. *See id.*

66. The SPC, which stipulated this jurisdictional rule, has raised the threshold when inflation or economic development made it too easy to bring cases to higher-level courts. The last time this jurisdictional rule was promulgated was 2008; the threshold at that time was about fifty percent of the current rule's threshold. *Compare id.*, with Zuigao Renmin Fayuan Guanyu Tiaozheng Chushen Minshi, Shangshi Anjian Gaoji Renmin Fayuan he Zhongji Renmin Fayuan Guanxia Biaozhun Di Tongzhi (最高人民法院关于调整初审民事, 商事案件高级人民法院和中级人民法管辖标准的通知) [Notice of the Supreme People's Court on Adjusting the Standards for the Jurisdiction of the Higher People's Courts and Intermediate People's Courts over Civil and Commercial Cases of the First Instance] (promulgated by the Sup. People's Ct., Feb. 3, 2008, effective Feb. 3, 2008), no. 10, <http://en.pkulaw.cn/display.aspx?cgid=104187&lib=law> (China).

67. CLASSIC LAW INST., <http://www.classiclawn.com> (last visited Apr. 26, 2018).

68. To put this in context, in Taiwan, where a private-law dispute with more than fifty-thousand USD at stake can be appealed to the Taiwan Supreme Court, their highest court rendered 1.6% of all the rendered civil cases in 2015.

**Table 1: Jurisdictional Rules Regarding Courts of the First Instance**

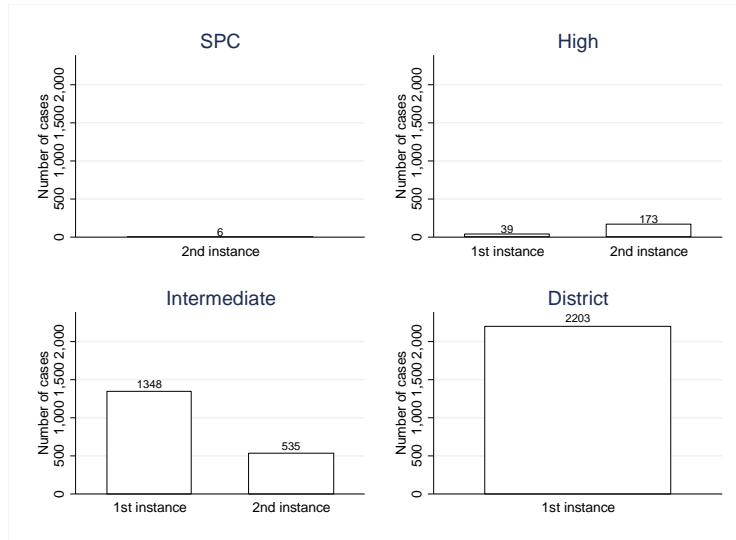
Province Names	Amount at Stake to Gain Original Jurisdiction (U.S. Dollars)		
	Provincial High Court	Provincial Inter- mediate Court	Provincial District Court
Beijing, Shanghai, Jiangsu, Zhejiang, Guangdong	$\geq 75M$	$\geq 15M$	$< 15M$
Tianjin, Hebei, Shanxi, Neimenggu, Liangning, Anhui, Fujian, Shan- dong, Henan, Hubei, Hu- nan, Guanxi, Hainan, Si- chuan, Chongqing	$\geq 45M$	$\geq 4.5M$	$< 4.5M$
Jilin, Heilongjiang, Jiangxi, Yunnan, Shanxi, Xinjiang	$\geq 30M$	$\geq 1.5M$	$< 1.5M$
Guizhou, Tibet, Gansu, Qinghai, Ningxia	$\geq 15M$	$\geq 0.75M$	$< 0.75M$

Notes: This rule has applied since 2015 for parties living in the same province. If one party does not live in the jurisdictional province, the threshold amount is reduced to about thirty to fifty percent of the threshold indicated in Table 1.

Data Source: See Notice of Jurisdiction Standards Adjustment, *supra* note 34.



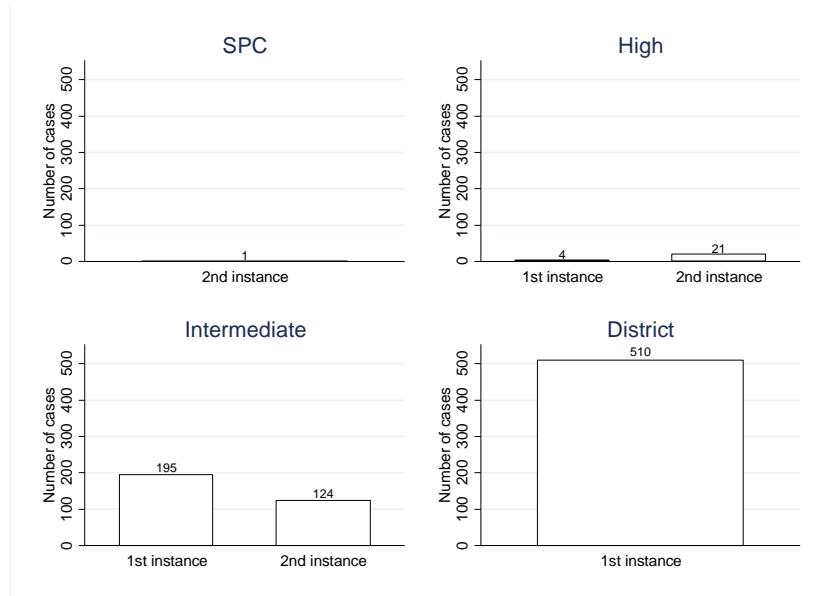
**Figure 1: Distribution of Cases Among Four Levels of Courts—First Mortgage Research Study**



Notes: “District” stands for provincial district courts. “Intermediate” stands for provincial intermediate courts. “High” stands for provincial high courts. “SPC” stands for the Supreme People’s Court. The research question itself will be elaborated in Part II.

Data source: CLASSIC LAW INST., <http://www.classiclawn.com> (last visited Apr. 26, 2018).

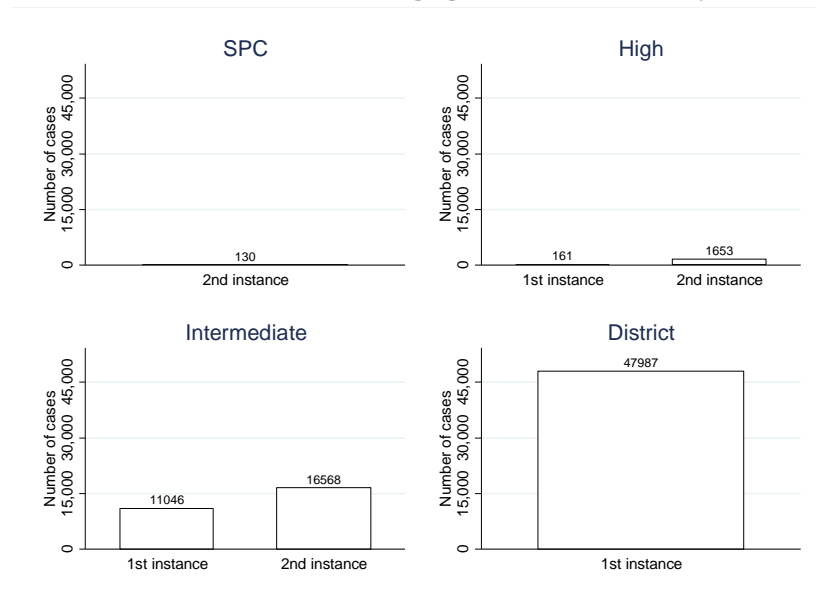
**Figure 2: Distribution of Cases Among Four Levels of Courts—Second Mortgage Research Study**



Notes: “District” stands for provincial district courts. “Intermediate” stands for provincial intermediate courts. “High” stands for provincial high courts. “SPC” stands for the Supreme People’s Court. The research question itself will be elaborated in Part II.

Data source: CLASSIC LAW INST., <http://www.classiclawn.com> (last visited Apr. 26, 2018).

**Figure 3: Distribution of Cases Among Four Levels of Courts—Third Mortgage Research Study**



Notes: “District” stands for provincial district courts. “Intermediate” stands for provincial intermediate courts. “High” stands for provincial high courts. “SPC” stands for the Supreme People’s Court. The research question itself will be elaborated in Part II.

Data source: CLASSIC LAW INST., <http://www.classiclawn.com> (last visited Apr. 26, 2018).

### C. SPC’S CONSERVATIVE ATTITUDES

The SPC is not a full-time adjudicator. Rather, it is a part-time lawmaker that promulgates statutes in the name of judicial interpretation and handpicks cases rendered by lower courts as guiding cases.<sup>69</sup> Judicial interpretations and guiding cases in the Chinese judicial system are, in theory, followed by all courts. In practice, however, they can hardly rein in the provincial courts.

First, guiding cases are less effective than they appear to be. According to a recent empirical study spanning from 2010 to 2016, guiding cases chosen by the SPC were rarely cited by all

69. For an explanation of how guiding cases work, see *China Guiding Cases Project*, STANFORD LAW SCH., <http://cgc.law.stanford.edu> (last visited Apr. 26, 2018).

levels of courts.<sup>70</sup> More specifically, less than thirty percent of all the existing sixty-four guiding cases have been cited.<sup>71</sup> Courts in only five provinces have cited guiding cases more than ten times; most citations have come from the two lowest levels of courts, as the SPC has never cited guiding cases itself and there have been only two citations at the level of the provincial high court.<sup>72</sup> Only four percent of the guiding cases fill statutory gaps.<sup>73</sup> Eighty-two percent of the guiding cases are chosen from cases rendered by seven provinces, all of which are economically more developed.<sup>74</sup> The most likely explanation for this phenomenon is that, first, lower court judges care more about reversals from the next highest court than from the SPC,<sup>75</sup> and, second, the higher courts have not been guarding the sanctity of the guiding cases. As a result, this idiosyncratic Chinese regime does not appear to be sufficient to unify statutory interpretations.

Second, while the SPC has promulgated judicial interpretations about property, contracts, and torts, their purpose is more gap-filling than split-solving. Gap-filling is, of course, an important judicial function, but gap-filling judicial interpretations may act as mere stepping stones from which provincial courts are likely to diverge. Recall our theory that a national rule in China, no matter whether enacted by the National People's Congress or promulgated by the SPC, will tend to be interpreted differently by provincial courts to fit local needs.<sup>76</sup> To unify the interpretation, the SPC must occasionally render a split-solving decision or promulgate a split-solving stipulation in one of the judicial interpretations. As mentioned above, private-law cases have rarely made their way to the SPC; thus, the SPC may not even be aware of a split, much less able to establish a precedent favoring a particular interpretation.

The conservative mindset of SPC judges also obstructs the SPC from being more active in resolving splits. It appears to be

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70. See Xiang Li (向力), *Cong Xianjian Canzhao dao Changgui Canzhao : Jiyu Zhidaoxing Anli Canzhao Qingkuang de Shizheng Fenxi* (从鲜见参照到常规参照——基于指导性案例参照情况的实证分析) [From Rare Reference to Conventional Reference: An Empirical Analysis of the Guiding Case System in China], 175 FA SHANG YANJIU (法商研究) [STUD. L. & BUS.] 96, 98–100 (2016).

71. *Id.* at 98.

72. *See id.*

73. *See id.* at 100.

74. *See id.* at 102.

75. *See id.* at 101.

76. *See supra* Introduction.

the SPC's policy that a judicial interpretation should be promulgated only when the dust has settled. By contrast, when two or more policy stances have their own supporters, the SPC refrains from taking a position. Consider the first and so far only judicial interpretation regarding the Property Act. The final draft was passed "in principle" by the SPC on December 10, 2015.<sup>77</sup> The forty-one articles in this draft were sent to the China Civil Law Society (中国法学会民法学研究会) for comment.<sup>78</sup> On February 22, 2016, the SPC announced the final version, which contained only twenty-two articles.<sup>79</sup> In the draft, fourteen articles were drafted to present two or more views on particular property law issues, and eight of them were not included in the final version.<sup>80</sup> This is strong evidence that the SPC, aware of competing statutory interpretations, decided not to take a position on the matter.

Another good example is the *Interpretation of the SPC on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Condominium Ownership*, enacted in 2009.<sup>81</sup> The definitions of common areas and common facilities were proposed in the draft for public comment, but were taken out in the final enactment due to controversy over how to delineate coownership in condominiums.<sup>82</sup> However, the debate did

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77. See *Zuigao Renmin Fayuan Shiyong Zhonghua Renmin Gongheguo Wuquanfa Ruogan Wenti de Jieshi (Yi)* (最高人民法院关于适用《中华人民共和国物权法》若干问题的解释(一)(民法学会讨论稿)) [*Interpretation I of the Supreme People's Court on Several Issues Concerning the Application of the Property Law of the People's Republic of China (Draft for China Civil Law Society Discussion)*], XINCHANG ZHANG JIAN LAWYER NETWORK (新昌张建律师网络) (Feb. 23, 2016) [hereinafter *Property Law Interpretation Draft*], <http://m.zhangjianls.com/article20150606142710/article285.html>.

78. *Id.*

79. See *Zuigao Renmin Fayuan Shiyong Zhonghua Renmin Gongheguo Wuquanfa Ruogan Wenti de Jieshi (Yi)* (最高人民法院关于适用《中华人民共和国物权法》若干问题的解释(一)) [*Interpretation I of the Supreme People's Court on Several Issues Concerning the Application of the Property Law of the People's Republic of China*] (promulgated by the Sup. People's Ct., Feb. 22, 2016, effective Mar. 1, 2016), [hereinafter *Interpretation I*] <http://en.pkulaw.cn/display.aspx?id=3baf5eb4ae84ea48bdfb&lib=law> (China).

80. Compare *id.*, with *Property Law Interpretation Draft*, *supra* note 77.

81. *Zuigao Renmin Fayuan Guanyu Shenli Jianzhuwu Qufensuoyouquan Jiufen Anjian Jiti Yingyong Falyu Ruogan Wenti De Jieshi* (最高人民法院关于审理建筑物区分所有权纠纷案件具体应用法律若干问题的解释) [*Interpretation of the SPC on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Condominium Ownership*] (promulgated by the Sup. People's Ct., Mar. 23, 2008, effective Oct. 1, 2009), no. 7, <http://www.court.gov.cn/fabu-xiangqing-66.html> (China).

82. Common areas and common facilities are defined by "public use purpose." See *Guanyu Shenli Jianzhuwu Qufensuoyouquan Jiufen Anjian Jiti Yingyong Falyu Ruogan Wenti de Jieshi* (关于审理建筑物区分所有权纠纷案件具

not surround technical questions. The issue was a hot potato because China is one of the few countries in which the development of condominiums long precedes the legal authorization.<sup>83</sup>

By the time the Property Act was enacted and the SPC set out to deal with the issue, common facilities, such as parking spaces, had been subject to all kinds of quasi-property arrangements.<sup>84</sup> A phased-in unitary solution could still be imposed to reduce information costs and streamline property relations. The SPC, however, has balked at providing a timely solution.

To put the idiosyncrasy of Chinese courts in context, it is helpful to compare them with the American courts. First, in the United States, the Supreme Court is political because Justices will decide cases based primarily on, or with a large consideration of, their ideology (liberal versus conservative or democratic versus republican).<sup>85</sup> In China, describing courts as political means that they are organized under the political branch of government, where only the Communist ideology matters.<sup>86</sup> Second,

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体应用法律若干问题的解释（征求意见稿）[Interpretation of the SPC on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over Condominium Ownership (Soliciting Opinions Draft)] (promulgated by the Sup. People's Ct., June 16, 2008), art. 2, <http://politics.people.com.cn/GB/1026/7385694.html> (China). However, there has been no consensus on how to define public use between property owners and property developers in practice. See Tang Hongbo (唐宏波), *Zuigao Renmin Fayuan Guanyu Shenli fangwu Suoyouquan Fenge Zhengyi Falyu Shiyong Ruogan Wenti de Jieshi (Zhengqiu Yijian Gao)—Yi Feizhi* (最高人民法院关于审理建筑物区分所有权纠纷案件具体应用法律若干问题的解释（征求意见稿）——已废止) [*Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Disputes over the Differentiation of Ownership of Buildings (Draft for Comment)—Terminated*], TANG HONGBO LAWYER NETWORK (唐洪波律师网络) (May 20, 2016), <http://www.maxlaw.cn/p-thbls-com/artview/850268690383>.

83. Before 2007, legal issues regarding condominiums were regulated by the Zhonghua Renmin Gongheguo Chengshi YiChan Pilin Fangwu Guanli Guiding (中华人民共和国城市异产毗连房屋管理规定) [Regulations of People's Republic of China Municipality on the Administration of Adjacent Houses with Different Property] (promulgated by the Ministry of Construction, Aug. 15, 2001, effective Aug. 15, 2001) (China). These regulations offer very few rules and those that are provided are unclear and have little power in the hierarchy of the PRC's legal system. Hence, such regulations can hardly be used as legal basis in courts.

84. See *id.*

85. See Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 520 (2006) ("Many legal researchers now recognize that judicial ideology influences judicial decisions."). The famous *Bush v. Gore* case is one example. See Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001).

86. For instance, when former Chinese President Hu chose "building a harmonious socialist society" as the slogan of his era, the SPC echoed by requesting

in the United States, the Supreme Court is often political in its decisions, whereas lower courts are often nonpolitical.<sup>87</sup> In China, every court is political. Third, in the United States, courts only provide legal or equitable relief. In China, courts, through the political connection of court presidents, may manage to provide extra-legal relief. For example, courts may pacify a disgruntled defendant by giving his son a job.<sup>88</sup> Additionally, they may solve the judgement-proof problem by ensuring that the tortfeasor receives a loan in order to be able to afford to pay compensation, while the tort victim receives a job so that he does not demand more compensation.<sup>89</sup>

When strong and continuous external political influences are present, sometimes in the form of a formal administrative policy, Chinese courts are expected to deviate from the standard statutory interpretation of a particular provision. The observable phenomenon can be aptly labeled: decentralized development of law. Sometimes, the political and social pressures are ad hoc. Chinese courts will adopt extraordinary interpretive approaches or use extra-legal measures to resolve those disputes, which often leads to anomalous interpretations. These two types of approaches have the same origin—the political and bureaucratic nature of Chinese courts.

## II. EMPIRICAL EVIDENCE

The Introduction introduced the institutional environment of the Chinese judiciary and pointed out that the political and bureaucratic judicial system is under a strict jurisdictional rule to bring cases to the highest court to provide fertile ground for decentralized or anomalous interpretation of national statutes. Part I argued that Chinese courts interpret statutes differently when they face political or social pressure. Case studies have shown that anomalous statutory interpretations do exist, but large-scale empirical studies of judicial decisions in China are scant. This Part presents one of the very first such empirical

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lower courts to enhance settlement rates, as settlement is considered more harmonious. See Yedan Li et al., *Understanding China's Court Mediation Surge: Insights from a Local Court*, 43 LAW & SOC. INQUIRY 58 (2018) (discussing the rapid rise of mediation rates “spurred by national level policies from the SPC,” and “national political ideology”); Jian Wang, *Neutral, Biased, or Both? Discursive Construction of a Mediator's Dual Role*, 31 NEGOT. J. 47, 52 (2015).

87. See EPSTEIN, LANDES & POSNER, *supra* note 23, at 50–51.

88. ZHU, *supra* note 41, at 84 n.52.

89. *Id.* at 85–86.

studies to support the anomalous statutory interpretations theory. Section II.A summarizes literature that has found decentralized interpretation in the law of contracts, labor contracts, and torts. The rest of Section II.A focuses on property issues. Section II.B investigates whether Chinese courts recognized the traditional *dian* (典) as a type of property right. Section II.C looks into whether Chinese courts have correctly cited the Property Act of 2007 (物权法), or have incorrectly cited the Security Act of 1995 (担保法) and its accompanying Judicial Interpretation (担保法司法解释). We find evidence that Chinese courts sometimes have gone out of their way to reach unconvincing doctrinal results. Note that the purpose of our empirical study is to identify the phenomenon of decentralized and anomalous statutory interpretation. The nature of our quantitative work does not enable us to tease out the political or social pressure behind the scenes.

Our empirical approach is risky, but this is for a reason. Judges under constant political pressure to deviate from standard statutory interpretations to achieve extra-legal goals are more likely to succumb to that political pressure when there are multiple reasonable statutory interpretations of a certain issue. The two case studies we conducted, however, have only one correct answer. Rational judges would avoid deviating from the correct answer. Therefore, if clearly wrong interpretations were adopted in a sufficient number of cases, nonstandard (decentralized or anomalous) statutory interpretations should be more prevalent when the statutory text is ambiguous. Accordingly, we decided to gather empirical evidence in this risky way, as it is otherwise impossible to conduct large-scale empirical studies. Indeed, even if we could read all the relevant cases, we would have a difficult time sorting out cases in which judges adopted an unconventional interpretation due to sociopolitical pressure, since nonstandard interpretations in these contexts may still be reasonable.

#### A. EXISTING LITERATURE ON DECENTRALIZED INTERPRETATION

One recent empirical study shows exactly what our theory predicts; the observed phenomenon is a prime example of decentralized interpretations of private law in China. The study focuses on a judicial interpretation promulgated in 1991, in which



the SPC capped the interest rate in loans between natural persons at 400% of the interest rate charged by a bank.<sup>90</sup> For legalistic judges, the rule is simple and clear—never allowing interest rates that exceed the cap. An empirical study collected 1421 court decisions in Zhejiang Province and found that in nine percent of the sampled cases, the interest rates are higher than the cap; this study also found that there are regional variations.<sup>91</sup> In one of the cities, Wenzhou, the city government established a financial task force that stipulates an index of interest rates.<sup>92</sup> The intermediate court in the city was greatly influenced by the index and much less frequently allowed above-the-cap interest rates.<sup>93</sup> In sum, a crystal clear rule has been ignored in a number of cases, but administrative policies may often constrain court decisions.

Further, provincial courts have issued guiding opinions (司法指导意见) that fly in the face of statutes and SPC judicial interpretations. Guiding opinions of provincial courts bind their subordinate courts.<sup>94</sup> These guiding opinions, while interpreting the same statutory provision, are often drastically different from one another. The most famous examples are those issued by high

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90. See Zuigao Renmin Fayuan Guanyu Renmin Fayuan Shenli Jiedai Anjian de Ruogan Yijian (最高人民法院关于人民法院审理借贷案件的若干意见) [Several Opinions of the Supreme People's Court on the Application of Law in the Trial of Private Lending Cases] (promulgated by the Sup. People's Ct., Aug. 13, 1991, effective Aug. 13, 1991) (China).

91. See Cheng Jinhua (程金华), *Sibeililyu Guize de Sifa Shijian yu Chonggou* (四倍利率规则的司法实践与重构) [*An Empirical Study of Judicial Practice of the "Four-Time Interest Rate Rule" in China and Its Implication for Reform*], 27 ZHONGWAI FAXUE (中外法学) [PEKING U. L.J.] 684, 703 (2015).

92. *Id.* at 706–11.

93. *Id.*

94. According to the Zuigao Renmin Fayuan Yinfa Guanyu Guifan Shangxiaji Renmin Fayuan (最高人民法院印发《关于规范上下级人民法院审判业务关系的若干意见》的通知) [Notice of the Supreme People's Court on Issuing Several Opinions on Regulating the Trial Working Relations Between the People's Courts at Different Levels], higher people's courts shall guide the trial work of local people's courts at all levels and special people's courts within their respective jurisdictions by reviewing cases, formulating trial work documents, releasing directive cases, holding trial work symposiums, organizing training for judges, etc. See Zuigao Renmin Fayuan Yinfa Guanyu Guifan Shangxiaji Renmin Fayuan (最高人民法院印发《关于规范上下级人民法院审判业务关系的若干意见》的通知) [Notice of the Supreme People's Court on Issuing Several Opinions on Regulating the Trial Working Relations Between the People's Courts at Different Levels] (promulgated by the Sup. People's Ct., Dec. 28, 2010, effective Dec. 28, 2010), art. 8, <http://www.court.gov.cn/fabu-xiangqing-2583.html> (China).

courts in Jiangsu, Zhejiang, and Shanghai regarding renegotiation of labor employment contracts.<sup>95</sup> article 35 of the Labor Contract Act of 2008 protects laborers by requiring that reduction in salary and changes in workplace cannot be done without renegotiations between employers and employees, and new agreements must be put in writing.<sup>96</sup> In other words, employers cannot unilaterally change the major employment conditions in labor contracts. A judicial interpretation by the SPC reiterates the gist of this protective stipulation.

Nevertheless, the guiding opinions issued by the three aforementioned provincial high courts manipulate the meaning of the statutory text by essentially allowing employers to act unilaterally.<sup>97</sup> While blatantly violating the plain meaning of both a statute and a judicial interpretation, these guiding opinions have not been challenged or corrected by the National People's Congress

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95. See Zhou Changzheng (周长征), *Guoji Jinrong Weiji Beijing Xia Laodong Hetong Fa de Shishi: Jian lun Sifa Nengdong Zhuyi zai Laodong Zhengyi Chuli Zhong de Zuoyong yu Juxian* (国际金融危机背景下劳动合同法的实施——兼论司法能动主义在劳动争议处理中的作用与局限) [*The Implementation of the Labor Contract Act During International Financial Crisis: With Comments on the Effects and Limits of Judicial Activism in Employment Disputes*], 5 QINGHUA FAXUE (清华法学) [TSINGHUA L.J.] 15, 17–18 (2010).

96. See, Labor Law, art. 35.

97. For a different interpretation of article 35 of the Labor Contract Act, see Jiangsu Sheng Gaoji Renmin Fayuan, Jiansu Sheng Laodong Zhengyi Zhongcai Weiyuanhui Guanyu Shenli Laodong Zhengyi Anjian de Zhidao Yijian (江苏省高级人民法院、江苏省劳动争议仲裁委员会《关于审理劳动争议案件的指导意见》) [Guiding Opinions Regarding Labor Dispute Cases Issued by Jiangsu Provincial High Court and Jiangsu Labor Dispute Arbitration Committee] (promulgated by the Jiangsu Provincial High Court and Jiangsu Labor Dispute Arbitration Committee Dec. 14, 2009, effective Dec. 14, 2009), art. 14 (China) (stipulating that when employers are in business hardship, they can unilaterally take actions to amend labor contracts and no written document is required); Shanghai Gaoyuan Guanyu Shiyong Laodong Hetong Fa Ruogan Wenti de Yijian (上海高院《关于适用〈劳动合同法〉若干问题的意见》) [Opinions Regarding Interpreting Labor Contract Act Issued by Shanghai Provincial High Court] (promulgated by Shanghai Provincial High Court Mar. 3, 2009, effective Mar. 3, 2009), art. 3 (China) (stipulating that written documents used to change employment agreements include salary notification and change of post and rank notification, which essentially gives employers the power to unilaterally change salary, post, and rank of the employees); Zhejiang Sheng Gaoji Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Ruogan Wenti de Yijian (Shixing) (浙江省高级人民法院《关于审理劳动争议案件若干问题的意见(试行)》) [Opinions Regarding Labor Dispute Cases Issued by Zhejiang Provincial High Court] (promulgated by Zhejiang Provincial High Court Apr. 16, 2009, effective Apr. 16, 2009), art. 42 (China) (stipulating that if major rights or duties are not changed—or, if changed, but the changes are necessary for the employers' operation—and given that laborers' compensation and other labor conditions are not changed adversely, employers have the power to unilaterally change the labor contract).

nor the SPC. These high courts have given employers extreme flexibility despite the fact that they are not the ideologically favored group in communist China. This is likely due to the surprising 2008 financial crisis. Firms in each of the three provinces are economic engines of China's growth.<sup>98</sup> Thus, to attain a soft landing, courts were likely willing to bend the statutory text to give employers leeway in dealing with the global recession.

There are more contrasting views of the Labor Contract Act. The plain meaning of the Labor Contract Act prescribes that after two consecutive fixed-term labor contracts have been signed, employees can request that employers sign indefinite-term employment contracts.<sup>99</sup> The Beijing High Court has reaffirmed this textual interpretation.<sup>100</sup> The Shanghai High Court, by contrast, in the *Opinion of Several Questions concerning the Application of the Labor Contract Law* (关于适用《劳动合同法》若干问题的意见),<sup>101</sup> maintained that an employer's consent to indefinite terms is required and must be voluntary.<sup>102</sup> Moreover, the Labor Contract Act stipulates that dispatched laborers can be used in only "temporary, auxiliary or alternative positions" (临时性、辅助性或者替代性岗位).<sup>103</sup> Disputes arise as to whether a dispatched labor contract is valid when the worker is slotted in a long-term and important position. Most provincial courts, such as those in Guangdong, Liaoning, Jilin, and Chongqing, probably

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98. Provincial GDP growths in Shanghai, Zhejiang, and Jiangsu in 2008 were 11.5%, 11.8%, and 13.7%, whereas those in 2009 reduced to 3.1%, 3.4%, and 10.2%. See *Indices of Gross Regional Product, Quarterly by Province*, NAT'L BUREAU OF STATISTICS OF CHINA, <http://data.stats.gov.cn/english/easyquery.htm?cn=E0102> (last visited Apr. 26, 2018).

99. See Labor Law, art. 14.

100. See Beijing Shi Gaoji Renmin Fayuan, Beijing Shi Laodong Zhengyi Zhongcai Weiyuanhui Guanyu Laodong Zhengyi Anjian Falyu Shiyong Wenti Yantaohui Huiyi Jiyao (北京市高级人民法院、北京市劳动争议仲裁委员会关于劳动争议案件适用法律问题研讨会会议纪要) [The Beijing Higher People's Court and the Beijing Labor Dispute Arbitration Commission Jointly Release the Minutes of the Seminar on the Issues Concerning the Application of Law in the Cases Involving Labor Disputes] (promulgated by the Beijing Higher People's Court and the Beijing Labor Dispute Arbitration Commission May 7, 2014, effective May 7, 2014), art. 34 (China).

101. See Shanghai Shi Gaoji Renmin Fayuan Guanyu Yinfa Guanyu Shiyong Laodong Hetong Fa Ruogan Wenti de Yijian de Tongzhi (上海市高级人民法院关于印发《关于适用〈劳动合同法〉若干问题的意见》的通知) [Shanghai High Court on the Issuance of Opinions Regarding Several Issues Concerning the Application of the Labor Contract Law] (promulgated by Shanghai High Court Mar. 3, 2009, effective Mar. 3, 2009) (China).

102. *Id.* at art. 4.

103. See Labor Law, art. 66.

followed national and provincial statutes and regarded such contracts as invalid—in effect holding instead there is an indefinite-term employment contract implied in the relationship between the actual employer and the dispatched laborer.<sup>104</sup> In other words, there is a *de facto* employment contract. By contrast, the Shanghai High Court publicized meeting minutes regarding the *Application of Law in Labor Dispatch Issues* (关于劳务派遣适用法律若干问题的会议纪要) in 2015 by way of informal regulation.<sup>105</sup> The meeting minutes took the position that the labor dispatch contract is still valid; employers, however, could be subject to administrative fines for these contracts.<sup>106</sup> Once again, courts in Shanghai took the proemployer stance.

In tort law, provincial courts also go their own ways. In its law-making mode, in 2001 the SPC announced a *Judicial Interpretation regarding Pain and Suffering Damages* (最高人民法院关于确定民事侵权精神损害赔偿若干问题的解释).<sup>107</sup> In article 10, the local living standard is listed as one of the factors to be

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104. See Chongqing Shi Zhigong Quanyi Baozhang Tiaoli (重庆市职工权益保障条例) [Regulation of Chongqing City on Regulation of Protection on Rights and Interests of Employees] (promulgated by Chongqing Municipal People's Congress Dec. 6, 2002, effective May 1, 2003) (China); Jilin Sheng Laowu Paiqian Guanli Banfa (吉林省劳务派遣管理办法) [Administrative Rules of Jilin Province on Labor Dispatches] (promulgated by Jilin Provincial Department of Human Resources and Social Security Dec. 1, 2011, effective Dec. 1, 2011) (China); Liaoning Zhigong Quanyi Baozhang Tiaoli (辽宁职工权益保障条例) [Regulation of Liaoning Province on Protection of Rights and Interests of Employees] (promulgated by Liaoning Provincial People's Congress May 30, 2013, effective Aug. 1, 2013) (China); Shandong Jingji Tequ Zhigong Quanyi Baozhang Tiaoli (汕头经济特区职工权益保障条例) [Regulation of Shantou Special Economic Zone on Protection of Rights and Interests of Employees] (promulgated by Shantou City People's Congress Aug. 27, 2015, effective Oct. 1, 2015) (China).

105. See Shanghai Shi Renliziyuan he Shehui Baozhang Ju, Shangshi Shi Gaoyuan Guanyu Laowu Paiqian Shiyong Falyu Ruogan Wenti de Huiyi Jiyao (上海市人力资源和社会保障局、上海市高院关于劳务派遣适用法律若干问题的会议纪要) [The Meeting Minutes of Shanghai Municipal Human Resources and Social Insurance Bureau & Shanghai High Court Regarding Application of Law in Labor Dispatch Issues] (promulgated by Shanghai Municipal Human Resources and Social Insurance Bureau and Shanghai High Court Dec. 31, 2014, effective Dec. 31, 2014) (China).

106. *Id.* at art. 4.

107. Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi (最高人民法院关于确定民事侵权精神损害赔偿若干问题的解释) [Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts] (promulgated by the Supreme People's Court Feb. 26, 2001, effective Mar. 10, 2001) (China).

considered in assessing the amount of pain and suffering damages.<sup>108</sup> In an essay written by an SPC judge, published along with the judicial interpretation, the local living standard is highlighted and the essay essentially encourages provincial courts to refrain from imitating one another in setting guidelines for assessing pain and suffering damages.<sup>109</sup> With this green light, provincial high courts and intermediate courts stipulated different caps and formulas for pain and suffering damages, essentially pricing lives and limbs differently under a unitary system.<sup>110</sup>

While this example may not be a strong case for our theory, it demonstrates that even the SPC has encouraged decentralized development of tort law.<sup>111</sup>

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108. *Id.* at art. 10.

109. See Chen Xianjie (陈现杰), *Guyuan Queding Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi de Lijie Yu Shiyong* (〈关于确定民事侵权精神损害赔偿责任若干问题的解释〉的理解与适用) [*Understanding and Application of Interpretation of the Supreme People's Court on Problems Regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts*], 4 RENMIN SIFA (人民司法) [PEOPLE'S JUDICATURE] 14 (2001).

110. Compare the court practices in the following three provincial courts:

First, in Anhui Province, pain and suffering damages shall be between 50,000 and 80,000 RMB. See Anhui Sheng Gaoji Renmin Fayuan Shenli Renshen Sunhai Anjian Ruogan Wenti de Zhidao Yijian (安徽省高级人民法院审理人身损害赔偿案件若干问题的指导意见) [Guiding Opinion Issued by the Higher People's Court of Anhui Province Regarding Personal Injury Cases] (promulgated by the Judicial Committee of the Higher People's Court of Anhui Province, Dec. 26, 2005, effective Feb. 22, 2006; amended July 2006), art. 25 (China).

Second, in Guangdong Province, pain and suffering damages for grave injuries or death shall be below 300,000 RMB. See Guangdong Sheng Gaoyuan Guanyu Zai Guojia Peichang Gongzuo Zhong Shiyong Jingshen Sunhai Fuweijin Ruogan Wenti de Zuotanhui Jiyao (广东省高院关于在国家赔偿工作中适用精神损害抚慰金若干问题的座谈会纪要) [Seminar Summary of the Higher People's Court of Guangdong Province Regarding Awarding Pain and Suffering Damages in State Compensation Disputes] (promulgated by Guangdong Higher People's Court Sept. 5, 2011, effective Sept. 5, 2011), art. 9 (China).

Third, in Sichuan Province, pain and suffering damages in wrongful death cases shall be calculated according to the average living expenses at the court venue for twenty years. See Sichuan Sheng Gaoji Renmin Fayuan Guanche Zhixing Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti de Jieshi de Yijian (四川省高级人民法院贯彻执行最高人民法院〈关于确定民事侵权精神损害赔偿责任若干问题的解释〉的意见) [Opinions Issued by the Higher People's Court of Sichuan Province Regarding Implementing the Guiding Opinions Issued by the Supreme People's Court Regarding Pain and Suffering Damages in Civil Torts Cases] (promulgated by the Sichuan Higher People's Court May 23, 2002, effective July 1, 2002), art. 3 (China).

111. For other examples of decentralized development of tort law, see, for example, Tian Fang (田芳), *Falyu Jieshi Ruhe Tongyi: Guanyu Sifa Jieshi Quan*

B. THE LIFE AND DEATH OF THE *DIAN* RIGHT

Having summarized the empirical literature so far, we set out to lay out our own empirical results. In this section, we investigate the unique *dian* right.<sup>112</sup> *Dian* has been used for about a thousand years in China, and yet it has lost favor with lawmakers. Article 5 of China's Property Act of 2007 and article 116 of the Book of General Principles of the Chinese Civil Code, passed in March 2017, adopt a strict version of the *numerus clausus* principle, meaning that only statutorily sanctioned property forms are allowed.<sup>113</sup> *Dian* rights, however, were not sanctioned by any statute and shall not have in rem, third-party effect, pursuant to the *numerus clausus* principle. Yet a rigid stance like this may not fit well into every case on the ground. Given that the *numerus clausus* principle was not prescribed between 1949 and 2007, a lot of transacting parties must be using property forms that are not recognized under statute, and courts might be unwilling to employ a strict construction of the stipulation. In the aforementioned final draft of the judicial interpretation regarding the Property Act, its first article addresses exactly this question.<sup>114</sup> The proposed final draft of the judicial interpretation maintains the strict construction of the *numerus clausus* principle.<sup>115</sup> The alternative interpretation listed in the final draft takes the position that statute in the context of the *numerus clausus* principle should be interpreted flexibly,<sup>116</sup> so that

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*de Falyu Tongyi Jieshi Gongneng de Sikao* (法律解释如何统一——关于司法解释权的法律统一解释功能的思考) [*How To Unify the Legal Interpretation?*], 6 FALYU KEXUE (法律科学) [SCI. OF L.J. NORTHWEST U. POL. SCI. & L.] 3, 8 (2007) (noting that provincial courts are divided on whether local governments can sue negligent drivers who have killed homeless people with no known relatives).

112. *Dian* is like a conditional sale. The property owner may *dian* her right to another, who will possess and use the land for decades. The *dian* price is below the outright sale price. By the pre-established redeeming deadline, if the property owner cannot afford to repay the *dian* price to the long-term possessor, the latter will become the new owner. See Taisu Zhang, *Cultural Paradigms in Property Institutions*, 41 YALE J. INT'L L. 347 (2016).

113. See Property Rights Law, art 5; General Civil Law Provisions, art. 116.

114. See Interpretation I.

115. See *id.* at art. 5.

116. This interpretation, however, is a blatant deviation from the statutory text. Although we use the Latin term *numerus clausus* to describe the stipulation, the exact wording of article 5 is that "the types and contents of property rights shall be prescribed by 'statutes.'" Statutes (法律), according to the Legislation Act, clearly mean legal rules passed by the National People's Congress. Lifa Fa (立法法) [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 112. There is no ambiguity in the text.

the *dian* right and the residence right (recognized in France, Germany, and elsewhere) may be valid. Neither interpretation was adopted, as this article was not included in the final version. Nonetheless, because the final draft passed by the SPC explicitly uses the *dian* right as one of the two prime examples to explain why loosening the strict *numerus clausus* principle warrants consideration,<sup>117</sup> we set out to analyze how provincial courts have treated the *dian* right and whether there are local variations. Our conjecture is that provincial courts may have recognized *dian* rights as property rights; thus, the SPC sensed the necessity to formally sanction this position.

As it now stands, the only reasonable doctrinal explanation of article 5 of the Property Act, in light of its legislative history, is that *dian* is not a property right. ClassicLaw contained 18,025,009 cases as of Feb. 2, 2017. We searched post-2007 cases and found thirty-three cases that explicitly used the term *dian* right and dealt with disputes regarding this type of arrangement.<sup>118</sup> In nine of these cases, courts explicitly recognized *dian* as a property right.<sup>119</sup> These *dian* rights were established as early as 1954 or as late as 2011, and have been recognized by the provincial high court in Henan and intermediate or district courts in Jiangsu, Shandong, and Fujian.<sup>120</sup> Note that in the twenty-four cases in which courts did not explicitly recognize the property status of *dian*, we argue that they implicitly did so by using the term *dian* right (典权), because in Chinese usage, the word right will only be embedded in the names of property rights, not contracts.

That said, a total of thirty-three cases that deviate from the standard statutory interpretation is not strong evidence for decentralized or anomalous interpretations of private law. Therefore, we conducted a second study, reported below, in Section II.C. Note, however, that we doubt that only a handful of courts have dealt with the *dian* right. Otherwise, why would the final draft of the aforementioned SPC judicial interpretation use *dian* as one prime example?<sup>121</sup> Perhaps courts are fully aware of the

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117. See Interpretation I, art. 1.

118. The full list of cases is included in appendix on the *Minnesota Law Review* website. [http://www.minnesotalawreview.org/wp-content/uploads/2018/04/ChangXu\\_dianRightsSummary.pdf](http://www.minnesotalawreview.org/wp-content/uploads/2018/04/ChangXu_dianRightsSummary.pdf).

119. See *id.*

120. See *id.*

121. See Interpretation I. Also, in 1990, the SPC explicitly recognized *dian* right in its official answer to a question asked by the Henan High Court. Zuigao Renmin Fayuah Guanyu Gongsihaying Zhong Dian Quan Rug de Fangwu Ying

ill effect of deviating from a clear statute without any local or national guiding opinions as authorities; thus, they chose not to publicize these opinions. Before 2013, courts had no legal duty to publicize all their opinions. After the all-cases-online policy announced by the SPC in 2013,<sup>122</sup> many believe that some courts have not fully complied with the SPC policy. A recent empirical study estimates that only fifty percent of the cases in 2014 and 2015 were publicized.<sup>123</sup> Hence, half of the cases may still not be public, and those cases are unlikely to be a random sample of all the cases.

### C. THE BATTLE OF TWO SECURITY RIGHT STATUTES

Our exploration of the *dian* right was inconclusive as to whether provincial courts often made decentralized and anomalous statutory interpretations. We thus test our theory in another field: mortgage. Mortgage is the first type of limited property right formally recognized by statutes—albeit not necessarily conceptualized as a type of property right in the beginning. In the General Principles of the Civil Law Act of 1986 (民法通则), ownership, coownership, state ownership, and collective ownership were defined, but no limited property rights were included.<sup>124</sup> The Security Act of 1995 specified the rules regarding guarantee, mortgage, and pledge.<sup>125</sup> The stipulations in this

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Ruhe Chuli de Han (最高人民法院关于公私合营中典权入股的房屋应如何处理的函) [Letter of the SPC on How To Deal with Equity Ownership in Public-Private Partnership] (promulgated by the Sup. People's Ct., Apr. 9, 1990, effective Apr. 9, 1990) (China). Thus, transacting parties for years may have relied on this positive answer and use *dian* to structure their deal.

122. See Zuigao Renmin Fayuan Guahyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu de Guiding; Fa Shi (最高人民法院关于人民法院在互联网公布裁判文书的规定; 法释) [Provisions of the SPC on the Issuance of Judgments on the Internet by the People's Courts] (promulgated by the Sup. People's Ct., Nov. 21, 2013, effective Jan. 1, 2014) (China).

123. See Ma Chao, Ma Xiaohong & He Haibo, *Big Data Analysis: A Report on Publications of Judicial Cases*, 4 CHINA L. REV. 195, 242 (2016).

124. General Principles, arts. 71, 73, 74, 78.

125. Zhonghua Renmin Gongheguo Danbao Fa (中华人民共和国担保法) [The Guarantee Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 30, 1995, effective Oct. 1, 1995), art. 2 [hereinafter *Guarantee Law*], [http://www.pkulaw.cn/fulltext\\_form.aspx?Db=chl&Gid=9be45428dc2a2777bdfb&keyword=&EncodingName=&Search\\_Mode=like&Search\\_IsTitle=0](http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=9be45428dc2a2777bdfb&keyword=&EncodingName=&Search_Mode=like&Search_IsTitle=0) (China).



Act do not clarify whether mortgage is a type of property, contract, or something in between.<sup>126</sup> Eventually, when the Property Act of 2007 included mortgage as a type of security right,<sup>127</sup> it became clear that, conceptually, mortgage is a property right in China.

#### 1. The Statutory Interpretation Issue

Doctrinal questions, however, arise. Several stipulations in the Property Act and the Security Act overlap, and even conflict, with each other. While the National People's Congress did not repeal the Security Act, article 178 of the Property Act explicitly prescribes that the Property Act should prevail should there be a conflict between the Property Act and the Security Act.<sup>128</sup> Thus, for most jurists around the world, it is a no-brainer to apply the Property Act should there be a direct conflict. Nonetheless, based on prior discussions with other Chinese scholars, we had reason to believe that the continued existence of the Security Act gives courts leeway to apply it should the context of the case require.

We identify three sets of doctrines where the Property Act and the Security Act (or *Judicial Interpretation Regarding the Security Act*) are explicitly in conflict with each other. They are: (1) article 204 of the Property Act versus article 61 of the Security Act;<sup>129</sup> (2) article 202 of the Property Act versus article 12 of the Judicial Interpretation regarding the Security Act;<sup>130</sup> and (3) article 191 of the Property Act versus article 67 of the Security Act.<sup>131</sup> The first set concerns whether the debt secured by a line-of-credit mortgage can be consigned;<sup>132</sup> the second set regards the statute of limitations for foreclosure;<sup>133</sup> and the third set disagrees on whether consent of mortgagees is required before sale

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126. Many countries conceptualize mortgage as a kind of contract or as a right halfway along the contract-property continuum, although functionally mortgage is a type of property. See Yun-chien Chang & Henry E. Smith, *Structure and Style in Comparative Property Law*, in *COMPARATIVE LAW AND ECONOMICS*, 131, 150–55 (Theodore Eisenberg & Giovanni B. Ramello eds., 2016).

127. Property Rights Law, arts. 179–207.

128. *Id.* art. 178.

129. Compare *id.* art. 204, with Guarantee Law, art. 61.

130. Compare Property Rights Law, art. 202, with Guarantee Law, art. 12.

131. Compare Property Rights Law, art. 191, with Guarantee Law, art. 67.

132. See sources cited *supra* note 129.

133. See sources cited *supra* note 130.

of movable things subjected to chattel mortgage.<sup>134</sup> In the first and third sets, the Property Act favors creditors as compared to the Security Act, while in the second set the Property Act favors debtors.

## 2. Data and Methodology

We acquired our databases from ClassicLaw.<sup>135</sup> Literally millions of cases involve mortgage. Any keywords we used in the ordinary user interface produced more results than we could digest, and hand-coding the selected cases would have consumed a great deal of research resources. We thus sought assistance from ClassicLaw. For each of three sets of doctrinal conflicts, we chose several keywords that would narrow the search to relevant cases (only cases rendered after the Property Act went into force in 2007 are relevant). This search generated 4399; 876; and 79,841 potentially relevant cases in questions one, two, and three, respectively. ClassicLaw then used its advanced text-mining algorithms to identify cases that contain the relevant article number and statute name of either act in the reasoning part of the opinions. For each potentially relevant case, ClassicLaw also provided us with information regarding court levels, first or second instance, plaintiff and defendant types (banks, companies, or others), plaintiff and defendant representation types, verdict dates, and other information.

The databases inform us of whether a case cites the Property Act, the Security Act, both, or neither. The cases that only cite the specific articles of the Property Act are likely to be correct at least in terms of the statutory interpretation questions concerning us here because the National People's Congress has made it clear that the Property Act prevails.<sup>136</sup> The numerous cases that cite neither are likely irrelevant and excluded from analysis. Those that cite both Acts may be wrong if judges eventually reject applying the Property Act, though we suspect that this is unlikely.<sup>137</sup> The cases that cite only the specific articles of the Security Act are our suspects for incorrect statutory interpretations. Each case was read to exclude false negatives. For instance, if the secured transactions were consummated before

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134. See sources cited *supra* note 131.

135. CLASSIC LAW INST., <http://www.classiclaw.com> (last visited Apr. 26, 2018).

136. See *supra* note 128 and accompanying text.

137. The numbers of cases that cited both statutes are ten, seven, and sixty in questions one, two, and three respectively.

2007, the Security Act should apply. These cases are excluded from the list of wrongly decided cases. In short, we define cases that cited but should not have applied only the Security Act as incorrectly decided, and cases that cited only the Property Act as correctly decided.

### 3. Findings and Discussion

While we have identified ninety-two cases, or nine percent of the relevant mortgage cases,<sup>138</sup> in which the Chinese courts incorrectly cited only the Security Act,<sup>139</sup> there seems to be no pattern behind the wrong statutory interpretations. Figure 4 shows the distributions of correct and incorrect statutory interpretations among the three research questions. Question two has a more balanced distribution between the two results, and the largest number of incorrect interpretations occurred when courts dealt with this question. Among the three sets of statutory provisions, the Property Act is only more prodebtor than the Security Act on this question. One might suppose that potentially politically influential creditors like banks or credit unions are more likely to sway the courts to apply the more pro-creditor Security Act when they are one of the parties. Unreported statistical analysis did not produce evidence that supports this conjecture. We have categorized courts in our data into eastern, central, and western according to a popular classification system based on levels of economic development.<sup>140</sup> We did not find regional patterns in citing the wrong statute.

Our take-away lesson is that the incorrectly decided cases appear to be isolated events, but not systemic (region-wide) deviations. They are evidence of widespread anomalous statutory interpretations. Without further archival work and on-site interviews, it is difficult, perhaps impossible, to identify the political calculus behind these cases. We thus cannot declare that our em-

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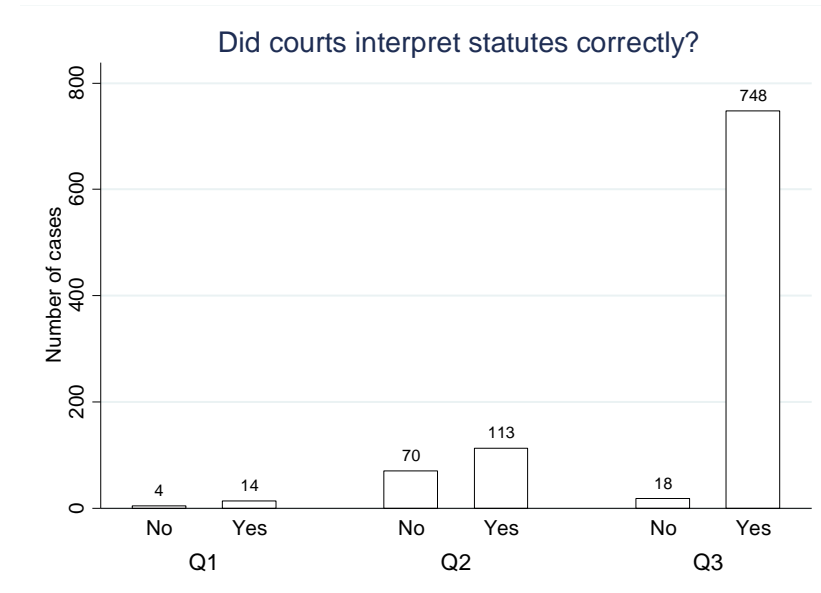
138. We define the relevant mortgage cases as those that cited either or both statutes—a total of 1054 cases. Of those, ninety-two were decided incorrectly, yielding a nine percent error rate. The erroneous decision rate would be much higher but for the high number of correctly decided cases in question three.

139. Twenty-three cases were handled by intermediate courts and sixty-nine cases were handled by district courts. Forty cases were handled by courts in the Eastern region; twenty-nine cases were handled by courts in the Central region; and twenty-three cases were handled by courts in the Western region. In fifty-nine of the ninety-two cases, at least one party was represented by an attorney.

140. See Sheng-long Liu & An-gang Hu, *Transportation Infrastructure and Economic Growth: Perspective from China's Regional Disparities*, 4 CHINA INDUS. ECON. 14, 14 (2010).

irical findings are direct evidence for our positive theory. Nonetheless, the findings are consistent with the theory.

**Figure 3: Distributions of Correct and Incorrect Statutory Interpretations**



Note. Q1 refers to the first research question, and so on.

### CONCLUSION

In this Article, we have advanced a theory that courts in China render nonstandard statutory interpretations of private laws. If local governments systemically exert political influence over courts via the political court presidents, regional deviation from the statutory text is likely to take place. If the external pressure is ad hoc, private laws will be interpreted idiosyncratically from time to time, but not systemically. Several other articles have found evidence in support of decentralized interpretations of private laws, though they do not put the case studies within our theoretical framework. Our two case studies have identified dozens of court cases that violate the clear meaning of private-law statutes. While the external force that affects the judicial decisions is unclear, it is likely to exist behind the scene.

Our Article thus lays the groundwork for answering the next big question: do decentralized and anomalous statutory interpretations of the same statutory provision help or hurt economic development? Our case studies present a mixed picture. *Dian* is a thousand-year-old property form. The information cost of understanding the nature and existence of such a right within the community might be on the low end. It thus makes sense for local courts to put the *numerus clausus* principle aside and recognize *dian* as valid in rem transactions. By contrast, for mortgage arrangements consummated after 2007, given the clear content and the reasonableness of the new rule, courts should not attempt to reassign entitlements between creditors and debtors. Citing incorrect statutes will confuse the parties and send the wrong signals to the local business community.