

Judicial Legitimation in China

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China's judiciary is becoming increasingly professionalized and its courts are enjoying a degree of autonomy they had not enjoyed since the Revolution. By promulgating abstract interpretations of statutes and through the selective publication of cases, Chinese judicial institutions today function as policymaking bodies on both national and local scales. But are they able to legitimize social policy? This question has received little attention from legal scholars but its answer is important for our understanding of the judicial role in the governance of modern China.

We conducted a survey experiment that seeks to measure the persuasiveness of courts vis-à-vis administrative and non-regulatory actors. We conclude that courts are sometimes able to induce support for the policies they endorse. We also find, however, that this ability is not unique to courts and is, at least, shared by administrative bodies.

Our results have profound implications for the future of judicialization in China. They illuminate the potential of litigation as a tool for fostering social change. But they also explain why the regime does not rely on judicial institutions to convince the public of the rightness of government policy: other governmental entities are as persuasive as courts, if not more so. More broadly, the empirical findings presented here suggest that while the Chinese party-state might find it advantageous to operate through law, it does not necessarily have to govern through courts.

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Introduction

Courts have emerged as vital policymaking bodies of the People's Republic of China. Chinese courts do not only adjudicate individual cases; they also operate as quasi-legislative bodies by promulgating interpretations on a wide range of fields and subjects. These judicial interpretations—issued in the absence of a live case or controversy—have come to acquire the force of law despite their initial lack of a constitutional or statutory basis. In some instances, they do not merely elaborate the statutory code at issue but also supplement it.

In addition to their quasi-legislative function, courts shape policy through their selective publication of cases. Although cases are not a formal source of law in China, higher judicial opinions hold greater reference value and are often followed by inferior tribunals in the superior court's jurisdiction. Since judicial opinions are often written in the specialized language of the law, the transmission of policy through cases shields judicial decisions from political interference.¹

These developments have magnified the influence of courts over the Chinese administrative regulatory state, especially that of the Supreme People's Court (SPC). The "transformation of the [SPC] from a state security agency into a relatively autonomous policy[making] organization"² has kindled hopes that the SPC can become an advocate for reform within the Chinese state.³ The more extravagant of these hopes is that the SPC might become a vector for introducing liberal notions of rule of law and constitutional governance into China.⁴ But sober-eyed observers emphasize that the SPC is not independent of the Chinese government and is, ultimately, subordinate to the Chinese Communist Party (the CCP or the Party).⁵

1. See generally Björn Ahl, *Judicialization in Authoritarian Regimes: The Expansion of Powers of the Chinese Supreme People's Court*, 17 INT'L J. CONST. L. 252 (2019) [hereinafter Ahl, *Judicialization in Authoritarian Regimes*]; Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court*, 217 CHINA Q. 121 (2014) [hereinafter Ahl, *Retaining Judicial Professionalism*].

2. Eric C. Ip, *The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 COLUM. J. ASIAN. L. 367, 371 (2011).

3. See *id.*

4. See RONALD C. KEITH ET AL., CHINA'S SUPREME COURT 76 (2014) ("For some reformers, the Court's improvised formats have pragmatically served to keep the system going in favor of applied justice and efficiency, but for those reformers of more daring stamp, SPC pragmatism is getting in the way of real institutional reform. To some degree conservative opinion may be justified in that radical reformers are advocating reform that can significantly alter the existing political and legal system."); Thomas E. Kellogg, *The Constitution in the Courtroom: Constitutional Development and Civil Litigation in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 340, 343 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011) ("For the first time in Chinese history, Chinese scholars, lawyers, and activists are attempting, through litigation, not only to assert their constitutional rights but also to change the very understanding of the structure of their government.").

5. See Ip, *supra* note 2, at 372.

While the legislature may have acquiesced in the Court's interstitial law-making, ideas that undermine the Party's doctrine or its continued rule will not be countenanced by the CCP.

Critical to assessing the institutional capacity of the judiciary is its influence on the masses. The persuasiveness of judicial institutions hinges on the amount of support they can muster for their positions. It also matters for their standing vis-à-vis other state organs: the party-state is more likely to indulge judicial policymaking if doing so serves to legitimize the regime. This Article offers some of the first causal evidence on the ability of courts to move public opinion in China. The Introduction of this Article provides context for the survey experiment by elucidating the policymaking function of courts, focusing in particular on the SPC. Part I provides some theoretical background on persuasion and discusses relevant findings from comparative literature. Part II describes the design of the survey experiment and analyzes its results. Part III draws out some of the implications of the empirical findings for judicialization in China, a theme that encompasses, for instance, the institutional design of constitutional review and the promise of public interest litigation as a tool for combating harmful social practices.

I. Judicial Policymaking in China

Studies of authoritarian courts suggest that they do more than dispense justice between private citizens; they also legitimize official policy by lending them an aura of fairness and objectivity.⁶ Judicial institutions are able to engender acquiescence—even agreement—because they are portrayed as being fundamentally different from other state organs.⁷ Symbols articulate and reinforce this understanding of judicial authority.⁸ The emblem of the SPC features the scales of justice. Similarly, the “monumentality” of provincial courthouses impresses on viewers the status of the judiciary and its mandate to act as a neutral arbiter and “check other state organs.”⁹

The persuasiveness of judicial institutions is an especially interesting question in the Chinese context where courts exercise both adjudicative and quasi-legislative functions. The Constitution of the People's Republic of China (PRC) vests legislative power in the National People's Congress

6. Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 207, 207 (Tom Ginsburg & Tamir Moustafa eds., 2008). It is important to distinguish between legitimacy derived from the performance of a government function—the resolution of private disputes being one particular example, see Susan H. Whiting, *Authoritarian “Rule of Law” and Regime Legitimacy*, 50 *COMPAR. POL. STUD.* 1907, 1912 (2017)—and the legitimization of policy through the courts. We refer here to the latter.

7. See James L. Gibson et al., *Losing, but Accepting: Legitimacy, Positivity Theory, and the Symbols of Judicial Authority*, 48 *LAW & SOC'Y REV.* 837, 840 (2014).

8. See *id.*

9. Björn Ahl & Hendrik Tieben, *Modern Chinese Court Buildings, Regime Legitimacy and the Public*, 28 *INT'L J. SEMIOTICS L.* 603, 620 (2015).

(NPC) and the NPC's Standing Committee.¹⁰ A law passed by the NPC may, however, be interpreted by several bodies. Legislative interpretations are promulgated by the Standing Committee of the NPC in order to elucidate the law "[i]n cases where the[ir] limits need to be further defined or additional stipulations need to be made."¹¹ Judicial interpretations are issued by the SPC in response to "questions involving the specific application of laws and decrees in court trials."¹² The Chinese Supreme People's Procuratorate also interprets questions of law arising in the course of its duties.¹³ Finally, other issues regarding the application or implementation of laws are addressed by the State Council and the relevant ministries through administrative interpretations.¹⁴

A judicial interpretation by the SPC takes one of four forms: interpretation, provision, reply, or decision.¹⁵ An "interpretation" addresses the specific application of a law for purposes of adjudication and explains how the law should be applied to a particular type of case or issue.¹⁶ A "provision" formulates norms or opinions essential to the task of adjudication by drawing on the spirit of the law.¹⁷ A "reply" is furnished by the SPC in response to requests by a High People's Court or a military court of the People's Liberation Army for clarification on a specific legal question.¹⁸ Finally, a "decision" amends or abrogates a prior judicial interpretation of the SPC.¹⁹ The proliferation of judicial interpretations has elevated the SPC from an institution that merely implements the diktats of the state—and the party—to a substantive policymaking body.²⁰

One of the most notable judicial interpretations in recent history is *Qi Yuling v. Chen Xiaoqi*, issued in 2001²¹—a case many commentators

10. See XIANFA art. 58 (1982) (China).

11. Quanguo Renmin Daibiao Dahui Changwu Wei yuanhui Guanyu Jiaqiang Falv Jieshi Gongzuo de Jueyi (全国人民代表大会常务委员会关于加强法律解释工作的决议) [Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 1981, effective June 10, 1981), art.1 (China) [hereinafter Resolution Providing an Improved Interpretation of the Law].

12. *Id.* at art. 2.

13. *Id.*

14. *Id.* at art. 3.

15. Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo de Guiding (最高人民法院关于司法解释工作的规定) [Provisions of the Supreme People's Court on the Judicial Interpretation Work] (promulgated by the Sup. People's Ct., Mar. 9, 2007, effective Apr. 1, 2007), art. 6 (China).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. See Ip, *supra* note 2, at 371. In addition to judicial interpretations, the SPC also publishes other documents that may be normative in nature, such as notices and conference summaries. While these documents exercise a guiding influence on adjudication or administration in the lower courts, they do not always interpret the law nor do they enjoy the same legal status as judicial interpretations. See Susan Finder, *The Supreme People's Court of the People's Republic of China*, 7 J. CHINESE L. 145, 180–84 (1993).

21. See generally Qi Yuling Su Chen Xiaoqi Deng Yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shoujiaoyu de Jibenquanli Jiufen An (齐玉苓诉陈晓琪等以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利纠纷案)

dubbed “China’s *Marbury*.”²² Qi Yuling and Chen Xiaoqi graduated from the same middle school in 1990. Chen did not qualify to take the national entrance examination after failing the preliminary examination.²³ Qi, on the other hand, sat for the national entrance examination and achieved a score that made her eligible for an employer-sponsored education.²⁴ However, Qi never received her examination results.²⁵ Her offer of admission to a commerce school was mistakenly delivered to Chen by their middle school.²⁶ Chen appropriated, and accepted, Qi’s offer and procured fabricated documents to attend the commerce school under Qi’s name.²⁷ Chen eventually secured employment at a bank.²⁸ After Chen’s fraud came to light, Qi filed suit alleging violations of her right to her name as well as her right to education.²⁹ A key issue in Qi’s claim for damages concerned the legal status of the latter right.³⁰ If the right to education were not remediable at law, then Qi could only be awarded damages for emotional distress and not for economic loss.³¹ Because the General Principles of Civil Law did not expressly articulate a private right to education, the lower courts sought the SPC’s guidance on the issue.³² The SPC held that Qi had a constitutional right to education and that the violation of that right gave rise to civil liability.³³ As Huang Songyou, then-Vice President of the SPC, later explained:

Previously[,] the Supreme People’s Court issued very few replies concerning cases of indirect application of the Constitution. However, the issues in *Qi Yuling* concerned violations of citizens’ constitutional rights, as well as and [sic] rights provided in laws such as the General Principles of the Civil Law. In the Reply to the principal case, Qi’s right to receive education is a right difficult for civil law theory to cover and is obviously one of the fundamental

[Qi Yuling v. Chen Xiaoqi et al.], 2001 Sup. People’s Ct. Gaz. (Sup. People’s Ct. 2001) (China).

22. Huang Zhengdong, *Feizhi Qiyuling An Pifu yu Xianfa Shiyong zhi Guanlian* (废止齐玉苓案与宪法适用之关联) [*The Connection Between the Abolishment of the Reply of the Qiyuling Case and the Application of the Constitution*], 4 FAXUE (法學) [LEGAL SCI.] 3, 3–10 (2009); see also Tong Zhiwei, *Xianfa Shiyong ying Yixun Xianfa Benshen Guiding de Lujing* (宪法适用应遵循宪法本身规定的路径) [*The Constitutional Application Should Follow the Route Provided for by the Constitution*], 6 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCI.] 22, 22–48 (2008). See generally Robert J. Morris, *China’s Marbury: Qi Yuling v. Chen Xiaoqi—The Once and Future Trial of Both Education & Constitutionalization*, 2 TSINGHUA CHINA L. REV. 273 (2010).

23. See Qi Yuling Su Chen Xiaoqi Deng Yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shoujiaoyu de Jibenquanli Jiufen An (齐玉苓诉陈晓琪等以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利纠纷案) [Qi Yuling v. Chen Xiaoqi et al.], 2001 Sup. People’s Ct. Gaz. 63 (Sup. People’s Ct. 2001) (China).

24. See *id.*

25. See *id.* at 64.

26. See *id.* at 72.

27. See *id.* at 63–64.

28. See *id.* at 64.

29. See *id.* at 61.

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.*

rights provided by the Constitution. Had we not directly applied the Constitutional provisions, it would have been hard to provide judicial remedies. Apparently, the Reply established a precedent for the justiciability of the Constitution in China.³⁴

The SPC's Reply excited controversy because constitutional disputes were generally understood to be beyond the court's jurisdiction.³⁵ Article 62 of the Constitution grants the NPC the "power to supervise the enforcement of the Constitution" while Article 67 vests in the NPC's Standing Committee the "power to interpret the Constitution and supervise its enforcement."³⁶ Some scholars construed the Reply as an arrogation of the power to interpret the Constitution or even exercise constitutional review.³⁷ Others, however, disagreed.³⁸ Zhang Qianfan, a law professor at Peking University, suggested that the Reply should be read narrowly, and that the Constitution should be invoked only where no remedy is otherwise available or if the applicable laws are in conflict.³⁹ Wang Zhenmin of Tsinghua University went further, arguing that "[t]he Constitution itself contains no clause manifestly prohibiting its application in litigation."⁴⁰ While the Reply was short-lived—the SPC abolished it in 2007 stating it was no longer applicable—Qi Yuling illustrates the potential for the SPC to assert itself institutionally through judicial interpretation.

The SPC also promulgates judicial interpretations to implement legislation or to adapt the law to social, economic, and technological changes. Although there was initially no legal foundation for the SPC's authority to engage in abstract rulemaking absent a controversy, the NPC silently acquiesced in SPC's practice of doing so and eventually authorized it.⁴¹ "[T]he

34. Shen Kui & Yuping Liu, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case"*, 12 PAC. RIM L. & POL'Y J. 199, 208 n.20 (2003) (citing Guo Guosong, *Maoming Shangxue Shijian Yinfa Xianfa Sifahua Diyian* (冒名上学事件引发宪法司法化第一案) [*Academic Impersonation Incident Triggers First Case of Constitutional Judicialization*], NAFANG ZHOUMO (南方周末) [S. WEEKEND], Aug. 17, 2001)).

35. See Yu Xingzhong, *Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005*, in BUILDING CONSTITUTIONALISM IN CHINA 111, 120 (Stéphanie Balme & Michael W. Dowdle eds., 2009).

36. *Id.*

37. See Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 43 SUFFOLK U.L. REV. 669, 669–70 (2010).

38. See Zhang Qianfan, *Lun Xianfa Xiaoli De Jieding Jiqi Dui Sifa De Yingxiang* (论宪法效力的界定及其对司法的影响) [*On the Demarcation of Legal Effects of the Constitution and Its Influence over Private Law*], 2 BUIAOFA YANJIU (比较法) [J. COMPAR. L.] 1, 17–18 (2004).

39. See *id.* at 17.

40. Wang Zhenmin, *Woguo Xianfa Kefou Jinru Susong* (我国宪法可否进入诉讼) [*Does Chinese Constitution Have Access to Litigation*], 5 FASHANG YANJIU (法商研究) [STUD. L. & BUS.] 28, 28 (1999).

41. The SPC engaged in abstract rulemaking even before the NPC officially granted it the power to issue judicial interpretations in 1981. See generally Resolution Providing an Improved Interpretation of the Law, *supra* note 11; Zuigao Renmin Fayuan 1955nian Yilai Jianyin Younv Anjian Jiancha Zongjie (最高人民法院1955年以来奸淫幼女案件检查总结) [Summary of the Inspection of Fornication with Underage Girls Cases Decided Since 1955] (promulgated by the Sup. People's Ct., Apr. 30, 1957, effective Apr. 30, 1957) (China); Zhou Jue, *Jianguo Chuqi Xingshi Shenpan Gongzuo De Huiyi* (建国初期刑事审判工作的回忆) [*Mem-*

SPC has [consequently] become a third legislative actor on the national level in addition to the NPC and the State Council and its quasi-legislative acts, in general, take precedence over other legislation.”⁴² An example of such quasi-legislation is an interpretation issued by the SPC in September 2013 regarding defamation and the disruption of social order through information networks—or “fake news.”⁴³ Several months before the interpretation was issued, the Chinese Administration of Public Security executed a national crackdown on Internet-related crimes, or *qingwang xingdong* (清网行动), and arrested several social media personalities. Article 246 of the Criminal Law provides:

Those openly insulting others using force or other methods or those fabricating stories to slander others, if the case is serious, are to be sentenced to three years or fewer in prison, put under criminal detention or surveillance, or deprived of their political rights.

Those committing crimes mentioned above are to be investigated only if they are sued, with the exception of cases that seriously undermine social order or the state’s interests.⁴⁴

The SPC clarified that the fabrication and dissemination of false information through the Internet resulting in damage to another person’s reputation is punishable as defamation under Article 246.⁴⁵ Furthermore, defamatory social media posts that have been clicked or viewed more than 5,000 times, or forwarded more than 500 times, are deemed serious enough to subject the offender to a maximum of three years imprisonment.⁴⁶ These cases are to be taken up only on complaint, unless the social media publications at issue grievously injure social order or the national interest by, for example, inciting a mass incident or fomenting ethical or religious strife.⁴⁷ The SPC also made Article 293 of the Criminal Law applicable to fake news.⁴⁸ Article 293 prescribes a sentence of “not

ories About Criminal Adjudication Work in the Early Days of the Establishment of the Country], ZHONGGUO FAYUAN WANG (中国法院网) [CHINA CT. NET] (Sept. 29, 2007), <https://www.chinacourt.org/article/detail/2007/09/id/268326.shtml> [<https://perma.cc/F2HK-4S6D>].

42. Ahl, *Judicialization in Authoritarian Regimes*, *supra* note 1, at 265.

43. See generally Zuigao Renmin Fayuan Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinxu Wangluo Shishi Feibang Deng Xingshi Anjian Shiyong Falv Ruogan Wenti De Jieshi (最高人民法院、最高人民检察院关于办理利用信息网络实施诽谤等刑事案件适用法律若干问题的解释) [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues Concerning the Specific Application of Law in the Handling of Defamation Through Information Networks and Other Criminal Cases] (promulgated by the Sup. People’s Ct. and the Sup. People’s Procuratorate, Sept. 6, 2013, effective Sept. 10, 2013) (China) [hereinafter Interpretation Concerning the Specific Application of Law].

44. Zhonghua Renmin Gongheguo Xingfa 1997 Xiuding (中华人民共和国刑法(1997修订)) [Criminal Law of the People’s Republic of China (97 Revision)] (promulgated by the Nat’l People’s Cong., Oct. 1, 1997, effective Mar. 14, 1997), art. 246 (China).

45. Interpretation Concerning the Specific Application of Law, *supra* note 43, at art. 1.

46. *Id.* at art. 2.

47. *Id.* at art. 3.

48. *Id.* at art. 5.

more than five years of fixed-term imprisonment, criminal detention, or control” for those whose “provocative and disturbing behavior creat[e] a disturbance in a public place, causing serious disorder.”⁴⁹ Knowingly posting or spreading false information online, the SPC declared, constitutes such an offense if it results in serious public disorder.⁵⁰

This interpretation became the subject of intense public debate in 2014 after a prominent Chinese blogger, Qin Zhihui, was sentenced to three years in jail for defamation and spreading rumors on Weibo between 2010 and 2013. Qin, a Weibo celebrity, was alleged to have published over 3,000 libelous tweets attacking public figures or governmental authorities.⁵¹ These tweets were shared thousands of times by his followers and his followers’ followers.⁵² One of Qin’s most contentious tweets accused the Railway Ministry of paying thirty million euros to mollify the bereaved family of a foreign passenger who died in a Wenzhou train collision in July 2011.⁵³ Another tweet claimed that the story of Lei Feng—a soldier lionized by the CCP as a paragon of modesty and selflessness—was purely apocryphal.⁵⁴ And yet another tweet suggested that Chinese civil servants were being forced to donate to the Red Cross in order to cultivate a charitable national image.⁵⁵ Qin’s case was the first to be tried publicly since China began its crackdown on Internet-related crimes.⁵⁶ At trial, Qin apologized for his misdeeds and cautioned others against committing the same mistakes.⁵⁷

The implications of the SPC’s position for freedom of speech provoked consternation in some areas of the Chinese legal community. Zhu Wei, a law professor at the China University of Political Science and Law, praised

49. Article 293 of the Criminal Law provides that “[w]hoever undermines public order with any one of the following provocative and disturbing behaviors is to be sentenced to not more than five years of fixed-term imprisonment, criminal detention, or control: . . . (4) creating a disturbance in a public place, causing serious disorder.” *Zhonghua Renmin Gongheguo Xingfa* 1997 Xiuding, *supra* note 44, at art. 293.

50. Interpretation Concerning the Specific Application of Law, *supra* note 43, at art. 5.

51. Dong Jianing, *Qin Huohuo Feibang, Xunxin Zishi An Jiangyu 4yue 11ri Kaiting Beijing Chaoyang Fayuan Weibo Zhibo* (“秦火火”诽谤、寻衅滋事案将于4月11日开庭 北京朝阳法院微博直播) [*Qin Huohuo Defamation and Causing Trouble Case Will Be Heard on Apr. 11 Beijing Chaoyang People’s Court Streaming the Trial on Weibo*], GUAN CHA ZHE (观察者) [OBSERVER] (Apr. 8, 2014), https://www.guancha.cn/FaZhi/2014_04_08_220416.shtml [<https://perma.cc/68V6-A2UT>].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. See Liu Yang, *Qin Huohuo Xi Woguo Diyige Huoxing De Wangluo Zaoyao Zhe* (“秦火火”系我国第一个获刑的网络造谣者) [*Qin Huohuo Is China’s First Defamer on the Internet Who Has Been Sentenced*], SOHU XINWEN (搜狐新闻) [SOHU NEWS] (Apr. 18, 2014), news.sohu.com/20140418/n398427491.shtml [<https://perma.cc/BE8N-RXBP>].

57. See Ma Junqin, “Qin Huohuo” Dangting Xiang Yanglan Dengren Daoqian Ziyuan Renzui (“秦火火”当庭向杨澜等人道歉 自愿认罪) [*“Qin Huohuo” Apologized to Yang Lan and Others at Trial and Voluntarily Pleaded Guilty*], XINHUA WANG (新华网) [XINHUA NET] (Apr. 11, 2014), http://www.xinhuanet.com/photo/2014-04/11/c_126382186.htm [<https://perma.cc/9GUE-VRR3>].

the high court's interpretation for preventing the virtual space from becoming a hotbed for Internet-related crimes.⁵⁸ In contrast, Ma Changshan of the East China University of Political Science and Law questioned the legal definition and scope of the term "public places."⁵⁹ He contended that the Internet should not be treated like the physical spaces where people toil, study, and socialize.⁶⁰ A Beijing lawyer also criticized the SPC's interpretation by pointing out that followers and retweets on social networks can be purchased from public relations firms.⁶¹ The lawyer said, "[f]rom now on, whenever anyone says anything bad about me, I will just get zombie followers to view their post 5,000 times or repost it 500 times and get them sent to prison."⁶² While the SPC's September 2013 interpretation clamping down on fake news is especially salient, judicial interpretations are not a recent phenomenon. "Between 1998 and 2009, the SPC handed down 264 publicly accessible and binding [j]udicial [i]nterpretations" touching on fields from corporate law to family law and subjects ranging from international trade to environmental pollution.⁶³ The SPC's judicial interpretations pervade Chinese law and policy so much so that were they to be abolished, "the legal system would grind to a halt."⁶⁴

Besides judicial interpretations, the SPC also promulgates exemplary cases to "summarize adjudication experiences and guide [future] practices."⁶⁵ For example, the SPC Gazette has published selected cases from

58. See Zhu Wei, *Qinhuohuo An Dailai De Qishi yu Fansi* (秦火火案带来的启示与反思) [The Implication and Reflection Brought by the Qinhuohuo Case], RENMIN WANG (人民网) [PEOPLE] (Apr. 16, 2014), <http://legal.people.com.cn/n/2014/0416/c42510-24900204.html> [https://perma.cc/C88Z-GVEA].

59. Ma Changshan, *Falv de Kongjian Chuanyue Jiqi Fengxian: Cong Lianggao Banli Wangluo Feibang Deng Xingshi Anjian De Sifa Jieshi Chufa* (法律空间的穿越及其风险：从两高办理网络诽谤等刑事案件的司法解释出发) [The Crossover and Risk of the Space of Law: From the Judicial Interpretation of the SPC and SPP Handling Criminal Cases Concerning Internet-related Defamation], 4 SUZHOU DAXUE XUEBAO (苏州大学学报) [J. SOOCHOW U.] 34, 34-41 (2014).

60. See *id.*

61. See C. Custer, *In China, Tweeting Rumors Can Now Land You Three Years in Jail or Worse*, TECH. ASIA (Sept. 9, 2013), <https://www.techinasia.com/china-tweeting-rumors-land-years-jail-or-worse> [https://perma.cc/NM33-UHVA].

62. *Id.*

63. *Ip, supra* note 2, at 394-95.

64. RANDALL PEERENBOOM, *COURTS AS LEGISLATORS: SUPREME PEOPLE'S COURT INTERPRETATIONS AND PROCEDURAL REFORMS* 3 (2007). Though the discussion thus far has focused exclusively on the high court, the same phenomenon has been observed at the sub-national level. In spite of official discouragement by the SPC, local courts, too, announce interpretations of law and regulations that they then apply as rules of decisions to cases pending before them. See generally Chao Xi, *Local Courts as Legislators? Judicial Lawmaking by Subnational Courts in China*, 34 *STATUTE L. REV.* 39 (2012).

65. The SPC publishes exemplary cases in various outlets including the Supreme People's Court Gazette, Selection of People's Court Cases, China Case Trial Highlights, and China Court Annual Cases. Li Yusheng, *Gaoji Fayuan Cankaoxing Anli Bianxuan Biaozhun Tantai* (高级法院参考性案例编选标准探讨) [Exploring the Selection Criteria for High People's Courts' Cases for Reference], *FALV SHIYONG* [APPLICATION LAW.] 28, 28 (2018); see also Susan Finder, *China's Evolving Case Law System in Practice*, 9 *TSINGHUA CHINA L. REV.* 245, 248-50 (2017).

courts at all levels since 1985.⁶⁶ Chinese judicial opinions do not have precedential value and are not formally recognized as a source of law. Those approved by the SPC, however, bear its imprimatur and are generally followed by lower courts.⁶⁷ Today, cases selected for inclusion in the Gazette reach a broader audience than just judges. Since March 2017, the SPC has made those cases available to the public through its website.⁶⁸ In addition to the Gazette, the SPC edits and compiles a series of “guiding cases” that lower court judges must consult when adjudicating similar matters.⁶⁹ These cases span the range of legal subjects and they too are available for consultation by the public in print and electronic form.⁷⁰ By selecting and editing cases for publication, the SPC influences the practical application of statutory law and thereby shapes public policy.⁷¹ For example, in 2014, after President Xi Jinping emphasized the “core values of socialism” and urged comprehensive implementation of these moral doctrines nationwide, the SPC designated twenty local judicial decisions as exemplary cases upholding values such as honesty, trustworthiness, public order, good custom, and family virtues.⁷²

In sum, by issuing judicial interpretations and designating selected cases as models to be emulated by the lower courts, the SPC refines and even revises statutory law. As a *de facto*, if not *de jure*, policymaking body, the SPC exercises its quasi-legislative powers broadly and not merely interstitially. “[I]t competes with other state organs in legislating directly vis-à-

66. See generally GAZETTES SUP. PEOPLE’S CT., http://gongbao.court.gov.cn/Article-List.html?serial_no=al [<https://perma.cc/AL4Z-VGLA>] (last visited Feb. 15, 2019) [hereinafter GAZETTES SUP. PEOPLE’S CT.].

67. See Liu Nanping, “Judicial Review” in *China: A Comparative Perspective*, 14 REV. SOCIALIST L. 241, 246–50 (1988).

68. These cases may be consulted at GAZETTES SUP. PEOPLE’S CT., *supra* note 66.

69. See generally *Zhidao Anli* (指导案例) [Guiding Cases], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN FAYUAN (中华人民共和国最高人民法院) [SUP. PEOPLE’S CT. CHINA], <http://www.court.gov.cn/fabu-gengduo-77.html> [<https://perma.cc/8W95-6K3D>] (last visited Feb. 15, 2019); *Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo De Guiding Shishi Xize* (《最高人民法院关于案例指导工作的规定》实施细则) [Details Implementing Rules on the “Provisions of the Supreme People’s Court Concerning Work on Case Guidance”] (promulgated by the Sup. People’s Ct., Apr. 27, 2015, effective May 13, 2015), arts. 9–10 (China); *Zuigao Renmin Fayuan Guanyu Anli Zhidao Gongzuo de Guiding* (最高人民法院关于案例指导工作的规定) [Provisions of the Supreme People’s Court Concerning Work on Case Guidance] (promulgated by the Sup. People’s Ct., Nov. 26, 2010, effective Nov. 26, 2010) (China).

70. See generally *Zhidao Anli*, *supra* note 69.

71. See Ahl, *Judicialization in Authoritarian Regimes*, *supra* note 1, at 265.

72. See generally *Zuigao Renmin Fayuan Guanyu Hongyang Shehui Zhuyi Hexin Jiazhiguan Dianxing Anli* (最高人民法院关于弘扬社会主义核心价值观典型案例) [Model Cases Regarding Upholding the Socialist Core Values Issued by the Supreme People’s Court] (promulgated by the Sup. People’s Ct., Aug. 23, 2016, effective Aug. 23, 2016) (China); *Zuigao Renmin Fayuan Gongbu 10qi Hongyang Shehui Zhuyi Hexin Jiazhiguan Dianxing Anli* (最高人民法院公布10起弘扬社会主义核心价值观典型案例) [Ten Model Cases Regarding Upholding the Socialist Core Values Issued by the Supreme People’s Court] (promulgated by the Sup. People’s Ct., Mar. 10, 2016, effective Mar. 10, 2016) (China).

vis legal subjects.⁷³ At the same time, it is legally and politically subordinate to the NPC and, ultimately, the Party. While the SPC strives to promote its own agenda and interests,⁷⁴ it also serves the party-state, employing its expertise to develop and advance national objectives.⁷⁵ The tension between these two pursuits is not irreconcilable: the autonomy enjoyed by the SPC depends, in part, on its ability to legitimize policy.⁷⁶ The greater its influence on public opinion in China, the more useful the SPC becomes to the party-state, thereby making it more likely for other political actors to tolerate its assertiveness in domains removed from the regime's core interests.⁷⁷ The persuasiveness of the SPC is therefore critical to our understanding of its institutional strength and the future of judicially initiated change in China.

The discussion up to now has focused exclusively on the SPC. But lower courts also make rules through the same channels as those employed by the SPC, albeit on a more modest scale. Despite official disapproval of the practice before 2010,⁷⁸ high courts in Beijing, Shanghai, Jiangsu, and Zhejiang have formulated abstract opinions to address burgeoning issues in corporate law and governance.⁷⁹ Some of these provisions are intersti-

73. Ahl, *Judicialization in Authoritarian Regimes*, *supra* note 1, at 265; see also Zhao Yanrong, *The Way to Understand the Nature and Extent of Judicial Independence in China*, 6 *ASIAN J.L. & SOC'Y* 131, 150 (2019) (describing judicial independence as part of the "strategic interaction" school of thought in China where, "by interpreting the law creatively and strategically, the courts can advance their own institutional interests and compete in the struggle for power and legitimacy with other political actors").

74. See Ip, *supra* note 2, at 434–35; Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 *COLUM. J. ASIAN L.* 1, 2–3 (2012).

75. See Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 *AM. J. COMPAR. L.* 37, 42 (2016).

76. See Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, 10 *J. CHINESE POL. SCI.* 43, 48 (2005) ("[T]he Chinese authorities are keen to push forward the establishment of a 'rule by law' and a professional and autonomous court system, albeit of 'socialist' texture, aimed both at enhancing the regime's political legitimacy and at stabilizing society and relations between state and society by opening new avenues for the presumably more reliable settlement of disputes.").

77. For an example from Egypt, see Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 *LAW & SOC. INQUIRY* 883, 883 (2003).

78. In 1987, the SPC issued a Reply which disapproved of the Guangxi High People's Court articulation of policies governing real estate legal issues. The SPC found such a practice inappropriate as local courts did not have the authority to make abstract policies. In 2010, the SPC officially authorized higher people's courts to issue documents which guide the adjudicatory work of local courts in the region. See generally Zuigao Renmin Fayuan Guanyu Difang Ge Ji Fayuan Buyi Zhiding Sifa Jieshi Xingzhi Wenjian Wenti De Pifu (最高人民法院关于地方各级法院不宜制定司法解释性质文件问题的批复) [SPC Reply Concerning the Inappropriateness for Local Courts at Various Levels to Adopt Documents of the Nature of Judicial Interpretation] (promulgated by the Sup. People's Ct., Mar. 31, 1987, effective Mar. 31, 1987) (China); Zuigao Renmin Fayuan Yinfu Guanyu Guifan Shangxiaji Renmin Fayuan Shenpan Yewu Guanxi de Ruogan Yijian de Tongzhi (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 the Several Opinions on Regulating the Trial Work Relations Between the People's Courts at Different Levels] (promulgated by Sup. People's Ct., Dec. 28, 2010, effective Dec. 28, 2010), art. 9 (China).

79. See Xi, *supra* note 64, at 49.

tial in character, providing for remedies where none were specified in the Company Law.⁸⁰ Others, such as the rules for piercing of the corporate veil and instituting a derivative lawsuit, appear to lack any foundation in statutory authority, being justified only by expedience.⁸¹ Local courts have also introduced notions of *stare decisis* into their adjudications by designating cases as precedential in their own jurisdictions.⁸² For example, as early as 2002, a basic people's court in Zhongyuan, Zhengzhou, implemented "a process whereby a holding shall be recognized as a 'precedent' with a certain degree of binding effect in the adjudication of similar cases in the future, which other panels and individual judges should refer to in handling similar cases."⁸³ Until today, the Tianjin City High People's Court operates on a similar model.⁸⁴ Elsewhere, the Guangdong and Jiangsu High People's Courts regularly designate "typical cases" for consultation by judges in their respective jurisdictions.⁸⁵

Because they exercise systematic influence over the behavior of legal subjects, these courts, like the SPC, are able to formulate and implement policies to advance their interests and those of the party-state as articulated by local governments. And as with the SPC, the institutional autonomy and strength of the lower courts vis-à-vis other government organs at the same level depends in no small measure on their contribution to national objectives, including the maintenance of stability and order.⁸⁶

II. The Persuasiveness of Chinese Institutions

A. Theoretical Background

How does legitimation happen? It might occur through acceptance or

80. See *id.* at 46.

81. See *id.* at 46-50.

82. See Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Reform*, ASIAN-PAC. L. & POL'Y J., Summer 2003, at 255, 300, 302.

83. *Id.* at 300-01 (quoting Li Guanghu, *Tan Xianli Panjue Zhidu* (谈先例判例制度) [On the Precedent System], RENMIN FAYUAN BAO (人民法院报 [PEOPLE'S CT. DAILY] (Sept. 20, 2002), <http://rmfyb.chinacourt.org/public/detail.php?id=41941> [<https://perma.cc/HG9R-HWXT>]); see also Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 CHI. J. INT'L L. 257, 290 (2007).

84. See Lin, *supra* note 82, at 302.

85. See, e.g., *Guangdong Gaoyuan Fabu Goujian Hexie Laodong Guanxi Shida Dianxing Anli* (广东高院发布构建和谐劳动关系十大典型案例) [Guangdong High People's Court Published Ten Typical Cases Concerning Harmonious Labor Relations], GUANGDONG FAYUAN WANG (广东法院网) [GUANGDONG CT.], <http://www.gdcourts.gov.cn/web/content/42887-?lmdm=2002> [<https://perma.cc/75QM-DPQG>] (last visited Feb. 12, 2019); *Jiangsu Gaoyuan Fabu Dianxing Anli 800 Yujian* (江苏高院发布典型案例800余件) [Jiangsu High People's Court Issued over 800 Typical Cases], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S CT.], <http://www.court.gov.cn/zixun-xiangqing-13941.html> [<https://perma.cc/M73V-T93G>] (last visited Feb. 12, 2019).

86. See Xin He, *Why Did They Not Take on The Disputes? Law, Power and Politics in the Decision-Making of Chinese Courts*, 3 INT'L J.L. CONTEXT 203, 222-23 (2007) (arguing that for local courts to cultivate a degree of autonomy, they "must first rely on, and co-operate with, administrative power in fulfilling the social control function required by the party-state").

persuasion.⁸⁷ The former involves conformance to a decision perceived to be dubious or even wrong.⁸⁸ The latter, on the other hand, implies a change in attitude.⁸⁹ That is, the judicial imprimatur convinces citizens of the correctness or rightness of the policy being endorsed. This second notion of legitimation—persuasion—is the subject of our study. The question that interests us here is whether the courts' status as a judicial rather than administrative body makes it more persuasive than other state organs. The persuasiveness of United States (U.S.) courts has been the subject of extensive research.⁹⁰ Although the evidence is mixed, several studies have concluded that the United States Supreme Court can sway public opinion.⁹¹ For example, Brandon Bartels and Diana Mutz find that “the [United States Supreme] Court is more influential than Congress in using its institutional credibility to move opinion, and it can do so fairly unconditionally, regardless of people’s sophistication levels, levels of issue relevant thinking, or the presence of issue relevant arguments.”⁹² At the state-level, courts are also sometimes “more effective than other institutions at increasing public support for government policies.”⁹³ But up until now, little attention has been paid to the persuasiveness of courts in authoritarian regimes like China’s.⁹⁴ This neglect is regrettable because courts in one-party dominated states are also sites of political contestation and may function both as instruments of repression and agents of reform.

87. See generally Moustafa, *supra* note 77. For an articulation of this distinction, see Jeffrey J. Mondak, *Policy Legitimation and the Supreme Court: The Sources and Contexts of Legitimation*, 47 POL. RSCH. Q. 675, 676–79 (1994); James L. Gibson & Michael J. Nelson, *The Legitimacy of the US Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 204 (2014).

88. See Mondak, *supra* note 87, at 676–78.

89. See *id.* at 675–77.

90. See *id.* at 675–76, 678; Gibson & Nelson, *supra* note 87, at 204.

91. See Valerie J. Hoekstra, *The Supreme Court and Opinion Change: An Experimental Study of the Court’s Ability to Change Opinion*, 23 AM. POL. Q. 109, 109–10 (1995); Rosalee A. Clawson et al., *The Legitimacy-Confering Authority of the U.S. Supreme Court: An Experimental Design*, 29 AM. POL. RSCH. 566, 566–68 (2001); Brandon L. Bartels & Diana C. Mutz, *Explaining Processes of Institutional Opinion Leadership*, 71 J. POL. 249, 249 (2009); Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods*, 45 J. LEGAL STUD. 223, 223–24 (2016). But see Larry R. Baas & Dan Thomas, *The Supreme Court and Policy Legitimation: Experimental Tests*, 12 AM. POL. Q. 335, 335 (1984); Patrick J. Egan & Jack Citrin, *The Limits of Judicial Persuasion and the Fragility of Judicial Legitimacy* 15 (U.C. Berkley: Inst. Gov’t Stud., Working Paper No. 2011, 2011) (claiming that “even among the Court’s strongest supporters, its power to shift mass opinion towards accepting its rulings [is] essentially nil.”).

92. Bartels & Mutz, *supra* note 91, at 259.

93. Robert J. Hume, *State Courts and Policy Legitimation: An Experimental Study of the Ability of State Courts to Change Opinion*, 42 PUBLIUS 211, 226 (2011).

94. A notable exception to this lacuna in literature, though not framed in these exact terms, is a study conducted in Russia. See generally Vanessa A. Baird & Debra Javeline, *The Persuasive Power of Russian Courts*, 60 POL. RSCH. Q. 429 (2007). Although Russian courts have been timid in the face of an overbearing executive, Vanessa Baird and Debra Javeline find that the Russian Supreme Court and the Russian Constitutional Court, like the Duma, are able to persuade the public, and all the more so if their rulings have an intolerant, rather than tolerant, valence. *Id.* at 249.

It is possible, however, to formulate some hypotheses about the persuasiveness of Chinese courts based on general theories and established facts. Persuasion, according to the mainstream models of psychology, can occur through elaborative or non-elaborative processing of information.⁹⁵ An individual may come to hold a certain attitude after systematically considering all the arguments presented for and against it (elaborative) or by relying on heuristics such as source credibility (non-elaborative).⁹⁶ But source credibility can also affect the individual's motivation to think about the issue under discussion, thus activating the elaborative mode of attitudinal change.⁹⁷ Credibility is therefore an important aspect of persuasiveness.

Credibility, in this context, may be understood as a combination of expertise and trustworthiness.⁹⁸ Research on Chinese state institutions has not drawn this precise distinction, focusing instead on a more capacious understanding of trust. Trust has been operationalized differently in the literature. Sometimes, citizens are asked how much they "trust" various government institutions.⁹⁹ Other times, the question is phrased as one of confidence in,¹⁰⁰ support for,¹⁰¹ or satisfaction with,¹⁰² these institutions. Trust, however, is a contested concept and it is "seldom unconditional; it is given to specific individuals or institutions over specific domains."¹⁰³ These survey results are therefore difficult to interpret. For example, "global and generic measures" are apt to mislead if respondents "sound confident about central leaders in general while they only trust a small

95. See generally RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* (1986); 5 Shelly Chaiken, *The Heuristic Model of Persuasion*, in *SOCIAL INFLUENCE: THE ONTARIO SYMPOSIUM 3* (Mark P. Zanna et al. eds., 2014); Serena Chen & Shelly Chaiken, *The Heuristic-Systematic Model in Its Broader Context*, in *DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY 73* (Shelly Chaiken & Yaacov Trope eds., 1999); Shelly Chaiken, *Heuristic Versus Systematic Information Processing and the Use of Source Versus Message Cues in Persuasion*, 39 J. PERSONALITY & SOC. PSYCH. 752 (1980) [hereinafter Chaiken, *Heuristic Versus Systematic Information Processing*].

96. See generally Chaiken, *Heuristic Versus Systematic Information Processing*, *supra* note 95.

97. See *id.* at 762.

98. Chanthika Pornpitakpan, *The Persuasiveness of Source Credibility: A Critical Review of Five Decades' Evidence*, 34 J. APPLIED SOC. PSYCH. 243, 244 (2004).

99. See Huaxing Liu & John Watson Raine, *Why Is There Less Public Trust in Local Government than in Central Government in China?*, 39 INT'L J. PUB. ADMIN. 258, 259 (2016); Wenfang Tang & Yang Zhang, *Political Trust: An Experimental Study*, in *POPULIST AUTHORITARIANISM: CHINESE POLITICAL CULTURE AND REGIME SUSTAINABILITY 134*, 134 (2016).

100. See generally WVS Wave 6 (2010-2014), WORLD VALUES SURV. (Sept. 12, 2018), <http://www.worldvaluessurvey.org/WVSDocumentationWV6.jsp> [<https://perma.cc/F58Q-2BW7>].

101. See generally Bruce J. Dickson et al., *Generating Regime Support in Contemporary China: Legitimation and the Local Legitimacy Deficit*, 43 MOD. CHINA 123 (2017).

102. See Ethan Michelson & Benjamin L. Read, *Public Attitudes Toward Official Justice in Beijing and Rural China*, in *CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA*, *supra* note 4, at 169, 199.

103. Margaret Levi & Laura Stoker, *Political Trust and Trustworthiness*, 3 ANN. L. REV. POL. SCI. 475, 476 (2000).

number of leaders.”¹⁰⁴

Nevertheless, there are two “stylized facts” that surface from these disparate studies.¹⁰⁵ The first is that while liberal democracies have been experiencing a general trend of declining institutional trust since the 1960s, the Chinese state has historically enjoyed a relatively elevated level of trust from its citizens. This phenomenon has usually been attributed to a confluence of factors: the state’s ability to deliver results, especially in relation to the economy; nationalist sentiment; and fears of instability.¹⁰⁶ The second is that central institutions are more trusted than local ones.¹⁰⁷

The first generalization applies equally to judicial institutions. For example, 8.9% of U.S. respondents in the *World Values Survey Wave 6* had “a great deal” of confidence in their court system.¹⁰⁸ In contrast, 21.1% of Chinese respondents had “a great deal” of confidence in Chinese courts (Tables 1 and 2).¹⁰⁹ As Jeffrey Mondak noted, however, “[t]he legitimacy-conferring ability of a political institution does not exist in a vacuum, because legitimacy is inherently comparative.”¹¹⁰ Although Chinese citizens trust their legal and political institutions more than U.S. citizens, the former have more confidence in the national government¹¹¹ and national legislature¹¹² whereas the latter maintain greater confidence in their courts.¹¹³ This difference could, perhaps, be explained by the subordination of Chinese courts to the overriding interests of the party-state.

104. Lianjiang Li, *The Magnitude and Resilience of Trust in the Center: Evidence from Interviews with Petitioners in Beijing and a Local Survey in Rural China*, 39 *MOD. CHINA* 3, 26 (2013).

105. Dickson et al., *supra* note 101, at 131.

106. See JIE CHEN, *POPULAR POLITICAL SUPPORT IN URBAN CHINA* 32 (2004); Andrew J. Nathan, *China’s Changing of the Guard: Authoritarian Resilience*, *J. DEMOCRACY*, Jan. 2003, at 6, 6–7; Qing Yang & Wenfang Tang, *Exploring the Sources of Institutional Trust in China: Culture, Mobilization, or Performance?*, 2 *ASIAN POL. & POL’Y* 415, 415–16 (2010).

107. See generally Liu & Raine, *supra* note 99; Dickson et al., *supra* note 101.

108. V114.- Confidence: Justice System/Courts, *WORLD VALUES SURV.*, <http://www.worldvaluessurvey.org/WVSOnline.jsp> [<https://perma.cc/V95F-A46N>] [hereinafter V114] (follow the 2010-2014 hyperlink; then select “United States” from the list of countries; then select “Next”; then select “V114” by scrolling through the table).

109. *Id.* (follow the 2010-2014 hyperlink; then select “China” from the list of countries; then select “Next”; then select “V114” by scrolling through the table).

110. Jeffrey J. Mondak, *Perceived Legitimacy of Supreme Court Decisions: Three Functions of Source Credibility*, 12 *POL. BEHAV.* 363, 365 (1990).

111. See V115.- Confidence: The Government, *WORLD VALUES SURV.*, <http://www.worldvaluessurvey.org/WVSOnline.jsp> [<https://perma.cc/5WLN-M362>] [hereinafter V115] (follow the 2010-2014 hyperlink; then select “United States” from the list of countries; then select “Next”; then select “V115” by scrolling through the table. Repeat the steps for the country of “China”).

112. See V117.- Confidence: Parliament, *WORLD VALUES SURV.*, <http://www.worldvaluessurvey.org/WVSOnline.jsp> [<https://perma.cc/5WLN-M362>] [hereinafter V117] (follow the 2010-2014 hyperlink; then select “United States” from the list of countries; then select “Next”; then select “V117” by scrolling through the table. Repeat the steps for the country of “China”).

113. See Yang & Tang, *supra* note 106, at 421–22. According to Yang and Tang, the Chinese Communist Party enjoys the most amount of trust out of all compared institutions, with 60% of respondents trusting it “a great deal.” The government, public security forces, and courts register 32%, 32%, and 37%, respectively. *Id.* at 421 fig.2.

Although instances of “telephone justice” are increasingly rare, courts remain under formal supervision of the political-legal committees of the CCP.¹¹⁴ Courts that are perceived as political stooges “mask nothing [and] legitimize nothing.”¹¹⁵ Furthermore, the Chinese court system has been described as one characterized by informality and discretion¹¹⁶—a state of affairs that breeds unaccountability and corruption.¹¹⁷

	Courts	Government in Beijing	Parliament
A great deal	21.1%	37.7%	28.8%
Quite a lot	50.0%	46.9%	48.6%
Not very much	15.4%	6.2%	10.4%
None at all	2.2%	1.0%	1.2%
No answer	5.4%	5.3%	5.4%
Don't know	5.9%	3.0%	5.6%
(N)	(2,300)	(2,300)	(2,300)

Table 1: Confidence in Chinese Institutions, World Values Survey (2012)¹¹⁸

114. See Li, *supra* note 75, at 71.

115. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (1975); see also Martin Shapiro, *Courts in Authoritarian Regimes*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES, *supra* note 6, at 326, 334-35. As Anthony Pereira observed, “military justice in Brazil was not a simple ‘extension of the military-police repressive apparatus’” for “[i]f that had been the case, the usefulness of military justice as a legitimating device for the regime would have been negligible.” Anthony W. Pereira, “Persecution and Farce”: The Origins and Transformations of Brazil’s Political Trials: 1964-1979, 33 LATIN AM. RSCH. REV. 43, 44 (1998).

116. See generally Margaret Y.K. Woo, *Adjudication Supervision and Judicial Independence in the P.R.C.*, 39 AM. J. COMPAR. L. 95 (1991); Margaret Y.K. Woo, *Law and Discretion in the Contemporary Chinese Courts*, 8 PAC. RIM L. & POL’Y J. 581 (1999).

117. See Ting Gong, *Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China*, CHINA REV., Fall 2004, at 33, 45. See generally Ling Li, *The “Production” of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State*, 37 LAW & SOC. INQUIRY 848 (2012).

118. V114, *supra* note 108; V115, *supra* note 111; V117, *supra* note 112.

	Courts	Government in D.C.	Parliament
A great deal	8.9%	3.7%	1.7%
Quite a lot	44.9%	28.9%	18.5%
Not very much	37.6%	51.2%	57.1%
None at all	6.5%	14.1%	19.6%
No answer	2.1% ^a	2.1%	3.1%
(N)	(2,232)	(2,232)	(2,232)

Table 2: Confidence in United States Institutions, *World Values Survey* (2011)¹¹⁹

While the theoretical and empirical relationship between trust and persuasiveness remains nebulous, these observations—distilled from the vast bodies of work on Chinese institutions—imply that although courts may have the ability to change attitudes, they are unlikely to be more successful than other governmental entities in doing so.

B. The Survey Experiment

1. Design

To test these hypotheses, we designed a survey canvassing opinions for two scenarios—the criminalization of marital rape and a restriction on speech—after presenting respondents with arguments against and for the policies, respectively. Though we will refer to the marital rape scenario as the first scenario and the freedom of speech scenario as the second scenario, the scenarios were not necessarily presented in that order on the survey questionnaire. The ordering of the two scenarios was randomized across respondents.¹²⁰

The experiment has three factors. The first factor is the type of institution being identified as the source of the arguments: judicial or administrative.¹²¹ The second factor is the level of the relevant institution: national or municipal.¹²² This factor allows us to distinguish the SPC from its less visible judicial subordinates and, in so doing, to separate persuasion engendered by the prestige of the apex court from persuasion induced by the judicial character of courts more generally. The third factor is the presence of a counter-argument.¹²³ Research in political psychology has

119. *Id.*
120. We did not find any evidence of order effects.
121. See Mondak, *supra* note 110, at 365.
122. See Liu & Raine, *supra* note 99, at 260, 262.
123. See Dennis Chong & James N. Druckman, *A Theory of Framing and Opinion Formation in Competitive Elite Environments*, 57 J. COMMUN 99, 105 (2007) [hereinafter Chong & Druckman, *Competitive Elite Environments*]. See generally Dennis Chong & James N. Druckman, *Counterframing Effects*, 75 J. POL. 1 (2013) [hereinafter Chong & Druckman, *Counterframing Effects*].

demonstrated that individuals exposed to a one-sided frame of an issue, rather than a two-sided frame, display reduced amounts of attitudinal change.¹²⁴ Additionally, the robustness of any treatment effect in the face of counterarguments from other actors deepens our understanding of institutional persuasiveness.¹²⁵ Together, these factors comprise a 2 (Judicial or Administrative) \times 2 (Municipal or National) \times 2 (No Counterargument or Counterargument) factorial design. Finally, the experiment also includes two control conditions. The policy arguments in these conditions are attributed to a non-regulatory entity; one condition featured a counterargument while the other did not. These control conditions enable us to compare the persuasiveness of Chinese judicial and administrative entities vis-à-vis other actors.

In the first scenario, respondents are informed of the prevalence of marital rape in Chinese society. Depending on their random assignment to one condition or the other, this introduction is followed by either an appeal by the Chinese Women's Federation in favor of the criminalization of marital rape, or no appeal at all. The respondents are then exposed to arguments against the criminalization of marital rape, for example:

[M]arital rape should, under usual circumstances, not be charged as a crime. This is because a husband and wife in a normal marriage have a right and a duty to cohabit, and marriage itself is generally deemed to be a form of generalized consent to sexual activity. In consideration of the need to build a harmonious society, the evidentiary difficulties that many cases of marital rape encounter, and litigants' regret over having filed a case, the criminalization of marital rape is not currently recommended.¹²⁶

In the treatment conditions, these arguments are attributed to either a court or a public security agency, and to either the national or municipal level of these authorities. In contrast, the control conditions attribute the arguments to a "prominent" lawyer. Finally, respondents are asked (1) if they support, oppose, or neither support nor oppose the criminalization of marital rape; and (2) the degree of their support for or opposition to the policy as registered on a scale of one to four.

The second scenario follows the same format. In the second scenario, respondents are told of a recent controversy over an essay that challenged the veracity of the courageous deeds of a revolutionary hero.¹²⁷ The issue

124. See Chong & Druckman, *Competitive Elite Environments*, *supra* note 123, at 105. See generally Chong & Druckman, *Counterframing Effects*, *supra* note 123; Linos & Twist, *supra* note 91 (reporting on a recent study that found media coverage affected public opinion regarding the decisions of the United States Supreme Court).

125. See Bartels & Mutz, *supra* note 91, at 254–55.

126. This language is taken directly from the authors' original survey.

127. In May 2018, the NPC enacted a statute for the avowed purpose of:

[S]trengthening the protection of heroes and martyrs, safeguarding the public interest, upholding and passing on the spirit of heroes and martyrs and the spirit of patriotism, fostering and practicing the core values of socialism and unleashing the strong spiritual power to realize the Chinese Dream of the great rejuvenation of the Chinese nation.

Zhonghua Renmin Gongheguo Yingxiong Lieshi Baohufa (中华人民共和国英雄烈士保护法) [Law of the People's Republic of China on the Protection of Heroes and Martyrs]

is whether the author of the essay should be liable for defamation. The respondents are then given arguments in favor of legal liability, for example:

[H]eroes such as Huang Jiguang partially embody the collective memory of the nation, national spirit, and socialist values, and are an element of the social public interest; a premise of academic freedom and freedom of speech is that they should not harm the social public interest.¹²⁸

In the treatment conditions, these arguments are attributed to either a court or a Press, Publication, Radio, Film and Television (PPRFT) agency, and to either the national or municipal level of these authorities. The control conditions attribute the arguments to Xinhua News Agency. The scenario concludes with either a counterargument made by a professor of humanities or no counterargument at all. Similar to the first scenario, respondents are asked (1) if they support, oppose, or neither support nor oppose legal liability for essays that question the veracity of heroic deeds; and (2) the degree of their support for or opposition to the policy as registered on a scale of one to four.

The two scenarios share one similarity. They address themes that are interesting and salient to our targeted respondents: university students. This feature of the scenarios and the articulation of reasons for the endorsements mean that any attitudinal change is likely to be the result of more elaborative cognitive processes.¹²⁹ Any attitudinal change should therefore be resistant to counterargument.

The contrast between the two scenarios lies in the type of issue under consideration, the direction of the endorsement, and the control condition. Unlike the first scenario, the second scenario has ideological freight. In addition, the endorsement in the first scenario counsels against the policy while the endorsement in the second scenario favors it. There is some evidence that the former kind of endorsement is more persuasive than the latter.¹³⁰ Finally, the source quoted in the control for the second scenario has official ties to the party-state. The source quoted in the control for the first scenario does not. Therefore, the second scenario presents a more severe test of the persuasiveness of courts and other governmental agencies than the first scenario.

The second scenario also serves as a rough and ready check on the validity of the survey experiment. There is pervasive anxiety among

(promulgated by the Sup. People's Ct., Apr. 27, 2018, effective May 1, 2018), art. 1 (China). This statute forbids individuals or organizations from distorting, smearing, desecrating, or denying the deeds of heroes and martyrs, and subjects violators to civil or criminal liability. *See id.*; *see also*, Peng Bo, *Baohu Yinglie, Yi Falv De Mingyi* (保护英烈, 以法律的名义) [*Protect Heroes and Martyrs in the Name of Law*], RENMIN WANG (人民网) [PEOPLE] (June 13, 2018), <http://legal.people.com.cn/n1/2018/0613/c42510-30053577.html> [<https://perma.cc/YGX4-R7YY>]. The survey experiment was conducted before the passage of this law.

128. This language is taken directly from the authors' original survey.

129. *See* Mondak, *supra* note 110, at 365–66; Bartel & Mutz, *supra* note 91, at 252.

130. *See* Michael D. Cobb & James H. Kuklinski, *Changing Minds: Political Arguments and Political Persuasion*, 41 AM. J. POL. SCI. 88, 103–04 (1997).

researchers about the truthfulness of responses collected in authoritarian states, especially if the questions being asked are of a politically sensitive nature. Although recent experimental evidence from China suggests that these concerns are, perhaps, overblown,¹³¹ one could interpret any treatment effect as the product of fear. For example, greater opposition to the criminalization of marital rape after exposure to arguments from the Ministry of Public Security, as compared to the same arguments from a prominent lawyer, could be caused by a wariness of contradicting an official, authoritative stance, rather than any true attitudinal change. The second scenario thus doubles as a safeguard against this alternative explanation. Suspicion is warranted if there is a large difference in agreement scores between the conditions in the second scenario despite the overtly ideological nature of the endorsed arguments.

2. Sample Characteristics

The instrument was fielded to 806 university students residing in two major cities. This sample is unrepresentative of the general populace. Under normal circumstances, a population sample would be ideal. But the risk of governmental interference in academic surveys is non-negligible, especially if the surveys touch on political subjects.¹³² The pursuit of a nationally representative subject pool could require researchers to subordinate their inquiries to governmental or other quasi-official priorities. We, therefore, eschewed the population sample. This decision renders the experimental results less generalizable than they might otherwise

131. See Xuchuan Leu & Jie Lu, *Revisiting Political Wariness in China's Public Opinion Surveys: Experimental Evidence on Responses to Politically Sensitive Questions*, 26 J. CONTEMP. CHINA 213, 214 (2017). See generally Tang & Zhang, *supra* note 99.

132. See WENFANG TANG, PUBLIC OPINION AND POLITICAL CHANGE IN CHINA 39-41 (2005); Melanie Manion, *A Survey of Survey Research on Chinese Politics: What Have We Learned?*, in CONTEMPORARY CHINESE POLITICS: NEW SOURCES, METHODS, AND FIELD STRATEGIES 181, 185 (Allen Carlson et al. eds., 2010); see also Xiaobo Lü, *Ethical Challenges in Comparative Politics Experiments in China*, in ETHICS AND EXPERIMENTS: PROBLEMS AND SOLUTIONS FOR SOCIAL SCIENTISTS AND POLICY PROFESSIONALS 113, 113 (Scott Desposato ed., 2016) ("On many occasions, scholars face ethical dilemmas between satisfying the scientific standards in their studies and ensuring the safety of local collaborators, respondents, and even scholars themselves. These issues are particularly salient when studying topics that are considered politically sensitive to the Chinese government."); Marie-Eve Reny, *Authoritarianism as a Research Constraint: Political Scientists in China*, 97 SOC. SCI. Q. 909, 911 (2016) ("Furthermore, opinion surveys by foreign investigators continue to be the object of government wariness as they can be used to analyze the performance of local governments. The government does not prohibit foreign investigators from conducting opinion surveys, provided that they cover subjects situated within acceptable boundaries of inquiry, but it monitors closely the process through which those surveys are conducted."); Sheena Chestnut Greitens & Rory Truex, *Repressive Experiences Among China Scholars: New Evidence from Survey Data*, 242 CHINA Q. 349, 355-58 (2020); Li Cheng, *The China Paradox and American Misperceptions*, in THE UNITED STATES AND CHINA: MUTUAL PUBLIC PERCEPTIONS 26, 29-30 (Douglas G. Spelman ed., 2011) ("[T]ighter political controls on the part of the Chinese government remain serious constraining factors that risk severely damaging international academic collaboration and China's image in the world.").

be. At the same time, however, it enables us to offer some insight into the legitimacy of authoritarian courts as policymaking institutions.

The survey experiments were administered in person. Demographic questions were posed at the end of these surveys. Respondents were also quizzed on their knowledge of Chinese political and legal institutions. This quiz comprised six multiple-choice questions of varying difficulty levels. Three questions tested respondents' knowledge of political institutions: (1) "Which agency in China exercises the legislative power of the State?"; (2) "What is the maximum number of consecutive terms that a President of the People's Republic of China may serve?"; and (3) "How many incumbent members does the Politburo Standing Committee of the CPC Central Committee have?" Three other questions assessed respondents' knowledge of legal institutions: (1) "What type of organ appoints and removes the adjudicative personnel of the local people's court at each level?"; (2) "Among the following criminal sentences, which one has to be reported to the Supreme People's Court for examination and approval (expecting those that should be adjudicated by the Supreme People's Court according to the law)?"; and (3) "Who is the incumbent president of the Supreme People's Court?"

Data on respondents' gender and their level of legal and political knowledge are recorded for two reasons. First, the criminalization of marital rape is a gendered issue, and people's susceptibility to persuasion might depend on the strength of the criminals' existing convictions. Second, prior research has uncovered a significant correlation between trust in Chinese institutions, on the one hand, and gender and "legal and political information" on the other.¹³³ Specifically, Qing Yang and Wenfang Tang report that "males are less trustful of legal institutions," and that the "more legal and political information people have, the less likely they are to trust institutions."¹³⁴

We define two indicator variables for our subsequent analyses—"Male" and "Sophistication." There were 490 females and 316 males in the pool of respondents. The gender indicator, "Male," is constructed by assigning females a value of zero and males a value of one. In addition, the number of correct answers given by each respondent to the six political and legal questions is summed to produce a knowledge score. The median of this sum is 3.0, and the mean is 3.3722. The distribution of knowledge scores is plotted in Table 3.

133. Yang & Tang, *supra* note 106, at 426. Although Yang and Tang report other variables being significantly correlated with trust in institutions, such as urban experience and education (beyond the primary level), we are unable to test these hypotheses here.

134. *Id.*

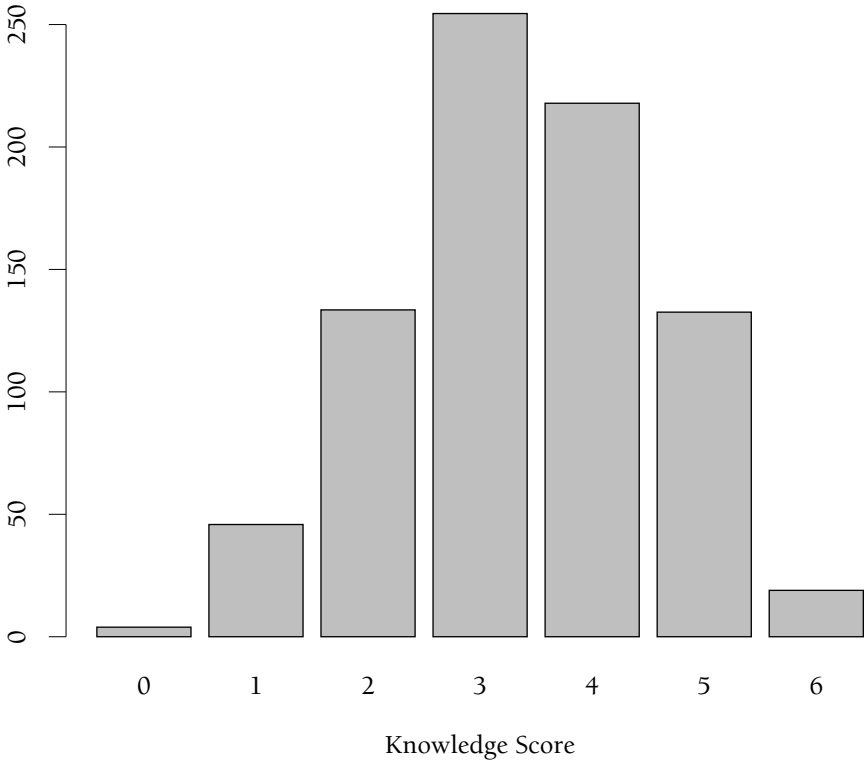


Table 3: Distribution of Political and Legal Knowledge Scores

To conserve statistical power, the indicator variable “Sophistication” is constructed by assigning a value of one to respondents who have attained a score of four or higher; otherwise, they are assigned a score of zero.

3. Results and Analysis

All responses to the two scenarios are coded from a one-to-nine scale: one corresponds to “completely oppose,” five corresponds to “neither support nor oppose”; and nine corresponds to “completely support.” Averages of these agreement scores for the control and treatment conditions in the marital rape scenario are summarized in Table 4. Moreover, the main and interaction effects between treatment conditions are estimated through an ordinary least squares (OLS) regression, presented in Table 5.¹³⁵

135. The main and interaction effects in a factorial design are straightforwardly defined by the Neyman-Rubin potential outcomes model. See Tirthankar Dasgupta et al., *Causal Inference from 2^k Factorial Designs by Using Potential Outcomes*, 77 J. ROYAL STAT. SOC’Y: SERIES B 727, 729 (2015). For the equivalence between regression-based and randomization-based inference of these effects, see generally Jiannan Lu, *On Randomization-based and Regression-based Inferences for 2^k Factorial Designs*, 112 STAT. & PROBABILITY LETTERS 72 (2016). For a proof of the OLS estimator’s effect on a finite populations’ asymptotic normality, see Jiannan Lu, *Covariate Adjustment in Randomiza-*

Institution	Level	Counterargument	Average Score
Lawyer		No	6.8395
Lawyer		Yes	7.2750
Governmental Agency	National	No	6.3210
Governmental Agency	National	Yes	6.7778
Governmental Agency	Local	No	6.4625
Governmental Agency	Local	Yes	6.5823
Court	National	No	6.4634
Court	National	Yes	6.9877
Court	Local	No	6.6667
Court	Local	Yes	6.8125

Table 4: Average Agreement Score for Conditions in Scenario One

The regression analysis reveals no evidence of judicial organs being more persuasive than administrative ones, or evidence of national entities being more persuasive than local entities. As can be seen from Table 5, the differences in agreement scores between the factors, or combination of factors, are small and quite possibly the result of random variation.¹³⁶ It appears that courts and public security agencies are not appreciably different in their ability to persuade.

tion-based Causal Inference for 2^k Factorial Designs, 119 STAT. & PROBABILITY LETTERS 11, 18 (2016). The standard errors are estimated using the Huber-White Sandwich Estimator.

136. The significance tests rely on the asymptotic normality of the OLS estimator. As a robustness check, we have also performed nonparametric analyses of variance (ANOVA) on aligned, rank-transformed data and obtained similar qualitative results.

	Agreement Score
Constant	6.667*** (0.198)
Administrative	-0.204 (0.280)
National	-0.203 (0.279)
Counterargument	0.146 (0.280)
Administrative: National	0.062 (0.395)
Administrative: Counterargument	-0.026 (0.398)
National: Counterargument	0.378 (0.395)
Administrative: National: Counterargument	-0.041 (0.560)
Observations	645
R ²	0.013
Adjusted R ²	0.003
Note:	* $p < 0.05$ ** $p < 0.01$ *** $p < 0.001$

Table 5: OLS Regression of Agreement Score in Scenario One on Factors, Excluding Controls. Robust Standard Error in Parentheses.

To examine whether courts and agencies are in fact more persuasive than non-judicial or administrative actors, we compare them against the lawyer quoted in the control conditions (Table 6). Relative to the lawyer, courts and public security agencies are able to induce a greater amount of attitudinal change.¹³⁷ Specifically, the baseline model (which does not consider any of the covariates) estimates that attributing the argument against the criminalization of marital rape to a court or an agency, rather than a legal practitioner, reduces the average support for reform by 0.324 and 0.520, respectively, on a nine-point scale. These results are largely

137. As an additional robustness check, we performed the Kruskal-Wallis rank sum test and rejected the null hypothesis of identical means across lawyers, courts, and public security agencies conditions at conventional levels of significance (p -value=0.007127). A follow-on, pairwise Wilcoxon rank sum test that uses the Holm-Bonferroni correction for multiple hypothesis testing yields the same qualitative results, except that the difference in means between the lawyers and the courts no longer attains conventional levels of significance (p -value=0.0915).

undisturbed¹³⁸ even after covariate adjustments for gender and knowledge.¹³⁹ Although greater legal and political knowledge does not appear to vitiate the influence of an institutional endorsement, there is some support for Yang and Tang's finding that "males are less trustful of legal institutions."¹⁴⁰

138. In one specification, the coefficient for the court indicator does not reach conventional levels of significance (p -value=0.1061). However, this specification is unlikely to be a good fit for the data because the knowledge covariate seems to contribute very little to an explanation of the variance in the dependent variable. In any case, it is fairest to say, given the outcomes of the nonparametric tests, that our conclusions as to public security agencies are more robust than our findings as to courts.

139. As might perhaps be expected, male respondents were more likely to oppose the criminalization of marital rape than female respondents, independent of their assignment to any of the treatment or control conditions.

140. Yang & Tang, *supra* note 106, at 426.

	Agreement Score			
Constant	7.056 ^{***}	7.056 ^{***}	7.388 ^{***}	7.381 ^{***}
	(0.138)	(0.158)	(0.170)	(0.188)
Judicial	-0.324 [*]	-0.292	-0.497 ^{**}	-0.548 ^{**}
	(0.169)	(0.191)	(0.210)	(0.230)
Administrative	-0.520 ^{***}	-0.475 ^{**}	-0.565 ^{***}	-0.552 ^{**}
	(0.169)	(0.191)	(0.211)	(0.230)
Sophistication		-0.002		0.040
		(0.329)		(0.439)
Judicial: Sophistication		-0.191		0.527
		(0.418)		(0.599)
Administrative: Sophistication		-0.252		-0.087
		(0.416)		(0.583)
Male			-0.923 ^{***}	-1.006 ^{***}
			(0.283)	(0.332)
Judicial: Male			0.523	0.811 ^{**}
			(0.344)	(0.399)
Administrative: Male			0.201	0.306
			(0.345)	(0.400)
Sophistication: Male				0.252
				(0.658)
Judicial: Sophistication: Male				-1.345
				(0.845)
Administrative: Sophistication: Male				-0.305
				(0.835)
Observations	806	806	806	806
R ²	0.012	0.014	0.045	0.051
Adjusted R ²	0.009	0.007	0.039	0.038
Note:	* $p < 0.05$ ** $p < 0.01$ *** $p < 0.001$			

Table 6: OLS Regression of Agreement Score in Scenario One on Factors and Covariates, Including Controls. Robust Standard Errors in Parentheses.

We repeat the same analyses for the freedom of speech scenario. Table 7 summarizes the averages of the agreement scores for the control and treatment conditions in this second scenario. Table 8 presents an OLS regression to estimate the main and interaction effects between treatment conditions.

Institution	Level	Counterargument	Average Score
State Media		No	5.4735
State Media		Yes	5.0500
Governmental Agency	National	No	5.3086
Governmental Agency	National	Yes	5.6830
Governmental Agency	Local	No	5.3951
Governmental Agency	Local	Yes	5.5732
Court	National	No	5.4198
Court	National	Yes	5.4375
Court	Local	No	5.5000
Court	Local	Yes	5.6296

Table 7: Average Agreement Score for Conditions in Scenario Two

Like in the first scenario, there is no evidence that judicial organs are more persuasive than administrative ones. There is also no evidence that national entities are more persuasive than local ones. Overall, no significant differences in agreement score were detected between any factor—or combination of factors—across the treatment conditions (Table 8).¹⁴¹ The null hypothesis that courts and governmental agencies are similar in their ability to persuade cannot be rejected.

141. As before, we performed nonparametric ANOVA on aligned, rank-transformed data and obtained similar qualitative results.

	Agreement Score
Constant	6.705*** (0.197)
Judicial	-0.372 (0.276)
National	0.171 (0.276)
Counterargument	-0.199 (0.276)
Judicial: National	0.125 (0.388)
National: Counterargument	0.756 (0.388)
National: Counterargument	0.122 (0.389)
Judicial: National: Counterargument	-0.394 (0.547)
Observations	646
R ²	0.012
Adjusted R ²	0.002
Note:	* <i>p</i> <0.05 ** <i>p</i> <0.01 *** <i>p</i> <0.001

Table 8: OLS Regression of Agreement Score in Scenario Two on Factors, Excluding Controls. Robust Standard Errors in Parentheses.

To see if these institutions are in fact more persuasive than non-regulatory actors, we once again compare courts and PPRFT agencies to Xinhua News Agency whose editorial is used in the control conditions. True to our expectations, the former does not have a noticeable edge over the latter in

inducing attitudinal change (Table 9).¹⁴² There are no indications that treatment effects vary by knowledge or gender.

	Agreement Score			
Constant	5.244*** (0.139)	5.271*** (0.155)	5.362*** (0.172)	5.319*** (0.185)
Judicial	0.253 (0.171)	0.262 (0.190)	0.064 (0.213)	0.150 (0.231)
Administrative	0.247 (0.170)	0.193 (0.189)	0.022 (0.214)	0.058 (0.228)
Sophistication		-0.142 (0.353)		0.324 (0.507)
Judicial: Sophistication		-0.046 (0.433)		-0.581 (0.609)
Administrative: Sophistication		0.288 (0.435)		-0.235 (0.695)
Male			-0.344 (0.293)	-0.161 (0.341)
Judicial: Male			0.526 (0.356)	0.331 (0.410)
Administrative: Male			(0.354)	(0.410)
Sophistication: Male				-0.776 (0.723)
Judicial: Sophistication: Male				0.894 (0.884)
Administrative: Sophistication: Male				0.715 (0.924)
Observations	806	806	806	806
R ²	0.003	0.005	0.008	0.010
Adjusted R ²	0.001	-0.002	0.002	-0.003
Note:	* $p < 0.05$	** $p < 0.01$	*** $p < 0.001$	

Table 9: OLS Regression of Agreement Score in Scenario Two on Factors and Covariates, Including Controls. Robust Standard Errors in Parentheses.

142. The Kruskal-Wallis rank sum test is unable to reject the null hypothesis of identical means across lawyers, courts, and PPRFT agencies conditions at conventional levels of significance (p -value=0.3655).

Taking the two experimental scenarios together, it appears that Chinese judicial and administrative institutions can legitimize policy but only if the issues or arguments are non-ideological in nature. Moreover, courts do not seem to be more persuasive than other government institutions. Care must be exercised in generalizing these findings since our subject pool is comprised entirely of university students. Nevertheless, the qualitative conclusions reached here might well extend to the Chinese population despite the unrepresentativeness of the sample. Citizens who are younger and more educated are likely to be more skeptical of governmental institutions.¹⁴³ To the extent that trust moderates the persuasiveness of state institutions, the phenomena documented by the survey experiment should be amplified in the overall population. To the best of our knowledge, there is no theoretical or empirical basis for believing that, compared to the average citizen, university students systemically repose more trust in judicial rather than administrative institutions, or vice versa. It is therefore not unreasonable to extrapolate our findings to the population as a whole—at least until data from a more representative sample comes along.

III. The Future of Judicialization in China

A. The Political Economy of Chinese Institutions

As Benjamin Liebman mused,

Many in the West and in China have looked to China's courts in the hope that they may play a transformative role in the Chinese political system. But the more pertinent question may be what role courts can play within the current system. Can they serve as fair adjudicators of private disputes, and as checks on some forms of official action, without political change? And, if they do, will they legitimize Party rule, or will the development of a more professionalized judiciary inevitably lead to courts that challenge Party authority?¹⁴⁴

Taking the inquiry in this direction requires an empirical assessment of the persuasiveness of courts relative to other state organs. The hold that judicial institutions have on mass opinion will influence the degree of public support courts might expect were they to confront rival institutions.¹⁴⁵ Moreover, the more effective courts are at legitimizing national or party

143. See Dahai Zhao & Wei Hu, *Determinants of Public Trust in Government: Empirical Evidence from Urban China*, 83 INT'L REV. ADMIN. SCIS. 358, 366 tbl.5 (2017) (reporting results from a digit-dialed telephone survey of adult respondents in thirty-four Chinese metropolitan cities); Lianjiang Li, *Political Trust in Rural China*, 30 MOD. CHINA 228, 236 tbl.2 (2004) (reporting results from face-to-face interviews with adult respondents in four counties).

144. Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620, 636 (2007).

145. See Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 129 fig.2 (2001) (elaborating a theory of how constitutional courts build up legitimacy by confining their decisions to the "tolerance interval"—that is, the range of outcomes that are acceptable to the political branches).

directives, the more latitude they are likely to receive from their governmental and political overseers.

The evidence here suggests that despite their recent ascendance, Chinese courts are unlikely to openly defy other state organs, nor are they likely to assert themselves against the ruling party. Though they are sometimes able to induce agreement to controversial policies, they are not the only entities capable of doing so. Administrative bodies can also produce attitudinal change, perhaps to a greater extent than the courts. The party-state might well cultivate a professional judiciary to police the excesses of local governments or to forestall social unrest through the satisfactory, if not always principled, resolution of large-scale disputes.¹⁴⁶ But it does not rely on courts to convince the public of the rightness of its decisions. For matters that do not implicate party doctrine or orthodoxy, non-judicial endorsements seem to be as effective as judicial ones. As for issues that carry ideological freight, state organs, including courts, appear powerless to change minds.

These facts might help explain, among other things, the institutional design of constitutional review in China. As previously mentioned, the Chinese Constitution provides for the NPC and its Standing Committee “to supervise [its] enforcement.”¹⁴⁷ The Standing Committee has, in addition, the authority “to interpret the Constitution.”¹⁴⁸ These provisions have been read to preclude judicial review of the constitutionality of legislative and administrative acts. Indeed, it has long been understood that courts are not permitted to resolve a conflict between the Constitution and ordinary laws, or other official documents, by disregarding the latter.¹⁴⁹ This is a task for the national legislature. Since 2000, constitutional regularity has been assured—at least nominally—through a system of “recording and review.”¹⁵⁰ Under this regime, regulations and interpretations issued by

146. See generally He Xin, *Administrative Law as a Mechanism for Political Control in Contemporary China*, in *BUILDING CONSTITUTIONALISM IN CHINA*, *supra* note 35, at 143. (arguing that political and socioeconomic conditions explain the use or nonuse of administrative law as a mechanism for monitoring and controlling lower-level governments).

147. Zhonghua Renmin Gongheguo Xianfa (1982) (中华人民共和国宪法) (1982) [Constitution of the People's Republic of China (1982)] (promulgated by the Nat'l People's Cong., Dec. 4, 1982, effective Dec. 4, 1982), arts. 62, 67 (China).

148. *Id.*

149. He Haibo, *How Much Progress Can Legislation Bring? The 2014 Amendment of the Administrative Litigation Law of PRC*, 13 U. PA. ASIAN L. REV. 137, 174 (2018) (“It is completely out of the question in China for courts to review the constitutionality of laws.”).

150. The 2000 amendment to the Law on Legislation prescribes substantive and procedural rules regarding constitutional review. In 2004, the Standing Committee of the NPC set up an office responsible for recording and reviewing the constitutionality and legality of statutes and regulations. See generally Xingzheng Fagui, Difangxing Fagui, Zizhi Tiaoli he Danxing Tiaoli, Jingji Tequ Fagui Beian Shencha Gongzuo Chengxu (行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序) [The Procedure of the Work of Record and Review of Administrative Regulations, Local Regulations, Autonomy Rules, and Special Economic Zone Regulations] (promulgated by the Nat'l People's Cong., Oct. 16, 2000, effective Oct. 16, 2000) (China); Qianfan Zhang, *Establishing Judicial Review in China*, in *CONSTITUTIONAL COURTS IN ASIA: A COMPARATIVE*

governmental bodies other than the NPC or its Standing Committee are sent to the Secretariat of the NPC Standing Committee's General Office to be recorded.¹⁵¹ A small number of these documents are subject to active review by the NPC Standing Committee's Legislative Affairs Commission.¹⁵² The vast majority are not given any scrutiny at all unless a concern is brought to the commission's attention.¹⁵³ In theory, any citizen could submit suggestions for review. In practice, "private individuals have never been able to trigger the seemingly well-designed, albeit convoluted, review process and no public institution has ever even bothered to try."¹⁵⁴ The result is the proliferation of unconstitutional rules and a chaotic lack of uniformity in the law. This state of affairs probably spurred President Xi Jinping to announce, at the 19th National People's Congress in October 2017, the imperative to "strengthen oversight to ensure compliance with the Constitution, advance constitutionality review, and safeguard the authority of the Constitution."¹⁵⁵

Now, operating through law may legitimize the party-state by giving it the veneer of procedural regularity. But legalization does not always entail judicialization—that is, "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies."¹⁵⁶ In order to implement President Xi's directive at the

PERSPECTIVE 311, 320–22 (Albert H.Y. Chen & Andrew Harding eds., 2018); Shen Kui, *Administrative "Self-Regulation" and the Rule of Administrative Law in China*, 13 U. PA. ASIAN L. REV. 72, 88–92 (2018) (describing the "filing and check" system for reviewing the constitutionality of administrative regulations and local regulations).

151. See Xingzheng Fagui Difangxing Fagui Zizhi Tiaoli he Danxing Tiaoli Jingji Tequ Fagui Beian Shenchu Gongzuo Chengxu (行政法规、地方性法规、自治条例和单行条例、经济特区法规备案审查工作程序) [Working Procedure of Filing and Review of Administrative Regulations, Local Regulations, Autonomous Regulations and Specific Regulations, and Regulations of Special Economic Zones] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 16, 2000, effective Oct. 16, 2000), art. 5 (China).

152. See Quanguo Renmin Daibiao Dahui Guanyu Xiugai Zhonghua Renmin Gongheguo Lifafa de Jueding (2015) (全国人民代表大会关于修改《中华人民共和国立法法》的决定 (2015)) [National People's Congress on Amending the Law on Legislation of the People's Republic of China (2015)] (promulgated by the Nat'l People's Cong., Mar. 15, 2015, effective Mar. 15, 2015), art. 42 (China).

153. See *id.*

154. Zhang, *supra* note 150, at 321–22.

155. Xinhua, *Full Text of Xi Jinping's Report at 19th CPC National Congress*, CHINA DAILY (Nov. 4, 2017), http://www.chinadaily.com.cn/china/19thcpnationalcongress/2017-11/04/content_34115212.htm [https://perma.cc/JY8N-DQWH]; see also Zhu Jie, *Lun Hexianxing Shenchu de Zhengzhi Jueduan he Zhidu Tuijin - Jiyu Dang de Shijiuda Baogao de Jiedu* (论合宪性审查的政治决断和制度推进—基于党的十九大报告的解读) [The Political Determination and System Promotion of Constitutional Review: Based on the Interpretation of the 19th CCP's National Congress], 12 FAXUE ZAZHI (法学杂志) [LAW SCI. MAG.] 26, 26 (2017).

156. Ran Hirschl, *The Judicialization of Politics*, in THE OXFORD HANDBOOK OF POLITICAL SCIENCE 253, 253 (Robert E. Goodin ed., 2009); see also Albert H.Y. Chen, *Book Review, The Reform and Renewal of China's Constitutional System* (Zhongguo xianzhi zhi weixin' 中国宪制之维新), 16 INT'L J. CONST. L. 728, 729 (2018) ("[A]lthough Xi Jinping's report at the 19th National Congress of the CCP in October 2017 legitimizes the idea of 'constitutional review', there is no suggestion or intention to alter the existing relation-

19th National People's Congress, the Chinese Constitution was amended to reorganize the Law Committee of the NPC into the Constitution and Law Committee.¹⁵⁷ This committee—not the courts—is responsible for ensuring that local legislation does not run afoul of the Constitution. Academics did propose alternatives that contemplated greater judicial participation. A professor at the China Youth Institute of Political Studies, for instance, argued for the establishment of a special SPC tribunal to adjudicate the constitutionality of local legislation. Such a system, she claimed, would strengthen the authority of both the central government and the judiciary.¹⁵⁸ But the political calculus tells against such an idea. For the party-state, the benefits of having the SPC perform constitutional review are meager. The SPC is no more effective than other state organs in inducing policy agreement and quelling social dissent. On the cost side, however, authorizing the SPC to set aside lower laws as inconsistent with higher ones loosens the grip of the NPC on subordinate legislatures. More dangerously, it gives the court the opportunity to elaborate a constitutional jurisprudence that, through accretion, might eventually come to regulate the party-state's exercise of its powers. Therefore, it is not surprising that President Xi never contemplated judicializing constitutional review, though he has advocated conformance to the Constitution. The task of arbitrating between contradictory legal norms remains to this day a legislative, not judicial, prerogative.

B. Public Interest Litigation in China and Its Possibilities

The persuasiveness of Chinese courts also bears on the promise of public interest litigation in achieving social change.¹⁵⁹ As others have observed, many plaintiffs broadcast their grievances in order to marshal

ship between the CCP and the constitutional and legal systems of the state.”); Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306, 389 (2019) (arguing that the trend towards legality augurs an “increasingly professional, independent, and powerful” judiciary); Mark Jia, *China's Constitutional Entrepreneurs*, 64 AM. J. COMPAR. L. 619, 625 (2016).

157. Zhonghua Renmin Gongheguo Xianfa, *supra* note 147, at art. 70; *see also* Fan Jinxue, *Quanguo Renda Xianfa he Falv Weiyuanhui de Gongneng he Shiming* (全国人大宪法和法律委员的功能与使命) [The Function and Mission of the Constitution and Law Committee of the National People's Congress], 4 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [EUCPL J.] 13, 13–21 (2018); Han Dayuan, *Cong Falv Weiyuanhui dao Xianfa he Falv Weiyuanhui: Tizhi yu Gongneng de Zhuanxing* (从法律委员会到宪法和法律委员会：体制与功能的转型) [From the Law Committee to the Constitution and Law Committee: Transformation of System and Function], 19 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [EUCPL J.] 6, 6–12 (2018).

158. *See* Ma Ling, *Woguo Weixian Shencha Jigou de Moshi Xuanze* (我国违宪审查机构的模式选择) [The Choice of Models of China's Constitutional Review Authority], 6 HENAN CAIJING ZHENGFA DAXUE XUEBAO (河南财经政法大学学报) [J. HENAN U. ECON. & L.] 27, 27–31 (2014).

159. *See* Hualing Fu & Richard Cullen, Wei-quan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-Interest Lawyering, 59 CHINA J. 111, 112–16 (2008) (defining the concept of *weiquan* lawyering). We recognize our experimental scenarios addressed judicial interpretations, not judicial opinions. But there is little reason to believe that this distinction makes a difference for persuasion.

the public behind their own causes.¹⁶⁰ But many plaintiffs, especially those bringing claims implicating gender or the environment, also seek to challenge pernicious practices, beliefs, and norms.¹⁶¹ As Titi Liu describes it, “[t]he central motivation of [such] plaintiffs is the struggle to define abusive practices that had previously been tolerated by the Chinese public as both a legal harm and harmful to a collective public interest.”¹⁶² These plaintiffs carry on this struggle by publicizing the particular injury they suffered, thereby demonstrating the systemic injustice being perpetrated on others like them. They also hope that a legal victory will inspire victims to stand up for themselves and help victimizers see the error of their ways.

Employment discrimination is an area where the law’s strictures brush up against prevalent and entrenched stereotypes. Formally, the Women’s Rights Law states that “[w]omen shall enjoy equal rights with men in all aspects of political, economic, cultural, social, and family life” and declares “[e]quality between men and women [to be] a basic [s]tate [p]olicy.”¹⁶³ “The State,” the statute continues, “takes the necessary measures to gradually improve the systems for protecting the rights and interests of women, in order to eliminate all forms of discrimination against women.”¹⁶⁴ This law harkens back “[o]ne of the promises made by the revolutionaries who established the People’s Republic in 1949”¹⁶⁵—mainly, “to raise the status of women. The entry of women into the labor force was deemed especially important because of the belief of Chinese and other Marxists that women’s participation was the key to the liberation of women.”¹⁶⁶ “Women,” according to Mao Zedong, “hold up half the sky” and “[w]hatever men comrades can do, woman comrades can do.”¹⁶⁷ The real-

160. See *id.* at 125.

161. See Liebman, *supra* note 144, at 633.

162. Titi M. Liu, *Transmission of Public Interest Law: A Chinese Case Study*, 13 UCLA J. INT’L L. & FOREIGN AFF. 263, 292 (2008); see also Liebman, *supra* note 144, at 633 (“[A]lthough China’s courts are not fora for adjudicating public rights, they have become fora for airing a range of grievances. Over the past decade, litigants have brought a widening array of what might be thought of as public grievances into the courts—including class actions, public interest lawsuits on such issues as women’s and environmental rights, and constitutional claims.”).

163. China enacted the Women’s Rights Law in April 1992. In 2005, the NPC amended the law, adding the quoted statements to the statute. These statements survive the 2018 amendment. See *Zhonghua Renmin Gongheguo Funv Quanyi Baozhangfa* (2018 *Xiuzheng*) (中华人民共和国妇女权益保障法 (2018修正)) [Law of the People’s Republic of China on the Protection of Women’s Rights and Interests (2018 Amendment)] (promulgated by the Nat’l People’s Cong., Oct. 26, 2018, effective Oct. 26, 2018), art. 2 (China).

164. *Id.*

165. John Bauer et al., *Gender Inequality in Urban China: Education and Employment*, 18 MOD. CHINA 333, 333 (1992).

166. *Id.* (citations omitted).

167. Gail Hershat, *State of the Field: Women in China’s Long Twentieth Century*, 63 J. ASIAN STUD. 991, 1013 (2004) (quoting Mao Zedong, founder and former Chairman of the PRC).

ity, however, falls woefully short of the rhetoric.¹⁶⁸ Even today, women tend to be “perceived as fragile and more deserving to work at home, rather than getting advancement toward managerial positions.”¹⁶⁹ They are paid less than men and tend to be the last to be hired and the first to be fired. Additionally, job advertisements continue to perpetuate stereotypes that cast women as physically and intellectually inferior to men.¹⁷⁰

One example of this inequality can be seen in *Cao Ju v. Juren Academy*,¹⁷¹ where the plaintiff initiated a suit in Beijing’s Haidian District for damages after being rejected for an executive assistant position because of her gender. Cao alleged a violation of her right to obtain employment on an equal basis.¹⁷² The court temporized, establishing the case after a fourteen-month wait.¹⁷³ At trial, the principal of Juren Academy formally apologized for the school’s policy of recruiting only men and offered Cao ¥30,000 in compensation.¹⁷⁴ Cao accepted the offer and her case—dubbed “the first gender discrimination lawsuit in China”—was settled on December 18, 2013.¹⁷⁵ As the affair drew to a close, Juren Academy’s principal reflected on the case’s “great influence in China.”¹⁷⁶ According to him, the controversy highlighted the need to overhaul human resource practices and implement supplementary regulation defining and promoting gender equality in the workplace.¹⁷⁷ For her part, Cao hoped that her case “w[ould] tell other university graduates like [her] to not be afraid and stand up to protect their rights.”¹⁷⁸

Indeed, *Juren Academy* spawned similar litigation attacking gender discrimination in China.¹⁷⁹ *Gao Xiao v. Guangdong Huishijia Economic*

168. See Jamie Burnett, *Women’s Employment Rights in China: Creating Harmony for Women in the Workforce*, 17 IND. J. GLOB. LEGAL STUD. 289, 294–95 (2010).

169. Rangita de Silva de Alwis, *Opportunities and Challenges for Gender-Based Legal Reform in China*, 5 E. ASIA L. REV. 197, 220 (2010).

170. See generally Carol Woodhams et al., *The Persistence of Gender Discrimination in China—Evidence from Recruitment Advertisements*, 20 INT’L J. HUM. RES. MGMT. 2084 (2009).

171. See Caoju Su *Juren Jiaoyu Xingbie Jiuye Qishi An* (曹菊诉巨人教育性别就业歧视案) [*Caoju v. Juren Academy* (2013)].

172. *Id.*

173. *Id.*

174. *Id.*

175. Liu Minghui, *Shouli Jiuye Jihui Xingbie Qishian Zeshe de Lifa Queshi* (首例就业机会性别歧视案折射的立法缺失) [*The Gap of Legislation Reflected in the First Case of Gender Discrimination to Employment*], 122 FUNV YANJIU LUNCONG (妇女研究论丛) [COLLECTION WOMEN’S STUD.] 44, 44–48 (2014).

176. Nvxing Su *Danwei Xingbie Qishian: Shuangfang Hejie Huopei 3 Wanyuan* (女性诉单位性别就业歧视案：双方和解获赔3万元) [*Women Sued a Hiring Company for Gender Discrimination in Employment: The Parties Settled for 30,000 Yuan*], BEIJING CHENBAO (北京晨报) [BEIJING MORNING POST] (Dec. 19, 2013), <http://news.sina.com.cn/s/2013-12-19/040429022586.shtml> [<https://perma.cc/X48G-YHEF>].

177. *See id.*

178. *Id.*

179. For example, inspired by the highly publicized *Juren Academy* case, Huang Rong, a newly college graduate, filed a lawsuit against the New Oriental Cooking School which refused to consider her application for a clerk position based on gender. Over a phone conversation with Huang Rong, the New Oriental Cooking School cited one of the common stereotypes about women in China to explain why its clerk position only welcomes

Development Co. is illustrative.¹⁸⁰ Plaintiff Gao applied to be a trainee cook at defendant's restaurant and was told that the opening had been filled.¹⁸¹ As she later discovered, that statement was false: the position was subsequently re-advertised as being for "male applicants only."¹⁸² The restaurant then explained that the job was more suited for men because it was physically demanding.¹⁸³ Dissatisfied, Gao sued the restaurant's owner in Guangdong's Haizhu District, demanding a formal apology and ¥40,800 in damages.¹⁸⁴ Though the court hesitated to hear the case, it eventually held that the restaurant's hiring policies were unlawful and awarded Gao ¥2,000 for the mental distress she suffered.¹⁸⁵ On appeal, the Guangdong Intermediate People's Court denied Gao's request for higher damages.¹⁸⁶ It did, however, order the defendant to publish an apology in a local newspaper.¹⁸⁷ In an interview at the conclusion of her lawsuit, Gao said "[she] was hoping for a legal breakthrough, to send the message to everyone, to women, that there is such a thing as gender discrimination in today's society. Recruitment should be done on the basis of ability, not gender."¹⁸⁸

male applicants, "women are not suited to travel or they are too weak to carry a suitcase." Huang Rong Su Hangzhou Xindongfang Pengren Zhiye Jineng Peixun Xuexiao (黄蓉诉杭州新东方烹饪职业技能培训学校) [Huang Rong v. New Oriental Cooking School (2014)]. Although Huang Rong told the recruiter that she did not mind traveling and was physically strong, her application was still rejected. The court in Zhejiang Province found the defendant had violated Huang Rong's right to equal employment and had committed employment discrimination by restricting job applications to men only and thus ordered the defendant to compensate Huang Rong with ¥2,000 for the mental distress she incurred. This is the first judgment awarding compensation for gender discrimination in employment since China adopted the Law on the Protection of Women's Rights and Interests of the People's Republic of China in 1992. See *id.*; see also *Plaintiff Obtains 30,000 Yuan in China's First Gender Discrimination Lawsuit*, ZHONGGUO LAOGONG TONGXU (CHINA LAB. BULL.) (Jan. 9, 2014), <https://clb.org.hk/content/plaintiff-obtains-30000-yuan-china%E2%80%99s-first-gender-discrimination-lawsuit> [<https://perma.cc/W9ZB-BGPS>].

180. See Gaoxiao Su Guangdong Huishijia Jingji Fazhan Youxian Gongsi (高晓诉广东惠食佳经济发展有限公司) [Gao Xiao v. Guangdong Huishijia Economic Development Co. (2014)] [hereinafter *Guangdong Hushijia Economic Development Co.*]; see also Huang Yizhi, *Tuokuan Xingbie Jiuye Qishi Anjian de Sifa Jiuji: Cong Guangzhou Huishijia Xingbie Jiuye Qishian Tanqi*

(拓宽性别就业歧视案件的司法救济——从广州惠食佳性别就业歧视案谈起) [*Broaden the Judicial Remedy of Gender Discrimination to Employment Cases: Discussion from Guangdong Huishijia Economic Development Co. Case Involving Employment Discrimination*], FANQISHI PINGLUN (反歧视评论) [ANTI-DISCRIMINATION L. REV.] 138, 139–54 (2017).

181. See *Guangdong Hushijia Economic Development Co.*, *supra* note 180.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Ding Wenqi, *Guangzhou Jiuye Xingbie Qishi Diyian Fayuan Leling Qiye Daoqian* (广州就业性别歧视第一案 法院勒令企业道歉) [*The First Case on Gender Discrimination in the Workforce in Guangdong: The Court Orders the Company to Apologize*], ZIYOU YAZHOU DIANTAI PUTONGHUA (自由亚洲电台普通话) [RADIO FREE ASIA] (Mar. 31, 2017), <https://www.rfa.org/mandarin/yataibaodao/renquanfazhi/ml2-03312017103943.html> [<https://perma.cc/7GGR-AAJH>].

Plaintiffs in *Juren Academy* and *Guangdong Hushijia Economic Development Co.* sought more than just compensation; they also sought to deploy the law—in ways tolerated if not encouraged by the party-state—to improve the condition of women.¹⁸⁹ Such plaintiffs hope, through litigation, to broadcast the plight of others like themselves and, more ambitiously, to reform traditional values, attitudes, and beliefs. The empirical data presented here suggests that such litigation may produce the desired impression on the populace. This conclusion depends, of course, on people hearing about judicial decisions. Because cases revolve around personal stories, they can be more concrete and palpable than abstract statements of law. Lawsuits, therefore, have the potential to captivate public interest. Insofar as they do, they can be a promising medium for social change.

Conclusion

This Article presents evidence that administrative bodies in China are at least as persuasive as the courts and that both types of entities can occasionally be more effective than other actors in producing attitudinal change. The generality of these conclusions has to be qualified by the narrow range of topics addressed in the two experimental scenarios and the unrepresentativeness of student respondents. Nevertheless, the results of the survey experiment are broadly consistent with the literature on trust in Chinese institutions¹⁹⁰ and echo research demonstrating that “persuasive powers are not the exclusive preserve of courts.”¹⁹¹ Though scant, the accumulated evidence on the persuasiveness of judicial institutions in authoritarian states indicates that courts can sometimes sway public opinion. However, they are manifestly not the only institutions capable of doing so, casting doubt on the thesis that courts are unique in their capacity to legitimize policy.

Our findings also imply that the prevalence of judicial policymaking in China does not lie in the ability of courts to persuade. The quasi-legislative function of courts may, instead, be attributable to their technical and informational superiority over legislatures and the flexibility of judicial, as opposed to legislative, policymaking.¹⁹² The pace of social, economic, and technological change thus contributes to the “attractiveness of [courts] as a flexible and fast parallel lawmaker.”¹⁹³ For these reasons, the judiciary will remain important to the articulation and implementation of govern-

189. *Id.*

190. Although, as remarked previously, it is not obvious that trust, as operationalized by these surveys, necessarily translates into persuasiveness.

191. Baird & Javeline, *supra* note 94, at 439.

192. See Ahl, *Judicialization in Authoritarian Regimes*, *supra* note 1, at 276; see also Ling Li, *Political-Legal Order and the Curious Double Character of China's Courts*, 6 *ASIAN J.L. & Soc'y* 19, 28 (2019) (“Since judicial policy[making] is not bound by the deliberation, public participation, and voting procedures that are mandatory for the legislative process, judicial policies are issued with more flexibility.”).

193. Ahl, *Judicialization in Authoritarian Regimes*, *supra* note 1, at 276.

mental policy. But one should be slow to infer from China's turn towards legality¹⁹⁴ that courts might, in short order, acquire the de facto or de jure power to subject the party-state itself to the law's demands. The judicial influence on public opinion is limited, and courts lack the institutional strength to challenge, much less defy, more powerful state organs. We should therefore expect courts in China to proceed as they have always done: cautiously, clandestinely, and incrementally.¹⁹⁵

194. See Zhang & Ginsburg, *supra* note 156, at 389.

195. See Ahl, *Retaining Judicial Professionalism*, *supra* note 1, at 132; Ronald C. Keith & Zhiqiu Lin, *Judicial Interpretation of China's Supreme People's Court as "Secondary Law" with Special Reference to Criminal Law*, 23 CHINA INFO. 223, 247 (2009).