THE ELABORATE PAPER TIGER: ENVIRONMENTAL ENFORCEMENT AND THE RULE OF LAW IN CHINA

ERIN RYAN†

ABSTRACT

In recent decades, the eyes of the world have been trained on China's remarkable feats of rapid economic development. Yet the enormous environmental toll associated with China's growth has also drawn global attention, as Chinese air and water quality plummet to historic lows. Epic levels of environmental degradation have fueled a growing domestic consensus that China must do better at reconciling these competing goals. This article reviews the contemporary challenges facing the second wave of environmental governance in China (with an addendum addressing important environmental law amendments enacted as it went to press).

In the first wave of environmental governance, the government promulgated a series of environmental statutes that seem comprehensive—at least on paper. Nevertheless, it has become an article of faith among observers that they are superficially designed and too often unrealized for lack of meaningful implementation. Many environmental law and policy directives are crafted in aspirational form, and even those that do contain enforceable provisions are too often obstructed, for reasons both political and economic. When political patronage and economic interests take precedence over the faithful implementation of these laws, environmental protection suffers alongside other fundamental goals of good governance.

For Chinese environmental law to succeed at its increasingly urgent objectives, it must become more than an elaborate paper tiger, moving from the present era of exhortation toward a more mature era of consistent implementation and enforcement. However change unfolds, China will have to wrestle with three basic challenges that continue to obstruct

---

Copyright © 2014 Erin Ryan.

† Erin Ryan, Associate Professor, Lewis & Clark Law School; J.D., Harvard Law School, M.A., Wesleyan University, B.A. Harvard University, U.S.-China Fulbright Lecturer and Researcher, 2011–12. I am grateful to Professors Dan Guttman, Bob Percival, Alex Wang, Zhao Huiyu, Jason Czarnezki, and Zhang Shijun for their generous comments and to Laura Shoaps, Sarah Blankenship, and Yuan Ye for their research assistance. Due to confidentiality concerns, the identities of Chinese interviewees referenced in this article have been kept anonymous.

enforcement efforts: (1) effective pollution source management, (2) faithful local implementation of national environmental policies, and (3) reliable judicial access by the victims of environmental harm. This article considers these three distinct hurdles and their implications for the relationship between environmental governance and broader rule-of-law challenges in China.

Part I reviews environmental enforcement lapses against polluters and the resulting groundswell of public frustration over health and safety. Part II explores the frequently broken link in the enforcement chain that occurs between central policymaking and local implementation. Part III reviews routine failures by the judicial system to provide redress for the victims of environmental harm and deterrence against future wrongdoing. Part IV considers environmental enforcement problems as a subcategory of more generalized failures of the rule of law in China. Part V concludes with a modest but concrete suggestion for advancing rule-of-law objectives through judicial reform that would materially benefit environmental governance. The proposal would facilitate greater judicial access and accountability, without imposing a fully Westernized model or triggering the massive political upheaval that most Chinese fear.

TABLE OF CONTENTS

Introduction…….. 185
I. Weak Enforcement Against Violators ……... 192
A. The Crisis of Public Confidence in Environmental Governance……..……..…. 193
B. Limited Regulatory Capacity…….. 196
C. The Influence of Political Patronage…….. 198
D. Economic Development Conflicts…….……. 201
II. Weak Local Enforcement of Central Environmental Directives…203
A. Conflicts Between Law and Plan ……..…….…….. 204
B. Conflicts Between Local and National Priorities…..……. 207
C. Central-Provincial Relations and Chinese "Environmental Federalism"…….…… 208
D. Mechanics, Mixed Messages, and Nuance……. 211
III. Weak Judicial Enforcement …….. 213
A. Limited Public Interest Standing ……..…….…….. 215
B. Discretion to Decline Environmental Cases……216
C. Public Accountability and Limited Access to Court Proceedings ……..…….……219
D. The Wider Advantages of Judicial Enforcement…… 220
IV. Environmental Law and the Rule of Law in China …….. 221
A. "Rule of Law" vs. "Rule by Law" …….…….... 222
B. The Political Puzzle for Reform…….…… 225
V. A Modest Proposal for Incremental Change ……... 227
A. Step One: Guaranteed Judicial Access…….….. 228
B. Step Two: Unfettered Public Viewing……...…… 229
C. The Mechanics of Transparency and Accountability……. 232
D. Political Feasibility……..……... 234
Conclusion……..……. 236
Addendum……..…….…… 237

INTRODUCTION

In recent decades, the eyes of the world have been trained on China's remarkable feats of rapid economic development. Yet the enormous environmental toll associated with China's growth has also drawn global attention, as Chinese air and water quality plummet to historic lows.[1] Epic

1. *See, e.g.*, Tseming Yang, Introduction, *Snapshot of the State of China's Environmental Regulatory System,* 8 VT. J. ENVTL. L. 145, 145 (2007) ("[O]nly in recent years has the serious impact of pollution and environmental degradation on China itself become visible to the rest of the world. Nowadays, China is oftentimes pointed to as the nation with the world's worst urban air pollution

levels of environmental degradation have fueled a growing domestic consensus that China must do better at reconciling these competing goals.[2] Environmental consciousness is gathering force among the public, reflecting both despair over current conditions and hope for a better future. Still, government leaders struggling to correct course have confronted sobering obstacles to environmental reform, many related to broader rule-of-law challenges for Chinese governance more generally. With special attention to these issues, this article reviews the contemporary challenges facing the second wave of environmental governance in China.

In the first wave of environmental governance, the government promulgated a series of environmental statutes that seem comprehensive—at least on paper.[3] In 1989, China enacted the basic Environmental Protection Law,[4] which authorizes the establishment of local and national environmental standards,[5] requires permits for the discharge of pollutants and ongoing environmental monitoring and impact assessment,[6] creates civil and criminal penalties for violations,[7] and generally adopts the "polluter pays" principle.[8] The Environmental Protection Law is now

---

problems, including the highest levels of sulfur dioxide emissions, severe water pollution issues, and serious problems of agricultural soil contamination.").

2. *See, e.g.*, Jennifer Duggan, *China's Environmental Problems are Grim, Admits Ministry Report*, GUARDIAN (June 7, 2013, 7:19 AM), http://www.theguardian.com/environment/chinas-choice/2013/jun/07/chinas-environmental-problems-grim-ministry-report (noting that Chinese officials are balancing environmental protection with economic growth); Wang Yiqing, *Steps Forward, and a Step Back*, CHINA DAILY (Aug. 16, 2013, 8:16 AM), http://www.chinadaily.com.cn/cndy/2013-08/16/content_16898274.htm (noting the sharp deterioration of China's environment over the past two decades).

3. *See generally* William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125 (1997) (describing and critiquing China's early efforts in environmental law); Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 184–93, 164–69 (2007) (providing a full review of the progress of environmental law in China and identifying failed enforcement as the principle systemic flaw). *See also* Guizhen He, Lei Zhang, Arthur P. Mol, Yonglong Lu & Jiango Liu, *Revising China's Environmental Law*, SCIENCE, July 12, 2013, at 133 (critiquing China's environmental legal system for failures in implementation and enforcement).

4. Environmental Protection Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) 1987–1989 P.R.C. LAWS 337, 337 (China).

5. *Id.* ch.II ("Supervision and Management of the Environment").

6. *Id.* ch. II, arts. 11 & 14 (monitoring and inspections), 13 (impact assessment), & 10 (discharged pollutants).

7. *Id.* ch. V ("Legal Liability"), arts. 35, 38, 39, 43, & 45.

8. *Id.* ch. IV ("Prevention and Control of Environmental Pollution and Other Public Hazards"), arts. 28 & 29; *Id.* ch. V ("Legal Liability"), arts. 41 & 44 (describing the "polluter pays" principle as making the emitter of pollution responsible for remediating any harms resulting from that pollution); *see generally* Grantham Res. Inst. & Duncan Clark, *What is the 'Polluter Pays' Principle?,* GUARDIAN (July 2, 2012, 8:34 AM), http://www.theguardian.com/environment/2012/jul/02/polluter-pays-climate-change (defining the "polluter pays" principle as "the commonly accepted practice that those who

flanked by a series of more specific environmental statutes,[9] including laws that address air pollution,[10] water pollution,[11] solid waste,[12] soil and water conservation,[13] urban planning,[14] the protection of various natural resources,[15] and the Circular (or "'Recycling"') Economy Law, which exhorts all sectors of society to adopt sustainable practices such as recycling, conservation, and the restricted use of hazardous materials in production processes.[16] China has also embraced important environmental goals in the two most recent Five Year Plans, the comprehensive statements of public policy than can assume even greater importance than statutory laws.[17]

Despite this elaborate mosaic of environmental regulation, the Chinese are enduring increasingly daunting environmental and public health challenges. China recorded some of the worst air quality days in history,[18]

---

produce pollution should bear the costs of managing it to prevent damage to human health or the environment").

9. *See generally Environment*, CHINA.ORG, http://www.china.org.cn/english/environment/34152.htm (last visited Dec. 18, 2013) (listing all of China's environmental laws).

10. Da Qi Wu Ran Fang Zhi Fa [Law on Prevention and Control of Atmospheric Pollution] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 15, 1987, revised Aug. 29, 1995 and Apr. 29, 2000, effective Sept. 1, 2000) 2000 Standing Comm. Nat'l People's Cong. Gaz. 3 (P.R.C.).

11. Shui Wu Ran Fang Zhi Fa [Law on Prevention and Control of Water Pollution] (promulgated by the Standing Comm. Nat'l People's Cong., May 11, 1984, revised May 15, 1996 and Feb. 28, 2008, effective June 1, 2008) 2008 Standing Comm. Nat'l People's Cong. Gaz. 2(268) (P.R.C.).

12. Gu Ti Fei Wu Wu Ran Huan Jing Fang Zhi Fa [Law on Prevention and Control of Solid Waste Pollution] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 30, 1995, revised Dec. 29, 2004, effective Apr. 1, 2005) 2005 Standing Comm. Nat'l People's Cong. Gaz. 1(245) (P.R.C.).

13. Law of the People's Republic of China on Water and Soil Conservation (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 1991, effective June 29, 1991) 1990–1992 P.R.C. LAWS 279, 279.

14. City Planning Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Apr. 1, 1990) 1987–1989 P.R.C. LAWS 349, 349 (China).

15. Specific laws have also been enacted to regulate forests, grasslands, coastal resources, agriculture, and others. English translations are available at CHINA.ORG, *supra* note 9.

16. Zhong Hua Ren Min Gong He Guo Xun Huan Jing Ji Cu Jin Fa [The Circular Economy Promotion Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2008, effective Jan. 1, 2009), *translated in Circular Economy Promotion Law*, LAW INFO CHINA, http://www.amcham-shanghai.org/NR/rdonlyres/4447E575-58FD-4D8E-BB0F-65B920770D F7/7987/CircularEconomyLawEnglish.pdf (last visited Dec. 20, 2013). *See generally* UNITED NATIONS ENVTL. PROGRAMME, CIRCULAR ECONOMY IN CHINA: AN ALTERNATIVE MODEL FOR ECONOMIC DEVELOPMENT (2006), *available at* http://www.unep.org/resourceefficiency/Portals/24147/scp/nap/circular/pdf/prodev-summary.pdf; Charlie McElwee, *China Adopts Circular Economy Law*, CHINA ENVTL. L. BLOG (Aug. 30, 2008), http://www.chinaenvironmentallaw.com/2008/08/30/china-adopts-circular-economy-law/.

17. *See infra* notes 100–106 and accompanying text (discussing the role of the Five Year Plans and other non-statutory sources in Chinese governance) *and* notes 112–114 and accompanying text (discussing new environmental awareness evident in the Eleventh and Twelfth Five Year Plans).

18. *See, e.g.*, Louisa Lim, *Beijing's 'Airpocalypse' Spurs Pollution Controls, Public Pressure*,

culminating in the so-called "Airpocalypse" of January 2013,[19] when the air quality index reached a record high of 755—thirty times higher than the safety levels established by the World Health Organization. Immersed in air so densely polluted that aircraft were grounded and public transportation halted for lack of visibility, thousands of Beijing children were hospitalized for respiratory issues.[20] Less than two months later, 16,000 dead pigs from factory farms were discovered decaying in the Huangpu River that provides drinking water for the City of Shanghai.[21] Chinese parents remain fearful of domestically produced milk products after a 2008 scandal in which chemical contaminants sickened hundreds of thousands of children and killed several infants.[22] The increasing frequency of news items like these demonstrate that while China's environmental laws may look good on paper, they have proven little more than a paper tiger when it comes to the lived experience of its people.

What explains the disjuncture between China's seemingly ambitious environmental governance and the reality of environmental experience in China? The issues are complex, and outside observers must be cautious with oversimplifying analyses. Part of the problem involves the ongoing

---

NPR MORNING EDITION (Jan. 14, 2013, 4:00 AM), http://www.npr.org/2013/01/14/169305324/beijings-air-quality-reaches-hazardous-levels.

19. *Id.*

20. *Cf.* Jonathan Kaiman, *Chinese Struggle Through 'Airpocalypse' Smog*, GUARDIAN (Feb. 16, 2013, 2:47 PM), http://www.theguardian.com/world/2013/feb/16/chinese-struggle-through-airpocalypse-smog (reporting on one hospital in Beijing that treated 900 children for respiratory issues that day). Air quality crises have continued to seize northern China since then, including the emergency measures required in Harbin in October 2013, which included school closures, aircraft grounding, bus suspensions, and police interventions to prevent further pollution from car tailpipes and farmers burning cornstalks left from the autumn harvest. *See* Edward Wong, *Response to a City's Smog Points to a Change in Chinese Attitude*, N.Y. TIMES, Oct. 25, 2013, at A12.

21. Nicola Davison, *Rivers of Blood: The Dead Pigs Rotting in China's Water Supply*, GUARDIAN (Mar. 29, 2013, 12:09 PM), http://www.theguardian.com/world/2013/mar/29/dead-pigs-china-water-supply.

22. In the so-called "Milk Scandal" of 2008, producers laced milk powder with a chemical that boosts its apparent protein content but causes kidney damage, especially in the young. Peter Foster, *Top Ten Chinese Food Scandals*, TELEGRAPH (Apr. 27, 2011, 11:00 AM), http://www.telegraph.co.uk/news/worldnews/asia/china/8476080/Top-10-Chinese-Food-Scandals.html (noting that six babies died and 300,000 others were sickened during the milk scandal, and reporting on other food-safety related scandals in China); Alfred Wilhelm Meier, *Baby Milk 'Traffickers' Supply China*, CHINA DAILY MAIL (Apr. 13, 2013), http://chinadailymail.com/2013/04/13/baby-milk-traffickers-supply-china/ (describing the milk scandal and its aftermath in detail). China is currently cracking down on the ferociously profitable trafficking of imported baby formula, after demand among Chinese consumers became so intense that it caused shortages in Europe and Australia. *See* Meier, *supra* ("Blamed for empty shop shelves from Europe to Australia, networks of baby formula traffickers are shipping milk powder to Chinese parents fearful of local products, and working ever harder to meet demand."). *See also* Jason Czarnezki, Yanmei Lin & Cameron Field, *Global Environmental Law: Food Safety in China*, GEORGETOWN INT'L ENVT. L. REV. (forthcoming 2013) (describing food safety issues more generally).

cultural shifts required to make environmental regulation effective and sustainable practices the norm—a shift that began earlier in the West, but with which Western nations like the United States are also still struggling.[23] Traditions of environmental stewardship are resurfacing in China, but it is still commonplace to offload private waste into public commons.[24] The Circular Economy Law and other sustainability initiatives were designed to seed greater cultural appreciation for environmental values, from which more faithful environmental compliance will one day flow.[25] Legal and cultural norms form a recursive dialectic in which each exerts force on the other, but many public attitudes have yet to catch up with the normative premises of China's environmental laws.

Nevertheless, other parts of the problem are simpler to articulate. While cognizant of the philosophical dimension, this article focuses on those aspects of the disjuncture that have less to do with philosophy and more to do with action—or more precisely, the regrettable lack thereof when it comes to environmental enforcement.

China's environmental law and policy targets seem ambitious on the surface, but it has become an article of faith among observers that they are superficially designed and too often unrealized for lack of meaningful implementation.[26] The Circular Economy Law, for example, is largely

---

23. *See* Erin Ryan, *China Environmental Experiences #6: Environmental Philosophy and Human Relationships with Nature*, ENVTL. L. PROFS BLOG (Sept. 12, 2012), http://lawprofessors.typepad.com/environmental_law/2012/09/china-environmental-experiences-6-environmental-philosophy-and-human-relationships-with-nature.html; Erin Ryan, *China Environmental Experiences #7: Environmental Philosophy - Conservation, Stewardship, and Scarcity*, ENVTL. L. PROFS BLOG (Nov. 8, 2012), http://lawprofessors.typepad.com/environmental_law/2012/11/china-environmental-experiences-7-environmental-philosophy-conservation-stewardship-and-scarcity.html; Erin Ryan, *China Environmental Experiences #8: Environmental Protection as an Act of Cultural Change,* ENVTL. L. PROFS BLOG (Dec. 18, 2012), http://lawprofessors.typepad.com/environmental_law/2012/12/china-environmental-experiences-8-environmental-protection-as-an-act-of-cultural-change.html (reflecting on the different cultural foundations for environmental governance in the East and West); Erin Ryan, *Breathing Air with Heft: Environmental Regulation and Public Health in Urban China* (forthcoming 2014) (same). *See generally* Joseph W. Dellapenna, *A Few Words on Law and the Environment in China*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 367 (2005) (discussing the cultural roots of environmental enforcement issues in China).

24. *See* Erin Ryan, *China Environmental Experiences #7: Environmental Philosophy – Conservation, Stewardship, and Scarcity*, *supra* note 23 (discussing differences in Eastern and Western traditions of environmental stewardship).

25. In support of these efforts, official signs have been posted in prominent public places to remind the public that "Environmental Protection is Everyone's Responsibility." *See id* (photo of Sign in City of Qingdao, Shandong Province). However, some environmental critics are skeptical of the government's motive in posting such signs, suggesting that they are intended more to court favor with global audiences than to effect a genuine change in domestic attitudes. Oral communications with author by Chinese acquaintances, September 2011 (names withheld for their protection).

26. *See, e.g.*, Wang Canfra, *supra* note 3, at 159 ("The primary problem with Chinese environmental law is enforcement."); Alex L. Wang, *The Role of Law in Environmental Protection in*

exhortatory and contains few enforceable provisions.[27] The Energy Conservation Law, which has yet to yield satisfying results, has also been critiqued as more of a policy statement than an operational legal device.[28] The Solid Waste Pollution Law adopted in 1995 still lacked implementing regulations twelve years later.[29] Meanwhile, officials responsible for implementing the Five Year Plans have routinely ignored environmental targets, although new efforts to hold government officials accountable to these targets are a positive step.[30]

Even environmental laws that do contain enforceable provisions are too often ignored, for both political and economic reasons.[31] Sometimes enforcement failures reflect larger rule-of-law problems in China, such as the corruption and political patronage that enables some enforcement targets to evade compliance through financial or political ties to powerful officials. Other enforcement failures reflect the math of the marketplace, as government officials prioritize economic development over environmental externalities.[32] In China, as elsewhere, regulations that target activity seen

---

China: Recent Developments, 8 VT. J. ENVTL. L. 195, 202–03 (observing that "[i]t is now generally accepted that China's environmental laws are relatively complete and that enforcement is the real problem," while arguing that there still remains room for substantive improvement in these laws); Christine J. Lee, Comment, *Pollute First, Control Later No More: Combating Environmental Degradation in China Through an Approach Based in Public Interest Litigation and Public Participation*, 17 PAC. RIM L. & POL'Y J. 795, 799–809 (2008) (observing that China's environmental laws are comprehensive but implementation and enforcement is lacking).

27. Zhong Hua Ren Min Gong He Guo Xun Huan Jing Ji Cu Jin Fa [The Circular Economy Promotion Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2008, effective Jan. 1, 2009), *translated in Circular Economy Promotion Law*, LAW INFO CHINA, http://www.amcham-shanghai.org/NR/rdonlyres/4447E575-58FD-4D8E-BB0F-65B920770D F7/7987/CircularEconomyLawEnglish.pdf (last visited Dec. 20, 2013) (setting forth sustainable practices that the state will exhort private actors to undertake). *See also* Alford & Shen, *supra* note 3, at 134–35 (critiquing Chinese environmental law for failing to match exhortation with enforceable mandates).

28. Wang Mingyuin, *Issues Related to the Implementation of China's Energy Law,* 8 VT. J. ENVTL. L. 225, 231 (2007) ("Generally speaking, the Energy Conservation Law is only a policy statement and a policy framework law; it is hardly operative.").

29. *See* Wang Canfra, *supra* note 3, at 171.

30. Alex L. Wang, *The Search for Sustainable Legitimacy: Environmental Law and Bureaucracy in China*, 37 HARV. ENVTL. L. REV. 365, 368 (2013) (describing efforts following the Eleventh Five Year Plan to modify government officials' performance assessments to incentivize better environmental governance).

31. *See* He et al., *supra* note 3, at 133; Wang Canfra, *supra* note 3, at 169; Lee, *supra* note 26, at 809 (blaming China's loose enforcement on environmental laws on the decentralized structure of enforcement of environmental laws and the prioritization of economic growth over environmental protection).

32. *See, e.g.*, Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extreme*, N.Y. TIMES, Aug. 26, 2007, at A1 (describing the political and economic obstacles to greater environmental protection in China).

as important for economic growth continue to face stiff opposition.[33] But when political patronage and economic interests take precedence over the faithful implementation of these laws, environmental protection suffers alongside other fundamental goals of good governance.

At the end of the day, the task at hand is clear. For Chinese environmental law to succeed at its increasingly urgent objectives, it must become more than an elaborate paper tiger. In the second wave of environmental governance, leadership at all levels must reckon more effectively with the costs of unfettered development. Serious changes in the culture of regulatory governance will be required, in which officials are rewarded not only for their contributions toward planned economic growth, but also for verifiable accomplishments in safeguarding environmental values.[34] Most of all, environmental law must move from the present era of exhortation toward a more mature era of consistent implementation and enforcement.

There are many possible starting points for environmental reform, and Chinese environmental leaders have proposed ambitious plans to begin the process.[35] Yet however change unfolds, China will have to wrestle with three basic challenges that continue to obstruct enforcement efforts: (1) effective pollution source management, (2) faithful local implementation of national environmental policies, and (3) reliable judicial access by the victims of environmental harm. This article considers these three distinct hurdles and their implications for the relationship between environmental governance and broader rule-of-law challenges in China.

---

33. *Id.* ("For the Communist Party, the political calculus is daunting. Reining in economic growth to alleviate pollution may seem logical, but the country's authoritarian system is addicted to fast growth. Delivering prosperity placates the public, provides spoils for well-connected officials and forestalls demands for political change. A major slowdown could incite social unrest, alienate business interests and threaten the party's rule.").

34. *See* Wang Alex L., *supra* note 30, at 368 (describing the adoption of cadre evaluation for environmental targets).

35. For example, Wang Canfa, a well-known professor at China University of Political Science and Law and Director of the Center for Legal Assistance to Pollution Victims, suggests that "[i]n order to overcome these current deficiencies, Chinese authorities should: establish an Environmental Supervision Bureau within SEPA [China's central environmental protection agency] responsible for 'spot' law enforcement; transform the environmental protection agency into smaller, detached entities; reform current assessment methods of local governmental compliance and achievement; replace the traditional Gross Domestic Product (GDP) analysis with a Green GDP; reform current judicial management mechanisms; free courts from the influence of local governments; establish environmental public interest legislation; and create a successful procedure for enhancing public participation in Chinese environmental protection." Wang Canfra, *supra* note 3, at 160. *See also* Robert V. Percival & Zhao Huiyu, *The Role of Civil Society in Environmental Governance in the United States and China*, 24 DUKE ENVTL. L. & POL'Y F. 140 (cautioning against importing the American model of environmental governance wholesale into China).

Part I reviews environmental enforcement lapses against polluters and the resulting groundswell of public frustration over health and safety. Part II explores the frequently broken link in the enforcement chain that occurs between central policymaking and local implementation. Part III reviews routine failures by the judicial system to provide redress for the victims of environmental harm and deterrence against future wrongdoing. Part IV considers environmental enforcement problems as a subcategory of more generalized failures of the rule of law in China. Part V concludes with a modest but concrete suggestion for advancing rule-of-law objectives through judicial reform that would materially benefit environmental governance. The proposal would facilitate the development of greater judicial access and accountability, without imposing a fully Westernized model or triggering the massive political upheaval that most Chinese fear.

I. WEAK ENFORCEMENT AGAINST VIOLATORS

The most obvious challenge for Chinese environmental governance is that its laws, rules, and policies[36] are of limited value in protecting the public from harm if their operative provisions are not regularly and credibly enforced against polluters. Accurate statistics about environmental enforcement are elusive, but anecdotal reports of implementation failures are widespread.[37] Law Professor Wang Canfa, an internationally known Chinese environmental activist, summarizes the problem this way:

36. As discussed further in Part II, Chinese environmental governance flows from a web of statutes, rules, public policy plans, leadership statements, and other sources of sovereign authority. *See infra* notes 100–106 and accompanying text. For ease, I refer to all of these collectively as "law" unless otherwise specified.

37. *See, e.g.*, Wang Canfra, *supra* note 3, at 181; Li Zhiping, *The Challenges of China's Discharge Permit System and Effective Solutions*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 375, 379–82 (2005) (discussing failures of the pollutant discharge permit system including a low implementation rate, distorted implementation, and a lack of determinability, stability, continuity, and authority). Professor Li attributes these problems to a lack of legislative support, the agency's unwillingness and inability to enforce, problems of economic analysis, and defects in the permitting procedure. *Id. But see* Dellapenna, *supra* note 23, at 367 (suggesting that Li's proposed solutions may be difficult to implement for cultural reasons). *See also China and the World Discuss the Environment,* CHINA DIALOGUE BLOG, https://www.chinadialogue.net/ (providing a forum for reporting on specific environmental problems in China).

> Chinese environmental laws and regulations are abundant, but suffer from a lack of proper adherence and enforcement. This deficiency remains prevalent because: legislative objectives remain unachieved; enforcement is superficial; excessive time exists between noncompliance and enforcement; available punishment for noncompliance is inadequate; injured parties are not properly compensated; and some environmental crimes receive administrative instead of criminal punishments.[38]

Environmental concerns have long taken a backseat to economic development priorities, an understandable accommodation as the new nation struggled to lift millions of people from abject poverty in the early days of economic reform.[39] Nevertheless, the growing Chinese middle class is now questioning this calculus.[40] Enormous public frustration has been brewing over the government's ongoing tolerance of profitable but toxic production methods at the expense of public health.[41]

This Part reviews the unfolding crisis of public confidence in the enforcement of environmental laws against polluters, together with the reasons enforcement efforts so often fall short.

A. The Crisis of Public Confidence in Environmental Governance

A recent wave of mass environmental protests underscores deep public anxiety over the government's commitment to environmental protection, notwithstanding the aspirational promises of the nation's environmental laws.[42] A 2011 study by researchers at Nankai University in North China reported that "almost 90,000 such 'mass incidents' of riots, protests, mass petitions and other acts of unrest" took place in 2009 alone, many reflecting public alarm about the adverse health consequences of pollution.[43] New research indicates that environmental protests grew in

---

38. Wang Canfra, *supra* note 3, at 159.

39. *See, e.g.*, Yang, *supra* note 1, at 146 (attributing traditional preference of economic development over environmental protection to social development and poverty alleviation).

40. *Cf.* Wong, *supra* note 20 ("Awareness of various kinds of pollution—air, water and soil—has risen quickly this year, especially among middle-class urbanites.").

41. *See* Jennifer Duggan, *Kunming Pollution Protest is Tip of Rising Chinese Environmental Activism,* GUARDIAN (May 16, 2013, 11:59 AM), http://www.theguardian.com/environment/chinas-choice/2013/may/16/kunming-pollution-protest-chinese-environmental-activism ("The Chinese public are becoming increasing [sic] concerned about the state of their local environment and up to 80% believe that environmental protection should be a higher priority than economic development, according to a new survey . . . carried out by the Public Opinion Research Centre in collaboration with Shanghai Jiao Tong University.").

42. *Id.*

43. *See* Sui-Lee Wee, *China Says Will Shut Plant As Thousands Protest*, REUTERS (Aug. 14, 2011, 5:47 AM), http://www.reuters.com/article/2011/08/14/us-china-protests-idUSTRE77D0EK20110814 (noting that "([e]nvironmental pollution is one of the major causes of social unrest in China" and describing the Nankai University study).

frequency by 120 percent between 2010 and 2011.[44] Chinese environmental law suffers from such serious under-enforcement that the public apparently lacks confidence that these laws will truly protect them from harm.[45]

In an especially dramatic example, 12,000 citizens in the coastal city of Dalian took to the streets on August 14, 2011 to protest a local petrochemical plant's production of paraxylene, a carcinogen used in the manufacture of polyester and other plastic products.[46] The plant had been fully operational for two years, although it had operated in its first year without the required environmental approval from provincial officials.[47] However, even the mandatory environmental review did not quell public fear about potential safety hazards. Concerned that factory storage tanks could rupture during a storm, thousands of protesters occupied the People's Square opposite City Hall.[48] They remained there for hours until the local government publicly promised that the factory would be immediately closed and relocated.[49] Remarkable both for its numbers and for the fact that the government appeared to capitulate to public pressure, the incident became known in China as the "8-14 Event".

Until recently, public demonstrations of this sort were rare in China, because participants can risk serious personal and political consequences.[50] Those who lingered at the 8-14 event reportedly faced police beatings,[51] and demonstrators at other public protests have reportedly been killed in clashes with police.[52] However, mass environmental protests have taken

---

44. Duggan, *supra* note 41 (reporting figures from Yang Chaofei, the vice-chairman of the Chinese Society for Environmental Sciences).

45. *Id.* (describing the incidence of large anti-pollution protests and the widespread belief that governmental environmental protection information is not transparent).

46. Duggan, *supra* note 41 (describing paraxylene); Christina Larson, *The New Epicenter of China's Discontent,* FOREIGN POLICY (Aug. 23, 2011), http://www.foreignpolicy.com/articles/2011/08/23/the_new_epicenter_of_china_s_discontent (describing the public fears that led to the incident); Wee, *supra* note 43 (describing the protests).

47. Wee, *supra* note 43 ("Environmental worries in China have stoked calls for expanded rights for citizens in the one-party state, but this protest has extended it to calls for more government accountability, highlighting the mistrust that Dalian residents have in its leaders.").

48. Larson, *supra* note 46.

49. *Id.* As this article goes to press two years later, however, the factory has yet to be closed.

50. *See, e.g.*, Andrew Jacobs, *Protests Over Chemical Plant Force Chinese Officials to Back Down,* N.Y. TIMES, Oct. 28, 2012, at A4 ("The protests, which followed similar demonstrations in other cities in the past year, point to the increasing willingness of the Chinese to take to the streets despite the perils of openly challenging the country's authoritarian government.").

51. Larson, *supra* note 46 ("[By] evening, after the light had faded from the sky, a smaller crowd was left in People's Square . . . .Now outnumbered by security forces, some were chased and reportedly beaten (fortunately, no one died).").

52. *See* N. Bruce Duthu, *Starbucks in the Forbidden City: Reflections on the Challenges and Opportunities for a U.S.-Chinese Partnership on Environmental Law and Policy,* 8 VT. J. OF ENVTL. L. 151, 155 (2007) ("While many of these public protests led to positive responses by government and

place regularly in recent years, including the 10,000 who successfully aborted plans for a new paraxylene plant in Ningbo after three days of protest in 2012,[53] the 2,500 who protested the construction of an oil refinery near Kunming not one year later,[54] and many others. Demonstrators across China are increasingly willing to take on the risks of public protest, presumably because they fear the risks of inaction even more.

Public expressions of environmental frustration have been effective, and China's leadership is taking environmental concerns more seriously. For example, in a stunning victory for governmental transparency and accountability, Beijing recently capitulated to intense public pressure and began monitoring airborne particulates according to the international PM 2.5 standard, rather than the antiquated PM 10 standard that allowed for rosier reporting but failed to detect the most harmful pollutants.[55] Prompted by a public uproar after the U.S. Embassy began publishing real-time PM 2.5 data from a rooftop monitoring station, the Chinese government reversed course late in 2011 and adopted the more accurate standard.[56] Since ordering cities to publish their own PM 2.5 data in 2012, 179 cities now do so, and the Ministry of Environmental Protection has begun ranking the worst offenders.[57]

Nevertheless, the government does not welcome public protest, and

---

business leaders, the government commonly responds with repressive and violent means. One of the most notorious recent clashes occurred in December 2005 in the village of Dongzhou in Guangdong Province, where villagers rose up to challenge the siting of a power plant on lands they claimed were illegally taken from them. Official reports acknowledged that government forces killed three villagers while recent commentary suggests that about 20 people were killed, making it 'the deadliest use of force by the party-state since the [1989] Tiananmen [Square] massacre.'").

53. Jacobs, *supra* note 50 (describing the three days of protests, which were occasionally met with violence).

54. Duggan, *supra* note 41 ("Environmental protests are becoming one of the biggest forms of social unrest in China").

55. "PM 2.5" and "PM 10" refer to particulate matter that measures less than 2.5 and 10 micrometers in diameter, respectively. Erin Ryan, *China Environmental Experiences #3: Breathing Air With Heft*, ENVTL. L. PROFS BLOG (Apr. 7, 2012), http://lawprofessors.typepad.com/environmental_law/2012/04/china-environmental-experiences-3-air-with-heft-taste-and-texture.html (describing the public confrontations that led to China's change in course). *See also* Simon Denyer, *In China's War on Bad Air, Government Decision to Release Data Gives Fresh Hope,* WASHINGTON POST (Feb. 2, 2014), http://www.washingtonpost.com/world/in-chinas-war-on-bad-air-government-decision-to-release-data-gives-fresh-hope/2014/02/02/5e50c872-8745-11e3-a5bd-844629433ba3_story.html?wpisrc=nl_headlines.

56. *Id.*

57. *See* Denyer, *supra* note 55 ("The ministry's rankings showed that seven of the ten most polluted cities in China in 2013 were in Hebei province, which surrounds the capital and is the center of the nation's steel industry, as well as being a major glass, coke and cement producer. The data made one conclusion inescapable: Beijing's pollution would never be tackled unless Hebei's heavy industry was either cleaned up or shut down.").

even the most successful demonstrations can be met with mixed results. For example, after the apparent victory by the Dalian 8-14 protesters, records of the protest were expunged from the Chinese Internet.[58] Six months later, the factory still remained in full operation despite the government's promise of immediate suspension.[59]

Taken together, the contemporaneous PM 2.5 and 8-14 events showcase a more general problem in Chinese environmental governance, in which acknowledgment of the importance of regulation is not always followed by actual enforcement against identifiable polluters. In moving to the PM 2.5 standard, the government effectively conceded that accurate information is needed to successfully combat pollution—but it has so far declined to take concrete action in Dalian to resolve public concerns over pollution-related harm. A number of factors contribute to these missed enforcement opportunities, including limited enforcement capacity, political patronage, and conflicting economic priorities.

B. Limited Regulatory Capacity

To some extent, under-enforcement against pollution sources may reflect a problem of capacity within the Chinese government. The Ministry of Environmental Protection, which oversees countless sources of pollution among a nation of 1.4 billion people, was staffed by as few as 200 employees in 2007.[60] In the same year, the U.S. Environmental Protection Agency (EPA) was staffed by 18,000 to oversee a nation of 300 million.[61] The Chinese Ministry derives support from government research institutes with additional personnel, but overall levels still lag far behind U.S. capacity. Given the limits of staffing alone, it is easy to imagine how holes in the enforcement net might appear.

That said, the government is currently marshalling all available capacity to confront the staggering personal and political costs of the air

---

58. Larson, *supra* note 46. Notwithstanding even Wikipedia's recognition of the 8-14 event, the government's efforts to quell its social influence have been at least partially successful. *Dalian PX Protest*, WIKIPEDIA.ORG http://en.wikipedia.org/wiki/Dalian_PX_protest (last modified Dec. 18, 2013, 5:59 AM). One learned Chinese professor from a respected university assured me that few of his colleagues know about it, and they seldom discuss it. Email communication with author [name withheld for protection] (Oct. 25, 2013, 5:15 AM) (on file with author).

59. Jaime FlorCruz & Haolan Hong, *Controversial Chemical Plant Resumes Production in China*, CNN (Jan. 17, 2012, 6:04 AM), http://www.cnn.com/2012/01/17/world/asia/china-chemical-plant (reporting that the plant had resumed production despite the promise of immediate suspension that had quelled the protest the previous year, and reporting on the local government's financial stake in the plant).

60. Kahn & Yardley, *supra* note 32. Until 2008, the Ministry of Environmental Protection (MEP) was known as the State Environmental Protection Administration.

61. *Id.*

pollution crisis.[62] In September of 2013, the central government announced a $280 billion plan to improve air quality, including plans to limit the use of coal and ban high-polluting vehicles.[63] In January of 2014, the central government also launched an ambitious new program requiring public disclosure of industrial pollution, even by state-owned enterprises.[64] This landmark reporting program has the potential to mitigate the burden of physical inspections on strained agency personnel and to harness voluntary contributions by interested members of the public.[65]

In a move hailed by domestic and international environmental watchdogs, the central government is now requiring 15,000 factories to provide real-time public accounting of discharged pollutants to air and water.[66] In theory, real-time reporting facilitates the ability of agency staff to target the worst violators and enables them to more efficiently allocate enforcement resources. More importantly, the system enables NGOs and local people to assist environmental enforcement by essentially crowd-sourcing public capacity.[67] Concerned citizens can now follow their local data stream, reality-test its accuracy, and bring concerns to the attention of the government.[68]

Such benefits presume industry compliance, so the success of the program still hinges on the ability of the government to enforce accurate reporting. However, early experience with the program has been encouraging. According to Ma Jun, the head of the Institute of Public and Environmental Affairs in Beijing, the system is already working to identify violations, and it will enable his organization and others to directly support agency enforcement efforts.[69] As reported in the WASHINGTON POST:

> [I]t is the focus on individual factories that really gives environmentalists such as Ma reason for optimism. Although several provinces have yet to comply with the government's edict to publish data, figures from Hebei are available and show factories brazenly flaunting limits on emissions.

---

62. *See* Denyer, *supra* note 55 ("The country's appalling air is blamed for more than a million premature deaths a year, for producing acid rain that damages the nation's agriculture, for driving away tourists and even for encouraging the brightest students to study abroad. Perhaps just as important, Beijing's bad air has been making its Communist leaders lose face.").

63. *Id.*

64. *Id.* ("Since Jan. 1, the central government has required 15,000 factories — including influential state-run enterprises — to publicly report details on their air emissions and water discharges in real time, an unprecedented degree of disclosure that is shedding light on the who, what, when and where of China's devastating environmental problems.").

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

> Ma is working with experts to design a phone app that could vividly expose the offenders, with factories meeting emissions targets showing up as blue and those breaking the law coded red. "What we aim to do, through public pressure, is help the environment protection bureau to enforce the law," he said.[70]

Linda Greer of the Natural Resources Defense Council, a U.S.-based environmental NGO, told the WASHINGTON POST that the "reporting requirement for factories is the 'biggest thing' China has done to address its pollution problems, and the most likely to produce results."[71] The United States EPA launched a similar reporting program in 1986, the Toxics Release Inventory, which Greer heralds as one of the agency's most successful regulatory programs.[72] However, she notes that "China's real-time disclosure program is bigger than anything the EPA has done:"[73]

> "It brings them from the back of the pack globally, in terms of public information disclosure, to the front of the pack," Greer added…. "Inevitably it will strengthen the hand of regulators when they have bad air pollution days, to look at real-time data."[74]

C. *The Influence of Political Patronage*

Limited capacity can still pose serious enforcement obstacles, but the problem has also been a matter of political will.[75] The new reporting requirement is especially encouraging because its deployment of public accountability promises to limit the infamous interference of political patronage in effective environmental enforcement. In China, the tale of the polluting factory that evades enforcement no matter how egregious the violation is all too common.[76] In some cases, factory operators bribe

---

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *See, e.g.*, Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience*, 8 VT. J. ENVTL. L. 251, 253 (2007) ("The environmental agencies lack the resources, and sometimes the will, to exercise their investigation and enforcement authority to cabin in polluting industries that contribute to the local tax base."). *See also A Great Wall of Waste*, ECONOMIST, Aug. 19, 2004, at 56 ("It is no rarity . . . to find a bureau imposing a fine on a dirty local enterprise (thus fulfilling its duty), but then passing the money on to the local administration, which refunds it to the company via a tax break.").

76. *See, e.g.*, Wang Canfra, *supra* note 3, at 181. As Professor Wang describes, "Li Jianguo and four other victims were peasants living on the bank of the Tingliu River, Laoting County of Hebei Province. In February 2000, Lefeng Steel Plant which lies to the east of Li Jianguo's village, began to manufacture steel. According to the related laws and regulations, the steel plant was a severe polluter and should have been closed. It had not completed either an environmental protection examination or approval procedures during its construction and there were no active environmental protective measures

government officials to avoid enforcement, a custom that has become an accepted cost of doing business in the culture of corruption that pervades Chinese governance.[77] In other cases, industrialists benefit from a strong social network that dissuades the enforcement agency from taking action.[78] Personal connections, or *guanxi*, are part of the fundamental fabric of

---

in place. The factory seriously polluted the local environment. In May 2000, crops and vegetation around the plant began to wither and die. The village leader, Zhao Wentu, and several other victims reported the incidents to the local authorities and the county environmental protection agency, but nothing was done. Because of this inaction, 100 villagers blocked the door to the plant, stopping steel production and the noxious emissions." *Id*. The villagers elected six leaders to represent them in negotiating with the plant, who were later sentenced to prison for inciting a mob.*Id.*

One of my former Chinese students shared another example: "There is water pollution in a small village, Baimiao Village, which is located by the side of Minjiang river that goes through Sichuan province. The villagers believe that the newly-built pesticide factory polluted the water and make the water undrinkable or even unusable. They started pressing the local government for an explanation why companies like this could successfully pass environmental impact assessment to engage this pesticide production activity. Surprisingly, they managed to take pictures of [the damning] original environmental impact assessment, and used it as evidence to sue Environmental Protection Department of Sichuan province. The villagers lost both at trial and on appeal. The source that I found did not provide reasons why the villagers lost." Email to author [name withheld for student's protection], Aug. 24, 2013, 9:11 PM (on file with author). *See also Baimiao Water War,* SINA (May 28, 2013, 3:45 PM), http://blog.sina.com.cn/s/blog_5fbaf32e0101asrz.html (providing photographs of the pollution at issue in the lawsuit).

77. *See, e.g.*, Patricia Ross McCubbin, *China and Climate Change: Domestic Environmental Needs, Differentiated International Responsibilities, and Rule of Law Weaknesses*, 3 ENVTL. & ENERGY L. POL'Y J. 200, 230 (2008) ("[T]he judiciary is rife with corruption, so polluters can often buy their way out of environmental obligations."); *cf.* Simon Denyer, *China Arrests Anti-corruption Activists Even as it Pledges to Oust Dishonest Officials*, WASH. POST (July 23, 2013), http://articles.washingtonpost.com/2013-07-23/world/40735291_1_liu-zhijun-corruption-xu-zhiyong (describing rampant corruption in Chinese politics); Jia Lynn Yang, *Ji Yingnan and Other Jilted Mistresses Expose Chinese Officials' Corruption*, WASH. POST (July 25, 2013), http://www.washingtonpost.com/world/ji-yingnan-and-other-jilted-mistresses-expose-chinese-officials-corruption/2013/07/25/8d8d35f6-eb02-11e2-aa9f-c03a72e2d342_story.html (same). For a discussion of the ubiquitous "hidden rules" of corruption in which governmental officials and others routinely engage, see Rocky Wen, *Don't Get Confused By "Hidden Rules,"* GLOBAL TIMES (Aug. 11, 2009, 8:22 PM), http://www.globaltimes.cn/opinion/commentary/2009-08/456674.html ("Though these 'hidden rules' were viewed as illegal or immoral and conflicted with the official rules, all but a few abided by these qian guize in order to safeguard their interests. Those who ignored the qian guize were usually punished or disfavored.").

78. For example, a former Chinese environmental law student interned for an environmental NGO fighting gold mining pollution along the Biliu River in Liaoning Province, which had seriously harmed the local people. Email to author [name withheld for student's protection] (Aug. 23, 2013) (on file with author). The NGO planned to file a lawsuit against the mining company until it discovered that the man in charge of the mining company was a high government official, which, as the student described, "makes it a hard case to resolve through the legal process." *See also* Kristen McDonald, *Winter Travels with Blue Dalian* (Mar. 13, 2012, 1:02 PM), http://pacificenvironment.org/blog/2012/03/winter-travels-with-blue-dalian/ (explaining that the pollution issue remains unresolved due in part to a fear of confronting mining companies, "most of which are controlled by powerful local government officials and have deep connections in their communities.").

Chinese commerce and politics.[79] Individual bureaucrats shy away from taking action against a well-connected violator if doing so could jeopardize their place in the professional hierarchy.[80] Government official hesitate to make political enemies by alienating interested officials higher up the chain.

Political patronage and government corruption are pervasive problems in China, complicating environmental enforcement and the rule of law more generally.[81] Chinese leaders are confronting the problem of self-dealing officials with increasing force, concerned by waning public confidence in government. Party General Secretary and President Xi Jinping recently announced a new anti-corruption campaign, promising to punish bribery and reform the entrenched culture of excess among government officials.[82] Nevertheless, critics have questioned the prospects of the campaign, especially after the subsequent arrest of law professor and

---

79. *See, e.g.*, Jerome Cohen, Keynote, *An Introduction to Law in China*, 8 VT. J. ENVTL. L. 393, 402 (2007) ("The biggest problem in achieving fair adjudication in China, and it affects commercial arbitration as well as court decisions, is "*guanxi*," that network of family, friendships and other contacts and reciprocities by which Chinese live and that seems to undermine all hope of evenhanded enforcement of the law.").

80. The spectacular scandal involving the fall of former Party Leader Bo Xilai and former Chongqing Chief of Police Wang Lijun provides one example of this common dynamic. *See, e.g.*, Katie Hunt, *Wang Lijun: Chinese Cop at the Heart of Bo Xilai Scandal,* CNN (Aug. 19, 2013, 12:55 AM), http://www.cnn.com/2012/09/18/world/asia/profile-wang-lijun; Michael Wines, *In Rise and Fall of Chinese Boss, A Ruthless Arc*, N.Y. TIMES (May 7, 2012), at A1 (describing the long-tolerated misbehavior of fallen leader Bo Xilai out of fear of repercussions).

81. *See* sources cited *supra* note 77. Some of my former Chinese law students, many of whom had been placed into the law major by fiat rather than personal choice, privately expressed their deep personal reluctance to become lawyers because they feared being forced to participate in the cycle of corruption endemic to the legal system. They told me that as lawyers, they would be expected to bribe judges and wield personal connections as necessary to win their cases. Everyone knows, I was assured, that the best lawyer to hire is the wife of a judge—because she will have social connections with all the local judges that she can wield in support of her clients. Oral communications to author by multiple Chinese students (Nov. 2011) [names withheld for their protection].

Professor Cohen describes a similar phenomenon: "Not long ago, I asked a fortyish Chinese businessman whether he used lawyers in his work. 'No,' he said, 'I don't need lawyers. I use standard trade contracts for both my local and international business.' I said: 'But don't you have disputes?' 'Oh, of course I have disputes,' he replied. I said: 'Then don't you need a lawyer to help you in disputes?' He responded: 'Why should I hire a lawyer? My wife is a judge.' Through her he could go to whatever local court he had to in order to get the case taken care of. This attitude permeates Chinese society and demoralizes many of its younger lawyers." Cohen, *supra* note 79, at 403. *See also* Robert Marquand, *New for China's Courts: Trained Judges, Standard Rules,* CHRISTIAN SCI. MONITOR, Aug. 16, 2001, *available at* http://www.csmonitor.com/2001/0816/p1s3-woap.html (quoting a Chinese lawyer's explanation that "An American lawyer might win with legal knowledge, history, case law, and briefs. In China, what still matters is the lawyer's contacts, money, and the human influence.").

82. *See, e.g.*, Bi Mingxin, *Xi's Anti-Corruption Resolution Arouses Public Expectations,* XINHUANET (Jan. 24, 2013, 12:10 AM), http://news.xinhuanet.com/english/china/2013-01/24/c_132123521.htm (describing the plan, including a "cage of regulations"—prevention and disciplinary measures that will reduce opportunities and incentives for corruption).

noted anti-corruption activist Xu Zhiyong.[83] After calling on public officials to disclose their financial assets and to release jailed corruption protesters,[84] Professor Xu was convicted of "gathering a crowd to disturb public order" and sentenced to four years in prison.[85] Analysts had cited transparency and the disclosure of officials' assets as critical to the success of President Xi's plan, making the prosecution of Professor Xu especially troubling.[86]

D. Economic Development Conflicts

Environmental enforcement actions can also dissolve when the relevant agency is instructed not to pursue a violation for less nefarious reasons.[87] Distinguishable from self-dealing enforcement failures, enforcement is sometimes curtailed because leaders with influence genuinely believe that enforcement would not serve the public interest as they understand it. More often than not, the concern is that the enforcement action would unduly interfere with the government's overarching goal of increasing gross domestic product.[88]

Enforcement decisions are vulnerable to veto by even non-agency officials because of the many paths of exchange among the organs of Chinese governance. In China, the legislative, executive, and judicial branches are more interconnected than their counterparts in the U.S.; there is no corresponding separation of powers principle.[89] Moreover, all

---

83. *E.g.*, Matt Schiavenza, *Why Xi Jinping's 'Anti-Corruption Campaign' is Hollow, Unserious, and Ultimately Doomed,* THE ATLANTIC (July 18, 2013, 4:17 PM), http://www.theatlantic.com/china/archive/2013/07/why-xi-jinpings-anti-corruption-campaign-is-hollow-unserious-and-ultimately-doomed/277908/.

84. *Id.*

85. Andrew Jacobs and Chris Buckley,*China Sentences Xu Zhiyong, Legal Activist, to 4 Years in Prison,* New York Times (Jan. 6, 2014), http://www.nytimes.com/2014/01/27/world/asia/china-sentences-xu-zhiyong-to-4-years-for-role-in-protests.html?_r=0.

86. *See* Bi, *supra* note 82.

87. *See* Wang Canfra, *supra* note 3, at 171.

88. *See* Li, *supra* note 37, at 380–81 (noting that "environmental regulation adds cost to industry and may thus slow the speed of economic development" and that "[i]n the view and ideology of many government officials in China, economic development always comes before environmental protection"); Wang Mingyuin, *supra* note 28, at 245 ("[T]he predominance of GDP as a supreme indicator for political merit . . . induced local governments . . . to blindly pursue local GDP growth for their own self-interest, without showing concern for the social and environmental costs.").

89. The State Council, "the highest executive organ of state power," supervises the administrative functions of government. *See The State Council*, CENT. PEOPLE'S GOV'T, P.R.C., http://english.gov.cn/2013-03/15/content_2354765.htm (last updated Mar. 16, 2013); *The Organizational Structure of the State Council*, CENT. PEOPLE'S GOV'T, P.R.C., http://english.gov.cn/links.htm (last visited Dec. 19, 2013). According to the Chinese Constitution, the State Council reports to the National People's Congress. *The Relationship Between the People's Congresses, the State Administrative Organs, the People's Courts and People's Procuratorates*, CENT.

branches are effectively subordinate to the directives of the political wing of Chinese governance, the Chinese Communist Party.[90] The Party operates in concert with the constitutional branches through a parallel structure at all levels of government.[91] Officials move freely between Party and constitutional posts, sometimes holding them simultaneously.[92] Matters of state, including enforcement and implementation decisions, are not handled solely by the nominally responsible agency but through a process of consultation involving higher-up officials elsewhere in governance. When there is upper-level consensus that enforcement is not in the public interest, that decision will be made manifest down the chain.[93]

Many environmental violations have thus been openly tolerated because enforcement would have interfered with competing economic or political priorities. In one recent example, officials in the northern province of Shanxi waived environmental regulations to boost the ailing coal industry at the center of the provincial economy—even though coal-related pollution threatens local water supplies and may have contributed to notorious public health crises.[94] Shanxi is one of the most polluted cities in China, with a local rate of birth defects that is 600 percent higher than the national average.[95] However, when the coal industry began to decline due

---

PEOPLE'S GOV'T, P.R.C., http://english.gov.cn/2005-09/02/content_28453.htm (last visited Dec. 19, 2013). However, most contemporary political accounts point to the State Council as the true seat of governmental power in China, and explain that it reports to the Chinese Communist Party. *E.g.*, Patrick Chovanec, *Primer on China's Leadership Transition*, AN AMERICAN PERSPECTIVE FROM CHINA (May 8, 2011), http://chovanec.wordpress.com/2011/05/08/primer-on-chinas-leadership-transition/ ("The first and most important thing to understand about that political system is that it is composed of three parts. In the U.S., we have the executive, legislative, and judicial branches of government. In China there is the Party, the Army, and the State. Unlike in the U.S., where the three branches are co-equal and are specifically designed to check and balance each other's powers, in China the Party is supreme and rules over the other two elements.").

90. Chovanec, *supra* note 89.

91. *Id.*

92. For example, the Secretary General of the Party, currently Xi Jinping, is also the President of China. His predecessor, Hu Jintao, simultaneously held the same positions. Such a transfer of power is mandated by the constitution. Xianfa art. 22, ch. 3 (2002) (China).

93. *See, e.g.*, *supra* notes 46–59 and accompanying text (describing the aftermath of the Dalian 8-14 event).

94. Luna Lin, *Shanxi Province: Saving the Coal Industry, But Sacrificing the Environment,* CHINA DIALOGUE (Aug. 21, 2013), https://www.chinadialogue.net/article/show/single/en/6300-Shanxi-province-saving-the-coal-industry-but-sacrificing-the-environment (highlighting the serious consequences associated with the provincial response, the article notes that the Shanxi environmental agency's chief engineer says that Shanxi's water resources have been seriously damaged by the coal industry, and that the BBC reports that the rate of birth defects in Shanxi is six times the national average).

95. James Reynolds, *Disabilities in China's Polluted Shanxi,* BBC (Apr. 24, 2009), http://news.bbc.co.uk/2/hi/asia-pacific/8012852.stm (reporting on overwhelming environmental pollution in Shanxi and its probable relationship to birth defects, and on local doctors' beliefs that

to reduced domestic demand, provincial leaders acted to stabilize the market by instituting subsidies and temporarily eliminating environmental protection fees.[96] The move earned praise for strengthening industry competitiveness, but criticism from those who saw it as "yet another example of sacrificing the environment for the sake of the economy."[97]

The lack of consistent enforcement against identifiable violators is a patent and troubling failure in Chinese environmental law. However, one root cause is a less conspicuous failure relating to the overall structure of Chinese governance. This more subtle enforcement failure takes place somewhere between the national level, where environmental laws and policies are made, and the provincial and municipal levels where they must eventually be implemented.

II. WEAK LOCAL ENFORCEMENT OF CENTRAL ENVIRONMENTAL DIRECTIVES

The second enforcement challenge for Chinese environmental governance is the problem of central-provincial relations—revealing a surprisingly weak link in the regulatory chain by which China's centrally planned governance is locally administered. Even when the national government sets stringent anti-pollution goals, securing provincial and municipal implementation is not always easy. It has proven especially challenging because municipal budgets and local officials' job security are still so closely aligned with competing economic development targets.[98]

The challenge for central regulators goes beyond the task of ensuring that environmental laws are enforced against violators at the local level. The larger task is to motivate local officials to credibly implement national policies designed to place environmental protection at a higher level of

---

malnutrition may be responsible).

96. Lin, *supra* note 94 ("Shanxi has responded to the slump with a stimulus package . . . includ[ing] temporarily scrapping the environmental protection fees and industrial transformation development charges for coal mines.").

97. *Id.* (quoting Feng Yongfeng, "the founder of Nature University, a Beijing-based Green NGO").

98. *See* Lee, *supra* note 26, at 805 (noting that local environmental agencies "are often unwilling to vigorously enforce environmental mandates from the central government, generally because of local protectionism"); Wang Alex L., *supra* note 30, at 399 (discussing the role of cadre evaluation targets in this context); Wang Canfra, *supra* note 3 at 171; Wang Mingyuin, *supra* note 28, at 245 ("When combined with a highly centralized 'personal rule' political structure and the predominance of GDP as a supreme indicator for political merit, [the development strategy of 'placing focus on economic construction'] induced local governments—especially some Party heads—to blindly pursue local GDP growth for their own self-interest, without showing concern for the social and environmental costs."); Kahn & Yardley, *supra* note 32.

consideration before violations can occur—for example, when they approve future development projects or enact local land use planning policies that portend harmful environmental consequences.[99] Problems also arise when the enforcement of even mandatory environmental regulations conflict with countervailing policy targets, as demonstrated when Shanxi waived environmental fees to support the local coal economy.

This Part explores obstacles of local implementation by analysis of the complex relationships between Chinese statutory law and regulatory planning, local and national policy priorities, and central and provincial structures of governance. Mixed messages from the central government may also contribute to local enforcement breakdowns. At times, the resulting dynamics of Chinese environmental governance are surprisingly evocative of those associated with American environmental federalism.

A. Conflicts Between Law and Plan

Some of these hurdles reflect the complex relationship in China between statutory law and public policy more generally. In China, the line between law and policy is not always distinct, and in many respects, policy is the more important tool of governance.[100] Whereas all acts of American governance require authority from specific constitutional or statutory delegations, Chinese governance operates more independently from statutory sources of law. In particular, the formal statements of party consensus set forth in the cyclical Five Year Plans confer as much force as legislative statutes, and oftentimes more. In these plans, officials are sometimes directed to implement policies by taking action that is not otherwise authorized by statute—suggesting that the policy directive itself confers the needed authority, from a reservoir of sovereignty that must exist beyond the system of constitutional and statutory law.[101]

---

99. *Cf.* Wang Canfra, *supra* note 3, at 169.

100. Dan Guttman, *Different Operating Systems,* ENVTL. F., Nov./Dec.2008, at 27, 27, *available at* www.epa.gov/ogc/china/guttman.pdf (contrasting the CCP/executive policy planning-based legal system in China with the legislative statute-based legal system in the U.S.). Professor Guttman specifically questions the value of scholarship that treats 'law' "in the absence of upfront discussion of the role of law as one of many 'rule sets'—and [that mistakenly treats law] the most important one. If the question is 'is China taking action to address environmental concerns and is it working?' [then] 'law' is not now near core of the answer. But this does not mean there are not actions and 'rules' which guide them." Email communication with author (Oct. 19, 2013) (on file with author). As he explains, "China now has panoply of environmental 'laws.' But the most important rules are not what American [or Chinese lawyers] would call 'law.'" *Id.*

101. *See* Dan Guttman & Song Yaqin, *Making Central-Local Relations Work: Comparing American and China Environmental Governance Systems,* 1 FRONTIERS ENVTL. SCI. & ENG'G CHINA 418, 422–23 (2007) (describing the Chinese institution of the Five Year Plan); Dì shí'èr gè wǔ nián jìhuà (第十二个五年计划) *Twelfth Five-Year Plan (2011-15)* (promulgated by National People's

Each Five Year Plan is a detailed management program of central planning, designed to facilitate the implementation of social and economic policies by establishing specific governance targets over a specified period.[102] Formulated by the Party and approved by the national legislature, the Five Year Plans and accompanying Work Statements establish economic development targets from products manufactured and housing units constructed to the number of Ph.D.s that Chinese universities should grant in a given field, all based on projections of what the country will need at the end of the projected time horizon.[103] Five Year Plans are formulated by central leadership and imposed on each successive lower level of government as it adopts its own Five Year Plan in light of the national plan.[104] As aforementioned, because there is not always a clear statutory basis for the government action required to implement these policies, the plans themselves may function like an authorizing statute in U.S. law.[105] Other non-statutory sources of rules that bear on Chinese governance include leadership statements, official internal documents, public documents, and other formal communications that include suggestions intended for implementation.[106]

Statutory laws and Five Year Plans thus operate in coordination, if loosely at times. But when law and plan collide—for example, if enforcing a given environmental law would interfere with the local government's economic targets under the operative Five Year Plan—the plan often comes out on top. Plans increasingly include environmental targets in addition to production goals,[107] but the tacit understanding among plan implementers

---

Congress Mar. 14, 2011) (Trans. English Delegation of the European Union to China).

102. *See* JOSEPH CASEY & KATHERINE KOLESKI, U.S. & CHINA ECON. & SEC. REV. COMM., BACKGROUNDER: CHINA'S 12TH FIVE-YEAR PLAN 1 (2011), *available at* http://permanent.access.gpo.gov/gpo24710/12th-FiveYearPlan_062811.pdf.

103. *See id.* at 1, 4.

104. Guttman & Song, *supra* note 101, at 423–24.

105. *Id.*

106. As Professor Guttman has explained, other non-statutory sources of rules include "(1) leadership statements, especially those declaring and defining a 'movement' (*yun dong*); (2) public documents that may have no analog in the U.S., e.g., *yjian* (or 'suggestion'); (3) internal documents (sometimes made public) that may have no analog in U.S. law… such as *hongtou wenjian* ('red headed document'), *pizhun* ('leader signature signifying approval or ratification on a document'), and *pishi* (higher level comment which may have effect depending on substance and [hierarchical] relationship). The status of such rules or requirements as 'law' (or their evolution in relation to "law") is, perhaps, to be sorted out." Email communications (Oct. 19, 2013 and Dec. 8, 2013) (on file with author).

107. For example, the Twelfth Five Year Plan includes elaborate plans to combat climate change, including green development plans, carbon markets, and reforestation plans. *Government White Paper on China's Policies and Actions for Addressing Climate Change*, at pt. VII, (Nov. 2011), *available at* http://www.gov.cn/english/official/2011-11/22/content_2000272_8.htm (detailing Plan commitments to combat global warming, which include green development plans, carbon markets, and reforestation plans).

appears to be that economic development still takes precedence.[108] While government officials are routinely rewarded for meeting economic targets with promotions, there have been fewer corresponding rewards for environmental protection, signaling what leadership values most.[109] As a result, Chinese news reports acknowledged that in 2010, the cost of development-associated environmental degradation was about $230 billion—3.5 percent of GDP and three times the cost tallied in 2004.[110] When environmental and economic plan elements collide, goes the common wisdom, economic targets usually come out on top.[111]

The common wisdom may be shifting in Beijing, however, as evidenced by important environmental provisions in the two most recent Five Year Plans. The Eleventh Five Year Plan indicated centralized efforts to elevate environmental priorities by introducing environmental criteria into government officials' performance reviews.[112] The Twelfth Five Year Plan included an apparent commitment to experiment with carbon markets as a means of combating climate change.[113] Beijing has steadily followed through on the plan to establish markets in seven pilot cities before implementing a national scheme, beginning with the southern city of

---

108. *Cf.* Jason J. Czarnezki, *Climate Policy & U.S.-China Relations*, 12 VT. J. ENVTL. L. 659, 669 (2011) ("China is happy to become far more energy efficient, but will make no emissions limitations promises that have the potential to limit overall economic growth.").

109. *Cf. id.* at 662; Wang Alex L., *supra* note 30, at 1 (describing shifts in the Eleventh Five Year Plan, in which "Chinese authorities turned to cadre evaluation — the system for top-down bureaucratic personnel assessments — to set high-priority, quantitative environmental targets designed to mobilize governors, mayors, and state-owned enterprise leaders in every corner of China's massive bureaucracy"). Professor Wang hopes that the incorporation of cadre evaluation for environmental targets will provide the missing incentive for better regulatory performance. *Id.*

110. *See* Edward Wong, *Cost of Environmental Damage in China Growing Rapidly Amid Industrialization,* N.Y. TIMES (Mar. 30, 2013), at A4.

111. Some scholars even view environmentally progressive governance in these terms. *See, e.g.*, Robert V. Percival, *China's Green Leap Forward toward Global Environmental Leadership*, 12 VT. J. ENVTL. L. 633, 635 (2011) (discussing China's interest in climate governance as related to the economic opportunities it creates); Srini Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 302 (2007) ("The underlying motive behind China's efforts to reform its administrative and legal system is largely driven by the growing concern that the swift deterioration of its natural resources will harm its economic growth and affect the overall quality of life."). *See also* Chris Buckley, *Silver Lining in China's Smog As It Puts Focus on Emissions*, N.Y. TIMES, Sept. 1, 2013, at A6 (observing the connection between economic and environmental goals and reporting that "[t]he new leadership wants to reinvigorate the economy by reducing reliance on heavy industry that produces high amounts of pollution").

112. Wang Alex L., *supra* note 30, at 1.

113. *See* Wang Xin & Gao Yinan, *China to Launch Carbon Market Trading Scheme*, PEOPLE'S DAILY ONLINE (June 18, 2013, 1:23 PM), http://english.peopledaily.com.cn/90778/8288822.html (describing the new Shenzhen market).

Shenzhen in 2013.[114] These efforts warrant considerable praise.

B. Conflicts Between Local and National Priorities

Yet the common wisdom that economics trumps the environment appears firmly entrenched in many provinces beyond easy reach of Beijing, exposing the weak link in actualizing well-intended national policies. Local reluctance to enforce environmental regulations is often fueled by municipal reliance on tax income from polluting industries.[115] When local governments resist central initiatives, lofty environmental directives stall. As Tsinghua University law professor Wang Mingyuan explains:

> The central government must consider the interests of the whole society and maintain macroeconomic stability and sustainable, long-term economic growth. It depends for this on local governments at different levels to implement its policies and guidelines. However, with local governments becoming "quasi-enterprises" due to their independent economic interests, their interests often come into conflict with the central government's economic policies, including environmental protection and renewable energy development policies. Thus, local governments either agree outwardly and disagree inwardly, or openly disobey the central government in the process of implementation. Overcoming these deep-rooted conflicts of interest is an important factor for the State's effective macro regulatory control and administration.[116]

While Beijing officials thus increasingly talk the talk of environmental reform in national policymaking, too many local officials decline to walk the walk at the level of local implementation, where the true die is cast.

Shanxi's decision to subsidize the coal industry provides a good example, because it was made in the immediate wake of new policies from Beijing to reduce greenhouse gas emissions by weaning the nation from fossil fuels. China's central government has committed to reducing domestic carbon emissions per unit of GDP "by between 40% and 45% from 2005 levels by 2020, as well as using non-fossil fuels for about 15% of its energy by 2020."[117] The State Council, the highest governing body in China, also issued a guideline on thermal coal markets specifically stating that "all local governments should not interfere with the normal business operation of coal miners and power companies."

---

114. *Id.*

115. *See, e.g.*, Ben Blanchard & Andrew Roche, *China Threatens Death Penalty for Serious Polluters*, REUTERS (June 19, 2013, 10:50 AM), http://www.reuters.com/article/2013/06/19/us-china-pollution-idUSBRE95I10D20130619 ("Previous promises to tackle China's pollution crisis have had mixed results, and enforcement has been a problem at the local level, where governments often heavily rely on tax receipts from polluting industries under their jurisdiction.").

116. Wang Mingyuin, *supra* note 28, at 246.

117. Lin, *supra* note 94.

In other words, the State Council had explicitly forbidden subsidies of the very sort Shanxi officials imposed.[118] Shanxi's protectionist coal policy thus directly contravened the clearly-stated national policy prohibiting local subsidies for fossil fuel production. As one commentator noted, "Shanxi's eagerness to invite power plant investments may yet hinder the central government's efforts to reduce emissions and conserve energy," highlighting the problem of central-provincial relations.[119]

C. Central-Provincial Relations and Chinese "Environmental Federalism"

Westerner observers may wonder how such gaps between central policy and local enforcement could materialize in a political system so dominated by the center. After all, China is the world's leading example of a centrally organized socialist republic, in which national policymaking is conducted between the highest echelons of the Chinese Communist Party and central government in Beijing.[120] National policies and directives are conveyed to the twenty-two provinces,[121] five autonomous regions, and six independent municipal/administrative districts, which are then tasked with implementation.[122] Provincial leaders then pass along specific goals and directives to local and municipal leaders. In this way, local policies almost always stem from central priorities.

Nevertheless, the success of central planning is highly dependent on the cooperation of local leaders, especially in realms that implicate local land use. Of course, other areas of Chinese governance may be effectively implemented from the center—for example, information management and Internet censorship.[123] With the right technology, national officials can

---

118. *Id.*

119. *Id.*

120. For links to English-language descriptions of the components of China's structure of government, see *China's Political System*, CHINA INFO. CTR., *available at* http://www.china.org.cn/english/Political/25060.htm (last visited Dec. 19, 2013). For an excellent diagram showing the relationship between the governing bodies of the Chinese Communist Party and central Chinese government, see *Chinese Power Structure*, ZERO HEDGE, *available at* http://www.zerohedge.com/sites/default/files/images/user3303/imageroot/2012/11/20121105_China1_2.jpg (last visited Dec. 19, 2013).

121. China officially counts twenty-three provinces, including Taiwan, but Taiwan has operated under an independent government since separating from the mainland after the Chinese Revolution of 1949. *China Provinces*, http://www.china-provinces.com (last visited Dec. 19, 2013).

122. *Chinaview – About China*, XINHUANET, http://news.xinhuanet.com/english/2003-02/19/content_815536.htm (last visited Dec. 19, 2013).

123. *See, e.g.*, Edward Wong, *Beijing Imposes New Rules on Social Networking Sites*, N.Y. TIMES, Dec. 17, 2011, at A9 (discussing China's Internet censorship program and new regulations requiring microbloggers to register with their actual names and addresses).

effectively monitor and control the information moving across networked devices from the seat of government in Beijing.[124] But environmental and land use regulation operates very differently. As in the United States, national officials can set governance objectives, but they must rely heavily on local and provincial officials for boots-on-the-ground enforcement and expertise.[125]

Accordingly, local implementation is where most environmental law either succeeds or fails. Beijing bureaucrats are not in a position to monitor the local Shanxi coal industry, and they will not necessarily know when the water there starts to smell funny. When local governments flout central policy as Professor Wang Mingyuan describes, environmental law fails.[126]

Local obstruction of national environmental policy in China is especially surprising because provincial governments do not operate independently from the central government in Beijing in the same way that, for example, American states are independent of the central government in Washington.[127] In China's unitary system of governance,[128] a single source of sovereign authority empowers all levels of government, administered in concentric circles.[129] Beijing sets national policies and delegates implementation authority to the provincial governments, which set their own targets consistent with national policies and delegate authority downward to effect local implementation. Chinese sovereign authority is thus nested from the center down to the village like a Russian doll.

By contrast, in a federal system like that of the United States, the central and state governments operate from separate sources of independent sovereign authority.[130] While the two levels govern simultaneously in

---

124. *Id.*

125. *Cf.* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN, 150–56 (2012) (discussing the example of American water pollution management, in which national environmental policies are implemented at the state and local levels).

126. *See supra* quote accompanying note 116. *Cf.* Blanchard & Roche, *supra* note 115 (noting that local officials often fail to enforce environmental law because they rely on tax revenues of polluting industry).

127. *See generally* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA (Kenneth G. Lieberthal & David M. Lampton eds., 1992) (proposing a theory of "fragmented authoritarianism" to describe the dynamics of Chinese politics).

128. *See* Xianfa art. 2 (1982) (China); *China's Political System: The Constitutional System*, CHINA INFORMATION CENTER, http://www.china.org.cn/english/Political/26143.htm (summarizing China's Constitution in English).

129. *China's Political System: The Local Administrative System*, CHINA INFO. CTR., http://www.china.org.cn/english/Political/28842.htm (last visited Dec. 19, 2013) (describing nested authority within the overall system).

130. The states derive authority from the common law police power to protect public health and welfare, while the central government operates from authority conferred by constitutional consensus. RYAN, *supra* note 125, at 7–33.

certain areas of jurisdictional overlap, there are also realms in which neither can supplant the other's authority. For example, the state must defer to federal authority on matters involving war or international relations, while the federal government must defer to the states on matters of family law that do not implicate federal constitutional rights.[131] For this reason, environmental governance in the United States is often characterized by various forms of negotiation between federal and state actors, as the center tries to persuade the states to cooperate with federal programs to effectuate national policies.[132] The resulting state-federal bargaining over design and implementation is a hallmark of American environmental federalism.[133]

Compared to the unwieldy federal relationship in the United States—in which the center does not control the states in vast areas of law—it might appear that the Chinese central government would have a much easier time asserting national laws that require local implementation. However, research into Chinese multilevel governance suggests that this may not always be the case.[134] During my own research, I was periodically told that Beijing frequently struggles with provincial compliance, especially on matters of environmental enforcement.[135] After all, China is large, distances are great, and resources are scarce. As American Sinologist and law professor Jerry Cohen has described,

> Most Americans have grown up on the assumption that China is run by a totalitarian dictatorship led by the Politburo Standing Committee, whose rule supposedly reaches every village. But that is a skewed view of the actual situation. Once I started working in China I learned that in many, not all, respects the country is more like a series of feudal baronies. The reach of the central Party and government authorities is limited, except for those matters that are accorded the highest priority, such as suppression of what used to be called "counterrevolution," espionage,

131. *Id.* at xii–xv.

132. *Id.* at 265–314.

133. *Id.*

134. *See generally* ZHENG YONGNIAN, DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS (2007) (discussing the decentralizing effects of modern governance reform in China).

135. This first occurred at a conference of the United Nations Institute for Training & Research, *Second Global Conference on Environmental Governance and Democracy,* which took place at Yale University in New Haven, CT in 2010. Foreign researchers approached me about the Chinese analogy on Sept. 18, 2010, aftermy presentation on intergovernmental bargaining and climate regulation in the United States.. Their suggestions were anecdotally confirmed by multiple oral communications with Chinese academics between Aug. 2011 and July 2012 [names withheld for protection]. For more detail, see *infra* note 138. *See also* ZHENG, *supra* note 134, at 39 (arguing that China's unitary system displays intergovernmental bargaining dynamics associated with federalism even without any constitutional basis for federalism).

political democracy and the Falungong.[136]

Environmental enforcement has not yet reached this level of priority, though changes may be underway.[137] In the meanwhile, when the central government sets environmental policies requiring local enforcement, securing the needed implementation may occasionally require additional efforts at persuasion.[138] By whatever means, ongoing attention to this hurdle is required, or the gap between national policymaking and local implementation will continue to undermine environmental reform.

D. Mechanics, Mixed Messages, and Nuance

At the level of the actual mechanics, breakdowns between central policy and local implementation may reflect one of several underlying scenarios. It may be that some local leaders truly are so motivated by the need for economic development that they simply disregard central environmental directives when possible. Some may also be motivated by the associated rewards for encouraging economic development, which may include career advancement, profits associated with economic enterprise, and profits associated with development-related corruption.[139]

Alternatively, it may be that the center is sending genuinely mixed signals to local leaders, asking them to meet new environmental targets

---

136. Cohen, *supra* note 79, at 401.

137. *See* Wang Alex L., *supra* note 30, at 381 (discussing national efforts to improve environmental responsiveness in local governance).

138. I first learned of this possibility while sharing research on negotiated environmental federalism in the U.S. with international researchers. I was approached by several Sinologists who told me that the kind of central-peripheral bargaining I was describing also took place in China. I was incredulous: why would Beijing need to negotiate at all? Can't it just command the outcome it wants from provincial officials? However, these researchers suggested that the central government sometimes lacks the capacity to force priorities through the kinds of provincial roadblocks described here, and that this occasionally requires persuasion beyond the usual top-down model of policy delivery.

I spent the 2011–12 academic year in China attempting to study this dynamic, teaching in Shandong Province and traveling the country as a Fulbright lecturer. Unfortunately, I was not able to confirm these reports in a satisfactory academic manner. I was unable to access any official records of governance that might enable me to document such a pattern (and it is not clear whether any such records would exist, even if the pattern did). Nor did I have the opportunity to speak with governmental officials who could confirm it by personal experience. However, I spoke with fellow academics at universities around the country, many of whom anecdotally confirmed the familiar pattern of breakdown in environmental enforcement between central policymaking and provincial implementation, and the occasional need for more persuasive tactics. *See also* ZHENG, *supra* note 134, at 39 (arguing that "de facto federalism" exists in China even without constitutional basis because it reflects "a relatively institutionalized pattern which involves an explicit or implicit bargain between the center and the provinces, one element in the bargain being that the provinces receive certain institutionalized or *ad hoc* benefits in return for guarantees by provincial officials that they will behave in certain ways on behalf of the center").

139. *See* Wang Canfra, *supra* note 3, at 171; Wang Mingyuin, *supra* note 28, at 246.

while also asking them to meet the same economic development targets set before environmental regulation.[140] Where the targets conflict, local leaders are left to sort out for themselves which policy should take precedence—and they may try to interpret what the center most wants based on how they are rewarded career-wise.[141] Of course, both scenarios could also be playing out simultaneously.[142]

Despite working generalizations about local breakdowns in environmental enforcement, other scholars remind us that the truth is more nuanced. Noting that some provinces have adopted innovative measures to protect the environment, law professors Robert Percival and Zhao Huiyu admonish that:

> [T]he idea that local officials subvert the central leadership's good intentions" on environmental issues has become a "familiar narrative in Chinese politics" but one that it is important to approach with a good degree of nuance. A survey of Chinese NGOs reports that NGOs leaders have a more positive opinion of local leaders than the general public in China. Local efforts to protect economically important industries in China are real, but it is too simplistic "to call the central government pro-environment and the local government pro-growth.[143]

For example, Shenzhen is leading in experimentation with carbon markets, and others have led elsewhere.[144]

That some provinces and municipalities have proven to be environmental innovators is a hopeful sign. Notwithstanding important differences between the Chinese and American governance, it is reminiscent of an important strength of regulatory dynamism within American environmental law—itself a story of exchange between national and state leadership at various points in U.S. history.[145] But as yet, the story remains a work in progress, and environmental innovations by some national and local leaders will not meet with full success until they are consistently implemented nationwide.

---

140. *See*, *e.g.*, Buckley, *supra* note 111 ("There are, though, formidable obstacles facing proponents of rapidly cutting China's emissions. Robust economic growth remains imperative for leaders, who fear that slowing growth and rising joblessness would imperil the Communist Party's rule. China remains dependent on coal, the source of about 70 percent of the country's energy. And officials and companies in China are likely to resist steps they fear could jeopardize their industrial investments.").

141. *See* Wang Alex L., *supra* note 30, at 380–81.

142. *Cf.* Wang Mingyuin, *supra* note 28, at 245–46.

143. Percival & Zhao, *supra* note 35 at 180 (*citing* RACHEL STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE 232 (2013)).

144. *Id.*

145. *See* RYAN, *supra* note 125, at xxvii–xxviii (discussing alternating eras of federal and state environmental regulatory dominance, in which each took up the regulatory slack left by the other on matters of traditional air and water pollution law and climate governance).

III. WEAK JUDICIAL ENFORCEMENT

Environmental enforcement problems at all levels are compounded by judicial failures to provide a reliable means for the victims of environmental harm to seek justice. Although the situation is improving, serious hurdles remain in the way of plaintiffs hoping to enforce the law by injunction or seeking compensation for their losses.[146] Faithful vindication of environmental law by the judiciary could incentivize compliance by regulated entities and provide a meaningful check on enforcement failures by the other branches—but too often, it does not.

This Part explores the judicial role in Chinese environmental enforcement, but before going further, it is important to note the different expectations that Western and Chinese systems hold for the judicial role. The Chinese system has never relied on its courts in the same way that, for example, the American system does. The Chinese judiciary does not operate independently from the other branches of government,[147] and it does not command the same monopoly over dispute resolution associated with Western courts.[148] Many private conflicts, including environmental conflicts, have historically been managed through mediation and other avenues of dispute resolution unassociated with the judiciary.[149] After all, and in contrast to the statutory bias of American environmental law, much of China's environmental governance flows from policy documents that do not create judicially enforceable rights or obligations.[150]

---

146. Goldman, *supra* note 75, at 257 (noting that even though Chinese law authorizes victims to seek compensation for harm caused by pollution, plaintiffs often find it difficult to amass sufficient proof to prevail, and even when they do, "they may encounter further obstacles when seeking to collect damage awards"); Wang Canfra, *supra* note 3, at 167–68, 173 (noting that environmental law reforms have been increasing but leave much to be desired).

147. Wang Canfra, *supra* note 3, at 176–77 ("The existing judicial management mechanism is principally guided by the local Chinese Communist Party (CCP) Committee and supervised by the high court, which is responsible for trial and personnel affairs.").

148. Stefanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 189–91 (2006) (describing both the modern and traditional preference for mediation in Chinese dispute resolution); Jingjing Liu, *Oscillating Between Court Mediation and Adjudication in Chinese Environmental Lawsuits – Loss of Opportunities or A Happy Ending for All?*, (forthcoming 2014) (J.S.D. dissertation describing the prominent role of mediation in environmental dispute resolution) (prospectus on file with journal). The local government procuratorate also participates in extra-judicial environmental dispute resolution through the disbursement of "stability funds" and other discretionary relief to assist citizen complainants independently of a formal court hearing. Email from Daniel Guttman to the author (Oct. 19, 2013) (on file with author).

149. *See supra* note 148.1. *See* Kun Fan, *Glocalization of Arbitration: Transnational Standards Struggling with Local Norms Through the Lens of Arbitration Transplantation in China*, 18 HARV. NEGOTIATION L. REV. 175, 187–92 (2013) (discussing the critical role of non-adversarial dispute resolution in both ancient and contemporary Chinese legal institutions).

150. *See supra* notes 100–106 and accompanying text (discussing the amalgam of statute, rule, and

Nevertheless, and while there is much to recommend China's long history of non-litigation based dispute resolution,[151] even mediation takes place in the shadow of the relevant rules of law and policy. As environmental statutes designed to be judicially enforceable play an increasing role in Chinese environmental governance, so should genuine opportunities for reliable judicial enforcement. Judicial decisions are an important means for defining the contours of environmental obligations and for securing environmental justice in disputes that cannot be mediated. When publicly available, judicial decisions have the potential to curb the behavior of prospective violators in a way that private mediation cannot, and to inspire better performance by implementing agencies. Moreover, to the extent that many environmental governance challenges are rooted in more general problems of patronage and corruption, nurturing the development of a genuinely neutral judicial arbiter could be critical.

Indeed, the Chinese Supreme Court has recently indicated plans to take environmental enforcement more seriously, at least at the level of sentencing. New guidance issued by the Supreme Court in 2013 broke from past practice by opening the possibility of capital punishment for serious environmental crimes.[152] According to the Court, the death penalty is appropriate for offenders who intentionally cause environmental pollution that results in death or enormous damage to public or private property.[153]

However, lax sentencing has not been the primary concern for environmental plaintiffs; more pressing are the enormous hurdles they experience getting into court at all. This Part reviews the substantial barriers to judicial review of environmental harm and the advantages of allowing more consistent public access. Barriers to access include problems of limited public interest standing, judicial discretion to refuse valid legal claims, and limited public viewing of trials. The results are unfortunate, because judicial disposition of difficult environmental cases would yield benefits that extend far beyond the individual interests of harmed plaintiffs. The consistent availability of judicial review could also provide political cover for officials choosing between competing economic and environmental targets, help bridge the gap between central policymaking and local implementation, and advance publicly touted goals of increasing public participation in governance.

---

plan in Chinese law).

151. *See* sources cited *supra* note 149.

152. Blanchard & Roche, *supra* note 115 .

153. *Id.; translated in* Email from Yuan Ye, Chinese Research Assistant, to the author (Oct. 2013) (on file with author).

A. Limited Public Interest Standing

One barrier to environmental justice through the courts is the high threshold for standing to bring ordinary environmental lawsuits.[154] In most cases, private parties may not seek judicial review of general regulatory decisions by the government.[155] Plaintiffs must state a claim on which relief may be granted for a direct, individualized injury.[156] However, the idea of allowing an organization to bring a public interest environmental suit on behalf of others—an important tool of environmental litigation in the United States—is still a new one in China.[157]

Class action lawsuits have also been very limited in the past, although recent proposals to allow certain environmental class action suits by NGOs generated great hope.[158] A draft amendment to the Environmental Protection Law in 2013 designated only one Beijing-based environmental law NGO as entitled to bring these suits.[159] However, the monopoly this

---

154. Goldman, *supra* note 75, at 254 (proposing that China broaden standing for lawsuits to compel compliance with environmental law and reflecting on how essential judicial access has been in fostering the prevention of environmental harm in the United States); Percival & Zhao, *supra* note 35, at 151 (describing the difficulties of pursuing environmental public interest litigation in China).

155. *See* Percival & Zhao, *supra* note 35, at 164 ("Chinese law does not authorize private parties to seek judicial review of regulatory decisions by the State Council. In 2003 two judges in Henan province were fired as a result of a decision that struck down a provincial regulation as inconsistent with national law. This received national attention in China, providing a strong signal to other judges that aggressive judicial review was unwelcome in China.") (internal citation omitted).

156. Min Shi Su Song Fa [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 108, 4 P.R.C. LAWS 183, *translated in Civil Procedure Law of the People's Republic of China*, LAW INFO CHINA, http://www.lawinfochina.com /display.aspx?id=6459&lib=law&SearchKeyword=civil%20procedure&SearchCKeyword= (last visited Dec. 20, 2013). Article 108 provides that "[t]he following conditions must be met before a lawsuit is filed:

(1) The plaintiff must be a citizen, legal person, or an organization having a direct interest with the case;

(2) There must be a specific defendant;

(3) There must be a concrete claim, a factual basis, and a cause for the lawsuit; and

(4) The lawsuit must be within the scope of civil lawsuits to be accepted by the people's courts and within the jurisdiction of the people's court to which the lawsuit is filed." *Id.*

See also Goldman, *supra* note 75, at 257 (describing the difficulty meeting these standards, which are interpreted in ways that are stricter than U.S. standing rules, in many environmental cases); Percival & Zhao, *supra* note 35, at 170-71.

157. Percival & Zhao, *supra* note 35, at 172-73; Wang, *supra* note 26, at 204–05 (discussing the novelty and rarity of public interest environmental lawsuits). *See generally* DAN GUTTMAN & XIA KUNBAO, UNITED NATIONS DEMOCRACY FUND, UNDEF 4TH ROUND PROJECT EVALUATION REPORT: "PROTECT ENVIRONMENTAL RIGHTS AND JUSTICE OF THE PUBLIC" (2013), *available at* http://www.un.org/democracyfund/sites/dr7.un.org.democracyfund/files/UDF-CPR-09-320_ER.pdf (explaining the need for environmental public interest litigation in China and evaluating the All China Environment Federation as a pioneer in the field).

158. *See* Zhao Yinan, *Tougher Punishments for Polluters Proposed,* CHINA DAILY (June 27, 2013, 6:47 AM), *available at* http://www.chinadaily.com.cn/cndy/2013-06/27/content_16667928.htm.

159. *Id.*

would create fomented such public resentment that the future of the proposal remains unclear as this article goes to press.[160]

B. Discretion to Decline Environmental Cases

A more serious problem is that even when plaintiffs clearly satisfy the requirements of standing, courts often refuse to hear their valid environmental claims outright.[161] According to the Civil Procedure Code, article 111, plaintiffs meeting the basic standing requirements set forth earlier in the code have a right to pursue their claims in court.[162] However, formidable barriers of politics, *ex parte* influence, and limited judicial resources often conspire to prevent legitimate environmental plaintiffs from exercising their rights to judicial access.[163] China's judiciary is not independent,[164] and judges—some of whom are not even trained as lawyers—are politically vulnerable for the decisions they make.[165] Party representatives participate on judicial panels in deciding all important matters, including whether cases are accepted for hearing.[166]

If Party leaders do not wish a claim to be heard for whatever reason, the court will decline to hear the case—a problem that is especially severe for environmental plaintiffs.[167] Courts with limited resources prefer to

---

160. *Id.*

161. Xia Jun, *China's Courts Fail the Environment,* CHINA DIALOGUE (Jan. 16, 2012), https://www.chinadialogue.net/article/show/single/en/4727--China-s-courts-fail-the-environment-.

162. Min Shi Su Song Fa [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 111, 4 P.R.C. LAWS 183 (China), *translated in Civil Procedure Law of the People's Republic of China*, LAW INFO CHINA, http://www.lawinfochina.com/display.aspx?id=6459&lib=law&SearchKeyword=civil%20procedure&SearchCKeyword= (last visited Dec. 20, 2013) ("People's courts shall accept the lawsuits filed in conformity with the provisions of Article 108 of this Law."). For the standing requirements set forth in Article 108, *see supra* note 156.

163. Xia, *supra* note 161 (citing political and corruptive influences, as well as scarce judicial resources, as impediments to plaintiffs' ability to bring suit).

164. Wang Canfra, *supra* note 3, at 176–77 ("The existing judicial management mechanism is principally guided by the local Chinese Communist Party (CCP) Committee and supervised by the high court, which is responsible for trial and personnel affairs.").

165. *See* Marquand, *supra* note 81 ("For years, China's judges have been drawn from a pool of retired military officers with no legal background or students fresh from law school who 'do what they are told,' according to one expert who did not wish to be identified. Chinese courts do not have an independent judiciary that can make decisions separate from Communist Party influence."); McCubbin, *supra* note 77, at 230 ("[M]any judges are poorly trained and unfamiliar with their responsibilities to enforce the law uniformly") (internal citations omitted); *see also* Xia, *supra* note 161 (discussing judges refusing to take cases that may hinder economic growth out of fear of losing their jobs).

166. *Cf.* Xia, *supra* note 161 (describing a court criticized by local Communist Party committee and local government for hearing an environmental pollution case).

167. *See id.* (describing environmental plaintiffs' inability to petition the courts to bring suits, obtain information on polluters, or otherwise enforce environmental monitoring).

avoid environmental cases because they are highly technical, complex, and time-consuming. Judges worry that allowing one claim against a defendant who has potentially harmed large numbers of people will only encourage additional plaintiffs to come forward.[168] Judges are also subject to powerful influence from local government and party officials who hold economic interests in defendant enterprises. Because these officials control the staffing of the court and the career prospects of individual judges, it is difficult for judges to maintain neutrality in such cases.[169]

The combined result is that many qualifying environmental claims never see a courtroom. For example, in 2011, a devastating oil spill took place off China's northeast coast after a Conoco-Phillips oil rig ruptured in the Bohai Sea.[170] The accident created a 320-square mile oil slick that damaged 2,400 miles of marine area.[171] Afterward, countless qualifying plaintiffs attempted to bring claims for the significant losses they had sustained to fisheries, private property, and municipal services—but no private suits were allowed to be heard while the government negotiated a settlement with the defendants outside of court.[172] The government settlement did provide $160 million in damages for private losses (in addition to $269 million awarded to the state), but this may be a fraction of what individual plaintiffs may have been entitled to in independently assessed tort damages.[173]

Xia Jun, an environmental attorney practicing in Beijing, echoes popular sentiments about the difficulties of bringing environmental litigation in describing his own experiences:

> As a lawyer with a decade-long involvement in environmental rights, I still remember the sighs of my colleagues when I set out on this path: litigation is hard in China; environmental litigation doubly so. . . .
>
> This is true for every stage of the process: lodging a complaint,

---

168. *Id.*

169. *Id.* ("Often, cases are not heard – or are not heard fairly – because local government funds the court, as well as hiring and firing its staff.").

170. Andrew Jacobs, *China Admits Extent of Spill from Oil Rig*, N.Y. TIMES, July 6, 2011, A4.

171. *Id.*

172. *See China Sets Fines for Bohai Oil Spill,* UNITED PRESS INT'L (Apr. 30, 2012, 11:32 AM), http://www.upi.com/Business_News/Energy-Resources/2012/04/30/China-sets-fines-for-Bohai-oil-spill/UPI-94121335799975/ (noting the extent of the spill); Wu Xiaolei, *The Battering of the Bohai,* CHINA DIALOGUE (Oct. 20, 2011), https://www.chinadialogue.net/article/show/single/en/4592-The-battering-of-the-Bohai (discussing the impact of the spill on the fishing industry and local ecosystems); multiple oral communications with author by environmental academics over Aug. 2011 through July 2012 (names withheld for their protection).

173. *See* UNITED PRESS INT'L, *supra* note 172 (describing the fines and penalties defendants were required to pay); Xia, *supra* note 161 (explaining that private damage awards are much more likely to incentivize environmental compliance than administrative sanctions, which are too low to provide a meaningful deterrent).

> registering a case, assessing damages, winning the case and executing judgements [sic]. Each step is a battle, and no real solution has emerged. Perhaps most depressing is the refusal of courts to hear environmental or administrative lawsuits that are legally entitled to a hearing, often on the basis of flimsy reasoning, where a reason is given at all.[174]

Xia Jun notes that administrative sanctions and fines for pollution are too low to meaningfully deter violations of environmental laws, but judicially-imposed compensation for private damages has the potential to induce compliance by polluting industries concerned about their bottom lines.[175]

Nevertheless, he laments, too many environmental cases never make it into court, often for reasons of naked political interference:

> A major problem is that most courts are prone to interference from local government, and impartial judgements [sic] in environmental disputes are hard to come by. Often, cases are not heard – or not heard fairly – because local government funds the court, as well as hiring and firing its staff.
>
> Local governments' love-affair with GDP growth, focus on short-term benefits and narrow view of what it means to maintain stability mean that environmental legislation lacks authority and administrative powers are misused. Against this background, it is hardly surprising that many environmental disputes fail even to make it to court.[176]

He offers an example from 2005, when local government and party officials criticized a Chengde court that had accepted a class action environmental case brought by 1,500 villagers after a steel company polluted the local groundwater.[177] With this incident in mind, a later maritime judge declined to allow a group of Dalian fishermen to sue for damages after a 2010 oil spill, explaining that "[i]f we heard the fishermen's case, we would lose our jobs."[178] Xia Jun further describes his own years of failed attempts to get cases into court when pollution had caused disease and death, because judges were worried that taking one case would only result in more claims being filed.[179]

In one hopeful response to the difficulties accessing judicial review of environmental harms, China has experimented with the development of specialized environmental courts, dedicated to hearing environmental claims alone.[180] In recent years, nearly one hundred such tribunals have

---

174. Xia, *supra* note 161.

175. *Id.* ("High compensation payouts in a number of lawsuits would cause other polluters to pay attention.").

176. *Id.*

177. *Id.*

178. *Id.* (discussing the connection between the two events).

179. *Id.* ("The court was worried that the case would result in more claims being brought and so opted to ignore it.").

180. Rachel E. Stern, *Poor Rural Residents in China Seen as Easy Target for Environmental*

been established, raising hopes that the judiciary would finally play its part in enforcing China's environmental laws.[181]

With notable exceptions in Wuxi, Guiyang, and Chongqing, however, the experiment has so far mostly led to disappointment.[182] Caseloads have remained small and disproportionately focused on prosecuting poor rural violators for minor environmental crimes, rather than targeting large-scale polluters causing substantial public harm.[183] Reportedly, judges remain reluctant "to accept cases against big taxpayers, let along rule against them"[184]—poignantly demonstrating that the same problems of political patronage and fears of retribution that have undermined environmental enforcement in the general courts are also compromising the effectiveness of the new environmental courts.

C. Public Accountability and Limited Access to Court Proceedings

Limited judicial review of environmental claims enables polluters and enforcement agencies to escape public accountability for their respective enforcement failures.[185] These accountability problems are further compounded by judicial procedures that limit public viewing of even those matters that make it into court.

The Civil Procedure Code specifies that court proceedings should be open to the public,[186] but those seeking to view them in person must first register with the government, creating a written record of their personal attendance.[187] The identification requirement is inherently intimidating,

---

Lawsuits, CHINA DIALOGUE (April 24, 2013), https://www.chinadialogue.net/article/show/single/en/5937-Poor-rural-residents-in-China-seen-as-easy-target-for-environmental-lawsuits.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See, e.g.*, Ma Jun, *Transparency Test in the Bohai Sea*, CHINA DIALOGUE (July 20, 2011), https://www.chinadialogue.net/article/show/single/en/4418 (discussing public frustration over repeated efforts by the government to cover up environmental pollution affecting their health and livelihood).

186. WEI LUO, THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA 79 (2006) ("Civil cases adjudicated by people's courts shall usually be heard publicly, except for the cases that involve state secrets or the private affairs of individuals, or are otherwise provided by law.").

187. *See* JOSHUA D. ROSENZWEIG, DUI HUA FOUND., PROMOTING INCREASED TRANSPARENCY IN CHINA'S CRIMINAL JUSTICE SYSTEM, ANNEX A: PUBLIC ACCESS AND THE RIGHT TO A FAIR TRIAL IN CHINA (2009), *available at* http://duihua.org/wp/?page_id=2542 ("The rules in Chinese courts currently require prospective observers to register with an office of the court, where they present identification and request an 'observer pass' . . . that enables access to a particular hearing. Intentionally or not, this type of 'gatekeeper' system, by its very existence, restricts access and risks turning courts' obligation to provide access to their proceedings into a privilege to be granted at the discretion of court employees.").

dissuading otherwise interested members of the public from witnessing how the government responds to important matters of environmental management. Those who do register subject themselves to the potential for adverse political consequences, including harassment or retribution, if they show interest in litigation involving sensitive issues or parties.[188] These procedures effectively deter public viewing and further undermine transparency and accountability in environmental governance.

D. The Wider Advantages of Judicial Enforcement

Chinese courts have thus played a comparatively small role in environmental governance, although some observers hope that the innovation of environmental courts will eventually succeed.[189] The underutilization of judicial review for environmental harm is ironic, however, because encouraging it could yield benefits not only to the victims but also to the government officials coping with many of the other enforcement obstacles discussed previously.

For example, reliable judicial enforcement of environmental statutes could ease pressure on public officials hesitant to take on politically powerful polluters, helping them accomplish the very environmental progress they are now directed to make under the Twelfth Five Year Plan. In one anecdotal example, local officials in a pollution-stricken municipality were divided on whether to prioritize the health concerns raised by citizens or the economic value of the local factory.[190] The dispute was allowed to proceed to court, where it was concluded that the factory should be closed and relocated.[191] Officials can also ask courts to back up controversial enforcement decisions, helping to shield them from political retribution. For example, officials in Wuxi and Chongqing regularly ask the local environmental courts to provide judicial affirmation of risky enforcement decisions.[192]

Examples like these reveal how judicial review of environmental harms can provide helpful political cover for unpopular enforcement actions—actions that would otherwise be attributed solely to the judgment of individual policymakers. The unlucky official forced to choose between upholding environmental directives and honoring conflicting political

---

188. *Id.*

189. *See, e.g.,* Stern, *supra* note 180.

190. Oral communication with author. Because I was asked not to share identifying details about this story, the names of the municipality and involved parties have been withheld.

191. *Id.*

192. *See* Stern, *supra* note 180 (reporting on the use of "non-litigation administrative execution cases (NAECs) in which government agencies seek court enforcement of their decisions").

obligations might be grateful for the realistic threat of judicial review as a face-saving device. By the same mechanism, consistent judicial enforcement could help bridge the vexing gap between central environmental directives and local implementation. And of course, wholly apart from its face-saving potential, consistent judicial enforcement could straightforwardly procure greater local compliance.

Finally, allowing victims redress in open court would increase public participation and transparency in environmental governance, facilitating progress in another realm frequently singled out for criticism.[193] Over the last decade, the State Council itself has called for increased public participation in several important documents, including the 2004 "Guidelines of Comprehensively Promoting Administration by Law" and the 2010 "Opinions on Strengthening the Establishment of Government by Law."[194] Both call for greater public participation in governance to ensure that public rights are protected and legitimate public concerns addressed.[195]

However, the judicial access afforded to environmental plaintiffs and public attendees is presently too limited to accomplish these goals. For this reason, the public accountability promised by public judicial hearings falls short of the rule of law's true promise.

IV. ENVIRONMENTAL LAW AND THE RULE OF LAW IN CHINA

As it is for so many areas of law in China, the "rule of law" problem is perhaps the central problem for environmental law.[196] This Part reviews the relationship between Chinese environmental governance failures and more general governance challenges in China, including political patronage, corruption, and the limits of judicial independence. Reflecting on the

193. *See* Guttman & Xia, *supra* note 157, at 18–19, 20–24 (making specific recommendations for increased public participation in environmental governance and enforcement); Percival & Zhao, *supra* note 35, at 177-79; Tseming Yang & Xuehua Zhang, *Public Participation in Environmental Enforcement . . . with Chinese Characteristics?: A Comparative Assessment of China's Environmental Complaint Mechanism*, 24 GEO. INT'L ENVTL. L. REV. 325, 364–65 (2012) (advocating for greater transparency in environmental governance); Wenxuan Yu & Jason J. Czarnezki, *Challenges to China's Natural Resources Conservation & Biodiversity Legislation*, 43 ENVTL. LAW 125, 127 (2013) (arguing that China can improve lacking conservation legislation by increasing public participation and enforcement efforts).

194. *See* Percival & Zhao, *supra* note 35, at 160-61.

195. *Id.*

196. *See, e.g.*, Richard J. Ferris Jr. & Hongjun Zhang, *Reaching Out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime*, 11 WM. & MARY BILL RTS. J. 569, 594–600 (2003) (discussing how local protectionism, the lack of transparency, private practice norms, implementation barriers, and limited regulatory resources all pose challenges to more effective, rule-of-law-based implementation of environmental laws).

contemporary currents of public and Party sentiment, it considers the resulting puzzle for genuine efforts at reform.

A. "Rule of Law" vs. "Rule by Law"

Defined, the rule of law is the ideal that all people are equal before the law, and governed by the law, without exception.[197] The Chinese Constitution expressly articulates a version of the rule of law,[198] and China's new leadership has reinforced certain rule-of-law ideals, including Xi Jinping's anti-corruption admonition to officials that "no one can enjoy absolute power outside of the law and that anyone who exercises power must 'consciously accept supervision by the people.'"[199]

Yet as the subsequent arrest of anti-corruption agitators like Professor Xu Zhiyong suggests,[200] China often provides more of an example of rule *by* law, in which law is used instrumentally as a tool for accomplishing the specified goals of government leadership.[201] Rule by law is distinguishable from the rule of law, because legal rules are enforced by the government only insofar as they advance the political priorities of the leadership. The judgment of responsible officials thus trumps the letter of the law. Enforcement of the law is essentially viewed as a device to advance the overall public interest, rather than a public interest in and of itself.

Moving toward a true rule-of-law culture in China is an enormous, controversial task. At every level of environmental law—policymaking, goal-setting, implementation, and enforcement—rule-of-law ideals are in direct competition with entrenched systems of political patronage.[202] The most ambitious proposals for accomplishing rule-of-law goals involve the establishment of a fully independent judiciary, the dream of many Chinese

---

197. *See, e.g.*, Interview by Bob Schieffer with Madeline K. Albright, U.S. Secretary of State *Face the Nation* (CBS television broadcast June 28, 1998), *available at* http://secretary.state.gov./www/statements/1998/980628.html (quoting Albright's definition of the rule of law and contrasting the Chinese approach).

198. *See* Goldman, *supra* note 75, at 253 ("China's entry into the World Trade Organization (WTO) carries explicit obligations to develop a certain degree of transparency and provide legal remedies, at least in the commercial context.").

199. *See* Bi, *supra* note 82.

200. *See supra* notes 83-85 and accompanying text.

201. *See* McCubbin, *supra* note 77, at 230 (discussing how the rule of law is weakened when "[j]udges apply legal requirements inconsistently or rule in favor of entrenched political or economic interests because they are beholden to the local officials who pay their salaries and who pressure them to protect the enterprises that provide revenue for the local government"). *Cf. Strengthening the Rule of Law for U.S. Business Interests in Russia: Hearing Before the S. Finance Comm.*, 112th Cong. 3–4 (Mar. 15, 2012) (statement of Alan Larson), *available at* http://www.finance.senate.gov/imo/media/doc/Larson%20Testimony.pdf (discussing problems associated with the "rule by law" approach in Russia).

202. *The East is Grey*, ECONOMIST, Aug. 10, 2013, at 18.

lawyers and academics.[203] However, this remains an unlikely prospect in the near future. As Professor Wang Canfa has noted,

> Reforming the judicial management mechanisms presents a difficult and unavoidable problem. To reform the judicial system, including the appointment of judges and the precedent of a court, would be to reform the political system.[204]

There is no evidence that the Party is interested in this sort of political reform, and plenty to suggest that it is not. Party leadership recently circulated "Document No. 9," presumably written by Xi Jinping, which distilled a list of the seven most subversive ideas that the Party believes are threatening political stability in China.[205] At the top of the list: "Western constitutional democracy."[206] Establishing an independent judiciary raises exactly the specter of Western constitutional democracy that so alarms the Party, because it runs counter to the established structure of interdependent, political, and authoritarian decision-making that is the hallmark of modern Chinese governance.[207] And while many in China are advocating for greater judicial independence, few are advocating revolution.[208]

Document No. 9 shows that Western rule-of-law ideals have penetrated the Chinese discourse, but also how threatening these ideas appear to current Chinese leadership.[209] Given this reaction, it is difficult to imagine a serious move toward judicial independence without tremendous political upheaval.

Yet most Chinese are already exhausted by political upheaval—many with living memory of the convulsions of the 1949 Revolution, the devastation of the Great Leap Forward of the 1950s, the tragic Cultural

---

203. *See, e.g.*, Wang Canfra, *supra* note 3, at 177–78.

204. *Id.* at 178.

205. *See* Chris Buckley, *China Takes Aim at Western Ideas,* N.Y. TIMES, Aug. 20, 2013, at A1 (describing the Party's push-back against rule-of-law reforms); Editorial Board, *China's Half-Measure on the Rule of Law*, WASH. POST (Aug. 22, 2013), http://www.washingtonpost.com/opinions/chinas-half-measure-on-the-rule-of-law/2013/08/22/d2ed0020-09cc-11e3-9941-6711ed662e71_story.html?wpisrc=nl_cuzheads ("In nations that genuinely respect the rule of law, not even the highest officials are above the law. But China has put its Communist Party above it, and the party often dictates to judges, prosecutors and police."); Editorial Board, *Look Who's Afraid of Democracy*, N.Y. TIMES, Aug. 28, 2013, at A26 ("What does Mr. Xi consider subversive? The first was 'Western constitutional democracy,' feared because it would put the Communist Party under the rule of law, not above it.").

206. *Look Who's Afraid of Democracy*, *supra* note 205.

207. *See supra* notes 89–92 and accompanying text (describing the structure of Chinese governance).

208. Elizabeth J. Perry, *Studying Chinese Politics: Farewell to Revolution?*, 57 CHINA J. 8–9 (2007).

209. Stanley Lubman, *Document No.9: The Party Attacks Western Democratic Ideals*, WALL ST. J. (Aug. 27, 2013, 12:11 PM), http://blogs.wsj.com/chinarealtime/2013/08/27/document-no-9-the-party-attacks-western-democratic-ideals/.

Revolution of the 1960s, the momentous Deng Xiaoping reforms of the late 1970s and 1980s, the violence of the Tiananmen Square retrenchment in 1989, and the bone-rattling transition of recent decades toward a market economy. Almost nobody that I hear from in China is advocating for sudden change if the cost is further political turmoil. Nearly every one of the people who entrusted me with their earnest views advocated for paced, moderate change. No more revolution, they pleaded. China must change, they said, but change must come more slowly.

The appetite for upheaval is equally low among government elites. In China, it is common wisdom that the top priority of Party leadership is maintaining social stability (and as the Tiananmen incident demonstrated, it is willing to do so at extraordinary cost).[210] Until now, the government's calculation has been that increasing living standards through economic development was the key to continued stability. However, growing public frustration over the Airpocalypse and other environmental harm is changing that calculation.[211] Though environmental activism was long considered "safe" in comparison to political activism challenging more sensitive matters of governance (such as limits on freedom of speech, religion, or Tibetan nationalism),[212] such activism increasingly represents its own threat to social stability.[213] Indeed, one reason the government has responded more quickly to the demands of recent environmental protesters is because it understands that public anger over environmental policies could lead to deeper and more open social unrest.[214]

---

210. *See* Gillian Wong, *China Seeks to Stem Environmental Protests*, BOSTON GLOBE (Nov. 12, 2012), http://www.boston.com/news/world/asia/2012/11/12/china-seeks-stem-environmental-protests/q6QzZ2S5obq7ff8V9StlUN/story.html ("The Chinese government will require that future industrial projects include assessments of their risk to social stability, following several large protests around the country over pollution, a top official said Monday."); *China Emphasizes Maintaining Stability During the Tiananmen 20 Year Anniversary*, CHINASCOPE (Aug. 10, 2009), http://chinascope.org/m/content/view/1643/109/ ("The Hong Kong China News Agency reported that all mainland media remained mute during the 20th anniversary of the Tiananmen Massacre. Chinese officials promoted maintaining social stability (Editor's Note: that translates as no protests or petitions) to keep June 4 quiet."). *See also 1989: Massacre in Tiananmen Square*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm (last visited Dec. 20, 2013) (reporting on the events of the day).

211. *See* Buckley, *supra* note 205.

212. *See* Percival & Zhao, *supra* note 35, at 151 ("Theoretically, environmental NGOs create less political sensitivity than other NGOs in the view of Chinese government officials. NGOs that focus on human rights, labor and other issues are viewed as potentially more threatening by Chinese officials.").

213. *See* Wong, *supra* note 20, at A12 (noting that environmental enforcement "is often a weak point, even when leaders understand that cleaning up the environment has become critical to maintaining social and political stability").

214. Buckley, *supra* note 111 ("[P]ublic anger about noxious air has jolted the government, which long dismissed pollution as the necessary price of prosperity. . . . The widespread ire about air pollution has forced China's new leadership to vow firmer, faster measures for cleaner air that are likely to

B. The Political Puzzle for Reform

The resulting mix of concerns represents a political puzzle for both the Chinese people and their leaders.

Ordinary citizens, afraid to let their children play outside because of bad air quality, want immediate changes to protect public health and safety.[215] Yet for average people, levers of public participation in Chinese governance are limited. They rely on the government to lead them in the direction of change and are generally uninterested in challenging its authority (indeed, most are proud nationalists).[216] But when the government fails to lead them in the direction they desire, the people have few means of effecting their goals in a closed political system where dissenting views are suppressed in the press, on the Internet, and in elections.[217] They lack reliable judicial access to air grievances and seek redress.[218] Even though they do not want a revolution, thousands of people are turning out for potentially dangerous environmental protests because it is the only way they know to be heard.[219]

Meanwhile, a government that values social stability above all is faced with growing unrest over environmental harm. Document #9 reveals that Party leaders are not interested in political reforms that would weaken central authority—for example, by establishing an independent judiciary that could overturn central directives.[220] But central authority has so far

---

reduce carbon dioxide output, especially from coal, experts said. 'The public concern about the air pollution has helped raise awareness about broader environmental problems,' said Mr. Jiang, a researcher at the Energy Research Institute, which advises the Chinese government."). *But see* John Copeland Nagle, *How Much Should China Pollute?*, 12 VT. J. ENVTL. L. 591, 628 (2011) ("The government's prosecution of environmental activists, and its desire to maintain control above all else, hinders any serious attempt to control the massive amounts of pollution that have produced an environmental crisis in China. Those actions also threaten the very stability that China craves.").

215. *See* Edward Wong, *In China, Breathing Becomes a Childhood Risk*, N.Y. TIMES, Apr. 23, 2013, at A1 ("Levels of deadly pollutants up to 40 times the recommended exposure limit in Beijing and other cities have struck fear into parents and led them to take steps that are radically altering the nature of urban life for their children. Parents are confining sons and daughters to their homes, even if it means keeping them away from friends. Schools are canceling outdoor activities and field trips. Parents with means are choosing schools based on air-filtration systems, and some international schools have built gigantic, futuristic-looking domes over sports fields to ensure healthy breathing.").

216. *See generally* PETER HAYS GRIES, CHINA'S NEW NATIONALISM: PRIDE, POLITICS, AND DIPLOMACY (2005) (describing the emergence of a renewed patriotism and nationalism in Chinese popular and political culture).

217. *Cf.* Wong, *supra* note 123, at A9 (detailing steps Chinese government has taken to curb criticism of the government on social media).

218. *See* Xia, *supra* note 161 (blaming lack of access to the courts and economic reasons for the difficulty in bringing environmental lawsuits).

219. *See* Yang, *supra* note 1, at 146 (noting the increase in protest and upheavals).

220. *See* Buckley, *supra* note 205 (describing the regime's concern over losing power and the reaction of top party officials to calls for constitutionalism).

failed to curb the short-term self-interested behavior of officials who continue to subordinate environmental concerns to others, fueling public unrest. Politically connected polluters continue to evade enforcement. Many local governments continue to prioritize economic development over centrally-mandated environmental protection. Judges continue to dodge environmental cases for lack of resources, to avoid crossing their political patrons, and for fear of opening the floodgates. Beijing has reacted by trying even harder to assert control, but perhaps too broadly—over both the recalcitrant officials who disobey its policies and the public dissidents who critique it—further fueling social unrest.

Some policymakers are attempting to steer the ship of state toward better environmental governance, but the ship is so enormous (and so stymied in the weeds of political patronage) that progress can be hard to discern. As one Chinese law professor told me, the government periodically makes an example of disciplining a corrupt official for self-dealing, but it is not enough to deter corruption by others because of China's enormous population. There are simply so many self-dealing officials that the likelihood any one will be singled out for punishment is too low to overcome the overwhelming incentives to remain plugged into the status quo grid of personal and political favors.[221] As a result, even high-profile disciplinary actions by the Party have so far failed to dent the system, and public confidence in government continues to decline.[222]

To summarize the obvious, then, everybody wants social stability and nobody wants a revolution. The public wants more environmental protection, but targets are sporadically implemented and regulations enforced too poorly to deter wrongdoing. To maintain order, the central government is showing greater interest in environmental governance, but

---

221. *See* Didi Kirsten Tatlow, *Deciphering the Hidden Rules That Tempt China's Officials*, INT'L N.Y. TIMES (June 2, 2012, 2:22 AM), http://rendezvous.blogs.nytimes.com/2012/06/02/deciphering-the-hidden-rules-that-tempt-chinas-officials/ ("Increasingly, some Chinese officials are saying: It's O.K. to be a little bit corrupt, when others are so much more corrupt than you. The unusual self-defense by some public servants – corruption is unequivocally a crime in China – is featuring more and more in Chinese media reports, sparking wide debate in a country where the prime minister says corruption is so bad it could one day 'terminate' Communist Party rule . . . . The 'hidden rules' that Mr. Liu referred to are called 'qian guize' and are a well known, unofficial code for illegal behavior that ranges from minor rule-bending to amassing large amounts of ill-gotten gains. While the government stoutly opposes corruption in public, Mr. Liu's self-defense is increasingly common, the Procuratorial Daily's Justice Net noted . . . citing several other recent cases where officials sentenced for corruption said what they made was nothing compared to others."); *see also* Wen, *supra* note 77.

222. One example of a high profile disciplinary action that has done little to restore faith in government is the sensational conviction of former party leader, Bo Xilai. *See* John Sudworth, *Chinese Court Rejects Bo Xilai Appeal and Upholds Life Sentence*, BBC (Oct. 25, 2013, 2:55 PM), http://www.bbc.co.uk/news/world-asia-china-24652525 (discussing the outcome of the Bo Xilai trial). For more on the Bo Xilai scandal, see *supra* note 80.

China is immense and hard to control from the center. Local governments want continued economic growth and many prioritize it despite central efforts at environmental reform. Too many officials at all levels of government are enmeshed in a self-sustaining network of economic incentives and political patronage that ferociously resists all attempts to overcome it. This network facilitates environmental enforcement lapses that further fuel public anger, but the network is so entrenched that it is difficult to imagine dismantling it without massive political upheaval. But to reiterate, nobody wants that. Where to go from here?

One possible answer is that political power is so misplaced, or corruption so entrenched, or public safety so threatened that change must come at whatever cost—even if it requires political upheaval. Yet while the human suffering resulting from pollution in China cannot be understated, neither can the massive suffering that has attended the multiple points of political upheaval in modern Chinese history. For those who still remember the mass violence of land reform after the 1949 Revolution, the famines following the Great Leap Forward, and the killings and social upheaval during the Cultural Revolution—Tiananmen barely registers as tragedy.

It is eminently reasonable that today's Chinese shrink from further such tumult. The Party deserves credit for lifting millions from poverty in a remarkably short time, and most Chinese are justifiably proud of the government that led them in doing so. But by all accounts, the current leadership seems unlikely to relinquish authority to an independent judiciary without revolution, and so those who long for change must seek a more incremental path.

V. A MODEST PROPOSAL FOR INCREMENTAL CHANGE

With these complexities in mind, I conclude this article by offering one possible vision of what that incremental judicial reform could look like, based on primary research among Chinese law professors, lawyers, and average citizens. The proposal is not specific to environmental concerns and would benefit rule-of-law goals more generally. However, it would especially facilitate environmental reform because of the untapped potential benefits of increased judicial participation in environmental governance. Further, because the proposed change is so modest, it stands a chance of being enacted where more ambitious proposals might not. It is the kind of incremental adjustment that government insiders seeking reform could propose without attracting too much resistance from the opponents of change, who might not view so small a change as a threat.

In a nutshell, the proposal is simply to give genuine force to two

aforementioned Chinese laws that are already on the books, but poorly enforced: (1) guaranteed access to the courts when a plaintiff legitimately states a claim,[223] and (2) unfettered public viewing of trials and appeals.[224] Doing so would curtail judicial tendencies to avoid politically awkward cases and reduce the threat of political consequences for interested parties who must currently register with authorities to view court hearings. Beyond that, however, the judicial system would proceed as before, without requiring additional Western due process. The simple mechanism of allowing claims to be heard in court before a public audience creates just enough accountability to gradually shift the political calculations that go into judicial decision-making—and no more. It creates a foothold for the champions of reform without excessively provoking opponents, but one that, over time, could meaningfully alter the culture of expectations regarding law enforcement.

A. Step One: Guaranteed Judicial Access

The first prong of the proposal is to simply uphold the Civil Procedure Code's promise that all legitimate plaintiffs should get their day in court.[225] In its most modest form, the proposal seeks no further guarantees about the kind of due process that an American court would require—there is no additional requirement of a neutral arbiter or evidence-based rulings that could incite the anxieties underlying Document #9.

The proposal simply requires a genuine public hearing of the variety that average court cases receive in China. This would enable plaintiffs with meritorious claims the chance to seek legal redress, but more importantly, the chance to be heard. Even if judges rule against their claims, the losing plaintiffs would experience the dignity of airing their grievance in a court of law, before their peers and those they believe caused them harm, as citizens of equal value with all others. The very act of participating in the judicial process has the potential to strengthen public faith in the rule of law more generally, especially if the process is perceived as fair.[226]

To be sure, opening the courts to all legitimate cases could create big day-to-day changes for judicial administration. Confirming the concerns of judges who decline environmental cases for reasons of workload, the

---

223. *See supra* notes 161–184and accompanying text.

224. *See supra* notes 185–196 and accompanying text.

225. *See* Min Shi Su Song Fa [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991), art. 108, 4 P.R.C. LAWS 183 (setting forth standing requirements).

226. Marquand, *supra* note 81 (discussing reforms to make the judiciary a 'safety valve' where citizens can air their grievances).

change could substantially increase their dockets and potentially require additional judicial appointments. It could provoke the development of more stringent gatekeeping jurisprudence, such as the standing, mootness, and ripeness doctrines that the U.S. Supreme Court developed before it controlled its own docket. Nevertheless, on the index of political challenge, this change would probably prove the easier of the two elements of the proposal. After all, implementation would not require the amendment of any official statutes or policies; doing so would simply enforce the law as it already stands.

Moreover, the change itself would not directly threaten those who must make the decision to implement it—a feature that immeasurably increases the chance that any proposed change in governance gets made. Reversing the practice of disallowing qualifying claims in court does not change Party oversight of judicial outcomes, preserving its supervision over all aspects of Chinese governance. It does not change the method for deciding cases. Because few party leaders would have a direct stake in opposing the change, it should meet with mild opposition from all but the trial judges that may end up with more work (a problem that could be managed with additional staffing).

At worst, officials with ties to defendant enterprises may foresee the potential for awkward judicial calls that could once have been obviated by ignoring the case entirely. Still, because the change would be made prospectively and independently of any particular case, policymakers behind this particular veil of ignorance would not perceive a direct threat to their own personal interests.

B. Step Two: Unfettered Public Viewing

The second prong is what gives the proposal the chance to truly effect change over time. As aforementioned, the law already protects the right of the public to view cases, but would-be viewers are required to identify themselves by name to courthouse officials. This part of the proposal requires the government to allow people to attend court hearings without having to register with the local officials who may wield significant power over their lives.[227] Consistent with the Civil Procedure Code, this requirement would not apply to those matters implicating state secrets that are already exempted from Article 111's open hearings requirement.[228]

---

227. *See supra* notes 185–196 and accompanying text.

228. Civil Procedure Law art. 66, *translated in Civil Procedure Law of the People's Republic of China*, LAW INFO CHINA, http://www.lawinfochina.com/display.aspx?id=6459&lib=law&SearchKeyword=civil%20procedure&SearchCKeyword= (last visited Dec. 20, 2013) ("Evidence shall be presented in the court and cross-examined by parties, however, evidence that involves state

However, it would apply to all hearings that are already open to public view, though currently subject to the intimidating registration requirement.

Successful implementation of this prong would require that courts not simply replace the registration requirement with other means of intimidation, but registration is perhaps uniquely intimidating. Being identified carries with it an implicit threat: if the government knows you are interested in a subject the government wishes you were not, there may be unpleasant ramifications.[229] People are nervous that irritating government officials may result in retaliation of some kind—at work, if they work for the state or a state-owned enterprise; in their homes, which are almost always built on land owned by the government; or even by politically-motivated detention.[230] If credibly carried out, removing the ominous experience of officially signaling interest in potentially sensitive cases would increase the number of public attendees. Increasing the number of public attendees at trials would open a small window of transparency in a very small corner of Chinese governance, but even a cracked window beckons fresh air. Attendees would likely use the ferociously popular Chinese microblogs to spread word of what they see.

Allowing unfettered public viewing would not subject judicial decision-making to direct democracy, but it would open it to public appreciation or critique (however fleeting, in the censored blogosphere). Such transparency could enable just enough public accountability to gradually but eventually steer governmental impulses toward rule-of-law ideals that will inspire public faith. Public viewing would not necessarily change individual judicial outcomes, nor the process by which outcomes are determined behind the scenes. However, if observers bear witness to judicially-imposed perceived injustice, it will impact public opinion in a way that could create political consequences for the responsible officials and their social networks. Transparency would at least harness the self-interest of judges in the right direction, putting the consequences of public reaction into the mix of considerations—from genuine legal principles to pure political patronage—on which their decisions are based.

The government might respond quickly to censor unfavorable reports, but the government is also responsive to public unrest. The judicial committee that decides each case would now have to take the potential for

---

secrets, trade secrets, or individual privacy shall not be presented in an open court session.”).

229. For a recent example, consider the politically motivated prosecution of the relatives of Chen Guangcheng, the blind lawyer-activist who sought shelter in the U.S. Embassy in Beijing in 2012. Keith B. Richburg, *Chen Guangcheng's Nephew Found Guilty of Assault in China; Sentenced to 39 Months*, WASH. POST (Nov. 30, 2012), http://articles.washingtonpost.com/2012-11-30/world/35584589_1_shandong-officials-chen-guangcheng-chen-guangfu.

230. *See id.*

public backlash into its calculations. The hope is that this feedback loop of marginal accountability would initiate a process by which the system gradually and eventually self-corrects. Sensitive to the potential for social unrest, decision-makers could moderate the likelihood that wrongdoing goes unpunished. Policymakers could also use public reactions to matters in court as cover for politically difficult decisions about conflicting environmental and economic values.[231] Ideally, the simple shift in transparency becomes the thin edge of a wedge that grows gradually thicker over time, toward greater public accountability in governance more generally.

The second prong of the proposal would produce smaller impacts on day-to-day judicial operations than the first, but allowing unfettered judicial access requires a change in governance culture that may ultimately prove the more politically difficult of the two. In China, the state asserts an unquestioned right to keep track of its citizens' activities.[232] Mail, electronic communications, and residency are all unapologetically scrutinized by the Chinese government.[233] Other forms of personal surveillance, from ubiquitous surveillance cameras to CCP "monitors" in localities, government offices, places of business, and even universities, are the norm.[234] It might be difficult to persuade the government not to take names at the door, and even more difficult to persuade members of the public that their attendance at public trials would not be monitored and potentially punished regardless of the official line.

China's ubiquitous surveillance programs would provide another means of identifying participants, so the proposal would require a credible governmental pledge not to collect this data for the purpose of

---

231. *See* Email from Dan Guttman to the author, *supra* note 100 (describing an anecdotal example of this).

232. As the state department warned us when we arrived in Beijing, "there are no reasonable expectations of privacy in China." *See* Ann Bartow, *When Greed Pushes Privacy Levers: Online Surveillance versus Economic Development in the People's Republic of China*, 74 OHIO ST. L.J. (forthcoming 2013) (manuscript at 1) (contextualizing China's ongoing effort to reconcile extensively monitoring its citizens' communications with its goal of developing banking and financial industries, high tech innovation capabilities, and the knowledge economy).

233. Frank Langfitt, *In China Beware: A Camera May Be Watching You*, NAT'L PUB. RADIO (Jan. 29, 2013, 3:30 AM), http://www.npr.org/2013/01/29/170469038/in-china-beware-a-camera-may-be-watching-you ("China is becoming a surveillance state. In recent years, the government has installed more than 20 million cameras across a country where a decade ago there weren't many. Today, in Chinese cities, cameras are everywhere: on highways, in public parks, on balconies, in elevators, in taxis, even in the stands at sporting events. Officials say the cameras help combat crime and maintain 'social stability' – a euphemism for shutting up critics. In fact, the government routinely uses cameras to monitor and intimidate dissidents. Human rights activists worry that more surveillance will erode the freedom of ordinary people and undermine what little ability they have to question their rulers.").

234. *Id.*

intimidation.[235] Nevertheless, even video-surveillance at the courthouse door would likely exert less intimidation than the requirement to directly identify oneself in paperwork retained by the government. Video-identification requires later efforts to identify attendees from grainy photography, an investment of resources that might never take place. Besides, members of the public are so used to video-surveillance by now that its use in court may not provoke undue anxiety. After all, surveillance at the many sites of recent mass environmental protests did not discourage attendance. There is usually safety in numbers, and some have creative deployed the surgical masks that are now regular apparel for those seeking additional protection from air pollution. Either way, any form of surveillance that intimidates public viewing should be discouraged.

The encouragement of greater public access to court hearings is consistent with the government's recent emphasis on increasing public participation in environmental governance and all governance more generally. The Environmental Impact Assessment Law requires the state to encourage relevant entities, experts, and the general public to participate in assessment of actions that might impact their environment.[236] The Law of Administrative Approval requires administrative agencies to inform the relevant parties and provide them an opportunity to share their concerns when certain proposed actions could affect their interests.[237] The Law on Legislation provides that "[i]n the process of drafting an administrative regulation, the drafting body shall gather opinions from a wide circle of constituents such as the relevant agencies, organizations and citizens."[238] Even the State Council—at the apex of the pyramid of government policy—has expressly sought avenues for greater public participation and accountability in governance.[239] There is thus hope that the government might be willing to make the adjustment, even though it departs from past practice.

C. The Mechanics of Transparency and Accountability

The mechanics here are simple, and this is hardly the only way forward. Expert Chinese advocates have proposed more ambitious changes

---

235. Query whether similar conversations should be taking place in the United States, given the growth of American surveillance culture and new electronic means of data collection.

236. *See* Wang Canfra, *supra* note 3, at 172 (discussing Article 5).

237. *Id.* at 178 (discussing Article 36).

238. *See* Percival & Zhao, *supra* note 35, at 160–61 (discussing Article 58 and noting that public involvement may be sought through panel discussions, feasibility study meetings, hearings, and other means).

239. *See id.* at 12, 17 (discussing the primacy of the CCP alongside State Council's aspiration of increased public participation in the political process).

that deserve serious attention. These include restructuring enforcement agencies to create greater political independence from local governments,[240] establishing greater judicial independence through vertical management to avoid local protectionism,[241] and shifting the primary accounting tool of the Chinese bureaucrat from the "gross domestic product" to a "green domestic product" that includes the economically quantifiable costs and benefits of decisions affecting the environment.[242] The more modest proposal need not stand in the way of more ambitious reforms; ideally, they should proceed simultaneously.

Yet modesty is perhaps the proposal's principle virtue: because it is so small, there is a chance of its adoption even if the others prove too controversial. In simplest form, it merely ensures that people get to tell the government about their grievances, and that everyone else gets to see what the government does in response. Beyond that, the government still gets to respond however it wants, within the network of consultation and coordination that characterizes Chinese judicial administration. As modest as it is, it could just prove the kernel of change that helps propel Chinese governance toward more transparent and accountable rule of law.

After all, the proposal is designed to inject just enough transparency into the system to harness the synthesis between the public's interest in environmental affairs and the government's sensitivity to social unrest over environmental affairs. It leverages public environmental concern against the Party's renewed commitment to greater public participation in governance. It focuses on court reform though courts currently play a relatively small role in environmental governance, but it appropriately tracks the increased focus on judicially enforceable environmental statutes and regulations.

More generally, it asks for the minimal necessary amount of change to facilitate a natural process by which governance bends toward greater public accountability within the rule of law. Critically, it does so without imposing a fully Western model of due process to which the Party is openly hostile. If adopted, it could help initiate the kind of gradual, evolutionary transition away from political patronage without the political friction that led to the Tiananmen violence in 1989.

In this regard, the proposal shares important features with the government's new 2014 requirement that 15,000 factories disclose their air

240. *See* Wang Canfra, *supra* note 3, at 174–75 (describing positive outlook on recent reforms that divorce administrative agency action from county party interference).

241. *Id.* at 177.

242. *Id.* at 175–76.

and water pollution discharges in real time.[243] The theory underlying the celebrated reporting requirement is that transparency and public accountability will produce better environmental results, by curbing polluter behavior directly and by limiting the interference of political patronage in enforcement decisions. When everyone can know what factories are actually doing (and local observers can identify false reporting), the potential for public wrath will influence the cost-benefit analysis undertaken by regulated parties and regulators alike. Polluters must fear public backlash, and it becomes more expensive for officials to turn a blind eye to clear violations, even when they might prefer to protect their *guanxi*.

The judicial reforms proposed here operate from the same principles. The two reform measures similarly harness transparency and accountability to produce better environmental results, here by curbing polluter and judicial behavior. If everyone could know about environmental harms and how the government responds to them, the influence of public opinion would become part of the cost-benefit analysis that is a defining feature of the hybrid judicial/political decision-making by Chinese courts. Polluters would have to fear public backlash, and it would be that much harder for executive and judicial officials to prioritize their personal *guanxi*.

The pollution reporting requirement brilliantly taps into the potential for public accountability to overcome the hurdles of political patronage.[244] A move toward greater judicial transparency could do the same thing, and potentially promise even more. By reducing the successfulness of patronage networks, it could encourage the development of overall judicial norms away from the judicial/political hybrid model and toward more self-sustaining, rule-of-law consistent judicial neutrality.

D. Political Feasibility

Long discussions with Chinese colleagues over the years have elicited reactions to the idea ranging from "too small" to "too big." Some suggested that if one were really going to attempt reforms of this nature, why not just aim for judicial independence? Conversely, if the Party is unwilling to embrace judicial independence, why would it accept these changes, knowing that they are aiming for a similar goal over time? These criticisms are both fair; it is a small proposal, and it does have big ambitions. But those who admired the proposal saw strength in its realistic assessment of

243. *See supra* notes 62-76 and accompanying text (discussing China's new requirement of public pollution disclosures).

244. *See supra* notes 75-76 and accompanying text.

the mechanisms and possibilities for political reform. For them, its principal draw is that it the proposed changes are just small enough to be actually implemented in the foreseeable future, and just meaningful enough to trigger recursive governmental self-regulation.

While the proposal somewhat compromises open political control of individual disputes, the compromise is marginal because judicial outcomes will still be subject to political oversight, through Party representation on judicial panels. However, the displacement of political influence to its behind-the-scenes role in judicial adjudication may prove attractive to government leadership because of the subsidiary benefits of judicial enforcement discussed in Part III(D).[245] More consistent and publicly known judicial review could provide face-saving political cover for government officials prioritizing environmental directives over competing economic concerns and political obligations. It could also help central leadership more effectively corral recalcitrant local officials, closing the gap of local implementation that has thus far bedeviled effective environmental governance.

Most importantly, the proposal dovetails conveniently with the power struggles presently underway within China's leadership.[246] Though a unitary system, the Chinese government is not a unitary voice—like any other, it represents a tangled web of diverging interests and impulses, with some officials campaigning for greater political reforms and others favoring retrenchment.[247] Given China's famously black-box style of governance, these machinations are rarely apparent to observers. But factions vie for influence within the box, each imagining a different best path forward.[248] Against this backdrop, some leaders will indeed resist the thin edge of what they fear could become a thick wedge—but others will seek out the fledgling wedge. These reformers will seek opportunities to introduce it in the modest, incrementally important ways suggested here.

Generational differences will also cleave the government more powerfully as time moves forward.[249] Especially among those born after the

---

245. *See supra*, textual discussion accompanying note 192.

246. *See* Tania Branigan, *Where Next for China as the New Generation of Leaders Take Power?*, GUARDIAN (Sept. 29, 2012, 9:21 AM), http://www.theguardian.com/world/2012/sep/29/china-18th-communist-party-congress-xi-jinping (describing power struggles past and present within CCP leadership).

247. *See id.*

248. *Id.*

249. *See id.* ("Others hope a new generation of leaders could yet grasp the nettle. They are 'collectively more diverse in terms of their professional and political backgrounds, more weathered and adaptable from their formative experiences during the Cultural Revolution and more cosmopolitan in their worldviews and policy choices than the preceding generations. They may contribute, in a profound

Deng Xiaoping reforms, the thirst for change is strong. These younger Chinese have no personal memories of the Great Leap Forward or the Cultural Revolution. Fluent with Internet exchange and comfortable with prosperity, they have less fear of tumult and more appetite for political reform.[250] A proposal like this one might be embraced by those seeking a modest way forward without risking too much political capital or social instability.

This closing point reminds me of one of my most memorable conversations in China, with a particularly bright graduate student. He explained to me his complete faith that political change would come eventually and without revolution, through natural transitions in leadership. I pressed why it was so clear that change would follow leadership transitions, if the outgoing leaders will just seek to replace themselves with new leaders who share their worldview. He agreed that it was likely that outgoing leaders would attempt to solidify their positions through selective transition. But after a moment of thoughtful silence, he added: "Yet they can only choose from among us." [251]

His point was that, even with his entire generation to choose from, the current leaders could not simply replace themselves. What they represent cannot be found among the young people. Some in his generation lean left and some lean right, but none sees the world exactly as the aging leadership does. The new generation has a worldview all its own, informed by their experiences of greater economic development than their parents ever knew, the Internet, and environmental degradation. All are yearning for something just a little bit different, something more responsive to the public, something a little closer to the rule of law.

CONCLUSION

China's leaders are taking important steps to facilitate the development of a regulatory culture in which effective environmental governance can take hold. Enforcement remains the weak link in the chain,

---

way, to political institutionalisation and democratic governance of the country,' argued analyst Cheng Li of the Brookings Institution in a recent paper on the handover.").

250. *See* Martin Patience, *China Factory Construction Halted Amid Violent Protests*, BBC (July 3, 2012, 5:30 AM), http://www.bbc.co.uk/news/world-asia-china-18684895 (describing how students organized a notable protest in Shifang using their weibo accounts); Xu Nan, *Traditional Media Helps Prevent Violent Environmental Protest in China*, CHINA DIALOGUE (June 24, 2013), https://www.chinadialogue.net/blog/6128-Traditional-media-helps-prevent-violent-environmental-protest-in-China/en (providing further detail about the student weibo traffic preceding the Shifang protests).

251. Oral communication with author [name withheld for protection].

but for this very reason, it also offers the lowest-hanging fruit for environmental reform.

A variety of opportunities are within easy reach to substantially improve the environment and better protect public health and safety. Whether by modest improvements in judicial accountability or a full governance overhaul toward green GDP accounting, the goals of environmental enforcement are clear. Violations must be consistently prosecuted, policies must be consistently implemented, and victims must have consistent access to judicial redress, within full public view.

Ultimately, in China and elsewhere, the success of environmental governance will require social change from the bottom up, shifting cultural norms toward sustainability. But along that journey, it will also require effective enforcement from the top down. As so painfully learned by Beijing residents during the record-breaking Airpocalypse and by Shanghai residents as thousands of pig carcasses were pulled from their drinking water source, law without enforcement is a paper tiger.

ADDENDUM

On April 24, 2014, just as this article was going to press, the Chinese legislature passed a sweeping series of amendments to the Chinese Environmental Protection Law—the first since the law's enactment twenty-five years ago.[252] According to official government reports, these changes reflect the fact that China has "'declared war' against pollution and pledged to fight it with the same determination the country battled poverty."[253] Four drafts of the amendments were reviewed before passage—an unusually high number that suggests both the importance and controversial nature of the new terms, which go into effect on January 1, 2015.[254] Some make clear that the government is finally responding to environmental enforcement criticisms such as those raised in this Article.

The amended law includes twenty-three additional articles, merging well-worn elements with others that show hopeful signs of improvement. Familiar moves include amendments that impose stiffer penalties to deter environmental wrongdoing and promises that environmental violators will be "named and shamed" and held criminally

[252] Xinhua, *China's Legislature Adopts Revised Environmental Protection* Law, XINHUANET (April 24, 2014), *available at* http://news.xinhuanet.com/english/china/2014-04/24/c_133287570.htm).

[253] *Id. See also* Erin Ryan, *The Paper Tiger Gets Teeth: Developments in Chinese Environmental Law,* LAW.COM NETWORK (April 28, 2013) (republished in THE HUFFINGTON POST, April 30, 2014, http://www.huffingtonpost.com/erin-ryan/chinese-environmental-law_b_5234210.html). Some material from this addendum also appears there.

[254] Xinhua, *supra* note 252.

responsible where appropriate.[255] Harsher penalties do suggest that the government is taking environmental harm more seriously, but as argued above, threatening penalties are of limited value if violations are not consistently prosecuted. New provisions also exhort the public to adopt more environmentally sustainable behaviors,[256] consistent with previously non-enforceable exhortation in, for example, the Circular Economy Law.

Nevertheless, other amendments address enforcement failures head-on. The new law specifies that local officials can be fired or demoted if they are found to have covered up environmental wrongdoing, falsified data, illegally withheld environmental data from the public, or failed to enforce legally required closure of violators.[257] Similarly, those responsible for environmental impact assessment and supervision will now be held jointly liable for harm if they are found to have performed those duties fraudulently.[258] These critical changes acknowledge that under-enforcement has been the Achilles Heel of Chinese environmental law to this point. They are designed to deter not only violations, but also the complicit bureaucrats that have regularly allowed violations to continue unpunished. If these enforcement incentives are themselves enforced (the big "if"), they have the potential to put some real bite into the Paper Tiger.

The amendments also empower certain non-governmental organizations to bring public interest environmental litigation. Significantly, China's official news organ openly reported that the government was specifically interested in expanding public interest litigation to channel public environmental anger away from mass protests and toward the more contained channels of legal process: "By promoting public interest litigation, it is hoped that the public's appeal for a better environment can be addressed through rule of law, instead of resorting to protests."[259] After much controversy, the new law permits government-registered organizations in certain cities that have been operating for at least five years to bring these suits—a positive step forward from disallowing public interest standing to all, though falling short of calls by reformers to enable public interest standing to all environmental NGOs.[260]

Yet whether the primary motivation was to improve the Chinese environment or to avoid social unrest, we should consider this a hopeful sign. Efforts to shift environmental discontent toward legal channels must

---

[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] Xinhua Insight, *Draft Law Ups Punishment for Environmental Wrongdoing*, XINHUANET (April 21, 2014), *available at* http://news.xinhuanet.com/english/indepth/2014-04/21/c_133279232.htm).
[260] *See* Sui-Lee Wee, *China to Impose Tougher Penalties on Polluters Under New Law*, REUTERS (April 24, 2014), *available at* http://www.reuters.com/article/2014/04/24/china-environment-idUSL3N0NG35Q20140424).

be effectively coupled with the kinds of reforms suggested here to ensure that legal channels approximate the rule of law. But if they are, both the environment and the rule of law in China will benefit. The rule of law has always been a valuable societal tool for channeling public unrest away from more destructive means of expression and towards more productive mechanisms for social change. Peasants take up pitchforks when there is no other voice left to them—but genuine access to the courts could give effective voice to millions, sometimes many at a time. Hopefully, the amendments to the Chinese Environmental Protection law signify meaningful changes for China's environmental and legal future.