DOES JUDICIAL INDEPENDENCE MATTER? A STUDY OF THE DETERMINANTS OF ADMINISTRATIVE LITIGATION IN AN AUTHORITARIAN REGIME

WEI CUI*

ABSTRACT

Lawsuits against the government form a part of the regular functioning of legal systems in democratic countries, and responding to such lawsuits constitutes an unavoidable part of governance. However, in the context of authoritarian regimes, administrative litigation has been viewed as a distinctively valuable institution for promoting the rule of law and individual rights. Moreover, the judiciary is portrayed as the keystone to this institution and to the rule of law in general: the more powerful and competent is the judiciary, the more it is able to “constrain government” through judicial review. Through empirical and comparative analyses of over two decades of administrative litigation in China against one of the state’s essential branches, tax collection, I challenge the utility of this normative conception of administrative litigation. Using conceptual tools that apply across legal systems and regulatory areas, I show that while litigant behavior as well as the regulatory environment offer useful explanations of litigation patterns such as case volume and the plaintiff win rate, the relevance of judicial

* Associate Professor, Allard School of Law, University of British Columbia. Author email: cui@allard.ubc.ca. I am grateful to Eric Hou and Xiang Fangfang for excellent research assistance and to Zhiyuan Wang for assistance with statistical analysis. I have benefited from comments by Cheng Jie, Jiang Hao, Liu Yue, Pitman Potter, Wang Yaxin, Wei Guoqing, and audiences at the Sydney Chapter of the Australian Branch of the International Fiscal Association, Northwestern University Law School, the Canadian Law and Economics Association Annual Meeting in 2014, and the 2016 Annual Comparative Law Work-in-Progress Workshop at the University of Illinois Law School on earlier drafts. All errors remain my own.
quality is barely discernible. This highlights the intuitive idea that judicial review can operate only when a private party brings suit, and whether and when they will do so cannot be taken for granted. In countries with weak legal systems, the rule of law may fail in certain basic ways that even a competent and well-subsidized judiciary cannot remedy.

Key words: administrative litigation, judicial review, rule of law, tax litigation.
# Table of Contents

1. Introduction ................................................................................944
2. Basic Facts: Case Volume, Plaintiff Win Rate, and Rate of Adjudication in Chinese Tax Litigation .......................952
3. Institutional Determinants: Exhaustion of Administrative Remedies and Settlements during Litigation ..........959
   3.1. Settlement Prior to and as a Result of Administrative Appeal .................................................................959
   3.2. Settlement during Litigation .......................................................................................................................964
4. Evidence from a Systematic Review of Case Law ..........967
   4.1. The Sample ............................................................................968
   4.2. The Findings ...........................................................................971
      4.2.1. Does Tax Litigation Involve Aberrant Behavior? ......972
      4.2.2. Evidence of Selection Effects ....................................975
      4.2.3. Evidence for Information Asymmetry between Plaintiffs and Defendants ....................................977
      4.2.4. Legal Standards and Judicial Bias ............................979
   4.3. Summary ............................................................................985
5. The Regulatory Environment: The Heart of the Story .................................................................986
6. Administrative Litigation and the Rule of Law .................................................................992
7. Conclusion ..................................................................................996
1. INTRODUCTION

In democracies with strong traditions of the rule of law, litigation against the government, while generating important bodies of case law for various areas of government activity, is not itself viewed as a yardstick for evaluating the performance of legal systems. In the United States, a probably widely shared view about litigation against government agencies is expressed by Professors Theodore Eisenberg and Henry Farber:

“We suspect that, on average, the federal government is less fearful of litigation than are private litigants. Government is, after all, as permanent a secular institution as we have and has been litigating for hundreds of years. Litigation to enforce laws and defend against attacks on laws and government policies is part of its routine. Government is so large relative to most other litigants that it, more than the average litigant, knows substantial litigation will be a part of its existence.”

In other words, the occurrence of litigation to resolve disputes between the government and citizens is an epiphenomenal consequence of the general functioning of the legal system and the (wide) scope of government’s activities. One need not think of it as a distinct institution with a distinct purpose in itself. In countries

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2 Correspondingly it need not constitute a distinct subject of study. Thus in numerous quantitative studies of U.S. litigant behavior, lawsuits with government defendants are simply included as one type of litigation among many others. See Peter Siegelman & John J. Donohue III, The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis, 24 J. LEGAL STUD. 427, 453 (1995) (showing that in employment discrimination cases there are both private and government defendants); Peter Siegelman & Joel Waldofgel, Toward a Taxonomy of Disputes: New Evidence through the Prism of the Priest/Klein Model, 28 J. LEGAL STUD. 101, 109 (1999) (defining the different types of parties such as individuals, labor unions, governmental entities, and foreign countries); Daniel Kessler et al., Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. LEGAL STUD. 233 (1996).

In the large empirical literature studying judicial attitudes, lawsuits against government agencies offer particularly germane material for the examination of the ideological leanings of judges (e.g. whether they are pro-or anti-government). For a review, see Frank B. Cross, Decision Making in the U.S. Courts of Appeals (2007) (analyzing decisions made by the US district courts and arguing that while the courts' judges are influenced by ideology, legal requirements exercise a much stronger influence on their decisions). But the fact that these lawsuits are brought
with civil law traditions, a special judicial branch is often created to adjudicate lawsuits against the government: a special recognition for disputes between the government and private parties can thus be said to be institutionalized, somewhat in contrast with the U.S. and other common law countries. The existence of an administrative law branch of the judiciary, however, is not itself regarded as differentiating countries characterized by the rule of law from those that are not.

In countries subject to authoritarian rule, by contrast, lawsuits against government agencies can assume a special symbolic status: they may be seen as providing rare instances of institutionalized constraint on the exercise of authoritarian power. Well-justified antipathy towards oppressive regimes that frequently trample rule of law norms has led legal professionals, scholars, the media and citizens in general to applaud lawsuits against the government (frequently labeled as “administrative litigation”) as a good thing in itself. Administrative litigation is thus strongly promoted by those who aspire to limit the power of bad government, especially when few other mechanisms of such constraint are available.

3 See generally, Zaim M. Nedjati & J.E. Trice, English and Continental Systems of Administrative Law 35 (1979); Dominique Custos, Independent Administrative authorities in France: Structural and Procedural Change at the Intersection of Americanization, Europeanization and Gallicization, in COMPARATIVE ADMINISTRATIVE LAW 278 (Susan Rose-Ackerman & Peter L. Lindseth ed., 2010); Katharine Thompson & Brian Jones, Administrative Law in the United Kingdom, in ADMINISTRATIVE LAW OF THE EUROPEAN UNION: ITS MEMBER STATES AND THE UNITED STATES 177 (René Seerden ed., 3d ed. 2012) (arguing that the fact that England did not have an institutionally and doctrinally separate system of administrative law was distinctive from civil law countries and is considered by some as a virtue).

4 See, e.g. Tom Ginsburg, Administrative Law and the Judicial Control of Agents in Authoritarian Regimes, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 24 (Tom Ginsburg & Tamir Moustafa ed., 2008), http://ssrn.com/abstract=2006538 [https://perma.cc/T29B-S55T] (all page citations below to this chapter are by reference to the SSRN version) (“Regardless of the result of these dynamics of interaction among multiple agents, administrative litigation and procedural rules will tend to constrain the government, even if these regime opponents are not successful in their particular lawsuits”).

5 Kevin J. O’Brien & Lianjiang Li, RIGHTFUL RESISTANCE IN RURAL CHINA 2 (2006) (administrative litigation is a form of “rightful resistance”, which is “a form of popular contention that operates near the boundary of authorized channels, employs the rhetoric and commitments of the powerful to curb the exercise of power, hinges on locating and exploiting divisions within the state, and relies on mobilizing support from the wider public”).

6 Id, at 103 (administrative litigation has led many “to reconsider their relationship to authority, while posing new questions, encouraging innovative tactics,
Conversely, administrative litigation has also been conceived as a distinct device with which the principals in an authoritarian regime can monitor their agents.\textsuperscript{7} Once such positive valence, or at least distinct institutional purpose, is attached to administrative litigation, it also becomes instinctive to view the quantity of such litigation as well as litigation outcomes as meaningful indicators of how well the institution is serving its purpose. In particular, lower-than-expected case volume and plaintiff win rates against the government are taken to reflect judicial weakness vis-a-vis the executive branch. 

As natural as such reasoning may seem, it faces some serious theoretical and methodological difficulties. To begin, there is no generally accepted theory predicting the quantity of litigation in a given jurisdiction, i.e. explaining why some countries are more “litigious than others.”\textsuperscript{8} Consequently, it can be difficult to justify the implicit benchmarks used in making judgments such as that the volume of litigation or the rate of plaintiff wins in a country is “too low.” In addition, with respect to the plaintiff win rates, the most compelling existing theory posits that the key determinant of such rates is the rate of settlement among litigants, which is itself determined by the abilities of litigants to predict judicial outcomes, the cost of litigation, and the stakes the parties have in the disputes.\textsuperscript{9} Plaintiff win rates, in other words, by themselves do little and spurring thoughts about political change.”

\textsuperscript{7} Ginsburg, supra note 4, at 10 ("Judicially supervised administrative procedures, such as a right to a hearing, notice requirements, and a right to a statement of reasons for a decision, are a third mechanism for controlling agency costs.").

\textsuperscript{8} For recent discussions, see Theodore Eisenberg et al., Litigation as a Measure of Well-Being, 62 DePaul L. Rev. 247, 248 (2013) ("… higher litigation rates are not necessarily evidence of an overly litigious society or a drain on the economy; in fact, they can be a natural consequence of economic development and improved human well-being."); Mark Ramseyer & Eric B. Rasmusen, Are Americans More Litigious? Some Quantitative Evidence, in THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 66 (Frank Buckley ed., 2013).

\textsuperscript{9} George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 4 (1984) ("According to our model, the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement."); Joel Waldfogel, The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory, 103 J. Pol. Econ. 229, 233 (1995) ("The settlement process acts as a filter on filed cases. Cases go to trial only if the parties disagree substantially over the probability of plaintiff victory . . . If the plaintiff and defendant have little uncertainty about case quality or the decision standard, then only cases with true quality near the decision standard will be tried"); Joel Waldfogel, The Selection of Cases
to answer questions about whether the judiciary tends to side with the government, or whether the legal standard in a given area of dispute is otherwise too favorable to the government.

This article explores these challenges regarding the interpretation of the outcomes of administrative litigation in authoritarian regimes through an in-depth case study. I focus on one country, China, and litigation in one fundamental area of government activity, taxation. Because of its authoritarian government and weak rule of law, administrative litigation in China has long been held as an emblem of instruments for constraining government. Ever since the 1980s, both Chinese and foreign scholars have resorted to the study of administrative litigation as a way of assessing the development of China’s legal system. Various authors have also

10 PITMAN POTTER, CHINA’S LEGAL SYSTEM 192–93 (2013) (explaining how China continues to be an authoritarian regime that has a weak rule of law because it tends to subdue civil and political rights to the authority of the Party); Benjamin J. Liebman, China’s Courts: Restricted Reform, 191 CHINA Q. 620, 641–42 (2007) (showing that although China has made efforts to strengthen its legal system, the role of judges has not been sufficiently strengthened); RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARDS RULE OF LAW 247, 513 (2002) (showing that China is in transition from rule by law to a version of rule of law); Stanley Lubman, Bird in a Cage: Chinese Law Reform after Twenty Years, 20 NW. J. INT’L L. & BUS. 383, 385, 408 (2000) (explaining that Chinese authoritarianism is fragmented due to decentralization and that makes it difficult for comprehensive legal reform); KEVIN J. O’BRIEN, REFORM WITHOUT LIBERALIZATION: CHINA’S NATIONAL PEOPLE’S CONGRESS AND THE POLITICS OF INSTITUTIONAL CHANGE 13, 20 (2008).

11 See, e.g., Pitman Potter, The Administrative Litigation Law of the PRC: Judicial Review and Bureaucratic Reform, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 270 (Pitman Potter ed., 1994) (explaining that the Administrative Litigation Law represents a culmination of the legal reform effort by providing a framework for applying positivist legal regulation to administrative action); Minxin Pei, Citizens v. Mandarins: Administrative Litigation in China, 152 CHINA Q. 832, 859 (1997) (“The evidence presented and analyzed in this study shows that, although the constraints of China’s closed political system seriously limit the effectiveness of the ALL, the institution of judicial review of administrative actions is gradually being consolidated.”); David Weller, The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action, 98 COLUM. L. REV. 1238, 1282 (1998) (showing that the Administrative Litigation Law and other regulations provide a basis on which to challenge abusive acts by administrative agencies); Kevin J. O’Brien & Lianjiang Li, Suing the Local State: Administrative Litigation in Rural China, 51 CHINA J. 75, 93–94 (2004) (arguing that evidence shows that administrative litigation in China still faces great hurdles because the judicial system still remains
held forth putative evidence of low case volumes and low plaintiff win rates as confirming the lack of independence on the part of the Chinese judiciary. While Chinese tax litigation has generally attracted little attention to date, when instances of such litigation are reported in the media, they are also quickly portrayed as responding to oppressive government actions (and reflecting Chinese courts’ general inability to constrain such actions). Overall, both deeply embedded with politics; Donald Clarke et al., *The Role of Law in China’s Economic Development, in China’s Great Economic Transformation* 375 (Thomas Rawski & Loren Brandt ed., 2008); Ji Li, *Suing the Leviathan – An Empirical Analysis of the Changing Rate of Administrative Litigation in China*, 10 J. EMPIRICAL LEGAL STUD. 815, 815 (2013) (analyzing the changing rate of administrative litigation in China to evaluate social litigiousness, state-society relations in authoritarian regimes, Chinese elite politics, and Chinese administrative law); Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts, in The Limits of the Rule of Law in China* 163, 174, 183, 190 (Karen G. Turner et al. ed., 2000) (explaining that although the Administrative Litigation Law provides individuals the procedure to challenge decisions of officials, it does not allow the administrative rule itself to be challenged); Lubman, supra note 10, at 392 (“No where is the difficulty of improving Chinese legality better illustrated than in the hesitantly developing field of administrative law”).

12 Xin He & Yang Su, *Do the “Haves” Come Out Ahead in Shanghai Courts*, 10 J. EMPIRICAL LEGAL STUD. 120, 139 (2013) (“Scholarship has pointed out the obvious absence of judicial independence, and journalists and folk in the streets all know about the penetrable courts”); Ji Li, *Dare You Sue the Tax Collectors? An Empirical Study of Tax-Related Administrative Lawsuits in China*, 23 PAC. RIM L. & POLY J. 57, 69 (2014) (“Judicial weakness and bias favoring state agencies and high costs of agency retaliation explain the strong reluctance to file lawsuits against tax agencies in China”); He Haibo (何海波), *Kundun de Xingzheng Susong (困顿的行政诉讼)* [The wearied state of administrative litigation], 2012 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) no. 2.

popular and academic discussions of Chinese administrative litigation display a high degree of consensus with respect to two claims. First, both the volume and outcome of administrative litigation are chiefly functions of the distribution of powers between the Chinese judiciary and the executive branch—in short, of judicial independence. Second, administrative litigation is a good thing in itself, and judicial institutions should be reformed to deliver a greater amount of that good.

By examining empirical information relating to Chinese tax litigation spanning over two decades, I come to conclusions that challenge this consensus. I present four sets of findings, obtained from applying different devices of empirical and comparative analysis. First, certain instinctive judgments in reaction to seemingly low case volume and plaintiff win rates in Chinese tax litigation are hard to justify, in light of available cross-country comparative information. Second, I situate Chinese tax litigation in the context of a multi-year, multi-agency study of what disputes against the government are brought to Chinese courts and result in

14 Ginsburg, supra note 4, at 24 (“the administrative litigation scheme can become an effective arena of political contestation. However, the regime may also seek to tighten control over the courts to inhibit them from becoming a major locus of social and political change.”)

15 This argument is informed by comparative tax dispute resolution information generated by both scholarly studies and a variety of professional sources. For scholarly studies in the U.S., see, e.g. Leandra Lederman, Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle, 49 CASE W. RES. L. REV. 315, 318 (1999) (studying whether trials are non-random, and determining which factors predict that a case will go to trial); Leandra Lederman & Warren B. Hrung, Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers’ Effects on Tax Court Litigation Outcomes, 41 WAKE FOREST L. REV. 1235 (2006) (presenting an empirical study on the effects of having legal representation in a tax litigation case); in Canada, see Benjamin Alarie & Andrew Green, Policy Preferences and Expertise in Canadian Tax Adjudication, 62 CANADIAN TAX J. 985 (2014) (reporting an empirical study about both judicial decision making generally and tax decisions in particular, to examine the effect of judicial policy preferences and expertise on outcomes of challenges to tax decisions); in Japan, see J. Mark Ramseyer & Eric B. Rasmussen, Why the Japanese Taxpayer Always Loses, 72 S. CAL. L. REV. 571, 594 (1999) (showing evidence that in Japan, the government party to a tax litigation wins because, as a rational repeat player, it disproportionately selects for litigation those cases that will shift precedent to its advantage); in Israel, David Gliksberg, Does the Law Matter? Win Rates and Law Reforms, 11 J. EMPIRICAL LEGAL STUD. 378 (2014) (describing an empirical study which showed that litigants’ win rates changed after a fundamental and major law reform). Additional scholarly and professional sources are cited in Part 2 infra.
judicial decisions. Cross-agency comparisons furnish credible evidence that Chinese plaintiffs tend to encounter particularly adverse outcomes in litigating against tax agencies; but this may be the result of both information asymmetry between plaintiffs and defendants and adverse legal standards based on statutes, and need not indicate judicial bias favoring tax agency defendants. Third, I assembled the largest set of published Chinese judicial decisions in tax cases to date, and systematically analyzed the content of the decisions. I argue, based on such a comprehensive review, that the available evidence is consistent with the view that the Chinese judiciary is (and has been for some time) able to adjudicate tax disputes with competence and reasonable neutrality.

Fourth and finally, a separate study of Chinese tax administration, which forms the essential background of dispute resolution on tax matters, was carried out. That study suggests that the low level of tax litigation in China can well be explained by the organization of Chinese tax administration, which permits a high frequency of informal interactions among taxpayers and tax collectors. This explanation implies, however, that the volume of litigation may remain low regardless of improvements in the Chinese judiciary.

Collectively, these findings imply that inferences about the power of the judiciary vis-à-vis the executive branch on the basis of

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17 The case sample size is, to my knowledge, the largest among existing studies in English that analyze Chinese administrative litigation decisions, whether generally or within specific regulatory areas.

18 Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2008) (explaining that systematic content analysis is a technique that enables lawyers to read and analyze decisions more systematically and objectively). All decisions in the sample were coded intensively, using a score sheet of over 30 questions. The content analysis performed captures a large number of features of the decisions, providing a rich set of information about the substantive and procedural aspects of the cases.

19 The details of this study are fully reported in Cui Wei (崔威), *Zhongguo Shuiwu Xingzheng Susong Shizheng Yanjiu* (中国税务行政诉讼实证研究) [An Empirical Study of Tax Litigation in China], 2015 QINGHUA FAXUE (清华法学期刊) [TSINGHUA UNIVERSITY LAW JOURNAL] no.3, 135.

20 For a preliminary exposition, see Wei Cui, *Administrative Decentralization and Tax Compliance: A Transactional Cost Perspective*, 65 U. TORONTO L.J. 186 (2015) (arguing that decentralization increases communication costs related to the implementation of the law and changes the structure of taxpayer’s costs in acquiring knowledge of the law, and that this dynamic frustrates tax administration reform in China).
litigation volume and judicial outcomes are highly unreliable, because these observable patterns are determined primarily by other factors. This conclusion would not itself be very remarkable if reached in the context of a developed legal system. In the U.S., for example, the dominant approach to analyzing civil litigation patterns is to assume that they are driven by litigants’ rational choice. However, scholars have succumbed to the temptation to depart from this approach when engaging with the legal systems in authoritarian countries. I argue that portraying administrative litigation as a self-standing institution imbued with a distinct purpose (i.e. offering opportunities for plaintiffs and courts to constrain an otherwise unconstrained government) has limited benefits, particularly given its risk of generating spurious explanations.

The article proceeds as follows. Part 2 provides background information regarding patterns of Chinese tax litigation and discusses how these patterns are inadequately explained by prevailing views of Chinese administrative litigation. Part 3 first considers the procedural features of Chinese tax litigation that may explain some of the litigation patterns. It then presents evidence of a correlation between the settlement rate during litigation and plaintiff win rate, which suggests that the “trial selection theory” of disputes widely applied in studying litigation outcomes in the U.S. may also apply to China. According to this theory, non-independent (or incompetent) courts are only one among several equally plausible explanations for plaintiffs’ poor odds in tax litigation. Part 4 then investigates the strength of evidence for attributing taxpayer’s poor chances to an underperforming judiciary. I describe select findings based on the extensive content analysis of case law, and argue that neither qualitative nor quantitative evidence supports the hypothesis of judicial non-independence. Statutory biases and information asymmetries between litigants are at least equally good explanations of low plaintiff win rates. Part 5 then explains how the main cause of low tax litigation volume may lie in the structure of Chinese tax administration. Part 6 reviews

21 See especially the sources cited in supra note 9. See also Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW PART IV (2004) (Providing a detailed analysis of the economic approach to analyzing the litigation process); Kathleen Spier, Litigation, 1 HANDBOOK OF LAW AND ECONOMICS 259 (A. Mitchell Polinsky & Steven Shavell ed., 2007).

22 See Ginsburg supra note 4, at 24 (“administrative litigation...will tend to constrain the government, even if...regime opponents are [often] not successful in their particular lawsuits.”).
the implications of these findings for the discourse associating administrative litigation with the promotion of the rule of law. A brief Conclusion follows.

2. Basic Facts: Case Volume, Plaintiff Win Rate, and Rate of Adjudication in Chinese Tax Litigation

Interest in tax litigation has grown among Chinese tax and legal professionals in the last few years. As a result of Chinese courts’ recent extraordinary practice of publishing all decisions that are not politically sensitive, a massive amount of case law of all varieties has come to the public light in the last few years, and tax litigation is no exception. Chinese tax practitioners are discussing case law much more so than they ever did before, and tax advisors are beginning to advise clients to consider the option of litigation where they have not before.

However, lest one hasten to the conclusion that this growing interest is attributable to a rising wave of tax litigation, some sobering statistics should be considered. According to data published by China’s Supreme People’s Court (“SPC”), the quantity of first-instance tax litigation in China experienced a significant decline since the late 1990s: as Chart 1 indicates, close to 2,000 cases a year were brought at the beginning of this period; the number declined to around 1,000 a year by 2004, and to around 300 by 2007; they

23 The first administrative law case that China’s Supreme People’s Court (SPC) tried after a much anticipated revision of the Administrative Litigation Law in 2014 was a lawsuit against the local tax bureau. Luo Shuzhen (罗书臻), Zuigao Renmin Fayuan Gongkai Kaiting Shenli Xin Xinggai Xingzheng Susong Fa Shishi Hou Diyi Qi Xingzheng Anjian [The First Administrative Litigation Case Tried in a Public Hearing at the Supreme People’s Court After the Implementation of the Newly Amended Administrative Litigation Law]; Renmin Fayuan Bao (人民日报) [People’s Court Daily] (June 29, 2015).

24 For a discussion of the recent publication practice of Chinese courts, see infra notes 77–82 and accompanying text.


26 For a discussion of the nature of the SPC data, see Cui supra note 16. Since the late 1980s, the data has appeared in the annual China Law Yearbook (中国法律年鉴), Law Yearbook of China, LAWINFOCHINA.COM. Unless otherwise indicated, all data regarding the quantity of administrative litigation and manners in which such cases are disposed provided in this Article come from this source.
have stayed around 400 a year more recently. SPC data indicates that the ratio of tax litigation to the total volume of (first instance) administrative litigation in China also declined from 2.4% in 2000 to 0.3% in 2013. While tax disputes became rarer during this period, administrative litigation grew as a whole.

Thus, in both absolute and relative terms, the volume of Chinese tax litigation may seem low in some intuitive ways. The absolute number of cases a year—around 400—looks low relative to China’s population and the size of its economy. The U.S. Tax Court alone sees around 30,000 cases docketed a year. India, a country with a comparable population size to China, also sees over 20,000 first instance tax cases a year. China’s tax litigation volume is more comparable to Japan’s, which legal scholars have treated as a low-litigation jurisdiction.

27 Harold Dubroff & Brent J. Hellwig, The United States Tax Court: An Historical Analysis 72-73 (2d ed. 2014), https://www.ustaxcourt.gov/book/Dubroff_Hellwig.pdf [https://perma.cc/52H5-NQ6C]. Unlike the United States and a small number of other countries, China has no specialized tax courts—given the small quantity of tax litigation each year, creating such a court would be hard to justify. Tax cases, along with other types of administrative litigation, are tried by administrative law tribunals that can be found in most courts at various levels across the country.


29 Ramseyer, supra note 15, at 594 (reporting there were 189 and 154 cases of tax litigation, including appeals, in Japan in 1989 and 1994, respectively); see also Akihiro Hironaka, Michito Kitamura & Masaki Noda, Japan, in THE TAX DISPUTES
However, these crude comparative figures need to be viewed with caution: since comparative tax litigation data is not generally available, it is difficult to know which countries constitute the norm and which countries constitute the outliers. Even the United States’ and India’s tax litigation volumes are dwarfed by the number of tax cases in Italy and Brazil. Thus, perhaps a more persuasive assessment would refer to the fact that the Chinese tax bureaucracy employs more than 10% of China’s civil servants, and tax administration clearly touches on the everyday operation of every Chinese business. Given the size of the tax branch of the Chinese administrative state, even the 2.4% of tax cases in 2000 relative to the total volume of litigation against the government seems disproportionately low, not to mention the 0.3% found in recent years.

Equally striking, of course, is the decline in tax litigation in the last ten years. There are different hypotheses that would explain this decline, none of which can, at present, be confirmed. One is that Chinese tax administration practice has possibly improved in terms of greater conformity to rule of law norms.

AND LITIGATION REVIEW 162, 164 (Simon Whitehead ed., 2d ed. 2014), https://www.jurists.co.jp/sites/default/files/tractate_pdf/en/The_Tax_Dispute_Litigation_Review2_Japan_.pdf [https://perma.cc/7CLS-QB6N] (stating Japan reported 294 tax lawsuits in 2013). It is worth noting, however, that in recent years the Canadian Tax Court has decided on average only 600 cases a year, even though Canada does not have a reputation for being a “low litigation” jurisdiction. See Alarie & Green, supra note 15, at 996.


See Lourdes Garcia-Navarro, Brazil: The Land of Many Lawyers And Very Slow Justice, NATIONAL PUBLIC RADIO, ALL THINGS CONSIDERED (Nov. 05, 2014), http://www.npr.org/sections/parallels/2014/11/05/359830235/brazil-the-land-of-many-lawyers-and-very-slow-justice [https://perma.cc/EQS7-58CJ] (stating that there are 1,660,000 cases in progress in the court dealing with tax avoidance in Sao Paulo alone).

See Cui, supra note 20, at 201.

See Ramseyer supra note 15, (showing figures suggesting tax litigation comprises between 20% and one-third of all civil lawsuits against the government in Japan).

The Chinese police also saw a substantial decline in both the absolute and relative quantities of lawsuits brought against it—a drop of one-third and over 80%, respectively—in the same period, and some Chinese scholars have been
administration practices may also be relevant. It has been reported that tax agencies have in recent years adopted more “collaborative” forms of tax collection and applied penalties less frequently.\textsuperscript{35} Tax disputes may be predicted to decrease as a result.\textsuperscript{36} Another hypothesis for explaining the decline of tax litigation, with a different thrust, is that the revision in 2000 of the Law on the Administration of Tax Collection,\textsuperscript{37} the general procedural statute for tax administration, significantly expanded the powers of tax agencies, legitimized certain agency practices that had previously been controversial, and otherwise made it more difficult for lawsuits against tax agencies to be brought.\textsuperscript{38} Yet another hypothesis is that it was the high volume of tax litigation in the late 1990s that was abnormal, attributable possibly to the rapid changes in the organization of tax administration in China during that time.\textsuperscript{39} The steady, lower level of tax litigation in recent years merely represents a reversion to the mean. Because of the lack of information about Chinese tax litigation in the 1990s,\textsuperscript{40} it is difficult to confirm or disconfirm any of these hypotheses. Note, though, none of these hypotheses refers to the quality of Chinese courts at all.

\textsuperscript{35} Whether an agency adopts a collaborative or adversarial approach to regulation arguably has no direct implications for the assessment of the agency under rule of law norms. For a discussion of Chinese tax agencies’ experiments in recent years with more collaborative approaches to tax collection, see Qian Junwen (钱俊文) & Wei Guoqing (韦国庆), Nashui Pinggu de Hefa Xing Zhengyi Jiqi Jiejue (纳税评估的合法性争议及其解决) [The Controversy of Legal Status of Tax Assessment and its Solution], 2013 SHUJWU YANJU (税务研究) no. 1 72. For an analysis of the adoption of such collaborative forms in other Chinese regulatory agencies, see, e.g., Carlos Wing-Hung Lo, Gerald E. Fryxell & Benjamin van Rooij, Changes in Regulatory Enforcement Styles Among Environmental Enforcement Officials in China, 41 ENV’T. & PLAN. 1 (EU-China Bus. Mgmt. Training, Working Paper No. 003, Nov. 2009), https://www.researchgate.net/profile/Benjamin_Van_Rooij/publication/46559868_Changes_in_Regulatory_Enforcement_Styles_Among_Environmental_Enforcement_Officials_in_China/links/546209440cf27487b4557b2b.pdf [https://perma.cc/AY9E-5RKH].

\textsuperscript{36} Note that accepting this explanation can affect one’s view of what level of litigation is “too low”. One should be less inclined to view the current level of tax litigation as abnormally low, if its decline from a previously more “normal-looking” level has a ready explanation.


\textsuperscript{38} See infra notes 135–37.

\textsuperscript{39} See Cui, supra note 20, at 201.

\textsuperscript{40} See infra note 88.
Fluctuations in litigation levels are unique neither to tax agencies nor to China. In countries enjoying high levels of rule of law, both the level at any given time and fluctuations over time in administrative litigation volumes simply remain esoteric facts: they are rarely noticed and even more rarely highlighted as demanding explanation.\textsuperscript{41} However, when administrative litigation is held to symbolize mechanisms of constraining authoritarian power, its volume becomes imbued with significance. Moreover, instead of offering hypotheses like the ones just described, scholars of Chinese law who find the level of administrative litigation lower than they expect often take such low case volume to impugn the court system.\textsuperscript{42} Such commentary displays two implicit assumptions: first, the actions or inactions of courts are the primary determinants of observed litigation patterns; second, since administrative litigation is a good thing, a lower-than-expected level of such litigation indicates under-performance or even a malfunction of the courts.\textsuperscript{43} Yet at least in the tax context, these assumptions fit uncomfortably with the data. If they were held onto, declining litigation volume would imply that Chinese judiciary became less independent vis-à-vis tax agencies over time, and/or that tax agencies became more powerful relative to other agencies over time. But there is no independent reason to embrace or even consider such claims.

\textsuperscript{41} In U.S. tax scholarship, I am aware of only one instance of such attention. See Yehonatan Givati, \textit{Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings}, 29 Va. Tax Rev. 137, 146 (2009) (noting a greater than 50% drop of tax cases filed in the United States between 1996 and 2000 and complete recovery in the years afterwards, and stating that such fluctuation “calls for further research”).

\textsuperscript{42} See, \textit{e.g.}, He, supra note 12, at 88 (suggesting low level of tax litigation also signals a failure of the public remedy system); Rachel E. Stern, \textit{The Political Logic of China’s New Environmental Courts}, 72 China J. 53, 54 (2014) (noting an inadequate quantity of environmental litigation and suggesting that courts must do more to increase such quantity). A recent study argued that the level of tax litigation confirms a “shared understanding [among commentators on Chinese law] that local courts do not normally adjudicate administrative lawsuits against government agencies impartially and judicial bias is presumably more serious when powerful agencies, such as tax bureaus, are sued.” Li, supra note 12, at 58 (footnotes omitted).

\textsuperscript{43} See Li, supra note 11, at 840 (“After years of complaints about political intervention, the SPC in 2008 allowed local courts to move or upgrade the trials of certain administrative lawsuits. The scheme was to assure that administrative adjudication be insulated from direct influence of the defendant or its related state organs. The regression results indicate that, all else equal, such measures failed to create more lawsuits.”).
Another implicit assumption of previous commentary on Chinese administrative litigation is that plaintiff win rates serve as a specific mechanism through which the actions of Chinese courts may affect litigation volume. More specifically, plaintiff win rates reflect judicial attitudes, and low plaintiff win rates, reflecting judicial bias in favor of government defendants, could deter litigation. What do we know about plaintiff win rates in tax litigation? The SPC also offers information about the ways in which tax cases are disposed, which can be classified into plaintiff wins and losses. Using this information, for each year I calculate two rates, the “plaintiff win rate” and the “adjudication rate.” Chart 2 maps the evolution of both the plaintiff win rate and the adjudication rate for tax litigation over the course of sixteen years. It can be seen that the adjudication rate has largely followed an inverse U-shaped development—with a blip in 2005–06—going from a low of 24.4% in 1998 to a high of 67.5% in 2004 and back to 32.1% in 2010. Plaintiff win rates went from a high point of 26% in 1998 down to 9.5% in 2001 and back to 16.7% in 2012. Thus, in the late 1990s, when more lawsuits were brought against tax agencies, both the rate of withdrawal of lawsuits and the rate of plaintiff wins were also higher.


Are Chinese taxpayer–plaintiffs’ odds of winning too low, and could this be why few lawsuits are brought? Cross-country comparative information again offers no support for these assessments. Plaintiff win rates in U.S. tax and district courts have been reported

44 For a discussion on low plaintiff win rates and deterred litigation, see He & Su, supra note 12, at 139 and Li supra note 12, at 109–10.
to range from 15%,\textsuperscript{45} to 29\%,\textsuperscript{46} which are not much higher than China’s.\textsuperscript{47} While higher plaintiff win rates have been reported for other countries, those countries do not always have higher (per capita) litigation volumes.\textsuperscript{48} Although such comparative information is quite limited, it still warns us that, with no further theory, we should have little confidence that judicial biases and judicial capacity offer even relevant explanations of case volume and observed litigation outcome, let alone the most important ones.

The next Part will examine a number of features of Chinese dispute resolution institutions that are clearly relevant to understanding case volume and litigation outcome. Chinese institutions share each of these features with many other countries, although some combination of features may be more unique. One such feature is the availability of administrative remedies. In China, as in many other countries, the appeal of the action of a government agency within the executive branch, before a dispute is brought to courts, is either a requirement or a right that is commonly exercised. This may systematically reduce litigation volume, and also indirectly affect observed plaintiff win rates. Similarly, any cost to the pursuit of formal dispute resolution—such as the requirement that Chinese taxpayers face to pay the disputed tax liability before even bringing an appeal within the executive branch—could also suppress litigation volume and affect the outcome of cases that are brought to courts. More generally, the costs of dispute resolution may lead to settlements at different points after a dispute arises, conditional upon the litigants’ respective expectations and degrees of uncertainty. Litigants’ rational choices in light of these costs and


\textsuperscript{47} One professional article reports that taxpayers in Germany also win only 20% of the first instance cases. Michael Hendricks, Germany, in TAX DISPUTES AND LITIGATION REVIEW 101, 102 (Simon Whitehead ed., 2d ed. 2014).

\textsuperscript{48} For example, Alarie and Green report a close to 50% taxpayer win rate in the Canadian Tax Court, but the volume of tax litigation is low in Canada compared to the United States and to other countries with lower reported win rates, e.g., Italy. For litigation volume in Canada and Italy, see supra notes 15 and 30. Italy’s taxpayer’s win rate was between 30% and 40% in 2013. See SISTEMA STATISTICO NAZIONALE, supra note 30, at 14.
subject to these information constraints could easily reduce or eliminate the effect of judicial bias (or capacity) on observed litigation outcome.\textsuperscript{49} It is only by taking these institutional factors into account—as urged by some of the most influential contemporary theories about legal systems—that one can begin to make inferences from litigation patterns.

3. INSTITUTIONAL DETERMINANTS: EXHAUSTION OF ADMINISTRATIVE REMEDIES AND SETTLEMENTS DURING LITIGATION

3.1. Settlement Prior to and as a Result of Administrative Appeal

The option to pursue administrative appeals prior to litigation is an important feature distinguishing administrative litigation from other types of civil litigation. It implies the existence of an institutionalized procedure for resolving disputes between private parties and the government, before the disputes reach courts. Just as settlements during litigation reduce the number of cases tried by judges, appeals within the executive branch reduce the number of cases docketed with courts in the first place. While negotiations prior to potential plaintiffs’ decisions to bring suit also lead to settlements and reduce the number of cases docketed in other types of civil disputes, administrative appeal, as a public institution, often requires the government to record the quantity of disputes between it and private parties and the manners in which they are resolved pre-litigation. This type of pre-litigation settlement, therefore, may be more observable than in other areas.

In China, the administrative remedy that is available to citizens as an alternative to, or an option prior to, seeking judicial remedies is called administrative reconsideration (“AR’’).\textsuperscript{50} For tax disputes,

\textsuperscript{49} Law and economic analysis of the outcomes of civil litigation in the United States generally demonstrate—or assume—the elimination of such effects of judicial biases. See Hylton & Lin, supra note 9; see also Shavell, supra note 21.

AR possesses special significance, because in all disputes regarding the assessments of deficient tax payments, AR is a remedy that must be exhausted before judicial review is available. But not all disputes with tax agencies go through AR first. For disputes regarding the imposition of a civil penalty, an enforcement action or a seizure to secure tax payment, the taxpayer may choose either to apply for an AR or directly bring a complaint to court. Litigated cases therefore involve a mixture of disputes that have gone through the AR process and those that have not. Previous studies based on limited case samples suggest that litigated tax cases that are preceded by AR represent over 35% of all tax lawsuits. This is higher than the proportion of litigation preceded by AR in the overall population of administrative litigation, which has been estimated to be around 20%. The difference reflects the fact that, unlike in the United States, where the exhaustion of administrative remedies is a general administrative law doctrine broadly applicable across most agencies, the requirement is imposed in China only on less than a handful of agencies and subject areas other than tax agencies and the assessment of tax deficiencies.

Could this fact be relevant to understanding why the volume of tax litigation is distinctly low relative to total administrative litigation? Suppose two agencies, A and B, face the same amount of potential disputes, but disputes against A can go to court directly while disputes against B must go through AR first. If AR is able to

51 See LATC, supra note 37, art. 88 (“If any tax dispute between the tax authority and a taxpayer, withholding agent or tax payment guarantor occurs, the taxpayer, withholding agent or tax payment guarantor must first pay or remit the taxes and the late fee in accordance with the decision on tax payment made by the tax authority, or provide corresponding guaranty, and then may, apply for an administrative reconsideration in accordance with the law. If they object to the decision made after the administrative reconsideration, they may bring a suit in the people’s court in accordance with the law.”); see also Shuiwu Xingzheng Fuyi Guize [Rules for Tax Administration Reconsideration], LAWINFOCHINA.COM, (promulgated by the St. Admin. of Tax’n, Feb. 10, 2010, effective Apr. 1, 2010) (defining procedures of administrative appeals against all tax agencies).

52 See Cui, supra note 19, at 141; Huang Qihui (黄启辉), Xingzheng Susong Yishen Shenpan Zhuangkuang Yanjiu [A Study of First Instance Adjudication of Administrative Lawsuits], 4 QINGHUA FAXUE (清华法学) [TSINGHUA UNIVERSITY LAW JOURNAL] 73, 80 (2013).

53 See Xin He, Administrative Reconsideration’s Erosion of Administrative Litigation in China, 2 CHINA J. COMP. L. 252, 252 (2014) (discussing AR decisions in China from 1980s to present).

resolve many disputes, the number of lawsuits against B should be much lower than the number of lawsuits against A.

Unfortunately, this factor explains fairly little. In a previous study, I calculated that among tax disputes that are brought to AR, around 14% go on to be litigated.\footnote{This computation is based on knowledge of the ratio of the total number of ARs brought against tax agencies to the total number of lawsuits brought against the same tax agencies; the information is available only for a part of China’s tax bureaucracy and only for a few years. The estimate is consistent with the result of a government study in 2007. See Cui, supra note 19. Note that this percentage itself is not too different from the U.S. Lederman, see supra note 15, at 329; infra note 62, (reporting IRS “settles approximately 90% of the cases it considers”).} This implies that only about 1,000 AR procedures a year are pursued by Chinese taxpayers,\footnote{Currently no reliable statistic is independently available concerning the total number of AR proceedings against tax agencies. The number must therefore be inferred. If one assumes that 35% of litigated tax cases have gone through AR, and that these represent just 14% of all tax AR proceedings, then at 400 litigated cases a year, there are about 1,000 tax AR proceedings.} which seems like a miniscule number in light of the sheer size of the Chinese tax administration and the prominence taxation holds for most businesses. To understand the low case-load in courts, one must understand why taxpayers do not tend to seek administrative review of tax agencies’ assessments of deficiencies to begin with.

For those who are inclined to explain litigation outcomes in terms of features of judicial institutions, one explanation may come to mind. Perhaps Chinese taxpayers believe that anyone in the executive branch reviewing a tax agency action during an AR proceeding is likely to be biased in favor of the government.\footnote{Such a belief would be well justified, given that the rate of affirmation of agency actions during AR proceedings in general has consistently been greater than 50%. See Xin He, Supra note 53, at 253. No information is currently available regarding the breakdown of types of dispositions for tax AR proceedings specifically.} If they also believe that courts tend to rule in favor of tax agencies, then they may not initiate any AR proceeding at all: the pursuit of dispute resolution would be futile. Therefore, (perceived) judicial bias could indirectly reduce the volume of AR (and, mechanically, the volume of tax litigation). However, this explanation implies that those who do end up initiating AR proceedings should be prepared to litigate, since the complainant is unlikely to acquire new information about the biases of courts in the AR proceeding itself. But this is not the case. While an estimated 14% of tax AR cases continue to litigation, a far higher proportion of complainants...
receive unfavorable determinations at the end of AR proceedings. Such a high rate of attrition at the end of AR proceedings would be inexplicable if complainants made decisions to pursue AR after already having taken into account possible judicial bias.

What else, then, might explain the low volume of tax AR proceedings? Notably, when a taxpayer is required to apply for AR before bringing a lawsuit, e.g., in all disputes regarding deficiency assessments, it must also first remit the tax amount as determined by the tax authority, or provide corresponding guaranty, as a condition for opening an AR proceeding. Such a requirement is not totally exceptional in comparative perspective, but it does seem to erect a barrier to the pursuit of a dispute. It could do so in two ways. First, if the tax paid is later ruled to be over-assessed, but no interest is paid on the over-collected amount, the payoff to litigation is reduced, since the tax refunded in the future is worth less now given the foregone interest. This may induce settlement.

A 2007 government report claimed that complainants in tax AR proceedings were able to obtain a favorable ruling or a settlement 62% of the time, which would be markedly higher than the outcome for AR proceedings in general. See Lin Hong (蔺红), Guojia Shuiwu Zongju Fahui Fuyi Zhineng Cujin Zhengce Wanshan (国家税务总局发挥复议职能促进政策完善) [The State Administration of Taxation Used Administrative Reconsideration to Improve Tax Policymaking], ZHONGGUO SHUIWU BAO (中国税务报) [CHINA TAXATION NEWS] (Feb. 5, 2007). Yet even this high number implies that 38% of complainants receive unfavorable rulings.

See LATC, supra note 37, art. 88 (“If any tax dispute between the tax authority and a taxpayer . . . occurs, the taxpayer . . . must first pay or remit taxes and the late fee . . ., or provide corresponding guaranty, and then may, apply for an administrative reconsideration in accordance with the law.”). In disputes where AR is not a precondition for seeking judicial remedies, such prior payment, e.g., the penalty, also is not required. Id.

The OECD reports a large number of countries authorizing the collection of disputed tax during both AR and judicial review although tax agencies in some countries may refrain from exercising such authority while a dispute is pending. ORGANIZATION OF ECONOMIC COOPERATION AND DEVELOPMENT (OECD), TAX ADMINISTRATION 2013: COMPARATIVE INFORMATION ON OECD AND OTHER ADVANCED AND EMERGING ECONOMIES 324–25, T.9.11, 345–47 (2013), http://www.oecd-ilibrary.org/docserver/download/2313181e.pdf?expires=1484662105&id=id&accname=oacid177112&checksum=F8E8273BBEC385987454A13ED7D80C [https://perma.cc/Z84T-WKFS]. Some countries, including Japan and the UK, explicitly impose a requirement to pay assessed deficiencies before disputing an assessment in court. Id. at 324–25, T.9.11. Other countries require the provision of a guaranty for the tax amount disputed. See Aurora Ribes, Spain, in COURTS AND TAX TREATY LAW 333, 336 (Guglielmo Maisto ed., 3d ed. 2007) (footnote omitted) (“It should be emphasized that the claim form involves the temporary suspension of the administrative action provided that the taxpayer guarantees the tax sum, the interests and the correspondent charges during the period of examination and decision of the case.”).

Under current Chinese law, there is no clear provision requiring the gov-
However, such an effect is significant only if the expected duration of litigation is long, the rate of foregone interest is high, or the amount in dispute is very large. Second and more significantly, it is possible that the defendant’s negotiation position generally changes after an AR is brought: the government is easier to negotiate with before a formal dispute is instigated, but toughens its position once a dispute is governed by formal legal procedures. This may happen, for example, if the government’s negotiating position after entering into a formal dispute is based closely on law and estimates of the likelihood of prevailing during AR and litigation; whereas, before entering a formal dispute, it is influenced more by ongoing interactions with the taxpayer and considerations of revenue targets, or is more open to the discretion of particular revenue agents.

This second possibility, however, implies that even if there is no requirement to pay tax before bringing an AR complaint against a tax agency, taxpayers may prefer to reach settlements instead of going into AR. In other words, the incremental cost of paying tax first before pursuing formal dispute resolution may not exert a significant independent effect. In any case, existing AR statistics does not offer evidence that the requirement to pay tax as a precondition for AR induces more pre-AR settlement. If there is greater government to compensate for interest on tax refunded after AR or litigation.

My review of the sample of published tax cases discussed in Part 4 indicates that the average duration for a dispute to be decided by a first instance court is less than two years. While the opportunity cost of funds for average taxpayers or the cost of financing (for cash constrained taxpayers) is a more complex matter, it should be noted that the interest cost of owing tax is also high: Chinese tax law provides for an interest rate of over 18% per annum for overdue tax amounts. See LATC, supra note 37, art. 32. (“Where a taxpayer fails to pay taxes . . . within the prescribed time limit, the tax authority shall, . . . impose a late fee at the rate of 0.05% per day of the amount of taxes in arrears, on the day the tax payment is overdue.”).

One can imagine the tax agency’s position toughening once an AR proceeding opens and toughening even further once a lawsuit is launched.

In the U.S. Tax Court, cases represent 95% of all first-instance tax cases brought to federal courts. This has been explained by reference to the fact that, for a dispute with an IRS tax assessment to be accepted by the Federal Court of Claims or a District Court, the tax assessed must be paid first. Thus, these latter courts only accept lawsuits for refunds of tax paid. Leandra Lederman, What do Courts have to do with it? The Judiciary’s Role in Making Federal Tax Law, 65 Nat’l Tax J. 899, 900 (2012), http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1800&context=facpub [https://perma.cc/S9NH-FU8X]. However, there the observed effect of the requirement to pay tax before bringing a dispute is on the choice between alternative venues, not on whether to bring a dispute at all. Moreover, other aspects of the Tax Court practice, such as
AR settlement in tax, it should follow that the rate of settlement during a tax AR proceeding should be lower than AR proceedings in general: the tax cases that can be settled are more likely to have already been settled. However, this appears not to be the case. Previous authors suggest that between 16% and 18% of all AR cases continue to litigation. These percentages are actually higher, or at least not very different from, the estimated figure of 14% for the tax AR cases that continue to litigation. Taxpayer complainants drop out of dispute resolution no less frequently than other complainants.

In summary, while pre-litigation procedures for tax disputes are distinctive relative to other areas of disputes with Chinese government agencies, they do not seem to explain the low volume of tax litigation. Moreover, the limited information available regarding taxpayers’ use of these procedures seems to reject the relevance of judicial quality; the quality of the Chinese judiciary appears unlikely to be a primary or even significant factor explaining observed low case volume.

3.2. Settlement during Litigation

One might expect judicial quality to matter more once disputes availability of informal procedures and the commonality of pro se cases, may make the Tax Court a more attractive choice to most taxpayers. See generally, id. Lederman also mentions the fact that IRS notices of deficiency only inform taxpayers of the option to challenge the notice in the Tax Court, and not of other choices. Id. at 900.

65 See He, supra note 53, at 260, 263 (providing an estimate of 19% for 2009 and citing an earlier study that estimated an average of 16–17%). These percentages still reflect a relatively high rate of attrition from dispute resolution, even after receiving unfavorable AR determinations. Id. at 258.

66 Moreover, limited information on settlement before a decision is issued at the end of an AR proceeding suggests that this type of settlement does not occur less frequently in tax than in other areas. For a more detailed discussion, see Cui, supra note 19, at 142.

67 However, pre-litigation procedures may well have effects on other observed litigation patterns. For example, the disputes not resolved during the AR process and subsequently brought to courts may settle less frequently during litigation than cases that are directly brought to courts. One can expect this substitutive effect between earlier and later settlements because the disputes that are more amenable to settlement are likely to have been settled earlier. The lower settlement rates for lawsuits preceded by AR also implies that disputes preceded by AR may be over-represented in published court verdicts relative to its proportion in all lawsuits since only cases that are not settled receive judicial verdicts. See infra note 109 and accompanying text.
are brought to courts. However, it turns out that an important determinant of plaintiff win rate in Chinese tax litigation is the rate of withdrawal from litigation before courts issue their decisions. Using the same data as Chart 2, Chart 3 illustrates a negative correlation between the rates of adjudication, which is basically the complement of the rate of withdrawal, and the plaintiff win rates observed over sixteen years. This correlation implies that in any given year the more disputes reached the stages where courts issued decisions, i.e., the less often the plaintiffs settled with tax agencies or otherwise dropped their lawsuits, the less likely plaintiffs were to win in court.68

This finding is important in several ways. First, it implies that the cases that are decided by courts do not form a random and representative sample of all disputes that are litigated. If decided cases were such a sample, the rate of plaintiff win should remain roughly the same regardless of what proportion of disputes is adjudicated, but this is clearly not the case. Thus, as low as Chinese taxpayers’ chances of winning in court seem from decided cases (as indicated in Chart 2), their frequency of winning would be even lower if more cases were adjudicated. Second, a statistically significant correlation between the rates of adjudication and plaintiff wins, when observed in the United States context, is generally tak-

68 More advanced statistical analysis confirms the significance of the correlation observed in Chart 3. See Cui & Wang, supra note 16, Table 2.
en by existing scholarship to be strong evidence for the “trial selection theory” of civil litigation.\textsuperscript{69} According to the trial selection theory, rational litigants go to trial when the difference in their expected values of the payoff from litigation is greater than the aggregate cost of litigation for both parties.\textsuperscript{70} When the differences in expected value of litigation are smaller than the collective cost of litigation, the parties can achieve a mutually beneficial outcome by settling the dispute instead. This rational choice model of litigant behavior also predicts that, all other things equal, plaintiffs are less likely to win where defendants: (i) have greater stakes in litigation than plaintiffs, and/or (ii) have significant private information about the matter in dispute.\textsuperscript{71} In other words, insofar as the trial selection theory is applicable to a particular context,\textsuperscript{72} it tells us that litigation outcomes should be traced as much to the choices of litigants as to the behavior of judges.

Using a sophisticated analytical tool like the trial selection theory indeed allows one to make a number of refined judgments about Chinese tax litigation patterns. For example, a cross-agency comparison shows that the plaintiff win rate in tax disputes tends to be lower than the majority of other agencies.\textsuperscript{73} The trial selection theory typically explains such patterns by reference to several factors. For example, different degrees of information asymmetry among litigants may be relevant. Holding all else equal, any information advantage of the defendant is predicted by the selection theory to generate lower plaintiff win rates. In comparing litigation outcomes against different Chinese government agencies, it can indeed be seen that in tax and certain other areas of regulation,

\begin{itemize}
  \item \textsuperscript{69} For a recent review of this body of theory, see generally Hylton & Lin, supra note 9.
  \item \textsuperscript{70} Due to uncertainty and asymmetrical information, differences in expectations arise from different estimations of the probability of plaintiff prevailing.
  \item \textsuperscript{71} When both the stakes and information are symmetrical between the parties, as legal uncertainty goes down and the cost of litigation goes up, the adjudication rate tends towards zero and the plaintiff win rate—famously—tends towards 50%. See generally Priest & Klein, supra note 9.
  \item \textsuperscript{72} The novelty of finding evidence for the trial selection theory in the Chinese context lies in the fact that very few legal scholars have so far explored whether that theory holds in civil law jurisdictions. For further discussion, see Cui & Wang, supra note 16.
  \item \textsuperscript{73} Taxpayer plaintiffs seem to fare considerably better when suing certain other types of government entities, including township governments, land management bureaus, urban planning bureaus, and agricultural bureaus, although they tend to fare equally bad or even worse when suing family planning agencies and public health bureaus. See Cui & Wang, supra note 16, at 16–17.
\end{itemize}

https://scholarship.law.upenn.edu/jil/vol38/iss3/4
e.g. policing, public health, environmental protection, and family planning, the plaintiff win rates are lower. One explanation consistent with the selection theory is that these agencies’ primary roles are to enforce the law. Thus, they may be much more familiar with the details of the law to be enforced and how the law is generally applied than the subjects of enforcement. This amounts to a form of information asymmetry between plaintiff and defendants. By contrast, a number of other agencies that lose more often as defendants, such as land management and urban planning bureaus, face plaintiffs that are real estate developers or who bring class action suits. These are precisely the types of plaintiffs who suffer less from information disadvantages.

Another relevant factor is differences in statutory standards. It is conceivable that the Chinese government has written the law in such a way as to give greater power to its most coercive branches, such as taxation, family planning, and public security. In this case, holding all other things equal, plaintiffs should be less likely to win. By contrast, it seems very unlikely that the distribution of power of the judiciary relative to different government departments can explain the variation in plaintiff win rates. There is no reason to even have thought that family planning agencies are more powerful vis-à-vis the judiciary than township governments, or that public health officials are more powerful than those managing land use and issuing building permits. Other factors, unrelated to judicial quality, must be at play.

As with the discussion of factors that may explain the decline of the volume of tax litigation in Part 2, empirically establishing the factors affecting plaintiff win rates requires good data. In Part 4, I will summarize the findings from a unique collection of tax disputes that bear on these questions of information asymmetry and legal standards. In addition, having noted that judicial quality is unlikely to explain variations in plaintiffs’ chances when litigating against different agencies, I will also examine whether there is evidence for judicial bias in published tax case law.

4. Evidence from a Systematic Review of Case Law

Parts 2 and 3 analyzed aggregate data on Chinese tax litigation. To evaluate the determinants of administrative litigation patterns, and specifically to assess how the quality of judicial institutions
may affect both litigation outcome and whether private parties decide to bring suit in the first place, it is of course helpful to study the individual disputes themselves. This Part discusses some findings from analyses of the most comprehensive collection of judicial decisions resulting from tax litigation in China.\textsuperscript{74}

4.1. The Sample

Because China has a civil law system where most decided cases have no precedential value,\textsuperscript{75} for a long time there were no institutional mechanisms or rationales for Chinese courts to publish their decisions systematically. Consequently, the publication of judicial decisions on administrative lawsuits was both highly haphazard and highly selective.\textsuperscript{76} However, case publication practices of Chinese courts went through a radical transformation in recent years. In 2009, China’s Supreme People’s Court urged all courts to promote judicial transparency by placing cases online.\textsuperscript{77} Simultaneously with this announcement (and in some places even before), several jurisdictions, including the province of Henan and the City of Shanghai, began to release a large amount of judicial verdicts on the Internet.\textsuperscript{78} At the end of 2013, the SPC launched its own web-

\textsuperscript{74} For a detailed exposition, see Cui, \textit{supra} note 19.

\textsuperscript{75} See \textsc{Daniel C.K. Chow}, \textsc{The Legal System of the People’s Republic of China in a Nutshell} (3d ed. 2015), Chapter 6.

\textsuperscript{76} Some decisions were published in textbooks for judge training, or otherwise as results of one–time efforts by judges, scholars, or others interested in administrative litigation to depict judicial practice. The cases that became publicly accessible in this manner were probably unrepresentative due to editor bias.

\textsuperscript{77} Notice of the Supreme People’s Court on Issuing the Six Provisions on Judicial Openness and Several Provisions on the People’s Courts’ Exposure to Public Supervision through Mass Media (issued by the Sup. People’s Ct., Dec. 8, 2009) Zuigao Renmin Fayuan Yingfa Guanyu Sifa Gongkai de Liuxiang Guiding he Guanyu Renmin Fayuan Jieshou Xinwen Meiti Yulun Jiandu De Ruogan Guiding de Tongzhi (《最高人民法院印发关于司法公开的六项规定》和《关于人民法院接受新闻媒体舆论监督的若干规定》的通知) (“The trial management work and other management activities related to the trial work of the people’s court shall be disclosed to the public. The people’s court at all levels shall gradually establish and improve the websites and other information disclosure platforms.”).

\textsuperscript{78} For a discussion of such initiatives in Henan, see Benjamin L. Liebman, \textit{Leniency in Chinese Criminal Law? Everyday Justice in Henan}, 33 Berkeley J. Int’l Law. 153 (2015) at 158–65. By early 2014, more than 600,000 cases were posted online in Henan. \textit{Id.} at 160. For a discussion of similar initiatives in Shanghai, see He & Su, \textit{supra} note 12, at 126. More than 100,000 decisions were made available in Shanghai by 2009. Note, that these numbers pertain to all varieties of judicial verdicts
site publishing judicial decisions rendered by courts across China, while issuing guidelines regarding what types of decisions should be made public. Since then, an extraordinary amount of judicial decisions have become accessible. Although restrictions are placed on the publication of several categories of decisions, administrative litigation is not one of them. Existing examinations of recent court case publication practices suggest that the scope of publication in non-restricted areas is reasonably comprehensive.

The sample of tax cases discussed below was made possible by this recent change in publication practice. The sample includes 233 original or edited court documents published between 1987 and 2012, some of which combine first-instance and second-instance, i.e., regular appeals, decisions. Because Chinese appellate decisions tend to excerpt first-instance decisions extensively, close to 400 court judgments are reflected in the sample. The number of verdicts per year in the sample increased over time—not, we know, because the volume of tax litigation increased, but only because of better publication practice of courts. Similarly, the geographical distribution of the sample is uneven. The sample thus allowed to be published and not just administrative litigation.

80 See Provisions of the Supreme People’s Court on the Issuance of Judgments on the Internet by the People’s Courts, art. 2 (issued by the Sup. People’s Ct., Nov. 11, 2013) Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu de Guiding (最高人民法院关于人民法院在互联网公布裁判文书的规定) (“The Supreme People’s Court will set up a website for Judicial Opinions of China on the Internet, and uniformly issue the effective judgments on the people’s courts at all levels.”).
81 See Liebman, supra note 78, at 156 (“Certain cases, most notably death sentences, remain unavailable and we know little about those that are not made public. Nevertheless… there is much to learn from publicly available cases…”).
82 See id, at 163–64; He & Su, supra note 12, at 128.
83 However, case gathering ended in May 2013. Thus, the sample does not include tax cases that have become public after that time.
84 The 233 documents collected map onto 190 lawsuits, with the latter individuated by reference to whether the same set of parties and facts were involved. For several factors we examine in coding the cases, it is not the number of decisions, but the number of lawsuits, that is relevant.
85 See supra Part 2, Chart 1 (indicating overall decrease in Chinese tax litigation from 1998 to 2013).
86 The city of Shanghai and the province of Henan contribute almost half of the documents, while all but three of the other twenty-eight provinces each contributed fewer than ten. However, the predominance of Henan and Shanghai cases in the sample holds only for the years 2009–2011 and waned by 2012. It is also worth noting that there is presently no information about the geographical distri-
shares the geographical bias displayed by other recent scholarly attempts to analyze large quantities of Chinese case law. On the other hand, for 2010, the decisions included in the sample comprise over 20% of all tax decisions rendered in China in that year. This relatively high rate of publication—remarkable for a civil law country where published decisions do not yet fulfill any legal function—was also observed in 2011 and 2012.

Existing content analyses of Chinese judicial opinions have drawn on samples from particular courts and particular years. More problematically, studies of administrative litigation in particular have used samples that are truly small. While geographical bias is still present in the sample of tax cases used here, I tried to expand the sample’s coverage both geographically and over time. The longer time horizon of the sample especially permits the discovery of litigation patterns that take years to unfold. Finally, given the discussion in Part 3, it is known that, even if all or most court judgments are published, they are likely to be unrepresentative of all disputes brought to courts because many lawsuits settle before they result in judicial verdicts. Therefore, in interpreting the findings from the sample, I strive to take the biases that are present in the distribution of tax litigation across China, so how unrepresentative the sample is in this regard remains unknown.

87 For a discussion of shared geographic bias in large Chinese analyses, see Liebman, supra note 78; He & Su, supra note 12.
88 For statistical data pertaining to 2011 and 2012, see Cui, supra note 19, at 144–45. By contrast, published decisions collected for earlier years represented between only 0.6% and 2.7% of rendered decisions. Thus, in 2000, which witnessed the largest number of concluded tax cases—2025 decisions—only seventeen decisions were found.
89 See, e.g., He & Su, supra note 12 (reporting published decisions in Shanghai courts from 2004 to 2009); Liebman, supra note 78 (examining published Henan criminal cases in 2013 from two courts).
90 See, e.g., Li, supra note 12, at 79 (41 decisions corresponding to 19 tax disputes in one province between 2009 and 2011); Xuehua Zhang & Leonard Ortolano, Judicial Review of Environmental Administrative Decisions: Has it Changed the Behavior of Government Agencies? 64 CHINA J. 97, 102 (2010) (14 cases from two counties).
91 For further discussion, see text accompanying notes 130–133 infra. In the sample, the most common types of actions of tax agencies challenged in courts are assessments of deficiencies, penalties, and compulsory measures in collection or tax preservation. But, challenges against a wide variety of other agency actions, such as state compensation, denial of administrative reconsideration, government inaction, e.g., failure to reward whistleblowers, and government information disclosures are also included.
dicted by trial selection theory into account.92

4.2. The Findings

Judges have no reason to reveal any lack of independence in their written decisions. Conversely, even if judicial verdicts frequently end up in favor of government defendants, this may simply be the result of the facts of the cases and applicable law, and not of judicial attitudes. Therefore, evidence from published cases on whether judicial attitudes or judicial quality determine outcomes can only be indirect. In the following, I discuss four groups of relevant evidence. First, a previous study claimed that because Chinese courts can be assumed to lack independence in tax adjudication and because potential plaintiffs fear retaliation from tax agencies, actually observed cases of tax litigation tend to involve exceptional circumstances. The prevalence of such exceptional circumstances could thus constitute indirect evidence for judicial bias. Therefore, I examine the frequency of such circumstances. Second, the trial selection theory discussed earlier suggests that litigants’ rational choices with respect to settlement can mask judicial attitudes. Therefore, I consider the strength of selection effects in the sample, focusing on determinants of plaintiff wins. Third, findings relating to whether there exists information asymmetry between plaintiffs and defendants in tax litigation are discussed. Fourth and finally, I discuss what residual evidence there is both for the location of legal standards in tax disputes, and for the relationship between the judiciary and tax administration.

92 I calibrate the sample in several ways. First, one recent empirical study of Chinese administrative litigation is based on a large sample of cases—not restricted to tax—directly gathered from courts, including withdrawn cases and unpublished cases. See Huang, supra note 52. It is, thus, free from publication bias, and I make use of relevant results from that study. Second, I find the proportion of two main types of defendants in tax litigation—state tax bureaus and local tax bureaus—to be roughly consistent between our sample and what is known about the underlying dispute population. Third, the types of taxes involved in the sample disputes are also consistent with the tax structure in China. For details, see Cui, supra note 19.
4.2.1. Does Tax Litigation Involve Aberrant Behavior?

In a previous study of tax litigation in China, Professor Ji Li asserted that it is common knowledge that Chinese courts would generally favor defendants in tax disputes, and that anyone suing tax collectors would likely face “retaliation.” Therefore, he argues, it is hardly surprising that few Chinese taxpayers “dare sue” the tax collector; what is surprising is why anyone would sue. Professor Li postulates several reasons. One is that some plaintiffs are “retaliation-proof”: the defendant may have limited jurisdiction over the plaintiff and therefore cannot effectively retaliate; or the plaintiff literally has “nothing to lose” (the favored example is tax whistleblowers who are unemployed social gadflies). Another is that the plaintiff is politically well-connected, which forces the adjudicating court to act neutrally. Yet a third reason is that “high stakes” are involved and other channels of conflict resolution are closed. Professor Li’s argument appears to be that unless one of these factors is present, litigating against Chinese tax collectors would be “irrational.”

I investigated these claims in several ways. The first is the monetary amount in dispute. In half of the cases in our sample, the amounts of tax payment in dispute (not including penalties) are given. The smallest such amount is 30 Chinese Yuan (CNY)—approximately 5 US dollars, while the largest amount is 12,806,105 CNY. The mean amount disputed is 1,314,541 CNY and median 138,976 CNY. The following two charts illustrate the distribution of disputed amounts. The first chart, covering the entire sample, shows that the top two deciles of cases involve disputes over RMB 2 million or more, which are substantial amounts by any standards. The second chart shows that within the bottom half of distribution of cases in terms of amount, there is still a significant
spread, and once the third decile is passed, the disputes amounts are already above RMB 20,000. Thus, at least judging by the published decisions, many Chinese taxpayers sue tax agencies because non-trivial sums are at stake, and not because of antagonisms unrelated to the economic value of a dispute.99 The distribution of amount disputed is also continuous up to the top decile, with no evidence of disputes bunching at the low end (due to those plaintiffs who “have nothing to lose”) and at the high end (due to those plaintiffs with “high stakes”).

99 The preponderance of disputes involving small amounts at the bottom half of the distribution is also consistent with experiences in other countries. See, e.g., Dubroff & Hellwig, supra note 27, at 5034, (reporting that “small cases” consistently represented around 50% of all cases in the U.S. Tax Court in recent years). Small tax cases in the U.S. tax court are cases involving less than $50,000 a year. See also Lederman, supra note 64, at 901. In Canada, more than half of Tax Court cases were brought using the informal procedure, which is available only when the amount of federal tax and penalties in dispute is $25,000 or less. See also Alarie & Green, supra note 15, at 995–96.
Thus the majority of the cases do not involve plaintiffs “with low incomes and revenues [who] are relatively immune to the agencies’ retaliation threats.”\textsuperscript{100} In theory, cases with larger amounts in dispute may be more likely to go to trial,\textsuperscript{101} and thus the sample of published cases may not be representative of the underlying population.\textsuperscript{102} Therefore I also specifically reviewed for evidence that the plaintiff has low income or low levels of wealth, and found this to be the case only in 5 out of 190 cases.

I also tested Professor Li’s claim that potential plaintiffs in China would not sue the agencies that routinely regulate them, for fear of retaliation, and therefore that many actual lawsuits involve taxpayers and tax agencies that dealt on a one-time basis. I specifically attempted to determine whether the defendant in a case has regular jurisdiction over the plaintiff taxpayer. In the 135 cases in which it is possible to make this determination, the defendant is the regular tax administrator over the plaintiff in 100 cases. Thus, it is overwhelmingly disputes involving locals that are adjudicated.

\textsuperscript{100} Li, supra note 12, at 75. Such plaintiffs presumably would not be suing for such large amounts.

\textsuperscript{101} In the model of Priest and Klein, supra note 9 (taking trial and settlement costs as constant, the larger the amount in dispute, the more likely that a given difference in the estimated probability of outcomes by the plaintiff and defendant will result in a sufficiently large divergence in the expected values of judgments).

\textsuperscript{102} Note that Professor Li also drew his evidence from a small number of published cases.
The idea that only the “out-of-towner” sues the tax collector (along with local social misfits) finds no support in the sample. This appears to be a robust result since parties that deal on a routine basis should have more incentives to stay out of court or to settle during litigation. Therefore the various stages of trial selection—for the commencement of a lawsuit and for getting to a verdict—should screen out many disputes among locals and ensure that they are under-represented, instead of over-represented, in decided cases.

Finally, close to 60% of the cases in the sample studied involve individual plaintiffs. This percentage likely understates the proportion of individuals bringing suit, since individuals are more likely to withdraw a lawsuit (i.e. settle with the defendant) than other types of plaintiffs. Among the plaintiffs that are entities, 72% are non-state-owned, private firms. While some individual and private firm plaintiffs may be politically well-connected, claiming that plaintiffs would not sue tax collectors but for being politically well-connected seems far-fetched. Overall, political connections and plaintiff “retaliation-proofness” offer at best marginal explanations of why tax litigation happens in China.

4.2.2. Evidence of Selection Effects

According to trial selection theory, rational litigants will take any information regarding judicial bias into account when deciding whether to go to trial. If both the plaintiff and the defendant expect the deciding judge to be biased against the plaintiff, they

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103 See Huang, supra note 52, at 81. In Huang’s sample (which covers 2,767 administrative litigation cases, though only 28 of which were tax litigation) 79.5% of plaintiffs were individuals. See id., at 77. The under-representation of individuals in published decisions was also a feature of the case sample analyzed in Pei, supra note 11.

104 Some studies have suggested that politically well-connected Chinese firms are more likely to go to court in general (not just for purposes of suing government agencies). See Yuen Yuen Ang & Nan Jia, Perverse Complementarity: Political Connections and the Use of Courts among Chinese Private Firms, 76 J. Pol. 318 (2014) (examining the ways in which political connections promote or undermine the use of formal legal institutions). Note, however, that this may be little different from patterns observed in other countries. See B. Zorina Khan, “To Have and Have Not”: Are Rich Litigious Plaintiffs Favored in Court? (Nat’l Bureau of Econ. Research, Working Paper No. 20945, 2015), http://www.nber.org/papers/w20945 [https://perma.cc/42M6-NYP8] (studying civil litigation in Maine from the Colonial period through to the Civil War, and showing that wealthier individuals engaged in litigation more).
will settle instead of going to trial (thus saving the cost of litigation). Consequently, the judge’s bias may not end up being reflected in decided cases; any judicial bias can be observed in published decisions only where such filtering through litigants’ choices fails to be effective. Although, for reasons discussed below, it is presently not possible to implement any quantitative measure of judicial bias for Chinese administrative litigation, it makes sense to consider whether the selection effect of litigant choices is strong enough in tax litigation that any such bias would be masked anyway.

I find some evidence for the selection effect in the case sample. As argued in Part 3.1. supra, lawsuits preceded by administrative appeal (AR) are less likely to settle during litigation. This implies that disputes preceded by AR may be over-represented in published court verdicts relative to its proportion in all lawsuits (only cases that are not settled receive judicial verdicts). This prediction is confirmed by the sample: in 50% of the cases, the disputes either went through or an application for AR was rejected by a reviewing agency. This is significantly higher than the figure reported in a study based on a more representative sample of published and unpublished disputes, where only 36% of tax disputes were reported to be preceded by AR.

Another kind of evidence seems to confirm the selection effect of AR. Our sample captures 254 first-instance judicial decisions. Among these, the plaintiff win rate is 18.4%. This is somewhat higher than the average rate of plaintiff wins in Chinese tax litiga-

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106 See text accompanying notes 122-127 infra.

107 The evidence presented in Part 3.2. for the trial selection theory is based on aggregate data and on diachronic variations. Here I consider whether this effect is manifest in sample cases themselves.

108 Huang, supra note 52, at 80.

109 Because many decisions on appeal report the decisions of the first-instance courts, it is possible to code for some aspects of such first-instance decisions even though they are not directly available. Thus 272 first-instance dispositions are captured in the sample, including 49 summary dismissals and 18 permissions to withdraw. Consistently with the calculation described in Part 2, summary dismissals are included as a kind of judicial verdict (thus in the denominator for computing plaintiff wins) but permissions to withdraw are not.

110 119 decisions in our sample were rendered by courts on appeals. Among these, the plaintiff win rate was 20%.
In disputes involving penalties, however, the plaintiff win rate is even higher. 57 out of 190 lawsuits in the sample implicated penalties. First instance courts reversed the penalties in 21 cases (sustaining in part and reversing in part in 4 more.) This is a significantly higher win rate for plaintiffs than on average, and it may not be coincidental: as discussed in Section 3.1., penalty decisions can be appealed to courts directly without going through AR; thus, the filtering effect of AR—which suppresses observed plaintiff win rates—does not apply.

4.2.3. Evidence for Information Asymmetry between Plaintiffs and Defendants

An interesting set of results from the analysis of published cases relates to information asymmetry between plaintiffs and defendants. Under the trial selection theory, if the defendant enjoys an information advantage regarding issues relevant to trial outcome—e.g. it possesses private information about the facts implicated in the disputes such as whether the defendant was negligent, greater knowledge about judicial attitudes, and so on—it will make more informed decisions about settlement, adopt more effective strategies when bargaining with plaintiffs, etc., all of which will result in a lower observed plaintiff win rate. In tax and other administrative litigation, it is possible that the defendants systematically enjoy information advantages. In particular, tax agencies may have good knowledge of the law regardless of whether they have attorney representation, since enforcing the law is their job. By

111 See Chart 2 supra.

112 The importance of the trial selection theory is illustrated by this last discussion. Without applying such a theory, one might be tempted to explain why Chinese courts are more willing to hold against tax agencies in penalty cases than in other cases, in terms of judicial attitudes or judicial quality. For example, perhaps penalty cases more often involve intuitive judgments about fairness (i.e. "Was the penalty commensurate with the taxpayer’s fault?"). And judges are perhaps less willing to defer to tax agencies in respect of such judgments than in respect of more “technical” judgments about the proper tax treatment of various transactions. Moreover, since the impositions of penalties tend to be subject to more stringent administrative procedures, judges may seem especially well positioned to safeguard procedural (as opposed to substantive) justice. However, such hypotheses about the effect of judicial quality on litigation outcome may well be spurious, given the existence of another theory that simultaneously explains a much wider range of phenomena.
contrast, taxpayer plaintiffs (especially those that have been assessed deficiencies) are likely to be adequately informed about the law only when they engage attorneys. This hypothesis is partially supported in the U.S. context, where it has been found that attorney representation of taxpayers in Tax Court proceedings significantly reduced the IRS recovery rate.  

In the 233 judicial documents I analyzed, plaintiffs are represented by attorneys in 113 instances, and act pro se in the remaining 120 cases. Two different statistical tools (crosstab and multivariate logit regression) show that plaintiff attorney representation is significantly (at the .001 level) and negatively correlated with whether the plaintiff is an individual, and significantly (at the .05 level) and positively correlated with whether the case was preceded by AR. In other words, individual plaintiffs, as well as plaintiffs who have brought suit directly instead of going through AR, are less likely to hire attorneys. Interestingly, plaintiff representation significantly (at the .05 level) increased the chance that the plaintiff will make a procedural argument in the case. There is some evidence, therefore, that hiring attorneys helps mitigate plaintiffs’ information disadvantage, and the greater than half of plaintiffs who failed to hire attorneys did so to their own detriment.

Defendants’ representation by lawyers turns out to be an entirely different story. In the sample, tax agencies hired attorneys more frequently than plaintiffs—in 131 of the cases. However, whether a defendant engaged attorneys shows no significant corre-

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113 See Lederman & Hrung, supra note 15, at 1255 (referencing statistical findings of the IRS’s recovery ratio when a taxpayer has an attorney).

114 It is conceivable that cases with plaintiff attorney representation involve more elaborate fact finding and legal interpretation, and that courts are more likely to publish elaborate cases. In combination, these factors suggest that the proportion of plaintiff attorney representation may be over-stated in published cases.

115 In the multivariate analysis, I used two additional independent variables as controls: whether the dispute took place in an urban (as opposed to rural) area, and the monetary amount disputed. Neither of these variables turned out to have any significant correlation with either plaintiff or defendant attorney representation. The independent variables also bear no significant correlations with one another, dispelling concerns about multi-collinearity in the multivariate regressions.

116 This is consistent with the pattern in the descriptive statistics in Huang, supra note 52: entity plaintiffs are much more likely to engage attorneys than individual plaintiffs.

117 Plaintiff representation is also positively correlated with the outcome of an adverse ruling against the defendant using a simple crosstab measure, although this effect disappears using the more rigorous multivariate logit analysis.
lation with whether the lawsuit was preceded by AR or with other independent variables (e.g. the location or amount in dispute). Moreover, defendant representation by lawyers has no significant impact on the likelihood of the defendant mounting a procedural defense. Finally, defendant attorney representation even seems positively correlated (under crosstab) with an adverse ruling against the government—the government’s decision of hiring a lawyer is more likely to lead to a government loss—although a more rigorous multivariate analysis shows that it simply has no effect on case outcome. Whether external attorneys offer any “value added” to tax agency defendants, therefore, is quite unclear.

These patterns can be interpreted as evidence that tax agencies are themselves aware of the relevant procedural rules even without external legal support. In another recent empirical study of Chinese administrative litigation, the average frequency of attorney representation of defendants across agencies was 30%.

This is much lower than the frequency (57%) of defendant attorney representation in our tax sample. The author of that study, Professor Huang Qihui, argued that because government agencies both have in-house lawyers and are repeat-players in litigation, they are less likely to hire attorneys than plaintiffs. In other words, external lawyers may not provide enough “value added” for government defendants. This view is consistent with the observed effect of defendant attorney representation in our sample. It could also explain why tax agencies’ choice about whether to have attorney representation seems more random than that of plaintiffs.

4.2.4. Legal Standards and Judicial Bias

Notwithstanding the selection effects of both pre-litigation proceedings and settlements during litigation, and notwithstanding the general brevity of Chinese court decisions, it is possible to

118 Huang, supra note 52, at 78.
119 If external attorneys provide relatively little value added, there should also be little selection bias that would result in defendant attorney engagement being over-represented in case samples. This raises the possibility that tax agencies in fact engage lawyers in litigation more often than other agencies, despite (or perhaps because of) the low volume of tax litigation.
120 The average length of decisions in the sample is fewer than 3,000 Chinese characters (the equivalent, if translated, is not much more than 2,000 English words).
glean evidence from the large sample of tax cases regarding the legal standards applicable to disputes between taxpayers and tax administrators, the judicial application of these standards, and even the reactions of the executive branch of government towards tax litigation.

At the outset, however, it is worth noting that the method for empirically studying judicial bias most commonly employed in U.S. scholarship is not feasible in China. In empirical tests of the “attitudinal model” of judicial behavior—particularly to test the hypothesis that the decisions of judges can be predicted from their political party affiliation or ideology—scholars usually examine the decisions of a small number of judges in a large number of cases. In this approach, the large quantity of decisions associated with each judge dilutes the effect on case outcome of the merits of particular cases. The relatively small number of judges involved, meanwhile, makes it feasible to gather personal information about each of them. The theoretical validity of this approach to testing the attitudinal model is controversial. But even if it is valid (when properly used), it would be difficult to implement in China. Chinese judges’ role in most types of adjudication is much less individualistic than in the U.S.; the role of individual courts is much more prominent. Moreover, even if relevant, the personal characteristics of judges in the thousands of lower-level courts that adjudicate almost all of the first- and second-instance lawsuits are difficult to gather. Finally, in almost all areas of administrative litigation—tax is only one extreme example in this regard—the case volume is sufficiently low, and case publication practice sufficiently recent, that not many cases can be attributed to the same

121 Indeed, such method may not be deployable in most countries with civil law judiciaries and less individualistic judges.

122 See JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL. REVISITED (2002) (studying the use of the attitudinal model to predict Supreme Court decision-making); see also Cross, supra note 2.

123 There is a particularly acute question of whether it can be reconciled with the trial selection theory. See de Figueiredo, supra note 105.

124 See generally, Liebman, supra note 78.

125 In J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003), Professors Ramseyer and Rasmusen studied the Japanese judiciary, which is much smaller and more elite in composition than China’s corps of over 200,000 court employees. They provided evidence that Japanese judges could decide cases independently in tax and other subject matter areas, by using data about the judges’ promotions, demotions, and career stagnations. Such data is not available in China and thus this approach for studying judicial independence is also not feasible.
court. For example, in 2013, when all administrative lawsuits are combined, there are, on average, fewer than 40 cases for each of the over 3,000 Chinese basic-level courts, and there is approximately one tax case for every nine such courts.\footnote{126 The decisions of 133 different courts in China are represented in the case sample studied here. Even courts that published the largest number of tax cases in the sample (two intermediate courts in Shanghai) only had 9 and 8 cases each.}

The evidence we have, therefore, is circumstantial. Two types of weak evidence for judicial bias in favor of the government can be reported. First, in many cases in the sample, judges displayed strong deference to tax agencies on matters of legal interpretation, to the detriment of plaintiffs. This is especially apparent in a substantial number of decisions (69 of them) where the agency actions challenged were partially based on informal agency guidance. According to the SPC’s position, such guidance lacks the formal force of law and is not binding on courts.\footnote{127 The legal status of informal agency guidance and the SPC’s position with respect to such guidance is extensively discussed in Nicolas C. Howson, Enforcement Without Foundation? Insider Trading and China’s Administrative Law Crisis, 60 AM. J. COMP. L. 955 (2012), and Wei Cui, What is the “Law” in Chinese Tax Administration? 19 ASIA PAC. L. REV. 73 (2011).} In a number of these cases, plaintiffs requested the courts disregard allegedly inappropriate informal guidance, and the courts declined to do so even though they had the power to. However, it must be recognized that judicial deference to administrative agencies in statutory interpretation is widespread even in mature legal systems, and can clearly be compatible with judicial independence.\footnote{128 See KRISTIN E. HICKMAN & RICHARD J. PIERCE JR., FEDERAL ADMINISTRATIVE LAW, CASES AND MATERIALS, Chapter 6 (2D ED. 2014); see also Kristin E. Hickman, IRB Guidance: The No Man’s Land of Tax Code Interpretation, 2009 Mich. St. L. Rev. 239 (2009) (discussing issues of administrative law raised by the IRS’ informal policy guidance).} Moreover, the more statutes (or law with equivalent force) delegate authority to administrative agencies to engage in rulemaking and legal interpretation, the harder it will be for courts to contravene the exercise of such delegated power. Thus it is not clear that the prevalence of judicial deference in tax cases should be blamed on judicial weakness as opposed to excessive statutory delegation.\footnote{129 On excess statutory delegation in Chinese tax law, see Cui, supra note 127. Note also that, in our case sample, there were at least 30 instances where courts ruled that tax agencies misapplied the law.}

A second weak indication of judicial bias is the courts’ response to procedural arguments. In seventy-seven decisions in the sample, plaintiffs raised procedural challenges against agency actions,
but this led to adverse rulings against agencies only in thirteen instances. Defendants made defenses on procedural grounds also in a significant number of cases, which resulted in favorable rulings for the defendants in two thirds of the cases (forty-three out of sixty-six). However, in seven decisions, courts spontaneously (i.e. without the plaintiffs raising relevant challenges) made adverse rulings against agencies on procedural grounds. Without studying the merits of all these procedural claims (which often require knowledge of facts not sufficiently disclosed in the decisions), the evidence is not conclusive.

On the other hand, the sample also contains cases that reflect the executive branch’s view of judicial independence. Of particular interest are clusters of cases where a specific type of disputes is repeatedly brought to courts over time, and where the government appears to have changed the law in reaction to litigation. An important advantage of longitudinal coverage of the case sample assembled here is that it allows one to observe such shifts in legal standards.

One such cluster of cases relates to the treatment of innocent third parties in detected VAT fraud. A prevalent type of VAT fraud in China is the sham issuance of VAT invoices.\textsuperscript{130} Although both criminal and civil penalties apply to those who issue sham invoices, beginning in 1995 the Chinese tax authority applied an adverse rule against buyers who receive such invoices: any invoice that is the product of a sham issuance cannot be used to claim input credits by buyers, regardless of whether the buyer is aware of the sham issuance.\textsuperscript{131} That is, even innocent buyers, who receive VAT invoices from purported sellers who signed real contracts with the buyers, delivered the specified goods, and provided invoices that correspond perfectly with the transactions from the

\textsuperscript{130} For purposes other than criminal law, a sham issuance encompasses issuing, for oneself or for others, or allowing others to issue for oneself, invoices that are “inconsistent with actual business affairs.” Zhonghua Renmin Gongheguo Fapiao Guanli Banfa (《中华人民共和国发票管理办法》) [Invoice Management Measures of the People’s Republic of China] (promulgated by the State Council, Dec. 20, 2010, effective Feb. 1, 2011), Order No. 587. A sham issuance is distinguished from producing forged VAT invoices—the invoice issued is authentic, it just does not correspond to actual transactions. This area of substantive Chinese tax law is discussed in ALAN SCHENK ET AL, VALUE ADDED TAX: A COMPARATIVE PERSPECTIVE 467–73 (2015) (Chapter 14, Section VI.C).

\textsuperscript{131} This is a punitive outcome for taxpayers even if no explicit penalty is imposed: they would need to bear a sizeable tax burden that normally would be passed on to downstream producers or consumers.
buyers’ perspectives, are denied input credit if the invoices turn out to be issued in a sham. This controversial “buyer strict liability” regime gave rise to repeated disputes between taxpayers and tax authorities, some of which went into litigation. In our sample, four cases, litigated at different times and in different parts of China, presented such fact patterns. In all three cases tried before 2009, the plaintiffs (all innocent buyers) argued (correctly) that the tax authority’s rules lacked basis in the law. In all three lawsuits, courts in the first instance and on appeal held for the government and found ways to deflect plaintiff arguments about the legal infirmities of the tax agencies’ policies. One could interpret this either as a sign of the lack of judicial independence, or as a normal example of judicial deference to the executive branch. But more interestingly, the national government, when it revised the relevant VAT regulations in 2008, deliberately changed the legal standard. Whereas the old VAT regulation did not provide support for the informal policy of tax agencies regarding sham issuances, the new regulation endorsed the effectiveness of such informal policy, making it much harder for a taxpayer to challenge it. Not coincidently, in the fourth case in our sample, the plaintiff was not able to advance this legal argument.

There are other clusters of cases in our sample that illustrate the same pattern: the government was challenged in court on the basis of the legal infirmities of some of its policies (and occasionally suffered legal defeat); subsequently the law was amended in the government’s favor to fix the previous infirmity. For instance, certain

132 This could happen where, for example, unknowingly to the buyer, the purported seller was not the owner of the goods sold and was simply acting on behalf of someone else (who is not able to issue VAT invoices).

133 This legal issue continues to be litigated and new cases have emerged not contained in the original sample. See Anhui Sheng Hefei Shi Luyang Qu Renmin Fayuan Xingzheng Pan jue Shu (安徽省合肥市庐阳区人民法院行政判决书) [Anhui Province Hefei City Luyang District People’s Court Administrative Litigation Decision]; see also Lu Xing Chuzi Di 00032 Hao (庐行初字第00032号) [Lu Administrative Trial Decision No.00032] (2014); see also Jinhua Shengjin Tongye Youxian Gongsi yu Huaian Shi Guojia Shuiwu Ju Jicha Ju Xingzheng Chufa Ershen Xingzheng Panjue Shu (金湖盛锦铜业有限公司与淮安市国家税务局稽查局行政处罚二审行政判决书) [Jinhua Shengjin Copper Company Ltd. v. Huaian City State Taxation Bureau Tax Inspection Department Administrative Penalty Second Instance Administrative Litigation Decision]; see also Jiangsu Sheng Huaian Shi Zhongji Renmin Fayuan Xingzheng Panjue Shu (江苏省淮安市中级人民法院行政判决书) [Jiangsu Province Huaian City Intermediate People’s Court Administrative Litigation Decision]; see also Huai Zhong Xing Zhongzi Di 0139 Hao (淮中行终字第0139号) [Huai Intermediate Administrative Final Decision] (2014).
tax agency penalty practices that evolved in the late 1990s were subject to court challenges, and such practices prevailed only after being codified in statute. 134 Similarly, the authority of local tax inspection bureau to assess taxes was challenged until the late 1990s, and such authority was given statutory grounding in 2000 upon the revision of the Law on the Administration of Tax Collection. 135 Indeed, in this last set of disputes, tax authorities had seemed to be threatened with systematic defeat before the statute was changed, as the Chinese Supreme People’s Court had indicated that it believed that the law was not on the government’s side. 136

The claim here is not that in all these cases where the law was revised, the revision was a causal consequence of government defeats in courts or even of the government being challenged in courts. It is instead that the government could ultimately protect itself against legal vulnerabilities in court by changing the law, and this is what Chinese tax authorities have often done. In other words, there are two contrasting views regarding potential legal disputes between Chinese taxpayers and tax agencies. One is that even if the taxpayer has strong legal arguments, no good will come from bringing such a dispute to court, because Chinese courts are not independent and the defendant tax agencies will retaliate. The other is that if taxpayers have good legal arguments on a particular issue, then disputes on such issues are likely to arise often. The government may hope that it will not be sued as a result of such disputes, and that if sued, the courts will side with it, but ultimately, disputes, lawsuits, and court defeats can be avoided only by changing the law. Overall, existing case law provides more support for the second view rather than the first. 137

134 For discussion, see Wei Cui & Xiaoyu Ma, *The Option to Sue: Hainan Oriental Hotel v. Hainan Local Tax Bureau, 6 CHINA TAX INTELLIGENCE* 20 (2011).
137 Not all disputes and litigated cases involve issues of policy implementa-
4.3. Summary

To review: if a Chinese taxpayer, considering bringing a lawsuit against a tax agency, hires a good lawyer to review published decisions in tax litigation, they would find that many prior litigants are normal businesses typical of what one finds in the marketplace. They would find courts considering some fairly sophisticated legal arguments advanced by both plaintiffs and defendants. Courts hold against tax agencies with non-negligible frequency—in one fifth of the cases overall and one third of the penalty cases—but the odds of winning is evidently lower for plaintiffs than for defendants. The reasons why the plaintiffs lose, however, generally are not mysterious: either the law simply seems not to be on their side, or tax agencies are enforcing policies and practices that are adverse to the plaintiffs and have inadequate basis in the law, but which presumably are applied to all taxpayers and not just the plaintiffs. Courts are reluctant to invalidate these informal practices (although they occasionally do precisely that). Aside from this, there is little general evidence for courts’ lack of neutrality or competence. Adverse legal standards seem much more relevant than judicial attitude or quality. Finally, and most importantly, if the taxpayer and his lawyer are able to conclude that they have a strong case on the merits, there is nothing in the published cases (more than half of which involved pro se plaintiffs) that implies that they should preclude the litigation option.

Why, then, do Chinese taxpayers tend not to bring suit? Are legal standards so generally adverse to taxpayers that they rarely have a good case? How, then, do Chinese taxpayers normally survive? The next part suggests what is likely to be a surprising answer to these questions.
5. THE REGULATORY ENVIRONMENT: THE HEART OF THE STORY

The social environment in which disputes arise clearly may affect the volume of litigation. Professors Ramseyer and Rasmusen noted, for example, that the number of pawn shops in Japan declined dramatically from 1955 to the present, and as a result, the quantity of litigation pursued by Japanese creditors increased (since fewer creditors are pawnshops that could simply keep pawned objects of defaulting debtors).\(^{139}\) The challenge, though, is identifying such relevant features of the social environment when one’s scope of attention begins narrowly with the courts. In the case of Chinese tax litigation, such a non-obvious, but potentially key, determinant of how disputes arise and are dealt with is the structure of tax administration.

China’s workforce of tax administrators comprises approximately 756,000 civil servants.\(^{140}\) Although this is certainly the largest tax bureaucracy in the world by absolute size,\(^{141}\) it is not in per capita terms: the number of tax administrators relative to the size of the country’s general workforce is much lower than the OECD average.\(^{142}\) Notwithstanding this fact, the organization of China’s tax administration permits most business taxpayers to easily contact tax collectors. This is the result of what one might call radical “administrative decentralization”.\(^{143}\) The easiest way to appreciate what this means is to consider the vertical distribution of government personnel—what proportions of civil servants are employed

\(^{139}\) Ramseyer & Rasmusen, supra note 8.

\(^{140}\) OECD, TAX ADMINISTRATION 2015: COMPARATIVE INFORMATION ON OECD AND OTHER ADVANCED AND EMERGING ECONOMIES 84 (2015) (Table 2.4).

\(^{141}\) Id.

\(^{142}\) See Appendix in Leslie Robinson & Joel Slemrod, Understanding Multidimensional Tax Systems, 19 INT’L TAX PUB. FIN. 237 (2012) (analyzing OECD data to show that developed countries tend to have a much higher number of tax administrators relative to population than developing countries).

\(^{143}\) Cui, supra note 20. I define “administrative decentralization” by two features of the state: first, there is a single bureaucratic hierarchy, and government functions vis-a-vis citizens are performed at the lowest levels of the hierarchy. By contrast, higher levels of the bureaucracy do not exercise government power with respect to citizens directly, but instead issue commands to bureaucratic subordinates. Second, the lower the bureaucratic rank, the smaller is the geographical reach of units in the rank. Decentralization thus implies that the jurisdiction of a particular, citizen-facing government unit is geographically quite limited. What is unusual about China is first, how deep (i.e. multilayered) the bureaucratic hierarchy is, and second, how resolutely the tasks of government administration are placed at the bottom ranks of the hierarchy. Id. at 23.
at the various levels of government. At the national level, China’s State Administration of Taxation (SAT) houses just over 800 staff members—a mere 0.1% of the army of tax administrators. By way of contrast, in 2013 the U.S. Internal Revenue Service’s (IRS) National Office in Washington D.C. employed a staff of 4,072, out of a total IRS staff size of 86,977 (i.e. 4.68% of IRS staff work at the National Office). At the next, provincial level, China’s tax bureaucracy has 11,000 employees. Thus even when the national and provincial offices are combined, employees at these levels represent only 1.56% of the tax administration.

Where then are China’s tax collectors? Data compiled by the SAT shows that in 2003, 16% of tax administrators working at sub-national levels were posted at prefectural/municipal tax bureaus, and an overwhelming 79.5% or more work at the county level or below. Arriving at a breakdown of personnel between the county and lower levels takes some guess work, but the latter ranks contain at least as many employees as the county rank.

Imagine what the U.S. IRS would be like if it were structured like China’s tax bureaucracy. First, there would be barely anyone in the Washington D.C. National Office. There would also be no counterparts to the seven current IRS regional offices, each of which oversees matters across several states. Instead, the current 139 IRS district offices, which are field offices directly dealing with taxpayers, would become high-level offices giving commands to three additional layers of subordinate offices, where most personnel would be located. Most interestingly, these offices would form a dense network that is, so to speak, close to the ground. Instead of having 20 Taxpayer Assistance Centers in the entire state of New

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144 In 2011, the IRS national office employed a staff of 4,569, out of the total IRS staff size of 94,709. OECD, supra note 140, at 83 (Table 2.4).
145 Id. According to a recent OECD study of 52 countries, which covered thirty-five OECD countries and seventeen non-OECD countries/regions, China has by far the smallest percentage of tax administration staff working either at headquarters (i.e. national) offices, or at national and regional offices combined.
146 Cui, supra note 20.
147 Therefore, if one visualizes Chinese tax administration in a pyramidal figure with five tiers (national, provincial, prefectural, county, and sub-county), the proportions of areas of the tiers from the top to the bottom would have the ratios of 0.1:1.5:18.4:40:40. The top two tiers would be barely visible.
York, for example, there would be 20 such centers just for upper Manhattan. Instead of having just two or three hundred field offices in the entire country, there would be such a number of offices just in one metropolitan area.

The sheer density of this network of “grass-root” offices implies that each of the offices that constitute the network’s nodes has a small geographical jurisdiction. Taxpayers in each such small jurisdiction are thus in easy physical proximity to an office housing tax administrators. What a local office tends to do also accentuates this proximity. Although, nominally, the role of a local tax office is fairly comprehensive, in reality the bulk of a local office’s staff time and resources are devoted to a range of basic compliance tasks. Relatively fine divisions of labor, for example, are found for managing taxpayer registration, ensuring the timely filing of tax returns and the very basic processing of such returns, ensuring prompt payment of taxes, dealing with refund claims, and issuing tax invoices. In addition, the local office is supposed to give publicity to tax law, and provide taxpayer education, training, and other services. Thus, instead of mailing one’s returns and writing checks to distant “return processing centers” as U.S. taxpayers


The Dongcheng District in the City of Beijing (https://en.wikipedia.org/wiki/Dongcheng_District,_Beijing [https://perma.cc/5ZMW-V6ZP]), for example, has a population of 0.9 million and a geographical area of forty square kilometers—which is roughly half the size of Manhattan in both population and area terms. It has twenty taxpayer service centers. See Beijing Shi Guojia Shuiwu Ju (北京市国家税务局) [Beijing State Taxation Bureau], Dongcheng Qu Shuiwu Tingsuo (东城区税务局) [Dongcheng District Local Taxation Office], BEIJING SHI GUOJIA SHUIWU JU (北京市国家税务局) (Aug. 17, 2015), http://www.bjsat.gov.cn/bjsat/qxfj/dc/swts/.

OECD, supra note 140 (Table 2.4) states that IRS has 139 “regional offices” and 119 “local/branch offices.” The City of Beijing itself has more tax offices than this total number of 258.

Cui, supra note 20, at 203-04.

See, e.g., Shenzhen Shi Nanshan Qu Difang Shuiwu Ju (深圳市南山区地方税务局) [Shenzhen Nanshan District Local Taxation Bureau], Shenzhen Shi Nanshan Qu Difang Shuiwu Ju Shixiang Tiaozheng Gaozhi Shu (深圳市南山区地方税务局关于进一步优化调整事项) [Notice of the Shenzhen Nanshan District local taxation bureau regarding adjustments to tax-related matters], SHENZHEN SHI DIFANG SHUIWU JU (深圳市地方税务局) [SHENZHEN LOCAL TAXATION BUREAU] (Jul. 13, 2015), http://www.szds.gov.cn/wap/tzgg/201507/07d8debf75344486a2bd6a2b0453ee5d09.shtml (detailing the functions and services provided by a local taxation office).

Cui, supra note 20, at 204.
do, and in addition to being able to dial up the equivalent of IRS service hotlines, Chinese taxpayers can handle their basic tax compliance and obtain taxpayer services in their neighborhoods. In short, tax administration in China possesses a “personal face” to a much greater extent than in many other countries.

The origin of this organizational structure of Chinese tax administration is complex. Suffice it to say that the purpose of this structure is not to provide face-to-face taxpayer service, but to collect tax revenue in the main ways through which the government knows how. Moreover, by some measures this system has also worked well: close contact with taxpayers has reduced the size of the informal sector in China to one of the smallest in the world and Chinese tax revenue has been growing at a faster pace than its GDP for almost two decades. But it has also had many unintended implications. For our purposes here, the most important implication is for how Chinese taxpayer may choose to learn about and comply with tax law.

Like taxpayers elsewhere, a Chinese taxpayer may consult government publications, acquire professional tax advice, or inquire with taxpayer service units within the tax administration to learn about tax law. But in addition, because of the dense network of local tax offices, he is also able to consult with the tax administrators in the neighborhood, whom he deals with during routine (e.g. weekly or monthly) tax compliance, regarding the latter’s view about how certain transactions should be handled. This latter option offers two significant advantages. First, it is these officials who are most likely to be conducting any examination of the transactions in question in the future. Not only may the officials’ view now be a relevant predictor of their view in the future, but the offic-

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155 It needs to be traced both to the Chinese government’s attempt to build a tax system to embrace a market-based economy in the 1980s and 1990s, and to the overall structure of the Chinese state. See id., at 235–36.

156 In other words, physical proximity between Chinese taxpayers and tax collectors does not mean that the former get better taxpayer services than taxpayers in other countries: the primary objective of any local tax office and of most local office employees is still to collect revenue.

157 Cui, supra note 20, at 194, 199.

158 In many countries, only a small set of taxpayers, e.g. large corporations where audit teams from the tax agency are routinely stationed, have tax administration staff specifically assigned to them and deal with them on a routine basis. Taxpayers may have access to good taxpayer services, including having simple inquiries answered, but the government staff answering the inquiries are not the ones that will engage in audits and make tax assessments.
cials may also feel bound to some extent by their own advice to taxpayers, or at least be more reluctant to impose severe penalties if taxpayers turn out to owe additional taxes. In other words, consulting the local tax official about tax law has advantages analogous to obtaining an advanced ruling.\textsuperscript{159} Second, learning the law through local tax officials is also (considerably) cheaper than hiring tax advisors. By relying on local tax officials for legal advice, taxpayers effectively convert what would have been their compliance costs into the government’s administrative costs.\textsuperscript{160}

It is likely that many Chinese taxpayers precisely engage in such behavior. Moreover, because the grass-root offices offer low career incentives to their employees and inadequate opportunities for specialization, it is likely that local tax administrators have rather imperfect knowledge of tax law.\textsuperscript{161} When this is the case, and when taxpayers do not independently learn the tax law, even the most “compliant” taxpayers are only “semi-compliant”: their compliance activities are blessed by local tax administrators’ routine intervention and (non-binding) advice, but may still substantially deviate from the requirements of law.

Now consider a Chinese taxpayer’s incentives when a dispute with the local tax office arises. First, the dispute would be viewed from both sides in the context of an ongoing, physically proximal, and frequently interactive relationship: how the dispute is resolved is likely to affect future interactions, and both sides may prefer not to be burdened with continued adverse feelings. Moreover, the prospect of future interactions also creates rooms for bargaining in settlement. Second, to litigate in court, or even to bring a dispute through a formal administrative review proceeding, both sides would need to come to terms with what the law requires. Many taxpayers, however, have precisely chosen not to do that in regular compliance. Instead, by choosing to rely on the local tax office for various compliance efforts, they have benefited from both savings on advisory and compliance costs and perhaps even direct tax savings resulting from the local tax collectors’ partial ignorance (or discretionary application) of the law. Any taxpayer considering becoming a plaintiff, therefore, must be prepared to abandon this

\textsuperscript{159} See Cui, \textit{supra} note 20, at 223 (contrasting this type of ex ante consultation and advanced rulings systems available elsewhere).

\textsuperscript{160} Indeed, when local tax offices engage in extensive tax return processing, they may even be perceived as an adequate substitute for professional tax return preparers by many businesses.

\textsuperscript{161} Cui, \textit{supra} note 20, at 211–14.
type of normal equilibrium. These two factors—the greater opportunity for settlement due to repeated interactions and the desire that taxpayers may have for keeping to a particular type of compliance practice—may both have powerful effects in suppressing formal dispute resolution strictly based on the law.

Note that these explanations are distinct from the claim that taxpayers may hesitate to sue tax agencies for fear of retaliation. To begin, a tax agency’s ability to retaliate is presumably constrained by law: if a taxpayer can sue an agency in the first place, it can sue the same agency for retaliatory actions that have no basis in law. The question, then, is whether a defendant (especially one that loses) may retaliate within the bounds of law. In China it is plausible that this is feasible, but the reason lies in the tax administrators’ deep involvement with most taxpayers’ normal compliance activities, and the frequency with which taxpayers benefit from such involvement. It is not enough that the agency sued retains jurisdiction over the taxpayer; it must be the case that it delivers benefits to taxpayers that it could withdraw after being sued. Moreover, in the repeated interactions between taxpayers and tax administrators, it is also not just the government that can act strategically, e.g. by retaliating: taxpayers can also choose different levels of cooperation in response to the government’s choices. Thus, it is at least as plausible to see the suppression of formal disputes as resulting from the expanded space for bargaining and reaching settlement as it is to read such suppression as a reflection of government power.

In summary, the low tax litigation volume in China may be explained by the atomistic structure of Chinese tax administration, which creates opportunities for frequent informal actions between taxpayers and tax administrators. The logic of this explanation might extend to other regulatory areas, as well. For example, it has been noted in a number of studies that in the sphere of environmental protection, the level of environmental litigation (including administrative litigation) is so low that the maintenance of specialized environmental courts, which the Chinese government created in 2011, has been difficult to justify. It has similarly been noted that the penalties imposed on polluters and other violators of envi-

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162 This is true for most tax systems in other countries.

ronmental law are far lower than can be expected from statutory provisions.164 Fewer scholars have recognized that the organization of environment protection agencies in China is very decentralized, in ways not dissimilar to the decentralization of tax administration discussed above.165 But it is plausible that such decentralization is also the culprit for low litigation in the environmental area.

6. ADMINISTRATIVE LITIGATION AND THE RULE OF LAW

Among Chinese policymakers and legal scholars, it is conventional wisdom that administrative litigation is not just a mechanism for resolving disputes between private parties and government entities, disputes that arise because of factual and legal disagreements and perhaps simply as a part of life. Administrative litigation instead (and perhaps even primarily) serves the function of protecting the legal rights and interests of citizens from the encroachment of the government. This imputed function implies that the government is prone to making such encroachment, and perhaps more generally, to acting in ways that significantly deviate from what is required by the law. This implied claim is certainly apt in characterizing many of the activities of the Chinese government, which is far from being tamed by the rule of law.166 From this perspective, while citizens suing the government may or may not be acting purely in their own private interest, such lawsuits may generate a kind of social benefit beyond the private benefit for the plaintiffs: administrative litigation may deter the government from much unlawful activity, or at least help the government to improve its operations through better alignment with the law.167

164 Zhang et al., supra note 163.
166 See POTTER, supra note 10.
167 See SHAVELL, supra note 21, Chapter 17 (discussing the inevitable divergence between the private incentives and social cost and benefits of litigation).
Although public law scholars may be unfamiliar with such a formulation, the idea is that legal disputes with government agencies have strong positive externalities, as they promote a particular social good, namely the rule of law in governance.

It is very likely for this reason that the Chinese government has heavily subsidized administrative litigation. The subsidies take multiple forms. At the level of individual disputes, court fees for administration litigation are negligible (fifty yuan or eight dollars per case).\(^\text{168}\) In the institutional dimension, separate tribunals with dedicated judges for hearing administrative law disputes are set up at courts at all levels, resulting in an average case load of fewer than forty per year for such tribunals.\(^\text{169}\) The judicial system also separately gathers and publishes data on administrative litigation, which made possible the analysis in Parts 2 and 3 supra. Moreover, a large number of Chinese legal scholars specialize in research on how to make administrative litigation more effective at promoting the rule of law, for example by modifying the Administrative Litigation Law to offer more plaintiff rights and remedies.\(^\text{170}\) As a part of the judicial apparatus that receives such targeted subsidies, administrative litigation is clearly a distinct institution with a distinct purpose.

In tax and many other areas, however, what paradoxically seems to be preventing this institution from serving its purpose is the shortage of plaintiffs. Missing (often) are the very parties whose rights and interests administrative litigation is supposed to protect. Courts cannot by themselves constrain government and promote the rule of law in the executive branch, unless private parties spontaneously bring suits. This point seems obvious, but it is also precisely ignored when one assumes that if only courts are

\(^{168}\) Susong Fei, Jiona Banfa (诉 讼 费 纳 办 法) [Measures Regarding Payment of Litigation Fee] (promulgated by the St. Council, Dec. 19, 2006, effective April 1, 2007), art. 13(5). Attorney fees are also low. See Li, supra note 11, at 69.

\(^{169}\) Cui & Wang, supra note 16.

more neutral, competent, and particularly more independent and “powerful” vis-à-vis the executive branch, or the procedures for litigation are made more plaintiff-favorable, the lawsuits would naturally happen. The investigation carried out in this Article into the actual empirical patterns of Chinese tax litigation shows that this kind of assumption may have little justification in reality. Just as subsidizing administrative litigation hasn’t made it the institution it is intended to be, improving judicial quality and independence may not, either. The actions and choices of would-be-plaintiffs cannot be forgotten.

The empirical considerations discussed in Parts 3 to 5 suggest two reasons why administrative litigation may be deprived of its significance. The first, more straightforward, reason is that the laws that courts would enforce may be unfavorable to would-be plaintiffs: the judiciary cannot uphold rights that private parties do not have. Thus if Chinese tax law imposes many compliance requirements on taxpayers, taxpayers who flunk such requirements cannot expect much by way of judicial remedy.

The second, more profound reason why the significance of administrative litigation may diminish is that private parties may themselves benefit from, come to terms with, and perpetuate a social order that is inconsistent with the rule of law. Most obviously, thieves, tax evaders, polluters, unscrupulous merchants, and opportunistic businesses all benefit from ineffective law enforcement. But equally importantly, many private citizens may prefer to be spared the costs of learning and complying with the law, if they have the opportunity to do so. As discussed in Part 5, if taxpayers can obtain a significant amount of free tax advice and free assistance with return preparation at a local tax office—even if offering such free services is not the intended function of such offices—they may happily follow the personal discretion of the local civil servants, particularly if they don’t end up paying more tax. Indeed, they may actively seek access to such discretion, more than they try to learn about the law. When incentives for doing so are pervasive, “constraining government” may often not felt by citizens to be in their own interest. They may readily leave their supposed rights simply on the books.

While it may ultimately be the government’s responsibility to put an end to this kind of non-rule-based social practice, it is important to recognize that the problem here is that the rule of law has failed in a much more fundamental sense than unconstrained (or under-constrained) government: the failure rather lies in there
being no publicly announced legal rules that are generally followed. The making and publicizing of legal rules, and achieving general compliance with these rules, form the pre-conditions of and general backgrounds to large-scale social coordination in many countries (democratic or authoritarian) in the 21st century. They are also pre-conditions of the functioning of judicial institutions in these countries. Where both the government and private citizens opt for personal discretion and informal bargaining instead of rule-based social practices, courts that are supposed to enforce legal rules may end up being little used.

Of course, it is not only Chinese policymakers and legal scholars who tend to identify judicial monitoring of executive action as the locus for promoting the rule of law. The idea of “rule of law” is frequently associated with “constraining government” in discourses around the world. This Article has shown, however, that because the very possibility of judicial monitoring is conditional upon plaintiffs bringing suit, and because whether plaintiffs bring suit in the first place may depend on whether legal rules are generally being complied with by private citizens and effectively enforced by the government—that is, whether legal rules guide social and economic life—the rule of law is far from being synonymous with “constraining government.”

As mentioned in the Introduction, some scholars studying administrative litigation have also taken theoretical perspectives different from the one just described. They see administrative litigation as a distinctive institution, but not because it (purportedly) produces a distinctive public good, namely more rule of law in governance (or a more constrained government). Instead, in the context of authoritarian regimes, they see administrative litigation either as furnishing a meaningful tool for the “principals” in the regimes to monitor the actions of their “agents,” or as an inadvertent opening for those who oppose the regimes to pursue political contest. In the former case, a narrative is then developed to predict how authoritarian regimes may choose among different forms of monitoring. In the latter case, a new kind of normative significance, beyond the rule of law, is bestowed upon administrative litigation: such litigation may undermine authoritarianism itself.

The weaknesses of these theoretical claims, which can be seen

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171 Ginsburg, supra note 4.
172 O’Brien & Li, supra note 5.
readily purely in conceptual terms, are put into sharp relief by considering the realities of administrative litigation. The main problem with the “third-party monitoring for the benefit of dictators” story is that the objective of such monitoring is presumably catching malfeasance by agents of the authoritarian regime. However, it is not clear why courts are particularly adept at catching official malfeasance, especially when administrative litigation proceedings and not criminal prosecution are involved. Moreover, since courts are reactive, plaintiffs are needed to detect the instances of malfeasance first. The key “third party” in judicial monitoring, in other words, is the plaintiff, not the judge. It is not clear that the remedies that courts typically provide to plaintiffs in administrative litigation give distinctively strong incentives for monitoring official malfeasance. Given these facts, whistleblower or ombudsman systems with rewards appear much more suitable for the purpose of third-party monitoring from the perspective of authoritarian principals. The choice of administrative litigation for such purpose would be inexplicable.

As to the story of administrative litigation as a form of political contest, the overwhelming evidence from China is that citizens do not see things that way. As heavily subsidized as the institution of administrative litigation is, it is still infrequently used in many areas. Chinese citizens’ disinclination to challenge one of the most pervasive—and purposefully extractive—branches of the government, namely taxation, is hard to ignore. Instead of citizens using a seemingly neutral and apolitical channel—that of law—to pursue political purposes, the very functioning of administrative litigation as a legal mechanism is threatened by its disuse, for reasons that have no discernible connection with politics.

7. CONCLUSION

At the outset of this Article, I presented a contrast in how administrative litigation is viewed in democracies with established rule of law, on the one hand, and in countries that are characterized either by authoritarianism or by deficient legal systems, on the

173 Ginsburg, supra note 4, at 11.
174 They would be, if the errant agents tend to disguise their misconduct through the complexity of legal rules, but there is no reason to believe that this is the case.
other. In the former context, administrative litigation often does not stand out as a distinctive institution, but instead merges seamlessly into a background characterized by the rule of law. In the latter, administrative litigation is often portrayed as an aspirational institution, as capable of either promoting the rule of law or undermining authoritarianism. Consequently, it may be showered with subsidies (sometimes even by the governments it is supposed to reform themselves) and highlighted for political support by international rule of law initiatives. An implicit assumption underlying these different manners of (and motivations for) endorsing administrative litigation is that a weak judiciary will undermine that institution, and that to enhance it, one needs to empower the judiciary.

This Article, by analyzing the determinants of administrative litigation patterns in a context characterized by authoritarianism and a rule of law deficit, has questioned the justifiability of thus privileging the judiciary. It appears that the behaviors of litigants, as well as the laws that courts are supposed to enforce, have more explanatory power insofar as some core litigation outcomes are concerned. Moreover, by highlighting the causes of the disuse of administrative litigation, it has questioned an even deeper and more widely-held assumption, namely that the rule of law should be identified with judicial constraints on the executive.

This Article resembles previous revisionist scholarship that employs a generally applicable conceptual framework, combined with empirical analysis, to penetrate a self-enclosed, self-sustaining discourse about a particular legal system. For example, using similar methods, Professors Mark Ramseyer and Eric Rasmusen forcefully challenged “cultural models” of the Japanese legal system and common wisdom about litigation patterns in that system.\(^{175}\) The discourse on Chinese administration litigation studied here is similar to the discourse Professors Ramseyer and Rasmusen criticize in that the discourses’ participants rarely consider whether the

\(^{175}\) See J. Mark Ramseyer & Minoru Nakazato, The Rational Litigant: Settlement Amounts and Verdict Rates in Japan, 18 J. LEGAL STUD. 263 (1989) (demonstrating that rational choice models used in the U.S. can explain litigation choices in Japan without resorting to “cultural” models, and that “claims that Japanese courts are so expensive, powerless, and slow that they effectively deny relief to victims of legal wrongs” are unfounded); Ramseyer & Rasmusen, supra note 15 (using empirical analysis of Japanese judges’ careers to demonstrate the falseness of popular wisdom that low plaintiff win rates in Japanese tax litigation are due to the government’s manipulation of the judicial apparatus to obtain decisions biased in its favor).
explanations offered can apply in other legal systems, or fare better than alternative explanations in predictive power. But the stakes in this study are higher, since the Chinese discourse about administrative litigation has been taken to inform thinking about the relationship between the rule of law and authoritarian regimes in general.