UNDERSTANDING THE LAW OF TORTS IN CHINA: A POLITICAL ECONOMY PERSPECTIVE

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In this paper, I connect the text of the Chinese tort law with the institutional context of lawmaking in China from a political economy perspective. Two determinants, political influence and populist pressure, were identified for the tort law legislation in China, and a simple spatial model is presented to demonstrate the mechanism through which these determinants might have affected the text of the law. In particular, my research suggests that when tortfeasors’ political influence is kept constant, the populist pressure on the tortfeasor group tends to make tort law rules more favorable toward victims. In contrast, with similar populist pressure, the politically influential tortfeasors could mold legal rules to their advantage. Even within a particular type of tort, the subgroup of tortfeasors who were better organized to exert political influence would be rewarded with more favorable tort rules than their less organized fellow tortfeasors, especially where populist pressure was moderate. Hopefully, this research will inspire more efforts among students of Chinese law to explore the operation of law at the microscopic level against the macroscopic institutional backdrop of China.

Introduction

China’s new Tort Liability Law (Qinquan Zeren Fa) is the last of the three pillars of civil law, together with Contract Law (Hetong Fa) and Property Law (Wuquan Fa). But it is certainly not the least in terms of its practical importance. A quick search of

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judgments publicized on the Shanghai Court Net shows, for example, that during the four years after the Tort Liability Law became effective on July 1, 2010, the Tort Liability Law has been cited in 33,746 judgments rendered in Shanghai. During the same period of time, the number of judgments citing the Property Law, which took effect almost three years earlier, was merely 10,796, less than a third of the total citations of the former.¹ A few introductory works can be found in the English literature on the Tort Liability Law,² but none of them looked beyond the words of the law or delved into the impetus behind its terms.³ Indeed, there appears to be an inclination in the Chinese law scholarship to study the text and the institutional context of law in isolation.⁴ Recently, more efforts have been made to

¹ The search was performed on Oct. 13, 2014 at http://www.hshfy.sh.cn:8081/flws/. The search conditions were biased against the Tort Liability Law by setting the search period starting at the Law’s effective date. A newly implemented law could not be applied to disputes occurring before its implementation, so the judgments on those disputes closed soon after the effective date of the law were unlikely to cite that law.

² See, e.g., XIANG LI & JIGANG JIN, CONCISE CHINESE TORT LAW (2014) (providing a multidimensional perspective to present a complete picture of Tort Laws in China); MO ZHANG, INTRODUCTION TO CHINESE TORTS LAW (2014) (providing a comprehensive review of the modern Chinese tort system through an in-depth analysis of China’s Torts Law); Helmut Koziol & Yan Zhu, Background and Key Contents of the New Chinese Tort Liability Law, 1 J. EUR. TORT L. 328, 328 (2010) (providing an overview of the most important provisions in China’s Tort Liability Law). For a comparison between the Chinese and American Tort doctrines, see Ellen M. Bublick, China’s New Tort Law: The Promise of Reasonable Care, 13 ASIAN PAC. L. & POL’Y J. 36, 38-41 (2011) (addressing similarities and differences between China’s Tort Liability Law and U.S. tort law provisions and suggesting ways to improve both).

³ A recent paper on the medical malpractice disputes in China brought broader sociopolitical insights to the study of part of the Tort Liability Law, although it was mostly an inquiry into the implementation, rather than the terms, of the law. See Benjamin L. Liebman, Malpractice Mobs: Medical Dispute Resolution in China, 113 COLUM. L. REV. 181, 253-54 (2013) (suggesting limitations to contemporary understanding of both the functioning of the Chinese state and of the role of law in China, and adding to existing literature on the non-convergence of the Chinese system with existing models of legal and political development).

⁴ For a rare exception to this inclination, see MURRAY SCOT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS, 167-204 (1999) (providing a case study on the State-owned Industrial Enterprises Law (Quanmin Suoyouzhi Gongye Qiye Fa) and uncovering the competing interests giving birth to the pro-worker provisions of the law). Tanner’s approach, however, differs from the public choice perspective of this paper.
account for the adjudicative behaviors of Chinese courts in certain specific areas of law under the overriding political and economic constraints, yet such an institutional approach has not been amply extended to examine the legislative activities conducted by the various government entities in China. This academic shortfall is probably a reflection of the long-standing suspicion about the relevance of formal legal rules in authoritarian states. As detailed below, however, formal rules can be more relevant in these states than skeptics think.

To bridge this gap in the Chinese law scholarship, this paper aims to connect the text of the Chinese tort law with the institutional context in which the law was conceived. Inspired by the public choice theories on lawmaking, I will analyze the critical roles of two factors in determining the orientation of tort law in China, the political influence held by tortfeasor groups, and the populist pressure aggregating against these groups. Specifically, my analysis posits that the first determinant tilts the field toward tortfeasors while the second favors victims. I will also introduce a model illustrating how these determinants may play a part in China’s policymaking process. Although the wisdom of public choice has been widely used to explain legislative behavior in the United States, to the best of my knowledge, this research is the first endeavor to apply these insights to a particular body of Chinese law.

My study contributes to the literature in four respects. First, it provides new thoughts about the law in books under an authoritarian regime. Obviously, formal legal rules in China should not be taken at face value. But the willingness and ability of powerful tortfeasors to extract rules of torts in their own favor, as demonstrated below, offers empirical support to my argument that, even in

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6 See infra Part III A (discussing the public choice theory of legislation that has vastly enriched our knowledge about the impetus behind lawmaking).

7 See infra notes 65-66 (arguing that, while legislation can be consistent with the public interest or general efficiency requirement, public interest is not the primary concern in rulemaking and that the value of the public choice theory resides in the guidance it offers to understand the habitual undersupply of laws championing the public interest at the expense of well-organized pressure groups).
authoritarian states, the formal law is more than sheer political
decoration and deserves careful examination. Second, the paper
reveals previously unnoticed driving forces behind China’s
legislation on torts. The political economy perspective creates a new
landscape for the study of Chinese law and enables a nuanced
understanding about the rhetoric of law in light of the political
realities of this nation. Third, this paper produces some academic
ingredients potentially useful for the general study of Chinese law,
including a spatial model delineating the political mechanism of
lawmaking and an index evaluating the political influence of Chinese
ministries. Finally, the analytical framework of this research joins
together the two prominent views on the Chinese legal system. On
the one hand, the system has long been considered to be politically
biased,8 while on the other hand, many commentators believe it has
also been eroded by populism in the past decade.9 By taking both
political influence and populist pressure into account, I intend to
highlight the interaction of the two aspects in directing the course of
lawmaking in China.

One caveat is in order before unfolding my analytical
framework. As the first attempt at a complex subject, this research
could not draw on rigorous data to test its theories simply because
such data do not exist. Despite my efforts to seek factual support for
the analysis, it remains a formidable task to objectively specify the
values of the key variables pertaining to the different types of torts
surveyed below. Hence, I cannot reject the possibility that the
apparent consistency between the observation and theory is a result
of the manipulability of the model.10 This being said, “when the

8 For a comprehensive account of the political bias set in the Chinese judiciary, see
RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW, 280-330
(2002). For empirical evidence of such bias, see Michael Firth et al., The Effects
of Political Connections and State Ownership on Corporate Litigation in China,
54 J. L. & ECON. 573 (2011); Xin He & Yang Su, Do the “Haves” Come Out Ahead
9 See infra note 23 (discussing China’s retreat from its claimed course toward rule
of law).
10 In this respect, my research shares the same weakness with other pioneering
studies on the political economy of legislation. See, e.g., Jonathan R. Macey &
Geoffrey P. Miller, Toward and Interest-Group Theory of Delaware Corporate
theory and casual empiricism point in the same direction . . . the intellectual burden of proof should shift.”

Part I sets out the scope of laws explored in this paper and describes briefly the legislative history of the tort law in China. Part II discusses the intellectual significance of looking into the formal legal rules in general, and those of torts in particular, promulgated in authoritarian countries like China. Part III develops the theoretical framework of my research drawing on the public choice literature. Part IV applies this framework to the Chinese tort law through a series of comparisons of rules across different types of torts and disparate categories of tortfeasors. A short conclusion follows Part IV.

I. Creation of the Tort Law in China

Before we start a political economy inquiry into the Chinese tort law, it is essential to specify the laws to be examined in this study. For practical purposes, we must probe three categories of legal documents to have a clear picture of this field in Chinese law: general statutes, special statutes, and judicial interpretations. Indeed, here “law” is used in a broad sense, including any formal authority binding in adjudication.

A. Three Sources of Law

In China, at the national level, civil liability resulting from tortious actions are governed by three distinct categories of laws: general statutes, special statutes and judicial interpretations.

General statutes are comprehensive laws about tortious behaviors. They lay down the basic rules applicable to various types of torts. They are enacted either by the National People’s Congress (NPC) or its Standing Committee and are officially titled as “law” (falu), hence bearing the highest rank of effect among China’s official sources of law. Usually, the NPC Legislative Affairs Work Committee (fazhi gongzuoweiyunhui) under the Standing Committee, a working body of the NPC, leads the drafting of general statutes. The process may involve a long period of time during which a series

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12 TANNER, supra note 4, at 102.
of drafts are put forward and public opinions openly solicited for some of these drafts. So far, there are two general statutes on torts, the General Principles of Civil Law (Minfa Tongze, hereinafter as “General Principles”) and the Tort Liability Law. The former was passed by the NPC in 1986 and the latter by its Standing Committee in 2009.

Special statutes are laws related to specific types of torts conventionally referred to as “special torts” (teshu qinquan) by Chinese lawyers. This name comes from the fact that strict liability or res ips loquitur, instead of the regular negligence rule, is applicable to these torts. In most cases, the special statutes do not deal with tort liabilities in particular, but are regulatory rules for specific industries. Some of these special statutes are promulgated by the NPC Standing Committee, hence obtaining the status of “law.” Others are adopted by the State Council and are administrative regulations (xingzheng fagui), one rank lower than laws in terms of legal effect, or by the ministries of the State Council as departmental rules (bumen guizhang) with an even lower rank as a source of law. Regardless of their formal ranks, the ministry overseeing a certain industry often plays a key role in drafting the special statutes regulating that industry. There are more than forty “laws” other than the general statutes, and still more administrative regulations and departmental rules, pertaining to tort liabilities. All of them are deemed as special statutes on torts in this paper.

Besides the rules enacted by legislative and administrative institutions, the Supreme People’s Court (SPC) issues various judicial interpretations on the adjudication of tort disputes. The SPC interpretations either take the form of replies to requests of lower courts for instructions regarding particular cases, or stand alone as general directions on certain issues in tort litigations. Whereas the former is usually short and written in an essay style, the latter is closer to statutes in terms of format and generality. Although judicial

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13 For the ranks of effect of the official sources of law, see Zhonghua Renmin Gonghenguo Lifa Fa (中华人民共和国立法) [PRC Legislation Law] (Aug. 1, 2001), art. 79.
14 Tanner, supra note 4, at 120.
interpretations are not an official source of law, in practice, they are routinely cited in court decisions—especially the statute-style general directions—hence becoming a de facto source of law. SPC derives its authority to issue interpretations in relation to the application of laws and decrees in adjudications from a resolution passed by the NPC Standing Committee in 1981. SPC issues not only the general provisions applicable to a wide variety of torts, but also judicial interpretations on certain specific types of torts, such as traffic accidents. The drafting of judicial interpretations is completed within the SPC, sometimes with consultation with outside experts and other government institutions. SPC also elicited public opinions for its recent statute-style interpretations. However, the final adoption is not subject to any external approval. No exact number of SPC judicial interpretations related to torts could be found during my research.

B. A Brief History

Of the above sources of tort law, the oldest one is the General Principles. The SPC Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law (For Trial Implementation) (Zuigao Renmin Fayuan Guanyu Guanche Zhixing 1984. Part 9 of this judicial interpretation is about tort damages. However, its provisions are highly incomplete. It only contains a negligence rule for regular torts and barely touches on the special torts. Besides, this documents is a mixture of substantive and procedural rules. Thus, it is rarely regarded as the origin of the Chinese tort law.
“Zhonghua Renmin Gongheguo Minfa Tongze” Ruogan Wenti De Yijian (Shixing), hereinafter as “SPC Opinions”) was issued two years after this piece of groundbreaking legislation took effect. Most of its provisions can be seen as clarification of the rules in the General Principles. While the earliest special statute pertaining to tort liabilities appeared soon after the promulgation of the General Principles, the boom of such statutes came in the first half of the 1990s. Judicial interpretations often follow the special statutes to elaborate, and sometimes modify, the rules of the latter. The vast majority of SPC interpretations applicable to tort litigation were issued in the twenty-first century, especially in the early years of the century. In addition, the SPC issued in 2001 Some Provisions on Evidence in Civil Procedures (Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju De Ruogan Guiding, hereinafter as “Interpretation on Evidence”) that exerted profound influence on tort litigation by demarcating the burdens of proof. Premised on these prior legal documents, the Tort Liability Law was passed by the NPC Standing Committee five days before the end of 2009 after a drafting process spanning nearly a decade.

In a nutshell, the law of torts in China started with the General Principles, inviting a wave of special statutes in the 1990s. These were followed by a series of judicial interpretations in the 2000s before they were consolidated in the Tort Liability Law that came into effect on July 1, 2010. However, it is noteworthy that many of the special statutes and judicial interpretations on torts remained effective after the promulgation of the Tort Liability Law.

III. Why Look at the Law of Torts in China?

The motivation of the current study is to link the text of the law to the institutional context in which the law was created. This assumes that the words of the legal documents are more than cheap talk that can be ignored in practice. Therefore, the next two questions have to be addressed prior to a meaningful inquiry into the political

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20 The earliest draft of the Tort Liability Law was submitted to the NPC Standing Committee in December 2002.
economy of Chinese tort law: 1) why look at the formal law in China, an authoritarian state, and 2) why look at the law of torts?

A. Why Look at the Formal Law in China?

Given the authoritarian nature of the Chinese regime, many will question the value of looking at the text of its formal statutes since under such a regime what was written in books can be readily bent in practice. Some commentators have stated that when the chance of enforcement is remote, formal laws could be phrased in more pro-the-masses rhetoric in China than in countries committed full-heartedly to the rule of law.21 Others portrayed the everyday cases in China to be clustering under the rubric of “rough justice,” meaning adjudications are more in accord with informal problem solving strategies than the written laws.22 From a broader perspective, many are skeptical about the impact of the formal legal institutions on China’s remarkable economic growth during the past three decades,23 and still more have written on China’s retreat from its recently claimed course toward the rule of law.24

21 Ji Li, When Are There More Laws? When Do They Matter? Using Game Theory to Compare Laws, Power Distribution and Legal Environments in the United States and China, 16 PAC. RIM L. & POL’Y J. 335, 337-344 (2007) (recognizing, however, that the formal law in authoritarian states would be more seriously applied where the parties involved held comparable political status).
22 Stern, supra note 5, at 88-93.
24 E.g. Carl F. Minzner, China’s Turn Against Law, 59 AM. J. COMP. L. 935 (2011) (arguing that Chinese leaders’ shift away from formal law is a distinct domestic political reaction to building pressures within the Chinese system); Hualing Fu & Richard Cullen, From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25 (Margaret Y.K. Woo & Many E. Gallagher eds., 2011) (discussing the shift of priority from adjudicatory to mediatory justice); Benjamin L. Liebman, A Return to Populist Legality?: Historical Legacies and Legal Reform, in MAO’S INVISIBLE HAND: THE POLITICAL FOUNDATIONS OF ADAPTIVE
I do not dispute the strength of the institutional constraints under which the law in books are implemented in China, but I contend that it would be an oversimplification to sweepingly discredit the pertinence of China’s formal legal rules. On the one hand, such discredit stands at odds with the credible empirical evidence showing China’s Communist regime is facilitating, rather than inhibiting, the consolidation of its official legal institution. On the other, critical to the purpose of this paper, there is solid theoretical foundation to believe that the formal laws in authoritarian states can do more than showcase the hypocrisy of the regime.

In one of their influential papers, Professors Moustafa and Ginsburg developed in detail the functions of courts as part of the official legal institution in authoritarian politics, and many of their insights are applicable to the role played by formal laws in China. For instance, formal legislation can serve as documents to declare the policies cherished by the regime to achieve social control. As Professor Damaška acutely pointed out, the law in an activist state “springs from the state and expresses its policies,” and “it tells citizens what to do and how to behave.” Furthermore, to attain state objectives, “relatively stable standards” are indispensable. Thus, “the activist state is driven to respect a degree of fixity in its law.” Although not all activist states are authoritarian, an authoritarian state is frequently activist; China, in particular, fits squarely into this type. Apart from the existent wisdom about the judicial system in authoritarian states, I will highlight two other aspects in which the

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28 *Id.*

29 *Id.*

30 For example, in China, many rules governing personal claims against tortious actions are embedded in industrial regulatory schemes. In addition, certain “rights” in China, such as the right to education under Art. 46 of the PRC Constitution, shade into obligations, which is characteristic of an activist state. *Id.* at 84 & n.22.
formal law can influence even those states that are not bound by the rule of law.

First, the law in books can affect the settlement between parties in a legal dispute, even in the absence of the rule of law. It is common sense among law students that, in states under the rule of law, parties frequently bargain outside the courtroom in the shadow of the law. Nevertheless, formal laws are nevertheless crucial to such bargaining even when the parties know that the official rules may not be strictly applied at trial. This is because of the “anchoring” effect widely observed in human behaviors. This behavior refers to a cognitive bias for a decision-maker to rely too heavily on the initial piece of information offered when making a decision.

Formal legal rules set up the threat values indicating the parties’ payoffs when the negotiation does not go through and the parties end up in the courtroom. Hence, these values provide the benchmark to which the parties will refer in the bargaining process. In any event, a negotiated resolution to a dispute should not bring lower payoffs to the parties than their threat values. Where the formal law is not faithfully followed, uncertainty may arise regarding the parties’ threat values. While the parties understand that the outcome of a trial might be different from what a rigorous implementation of the law will dictate, they will have difficulty in adjusting their estimates to take into account the slackness in law enforcement. The parties are likely to take the words of the formal law as a starting point for their adjustments. Typically, such adjustments are insufficient. As a result, the parties’ estimates of the actual outcome of a trial tend to be biased toward what the strict


33 For the meaning and role of threat values in bargaining, see ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (6th ed.) 74-76 (2012).

34 Of course, parties can feel uncertain about their threat values even in jurisdictions loyal to formal laws, usually due to the ambiguity or incompleteness of law. My point here is simply that the greater variance of law enforcement will further aggravate this uncertainty.
enforcement of law would bring about. 35 In this sense, in countries without strict adherence to the rule of law, the terms of out-of-court settlements may as well be anchored to the mandate of these statutes.

This anchoring effect is especially important to lawmakers in authoritarian states when they attempt to favor their patrons. When the formal law sets threat values sufficiently low for groups disfavored by lawmakers, the anchoring effect will likely discourage these groups from making a demand in settlement bargaining high enough to correct the bias embedded in the law. 36 Consequently, terms of settlements that seemingly accommodate the disfavored groups’ requests in excess of their entitlements under the law will likely appease the disfavored groups without materially sacrificing the interests of the favored groups. 37

Second, when the parties fail to settle and end up in trial, the formal statutes will be applied as default rules. This is especially true where the judiciary is structured as a hierarchal authority. As Professor Damaška has observed, China is again a case in point. 38 If a fault is found in the superior review of lower court decisions,

35 Tversky & Kahneman, supra note 31, at 1128.
37 A good case in this point is my own experience in bargaining for compensation for the taking of our old residence in Shanghai. By setting a low initial assessment of the property value and agreeing on compensation slightly higher than that assessment, the government successfully induced the majority of the residents to yield their property consensually. But the paid compensations were just a meager portion of the tremendous surplus the local government and the developer would derive from the taking. The initial assessment price was about 25,000 RMB per square meter, and the old residential buildings in this area were usually two stories high. Newly developed projects at the same location are sixteen to thirty-one stories high and sold at an average price of 85,000 RMB per square meter. (For the price information, see http://luxiangyuan021.fang.com/house/1211081506/housedetail.htm). In other words, the originally assessed compensation for a piece of a two-story property with a premise of fifty square meters would be 2.5 million RMB, whereas new development on this same premise can be sold at 68 to 131.75 million RMB. Certainly, in most situations, the final amount of compensation was higher than the original assessment. Based on our own case, the final compensation for a piece of property on a premise of 50 square meters would be around 12 million RMB including the potential premium from resale of the relocation property sold, at a discount, to the owners subject to taking, i.e. 9% to 18% of the average market price of the new development. It should be mentioned that we did a hard bargaining with the government and were among the last 1% of residents to submit the property, so the above estimation is by all means on the higher end.
38 Damaška, supra note 27, at 198-99.
“hierarchical organizations have a battery of instruments at their
disposal to teach the errant official a lesson.”

In China, the judicial disciplinary system for incorrectly decided cases (cuo’an zeren zhuijiu zhidu) plays a major part in this regard, which can bring career and financial sanctions to judges whose decisions have been reversed or sent back for retrial in superior review.

Hence, in a hierarchical judiciary, “official discretion is anathema[.]” Instead, the so-called “logical legalism,” characterized by a tight attachment to context-free and general standards, is attractive to adjudicators under the hierarchical authority. Such negative attitudes toward discretion are often heard among Chinese judges. Thus, the explicit rules written in statutes become the best authority on which to rely in adjudicating commonplace cases. In this sense, the judicial arbitrariness stemming from the absence of the rule of law is mitigated by judges’ reluctance to exercise excessive discretion in a hierarchical system. This reluctance, in turn, strengthens the formal statutes with more authority rather than diminishing them in an authoritarian state.

However, judicial reservation over discretion in authoritarian states should not be interpreted as volitional respect for the formal rules of law. Instead, these rules are normally obeyed only in default of other superseding factors. Such factors may include political intervention or policy considerations, prominently from local governments. It is mostly because of these superseding factors that judges become willing to utilize various legal or extralegal devices to make decisions detached from a literal application of the law in books. However, to take advantage of the superseding factors, it is often necessary for the parties to credibly indicate their special circumstances before the judges. More often than not, this implies extra costs incurred by the parties in dispute, such as tapping into their

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39 Id. at 49.
40 Carl Minzner, Judicial Disciplinary Systems for Incorrectly Decided Cases, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA, 58, 64-73 (Margaret Woo & Mary E. Gallagher eds., 2011).
41 Damaška, supra note 27, at 19-20.
42 Id. at 22-23.
43 Interview with Judge L, Shanghai, China (July 4, 2013); interview with Judge S, Shanghai, China (July 28, 2014).
44 Previous studies on civil adjudications in China also found by-the-book decision making a routine of the judiciary. See Stern, supra note 5, at 88.
45 For some examples of such devices, see id. at 89-91.
political resources or daring extraordinary actions to claim their relief.  
For an example of such extraordinary actions used in anti-discrimination cases in China, see Minzner, supra note 24, at 960; see also Xin He, Maintaining Stability by Law: Protest-Supported Housing Demolition Litigation and Social Change in China, 39 LAW & SOC. INQUIRY 849 (2014) (discussing protestors’ use of collective administrative litigation to resist unfavorable housing demolition policies).

B. Why Look at the Law of Torts?

First of all, tort law is vital to Chinese judicial practice. Tort cases are among the most frequently litigated disputes in China. In 2008, for instance, the number of tort cases accepted by Chinese courts totaled approximately 992,000.  
While administrative litigation has attracted substantial attention among students of the Chinese legal system,  
the number of
administrative cases going to Chinese courts was a mere 108,398—about one-tenth of the number of tort cases. While studying administrative justice in China is unquestionably valuable, a tremendous piece of our knowledge of the Chinese legal system would be missing if the same scholastic diligence were not applied to other areas of law, such as contracts and torts, which account for the lion’s share of the courts’ everyday work.

In addition to its practical importance, tort law also brings good theoretical justifications. Unlike contract law where contracting parties can tailor most of the rules, tort law involves statutory provisions that are mandatory. Therefore, the law in books takes a more salient position in the area of torts. The rules guiding tort law are less vulnerable to ex ante adjustments by the parties mainly because of the high transaction costs of private agreements. For example, in automobile accidents, it is plainly impossible for all drivers and pedestrians to agree on the level of precaution that everyone should employ while driving. It is true that some types of torts are at the crossroads of contracts and torts, such as medical malpractice as reviewed below. Accordingly, parties might have a chance to opt out of the tort system in advance. However, this chance appears slim, at least in China. For one thing, in many of these borderline situations, potential defendants have deeply affected the creation of the tort rules. As result, it is hard to persuade such parties to agree on contract terms different from the statutory rules of torts.

Chinese administrative law insufficiently combats labor abuses, emerging regulatory innovation may eventually improve compliance with labor law); 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) (finding that “the rate of administrative litigation varies according to different levels of lawyer density and urbanization”); Kevin J. O’Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, 51 CHINA J. 75, 75 (2004) (concluding that the promulgation of the 1989 Administrative Litigation Law resulted in only modest deterrent effects); Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 CHINA Q. 832, 832-833 (1997) (conducting an empirical analysis of the implementation of the 1989 Administration Litigation Law).


51 COOTER & ULEN, supra note 36, at 189.
In addition, the contract law in China simply allows the victim to choose between contractual and tort remedies in cases involving both a breach of contract and a tortious action.\textsuperscript{52} Coupled with the lack of a defense of assumed risk,\textsuperscript{53} victims lack the incentive to accept an ex ante commitment to a level of care lower than the standard under tort law in return for a lower price on the tortfeasor’s service. This is because the victim can always renege and fall back to the tort law standard.\textsuperscript{54}

Furthermore, a political and economic inquiry into the law of torts is sensible because this body of law tends to represent collective decisions and promote the collective goals of society. In contrast, the law of contracts reflects predominantly individualistic decisions. The law of torts is collectivistic to the extent that the payment and amount of damages for harm caused by risky behaviors are determined on the basis of state authority, rather than consensual purchases of the right to harm.\textsuperscript{55} In other words, under the tort system, the conditions and costs for one party (the tortfeasor) to take away the legal entitlements of another (the victim) are subject to the collective decision of society. This stands in stark contrast to contracts, where people are permitted to decide transaction terms on their own. Having established that the tort law reveals collective decisions, it is appropriate to think of it as an outcome of the political process, making it suitable for a political economy analysis.

IV. The Analytical Framework

\textsuperscript{52} Zhonghua Renmin Gongheguo Hetong Fa (中国人民共和国合同法) [The PRC Contract Law] (promulgated by the Nat’l People’s Cong., March 15, 1999), art. 122.

\textsuperscript{53} With such a defense, the victim’s advance agreement on an insufficient level of precaution by the tortfeasor may be considered an assumption of risk.

\textsuperscript{54} In theory, the victim can agree on a higher level of care by the tortfeasor and also pay a higher price, in which case the victim will not have the incentive to renege. Such an agreement is nonetheless infeasible because it is often impractical to spell out the required level of precaution in the agreement and even more challenging to verify it before the court. Verification is especially troublesome in cases requiring specialized knowledge. In light of this difficulty, the tortfeasor will be incentivized to behave opportunistically after pocketing the higher price.

\textsuperscript{55} Guido Calabresi, \textit{Torts – The Law of the Mixed Society}, 56 TEX. L. REV. 519, 528, 534 (1978). Torts also incorporate individualistic elements, as compared to the criminal law that collectively determines which type of risky behaviors are forbidden outright and sanctioned with severe penalties.
The literature is legion on the political economy of legislation in democracies. From this literature, I will borrow a basic analytical framework and adapt it to the political and legal environment in China.

A. The Public Choice Theory on Legislation in Democracies

In the last four decades since Stigler’s seminal work in 1971, continuous efforts have been made to understand the official rulemaking process in democracies, mostly informed by the public choice theory. His well-received insight that regulators are captured by the regulated and adopt regulations mainly in the latter’s favor was extended by Professor Peltzman to integrate different interest groups, consumers and producers into the rent-seeking struggle through regulation. In a similar spirit, the late Nobel laureate Gary Becker developed a generalized model to encompass the various determinants of political equilibrium out of interest group contests for influence. In a slightly different context, when examining the evolution of law, Professor Rubin hypothesized that the statutory law, just like the common law, tended to approach efficiency only if the law would affect two well-defined small interest groups competing for advantageous treatment.

57 There was an even longer history of the public interest theory on regulations before the public choice theory dominated the area. This earlier theory argued that the principal government interventions in the economy were responses to public demands for the correction of “palpable and remedial inefficiencies and inequalities in the operation of the free market.” The public interest theory, however, is now considered theoretically unsound and empirically unsupported. See Richard A. Posner, Theories of Economic Regulation, 5 BELL J. ECON. & MGMT. SCI. 335, 336-341, 350 (1974).
60 Paul H. Rubin, Why Is the Common Law Efficient?, 6 J. LEGAL STUD. 51, 61 (1977) (positing that although statutes are often inefficient, lobbying for statutes can sometimes be a substitute for litigation); Paul H. Rubin, Common Law and Statute Law, 11 J. LEGAL STUD. 205, 211-19 (1982) (finding support for the claim that “[p]recedents will also be efficient if parties . . . are symmetrically
While the above literature uncovered the presence of interest groups in molding legislative preferences, another line of public choice research, known as the positive political theory (“PPT”), endeavors to relate the products of lawmaking to the specific institutional structures of lawmaking. Inspired by Hotelling’s famous location model, the classic works by the political economists Black and Downs broached the tradition to dissect elections in representative democracies using spatial models. More recently, spatial models have been extended further to explain the legislative behaviors in a wider ambit encompassing the strategic interactions among different branches of government. PPT recognizes that all political actors have a specified policy preference, and “[T]he core assumption . . . is that all relevant actors . . . act rationally to bring policy as close as possible to their own preferred outcome.” To PPT scholars, the judiciary is no longer considered as having the final say on statutory interpretations, and the legislature, constrained by its internal structure, acts in response to executive choices as well as judicial decisions.

The public choice theory of legislation has vastly enriched our knowledge about the impetus behind lawmaking. A number of law distributed . . . but the efficiency is a by-product of the litigation process aimed at maximizing the wealth of the litigants”). See also GORDON TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE (1980).

63 ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).
scholars have utilized the theory to shed new light on the creation of certain specific laws. Some of this research is focused on pinpointing the interests of the different groups involved in the formation of law, while others relied on spatial models to explain lawmaking under a particular set of institutional conditions. Enlightened by these thoughtful works on legislation, I now turn to Chinese tort law from a political economy perspective.

B. A Variant of the Public Choice Theory in China: Two Determinants

1. Why a Variant?

As reviewed above, the public choice theory on lawmaking starts from identifying the interest groups affected by the law at issue and rests the analysis on the capacity of these groups to claim their territories within the given institutional structure. The key insight of this academic tradition is that, instead of being motivated by the public interest, statutes and regulations cater to the requests of groups


that can effectively deliver what the lawmakers need – be it votes, money, or information.\textsuperscript{69}

Whereas the influence of interest groups is still crucial to the analysis of lawmaking under China’s authoritarian regime, such influence alone cannot fully account for the substance of the law. In democracies, where a typical voter remains “rationally ignorant” about public affairs, legislators can count on the interest groups to supply the essentials for political survival, votes in particular.\textsuperscript{70} In this sense, rent-seeking is a tolerated element of politics in democratic states, at least when it stays within the boundaries of existing law. However, things are quite different in authoritarian states like China.

First, under the strict state control over civil association, China has a dearth of social groups spontaneously organized by its citizens. As well-known to the students of modern China, each self-identified group in Chinese society “is allowed to be “represented” by only one body, and that body must reach an appropriate accommodation with the governing authorities”.\textsuperscript{71} In other words, the opportunity to form an interest group is reserved only for segments with governmental endorsement. At the same time, state-sanctioned groups are often awarded monopolistic positions to extract rents in return for their support of the regime. Therefore, in China, as in many other authoritarian states, there is no level playing field for rent-seeking, and rents are systematically transferred from the general

\footnotesize{\textsuperscript{69} This is not to deny that legislation can sometimes be consistent with the public interest or the general efficiency requirement, especially when groups with opposing interests are competing for legislative favor. See Becker, supra note 59; Rubin, supra note 60, at 216 (stating that in 19th century England, polluters, who were the party with the ongoing interest, would prevail in court over the public interest). The point is that the public interest is not the primary concern in rulemaking.}

\footnotesize{\textsuperscript{70} People choose not to get informed because the cost of doing so exceeds its benefit. Mancur Olson, The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities, 25-26 (1982); see also Becker, supra note 59, at 391-94. There are, of course, situations where the typical voter snaps to attention. Then, in order to win the reelection, the legislators can no longer afford to neglect the preferences of the diffuse public. R. Douglas Arnold, The Logic of Congressional Action (1992). The value of the public choice theory resides, however, in the guidance it offers us to understand the habitual undersupply of laws championing the public interest at the expense of well-organized pressure groups.}

\footnotesize{\textsuperscript{71} Kenneth Lieberthal, Governing China: From Revolution Through Reform 300 (2d ed. 2004).}
public to the coalition that effectively governs the country. Hence, rent-seeking by interest groups becomes a compromising factor for the legitimacy of the regime, which poses a serious threat to its security.

Second, authoritarian leaders cannot rely on the interest groups to obtain accurate information necessary for their political survival. The groups handpicked by the regime to extract rents are unlikely to reveal any intelligence working against the groups’ own interests. Without effective counteracting forces to induce disclosure, authoritarian leaders are deprived of the chance to correctly evaluate the consequences of their policies and swiftly deal with potential challenges to their endurance. It is just a reflection of the “dictator’s dilemma” predating that the more effective a dictator is at repression, the less likely he may be able to use repression to remain in office. This is because repression obfuscates the information needed to target repression accurately.

Considering the characteristics of the authoritarianism in China, I postulate a variant to the public choice theory to analyze the Chinese law of torts. In addition to the influence of interest groups, this variant takes populist pressure as the other determinant of the substance of the law. Generally speaking, these two determinants are working in opposite directions. While the interest groups exert influence to shape the law to their benefit, populist pressure moves the law to be more hospitable to their counterparties in tort disputes.

Before assessing the effects of the two determinants, however, I should clarify that by no means do I attempt to claim that these are the variables sufficient to account for the entire body of tort law in China. Other factors, such as the accepted practices in civil law jurisdictions, also contributed to the design of Chinese tort law. The goal of my current project is more modest: it merely tries to tease out the components in the tort law indicating an underlying logic of political economy that have so far been missed by most China law scholars.

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73 The term comes from Ronald Wintrobe, *The Political Economy of Dictatorship* 335 (1998), but the idea goes back to Gordon Tullock, *Autocracy* 115–127 (1987) (discussing the possibility that a dictator can be removed from power).
2. Political Influence

In China, government ministries are heavily involved in the operation of a wide array of industries ranging from railways and electricity to medicine. These industrial groups are well-organized and derive highly concentrated benefits from rent-seeking. On the contrary, the grass-root groups in China rarely survive legitimately, and even if they are allowed to exist under the restrictive regulatory framework, it is hardly possible for them to challenge the interest groups tied to the government. In effect, the Chinese legal system deliberately inflated the organization costs of the groups without governmental blessing so that they are paralyzed from producing collective goods for their members. Considering the intimacy between the interest groups and the regime, the first determinant pertaining to the political economy of Chinese tort law examined in this paper is political influence.

In the realm of torts, interest groups with official endorsement tend to be in the position of tortfeasors and are organized, whereas victims are usually unorganized. This is especially true with respect to special torts, such as railway accidents or medical malpractice. The lack of organization of victim groups is partly attributable to impediments traditionally associated with organizing large latent groups, as identified by Olson. However, the Chinese government’s tight control over spontaneous social groups certainly intensified the

74 Although the economic reform has corporatized the operation entities in some of these industries into large state-owned enterprises (SOEs) directly held by the State-Owned Assets Supervision and Administration Commission (SASAC), substantive management rights in such SOEs are granted to the ministries with supervisory authority over the relevant industries. Li-wen Lin & Curtis J. Milhaupt, We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China, 65 STAN. L. REV. 697, 726 (2013).

75 Under the current Chinese administrative regulation, voluntarily organized social groups can acquire legitimate status only after approval by and registration with government agencies. Shehui Tuanti Dengji Guanli Tiaoli ( 社会团体登记管理条例 ) [Regulation on Registration and Administration of Social Organizations] (promulgated by the State Council, Oct. 25, 1998, effective Feb. 6, 2016), art. 3 (hereinafter “Regulation on Social Organizations”). In addition, within each administrative region, only one social organization is allowed to represent a particular sector of society. Id. at 13(2).

76 OLSON, supra note 70.
difficulty. Indeed, an attempt to organize salient victim groups can even bring about substantial risk of persecution.

In passing, it is worth noting that, although the interest groups are more politically entrenched than the unorganized victims, their political influences are uneven nevertheless. Part IV will make a rough assessment of the influences of a few of these groups.

3. Populist Pressure

If we assume the political influence of interest groups solely determine the formation of the Chinese tort law, given the absence of organized victims, we would anticipate the predominance of one-sided rules favoring tortfeasors in the law. In particular, we would not see rule changes tipping the balance toward victims without the emergence of potent tort victim groups. As a matter of fact, we did see these changes. Therefore, another factor must exist to moderate the effect of political influence. This counteracting factor is populist pressure, which has been thought of as a critical feature of the Chinese judicial system in last decade. Some Chinese legal scholars believe that populist pressure represented a change in policy, whereas others trace it back to China’s revolutionary legal practices.

77 Apart from the aforementioned general restrictions on voluntary associations, the regime is no more tolerant toward plaintiffs of group litigations. For instance, the Chinese civil justice system adopts the less plaintiff-friendly opt-in rule in collective actions. More importantly, courts, whose incentives are molded by the government agendas, dominate the process of collective actions. Moreover, Chinese lawyers are subject to strict official surveillance when handling “mass suits” (quntixing anjian), and the contingency fee arrangements are no longer available to fund collective actions. Michael Palmer & Chao Xi, Collective and Representative Actions in China, https://www.law.stanford.edu/sites/default/files/event/261321/media/slspublic/China_National_Report.pdf.

78 The best-known case in this regard is the arrest and conviction of Zhao Lianhai, the father of a victim in the melamine-tainted milk scandal who became a leader in the parents’ movement to seek legal remedies and medical treatments for their children. See Shiyu Wang, et al., Jieshi Baobao: Haishi Yige “Jie” (结石宝宝: 还是一个“结”) [Stone Babies: Remaining a Complex], June 19, 2013, http://www.nandu.com/nis/201306/19/67650.html (describing the story of Zhao Lianhai and the travails he faced).

79 Minzner, supra note 24, at 936.

80 Liebman, supra note 24, at 166.
Evidently, populist pressure has loomed large in national politics since Hu Jintao and Wen Jiabao took office in 2003 and prioritized “stability maintenance” (weiwen) on the Chinese Communist Party’s (CCP’s) agenda.  

At the bottom of the regime’s emphasis on populist opinion might be a sophisticated strategy to retain political dominance of the CCP. This strategy is closely associated with the fundamental difficulty faced by authoritarian leaders to gather correct information from citizens under their rule. As noted by an eminent China scholar, unlike the democracies where the median voter’s opinion tends to prevail, the authoritarian government in China cares more about “the vocal extremists who are the most likely to take to the streets.” Due to a lack of competitive elections, an uncensored news media, and an active civil society, authoritarian regimes have to rely more frequently on citizens’ radical behaviors, such as protests, to detect and deal with the discontented communities before they turn to counter-regime activities. In this sense, extreme actions help the regime screen the genuine grievances that risk a revolt. By appeasing only those truly dissatisfied parts of the society, the government can avoid indiscriminately buying off every section of the society, hence reducing the cost to maintain its rule. A selective response to public opinions targeted at the intense discontents will also effectively showcase the regime’s concern about its citizens and improve its legitimacy.

It would be a mistake, however, to think of authoritarian governments as always responsive to populist demand. On the one hand, the strategy is adopted, after all, to preserve the regime. As such, populist schemes aiming at toppling the government will not be

84 Id. at 133-36.
tolerated. Consequently, populist pressure is likely to affect government policies only when its rhetoric is framed as accepting the regime’s legitimacy and narrowed to some particular economic issues or certain lower levels of the government. On the other hand, an overly lenient response to popular demands will encourage communities without real grievances to take advantage of the government’s accommodating policies by stirring up false populist pressure. In other words, excessive tolerance reduces extreme populist actions to cheap talk and compromises the credibility of populist pressure as a signal of social discontent. To disincentivize fake populist actions, authoritarian regimes take measures to elevate the costs of those actions. One example of such costs is the aforementioned requirement for careful rhetoric framing to distinguish a loyalist demand from a counter-regime uprising. In addition, in the case of China, the government seems to use incentives and punishments discriminatorily, even to the participants of the same mass incident. For example, while the vast majority of the participants of the riots in Shishou and Weng’an escaped without consequences, those believed to be critical instigators were jailed in the aftermath. Uncertainty about penalties faced by activists in mass incidents further raises the costs of populist actions.

In relation to torts, populist pressure is usually vented against some particular government agencies or the industries under their supervision. These are often tortfeasors in some special categories of accidents. Therefore, the strength of such pressure may well be correlated with the intensity and frequency of the accidents. While the legal system is ill-equipped to confront the full range and quantity of tort claims resulting from China’s rapid social transformation and proliferation of new laws, populist activities in certain areas such as medical malpractice may serve as credible evidence of grievances meriting serious attention. At the same time, in the field of torts, since popular grievances are normally targeted at specific agencies and about specific rules of liability without broader implications on

85 Id. at 143-44.
86 Id. at 135.
88 Liebman, supra note 3, at 254.
the regime’s power to rule, chances are higher that the government will take a flexible position to cope with the popular requests.

C. A Spatial Model

1. Setup

The spatial model presented in this section is heuristic, mainly to illustrate a decision-making mechanism through which the above two factors will influence the legislative outcomes. Rulemaking about torts can be depicted on a one-dimensional policy space of pro-victim or pro-tortfeasor choices. While political influence pushes laws toward the pro-tortfeasor end, populist pressure affects the law in the opposite direction.

Four players will jointly decide the location of the adopted rules in this space: the government agency (G), the SPC (C), the top CCP leaders (L), and the assembly making a policy choice (A). They have the usual single-peaked preferences in the policy space. This means the utility functions depicting their preferences over the policy alternatives under consideration have a maximum at some point on a line representing these alternatives and slopes away from this maximum on either side.89 Their preferences are functions of political influence and populist pressure. G takes charge of drafting the special statutes on tort liability. As noted above, the government agency often represents the interests of particular industries that tend to be tortfeasors of special torts; therefore, it prefers a pro-tortfeasor rule.90 The SPC is responsible for issuing judicial interpretations and is assumed to share the preferences of courts and judges. Since judges are at the forefront of handling tort litigation, they are probably the most vulnerable to populist pressure. From time to time, the judge presiding over a case is blamed as the culprit of an unpopular decision and risks his or her career or even personal safety.91 On the other

89 SHEPSLE, supra note 64, at 92.
90 This is not to deny the conflict of interests among different ministries generally present in the drafting of laws and regulations inside the State Council, see TANNER, supra note 4, at 127-29, 217-30 (describing the relationships between key lawmaking institutions). Nonetheless, in the context of tort liabilities, victims’ interests are unlikely to be bolstered by the ministries for lack of organization of the victim group.
91 A good illustration in this regard is the well-known Peiyu case in Nanjing. Liang Guorui, Wangchuan: “Pengyu An” Huo Fanan? Heshi: Zhushen Faguan Wei
hand, judges usually do not reap sizable benefit from ardently
upholding the interests of industrial tortfeasors. Consequently,
relative to other players of the game, C is presumed to take a pro-
victim position.

The top leaders and decision-making assembly are deemed as
two separate players to account for the collective decision-making
mechanism inside the CCP, as pointed out in the recent literature on
Chinese politics, without downplaying the role of the top leaders in
steering policies in a calculated direction.92 The top leaders are the
few people at the pinnacle of China’s power pagoda who are able to
set up the policy agenda for the country. The general secretary of the
CCP and the Premier of the State Council are among the top leaders.
The decision-making assembly is the top twenty-five to thirty-five
people inside the power structure, normally including the members
of the CCP Politburo.93 These people make up the locus of the
collective decision-making. Considering their multifaceted policy
objectives, L and A are postulated to have preferences in between G
and C, but preferences may also differ between L and A. In particular,
I will introduce two assumptions about L’s and A’s preferences. First,
it is assumed that L’s preference is closer to G’s preference, as
compared to A’s, when the level of populist pressure is low. This
assumption takes into account the more diverse composition of A, so
its members’ preferences tend to be more heterogeneous than L.94
Since the head of the State Council, of which G is a part, is included
in L, it is plausible that L will better entertain G’s concerns than A.
The second assumption is that L is more sensitive than A to populist
pressure. This is a reasonable assumption if the ultimate

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92 The core leader is believed to have less power over his colleagues after Deng’s
era, so the internal decision-making process of CCP increasingly takes on a
collective flavor. At the same time, he still holds the institutional power to convene
and to preside the meetings of the decision-making group. Lieberthal, supra note
71, at 175, 211.
93 Id. at 207-15.
94 The elite decision-making group is considered to be less cohesive during the
reform era and differentiated by functional area of work and degree of
specialization. Id. at 211 -15.
accountability for policy choices is more likely to rest on the top leaders than the decision-making assembly.

A status quo exists before the players take actions, and it is thought to be the provisions of the General Principles. Naturally, the oldest rules on torts can be regarded as the status quo. Furthermore, as detailed in the next Part, benchmarking the subsequent changes in rules against the General Principles also facilitates ascertaining the effects of political influence and populist pressure behind these changes.

I consider two different periods of time. The first period contains up to two rounds of lawmaking, while the second period only has one round. The players have fixed preferences at each period, but only L’s and A’s preferences can change between the two periods. For simplicity, I assume that the game is played independently at these two periods.95

At the first period, L will decide whether to begin a lawmaking process to replace the status quo.96 When the process is started, G will make a proposal, after which A will decide whether to take G’s proposal. If A rejects the proposal, the game at the first period will end and the status quo remains unchanged. On the other hand, if A accepts G’s proposal, it becomes a new law. But immediately after that, L can decide again whether to start another round of lawmaking. If the process opens a second time at the first period, C and G can put forward competitive proposals for A to choose from, and the one who wins the competition will be the law at the end of the first period. Of course, if the process is not reopened, then G’s original proposal remains the law when this period ends. The rules of the first-period game take into account an important restriction on C’s action, i.e. C can make a proposal only after G’s proposal has been adopted during the first round of lawmaking. This

95 This assumption is innocuous for our purposes. As shown below, the preference changes, as well as the resulting rule changes, often take a long time in China. The two legislative periods usually span over ten years. The assumption hence makes sense insofar as the players’ discount factors are not unreasonably high.

96 This, however, does not mean that L will always be the original source of legislative proposals. Consistent with Tanner’s finding, in my model, the top leadership does not have to commence the drafting of any proposal. TANNER, supra note 4, at 212-13. Instead, L’s key role is to decide whether a proposal initiated by other players will be placed on the official agenda of lawmaking, again in consonance with Tanner’s proposition that the top leadership endorsement is a pivotal stage in China’s lawmaking process. TANNER, supra note 4, at 209.
is a reflection of the fact, as indicated in the legislative history of the Chinese tort law, that a judicial interpretation regarding a special type of torts can only interpret an existing law but not stand on its own.

At the second period, given a change of status quo in the previous period, and in case of a shift of preferences, L will decide whether to commence yet another lawmaking process. If L chooses to do so, both G and C can make proposals and the one adopted by A becomes the law at the end of this second period. Similar to the second round of the first-period lawmaking, G and C compete with each other to make proposals at the second period. This is possible because once there is a law pertaining to a certain category of torts, C will be able to propose judicial interpretations on that law, whereas G can also propose amendments to the original law.

It is important to note that, despite the SPC and the State Council’s de jure authority to enact judicial interpretations and administrative regulations, respectively, the overarching power of the Party enables its leadership to retain de facto control over the rulemaking. This is captured by L’s agenda-setting power and A’s approval power in the setup.

2. Some Possible Outcomes

Since the purpose of this paper is to explain Chinese tort law in light of political motivations, I will present three consequences attainable in such a lawmaking game instead of offering a complete solution. As we will see in the next Part, these consequences appear to be largely consistent with the actual state of the tort law in China.

In Figure 1, the lower case $sq$, $c$, $a$, $l$, and $g$ indicate the status quo and the four players’ ideal positions, respectively. The Figure represents a scenario where the status quo is more sympathetic to the victims than any of the four players’ preferences. The distances between their ideals satisfy the following conditions: 1) $g-l < l-sq$; 2) $g-l < l-a$; and 3) $g-a < a-sq$. In this case, there is no change of

97 If the status quo did not change, then the second-period game would be played as a first-period game.

98 See Tanner, supra note 4, at 64-66 (explaining that although the role of Party leadership with respect to lawmaking has become less assertive—especially during the late 1980s—it probably still has power to influence the drafting process through vetoing and giving “prior approval” of laws before enactment).
preferences due to populist pressure between the first and second periods.

Figure 1 Adoption of Special Statutes and Judicial Interpretations Without Preference Changes

In the situation plotted by Figure 1, using backwards induction, L can predict that when it opens a second round of lawmaking, G and C will compete to make proposals while A will choose whichever proposal is closer to its ideal point (\(a\)), hence leading eventually to a law located at that point.\(^99\) Therefore, L will start a second round only if the result of the first round of lawmaking is farther away from \(l\) than \(a\) is. On the other hand, in the first round, A will approve any proposal made by G located closer to \(a\) than \(sq\). With the knowledge of the other players’ choices, G will propose, in the first round, a law located exactly at its own ideal position \(g\) since given condition 3, A will approve this proposal. Finally, foreseeing that \(g\) will be proposed and approved in the first round, L will be ready to initiate the whole lawmaking process in light of condition 1. Under condition 2, however, once \(g\) is approved, L will not open the second round. Therefore, \(g\), the most pro-tortfeasor legislation, will appear at the end of the first period. Now that neither L nor A changes its preference, \(g\) will remain the law at the second period.

In the second case scenario, the players have the same preferences at Period 1 as depicted in Figure 1, but L’s ideal position, \(l’\), shifts to the left at Period 2 so that condition 2 above becomes \(g-l’ > l’-a\).\(^{100}\) Figure 2 shows the second period of this case scenario.

\(^{99}\) This is the outcome of a typical Hotelling-Downs location model, see Hotelling, supra note 61; see also Downs, supra note 63 at 122 (applying Hotelling’s spatial market to argue that a “stable equilibrium” is possible for multiparty systems).

\(^{100}\) A’s ideal position \(a\) is assumed to remain unchanged for simplicity. However, this assumption is not essential to the revised condition 2). If we denote A’s ideal position at Period 2 as \(a’\), the generalized form of the revised condition 2) can be written as \(g-l’ > l’-a’\). Given that L is more sensitive to populist pressure than A, we will have \(l’-a’ < l-a\). Hence, the revised condition 2) can be satisfied insofar as L’s preference changes sufficiently so that \(g-l’ \geq l-a\).
Figure 2: Adoption of Special Statutes and Judicial Interpretations With Preference Changes: Less Pro-victim Than Status Quo

As shown above, the first period of lawmaking will yield legislation located at \( g \). Now, expecting the outcome to be \( a \), \( L \) will initiate the lawmaking process at Period 2 since, compared to the Period 1 outcome \( (g) \), this process will bring the law closer to \( L \)’s new ideal position \( l' \) under the revised condition 2. Consequently, after \( L \)’s preference changes, the law becomes more favorable to victims, though still less so than the status quo.

Figure 3 illustrates the third situation with Panel (A) indicating the players’ preferences at the first period and Panel (B) at the second. Here, at the first period, \( C \)’s ideal point, \( c \), is to the left of the status quo, meaning the latter is no longer the most pro-victim stance. In addition, unlike in the previous two cases, both \( A \)’s and \( L \)’s ideal positions are farther away from \( G \)’s preferred point, \( g \), than from the status quo. In other words, in Panel (A), the following conditions are met: 4) \( 0 < sq-c \); 5) \( 0 < a-sq \); 6) \( l-sq < g-l \); 7) \( a-sq < g-a \).

Figure 3: Adoption of Special Statutes and Judicial Interpretations With Preference Changes: More Pro-victim Than Status Quo

(A)

(B)
Knowing that, at the first period, the second-round lawmaking will result in a law located at \( a \), backward induction will show that L will open that round only if \( a \) is closer to \( l \) than the outcome of the first round. Since A will approve any proposal no farther away from \( a \) than \( sq \) in the first round, G will propose \( g^* \) so that \( g^*-a = a-sq \) if \( l > \frac{a-sq}{2} + a \), or \( g^*-l = l-a \) if \( l \leq \frac{a-sq}{2} + a \).\(^{101}\) Given condition 5 and the assumption that \( l \) is to the right of \( a \), it must be true that \( g^*-l < l-sq \),\(^{102}\) so L will initiate the very first round of lawmaking at Period 1. But at the same time, once \( g^* \) is picked, \( a \) can never be closer to \( l \) than \( g^* \), hence excluding the possibility of a second round of lawmaking. In short, \( g^* \) will be the law adopted at the end of Period 1.

At the second period illustrated in Panel (B), both L and A have changed preferences due to populist pressure. In particular, their new ideal points, \( l' \) and \( a' \), satisfy the conditions 11) \( 0 < sq-l' \); 12) \( 0 < sq-a' \), i.e. both \( a' \) and \( l' \) situated to the left of \( sq \); and 13) \( l'-a' < g^*-l' \). Consequently, L is willing to initiate a lawmaking process at Period 2, which will lead to a law situated at \( a' \), closer to L’s new ideal than \( g^* \). Again, we see a new law more favorable to the victims after the shift of preferences. Moreover, as both L and A changed preferences substantially, the new law leans even more toward the victims than the status quo.

3. Discussion

In the above spatial model, strong political influence drags L’s and A’s ideal positions nearer to G’s peak of preference, whereas strong populist pressure works in the opposite way. Accordingly, the first case scenario depicts an interest group that is politically influential and subject to mild populist pressure. L and A cluster their preferences around G’s liking at both periods. On the other hand, the second case can be associated with an interest group having strong political influence but also facing strong populist pressure, which leads L to make a moderate preference change at the second period.

\(^{101}\) See infra note 102 (explaining that \( g^* \) must satisfy three conditions: 8) \( g^*-a \leq a-sq \); 9) \( g^*-l \leq l-a \); and 10) \( g^*-l \leq l-sq \). 9) can be rewritten as \( g^*-a \leq 2(l-a) \). Thus, when \( a-sq < 2(l-a) \), i.e. \( l > \frac{a-sq}{2} + a \), 8) is binding; otherwise, 9) is binding. As for 10), it is always satisfied in this case).

\(^{102}\) Id. (stating that \( l \) is to the right of \( a \) implies \( a-sq < l-sq \) and \( g^*-l < g^*-a \). Since \( g^*-a = a-sq \) if \( l > \frac{a-sq}{2} + a \), we will have \( g^*-l < a-sq < l-sq \). On the other hand, if \( l \leq \frac{a-sq}{2} + a \), from condition 5), it follows \( g^*-l = l-a < l-sq \).
Finally, the third case scenario illustrates a moderately influential interest group confronted with strong populist pressure. Thus, L and A shift their preferences considerably away from G’s. The model suggests a first-mover advantage on G’s side. Since a law must be adopted before C can interpret it, G enjoys substantial freedom in shaping the initial law. By contrast, when C’s turn comes to make proposals for judicial interpretations, G will contest C by proposing amendments to the original law. Such competition restricts C’s capacity to get its ideal policy. G’s first-mover advantage not only corresponds to the actual temporal order of rulemaking in China, but also accords with China’s political reality featuring a powerful executive branch and a weak judiciary. Of course, G’s advantage grows larger as L’s and A’s preferences diverge farther away from the status quo relative to the distance between their preferences and G’s. This means that within the executive branch, ministries with more political clout can fix a law to favor their positions compared to their less influential counterparts.

Another implication of the model is the CCP leadership’s capacity to use the judiciary to balance out the influence held by the

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103 It is worth noting that, in practice, the government agencies’ advantage over the judiciary comes from a wide variety of sources other than the early movement in lawmaking. In fact, the first-mover status is used to model G’s favorable position in the political system generally.

104 For a classic study on the weakness of Chinese courts during the reform era, see generally Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT’L L. & BUS. 383, 383 (2000) (explaining that while the two decades of law reform since 1979 empowered legal institutions and legislation, courts still faced difficulties and obstacles as result of Maoist legacy, such as disorderly allocation of legislative power and continuing political interference). For administrative interferences over judicial enforcement of civil judgments, see Clarke, supra note 23, at 41-52 (explaining how “the dependence of local court personnel upon local government at the same level for their jobs and finances” empower local protectionism to thwart courts from executing judgments contrary to “state administrative organs and local power holders”). This is not to deny, though, that Chinese courts may be gaining more power over the years. See, e.g., Xin He, *The Judiciary Pushes Back: Law, Power, and Politics in Chinese Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 180 (Randall Peerenboom ed., 2010) (purporting that the judicial branch remains far less prestigious than the executive branch in China’s power structure. The head of the latter is always a member of the most powerful Standing Committee of the CCP Politburo, whereas few Chief Justices fared better than a much lower-profile member of the CCP Central Committee when in office).
executive branch. To the extent that the judiciary is more amenable to the leadership’s control, promoting its competition with the executive reigns in the conflicts between the latter and the Party leadership. In effect, then, competition between the judiciary and executive is indeed a wrestling between the Party leadership as the principal and the executive branch as the agent. Therefore, the leaders at the apex have a slightly larger decision-making circle and take center stage in my construction of the interaction among the political players. This postulation seems congruent with the authoritarian characteristics of the Chinese regime. Despite the tendency of decentralization inside this system, the CCP has maintained the ability to set the tone for the country’s key policies.105

4. Extension to General Statutes

The model discussed in this section can be adapted to illustrate the legislation of the Tort Liability Law. The entity in charge of this legislation, the NPC Standing Committee (N), is at a similar position to the government agencies in that it also enjoys a first-mover advantage relative to the judiciary, as judicial interpretations come only after the statute. Moreover, compared to the judiciary, it is more able to defy the Party leadership, although less so than the executive branch, mainly due to its higher institutional standing.106 A few adjustments to the model are nevertheless needed. First of all, N, though still subject to interest group influences, is not necessarily more pro-tortfeasor than L or A. This is because, unlike G, N does not run or derive benefits from the injurious industries where the special interests crystalize. Besides, as noted in Part I, the drafting process of general statutes is more transparent and responsive to the public, which curbs N’s impulse to be excessively

105 See Pierre F. Landry, Decentralized Authoritarianism in China: The Communist Party’s Control of Local Elites in the Post-Mao Era (2008) (positing that despite decentralization, CCP has maintained its influence on national policy); see also Hongbin Cai & Daniel Treisman, Did Government Decentralization Cause China’s Economic Miracle? 58 World Pol. 505, 506 (2006) (arguing it was China’s” authoritarian centralization”—before decentralization—that stimulated and laid the foundation for reform policies? the critical role of the top leadership in kicking off the reform policies).

106 See TANNER, supra note 4, at 72, 92 (supporting the claim that the head of the NPC Standing Committee is usually a member of the Standing Committee of the CCP Politburo, while the members of the NPC Standing Committee are generally on the nomenklatura list of the Politburo).
Second, L, as compared to A, does not have to stay closer to N in the policy space even before the populist pressure soars. This reflects N’s lesser significance to the survival of the authoritarian regime, causing top leaders to pay less attention to N’s preferences than to G’s. Third, when analyzing the legislative game of the Tort Liability Law, the status quo should be the relevant rules in the special statutes or judicial interpretations existing right before the adoption of this general statute. Finally, since the Tort Liability Law was promulgated very recently, changes in players’ preferences have yet to happen. Thus, there is no need to consider the second period lawmaking occurring as a result of preference change only.

This adjusted spatial model will be used to explain some specific provisions of the Tort Liability Law in the next Part. Suffice it here to mention two predictions of the model. First, when the rules prevailing before the adoption of the Tort Liability Law coincide with A’s ideal point, the new general statute will revise these rules only if A’s preference has changed since the old rules were adopted. These revisions should reflect A’s preference change. Second, when the rules prevailing before the adoption of the Tort Liability Law do not coincide with A’s ideal point, the new general statute may revise these rules, even if no preference has changed since the old rules were adopted. In addition, the revision will make at least one of L and A better off.

V. Applying to the Law of Torts in China

This Part applies the analytical framework described in Part III to the law in China regarding some special torts. Special torts are

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107 This implies that, in our one-dimensional policy space, N’s position, relative to G’s, would be no more favorable to the tortfeasors at any level of populist pressure. The literature on the people’s congresses seems to support this assumption. The deputies are found to play the role of remonstrators and challenge the interests of industrial groups in the name of constituents. For further discussion, see Kevin J. O’Brien, Agents and Remonstrators: Role Accumulation by Chinese People’s Congress Deputies, 1994 China Q. 359, 372-374 (explaining that while taking on the sub-role of remonstrator, the deputies “blend” it with their role as state agents to better ensure policy implementation against industrial groups, which pose harms to both constituent and state interests).

108 But the General Principles can still be used as a benchmark to evaluate the effects of political influence and populist pressure on the formation of the Tort Liability Law.
of great interest to this study because the tortfeasors and victims lack reciprocity in many of these cases. As mentioned before, the interest groups are usually the tortfeasors whereas the masses are the victims. Consequently, in special torts, it is easier to pinpoint the source of political influence and the target of populist pressure. As the differences observed in the cross-sectional comparisons of rules governing such torts cannot be readily attributed to other factors with across-the-board impact on the development of the Chinese tort law, they lend support to the central argument of this paper.

A. Cross-Type Comparisons

1. The Benchmark for Comparison

A consistent benchmark is needed for comparisons between different types of torts because they can be subject to different rules even without the impacts of political influence or populist pressure. I use the General Principles as the benchmark, and evaluate the effects of the two determinants of our interest by gauging the deviation of the subsequent rules from this benchmark in either a pro-tortfeasor or pro-victim directions. The General Principles is chosen for two reasons.

First, the provisions of the General Principles incorporated a primary constraint on making private laws in China, i.e. the civil law tradition advocating academic input in legislation. The legal academia was actively involved in the drafting of the General Principles. Four eminent civil law scholars served on the expert advisory committee, and one of them later chaired the drafting

group.\textsuperscript{111} As a result, the General Principles was clearly infused with heritages from the German and the Soviet laws.\textsuperscript{112} In this sense, therefore, the whole policy space delineated in our model is under the overarching constraint of the civil law tradition of torts.

Second, the General Principles seem to be free from both strong populist pressure and intense political influence. Based on the participants’ accounts, the drafting was mainly conducted by the group composed of the NPC and judiciary officials, as well as law scholars. This was a clear combination of elitists rather than populists. Unlike the more recent NPC legislative practices, the solicitation of feedback on the draft was not open to the general public, but limited to government agencies and law schools.\textsuperscript{113} At the same time, these accounts also suggest that the government agencies did not have a big part in the drafting.\textsuperscript{114} The minor role of the government agencies might be a result of their underestimation of the importance of the law after several decades of a legal vacuum. But it may as well be imputable to the tight drafting schedule. The first draft of the law was completed within three months and its official version was submitted to the NPC one month later. Eventually, the General Principles were passed merely nine months after drafting commenced.\textsuperscript{115} This short


\textsuperscript{112} Jichun Shi, A Comparison Between The PRC General Principles of Civil Law and the General Provisions in Traditional Foreign Civil Codes (我国民法通则与外国传统民法总则的比较), 7 SOC. SCI. (社会科学) 23, 24 (1986).

\textsuperscript{113} Wei Zhenying, Canjia Minfa Tongze Qicao De Pianduan Huihu (参加民法通则起草的片段回顾) [Recollection of the Episodes in the Drafting of the General Principles of Civil Law], REFORMDATA (Apr. 29, 2006), http://www.reformdata.org/content/2006429/25228.html (last visited Feb. 23, 2016). \textit{See also} Liang, supra note 105 (detailing how the drafting principles of the General Principles involved active participation of legal scholars).

\textsuperscript{114} Wei, supra note 112 (explaining the drafting process of the General Principles and the minimum involvement of the government agencies).

\textsuperscript{115} Liang, supra note 110.
period of time simply did not allow for many rent-seeking efforts. Consequently, when comparing the trajectories of the various branches of tort law from their origins in the General Principles, we can disentangle ourselves from the confounding factor of legal tradition and sift out the real effects of the two determinants considered in this paper. To some extent, such a comparison emulates the “difference-in-differences” strategy applied in quantitative analysis.

2. Assessing Political Influence and Populist Pressure

It is challenging to acquire the exact measurements of the two variables anticipated to explain the difference of tort rules. However, there is rough yet sensible guidance to assess tortfeasors’ political influence and the populist pressure mounted against them. As for the former, the clout of interest groups depends on the groups’ abilities to contribute to the sustainability and the political agenda of the regime. Commentators believe that, after the Tiananmen Square protests in 1989, the Chinese Communist regime has adopted a wide array of co-opting policies to buy loyalty from the critical supporters.\textsuperscript{116} The success of “a co-optation strategy is a source of rents.”\textsuperscript{117} As a result, those sectors apt to generate rents will have an upper hand in the race for political influence.\textsuperscript{118} Therefore, we expect

\textsuperscript{116} See, e.g., Bruce J. Dickson, Red Capitalists in China: The Party, Private Entrepreneurs, and Prospects for Political Change (2003); Bruce J. Dickson, Wealth into Power: The Communist Party’s Embrace of China’s Private Sector (2008) (explaining Chinese authoritarian regime preserved its power in the process of economic development and capitalization by “strategic co-optation” of entrepreneurs from the private sector); Haber, supra note 72 at 701 (“Far more common than the strategy of terrorizing the leadership of a launching organization is the strategy of co-opting it by buying its loyalty”).

\textsuperscript{117} Haber, supra note 72, at 701 (discussing co-optation by presenting the views of Huntington who believed that “The fact is that there is ‘no representation without taxation’ and there are no exceptions to this version of the rule.” He continues by explaining that when “Oil revenues accrue to the state: they therefore increase the power of the state bureaucracy and, because they reduce or eliminate the need for taxation, they also reduce the need for the government to solicit the acquiescence of the public to taxation. The lower the level of taxation, the less reason for publics to demand representation”).

more clout going to the industries whose production technology allows for easy exclusion of competition with the help of government regulations. As the resource and energy industries bear exactly this attribute, they are good candidates to wield deep political influence on lawmakers. Furthermore, as the CCP has shifted its priority from class struggle to economic growth in the past thirty years, the “Finance and Economics xitong” (meaning “system”) within the Communist regime has taken center stage in national politics. Therefore, those interest groups under its aegis, such as resource and energy industries, accumulated more political capital than the groups supervised by other divisions of the government.

Anecdotal evidence abounds as to the political clout of the energy and resource industries in China. The best-known example is the familial control over the electricity industry by Li Peng, the former Premier and NPC Chairman. To add credibility to the anecdotal evidence, I created an index to evaluate the political influence of several ministries deeply involved in industrial operations. The index is based on the political status of their ministers. The higher the offices held by the ministers after they became heads of the ministry, the more influential that ministry is in the political system. By contrast, that a ministry had a non-CCP minister indicates its relative insignificance in the system. Ultimately, this index measures the average rank held by the ministers of a particular ministry. It assumes that the politically promising officials

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119 For the state monopoly of the upstream industries and markets in China, see Xi Li et al., A Model of China’s State Capitalism (Aug. 2015) (working paper), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061521 (explaining how the “vertical structure” attribute of Chinese state capitalism led to the phenomenon of state-owned enterprises (SOEs) to dominate and control “key upstream industries” including energy).

120 The political influence of the resource industries and its implication on economic growth is dubbed as the “resource curse” in the literature. Although recent studies challenge the causal relationship between the abundance in resources and authoritarianism, it seems undisputed that the resource industries are more capable of creating rents for authoritarian regimes. See Thad Dunning, Crude Democracy: Natural Resource Wealth and Political Regimes (2008); Stephen Haber & Victor Menaldo, Do Natural Resources Fuel Authoritarianism? A Reappraisal of the Resource Curse, 105 AM. POL. SCI. REV. 1, 1 (2011) (detailing research and literature supporting a “causal relationship” manifested as a view that “economic and fiscal reliance on petroleum, natural gas, and minerals create and perpetuate authoritarian regimes”).

121 Lieberthal, supra note 71, at 228.
have a better chance to be assigned to those trophy ministries controlling the government activities critical to the survival of the regime. While the details of this index can be found in Appendix A, it is consistent with the proposition that the ministries overseeing vital economic resources fare better in terms of political clout. In particular, the ministries in charge of electric power and railway transportation, compared to those administering health care and education, are more politically powerful according to the index.

On the other hand, populist pressure against a certain industry is closely associated with the frequency and intensity of the defective services provided by this industry, and the former is related further to the prevalence of the services. Unfortunately, no easy measurements of the frequency, and the intensity of defects are available. I relied instead on an indirect measurement—the relative frequencies of key words related to a particular industry appearing on Sina Weibo, the most popular microblogging website in China. The details of the calculation are explained in Appendix B. This measurement entails several limitations. First, the selection of the key words is arbitrary, although I tried to test the robustness of the results using different selections. Second, Sina Weibo was launched only in August 2009 and my key word searches were further confined to the posts published on or after September 1, 2009. Most of the tort laws in China were adopted before that time. Therefore, it is assumed that the relative strengths of populist pressure against the relevant industries after 2009 and in the early 2000s, when most of the judicial interpretations on torts were promulgated, are positively correlated. Third, only those who have access to the Internet are able to write on Weibo; therefore, the sample selection may be biased. To make up for these limitations, I will also resort to anecdotal evidence in the comparisons that follow. Crude as it is, this “key words count” approach may shed new light on the effect of populism on legislation in China beyond exclusive dependence on intuition. The key words counts show that the industries of railway transportation, health care, and primary and secondary education are under much higher populist pressure than the electricity industry.

In Table 1, the special torts considered below are classified according to tortfeasors’ political influence and populist pressure against them.
Table 1 Classification of Special Torts

<table>
<thead>
<tr>
<th>Populist Pressure</th>
<th>Political influence</th>
</tr>
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<tbody>
<tr>
<td>Strong</td>
<td>Strong</td>
</tr>
<tr>
<td></td>
<td>Railway Accidents</td>
</tr>
<tr>
<td>Weak</td>
<td>Medical Malpractices/School Accidents</td>
</tr>
<tr>
<td></td>
<td>Electric Shocks</td>
</tr>
<tr>
<td></td>
<td>Traffic Accidents</td>
</tr>
</tbody>
</table>

Traffic accidents are tabulated at the lower right corner as a tort of weak influence and weak pressure. This is because, unlike other special torts, reciprocity exists between tortfeasors and victims of traffic accidents, especially with the prevalence of passenger cars in China. In other words, there is no readily identifiable group of tortfeasors in traffic accidents, let alone a government ministry representing their interests. Thus, no organized interests would press for rules favoring tortfeasors. At the same time, public grievance against the drivers is mild. As Table B shows, traffic accidents are relatively far from the center of Chinese Internet users’ attention, suggesting weak populist pressure against tortfeasors.

3. Railway Accidents vs. Electric Shocks

As stated above, both the railway and electricity industries hold strong political influence. However, while the former is also under strong populist pressure, the latter is much less pressured by the general public.

Under Article 123 of the General Principles, railway transportation and high voltage electricity are deemed as highly

122 Since China adopted no-fault insurance, the insurer will have to pay compensation after a traffic accident, up to a limit, regardless of the applicable liability rules. Therefore, the insurance industry does not have an interest in pro-tortfeasor rules. Arguably, pro-tortfeasor rules would benefit the automobile industry as lower liabilities induce more driving, hence promoting the sales of cars. In China, however, car sales have been robust since 2000. The quarterly sales-output ratio never falls below 96% (data source: National Bureau of Statistics). Thus, the automobile industry is in little need of expanding sales through the manipulation of tort law. See 汽车产销率 累计值（%） on http://data.stats.gov.cn/easyquery.htm?cn=B01.
dangerous operations (*gaodu weixian zuoye*). Hence, both are subject to the strict liability rule, and the only defense to liability is intentional action by victims. Nevertheless, the trajectories of lawmaker diverge thereafter.

Under Article 58 of the Railway Law (*Tielu Fa*), a special statute enacted in 1990, railway companies can exempt their tort liability completely when personal injuries are caused by “victims’ own reason.” This immunity clearly includes victims’ negligence and probably even their health conditions or physical features.

The SPC adopted two judicial interpretations regarding railway accidents, respectively, in 1994 and 2010. The 1994 SPC Interpretation on Several Issues Concerning the Adjudication of Cases Involving Compensation for Railway Transportation Accidents (*Zuigao Renmin Fayuan Guanyu Shenli Tielu Yunshu Sunhai Peichang Anjian Ruogan Wenti De Jieshi*, hereinafter “Interpretation on Railway Compensation”), defers completely to the Railway Law to immunize railway companies where injuries are caused by victims’ actions. This was replaced by the more recent judicial interpretation, the SPC Interpretation on Several Issues Concerning the Application of Law in Adjudicating Cases Involving Disputes over Compensation for Personal Injuries in Railway Transportation (*Zuigao Renmin Fayuan Guanyu Shenli Tielu Yunshu Renshen Sunhai Peichang Jiufen Anjian Shiying Falü Ruogan Wenti De Jieshi*), hereinafter “Interpretation on Railway Personal Injuries”). In this judicial interpretation, the SPC restricts

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123 MinFa Tongze (民法通则) [General Principles of Civil Law] (promulgated by the Fourth Session of the Sixthby the Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 123. Besides, the comparative negligence defense under Article 131 of the General Principles is meant to be applicable to abnormally dangerous activities.


125 Zuigao Renmin Fayuan Guanyu Shenli Tielu Yunshu Sunhai Peichang Anjian Ruogan Wenti De Jieshi (最高人民法院关于审理铁路运输损害赔偿案件若干问题的解释) [the SPC Interpretation on Several Issues Concerning the Adjudication of Cases Involving Compensation for Railway Transportation Accidents] (promulgated by the Sup. People’s Ct., Oct. 27, 1994).

126 Interpretation on Railway Compensation, art. 11.

127 Zuigao Renmin Fayuan Guanyu Shenli Tielu Yunshu Renshen Sunhai Peichang Jiufen Anjian Shiying Falü Ruogan Wenti De Jieshi (最高人民法院关于审理铁路
immunity to injuries caused by force majeure or victims’ intentional actions, including lying on tracks, collision with trains,\textsuperscript{128} crossing junctions, and walking or sitting on rail tracks ignoring the signal or railway staff’s alert.\textsuperscript{129} As for victims’ negligent or other intentional actions conducted after unpermitted entries into railway working areas (e.g. tracks, stations or trains), based on the degree of victims’ fault, railway companies are to bear 20% to 80% of the liability if they did not fully fulfill their duties of care, or 10% to 20% of the liability when they executed those duties.\textsuperscript{130} Furthermore, railway companies’ liabilities will be no lower than 50% or 40% when the victim is a legally incompetent or restrictively competent person, respectively.\textsuperscript{131} Finally, Article 13 of the Interpretation on Railway Personal Injuries imposes a complementary liability on railway companies when the injury is caused directly by a third party.\textsuperscript{132} As a result, the railway companies need to step in and compensate the victims if the third party who has caused the harm fails to pay damages. For certain types of third-party actions from outside the trains, such as throwing stones or hitting the train, the railway companies should compensate the victims first and seek indemnity from the third party thereafter.

Although railway companies’ liability was ratcheted up under the latest judicial interpretation, on balance, it still appears lenient to tortfeasors in comparison to the rule set in the General Principles. The current law provides railway companies with the additional immunity of force majeure and holds them liable for third-party-

\textsuperscript{128} Id. at art. 5(2).

\textsuperscript{129} Id. at art. 7. Under this article, railway companies need to prove that they have fully discharged the duty of care to be immunized from tort liability.

\textsuperscript{130} Id. at art. 6.

\textsuperscript{131} Id. at art. 8. A legally incompetent person is a minor under ten years of age, or a person with mental impairment who is unable to comprehend his or her conduct. A restrictively competent person is a minor from ten to eighteen years of age, or a person with mental impairment unable to fully comprehend his or her conduct. Nat’l People’s Cong., supra note 117, art. 11, 12, 13.

\textsuperscript{132} Interpretation on Railway Personal Injuries art. 5(1) and art. 13.
caused injuries only complementarily in most situations. In cases of victims’ negligence, the General Principles arguably held railway companies 100% liable, yet the judicial interpretation now reduces railway companies’ liabilities to as low as 10% if they are not negligent and no more than 80% even if they themselves are also negligent. Admittedly, for a small part of victims’ intentional actions, railway companies’ tort liability is raised under the judicial interpretation, yet to a seemingly marginal extent. Railway companies will be liable for at most 20% of the damages when they are not negligent. Even when they are, since, relative to their negligence, victims’ intention would be viewed as a more serious fault, railway companies’ share of liability is very likely to be below 50%.

When it comes to high voltage electric shock accidents, the relevant special statute is the Electric Power Law (Dianli Fa) of 1995. In addition to force majeure, it accords full immunity to electric companies engaging in high voltage operations when victims are at fault, meaning intentional as well as negligent actions. At the same time, when the injury from an electric shock is caused by a third party, electric companies are not required to pay damages at all.

In 2001, the SPC issued the SPC Interpretation on Several Issues in Adjudication of Cases Concerning Personal Injuries Caused by Electric Shocks (Zuigao Renmin Fayuan Guanyu Shenli Chudian Renshen Sunhai Peichang Anjian Ruo Gan Wenti De Jieshi, hereinafter as “Interpretation on Electric Shocks”). It restricted

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133 Id.
134 The comparative negligence defense might apply according to Article 131 of the General Principles. However, under Article 2 of the Interpretation on Personal Injuries, tortfeasors strictly liable for tortious actions, such as railway companies, are generally allowed to claim this defense only if the victim is grossly negligent, a limitation unseen in the latest judicial interpretation on railway accidents.
135 Id.
136 Interpretation on Railway Personal Injuries art. 6(2)
138 Id. at art. 60.
139 Id.
140 Zuigao Renmin Fayuan Guanyu Shenli Chudian Renshen Sunhai Peichang Anjian Ruo Gan Wenti De Jieshi (最高人民法院关于审理触电人身损害赔偿案件若干问题的解释) [The SPC Interpretation on Several Issues in Adjudication of
electric companies’ strict liability under the General Principles in three aspects. First, Article 2 of this judicial interpretation held electric companies liable only if they were owners of the electric facilities.

Second, Article 3 of this judicial interpretation provided electric companies with complete immunity in four situations: 1) force majeure, 2) victims’ suicidal or self-wounding behaviors, 3) victims’ criminal actions such as electric larceny, 4) victims’ actions inside the electric facility reservation areas and forbidden by laws or administrative regulations. Among these four, the last situation is especially effective in protecting electric companies because many electric shocks happen inside the reservation areas and, according to Articles 53 and 54 of the Electric Power Law, any action inside these areas without approval from the electric power management authority almost certainly falls into this category.

Third, where the electric company owns the facility and is not entitled to the above immunities, Article 2 of the Interpretation on Electric Shocks apportions liability among the parties involved according to the degree of causality between their actions and the injury. When comparing the causality, the court can theoretically reduce the tortfeasor’s liability even without determining the victim’s negligence. Since the judicial interpretation does not change the provision of the Electric Power Law forbidding victims to claim damages from electric companies when a third party caused the injury, electric companies do not have to compensate victims before they seek indemnities from the third party.

Comparing the rules of these two types of torts, we can clearly see that, while the special statutes were equally keen on tampering with the strict liability rules of the General Principles by expanding the immunities and defenses, the judicial interpretations obviously took a softer position against electric companies. When the victim enters electric companies’ working areas without permission and engages in prohibited activities, electric companies enjoy complete immunity while railway companies are held strictly

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141 Since both torts were subject to the same article of the General Principles, a direct comparison of the related special statutes and judicial interpretations suffices to tell the difference in their respective deviations from the benchmark.
liable for 10% to 20% of the damages. In addition, railway companies’ proportion of liability can rise to as high as 80% if they are found to be negligent. Also, electric companies are not subject to the minimum liability requirements, as railway companies are, in case of injuries suffered by incompetent or restrictively competent victims. Moreover, unlike electric companies’ full immunity, railway companies can be liable for harms caused by third parties. Finally, the ownership requirement and causality comparisons are available only to electric companies. However, it is worth noting that these differences are largely due to the judicial interpretation on railway accidents passed in 2010, whereas the earlier version did not frown at the approach taken by the special statute to reduce railway companies’ liabilities.

These observations are consistent with the model presented in Part III. The special statutes were enacted mostly in the first half of the 1990s when populist pressure had yet to exert influence on policy choices. Thus, the government agencies in charge of the legislation managed to insert provisions more favorable to tortfeasors than those under the General Principles, and the judicial interpretations then enacted were likewise pro-tortfeasor. Populist pressure against electric companies remains moderate, thanks mainly to the low frequency of high voltage shocks and the isolation of the related injuries. In contrast, China’s railway system has been under immense pressure after a series of severe accidents. For example, in April 2008, two trains hit each other following a derailment, killing seventy-two people and injuring over 400.142 Quite conceivably, populist pressure caused a preference change among the CCP leaders. In the aftermath, the adopted judicial interpretation on railway accidents became less pro-tortfeasor than the special statute.143 In contrast, without the same

143 Indeed, with the further escalation of populist pressure in the aftermath of a disastrous high-speed train collision claiming 40 lives on July 23, 2011, even the special statute was revised more pro-victim to repeal the excessively low compensation limits for railway accidents, see Tielu Jiaotong Shigu Yingji Jiuyuan He Diaocha Chuli Tiaoli (铁路交通事故应急救援和调查处理条例) [Administrative Regulation on Emergency Rescue in and Investigation and Handling of Railway Traffic Accidents] (promulgated by St. Council, Nov. 9, 2012, effective Jan. 1, 2013) (originally enacted as Regulation of June 27, 2007).
populist pressure, the judicial interpretation on electric shocks took a position similar to the special statute in terms of offering extra protection to tortfeasors. In other words, Figure 1 and Figure 2 approximate the situations of the electric shock law and the railway accident law, respectively.  

Under the Tort Liability Law, the two types of torts are again subject to one provision. Article 73 of the law immunizes railway and electric companies from tort liability for injuries caused by victims’ intentional actions or force majeure. Victims’ negligence, on the other hand, merely reduces the companies’ liability. Since the judicial interpretation contains rules more specific than the Tort Liability Law, it remains an important guidance to court decisions, even after the implementation of the Tort Liability Law. Regarding railway accidents, the judicial interpretation and the general statute hold consistent views and complement each other. Given the closeness in time of the adoption of these rules, they were essentially passed according to the same set of preferences of the CCP leadership, so it is not surprising to see compatible rules, as my model would predict.

On the other hand, the Interpretation on Electric Shocks was repealed in April 2013 after the implementation of the Tort Liability Law. Under the new law’s approach, victims’ negligence can reduce electric companies’ tort liability, but the companies are no longer entitled to certain favorable protections, such as the ownership requirement and causality comparison. Despite the rule change, electric companies are nonetheless better protected than their railway counterparts in that no minimum liability is required for the former and that harm caused by third parties is immunized completely. Hence, populist pressure does seem to make a difference where tortfeasors have likewise strong political influence.

Though there is no good reason to believe that the leadership’s preferences have shifted due to populist pressure, the rules of high

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144 My model does not explain what motivated the SPC’s adoption of the Interpretation on Electric Shocks five years after the passage of the Electric Power Law in the absence of preference changes of the Party leadership. Concerns outside the policy space of our interest might account for this action, such as encouraging nationwide uniformity in adjudication. Instead, the model predicts that, within the policy space, the position of the law on electric shocks should not move, which is virtually in line with our observation.

145 Interpretation on Electric Shocks, art. 2.
voltage electric shocks nevertheless have begun to favor victimstortfeasor. Before the Tort Liability Law, the rules were probably located at G’s, rather than A’s, ideal position. Therefore, it is possible that the general statute can push the rules in the pro-victim direction, even without the preference change. Figure 4 illustrates this possibility.

Figure 4 Adoption of General Statutes Without Preference Changes

Pro-victim  gp  c  a  n  l  sq(g)  Pro-tortfeasor

Figure 4 is almost the same as Figure 1, but the status quo becomes G’s ideal position, g, because that was the rule prevailing before the Tort Liability Law. Accordingly, I use gp to indicate the position of the General Principles. The most important change in Figure 4 is the addition of n, the NPC Standing Committee’s preferred position. The location of n satisfies the following conditions: 14) \( n-a < sq-a \); 15) \( l-n < sq-l \); and 16) \( l-n < l-a \). Given condition 14, once N proposes n, A will approve it. Due to condition 15, L is ready to open the lawmaking process when it foresees the outcome will be n. However, under condition 16, L will not commence a second round because it expects the result of that round to be a. Thus, the rules move toward the pro-victim end without a change of preference in either A or L.\footnote{Indeed, condition 16 is unnecessary to this outcome. Once conditions 14 and 15 are satisfied, the new general statute always moves toward the pro-victim end. The only difference is that the new law will be located at “a,” rather than “n,” when condition 16 is not met. The situation illustrated in Figure 4, however, does not mean that populist pressure plays no part in determining the position of the law. Since no populist pressure pushes L’s or A’s ideal point toward the pro-victim end, “n” cannot be excessively pro-victim. In particular, condition 15 must be satisfied, which explains why the Tort Liability Law permits more generous treatment of electric companies compared to railways.}

4. Medical Malpractices/School Accidents vs. Railway Accidents

Now, we compare medical malpractice and school injuries with railway accidents. The tortfeasors of these torts are confronted
similarly with strong populist pressure, yet they may have different degrees of political influence.

Under the General Principles, medical malpractice is a regular tort and is subject to the negligence rule. Plaintiffs must prove the negligence of medical institutions in order to claim damages for medical malpractice. This rule was inherited in two special statutes: the Measures for Handling Medical Accidents (Yiliao Shigu Chuli Banfa, hereinafter as “Medical Accident Measures”) and the later Regulation on the Handling of Medical Accidents (Yiliao Shigu Chuli Tiaoli, hereinafter as “Medical Accident Regulation”), both adopted by the State Council in 1987 and 2002, respectively.\(^{147}\) In the Interpretation on Evidence, however, the burden is shifted to medical institutions to prove lack of negligence or causation between the relevant medical treatment and injuries.\(^{148}\) In other words, the SPC applies res ipsa loquitur to medical malpractice.\(^ {149}\) The special statutes merely regulate medical errors or lapses amounting to medical accidents that lead to both civil liability and administrative sanctions. Hence, in theory, a mistake in treatment not held to be a medical accident can nevertheless be held as negligence, resulting in tort damages.

In terms of the scope of compensation, the General Principles include only a sketchy provision. In contrast, the Medical Accident Regulation includes itemized standards for assessment of compensation.\(^ {150}\) However, these rules are distinct from the more recent SPC Interpretation on Application of Law in Adjudication of Cases of Personal Injuries (Zuigao Renmin Fayuan Guanyu Shenli

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\(^{148}\) Interpretation on Evidence, art. 4 (8).

\(^{149}\) In practice, the key evidence in medical malpractice litigations is the inspection report on “medical errors.” The Medical Accident Regulation demands the inspection to be conducted by medical review boards, whereas the judicial interpretation does not touch on the inspection institution. Patients usually prefer judicial inspections implemented by non-medical institutions, yet hospitals strongly question the professional expertise of these institutions. See Liebman, supra note 3, at 195-203 (discussing the contests on inspection institutions).

\(^{150}\) Medical Accident Regulation, art. 50.
Generally speaking, the victims of medical malpractice will receive substantially greater compensation under the SPC interpretation, especially in death cases. To solve the conflict between the different bodies of rules about medical malpractice, the SPC issued the Notice on Adjudication of Civil Disputes over Medical Malpractices Referring to the Regulations on Handling of Medical Accidents (Guanyu Canzhao “Yiliao Shigu Chuli Tiaoli” Shenli Yiliao Jiufen Minshi Anjian De Tongzhi) in 2003, stipulating that the Medical Accident Regulation should apply only to medical accidents while the General Principles should govern incidents that constitute malpractice not amounting to accidents. Although this notice came out before the Interpretation on Personal Injuries, the later judicial interpretation would nonetheless determine the scope of compensation in non-accident malpractice cases because of its general application to personal injury disputes covered by the General Principles. Therefore, the so-called “dual-track” (eryuanhua) of compensation arises in medical malpractice cases. Some commentators pointed out the anomalous consequence under this dual-track system that the amount of compensation could be higher for the less serious malpractices not qualified as medical accidents.

151 Interpretation on Personal Injuries, art.19-29.
152 Although the Interpretation on Personal Injuries itself does not provide for damages for pain and suffering, the SPC Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts, Zuigao Renmin Fayuan Guanyu Queding Minshi Qinquan Jingshen Sunhai Peichang Zeren Ruogan Wenti De Jieshi (最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释) [Interpretation of the Supreme People's Court on Problems regarding the Ascertainment of Compensation Liability for Emotional Damages in Civil Torts] (promulgated by the Sup. People’s Ct., Mar. 8, 2001, effective Mar. 10, 2001) allows for such damages. Courts frequently award both the death indemnity and the damages for pain and suffering in death cases when the Interpretation on Personal Injuries is applied. The combined amount of these two items is much higher than the damages for pain and suffering acknowledged in the Medical Accident Regulation, which is capped at six times the average annual living expenses of local residents. In Shanghai, for instance, the death indemnity alone can be as high as 803,760 RMB yuan (about $130,400) for urban residents using the 2012 standard, while six times the average annual living expenses of Shanghai urban residents in 2012 is merely 104,406 RMB yuan (about $17,000).
153 THE CIVIL LAW OFFICE OF THE LEGISLATIVE AFFAIRS COMMISSION OF THE NPC STANDING COMMITTEE (hereinafter as “CIVIL LAW OFFICE”), QINQUAN ZEREN FA
The Medical Accident Regulation of 2002 is considered more pro-victim than its predecessor adopted fifteen years earlier. For one thing, the new administrative regulation expands the definition of “medical accident” beyond the malpractices causing the most serious injuries under the old one.\(^{154}\) For another, the itemized compensation rules took the place of the older provision of one-time and capped damages.\(^{155}\) However, the two legal documents promulgated in 2002, the Medical Accident Regulation and the Interpretation on Evidence, were inconsistent about the liability rules applicable to medical institutions. One continued with the negligence rule while the other introduced res ipsa loquitur, which might suggest the Party leaders’ ambiguous attitudes toward medical malpractice at that time. This being said, the actual difference is perhaps smaller than it appears. In any event, the Medical Accident Regulation says nothing directly about the burden of proof, and it does not insist that patients should always initiate the critical proving process – the expert inspection by the medical review board. Indeed, courts can follow the judicial interpretation by requiring hospitals to apply for the review and make them bear the expenses according to the Medical Accident Regulation.\(^{156}\) With regard to the dual-track compensation problem, it is probably less dramatic in practice than commentators believe. Above all, courts rarely award higher damages in cases where hospitals’ negligent practices do not amount to medical accidents.\(^{157}\) Moreover, even before the Tort Liability Law officially united the two tracks, abundant court decisions adopted the standard of the

\(^{154}\) Medical Accident Regulation, art. 2.

\(^{155}\) Medical Accident Measures, art. 18; CIVIL LAW OFFICE, supra note 148, at 740.

\(^{156}\) According to Article 34 of the Medical Accident Regulation, hospitals will bear the cost of proof if they apply for the review. Medical Accident Regulation, art. 34.

\(^{157}\) In my study on the publicized court decisions on medical malpractices made in Shanghai in 2011 and 2012, the average amount of damages awarded in cases of non-accident malpractices is considerably lower than in cases of medical accidents, both in absolute value and as a percentage of the plaintiff’s claim (the difference in absolute value is nearly 150,000 RMB and the percentage difference is about 40%). The differences are statistically significant at the 1% level, and present even if we only compare the cases involving the disputes occurring before the Tort Liability Law took effect.
judicial interpretation to evaluate damages, especially about the disability indemnity.\(^{158}\)

The public discontent with medical services continued to ferment after the early 2000s. In fact, many Chinese judges believe that, together with land takings and employment disputes, medical malpractice is one of the three major origins of public petitions against the Chinese judiciary.\(^{159}\) At the same time, many disputes resulted in violence, causing injury or even death to medical professionals. These violent incidents have become a potential threat to social stability.\(^{160}\) Against this complex backdrop, the Tort Liability Law has taken a mixed position toward medical malpractice, indicating the CCP leadership’s preference for some kind of balance between the public anger against medical services and the profession’s grievances against medical mobs.

On one hand, the Tort Liability Law confirms res ipsa loquitur employed in the judicial interpretation, but limits its usage to three situations: where hospitals 1) violate the provisions of law, administrative regulations or other regulatory rules on medical practices; 2) conceal or decline to present medical records related to the dispute; or 3) falsify, tamper with or destroy medical records.\(^{161}\) The rest of medical malpractice is still subject to the negligence rule.\(^{162}\) On the other hand, the Tort Liability Law also substantially restricts hospitals’ immunities.\(^{163}\) In particular, even when patients’ or their relatives’ non-cooperative behaviors have contributed to the negative consequences of treatment, hospitals are not exempt from tort liability if they are also at fault, which is an outright revision of the previous rule of full immunity in the case of patients’ fault. The

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\(^{158}\) E.g. Yuan v. PRC No. 411 Hospital, (2011) 虹民一（民）初字第 3867 号; Lu v. Shanghai A Hospital, (2011) 闽民一（民）初字第 7227 号.

\(^{159}\) Interview by author with Judge ZC, in Shanghai, China, (July 9, 2013).

\(^{160}\) A widely reported case of medical disturbance before the passage of the Tort Liability Law was the Fujian Nanping incident. See Wei Dong, Nanping “Yinao” Shijian Shishifeifei [Rights and Wrongs of the Nanping Medical Disturbance Incident], China Youth Daily (June 29, 2009), http://zqb.cyl.com/content/2009-06/29/content_2731661.htm (reporting a story of violence between a man’s family and the hospital where he died). See generally, Liebman, supra note 3.


\(^{162}\) Id. at art. 54.

\(^{163}\) Article 60 of the law only allows for three immunities, whereas the Medical Accident Regulation contains six. Medical Accident Regulation, art. 33.
new general statute also expands hospitals’ duties through other channels. For instance, regarding injuries due to transmission of contaminated blood, Article 59 of the law allows victims to claim damages from hospitals, even if the latter is not at fault. Although hospitals can seek indemnity from blood providers afterwards, such indemnity will not be realized without difficulty.¹⁶⁴ Finally, the Tort Liability Law ends the anomaly of dual-track compensation.¹⁶⁵ This means that, after the new law takes effect, assessment of damages in medical malpractice cases should follow the more generous standard in the Interpretation on Personal Injuries.

We now turn to injuries occurring at primary or secondary schools. The General Principles do not mention schools’ liability to minor students for injuries arising on their premises. The SPC first set forth a rule in the SPC Opinions, requiring schools to “provide appropriate compensation” if they are at fault for the injuries suffered by minors without legal competence.¹⁶⁶ In 2002, the Ministry of Education also held schools liable for students’ injuries when they are at fault, though with several immunities.¹⁶⁷ Later on, the SPC expanded schools’ liability to cover all minors, whether incompetent or restrictively competent, in 2003.¹⁶⁸ Under these rules, schools will be liable when they breach the duty of care in discharging their responsibilities of managing the campus or protecting and educating the students. In addition, according to the Interpretation on Personal Injuries, schools bear complementary liability for injuries inflicted by external personnel on minor students in proportion to their fault in managing the campus. This means that schools should be liable if the

¹⁶⁴ CIVIL LAW OFFICE, supra note 148, at 808.
¹⁶⁶ Zuigao Renmin Fayuan Guanyu Guanche Zhixing <Zhonghua Renmin Gongheguo Minfa Tongze> Ruogan Wenti De Yijian (Shixing) ([The SPC Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law (For Trial Implementation)] (promulgated by the Sup. People’s Ct., Jan. 26, 1988), art. 160.
¹⁶⁷ Xuesheng Shanghai Shigu Chuli Banfa (学生伤害事故处理办法) [Measures for Handling of Student Injury Accidents] (promulgated by the Dep’t of Educ. of China, June 25, 2002, effective Sept.1, 2002) art. 8, art. 12, art. 13. This department rule ceased to be effective in 2010.
¹⁶⁸ Interpretation on Personal Injuries, art. 7.
external personnel causing the injuries cannot bear the tort liability in full or is judgment-proof.

In a country with a stringent family planning policy, it is unsurprising that school safety has attracted great social attention. The department rules and the judicial interpretation came out in 2002, and the 2003 expansion of liability could well be understood as a reflection of such attention. Although the department rules imposed a variety of conditions on pursuing liabilities toward schools, the provision of the judicial interpretation is rather straightforward, probably consistent with the Party leadership’s preferences at that moment. However, the number of school injuries did not reduce thereafter. In 2007, the Ministry of Education released the first governmental report on the safety situations of primary and secondary schools, admitting the increase of the on-campus injuries during the previous years.169 This was also confirmed by the number of insurance claims associated with school injuries in Beijing. 170 Therefore, the law continues to evolve under the constant populist pressure toward school accidents.

Instead of applying the uniform negligence rule, the Tort Liability Law distinguishes injuries to students of complete incompetence from those to students of restrictive competence. Whereas the negligence rule remains for the latter, res ipsa loquitur now applies to the former.171 Consequently, where completely incompetent (i.e. younger) students are injured, schools will have to prove that they were not negligent in carrying out their duties. It is worth noting that schools’ liabilities are strengthened despite the practical difficulties in establishing a full-scale school liability insurance scheme.172 Therefore, it is less likely a consequence of the development of the insurance market than a response to the ever-growing public concern over campus security. Moreover, schools’ complementary liability is kept in Article 40 of this new general statute.

170 The number of claims rose from 273 in 2004 to 368 in 2006. See CIVIL LAW OFFICE, supra note 134, at 658-59.
171 Tort Liability Law, supra note 156, art. 38-39.
In cases of medical malpractice and school accidents, the law started leaning toward victims in the early 2000s and turning more pro-victim than the General Principles—likely as a result of populist pressure. These changes are conforming to the situation depicted in Figure 3. But the momentum of populist pressure remained high and pushed for further adaption of the law. The subsequent rule adjustments in the general statute can thus be thought of as geared toward the updated policy preferences held by the decision-makers of the CCP under the new sociopolitical environment.

Like the Chinese railway companies, hospitals and schools have been the center of populist pressure, yet the ministries running hospitals and schools do not have the political clout comparable to the Ministry of Railways. Accordingly, the tort law rules have also followed different tracks of evolvement. With respect to railway accidents, although populist pressure forced the rules away from the highly biased special statute, overall they still favor tortfeasors when compared to our benchmark, the General Principles. As elaborated in the previous subsection, the original strict liability rule under the General Principles has been chipped away in a variety of aspects so that the applicable rules became closer to an ordinary negligence test. By contrast, when it comes to medical malpractice or school accidents, the current rules are patently harsher to tortfeasors than the General Principles. Neither hospitals nor schools were subject to res ipsa loquitur under the earlier general statute. Nevertheless, this severe rule applies to both in the latest general statute. In addition, both are now liable, in one way or another, for injuries caused directly by a third party. In sum, here we see the liability rule passing through the benchmark of negligence and approaching strict liability. This comparison, therefore, evinces the impact of political clout when tortfeasors are confronted with high populist pressure.

5. Traffic Accidents vs. Medical Malpractices/School Accidents

Traffic accidents are like medical malpractice and school injuries in that the tortfeasors lack strong political influence. However, unlike the other two categories of torts, the reciprocity existing between victims and tortfeasors moves traffic accidents outside the focus of populist pressure.
The General Principles do not have provisions dealing specifically with traffic accidents. However, most tort law scholars in China agree that operation of motor vehicles is one of the abnormally dangerous activities specified under Article 123 of the statute, to which strict liability is applicable, with the only immunity being victims’ intentional acts.\textsuperscript{173} Since it is impractical to impose strict liability simultaneously on two motor vehicle drivers colliding with each other, this liability rule is appropriate only in cases where the accident involves both motorists and pedestrians or non-motorists.\textsuperscript{174}

The NPC Standing Committee passed the Road Traffic Safety Law (\textit{Daolu Jiaotong Anquan Fa}, hereinafter “Safety Law”) in 2003. In the initial version of the law, in accidents involving motorists and pedestrians or non-motorists, the former would be fully liable for damages in excess of the coverage provided by the mandatory traffic insurance unless they could prove that pedestrians or non-motorists had violated traffic rules and that the motorist had taken “necessary and proper measures” to avoid accidents, in which case their liability would be reduced. In effect, strict liability was reaffirmed because motorists are the ultimate bearer of harm insofar as pedestrians or non-motorists are not negligent.\textsuperscript{175}

The currently applicable rules to traffic accidents were established in the amendment to the Safety Law in 2007. Article 76 of the Safety Law first stipulates that motorists are liable in accidents involving motorists and pedestrians or non-motorists if the latter are not at fault. It then allows motorists’ liability to be reduced, like Article 131 of the General Principles, when victims are proven to be negligent. The thrust of the rule is again strict liability because motorists are still the ultimate bearer of harm. However, ambiguity arises from to the last part of this article, where it states that motorists should bear no more than 10\% of the liability if they are not at fault.\textsuperscript{176} This last part will be consistent with the strict liability rule if it applies

\textsuperscript{173} XINBAO ZHANG, QINQUAN ZEREN FA YUANLI (\textit{侵权责任法原理}) [\textit{PRINCIPLES OF THE TORT LIABILITY LAW}] 348 (2004). Victims’ negligence was supposed to reduce tortfeasors’ liability. \textit{See supra} note 124.

\textsuperscript{174} Accidents involving multiple motor vehicles are always subject to the comparative negligence rule.

\textsuperscript{175} “Ultimate bearer of harm” is a term borrowed from COOTER & ULEN, \textit{supra} note 36, at 212 (referring to the party bearing the harm of accidents when nobody is negligent).

\textsuperscript{176} Safety Law, art. 76.
only in the situation where the motorist is not negligent and the pedestrian or non-motorist is. But without this limitation, Article 76 would be mainly a rule of res ipsa loquitur. It turns out that the first reading of the article is not only supported by China’s eminent tort law scholars177 but is also the position taken by the vast majority of the provincial regulations on traffic accidents.178

Article 48 of the Tort Liability Law simply refers to the Safety Law for determining the liability in traffic accidents, and the latest judicial interpretation does not make any change to the rule.179 It is therefore proper to assert that, as for traffic accidents between motorists and pedestrians or non-motorists, strict liability is the prevailing rule in China at present.

The provisions about traffic accident liability are characterized by their similarity to the benchmark rules under the General Principles. Indeed, the stance of strict liability has been maintained almost entirely. In particular, when pedestrians or non-motorists are not at fault, motorists will be liable, even if the actual cause of the accident is force majeure or a third party. In this sense, of all the abnormally dangerous activities, motorists’ liabilities are the closest to the strict liability rule under Article 123 of the General Principles. Considering the dearth of both political influence and populist pressure in traffic accidents, this closeness is not at all unexpected since we noted that the General Principles itself was enacted with relatively little impact of either factor.


178 Of the twenty-six provinces that have included the relevant rules in their provincial regulations, twenty-three have essentially established the strict liability rule for motorists.

Another unique aspect of traffic accidents is that they belong to an area of special torts where the general statutes, the special statute, and the judicial interpretation appear to converge. This is foreseeable when neither political influence nor populist pressure plays a vital role in formulating the liability rules. In such circumstances, the tastes of the various lawmaking institutions are less affected by the two determinants of interest in this analysis. Consequently, other considerations, be it fairness, efficiency, or legal tradition, rise in importance in the course of legislation.

The characteristics of traffic accidents stand out saliently when compared to medical malpractice or school accidents, the other two types of torts with tortfeasors of weak political influence. Under strong populist pressure, the extant rules concerning the latter two have evolved to a more pro-victim position than the General Principles. Moreover, in both of these areas, the liability rules in the special statutes designed by the government ministries are clearly less favorable to victims than those from the judicial interpretations and the Tort Liability Law, because victims are assigned a heavier burden of proof or a wider range of immunities are allowed. Given tortfeasors’ similarly weak political clout, these differences are indicative of the effects of populist pressure on cultivating the preferences of key players of lawmaking, as well as the creation of the equilibrium outcomes of this process.

6. Traffic Accidents vs. Electric Shocks

The last cross-type comparison is between traffic accidents and electric shocks. In both areas, populist pressure is supposedly insignificant, but the tortfeasors are more politically powerful in one case than the other.

I elaborated in the previous subsection that, with regard to motorists’ liabilities against pedestrians or non-motorists, the current rules of Chinese law are close to the provisions in the General Principles, the benchmark of our comparison. In particular, motorists’ immunity is limited to victims’ intentional actions. Force majeure and third parties’ actions are not even included. In other words, motorists are required to bear stricter liability than other tortfeasors of abnormally dangerous activities, including electric companies.

On the other hand, as we have seen in subsection 3, rules governing electric companies’ tort liabilities in cases of electric shocks had been much more favorable to tortfeasors than the original
provisions in the General Principles until recently. Even after the implementation of the Tort Liability Law, the relevant special statute remains effective thereby completely immunizing electric companies from injuries caused by third parties or force majeure.

The comparison between traffic accidents and electric shocks thus demonstrates that where populist pressure is mild, tortfeasors’ political influence can be decisive to the position of tort liability rules. The more influential the tortfeasors are, the more likely the law would be pulled closer to their preferred locus. Indeed, although the rules now applicable to traffic accidents do not seem far from the General Principles, this has not always been the case. The mutation of the rules might as well be a consequence of the demotion of an average motorist’s political status.

B. Intra-Type Comparisons

1. The Evolution of the Traffic Accident Law

In section A, I have shown that, according to the Safety Law, motorists are subject to strict liability in accidents involving motor vehicles and pedestrians or non-motorists. However, this was not the case for a substantial amount of time since the promulgation of the General Principles. In 1991, the State Council enacted the Measures for Handling Road Traffic Accidents (Daolu Jiaotong Shigu Chuli Banfa, hereinafter “Traffic Accident Measures”), the first special statute on traffic accidents. Articles 17 and 19 of the Traffic Accident Measures basically adopted a comparative negligence rule to handle accidents occurring not only between motor vehicles, but also between motor vehicles and pedestrians or non-motorized vehicles. Thus, the parties in traffic accidents should be liable according to the extent of their negligence. At the same time, Article 44 of the Traffic Accident Measures restricted motorists’ strict liability to no more than 10% of damages and only in accidents causing death or serious injuries.

Interestingly, the trajectory of the traffic accident law in China features an initial pro-tortfeasor movement in disregard of strict

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180 More accurately, the Traffic Accident Measures looked to the parties’ violations of the traffic rules and deemed such violations as negligence per se.

181 The amount of damages was capped at the average living expenses of ten months.
liability under the General Principles and later returns to this origin. This trajectory appears to be correlated with the prevalence of private car ownership in this country.

Figure 5  Number of Privately Owned Vehicles (in 10,000s)

Figure 6  Percentage of Privately Owned Vehicles in Civilian Vehicles

Data source: PRC National Bureau of Statistics

As Figure 5 and Figure 6 show, the total number and percentage of privately owned vehicles in China have risen sharply in the 2000s. In particular, the share of private cars in civilian vehicles first exceeded 50% in 2003 when the Safety Law was passed. This growth pattern of private vehicles suggests that the reciprocity between traffic accident victims and tortfeasors is a relatively recent phenomenon. In the 1990s, before the pronounced surge of private car ownership, vehicles were more likely to be owned by public
institutions or enterprises, and motorists were usually employees of these public entities. At that time, in accidents involving motorists and pedestrians or non-motorists, tortfeasors were, on average, more influential politically than the victims. It is unsurprising that the law was biased in motorists’ favor in light of the theory advanced in this paper. After the substantial increase in private car ownership, however, the composition of motorists became diverse. Consequently, the benefit from lobbying for a pro-tortfeasor law diffused broadly among the general population and curbed the enthusiasm to press for such a law, even for the small proportion of public car owners. This phenomenon probably explains why the liability rule of traffic accidents traversed through comparative negligence before coming back to strict liability, as increasingly more people turn out to drive on the road.

In passing, it should be noted that the comparison in this subsection is longitudinal and could not be controlled for factors other than political clout that might have caused changes to the law over time. For example, the rule adjustment in 2003 could be a consequence of the general trend to expand the protection of tort victims.  

Furthermore, the dip in tortfeasors’ political influence does not account for the slightly less victim-friendly amendment to the Safety Law in 2007, although it has probably brought the rules even closer to the General Principles.

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182 Zhang, supra note 109. Nor did the comparison control the populist pressure on traffic accident disputes while the law was evolving. Thus, it is possible that the pro-victim movement of the law in the 2000s was fostered jointly by the decline of tortfeasors’ political prestige and the surge of populist pressure against the privileged motorists.

183 Daolu Jiaotong Anquan Fa (中华人民共和国道路交通安全法 (2007修正)) [Road Traffic Safety Law of the People's Republic of China (2007 Amendment)] (promulgated by the Standing Comm. of the Nat’l People's Cong., Dec. 29, 2007, effective May 1, 2011). Under the Safety Law of 2003, to reduce their liability, motorists had to prove both the victim’s negligence and their own innocence, whereas the latter no longer needs to be proven after the amendment, which makes the rule similar to comparative negligence under Article 131 of the General Principles.
2. The Special Treatment of Zoos

Under the General Principles, injuries caused by domesticated animals are regarded as a type of special tort. Article 127 of the law holds animal keepers or managers strictly liable unless they can prove that the injury was the victim’s fault. Noticeably, the General Principles does not distinguish zoos from individual animal keepers in terms of assigning liability. To a large extent, the Tort Liability Law inherited this article, but with two important alterations. The first alteration narrowed the scope of immunity conferred on animal keepers. Currently, in order to avoid or even reduce liability, animal keepers will have to prove that the injuries were caused by victims’ intentional or grossly negligent actions. In other words, victims’ ordinary negligence is no longer a defense to animal keepers’ liabilities.184

Whereas the new law has tightened the tort liability for ordinary animal keepers,185 it has loosened the liability for zoos. Article 81 of the Tort Liability Law allows zoos to be exempt from tort liabilities insofar as they can prove that they have discharged their duty of management, even when the victims are not at fault. In brief, when the injuries are caused by zoo animals, victims become the ultimate bearers of harm. But in situations involving individual animal keepers, the animal keeper will bear the ultimate harm when nobody is at fault; indeed, the animal keeper is liable even if the victim is in ordinary negligence.

This patent imbalance between zoos and individual animal keepers was not unnoticed in the drafting process of the Tort Liability Law. It was pointed out that zoos were usually for-profit, so no good justification could be found for their reduced tort liability.186 Regardless, the provision survived in the final version of the law. However, this result is again unsurprising in light of the political economy of lawmaking. Unlike ordinary pet owners, zoos in China

184 Qinquan Zeren Fa (侵权责任法) [Tort Liability Law] (promulgated by the Standing Comm. of the Eleventh Nat’l People’s Cong., Dec. 26, 2009), art. 78.
185 This change essentially reiterates the position taken by Article 2 of the Interpretation on Personal Injuries adopted in 2003, which is generally applicable to all strict liability cases. See supra text accompanying note 124 (describing the use of the comparative negligence defense). Therefore, it is likely a reflection of the global expansion of victim protection. See Zhang, supra note 104 (arguing that the prevalent trend in tort law is expansion of protection for tort victims).
186 CIVIL LAW OFFICE, supra note 148, at 146.
are public enterprises operated by local government agencies. The Chinese Association of Zoological Gardens was established in 1985 to represent the zoos nationwide. Currently, it is under the supervision of the Ministry of Housing and Urban-Development.\(^{187}\) In contrast, there is no family pet owners’ organization at the national level to date. Hence, the difference in political influence between zoos and ordinary family animal owners is conceivable. Although the zoos, as well as the government agencies overseeing their operations, are certainly not as politically prestigious as the ministries controlling railway transportation or electricity, they are probably also exposed to much less populist pressure.\(^{188}\) Consequently, the interest group lobbying might have affected the drafters of the law behind the scenes, and the rule in zoos’ favor snuck into the new statute without stirring up much public dissatisfaction.

3. The Exceptional Protection of Marine Environment Polluters

Tort liability for environmental pollution is provided in Article 124 of the General Principles, and the strict liability rule has been applied ever since. However, the polluters of marine environments are entitled to certain unique protections unavailable to other kinds of polluters. According to Article 68 of the Tort Liability Law, when the pollution is attributable to a third party, including both intentional and negligent actions, victims can claim damages either from the polluter or the third party ultimately responsible for the pollution. In other words, the Tort Liability Law does not allow polluters to use third party actions as a defense to victims’ compensation claims.\(^{189}\) Most of the special statutes on pollution also


\(^{188}\) Based on the key words count in Appendix B, animal-related injuries are generally not of high public attention.

\(^{189}\) Qinquan Zeren Fa (侵权责任法) [Tort Liability Law] (promulgated by the Standing Comm. of the Eleventh Nat’l People’s Cong., Dec. 26, 2009), Chapter VIII Liability for Environmental Pollution. Polluters can seek indemnity from the third party after compensating the victims.
take a position consistent with the Tort Liability Law. But there is one exception to this rule reserved for polluters of oceans. Under Article 90 of the Marine Environment Protection Law (Haiyang Huanjing Baohu Fa), when the pollution of marine environment is attributable to a third party’s intentional or negligent actions, the third party will be liable for the damages. Noticeably, this article remains in the latest amendment to the Marine Environment Protection Law of 2013. Therefore, it preempts the Tort Liability Law both as a special law and a newer one.

The exceptional protection of ocean polluters appears puzzling, especially when we notice that such protection is even beyond the requirement of the relevant international treaty to which China is a party. However, if we look at this exception from the political economy perspective, it becomes readily understandable. The prominent sources of ocean pollution is the leakage of oil tankers in the course of oil exploration and production. In China, both oil production and shipping are controlled by giant SOEs. Not only do they have a concentrated benefit in lobbying for favorable liability rules, but they also have tremendous political influence as members of the energy industry key to the national economy. These advantages are unavailable to other polluters, who are usually more diffuse and less politically eminent. Indeed, a recent study shows that large SOEs, such as the China National Petroliam Corporation (CNPC), are always able to avoid paying significant compensation in

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190 See, e.g., Shui Wuran Fangzhi Fa (水污染防治法) [Law of Prevention and Control of Water Pollution] (promulgated by the Standing Comm., Nat'l People’s Cong., Feb. 28, 2008, effective June 1, 2008), art. 85 (detailing the circumstances in which the polluter is required to eliminate the damage and compensate the victims for losses suffered). Most other special statutes do not have a specific article about the polluter’s defense of third party actions, so the general provision of the Tort Liability Law will apply.

191 Under Article 3 of the International Convention on Civil Liability for Oil Pollution Damage, the owner of a ship is not liable for oil pollution only if a third party’s intentional action or omission caused the pollution. International Convention on Civil Liability for Oil Pollution Damage, art. 3, June 19, 1975, 973 U.N.T.S. 14097.

accidents of pollution, thanks to their political clout. In addition, unlike air or water pollution more detectable by ordinary citizens, ocean pollution is less striking to most people because of the remoteness of the pollution sites. As a result, populist pressure is possibly weaker toward ocean pollution than other forms of pollution, which seems to be the case according to Appendix B. Consequently, the tortfeasors’ strong political influence, coupled with weak populist pressure, provides a reasonable explanation for the extraordinary favoritism toward ocean polluters in Chinese tort law.

Conclusion

In this paper, I have identified two determinants of the rules concerning special torts in China and presented a simple spatial model demonstrating the mechanism through which these determinants have affected tort law within China’s power framework. My analysis pointed out the central role of the CCP leadership in shaping the rules of torts, as well as its preferences under the counteractive impacts of tortfeasors’ political clout and the populist pressure on these tortfeasors. Ultimately, the survival requirements of the authoritarian regime have brought these determinants to the forefront of lawmaking in torts. While organized interest groups excel at maneuvering the policy orientation in China, just as in democracies, the CCP’s recent governance strategy enables the otherwise muffled voices of tort victims to be heard in the course of legislation.

In particular, my research suggests that, when tortfeasors’ political influence is kept constant, the populist pressure on the tortfeasor group tended to push tort law toward favoring victims. In contrast, with similar populist pressure, the politically influential tortfeasors could steer legal rules to their advantage. Even within a specific type of tort, the subgroup of tortfeasors that was better organized to exert political influence would be rewarded with more favorable tort rules than their fellow tortfeasors, especially where populist pressure was moderate.

193 See Jing Leng, Cong Zhongda Huanjing Shigu Kan Zhongguo Guoyou Qiye De Shehui Zeren [Looking at the Social Responsibilities of Chinese SOEs from the Major Environmental Accidents] (unpublished manuscript) (on file with the author).
Of course, there are limits to my study. I do not attempt to assert that the political economy perspective employed in this research is sufficient for a comprehensive understanding of the law of torts in China. Instead, I restricted my explorations to the special torts involving relatively definite and distinct groups of tortfeasors, for these are the fields of law where political factors are most likely to leave their footprint. This means that the vast sphere of regular torts were not under the scrutiny of this analysis. Even for the special torts within the scope of this study, the crudeness of the measurements of the key variables renders my application of the theory reliant on anecdotal knowledge and personal impression. Moreover, the lack of transparency in China’s political process reduces, to some extent, the description of its lawmaking apparatuses to an educated guess. Finally, despite its conscientious design, the qualitative nature of the study could not fully control the confounding factors acting on the formation of the Chinese tort law.

Alternative explanations might be conceivable for any of the aforementioned variations in the law of torts. A coherent and general theory on the rules regarding a variety of torts, however, is more advisable than ad hoc accounts of the law in a particular area in view of advancing our holistic knowledge of lawmaking. After all, the purpose of this research is to call academic attention to the political economy underlying the specific provisions of Chinese law, which, by and large, seems to have been left out of the scholarly agenda so far. I hope my study will inspire more efforts among students of Chinese law to explore the operation of law at the microscopic level against the macroscopic institutional backdrop of this country.

Appendix A: Political Influence Index for Some Ministries

This index was constructed according to the highest CCP or government positions held by the head of the ministries in charge of operating the related industries. Ministers in office from 1949 to March 2013, when the last cabinet of the Hu-Wen administration stepped down, were included in the index compilation, and the positions they held were recorded up to October 2014.194 Tier 1

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194 The Ministry of Electric Power Industry was first formed in 1955, so its ministers from 1955 to March 2013 were covered by the index. However, the ministers who held above-ministerial level positions when becoming ministers were not included in the index, for they were usually staffed to handle anomalous
leaders refer to members of the Standing Committee of the CCP Politburo, President of the PRC, Premier of the State Council, Chairman of the NPC Standing Committee, or Chairman of the Chinese People’s Political Consultative Conference (CPPCC) National Committee. Tier 2 leaders refer to members of the CCP Politburo. Tier 3 leaders refer to Vice President of the PRC, Vice Premier of the State Council, State Councilor, Vice Chairman of the NPC Standing Committee, Vice Chairman of the CPPCC National Committee, President of the SPC, or President of the Supreme People’s Procuratorate. Non-CCP ministers are ministers who are not a CCP member when in office. For every ministry, each minister was counted only once, even when he or she had multiple offices of the same tier. The index values were calculated using the formula below, and a higher value indicates higher influence:

\[
\text{Index Value} = \frac{\# \text{ of Tier 1 Leaders} \times 3 + \# \text{ of Tier 2 Leaders} \times 2 + \# \text{ of Tier 3 Leaders} - \# \text{ of Non-CCP Ministers} \times 1}{\# \text{ of Ministers}}
\]

situations, such as public health crises or massive upheavals, hence not indicative of the ministries’ regular political importance. An alternative index was constructed using ministers in the reform era from 1978. No qualitative difference was found in terms of the strength of political influence among the ministries.

195 According to a resolution passed on the 12th CCP National Congress, the members of the Standing Committee of the CCP Central Advisory Commission were conferred with the same political privileges as the Politburo members. Therefore, they were counted as Politburo members in the index.

196 However, if a person served as minister of multiple ministries, he or she would be repeatedly counted in compiling the index for each ministry. Besides, a non-CCP minister holding a tier 3 leader’s office was counted both as a non-CCP ministry and a tier 3 leader (no non-CCP minister ever served as a tier 1 or tier 2 leader).
Table A: Political Influence Index for Some Ministries

<table>
<thead>
<tr>
<th>Industry Operated</th>
<th>Name of Ministry</th>
<th># of Ministers</th>
<th># of Tier 1 Leaders</th>
<th># of Tier 2 Leaders</th>
<th># of Tier 3 Leaders</th>
<th># of Non-CCP Ministers</th>
<th>Index Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary/Secondary Education</td>
<td>Ministry of Education, State Education Commission</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>3</td>
<td>2</td>
<td>0.08</td>
</tr>
<tr>
<td>Electricity</td>
<td>Ministry of Electric Power Industry, Ministry of Water Conservancy and Electric Power, State Economic and Trade Commission, National Development and Reform Commission</td>
<td>10</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>1</td>
<td>0.8</td>
</tr>
<tr>
<td>Health</td>
<td>Ministry of Health</td>
<td>11</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Railway</td>
<td>Ministry of Railway</td>
<td>13</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>0</td>
<td>0.77</td>
</tr>
</tbody>
</table>

Appendix B: Key Words Count for Certain Types of Special Torts

The key words count is based on the microblogs posted on Sina Weibo from September 1, 2009 through January 15, 2014 (i.e. a total of 1598 days). The mean of average daily percentages is the mean of the average daily number of microblogs containing the key words related to a particular type of torts, as a percentage of the total number of the microblogs on Sina Weibo, during the covered period of time. A higher mean suggests a stronger populist pressure against the tortfeasors of the particular type of tort. Specifically, this value was calculated as follows:

197 To reduce the impact of outliers, only the key words appearing in no less than 100 days during the covered period were included in the calculation.
Mean of Average Daily Percentages = $\frac{\sum_{n=1}^{N} \sum_{d=1}^{1598} B_{dn} \cdot W_d \cdot N \cdot 1598}{N} \times 100\%$

where N is number of key words searched pertaining to a type of torts, $B_{dn}$ the number of microblogs containing the $n^{th}$ key word on the $d^{th}$ day, and $W_d$ the total number of microblogs on Sina Weibo on the $d^{th}$ day. \(^{(198)}\)

Table B: Key Words Count for Certain Types of Special Torts

<table>
<thead>
<tr>
<th>Types of Torts</th>
<th>Key Words</th>
<th>Mean of Average Daily Percentages</th>
</tr>
</thead>
<tbody>
<tr>
<td>School Accidents</td>
<td>primary school (xiaoxue), secondary school (zhongxue), primary and secondary school (zhongxiaoxue), kindergarten (you'eryuan), Ministry of Education (jiaoyubu), campus safety (xiaoyuan anquan)</td>
<td>0.249%</td>
</tr>
<tr>
<td>Electric Shocks</td>
<td>electric power (dianli), state power grid (guojia dianwang), power supply bureau (gongdianju), electric shock (chudian)</td>
<td>0.031%</td>
</tr>
</tbody>
</table>

\(^{(198)}\) As a simplified illustration, suppose we search two key words pertaining to a certain type of torts within two days. The counts are indicated in the table below. Then the mean of average daily percentages for this type of torts is calculated as $\frac{300 + 200 + 80 + 0}{2 \times 2} \times 100\% = 0.33\%.$
<table>
<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Medical Malpractices</strong></td>
<td>electric power (dianli), state power grid (guojia dianwang), power supply</td>
<td>0.030%</td>
</tr>
<tr>
<td></td>
<td>bureau (gongdianju), electric shock accident (chudian shigu)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>clinic (zhensuo), hospital (yiyuan), Ministry of Health (weishengbu),</td>
<td>0.427%</td>
</tr>
<tr>
<td></td>
<td>doctor-patient relationship (yihuan guanxi), medical treatment (yiliao)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>clinic (zhensuo), hospital (yiyuan), Ministry of Health (weishengbu),</td>
<td>0.327%</td>
</tr>
<tr>
<td></td>
<td>doctor-patient relationship (yihuan guanxi), medical accident (yiliao shigu)</td>
<td></td>
</tr>
<tr>
<td><strong>Railway Accidents</strong></td>
<td>high-speed railway (gaotie), railway (tielu), train (huoche), rail motor</td>
<td>0.306%</td>
</tr>
<tr>
<td></td>
<td>car (dongche), Ministry of Railway (tieaoabu)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>high-speed railway (gaotie), train (huoche), rail motor car (dongche),</td>
<td>0.265%</td>
</tr>
<tr>
<td></td>
<td>railway bureau (tieluju), Ministry of Railway (tieaoabu), railway</td>
<td></td>
</tr>
<tr>
<td></td>
<td>accident (tielu shigu)</td>
<td></td>
</tr>
<tr>
<td><strong>Traffic Accidents</strong></td>
<td>traffic accident (jiaotong shigu), motor vehicle accident (jidongche shigu)</td>
<td>0.0099%</td>
</tr>
<tr>
<td><strong>Injuries by Domestic Animals</strong></td>
<td>injuries by animals (dongwu shangren), zoo (dongwuyuan)</td>
<td>0.0158%</td>
</tr>
<tr>
<td><strong>Environmental Pollution</strong></td>
<td>environmental pollution (huanjing wuran), ocean pollution (haiyang wuran),</td>
<td>0.00181%</td>
</tr>
<tr>
<td></td>
<td>water pollution (shui wuran), air pollution (daqi wuran), PM 2.5, solid</td>
<td></td>
</tr>
<tr>
<td></td>
<td>waste pollution (guti feiwu wuran)</td>
<td></td>
</tr>
<tr>
<td>Type of Pollution</td>
<td>Percentage</td>
<td></td>
</tr>
<tr>
<td>---------------------------------------</td>
<td>------------</td>
<td></td>
</tr>
<tr>
<td>Air pollution (daqǐ wúrān), PM 2.5</td>
<td>0.00104%</td>
<td></td>
</tr>
<tr>
<td>Water pollution (shuǐ wúrān)</td>
<td>0.00357%</td>
<td></td>
</tr>
<tr>
<td>Ocean pollution (hǎiyāng wúrān)</td>
<td>0.000123%</td>
<td></td>
</tr>
</tbody>
</table>