

JUDICIAL CONTROL OF LOCAL PROTECTIONISM IN CHINA: ANTITRUST ENFORCEMENT AGAINST ADMINISTRATIVE MONOPOLY ON THE SUPREME PEOPLE'S COURT

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ABSTRACT

This article studies the rise of judicial review of local administrative monopolies in contemporary China. Anticompetitive abuses of power by local party-states, driven by corruption, have shaken the very foundations of the country's administrative unity and market efficiency. The entrenched skepticism of the authoritarian party-state toward legal institutions notwithstanding, the Supreme People's Court in Beijing has over the past decade steadily aggrandized its own and local courts' authority to constrain regional protectionist, collusive fiefdoms in ways unforeseen by the drafters of the landmark Anti-Monopoly Law; returning incremental but genuine benefits to the central party-state, whose tacit acquiescence in judicial empowerment has over time transformed into express approval. However, given that administrative monopoly is instinct in a Leninist polity, the central party-state and the Court should have few incentives to eradicate local protectionism once and for all. All things being equal, full-fledged, independent judicial review of administrative monopoly will not emerge in China.

JEL: D73; H70; H83; K21; K23; P35

I. INTRODUCTION

Antitrust law is traditionally associated with the regulation of abuse or aggregation of market power by private firms. Distortions of market competition may nevertheless be occasioned by government agencies that abuse their administrative powers.¹ Indeed, “administrative monopolies”

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¹ MINKANG GU, *ANTITRUST LAW AND PRACTICE IN CHINA AND HONG KONG* 169 (Wolters Kluwer 2016); Changqi Wu & Zhicheng Liu, *A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law*, 41 *REV. INDUS. ORG.* 133, 138 (2012).

have become one of the most unique and endemic species of corruption in the People's Republic of China.² Yet unlawful anticompetitive bureaucratic conduct can be difficult to detect: it is often dressed up as a sophisticated policy rooted in law in various forms,³ such as antitrust exemptions for state-owned enterprises and other favored classes;⁴ discriminatory tax measures and other trade restrictions;⁵ obligations on local authorities to purchase from nominated favored suppliers; and arbitrarily adopted sanitary or phytosanitary rules preventing the import of products from outside the region.⁶ Such discriminatory acts of administrative authorities not only obstruct free trade and impair market efficiency,⁷ but also bear important political ramifications insofar as they promote geopolitical protectionism and impede the integration of the broader unit, namely, the Chinese state.⁸

China's first comprehensive antitrust legislation, the Anti-Monopoly Law, after much anticipation and ten years of drafting, was adopted in 2007 by the Standing Committee of the National People's Congress with the manifold purposes of "preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding

- ² Yong Guo & Angang Hu, *The Administrative Monopoly in China's Economic Transition*, 37 COMMUNIST & POST-COMMUNIST STUD. 265, 266 (2004).
- ³ Shiyong Xu & Baisha Zhang, *Judicial and Administrative Remedies Against Administrative Monopoly: Cases and Analysis*, in CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS 271, 272 (Adrian Emch & David Stallibrass eds., Wolters Kluwer 2013).
- ⁴ Deborah Healey, *Competitive Neutrality: Addressing Government Advantage in Australian Markets*, in STATE-INITIATED RESTRAINTS OF COMPETITION 3 (Josef Drexler & Vicente Bagnoli eds., Edward Elgar 2015).
- ⁵ Mel Marquis, *Abuse of Administrative Power to Restrict Competition in China: Four Reflections, Two Ideas and a Thought*, in THE CHINESE ANTI-MONOPOLY LAW: NEW DEVELOPMENT AND EMPIRICAL EVIDENCE 73, 114 (Michael Faure & Xinzhu Zhang eds, Edward Elgar 2013).
- ⁶ Mark Williams, *China*, in THE POLITICAL ECONOMY OF COMPETITION LAW IN ASIA 88, 109 (Mark Williams ed., Edward Elgar 2013).
- ⁷ Liangchun Yu & Wei Zhang, *Research on the Intensity and Effect of Industrial Administrative Monopoly in China*, in THE CHINESE ANTI-MONOPOLY LAW: NEW DEVELOPMENT AND EMPIRICAL EVIDENCE 194, 206 (Michael Faure & Xinzhu Zhang eds, Edward Elgar 2013).
- ⁸ See Liangchun Yu & Donghua Yu, *The Measure of Regional Administrative Monopoly in China*, in COMPETITION POLICY AND REGULATION: RECENT DEVELOPMENTS IN CHINA, THE US AND EUROPE 79 (Michael Faure & Xinzhu Zhang eds, Edward Elgar 2010); Jacob S. Schneider, *Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine*, 87 WASH. U. L. REV. 869 (2010). This article focuses on governmental measures that promote local protectionism and thereby distort market competition internally within mainland China, as opposed to those that restrict free trade and prevent economic integration between mainland China and other jurisdictions. Regarding the latter, see Kelvin H. F. Kwok, *The Belt and Road Initiative: Co-operation in Trade Liberalisation and Antitrust Enforcement*, in INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE BELT AND ROAD INITIATIVE __ (Yun Zhao ed., Cambridge Univ. Press __); Kelvin H. F. Kwok, *Antitrust Enforcement and State Restraints at the Mainland China-Hong Kong Interface: The Importance of Bilateral Antitrust Co-operation*, 12 ASIAN J. COMP. L. __ (2017).

the interests of consumers and social public interest, [and] promoting the healthy development of the socialist market economy.”⁹ It relies on super-ordinate governments to rectify the abuses of subordinate ones, and therefore contains no provision that unambiguously sanctions administrative monopolies by judicial means.¹⁰ Against this background, it is remarkable that the Supreme People’s Court has managed to incrementally aggrandize judicial power over local administrative monopolies since the Anti-Monopoly Law entered into force in 2008. The Court’s modest experiments finally convinced the central party-state to forsake its earlier skepticism and formally ratify, in an amendment to the Administrative Litigation Law entering into effect in 2015, a nation-wide judicial power to review administrative monopolies.

It is surprising that scholars both of competition law and Chinese law have completely omitted to account for this important facet of judicial empowerment. The present article fills this perplexing gap in the literature in addressing the research puzzle of how the Supreme People’s Court could with impunity have aggrandized the scope of its judicial review of local administrative monopolies in the teeth of the party-state’s default unwillingness to empower judges to settle disputes over political governance.¹¹ It contributes to the burgeoning literature on the political economy of courts under autocracy, which can no longer be assumed irrelevant as it was formerly.¹² The ascendancy of courts thus situated, however constrained they may be, exhibits the paradox that judicial involvement in policy-making does not square with classical understandings of autocracy.¹³ The Court is a politicized extension of the Chinese Communist Party’s vise grip on state power, but that does not mean it may be dismissed as a non-entity.¹⁴ Scholars can no longer afford to ignore the highest court of the world’s most populous country.

The exposition takes the form of an analytic narrative, the approach most fitting for the problem-driven, contextualized study of a single nation, in

⁹ Anti-Monopoly Law (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Aug. 1, 2008), 6 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 517–23 (China), art. 1.

¹⁰ Gordon Y.M. Chan, *Administrative Monopoly and the Anti-Monopoly Law: An Examination of the Debate in China*, 18 J. CONTEMP. CHINA 263, 277 (2009).

¹¹ See Chien-Chih Lin, *Constitutions and Courts in Chinese Authoritarian Regimes: China and Pre-Democratic Taiwan in Comparison*, 14 INT’L J. CONST. L. 351 (2016).

¹² C. Neal Tate, *Why the Expansion of Judicial Power?*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 27, 28 (C. Neal Tate & Torbjörn Vallinder eds., New York Univ. Press 1995).

¹³ See Carlo Guarnieri, *Judicial Independence in Authoritarian Regimes: Lessons from Continental Europe*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom eds., Cambridge Univ. Press 2010); Randall Peerenboom, *Introduction*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., Cambridge Univ. Press 2010); Peter H. Solomon, *Courts and Judges in Authoritarian Regimes*, 60 WORLD POL. 122 (2007).

¹⁴ See Shumei Hou & Ronald Keith, *China’s Supreme People’s Court within the ‘Political-Legal System*, in THE JUDICIALIZATION OF POLITICS IN ASIA (Björn Dresse ed., Routledge 2012).

order to trace processes specific to time and space that produce interesting political outcomes as in the present case study.¹⁵ It is organized as follows. Part 2 shows how administrative monopolies, even though economically problematic, are instinct in Leninist polities such that their total eradication would entail skyrocketing political costs for the central party-state. The Anti-Monopoly Law thus reflects the Party's preference for just that level of administrative economic power which coincides with its political survival and oversight capacity, while also keeping the worst outrages in check. Part 3 traces the various creative means, alongside existing Party and administrative enforcement mechanisms, by which the Supreme People's Court self-initiated its role in imposing heightened judicial scrutiny over local—but not central—administrative monopolies. This reflects the Court's strong incentive to compete with local fiefdoms for control over local courts so as to construct a uniform legal system across China's vast territory. Part 4 explains why the Court's self-empowerment is best explained from a strategic perspective under which forward-looking judges interact with other actors interdependently.¹⁶ The Court has capitalized on central-local alienation and statutory ambiguity to supply real but limited judicial checks on local administrative monopolies in view of the costs and benefits that such judicial review brings to the state. Part 5 concludes with a prediction about the future of judicial review of administrative monopolies in China.

II. LENINIST ANTITRUST: THE POLITICAL ECONOMY OF REGULATING LOCAL ADMINISTRATIVE MONOPOLIES

Administrative monopoly can be found in any state-managed economy.¹⁷ Direct state control, inspired by Marxist-Leninist principles, permeated all aspects of the economy, from the supply of raw materials to the sale of end products, throughout the first three decades of the People's Republic.¹⁸ It was not until the 1980s, when China began reforms to liberalize aspects of the economy under then-Paramount Leader Deng Xiaoping that the problem of “administrative monopoly” began to materialize.¹⁹ Ironically, Deng's authoritarian state-supervised reforms had aggravated the problem in many ways, with local administrative elites acquiring virtually limitless power to

¹⁵ See Peter Kjaer & Ove K. Pedersen, *Translating Liberalization: Neoliberalism in the Danish Negotiated Economy*, in *THE RISE OF NEOLIBERALISM AND INSTITUTIONAL ANALYSIS* (John L. Campbell & Ove K. Pedersen eds., Princeton Univ. Press 2001); Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal & Barry R. Weingast, *The Analytical Narrative Project*, 94 AM. POL. SCI. REV. 696 (2000).

¹⁶ See Georg Vanberg, *Constitutional Courts in Comparative Perspective: A Theoretical Assessment*, 18 ANN. REV. POL. SCI. 167 (2015).

¹⁷ Wu & Liu, *supra* note 1, at 137.

¹⁸ Guo & Hu, *supra* note 2, at 272.

¹⁹ Yu & Zhang, *supra* note 7, at 194.

manage economic outcomes and thereupon commandeer the wealth derived from growth.²⁰ In contrast to Chairman Mao's overweening in economic affairs,²¹ the Dengist party-state retained control merely over ideology, the flow of information, the appointment of local officials,²² and the nationally strategic economic sectors such as heavy industry, public utilities, transportation, and banking,²³ while devolving to local officials authority over nearly all other dimensions of governance, ranging from implementation of laws, fiscal management, permission of investments, stewardship of state property, to formulation of regulations.²⁴ Dengist administrative reforms were so thorough that many cross-national indicators nowadays suggest that China, perhaps counterintuitively, has become one of the most decentralized countries in the world.²⁵

Decentralization is best analyzed by the standard principal-agent model:²⁶ the local party-state is an agent possessing unique first-hand information about local conditions, supposed to be advancing the interests of their principal, the central party-state. *De facto* federalism theoretically incentivizes local cadres to be creative and to experiment with best policies and measures, answer for their own prosperity, and speed entrepreneurialism and growth.²⁷ Local experiments, particularly noticeable in the case of agricultural reform,²⁸ can reveal important information to the center about regional variations and the potential national applicability of policy innovations. It should be no surprise that local empowerment has been an important ingredient in China's success.²⁹ And because the central party-state evaluates local performance strictly comparatively by noting their relative achievements, those cadres who have attained faster economic growth in their jurisdictions will

²⁰ Xianchu Zhang, *An Institutional Race: A Comparative Study of the Competition Law Regimes in India and China*, in CHINA, INDIA AND THE INTERNATIONAL ECONOMIC ORDER 577, 588 (Muthucumaraswamy Sornarajah & Jiangyu Wang eds., Cambridge Univ. Press 2010).

²¹ RONALD H. COASE & NING WANG, HOW CHINA BECAME CAPITALIST 147 (Palgrave Macmillan 2012).

²² See Chenggang Xu, *China's Political-Economic Institution: Regionally Decentralized Authoritarianism (RDA)*, in THE OXFORD COMPANION TO THE ECONOMICS OF CHINA 515, 515–19 (Shenggen Fan, Ravi Kanbur, Shang-jin Wei & Xiaobo Zhang eds., Oxford Univ. Press 2014).

²³ See TERESA WRIGHT, PARTY AND STATE IN POST-MAO CHINA (Polity 2015).

²⁴ MINXIN PEI, CHINA'S CRONY CAPITALISM: THE DYNAMICS OF REGIME DECAY 34 (Harvard Univ. Press 2016).

²⁵ See PIERRE F. LANDRY, DECENTRALIZED AUTHORITARIANISM IN CHINA: THE COMMUNIST PARTY'S CONTROL OF LOCAL ELITES IN THE POST-MAO ERA (Cambridge Univ. Press 2008).

²⁶ See WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 87–99 (Univ. of Chicago Press 2007).

²⁷ See Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995).

²⁸ COASE & WANG, *supra* note 21, at 148.

²⁹ ARTHUR R. KROEBER, CHINA'S ECONOMY: WHAT EVERYONE NEEDS TO KNOW 113 (Oxford Univ. Press 2016).

have better chances of promotion in the Party.³⁰ This has whetted fierce competition to maximize local economic growth.³¹ Against this background, China's real Gross Domestic Product ("GDP") grew at an astonishing average rate of over 9 percent per annum between 1979 and 2009.³²

The principal-agent relationship between the central party-state and a plethora of local party-states is complicated by a hardwired tension insofar as agents have interests of their own that may conflict with their principal.³³ The duty of local party-states to contribute their revenue to Beijing, for example, has goaded local cadres to pursue particularistic interests, which in turn create incentives for local protectionism.³⁴ Absent any meaningful respect for pro-competition values,³⁵ protectionist measures may take the form of acts creating or favoring local enterprises as sources of revenue,³⁶ or blocking or separating regional markets.³⁷ Decentralization maximized for local cadres the utility of extracting revenue informally through bribery and corruption, and that transformed them into attractive collusive allies of rent-seeking private interests.³⁸ Take for example the administrative licensing of private enterprises, where applicants bribe administrators normally by offering cash or non-pecuniary favors.³⁹ Rents flowing from local administrative monopolies are amongst other things used to bail state-owned or favored firms out of excessive operating costs.⁴⁰ With the blessing of such protective measures, these firms have little incentive to improve their operational efficiency, not inconsistent with Judge Learned Hand's observation in *Alcoa*⁴¹ that "possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress."⁴² In a desperate attempt to shield such enterprises from competition, local authorities have

³⁰ Wu & Liu, *supra* note 1, at 137.

³¹ VICTOR C. SHIH, *FACTIONS AND FINANCE IN CHINA: ELITE CONFLICT AND INFLATION* 4 (Cambridge Univ. Press 2008).

³² LINDA Y. YUEH, *THE ECONOMY OF CHINA* 21 (Edward Elgar 2010).

³³ See KENNETH A. SHEPSON & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* (W.W. Norton 1997).

³⁴ See Guo & Hu, *supra* note 2.

³⁵ Sailil K. Mehra & Yanbei Meng, *Against Antitrust Functionalism: Reconsidering China's Anti-Monopoly Law*, 49 VA. J. INT'L L. 379, 400 (2009).

³⁶ See Wentong Zheng, *State Capitalism and the Regulation of Competition in China*, in *ASIAN CAPITALISM AND THE REGULATION OF COMPETITION: TOWARDS A REGULATORY GEOGRAPHY OF GLOBAL COMPETITION LAW* 144 (Michael W. Dowdle, John Gillespie & Imelda Maher eds., Cambridge Univ. Press 2013).

³⁷ See Yu & Yu, *supra* note 3.

³⁸ PEI, *supra* note 24, at 243.

³⁹ See Melanie Manion, *Corruption by Design: Bribery in Chinese Enterprise Licensing*, 12 J.L. ECON. & ORG. 167 (1996).

⁴⁰ Loren Brandt, Hongbin Li & Joanne Roberts, *Banks and Enterprise Privatization in China*, 21 J.L. ECON. & ORG. 524, 525 (2005).

⁴¹ *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

⁴² *Id.* at 427.

resorted to interdicting the movement of products from other jurisdictions into their own.⁴³ The “examination and approval” system imposed on private companies by local Leninist party-states’ hardwired favoritism has radically increased the costs of market expansion for those firms, which suffer simply because they are less well connected to officialdom.⁴⁴ At the macro-level, the many artificial regulatory barriers raised by provincial administrations have prevented the spatial optimization of the Chinese economy in the teeth of the mutually beneficial situations of many regions.⁴⁵ China’s national economy is bedeviled by fragmentation and costly overregulation, which significantly undermine efforts by the central party-state to create a single internal market for goods and services.⁴⁶ Thus, the political influence of local governments in the coastal regions was so strong that, as of 2010, 93 of the country’s 100 wealthiest counties were located in coastal provinces, and as much as 90 percent of China’s exports originated from such provinces.⁴⁷

The political consequence of local protectionism is most daunting. Where collusive elites gain dominance over local cadres, they can trespass to such an extreme as to transform local party-states into “local mafia states.”⁴⁸ These routinely flout central directives on fiscal, tax, administrative and regulatory reform with brigand-like measures such as roadblocks, cargo seizures, *ad hoc* “taxes,” commercial surcharges and licensing fees.⁴⁹ Many local authorities now pose direct threats to the general line of maintaining regime stability through marketization and growth.⁵⁰ Intra-official competition, which unashamedly prioritizes results over rules,⁵¹ nudges local authorities toward infighting viciously to gouge higher rents, snuff citizens’ rights, and seize more land.⁵² Incumbent General Secretary Xi Jinping has admitted that unbridled corruption could gradually cause the Party to lose its grip on power.⁵³ Xi is hence determined to repair the tarnished reputation of

⁴³ Yu & Yu, *supra* note 3, at 83.

⁴⁴ Guangbin Yang, *Decentralization and Central-Local Relations in Reform-Era China*, in CHINA’S POLITICAL DEVELOPMENT: CHINESE AND AMERICAN PERSPECTIVES 254, 261 (Kenneth G. Lieberthal, Cheng Li & Keping Yu eds., Brookings Inst. Press 2014).

⁴⁵ Cheng Li, *China’s Communist Party-State: The Structure and Dynamics of Power*, in POLITICS IN CHINA: AN INTRODUCTION 192, 213 (William A. Joseph ed., Oxford Univ. Press 2d. ed. 2014).

⁴⁶ Wu & Liu, *supra* note 1, at 138–39.

⁴⁷ CHENG LI, CHINESE POLITICS IN THE XI JINPING ERA: REASSESSING COLLECTIVE LEADERSHIP 384 (Brookings Inst. Press 2016).

⁴⁸ PEI, *supra* note 24, at 243.

⁴⁹ See RONGXING GUO, AN INTRODUCTION TO THE CHINESE ECONOMY: THE DRIVING FORCES BEHIND MODERN DAY CHINA 170 (Wiley 2010); Xueguang Zhou, *The Institutional Logic of Collusion Among Local Governments in China*, 36 MOD. CHINA 47 (2010).

⁵⁰ See Eric C. Ip & Michael K.H. Law, *Decentralization, Agency Costs, and the New Economic Constitution of China*, 22 CONST. POL. ECON. 355 (2011).

⁵¹ Zheng, *supra* note 36, at 163.

⁵² Xu, *supra* note 22, at 519.

⁵³ XI JINPING, THE GOVERNANCE OF CHINA 432 (Foreign Languages Press 2014).

government agencies in the eyes of the citizenry through much-publicized campaigns against extravagance and corruption.⁵⁴ As information asymmetries widen in tandem with decentralization, local party-states have ever more incentives to deviate from the original terms of agency as prescribed by the central party-state.

Not surprisingly, therefore, the type of monopolism attracting the most criticism in all the decade-long debates over the draft Anti-Monopoly Law was none other than local administrative monopolies. The inclusion of provisions in the Anti-Monopoly Law outlawing governmental market misconduct was backed by the central authorities and strong public support, despite it might be seen as an anomaly from a comparative antitrust perspective, as state-led restraints of competition are normally dealt with by means other than antitrust law.⁵⁵ For instance, in the European Union (“EU”), state anticompetitive restraints are largely a matter for EU trade law; in the U.S., they are addressed under the dormant commerce clause of the United States Constitution.⁵⁶

The central party-state nonetheless faces a fundamental dilemma in designing the anti-administrative monopoly provisions of the Law: to maintain political power it must prevent attempts by local party-states to undermine its authority, yet to stimulate economic growth it must solicit the cooperation of the same locals and their collaborators.⁵⁷ Without a transition away from the existing Leninist constitutional framework, all attempts to eradicate administrative monopolies and their “economic warlordism” are politically doomed for the following reasons.⁵⁸ First, local officials who have benefited from decentralization will be keen to preserve the protectionist *status quo*, and will tenaciously resist offensives on their administrative-monopoly prerogatives.⁵⁹ By the same token, local investors whose successes depend on their ties with administrative monopolies will block reforms that threaten their entrenched rent-seeking privileges.⁶⁰ The central authorities, in order to govern, could not avoid relying on the same local bureaucratic interest group “collusion centers,” which intermediaries, in turn, would find

⁵⁴ STEIN RINGEN, *THE PERFECT DICTATORSHIP: CHINA IN THE 21ST CENTURY* 87 (Hong Kong Univ. Press 2016).

⁵⁵ Qian Hao, *An Overview of the Administrative Enforcement of China’s Competition Law: Origin and Evolution*, in *PROCEDURAL RIGHTS IN COMPETITION LAW IN THE EU AND CHINA* 39, 46 (Caroline Cauffman & Qian Hao eds., Springer 2016).

⁵⁶ See Thomas K. Cheng, *Abuse of Administrative Monopoly in China*, in *STATE-INITIATED RESTRAINTS OF COMPETITION* 35 (Edward Josef Drexel & Vicente Bagnoli eds., Elgar 2015).

⁵⁷ See JENNIFER GANDHI, *POLITICAL INSTITUTIONS UNDER DICTATORSHIP* xvii (Cambridge Univ. Press 2008).

⁵⁸ Xu, *supra* note 22, at 519.

⁵⁹ Wendy Leutert, *Challenges Ahead in China’s Reform of State-Owned Enterprises*, 21 *ASIA POL’Y* 83, 99 (2016).

⁶⁰ YUHUA WANG, *TYING THE AUTOCRAT’S HANDS: THE RISE OF THE RULE OF LAW IN CHINA* 158 (Cambridge Univ. Press 2015).

themselves superbly vantaged to stultify the central party-state by non-cooperation and half-measures.⁶¹ Second, central cadres will not have the willpower to permanently uproot administrative monopolies either, for they too abuse their administrative powers to favor state-owned enterprises, which still account for 40 percent of the country's GDP, even in sectors officially open to new entrants.⁶² A large government itself, the central party-state is simply not prepared to give up its colossal reserved intervention and control powers at all levels of the economy.⁶³

Seen in this light, the Anti-Monopoly Law, as an agency control mechanism for local administrative monopolies, has very definite limitations. A Leninist polity that shows no tendency to relinquish its own monopoly⁶⁴ is not the best prospect for drawing a prudent and consistent line between indispensable state intervention in the economy and illegal interference.⁶⁵ Considering the relevant provisions in the Law itself, Article 8 solemnly states: "administrative departments or organizations authorized by law and by regulation to carry out the duties of public affairs management shall not abuse their administrative powers to eliminate or restrict competition."⁶⁶ Article 32 defines as abuse for authorities to prohibit third parties to purchase or use the products of any suppliers but the authorized ones.⁶⁷ Article 33 purports to end local protectionism by outlawing discriminatory measures in various forms, including: discriminatory charges or charging standards that disfavor non-local products vis-à-vis local products; unequal inspection standards for local and non-local products; licensing requirements, barriers or measures intended to block the entry of non-local products.⁶⁸ Article 34 bars officials from adopting protectionist bidding procedures like one-sided publicity or discriminatory assessment standards.⁶⁹ Article 35 outlaws unequal treatment of non-local enterprises.⁷⁰ Article 36 forbids abuse of administrative powers to compel businesses to engage in monopolistic conduct.⁷¹

⁶¹ See Yadira González de Lara, Avner Greif & Saumitra Jha, *The Administrative Foundations of Self-Enforcing Constitutions*, 98 AM. ECON. REV.: PAPERS & PROC. 2008 105 (2008).

⁶² David Zweig, *China's Political Economy*, in *POLITICS IN CHINA: AN INTRODUCTION* 254, 255 (William A. Joseph ed., Oxford Univ. Press ed. Ed. 2014).

⁶³ Adrian Emch & Andy Huang, *Between Business and Government: The Addressees of Obligations Under the Anti-Monopoly Law*, in *CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS* 231 (Adrian Emch and David Stallibrass eds., Wolters Kluwer 2013).

⁶⁴ PEI, *supra* note 24, at 265.

⁶⁵ Jacob S. Schneider, *Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine*, 87 WASH. U. L. REV. 869, 870 (2010).

⁶⁶ Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 6 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517-23 (China), art. 8.

⁶⁷ *Id.*, art. 32.

⁶⁸ *Id.*, art. 33.

⁶⁹ *Id.*, art. 34.

⁷⁰ *Id.*, art. 35.

⁷¹ *Id.*, art. 36.

Article 37 imposes a ban on anticompetitive regulations that result from authorities' abuse of administrative powers.⁷²

Consistent with the central party-state's preference to hold its administrative monopoly powers in reserve, intervening only in the most egregious cases of local authority anticompetitive abuses that threaten its political monopoly, the Anti-Monopoly Law provides for a non-independent and decentralized model of non-judicial enforcement.⁷³ Article 9 erects an Anti-Monopoly Commission with no effective enforcement powers to simply coordinate the efforts of designated antimonopoly agencies under the State Council, currently the Ministry of Commerce, the National Development and Reform Commission, and the State Administration for Industry and Commerce.⁷⁴ The transaction costs for these agencies to take collective action are considerable; for instance, prosecuting an anticompetitive act involving both price and non-price elements raises potential enforcement conflict between the State Administration for Industry and Commerce and the National Development and Reform Commission.⁷⁵ "Police patrolling"⁷⁶ by disjoint, remote central agencies cannot avail to search and destroy the proliferation of local mafia states across a diverse country the population size of which is two times that of the European Union.

The Anti-Monopoly Law is silent on whether individuals or firms can sound "fire alarms"⁷⁷ to the central party-state by filing administrative lawsuits against local authorities for any anticompetitive abuse of administrative monopoly.⁷⁸ Article 51 provides that it is the higher-level administrative authority, not the courts, to rectify any anticompetitive administrative abuses.⁷⁹ The provision confines penalties to the officials "directly responsible" for the

⁷² *Id.*, art. 37.

⁷³ See Wendy Ng, *The Independence of Chinese Competition Agencies and the Impact on Competition Enforcement in China*, 4 J. ANTITRUST ENFORCEMENT 188 (2015).

⁷⁴ H. STEPHEN HARRIS, JR., PETER J. WANG, YIZHE ZHANG, MARK A. COHEN & SEBASTIEN J. EVRARD, *ANTI-MONOPOLY LAW AND PRACTICE IN CHINA* 188 (Oxford Univ. Press 2011); Yong Huang & Richean Zhiyan Li, *An Overview of Chinese Competition Policy: Between Fragmentation and Consolidation*, in *CHINA'S ANTI-MONOPOLY LAW: THE FIRST FIVE YEARS* 1, 6 (Adrian Emch and David Stallibrass eds., Wolters Kluwer 2013).

⁷⁵ Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law - Achievements and Challenges*, 1 J. ANTITRUST ENFORCEMENT 247, 268 (2013).

⁷⁶ See Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

⁷⁷ See Arthur Lucia & Matthew D. McCubbins, *Learning from Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994).

⁷⁸ Jianguyan Ma, *Market Integration as the Goal of Competition Law: The EU Experience and Its Implications for China*, in *MARKET INTEGRATION: THE EU EXPERIENCE AND IMPLICATIONS FOR REGULATORY REFORM IN CHINA* 15, 26 (Niels Philipsen, Stefan E. Weishaar & Guangdong Xu eds., Springer-Verlag 2016).

⁷⁹ Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 6 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517-23 (China), art. 51.

abuse,⁸⁰ exempting those who abetted, masterminded or condoned it. This is a very problematic provision, as enforcement against administrative monopolies is to be taken up by the same class of officials as the suspects, only hierarchically superior, sidelining the rights and interests of those outside its chain of command and control.⁸¹ Predictably, enforcement by the central party-state has not been notably active or methodical, and investigations of their inferiors by administrative superiors on administrative monopoly matters have been extremely rare.⁸² This has led one commentator to dub the Law a “toothless tiger.”⁸³

The omission from Article 51 of judicial remedies is not a mere coincidence, but a confirmation that the Law’s drafters had no intention whatsoever to empower the courts to conduct judicial review of administrative monopoly. At the time of Article 51’s drafting, the Administrative Litigation Law 1990 was the statute that formed the basis of the courts’ judicial review jurisdiction in China. Article 11 of this Law made it abundantly clear that only “concrete,” as opposed to “abstract” administrative acts could be subject to challenge before the courts; “concrete” acts are acts that target specific legal persons, whereas “abstract” acts refer to those that have a “general application.”⁸⁴ The Administrative Litigation Law’s ban on judicial review of “abstract” administrative acts had thus preempted, for all practical purposes, the review of administrative monopolies, because abuses of market regulatory powers tend to take the form of general policy formulae, rather than particularistic official actions against specific individuals.⁸⁵ To put it concretely, under this ban, a hypothetical non-local firm which has reluctantly paid discriminatory charges could merely bring a lawsuit against the impugned authority for the “concrete” act of inflicting charges in that particular instance, but not the “abstract” policy promulgated by the same authority that originated the charges in the first place. The inevitable effect of this restriction must be that the firm would have little incentive to seek judicial review even of the “concrete” act, for there is no guarantee that it would not be similarly charged iteratively under the discriminatory policy, which remains intact and unaltered, any nominally “successful” challenge notwithstanding.

⁸⁰ XIAOYE WANG, *THE EVOLUTION OF CHINA’S ANTI-MONOPOLY LAW* 432 (Edward Elgar 2014).

⁸¹ SHENG HONG, NONG ZHAO & JUNFENG YANG, *ADMINISTRATIVE MONOPOLY IN CHINA: CAUSES, BEHAVIORS AND TERMINATION* 140 (World Scientific 2015).

⁸² WANG, *supra* note 72, at 356.

⁸³ Xianchu Zhang, *China’s “Dual Track” Legislation on Business Organizations and the Effects of the Anti-Monopoly Law*, in *LAW, WEALTH AND POWER IN CHINA: COMMERCIAL LAW REFORMS IN CONTEXT* 142, 157 (John Garrick ed., Routledge 2011).

⁸⁴ ALBERT H.Y. CHEN, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA* 296 (LexisNexis 2011).

⁸⁵ HONG, ZHAO & YANG, *supra* note 73, at 134.

Meanwhile, local conditions are so hostile to the development of an effectual national policy, that the provisions of the Anti-Monopoly Law governing administrative monopolies have little chance to mature into anything but minimalist policy statements which are desultorily enforced.⁸⁶ But this state of affairs has never precluded a monitoring role for the people's courts in ways unforeseen by the Law's drafters. Empirical research, indeed, has found that fragmentation of central-local authority, as in the United States and the EU, operates to invigorate judicial policing so as to hold all sides to federal and supranational commitments, to their mutual benefit.⁸⁷ Where there is "significant and sustained interest" in developing centralized economic policy, national courts have all the more incentives to act on behalf of the national state against its local administrative agents.⁸⁸ As will be seen in the next Part, an apex court, even when constrained by authoritarianism, which aims to reduce the central party-state's agency costs while also shielding the authority and resources of those local courts subordinated to itself, will be highly motivated to devise a jurisprudence aggressive in its scrutiny of outrageous cases of local protectionism, but minimalist with equally outrageous central administrative monopolies. In this context, local courts function as a kind of "fire alarm" that enables aggrieved parties to identify flagrant incidents of malfeasance and alert the central party-state as to what sort of action to take.⁸⁹ No backlash against judicial self-empowerment will ensue inasmuch as the Court stops short of a full-blown war against all administrative monopolies by an excessive level of judicial review which might lose the crucial support of the central party-state.

III. AN ANALYTIC NARRATIVE OF THE ADMINISTRATIVE MONOPOLY JURISPRUDENCE OF THE SUPREME PEOPLE'S COURT

A. The Supreme People's Court as a Centrifugal Force

The Supreme People's Court, according to the Constitution of the People's Republic of China of 1982, is the "highest judicial organ" of the state, charged with the power to "supervise the administration of justice by the local People's courts at different levels and by the special People's courts;"⁹⁰

⁸⁶ Zheng, *supra* note 36, at 162–63.

⁸⁷ MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 136–48 (Oxford Univ. Press 2002).

⁸⁸ Michael W. Dowdle, *On the Regulatory Dynamics of Judicialization: The Promise and Perils of Exploring "Judicialization" in East and Southeast Asia*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* 28 (Tom Ginsburg & Albert H.Y. Chen, Routledge 2009).

⁸⁹ Tom Ginsburg, *Administrative Law and the Judicial Control of Agents in Authoritarian Regimes*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 63 (Tom Ginsburg & Tamir Moustafa eds., Cambridge Univ. Press 2008).

⁹⁰ XIANFA art. 127 (1982) (China).

yet obligated all the same, in line with socialist legal principles, to be “responsible to the National People’s Congress and its Standing Committee.”⁹¹ It is unabashedly a “political court” with a clear mandate established under the Chinese Communist Party to uphold State security at all costs.⁹² No Chinese judge is entitled to adjudicate without considering the political and social consequences of his judgment, as interpreted by the Party and the state.⁹³ The President of the Court is always a member of the Party and its Central Political-Legal Commission. It is primarily a political position that requires neither legal qualifications nor prior experience in legal practice. Despite this, it is worth noting that the nine Vice Presidents and many other judges on the Court typically hold law degrees, including doctorates, obtained not only from prestigious Chinese universities, but also institutions in the United States, Europe and Australia.⁹⁴ The Judicial Committee of the Court, its executive body, has been described as the “most professionalized” of all of China’s legal bodies.⁹⁵ Day-to-day monitoring of the Court by external Party officials is largely absent, for the Court’s Party Group is comprised of the Justices on the Judicial Committee.⁹⁶

The Court is by all accounts exceptional in the universe of apex judicial bodies.⁹⁷ First, the 350 judges on the Supreme People’s Court,⁹⁸ in contrast to the 9 justices on the United States Supreme Court and the 19 judges on the Russian Constitutional Court, gives it the appearance of a legislature rather than a court.⁹⁹ Indeed, the Supreme People’s Court exercises a powerful quasi-legislative function,¹⁰⁰ promulgating so-called “Judicial Interpretations” outside of court proceedings. Despite the somewhat misleading label, Judicial Interpretations function effectively as statutes within the Chinese legal system, as they determine the specifics of imprecise provisions in primary legislation, exclude certain statutorily permissible claims,

⁹¹ *Id.*, art. 128.

⁹² Shumei Hou & Ronald Keith, *China’s Supreme People’s Court within the “Political-Legal System*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 180 (Björn Dressel ed., Routledge 2012).

⁹³ See generally Weixia Gu, *The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?*, 1 *CHINESE J. COMP. L.* 303 (2013).

⁹⁴ Li, *supra* note 47, at 197.

⁹⁵ Suli Zhu, “Judicial Politics” as State-Building, in *BUILDING CONSTITUTIONALISM IN CHINA* 27 (Stephanie Balme & M.W. Dowdle eds., Palgrave Macmillan 2009).

⁹⁶ Eric C. Ip, *The Supreme People’s Court and the Political Economy of Judicial Empowerment in Contemporary China*, 24 *COLUM. J. ASIAN L.* 367, 381 (2011).

⁹⁷ Eric C. Ip, *The Supreme Court and the Making of Public Policy in Contemporary China*, 7 *MICH. J. PUB. AFF.* 1, 4–5 (2010).

⁹⁸ Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 *HARV. L. REV.* 2213, 2216 (2016).

⁹⁹ RANDALL PEERENBOOM, *COURTS AS LEGISLATORS: SUPREME PEOPLE’S COURT INTERPRETATIONS AND PROCEDURAL REFORMS* 4 (The Foundation for Law, Justice and Society 2007).

¹⁰⁰ Björn Ahl, *Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People’s Court*, 217 *CHINA Q.* 121, 135–36 (2014).

supply new grounds of judicial rule-making absent from primary legislation in a general and abstract manner, and so on.¹⁰¹ In fact, Judicial Interpretations are sometimes longer than the actual primary legislation that they interpret, and reflect the practical experience of judges in handling legal issues that emerge from adjudication of cases under the national laws in question.¹⁰² The vast corpus of Judicial Interpretations built up by the Court over the years has begun to usurp the legislative function of the National and Local People's Congresses.¹⁰³ Despite this, the Court is accustomed to publicly soliciting the opinions of the Standing Committee of the National People's Congress and the Legislative Affairs Office of the State Council before the drafting of a Judicial Interpretation, in order to minimize transaction costs arising from private consultations at a later stage. The official endorsement of the Court's position by the Standing Committee and the State Council is often crucial to the local courts in order to withstand backlashes from local People's Congresses against unpopular Judicial Interpretations.¹⁰⁴

The *de facto* "legislative" *modus operandi* of the Court is evident from its project beginning in 2009 to draft a Judicial Interpretation governing private antitrust lawsuits under the Anti-Monopoly Law. This "interpretive" process took three years during which the Court frequently solicited feedback from stakeholders and repeatedly revised the text. Interestingly, foreign actors who contributed to this Interpretation include the United States government, the American Bar Association, the European Union Chamber of Commerce, the Japanese Chamber of Commerce, and the group of competition law experts at the China World Trade Organization Research Center.¹⁰⁵ Indeed, the Court has come to play a consequential role by issuing a wide variety of Judicial Interpretations in areas beyond antitrust, regardless of the discontent which any given Interpretation may draw from members of the National People's Congress who out of institutional self-interest tend to object to the orientation and pertinacity of the Court's judicial activism.¹⁰⁶ It is fair to say

¹⁰¹ Nicholas C. Howson, *Judicial Independence and the Company Law in the Shanghai Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 134, 150 (Randall Peerenboom ed., Cambridge Univ. Press 2010).

¹⁰² Randall Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization, and Dejudicialization in China*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES 175, 183–84 (Tom Ginsburg & Albert H.Y. Chen eds., Routledge 2009).

¹⁰³ Eric C. Ip, *Judicial Review in China: A Positive Political Economy Analysis*, 8 REV. L. & ECON. 331, 358 (2012).

¹⁰⁴ Keith J. Hand, *Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139, 247 (2013).

¹⁰⁵ Xu & Zhang, *supra* note 3, at 290.

¹⁰⁶ RONALD C. KEITH, ZHIQIU LIN AND SHUMEI HOU, *CHINA'S SUPREME COURT* 63 (Routledge 2014).

that the Court is no pawn of the party-state, but an institution committed to its long-term interest in a professionalized judiciary.¹⁰⁷

Second, although formally China is a unitary state, the Supreme People's Court cannot take the vast majority of cases of final adjudication under China's four-tier court system. No matter how politically contentious a case may be, a local court will normally assume jurisdiction over the case and the decision rendered may be appealed, once and for all, to a court of the immediately higher rank. Most substantive hearings before the Supreme People's Court concern the approval of death sentences imposed by other courts;¹⁰⁸ the rest of its docket consists of cases involving substantial monetary claims or factual disagreements, but not administrative disputes.¹⁰⁹ In brief, the Court cannot on its appellate jurisdiction function as an effective vehicle for formulating any kind of administrative antimonopoly jurisprudence. That said, the Court has long creatively navigated extra-appellate channels of influence over the decisions of 31 provincial high courts, 409 intermediate courts, 3,117 courts of first instance, and nearly 190,000 judges.¹¹⁰ One such channel is called the "referral system," under which a lower court seeks direction from the next higher court on an issue currently at bar, no matter how detrimentally this may affect the rights of parties on appeal to the same court.¹¹¹ "Replies" from the higher court, despite only technically binding, are in practice *de facto* binding on the case at bar and in subsequent cases. Respecting and giving full effect to Replies as well as to Judicial Interpretations of the Supreme People's Court can relieve the political pressure exerted on local judges handling politically sensitive cases.¹¹²

Another channel is the system of Guiding Cases, dubbed as "common law with Chinese characteristics" by one of the present authors,¹¹³ which are meant not only to standardize the judicial response in similar cases, but also to guide lower courts on the applicable legal principles as well as the appropriate style of writing judgments.¹¹⁴ A Guiding Case is a lower court decision that typifies the various fact patterns of an entire class of legal disputes, followed by solutions which the Supreme People's Court considers appropriate. With the Court's *imprimatur*, even the lowest-level cases designated as Guiding Cases may become effectively binding on all courts throughout

¹⁰⁷ Ahl, *supra* note 92, at 122.

¹⁰⁸ QIANFAN ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* 182 (Hart Pub. 2012).

¹⁰⁹ YUWEN LI, *THE JUDICIAL SYSTEM AND REFORM IN POST-MAO CHINA: STUMBLING TOWARDS JUSTICE* 180 (Routledge 2016).

¹¹⁰ PEI, *supra* note 24, at 217.

¹¹¹ Weixia Gu, *Courts in China: Judiciary in the Economic and Societal Transitions, in ASIAN COURTS IN CONTEXT* 487, 510 (Jiunn-rong Yeh & Wen-Chen Chang eds., Cambridge Univ. Press 2015).

¹¹² Hand, *supra* note 96, at 242.

¹¹³ Ip, *supra* note 88, at 409.

¹¹⁴ Gu, *supra* note 103, at 509.

China.¹¹⁵ Compared to Judicial Interpretations and Replies, Guiding Cases are relatively costless for the Court to produce, for it needs not originate sophisticated documents while juggling stakeholder preferences, but rather react to legal developments promptly by selecting an appropriate case from a rich corpus of actual and ready-made cases.¹¹⁶ Yet another channel of influence is for the Supreme People's Court to publish interviews and scholarly articles of its own in the *People's Court Daily*, the Court's authoritatively official and closely supervised in-house mouthpiece, which is nationally circulated and regularly read by lower court judges to keep surely abreast of the latest policy position of the nation's apex judicial organ.

As a national, central institution resident in Beijing, the Supreme People's Court and its preferences are expected to be better aligned with those of the central party-state, of which it is part, than those of local party-states. Evidently, the Court has adopted as its main goal the construction of a fair and transparent legal environment which fosters sustainable economic growth.¹¹⁷ But the Court faces a distinct agency problem as the administrative headquarters of the entire system of Chinese courts. Although it directly supervises all lower courts, local judges may defect from its preferences in pursuing particularistic local interests.¹¹⁸ Indeed, courts of first instance rather often disregard instructions from higher-level courts in order to protect the economic interests of their own region. Their defection is also in part due to local authorities' competition with the Supreme People's Court over control of the local courts. Local court leaders commonly give priority to local Party committees and governments, the chief driving forces behind "local protectionism."¹¹⁹ Worst of all, local authorities accused of anticompetitive acts may also be those who make the courts' personnel and budgetary decisions.¹²⁰ It is therefore not surprising that most administrative monopoly cases are either simply dismissed or decided in favor of governmental defendants.¹²¹ This obviously poses a grave threat to the consistent and uniform enforcement of laws throughout China, including Judicial Interpretations in policy domains extending far beyond antitrust.¹²² This concern has driven the Supreme People's Court to single out local protectionism as the riskiest challenge to the process of judicial reform.

¹¹⁵ Ahl, *supra* note 92, at 128.

¹¹⁶ *Id.*, at 136.

¹¹⁷ Cheryl Xiaoning Long & Jun Wang, *Judicial Local Protectionism in China: An Empirical Study of IP Cases*, 42 INT'L REV. L. & ECON. 48, 59 (2015).

¹¹⁸ Gu, *supra* note 103, at 499.

¹¹⁹ YOUNG NAM CHO, LOCAL PEOPLE'S CONGRESSES IN CHINA: DEVELOPMENT AND TRANSITION 80 (Cambridge Univ. Press 2009).

¹²⁰ Qianfan Zhang, *Judicial Reform in China: An Overview*, in CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 17, 19 (John Garrick and Yan Chang Bennett eds., Routledge 2016).

¹²¹ Xu & Zhang, *supra* note 3, at 273.

¹²² ZHANG, *supra* note 100, at 182.

B. Constructing Judicial Review of Local Administrative Monopoly

This Part describes the jurisprudence which the Supreme People's Court has been developing to curb protectionist administrative monopolies, as laid out in its Judicial Interpretations, Guiding Cases, and *People's Court Daily* publications. On August 1, 2008, the day the Anti-Monopoly Law entered into force, Justice Yang Linping, Deputy President of the Court's Administrative Division, published an article in the *People's Court Daily* titled "Ten Focal Points of the Anti-Monopoly Law and Judicial Review."¹²³ The article was especially significant in view of the Law's silence on whether or not the anti-competitive acts of government agencies could be subject to judicial review. Justice Yang was rather emphatic in asserting that China's courts indeed possess authority to scrutinize "concrete" administrative measures,¹²⁴ with reference to four criteria, namely legality, reasonableness, competitiveness, and security. Yang then proceeded to make this revealing statement: regardless of the kind of administrative behavior that is brought to the courts, the courts should "conduct a legality review of that behavior, that is, to conduct a comprehensive review," and thus review "whether the ascertained facts are clear;" "whether legitimate legal procedures have been adhered to;" "whether there is any abuse of power and *ultra vires*;" "whether there is unfairness;" "whether legal responsibilities have been discharged;" "whether the administrative act on the whole is consistent with not just "the criterion of lawfulness, but also the criterion of reasonableness." Irrespective of whether the lower courts have in practice followed this statement or not, the statement was undoubtedly a highly provocative self-assertion of judicial power by Chinese standards, especially given the lack of an express statutory mandate. The fact that the said article has never been retracted and that Yang was not only not demoted, but rather promoted to the Court's elite Judicial Committee in 2014, suggests that her views are not unrepresentative of the Court's.

Three months later, in a *People's Court Daily* interview, an unnamed spokesman for the Administrative Division of the Court affirmed Yang's position *verbatim*, while providing guidance on the kind of administrative monopoly acts which are justiciable by the courts.¹²⁵ Recall that, at the time, the Administrative Litigation Law explicitly excluded from judicial review any challenge against "abstract" administrative acts, which by definition must include most instances of administrative monopoly. The Administrative Division spokesman effectively watered down this blanket ban by clarifying

¹²³ Linping Yang, *Ten Focal Points of the Anti-Monopoly Law and Judicial Review*, PEOPLE'S COURT DAILY, Aug. 1, 2008.

¹²⁴ See HARRIS, WANG, ZHANG, COHEN & EVRARD, *supra* note 67.

¹²⁵ Lan Liu, *Strengthening Anti-Monopoly Judicial Review to Protect Fair Competition According to the Law: An Interview with the Head of the Administrative Division of the Supreme People's Court on the Applicability of the Anti-Monopoly Law*, PEOPLE'S COURT DAILY, Nov. 3, 2008, <http://old.chinacourt.org/html/article/200811/03/328394.shtml>.

that authorities may not seek to avoid judicial review by pinning the label “abstract” to their administrative acts; rather, the act’s “concreteness” depends on its actual content; moreover, the same act may harbor both “concrete” and “abstract” implications.¹²⁶ This clarification not only gave the courts more leeway to bypass statutory constraints on their power to review abstract acts, but also signaled that the Court preferred more stringent judicial control of administrative monopolies, by specifically preventing collusive officials from escaping liability on the basis of purportedly “abstract” policy-making.

On April 9, 2012, the Court handed down its decision in the case of *Luwe* (*Fujian*) *Salt Industry Import and Export Co. Suzhou Branch v. The Salt Administration Bureau of Suzhou Municipality, Jiangsu Province*.¹²⁷ A private company from Fujian Province challenged in judicial review proceedings the penalties imposed on it by the Suzhou Municipality Salt Administration Bureau, a local authority in Jiangsu Province. The Bureau justified the penalties on the basis of local rules on administrative licensing and the purchase and transportation of industrial salt. The company further alleged the Jiangsu rules were in violation of national law. In two years of legal proceedings, the Jinchang District People’s Court sought instructions from the Suzhou Intermediate People’s Court, the Jiangsu High People’s Court, and finally the Supreme People’s Court. The latter reportedly took the case very seriously: besides conducting its own research, it had solicited opinions from the Law Committee of the National People’s Congress and the State Council’s Legislative Affairs Office before issuing its Reply in January 2011. The Reply in *Luwe* conclusively deprived local governments of authority to impose any system of industrial salt transportation permits, or to sanction any company other than a salt industry enterprise with an administrative penalty for running a wholesale salt business. The District People’s Court proceeded to rule in favour of the company on that basis. Even though it forbade what is properly an “abstract” administrative act, the decision in this case was nationally binding on every court in the land, upon comparable facts,¹²⁸ by virtue of a separate policy decision of the Court issued in 2015.¹²⁹

On October 22, 2015 the Court published a set of model cases, as distinct from formal precedents, which collectively came to be known as the “Classic Economic and Administrative Cases.” One of them, *Nanjing Faershi New*

¹²⁶ *Id.*

¹²⁷ Mei Gechlik & Di Dai, *Guiding Case No. 5, Monopoly in China’s Salt Industry, and Amendments to the Legislation Law and the Administrative Litigation Law*, CHINA GUIDING CASES PROJECT, Jun. 30, 2015, <https://cgc.law.stanford.edu/commentaries/13-gechlik-and-dai>.

¹²⁸ *Id.*

¹²⁹ Detailed Implementing Rules on the Provisions of the Supreme People’s Court Concerning Work on Case Guidance of 2015 (Discussed and Passed by the Adjudication Committee of the Supreme People’s Court, Apr. 27, 2015, effective May 13, 2015), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2015/10/guiding-cases-rules-20150513-english.pdf>.

Energy Company Limited v. Nanjing Jiangning District People's Government,¹³⁰ bears significant implications that are applicable to administrative monopolies. The defendant local authority had designated a favored company to be exclusively in charge of food waste disposal in the entirety of its jurisdiction, and threatened to punish any slaughterhouses that refused to contract with the designated company, all without tendering or other competitive procedures. The Nanjing Intermediate People's Court ruled in the claimant's favor and invalidated the impugned acts for violating Article 32 of the Anti-Monopoly Law and Section 19 of the Jiangsu Provincial Regulations on Food Waste Management. The Supreme People's Court, in its notes classicizing *Nanjing Faershi*, condemned the local administration for "eliminating other potential market participants and creating an illegal situation through the use of administrative power to restrict market competition." It also proclaimed that "as the rule of law progresses constantly, citizens, legal persons, and other market actors are bound to play a more important role in using the legal weapon of administrative litigation to safeguard rights, supervisory efforts, and regulation of administrative monopoly according to law."¹³¹

The costs of local judicial defiance cannot be reined in unless local administrative malfeasance is reined in simultaneously. To this end, the Court recently set up several "circuit tribunals" with jurisdiction over important administrative cases—certainly including those relating to administrative monopoly and local protectionism,¹³² to ride herd on the uniform application of national law at the local level. In January 2013, the Court, clearly with a view to eliminating the influence of the administrative monopolies over the judges reviewing them, decided that selected Intermediate People's Courts, which the Provincial High People's Courts supervise, were to centrally allocate jurisdiction of the administrative cases heard by the lowest Basic People's Courts, the ones most susceptible to influence.¹³³ It is noteworthy that the 31 Provincial High Courts tend to be staffed by better qualified judges who are loyal to the cause of the Supreme People's Court and relatively removed from local particularistic influence.¹³⁴ Mostly located in metropolitan areas, these courts are able to handle commercial cases competently and professionally.¹³⁵

¹³⁰ SUPREME PEOPLE'S COURT, CLASSIC ECONOMIC AND ADMINISTRATIVE CASES OF THE PEOPLE'S COURTS Case No. 1 (Oct. 22, 2015) (China), <http://www.court.gov.cn/zixun-xiangqing-15842.html>.

¹³¹ *Id.*

¹³² Zhang, *supra* note 112, at 28.

¹³³ Jianfu Chen, *Efforts Towards Procedural Justice in Post-Mao China*, in CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING 94, 104 (John Garrick and Yan Chang Bennett eds., Routledge 2016).

¹³⁴ CHO, *supra* note 111, at 79.

¹³⁵ Minxin Pei, Zhang Guoyan, Pei Fei & Chen Lixin, *A Survey of Commercial Litigation in Shanghai Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 221, 232 (Randall Peerenboom ed., Cambridge Univ. Press 2010).

A year later, the Supreme People's Court's campaign against local administrative monopolies reached a zenith when it finally received official ratification by the Standing Committee's recent amendment of the Administrative Litigation Law, which, upon becoming effective on May 1, 2015, formally abolished in Article 12 the ban on judicial review of "abstract" administrative acts, in alignment with the Court's continuous expansion of its *de facto* power to review the substance of government decisions.¹³⁶ Unprecedentedly, Article 12(8) of this Law provides for an unambiguous statutory authorization for the courts to hear suits brought forth by "citizens, legal persons or other organizations" "claiming that an administrative agency has abused its administrative power to preclude or restrict competition;"¹³⁷ Article 53 also establishes, for the first time, the statutory jurisdiction of courts to judicially review the legality of regulatory documents—undoubtedly "abstract" acts—issued not only by local government departments, but even by the State Council.¹³⁸

On the same day as the amended Administrative Litigation Law entered into force, the Court issued its own Interpretation on Several Issues Concerning the Application of the Administrative Litigation Law of the People's Republic of China.¹³⁹ Article 9 of this Interpretation addressed the decentralized regime of enforcement contained in the Anti-Monopoly Law, which, as noted above, risked establishing collusive senior bureaucrats as judges of their own causes. The Court opined that if the reconsidering authority sustains the challenged administrative act, then a court should concurrently review the legality of that act and of the reconsideration procedure itself, always placing on the authorities the burden of proving the legality of either. Article 21 of the Interpretation admonishes that a reviewing court "shall not rely on an illegal regulatory document to determine the legality of an administrative action and shall state so in its legal reasoning," and further authorizes it to "provide the enacting authority of the regulatory document with recommendations and... send copies to the people's government at the corresponding level or the administrative agency at the level immediately above."¹⁴⁰ This Interpretation expands the powers of courts to render to

¹³⁶ See Huang, Cheng-yi & David S. Law, *Proportionality Review of Administrative Action in Japan, Korea, Taiwan, and China*, in *COMPARATIVE LAW AND REGULATION: UNDERSTANDING THE GLOBAL REGULATORY PROCESS* 305 (Francesca Bignami & David Zaring eds., Edward Elgar 2016).

¹³⁷ Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 6 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.* 517–23 (China), art. 12(8).

¹³⁸ *Id.*, art. 53.

¹³⁹ Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Administrative Litigation Law of the People's Republic of China (Interpretation No. 9 [2015] of the Supreme People's Court, promulgated by the Judicial Committee of the Supreme People's Court, Apr. 20, 2015, effective May 1, 2015) (China), <http://www.lawinfochina.com/display.aspx?id=20726&lib=law>.

¹⁴⁰ *Id.*, art. 21.

local governmental authorities advisory opinions on refashioning their competition policies in line with the law.

In his report to the Standing Committee of the National People's Congress of November 2, 2015, Chief Justice Zhou Qiang summed up the Supreme People's Court's latest achievements as follows: under its auspices, the People's courts have since 2010 adjudicated 22,000 cases similar to *Luxwei* so as to "knock down departmental monopoly and local protectionism and push forward the clear delineation of powers and responsibilities, justice and fairness, transparency and efficiency, and the protection of the rule of law in the supervision of markets."¹⁴¹ The Chief Justice made no secret of his conviction that courts at all levels "should voluntarily discharge their administrative adjudication duties and tightly combine their service to the Party and the central party-state," and "should, through adjudicating administrative cases according to law ensure the uniform enforcement of the Constitution and laws, and guarantee the smooth enforcement of central directives."¹⁴²

IV. DISCUSSION

Despite the Supreme People's Court's enhancing judicial control of local administrative acts, it must be remembered that it limited its outreach to local administrative monopolies, eschewing the central ones. The Court has taken circumspect, incremental steps to remedy the catastrophes caused by administrative market abuses only in the most egregious cases, sidestepping an "all-in" attack on the problem, even though it imperils the central party-state. It must be remembered that, after all, the Court is nested in a web of central party-state bureaucracies. To avoid the kind of backlash it weathered in its abortive attempt back in 2002 to render the Chinese Constitution justiciable, it understands that success or failure depends crucially on anticipating the actions of the Politburo Standing Committee of the Communist Party, and on disincentivizing the Standing Committee of the National People's Congress to veto its decisions.¹⁴³ Given the ancillary role of the judiciary, the best strategy for the Court is to curb local protectionism by supplying meaningful but limited judicial scrutiny in view of the costs and benefits accruing to the state.¹⁴⁴ The factors to be examined below yield a conclusion that the Court may have inadvertently exceeded the limits by over-intensifying the scrutiny of judicial review.

¹⁴¹ QIANG ZHOU, REPORT OF THE SUPREME PEOPLE'S COURT ON THE SITUATION OF ADMINISTRATIVE ADJUDICATION WORK, DELIVERED ON THE SEVENTEENTH MEETING OF THE TWELFTH STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS (Nov. 2, 2015), http://www.npc.gov.cn/npc/xinwen/2015-11/03/content_1949926.htm.

¹⁴² *Id.*

¹⁴³ See generally Ip, *supra* note 95.

¹⁴⁴ See Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1891, 1922 (2016).

Consider the incremental benefits the Court could offer by supplying judicial review of greater intensity than what the framers of the Anti-Monopoly Law originally intended. The Court lacks competence to intervene in the vast majority of cases of local protectionism; nevertheless, its high-profile opinions can reveal and publicize information about local authorities' state of compliance with the Anti-Monopoly Law. Given that all local party-states would have no incentive to comply with the Law if the risk of being exposed were not credible, the select instances, publicized by the Court, of local administrators being excoriated for running administrative monopolies serve as useful benchmarks that may, however minimally, motivate other defiant locals to converge to a compliance equilibrium.¹⁴⁵ The landmark amendment to the Administrative Litigation Law, effective in 2015, was the result of the Court's decade-long lobbying efforts to centralize the responsibilities of judicial administration in its own hands and those of the Provincial High Courts.¹⁴⁶ Under the new arrangements, a Provincial High Court, with the approval of the Supreme People's Court, may now designate courts of first instance to accept cross-regional cases. By enabling local courts to take aggressive action against alien local authorities, the Court can bring principal-agency problems to the central party-state's attention by "fire alarms" which yield scarce, valuable information about the local authorities' behavior as agents in the vast expanse of China. The sheer scale of the Chinese bureaucracy redoubles the transaction costs of centralized control, for the profusion of local authorities in the nested hierarchy of regions makes anticompetitive abuses very difficult to detect.¹⁴⁷ An authoritarian polity makes it all the more difficult to collect accurate information because the usual discovery mechanisms, such as free press and watchdog interest groups, are forbidden in China.¹⁴⁸ Consequently, in the past decade, expectations have grown significantly among the citizenry and economic actors that the courts ought to intervene as impartial arbiters of civil and commercial disputes, including those that involve state-owned entities.¹⁴⁹

But there are significant limits to the involvement of the Supreme People's Court in the antimonopoly campaign. Generally speaking, authoritarian politics has no leeway for courts to function as independent third parties to enforce pre-commitments between key political actors.¹⁵⁰ Authoritarian rulers can conveniently hamstring courts by forbidding access to them, raising procedural and pecuniary barriers to access, and credibly threatening

¹⁴⁵ Ip & Law, *supra* note 50, at 366.

¹⁴⁶ Ip, *supra* note 88, at 415.

¹⁴⁷ LANDRY, *supra* note 25, at 258.

¹⁴⁸ Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANN. REV. L. SOC. SCI. 281, 283 (2014).

¹⁴⁹ Gu, *supra* note 103, at 519.

¹⁵⁰ MILAN W. SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE 1* (Cambridge Univ. Press 2012).

retaliations such as removals and reversals to pressurize judges to conform.¹⁵¹ This sufficiently explains why the Court's anti-administrative monopoly jurisprudence never impinges on central administrative monopolies, despite that the Anti-Monopoly Law makes no formal distinction between central and local liability. Moreover, local courts cannot stray too far from the preferences of local administrative authorities without consistent, responsive support from higher up. Judicial over-enforcement could easily result in diminishing returns and the proliferation of political costs to the central authorities, in view of the fact that corruption permeates China's "captured" judicial system itself,¹⁵² involving judges of every rank, level of education, and income,¹⁵³ and that the overall quality of the people's courts remains low and inconsistent.¹⁵⁴ The Supreme People's Court, even as the most prestigious court in China, is still in search of legitimacy of its own. Justice Xi Xiaoming, one of the Court's non-executive Vice Presidents, was put under investigation in July 2015 for his alleged collusion with a local coal company.¹⁵⁵ Oversupply of judicial review might also yield unintended negative consequences. Justice Jiang Bixin, another Vice President, has extrajudicially cautioned against "overly strengthening the supervision function of courts."¹⁵⁶ And in fact, state-owned enterprises and domestic companies are generally distrustful of courts and prefer to resolve their disputes through administrative tribunals or other informal dispute resolution mechanisms.¹⁵⁷ Courts scrutinizing acts of administrative monopolies may, moreover, be forced to confront the entire local party-state structure, inviting violent retaliations that might undermine judicial autonomy and capacity at regional level even further,¹⁵⁸ effectively forestalling the Supreme People's Court's plans for judicial empowerment. Poorly trained judges, lacking expertise and experience in handling antitrust cases,¹⁵⁹ are in a weak position to weigh the costs and benefits of, or make predictive or empirical judgments about, heightened judicial intervention into administrative monopolies for local authorities and economic actors.¹⁶⁰ Judicial miscalculations might well

¹⁵¹ Roderick A. Macdonald and Hoi Kong, *Judicial Independence as a Constitutional Virtue*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 831, 848 (Michael Rosenfeld & András Sajó eds., Oxford Univ. Press 2012).

¹⁵² PEI, *supra* note 24, at 216.

¹⁵³ Ling Li, *Corruption in China's Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 196, 219 (Randall Peerenboom ed., Cambridge Univ. Press 2010).

¹⁵⁴ RINGEN, *supra* note 54, at 83.

¹⁵⁵ *Id.*, at 91.

¹⁵⁶ Bixin Jiang, *Improvement of the Administrative Litigation System from a Macroscopic Perspective*, 9 FRONTIERS L. IN CHINA 1, 5 (2014).

¹⁵⁷ WANG, *supra* note 60, at 136.

¹⁵⁸ Moustafa, *supra* note 137, at 291.

¹⁵⁹ Zhang, *supra* note 20, at 588

¹⁶⁰ See Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 9 (2008).

concretize a perpetual fear on the part of the central party-state that local bureaucrats and economic oligarchs will avenge themselves not only on the courts, but also the higher administration by foot-dragging or even outright resistance.¹⁶¹ Hypothetically, even if the courts were successful in searching and destroying most instances of administrative monopoly, such overkill could still lead to economic loss if in consequence local officials would quit trying new initiatives and experiments and adopt a defensive “no achievement, no corruption” mindset.¹⁶²

Oversupplying judicial review also contradicts the central party-state’s general line. Legal institutions have yet to be accepted by the Party as the most useful tool for resolving problems of administrative malfeasance.¹⁶³ Xi Jinping’s take on law and the courts can be discerned from his ongoing anti-corruption campaign: instead of deploying formal legal institutions such as the courts,¹⁶⁴ Xi persistently relied on an extrajudicial mechanism operated by the Party’s Central Commission for Discipline Inspection to purge corrupt officials.¹⁶⁵ Other controls of malfeasance include administrative disciplinary actions like warning, demotion and removal, whereas legal investigation and punishment are generally considered to be the least popular option for the disciplinary decision-makers.¹⁶⁶ What is more, Xi’s campaigns are accompanied by a concurrent crackdown on potential support bases for independent judicial review, namely, activist lawyers. Indeed, China’s lethal anti-corruption campaigns mainly target “bad behavior not bad systems.”¹⁶⁷ The courts’ inability to second-guess administrative monopolies at the central level is underscored by the policy that anti-corruption efforts should focus on local officials only, as central leaders collectively prefer to direct popular outrage at local bureaucrats, while deflecting it from themselves.¹⁶⁸ The central party-state, being fully aware of the risks of judicialization of administrative governance, is always ready to downplay the role of the courts in politically controversial issues.¹⁶⁹

¹⁶¹ RINGEN, *supra* note 54, at 92.

¹⁶² BRUCE J. DICKSON, *THE DICTATOR’S DILEMMA: THE CHINESE COMMUNIST PARTY’S STRATEGY FOR SURVIVAL* 92 (Oxford Univ. Press 2016).

¹⁶³ SUJIAN GUO, *CHINESE POLITICS AND GOVERNMENT: POWER, IDEOLOGY AND ORGANIZATION* 183 (Routledge 2013).

¹⁶⁴ See Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935 (2011).

¹⁶⁵ Chongyi Feng, *China’s Socialist Rule of Law: A Critical Appraisal of the Relationship between the Communist Party and Comprehensive Law Reform*, in *CHINA’S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING* 45, 50 (John Garrick and Yan Chang Bennett eds., Routledge 2016).

¹⁶⁶ YONGSHUN CAI, *STATE AND AGENTS IN CHINA: DISCIPLINING GOVERNMENT OFFICIALS* 64–65 (Stanford Univ. Press 2015).

¹⁶⁷ RINGEN, *supra* note 54, at 89.

¹⁶⁸ DICKSON, *supra* note 151, at 92.

¹⁶⁹ Lin, *supra* note 11, at 367.

As explained in Part 2 above, administrative monopolies, which are often intertwined with bribery and corruption, is an intrinsic characteristic of the unreformed Leninist political system of contemporary China. The Party cannot reform the political and economic institutions of administrative monopolies without losing power, because they are precisely the building blocks of that power.¹⁷⁰ Judicial review cannot question the very foundations of the regime it forms part of, in order to eradicate most instances of administrative monopolies. The Supreme People's Court is thus well advised that it can deliver iterated waves of Judicial Interpretations, Guiding Cases, and the like against administrative monopolies subject to limits, beyond which judicial intervention will be counterproductive, if not manifestly detrimental, to the future of judicial empowerment in China.¹⁷¹

V. CONCLUSION

This article has contributed to the literature on the positive political economy of law and courts under authoritarianism with a peculiar case study of the Chinese Supreme People's Court's self-empowerment in the teeth of its marginalization by the Anti-Monopoly Law. Abuses of administrative power by local fiefdoms to undermine market competitiveness are no less harmful than abuses of market power by private entities. On the one hand, private economic power gained through productive or qualitative efficiency, or cartelization, is often transient and effectively constrained by competitive pricing or technological advancements by existing or new market players.¹⁷² Government intervention, on the other hand, is considered by Milton Friedman as “[p]robably the most important source of monopoly power,” and therefore “if economic power is joined to political power, concentration seems almost inevitable.”¹⁷³ The abuse of entrenched, politicized economic power is particularly dangerous in an authoritarian polity such as China. Anticompetitive abuses by administrative authorities of their economic power, as a consequential form of corruption, can greatly impair market efficiency and shake the very foundation of political unity in the People's Republic of China.

The milestone Anti-Monopoly Law of 2007 contains provisions explicitly outlawing administrative monopoly, but not judicial remedies for aggrieved parties. The central party-state's relative lack of interest in the law and forensic institutions as solutions to governance problems has further marginalized the role of the people's courts. This, however, did not prevent the Supreme People's Court from incrementally increasing the courts' power over local administrative monopolies. Key central party-state actors eventually ratified

¹⁷⁰ PEI, *supra* note 24, at 267.

¹⁷¹ Andrew Wedeman, *Anticorruption Campaigns and the Intensification of Corruption in China*, 14 J. CONTEMP. CHINA 93, 98 (2005).

¹⁷² See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Univ. of Chicago Press 1962).

¹⁷³ *Id.*, at 16.

such expansion of judicial power by significant amendments to the Administrative Litigation Law in November 2014 so as to formally establish judicial review of administrative monopolies on a national scale with effect from 2015. The Court's self-aggrandizement may look dubious under the lens of black letter law, but it is easily explicable from the perspective of strategic, interdependent decision-making.

The profusion of local administrative monopolies, a natural outcome of economic decentralization under the Dengist reforms, posed several fundamental dilemmas to the central authorities in Beijing. On the one hand, decentralization and intra-regional competition benefit market experimentation and economic prosperity; on the other, they are largely responsible for fomenting corruption and collusion, and causing fragmentations of the national market. Regulating local administrative monopolies can thwart the attempts of local mafia states to circumscribe the central party-state's authority, but risks devastating resistance from local authorities and vested interest groups. This dilemma convincingly explains the apparently paradoxical institutional design of the Anti-Monopoly Law. By definition, the suppression of administrative monopolies entails the suppression of state power,¹⁷⁴ which is intrinsically difficult under authoritarianism, where checks and balances do not exist. If the litmus test for the Law is its ability to nudge the central and local party-states towards surrendering their monopolies over market access,¹⁷⁵ there can be no hope for a genuine, complete eradication of administrative monopolies in the People's Republic of China. The Anti-Monopoly Law, in brief, will be unable to remedy anticompetitive abuses of administrative power by itself.¹⁷⁶

The Supreme People's Court, in order to develop its jurisprudence on the subject, has taken advantage of the Anti-Monopoly Law's ambiguity and the central party-state's urgent need to rein in local administrative monopolies. Constrained by China's peculiar appellate system, the Court has resorted to unconventional tools, such as Judicial Interpretations, Replies, Guiding Cases, and *People's Court Daily* articles, to hammer out its contributions to Beijing's enforcement efforts against local protectionism. It admonished lower courts to take a more aggressive approach than authorized by the Law to probe into the legality and reasonableness of allegedly anticompetitive administrative acts. It reinterpreted the putatively stringent restrictions on the jurisdiction of courts so as to enable scrutiny of "abstract" as well as "concrete" administrative acts. It intervened in local litigation over administrative monopolies, micromanaging select cases in order to secure an outcome unfavorable to local protectionism. It publicized instances of successful judicial

¹⁷⁴ HONG, ZHAO & YANG, *supra* note 73, at 7.

¹⁷⁵ Emch & Huang, *supra* note 63, at 258.

¹⁷⁶ See John Z. Ren, *The Dragon Mirrors the Eagle: Why China Should Look to U.S. Antitrust Law in Determining How to Treat Vertical Price-Fixing*, 47 CORNELL INT'L L.J. 473 (2014).

review of administrative abuses as Guiding Cases to be followed throughout the country. All of these finely calibrated efforts in cracking down the most outrageous incidents of local administrative monopolies, while simultaneously leaving central monopolies intact, won not only Beijing's tacit approval, but also its official recognition of judicial review of administrative monopolies, as well as judicial scrutiny of bureaucratic normative documents, in the 2014 amendments to the Administrative Litigation Law—which the Court has gladly received with an expansive elaboration in yet another Judicial Interpretation.

The Court's pragmatic approach to self-aggrandizement suggests that it is quite receptive to judicial empowerment whenever the political risks are not high.¹⁷⁷ It has succeeded in taking autonomous action inside the contours of the party-state's general line.¹⁷⁸ To avoid political backlash, the Court has to make a delicate balance in its supply of judicial review in view of the benefits and costs it brings to the central party-state. Judicial review as designed by the Supreme People's Court yields incremental benefits by reducing the central party-state's agency costs arising from information asymmetries as to local party-states' compliance with administrative antimonopoly law. At the same time, oversupplying judicial review in an authoritarian polity has negative consequences, including violent backlashes against already weak local courts, errors in judicial estimation of the magnitude of administrative monopoly costs, and worse still, local malingering that might result in economic losses. The Court's heightened enforcement efforts must never deviate from the general line, lest it imperil the entire judiciary. And the general line is as follows: in the absence of radical political reform, which might threaten Party dominance, the state must tolerate a substantial base level of administrative monopoly, while punishing the most flagrant local agent defections, in order to secure its own survival. Beyond this, the Supreme People's Court has no business. The available empirical evidence shows that the Court has so far managed to steer clear of open conflict. Neither the central party-state nor the Court has sufficient incentives to eradicate local protectionism or administrative abuses once and for all. The conclusion must be that full-fledged, independent judicial review of all or most acts of administrative monopolies cannot, *ceteris paribus*, emerge in China.

¹⁷⁷ See Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1 (2012).

¹⁷⁸ Jia, *supra* note 90, at 2217.